

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Frank R. Addy, Circuit Court Judge

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S.C. SUPREME COURT

DAMON JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002564

APPENDIX

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 DAMION JACQUISE JONES,) 2005-GS-42-3371.
7 Defendant.) NOVEMBER 29, 2005
8) Spartanburg, South Carolina

9 (VOLUME I)

10 B E F O R E:

11 THE HONORABLE PAUL BURCH, JUDGE, and a jury.

12
13
14 A P P E A R A N C E S:

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16 Attorney for the State

17 JENNIFER JORDAN, ASSISTANT SOLICITOR
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19 CHRISTOPHER BROUGH, ASSISTANT PUBLIC DEFENDER
20 Attorney for the Defendant

21 Michael R. Watts
22 Circuit Court Reporter
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1 (Proceedings, November 29, 2005)

2 (Videotape of Defendant's Statements at the Scene
3 marked as State's Exhibit No. 1 for identification)

4 (Diagram of the crime scene area marked as State's
5 Exhibit No. 6 for identification)

6 (Diagram of the inside of the room in [REDACTED]
7 [REDACTED] marked as State's Exhibit No. 7 for identification)

8 (Green nylon cap with bullet hole marked as
9 State's Exhibit No. 8 for identification)

10 (Picture of the front of [REDACTED] marked as
11 State's Exhibit No. 9 for identification)

12 (Picture of the crime scene area in front of [REDACTED]
13 [REDACTED] marked as State's Exhibit No. 10 for
14 identification)

15 (Picture of the crime scene showing area closer up
16 marked as State's Exhibit No. 11 for identification)

17 (Videotape of the Defendant's Statement at the
18 Police Station marked as State's Exhibit No. 12 for
19 identification)

20 (Waiver Form of the Defendant's Rights marked as
21 State's Exhibit No. 12-A for identification)

22 (Picture of the driver's side door of the car that
23 the defendant was in marked as State's Exhibit No. 13 for
24 identification)

25 (Picture of the inside of the car that the

1 defendant was in marked as State's Exhibit No. 14 for
2 identification)

3 (Picture of the room where the defendant went into
4 after the shooting and the .45 Bersa was marked as State's
5 Exhibit No. 15 for identification)

6 (Close-up picture of the .45 Bersa was marked as
7 State's Exhibit No. 16 for identification)

8 (Picture of the chair where the gun magazine was
9 found marked as State's Exhibit No. 17 for identification)

10 (Close-up picture of the gun magazine marked as
11 State's Exhibit No. 18 for identification)

12 (Picture of the .45 live round found on the floor
13 marked as State's Exhibit No. 19 for identification)

14 (Picture of the area where the live round was
15 found marked as State's Exhibit No. 20 for identification)

16 (Picture of the .45 Bersa pistol with the No. 3
17 sign marked as State's Exhibit No. 21 for identification)

18 (Picture of the gun magazine with the No. 4 sign
19 was marked as State's Exhibit No. 22 for identification)

20 (Picture of the live round with the No. 5 sign was
21 marked as State's Exhibit No. 23 for identification)

22 (Front picture of the defendant marked as State's
23 Exhibit No. 24 for identification)

24 (Close-up picture of the defendant's face marked
25 as State's Exhibit No. 25 for identification)

1 (Picture of the right side of the defendant marked
2 as State's Exhibit No. 26 for identification)

3 (Picture of the left side of the defendant marked
4 as State's Exhibit No. 27 for identification)

5 (Picture of the top of the defendant's hands
6 marked as State's Exhibit No. 28 for identification)

7 (Picture of the palms of the defendant's hands
8 marked as State's Exhibit No. 29 for identification)

9 (9-1-1 Tape marked as State's Exhibit No. 30 for
10 identification)

11 (Defendant's prior record and indictments marked
12 as Court's Exhibit No. 1 for identification)

13 THE COURT: Good morning.

14 MR. BARNETTE: Good morning, Your Honor.

15 THE COURT: Solicitor.

16 MR. BARNETTE: May it please the Court, the State
17 would like to call the case of the State versus Damion
18 Jacquise Jones, Indictment Number 05-GS-42-3371 for murder,
19 Your Honor. It has been True Billed to the Grand Jury.

20 I also have a potential witness list and voir dire
21 to hand up to the court.

22 MR. BROUGH: Your Honor, if I may approach
23 briefly, I also have a voir dire and a motion in limine, a
24 list of potential witnesses.

25 THE COURT: Can we go ahead and get a jury?

1 MR. BARNETTE: Yes, sir, there is no reason not
2 to.

3 MR. BROUGH: That would be fine.

4 MR. BARNETTE: Yes, sir.

5 THE COURT: Okay.

6 MR. BARNETTE: Can we approach the bench for a
7 second, Your Honor?

8 THE COURT: Yes, sir.

9 (Whereupon, the lawyers approached the bench for
10 an off-the-record discussion)

11 THE COURT: We are going to have to ask the people
12 in the courtroom behind the rail to step outside because we
13 are not going to have enough room for the jury. As soon as
14 we get the jury in and seated, we will let you come back in
15 and take whatever is available. Of course, once we get the
16 jury seated everybody can sit in.

17 (Whereupon, the jury venire panel was brought into
18 the courtroom)

19 THE COURT: Thank you, Mr. Bailiff.

20 Good morning everybody. I'm Paul Burch. I'm a
21 resident circuit judge over in the Fourth Circuit, which is
22 a ways from here. I'm from Chesterfield County. It's my
23 pleasure to be assigned to Spartanburg this week for a dual
24 term of Common Pleas and General Sessions Court. The Common
25 Pleas docket collapsed right off the bat yesterday in civil

1 cases, so we turned to the criminal docket.

2 I know all of you have already met I think Judge
3 Couch, who handled the pretrial jury matters, and we are
4 ready to seat a jury and start a trial over here in this
5 courtroom.

6 I have been up here many times before and I see
7 some familiar faces on the jury. It's good to have y'all
8 come in, and we want to thank you for being willing to come
9 and serve.

10 If any of you have any problems, please let the
11 bailiff staff know. We will try to address them, but we are
12 going to try to move right on through this jury selection
13 process to free up as many as we can. We hope to get a
14 trial started before lunch, if we can get a jury seated.

15 So with that said, let me tell you a little bit
16 about what we are going to do. I'm going to ask you some
17 additional questions and I would appreciate you responding
18 to them. If I ask you not to make any statement when I pose
19 the question, what will happen after that, I may ask you to
20 step up to the bench to where I can talk with you with the
21 attorneys present.

22 Now, the particular case that's been called for
23 trial is entitled the State of South Carolina versus Damion
24 Jacquise Jones. He's charged in the Bill of Indictment by
25 the Grand Jury of Spartanburg County with the offense of

1 murder.

2 The defendant is present in court at this time.

3 Mr. Jones, I need you to stand and face the jury panel.

4 Thank you sir, you may be seated.

5 All right. Are any members of the petit jury
6 panel related by blood, or connected by marriage, or have
7 any business, social, fraternal or religious relationship
8 with the defendant Mr. Jones? If so, please stand at this
9 time.

10 (No response)

11 THE COURT: Are any members of the petit jury
12 panel related by blood or connected by marriage or have any
13 business, social, fraternal or religious relationship with
14 any of the following individuals:

15 Jeffrey Hollifield.

16 Dustin Smith with SLED.

17 Gregg Hardy.

18 Gina Robinson.

19 Brad Wall.

20 Wendy Alley.

21 Sedrick Jones.

22 Michelle Jones.

23 Lavita Foster.

24 Officer B.H. Mabry.

25 I may repeat some of these names.

1 Also Officer S.M. Watts, Spartanburg Department of
2 Public Safety.

3 Also Officer C.W. Mason.

4 B.H. Mabry.

5 Sergeant Paul Roper.

6 Officer M. Hillers.

7 Officer J.B. Brewton.

8 Atiba Long of Greenville.

9 Sergeant Chris Taylor.

10 Investigator David Hearst.

11 Investigator Toby Bradley.

12 Mignon Williams of Spartanburg.

13 Investigator R.D. Porter.

14 Investigator R.C. Talanges.

15 Investigator Doris Boozer.

16 Lieutenant Steve Lamb.

17 Special Agent Ila Simmons with SLED.

18 Freddie Thompson with 9-1-1.

19 Senior Agent Dan DeFreese with SLED.

20 David Reeves.

21 Dr. J. David Wren.

22 Elaine Mitchell.

23 If so, we need you to stand at this time and I
24 need to know about that relationship.

25 I need your name and juror number first.

1 JUROR NUMBER 149: Number 149, William D. Worthy.
2 I work for the Spartanburg Public Safety fire division and I
3 do have interactions with these officers that work with the
4 Public Safety Department quite often, sir.

5 THE COURT: Thank you, sir.

6 JUROR NUMBER 170: Juror number 170, Kyle Henry.
7 I'm a cousin by marriage to Detective Toby Bradley with the
8 Spartanburg Public Safety.

9 THE COURT: No blood relationship, but by
10 marriage?

11 JUROR NUMBER 170: Yes.

12 THE COURT: Thank you, sir.

13 JUROR NUMBER 53: Juror number 53, Michael Hardy.
14 I think called Gregg Hardy out. That's a cousin.

15 THE COURT: Thank you Mr. Hardy. That's by blood
16 or by marriage.

17 JUROR NUMBER 53: Yes.

18 MR. BARNETTE: What was his number again?

19 THE COURT: Mr. Hardy, what was your first name.

20 JUROR NUMBER 53: Gregg Hardy.

21 THE COURT: Gregg Hardy.

22 MR. BARNETTE: Thank you, Your Honor.

23 THE COURT: Anybody else?

24 (No response)

25 THE COURT: Looking at the indictment allegations,

1 contained therein, it is alleged that this murder occurred
2 in Spartanburg County, on or about February the 25th, 2005.
3 The victim being Sigida Kenyatta Long, allegedly was killed
4 in a shooting with a handgun.

5 Have any members of the petit jury panel formed or
6 expressed an opinion as to the guilt or innocence of the
7 defendant or have any knowledge of any allegations or
8 matters involved in this case? If so, we need you to stand
9 at this time.

10 (No response)

11 THE COURT: Are any members of the petit jury
12 panel conscious of any interest, any bias, or any prejudice
13 for or against the defendant or the State? If so, please
14 stand.

15 (No response)

16 THE COURT: Anyone on the panel presently or in
17 the past represented by the solicitor's office?

18 (No response)

19 THE COURT: Or by Mr. Christopher Brough?

20 MR. BROUGH: Brough, Your Honor. Brough, like
21 rough with a B in front of it.

22 THE COURT: Brough, okay.

23 If so, we need you to stand at this time.

24 (No response)

25 THE COURT: Can each member of the petit jury

1 panel give the State and the defendant a fair and impartial
2 trial? If not, please stand, but don't make any comment.

3 (No response)

4 THE COURT: Now I'm going to expand on some of
5 these questions.

6 Does anyone on the jury panel know or work with
7 the defendant or anyone in his family?

8 Yes, sir, Mr. Hardy.

9 JUROR NUMBER 53: I think I worked with her, but
10 I'm not sure, at Arrow Automotive about two years ago, for
11 about two years.

12 THE COURT: Which individual is this you are
13 talking about?

14 JUROR NUMBER 53: Right there in the middle, yeah.

15 THE COURT: All right.

16 JUROR NUMBER 53: She looks familiar, but I can't
17 remember.

18 THE COURT: All those names that I called as
19 potential witnesses, anybody know any of them or work with
20 them?

21 Yes, sir.

22 JUROR NUMBER 149: 149, William D. Worthy. I do
23 work with the Public Safety Department.

24 JUROR NUMBER 170: Juror number 170, Kyle Henry.
25 There again, I'm family member by marriage to Detective Toby

1 Bradley.

2 THE COURT: All right.

3 JUROR NUMBER 159: Juror 159, Charles Morrow. I
4 work with Dr. Wren on a regular basis.

5 THE COURT: Okay.

6 JUROR NUMBER 36: Juror number 36, Nancy Edney. I
7 think I was in church with Brad Wall.

8 THE COURT: Has anybody on the panel ever been
9 represented or presently represented by the Public
10 Defender's office of Spartanburg County?

11 (No response)

12 THE COURT: In expansion of that question, does
13 anybody have a family member or close friend that's
14 represented by the Public Defender's office?

15 (No response)

16 JUROR NUMBER 149: Your Honor, going back to the
17 earlier statement with Brad Wall, I believe he is my banker
18 at my bank at Sun Trust Bank in Bi Lo. I'm almost certain
19 it's the same gentleman, and I've a very close relationship
20 with him as banker and client.

21 THE COURT: All right. I would defer to counsel.
22 Is that the same individual that works at the bank?

23 MR. BARNETTE: I don't know, judge, to be honest..
24 He used to be employed by the investigations. I know he's
25 no longer an investigator with them. I don't know where he

1 went to work for that.

2 THE COURT: He was security over there at the
3 bank?

4 MR. BARNETTE: At sheriff's office.

5 JUROR NUMBER 149: Same name then.

6 THE COURT: Not related.

7 He's still a deputy sheriff, yeah.

8 Has anybody on the panel ever been arrested or
9 charged with or convicted of any crime involving murder,
10 manslaughter or assault and battery, or a weapons charge in
11 any court, state court, or federal court?

12 (No response)

13 THE COURT: Or municipal court, as far as that
14 goes.

15 (No response)

16 THE COURT: Anybody on the panel ever had an
17 immediate family member or a very close friend that's been
18 charged with, arrested for, or convicted of any such
19 offense?

20 Your name, please.

21 JUROR NUMBER 85: My number is 85. I had a sister
22 Juanita Grasser indicted for murder.

23 THE COURT: All right. Was she convicted?

24 JUROR NUMBER 85: Uh-huh, that is correct.

25 JUROR NUMBER 174: Juror number 174, Charles

1 Coffman. I had a son that was charged with domestic
2 violence.

3 THE COURT: Thank you Mr. Coffman.

4 JUROR NUMBER 36: Juror number 36. I had a cousin
5 convicted of murder.

6 JUROR NUMBER 86: 86. I have a son that was
7 convicted of domestic violence.

8 THE COURT: Thank you.

9 Anybody on the panel or an immediate family member
10 being prosecuted by the solicitor's office for anything at
11 this time, or in the past?

12 (No response)

13 THE COURT: Anybody on the panel ever been
14 arrested by any officer with the Spartanburg Department of
15 Public Safety?

16 (No response)

17 THE COURT: Do I have anybody on the panel who may
18 be a member of an organization that does not recognize the
19 government of the United States or the State of South
20 Carolina?

21 (No response)

22 THE COURT: Anybody on the panel related by blood
23 or by marriage, or are you a close friend, or have any
24 business association with anybody with the solicitor's
25 office, the Spartanburg Department of Public Safety, the

1 Spartanburg County Sheriff's Office, the police departments
2 of any municipality in Spartanburg County, or with SLED,
3 State Law Enforcement Division?

4 We have already got you noted. That's fine.

5 (No response)

6 Yes, sir.

7 JUROR NUMBER 19: Juror number 19. I'm a
8 volunteer firefighter with the Duncan Fire Department and I
9 have contact with SLED and municipal police departments.

10 THE COURT: Thank you, sir.

11 JUROR NUMBER 136: By marriage, I guess Jeff Brody
12 was one of those. I'm not sure which one. He's a detective
13 and a cousin by marriage.

14 THE COURT: Your number, please?

15 JUROR NUMBER 136: 136.

16 THE COURT: 136.

17 JUROR NUMBER 136: Uh-huh.

18 MR. BROUGH: Thank you.

19 THE COURT: Have any of you ever been employed or
20 presently employed by any civilian --

21 JUROR NUMBER 36: Juror 36. I have a cousin who
22 is a highway patrolman.

23 THE COURT: Is that in Spartanburg County?

24 JUROR NUMBER 36: Yes.

25 THE COURT: All right. Any of you presently

1 employed or employed in the past by any civilian or military
2 law enforcement agency? If so, please stand.

3 JUROR NUMBER 134: Juror number 134, sir. Union
4 County police officer and United States Marine Corps
5 military police.

6 THE COURT: That was in the past?

7 JUROR NUMBER 134: Yes, sir.

8 THE COURT: Your number, please?

9 JUROR NUMBER 134: 134.

10 THE COURT: 134.

11 Anybody on the panel ever been the victim of a
12 violent crime or had a close personal friend or a family
13 member that's been the victim?

14 Yes, sir.

15 JUROR NUMBER 96: Yes, juror number 96. I was
16 working with the solicitor's office a month ago regarding
17 Mr. Stokes.

18 THE COURT: Involving --

19 JUROR NUMBER 96: Juror 96. I was working the
20 case with the solicitor's office a month ago regarding Mr.
21 Stokes, an armed robbery.

22 THE COURT: Okay. Anybody else?

23 JUROR NUMBER 131: Steve Thomas, 131. I had an
24 aunt that was murdered.

25 JUROR NUMBER 127: 127. I have a friend Cedrick

1 that was murdered.

2 MR. BROUGH: What was your number, sir.

3 JUROR NUMBER 127: 127.

4 JUROR NUMBER 147: Richard Wooley, 147, worked for
5 Landrum police department back a few years ago.

6 THE COURT: Thank you, sir.

7 Are any of you or immediate family member a member
8 or contributor to any gun control activist group?

9 JUROR NUMBER 131: 131. I'm a member of Grass
10 Roots here in South Carolina,

11 THE COURT: Thank you.

12 Are any of you or a family member the victim or
13 complaining witness in a case that's currently being
14 prosecuted by the solicitor's office?

15 (No response)

16 THE COURT: Any of you or immediate family member
17 been a member or contributor to any law enforcement support
18 group, or a group such as MADD, SADD, CAVE, and the Trooper
19 Association or the Sheriff's Association?

20 (No response)

21 MR. BARNETTE: May we approach the bench for a
22 second, Your Honor?

23 (Whereupon, the lawyers approached the bench for
24 an off-the-record discussion)

25 THE COURT: Do I have anybody on the panel that

1 would automatically feel that any individual that committed
2 a homicide, and homicide, in effect, means takes another
3 one's life, would be guilty, regardless of the
4 circumstances?

5 Do I have anybody that would have a religious or
6 moral or personal belief that anybody committing a homicide
7 would be guilty, regardless of the circumstances?

8 (No response)

9 THE COURT: I believe that's it, except one more
10 time I'll ask now that I have posed these questions. Can
11 each of you give the State and the defendant a fair and
12 impartial trial, if seated on this jury? If not, please
13 stand at this time, but don't make any comment.

14 (No response)

15 THE COURT: All right. Five and ten. We will
16 seat two alternates.

17 As your name is called, we need you to come around
18 to the middle of the floor up here, turn and face the
19 tables. Please bring any personal belongings with you,
20 because if you are seated on the jury, you are going to need
21 them. And I know that you are going to feel awkward, and
22 you got the court's permission to feel awkward, because I
23 would if I were y'all, so just relax, okay?

24 (Whereupon, the jury was impaneled)

25 THE COURT: Thank you, madam clerk.

1 THE COURT: Thank you, sir.

2 All right. Any matters before we get started that
3 we need to address?

4 MR. BARNETTE: Your Honor, I think defense has
5 some motions and we would have some motions in return.

6 MR. BROUGH: Your Honor, first of all I would like
7 to put on the record that in agreement between the defense
8 and State stipulate to the chain of custody involving the
9 blood that was taken from the victim and later tested for
10 toxicology purposes, as well as to the gunshot residue kit
11 that was taken both from the victim and from the defendant,
12 and additionally in regards to the ballistics that were
13 taken.

14 MR. BARNETTE: That's correct, Your Honor. The
15 ballistics, bullet, gun and so forth that was taken from the
16 chain, all the chain is being stipulated to, as well as
17 everything Mr. Brough said.

18 THE COURT: Okay.

19 MR. BROUGH: Your Honor, in regards to motions,
20 the defense would make a motion to sequester all the
21 witnesses, both for the State and defense, throughout the
22 trial of the case, including any pretrial hearings.

23 THE COURT: I don't have any problem with that
24 based on our pretrial conference in chambers, unless I hear
25 an objection I need to hear.

1 MR. BARNETTE: No, sir.

2 THE COURT: Okay.

3 MR. BROUGH: That would be fine.

4 Your Honor, additionally Mr. Jones gave some
5 statements. We would request a Jackson v. Denno hearing to
6 determine the admissibility of such statements, and also to
7 determine -- some of the statements were done on videotape,
8 and I just want to make sure there -- there was no written
9 statement, to my knowledge, that was given. I want to make
10 sure that any other statements outside of this videotape
11 were not taken.

12 THE COURT: Any written statements?

13 MR. BARNETTE: No, sir. He should have everything
14 that's on videotape. Obviously we have the officers
15 testify.

16 The only problem that I have is it's been marked
17 Exhibits 1 and 12, Your Honor, the two statements that are
18 in question. The tapes are quite long. They are about 45
19 minutes, or whatever, and I don't think the court would need
20 to watch them. I think both of us have seen the videotape.
21 The issue would be if they were given the Miranda Warnings
22 with the voluntariness and everything. I think that would
23 be the only issue that we would deal with the hearing.
24 Instead of having the court watch 45 minutes of tapes, or
25 something like that. I don't know if Mr. Brough has any

1 other way of doing it but I think just call the officers up
2 and have them testify concerning their testimony and what
3 was statements were made and they are on videotape and so
4 forth, I think that would be appropriate, Your Honor. There
5 is no objection from the defense.

6 MR. BROUGH: That would be fine.

7 THE COURT: Would you consider, please, as we get
8 into this, if you become satisfied that all the requirements
9 have been met, just let me know and we can stop it at that
10 point and move onto the next one?

11 MR. BROUGH: Yes, sir. My main concern is that
12 there were -- if there were any additional, whether oral
13 statements or not, that were taken.

14 THE COURT: Okay.

15 MR. BROUGH: Your Honor, additionally I know that
16 I had submitted some motions. The State has given me the
17 copies of the adult records on the State's lay witnesses. I
18 will be withdrawing that motion.

19 I would also like to make a motion to determine if
20 there is any Lyle evidence. There is some indication that
21 there may have been some sugar in the gas tank incident,
22 things of that nature. I'm not sure if the State was
23 planning on going into that on their case in chief or not.

24 MR. BARNETTE: We are not planning to, Your Honor,
25 unless it's asked on cross. We are just going to talk about

1 what happened that night.

2 THE COURT: Okay.

3 MR. BROUGH: In addition, we would ask that
4 certain photographs be suppressed. There are several
5 photographs taken at the scene, which I know the State is
6 planning to introduce regarding the placement of the gun.
7 My concern is is that there is also a sign on some of those
8 indicating "Islam is the way home". And my concern is
9 giving given the current climate that exists post 9-11 in
10 this country, and also the fact that I don't think that
11 that's really a part of the case. It wasn't even the
12 defendant's house that he was in at the time. I just ask
13 that those pictures not be admitted.

14 In addition, any autopsy photographs, and I think
15 Barry and I have gone over them in terms of marking them and
16 not be admitted.

17 MR. BARNETTE: Your Honor, I have got a State's
18 exhibit list, which I shared with Mr. Brough, and they have
19 been premarked. If you want to look at the pictures that's
20 in question, we have got those also premarked, Your Honor.
21 I'll hand that to the court there. I don't know if Mr.
22 Brough has got specific -- none of them has the autopsy
23 pictures in them. He's seen all the pictures that I plan to
24 introduce at this point.

25 THE COURT: If you will check through them right

1 quick and see if you see anything else wrong with them, I'll
2 take a look at them.

3 (Off the record)

4 (Back on the record)

5 MR. BROUGH: Your Honor, just as they stand
6 marked, we would object to No. 15 and No. 20, and that's
7 going back to the issue I brought up with the sign and the
8 gun placement, if Your Honor would care to look at them.

9 MR. BARNETTE: You can look at them, Your Honor.
10 I tried to get the less offensive pictures I could
11 to show the place where the weapon was.

12 MR. BROUGH: There is a couple of other pictures
13 that show the placement -- I don't know if you can see
14 everything else in the room, but there is a sign on the file
15 cabinet that I think you can make out, if you look closely
16 enough at it.

17 THE COURT: Your eyes are better than mine.

18 My goodness, I would never know what that is.

19 Show me the others you think that will suffice.

20 MR. BROUGH: Okay. This one would be fine.

21 Just a shot of the overall room in the -- it cuts
22 off exactly where that file cabinet is, but it's right over
23 across the way from that chair.

24 Again, my concern giving the placement of the gun
25 right over that and the climate that currently exists

1 through the media. That's my concern with those pictures.

2 THE COURT: Any issue --

3 MR. BARNETTE: I don't think there is.

4 THE COURT: -- argumentative about the placement
5 of where this gun was?

6 MR. BARNETTE: No, judge. What we were just going
7 to try to show the complete investigation. That's the --
8 obviously the jurors ask questions where do you find guns
9 and everything like that. I'm just trying to show that part
10 of the room.

11 There is other pictures, but they do show the sign
12 very clearly. Those are the ones I took from the side
13 trying not to show that picture or show that sign.

14 THE COURT: That bigger picture, the larger
15 picture, if they had a magnifying glass or something, they
16 might make that out, but I don't see how in the world they
17 possibly could on 20, but I'm going to grant your motion on
18 both of them.

19 MR. BROUGH: Thank you, Your Honor.

20 MR. BARNETTE: Judge, everything use --

21 THE COURT: What?

22 MR. BARNETTE: We use the projector.

23 THE COURT: Okay. 15 and 20, let's leave them out
24 just for safety sake.

25 MR. BARNETTE: Okay.

1 THE COURT: You don't have any objection to 21 and
2 16 and 17?

3 MR. BROUGH: That's correct.

4 THE COURT: Okay. All right.

5 MR. BROUGH: That would be it.

6 MR. BARNETTE: Your Honor, I have a motion to
7 follow up concerning the Lyle motion.

8 We made a motion in limine about any previous
9 record of the victim in this case. Obviously I think State
10 v. Brown covers that, which is 467 S.E. 2d 922, 1996 case.
11 I think there is other case law follows that.

12 And basically the court I'm sure is familiar with
13 it, "when a specific instance of conduct by the deceased is
14 closely connected in point of time or occasion to the
15 homicide so as to be admissible is in the judge's
16 discretion," there is lot of these instances they may talk
17 about that's not even related to this. I don't know what
18 they may try to bring up, but I don't think it would be
19 relevant and would be ask for a motion in limine to keep
20 those out, and even the question being asked about his prior
21 record or prior dealings.

22 MR. BROUGH: Your Honor, we are not planning on
23 asking any specific questions about prior record. However,
24 we do intend to go into conduct that Mr. Jones himself had
25 witnessed regarding the victim's action, the victim's

1 brother's action, and I believe that it would go to show
2 that a reasonable person in his situation would act in
3 self-defense. And I believe that's State v. Nichols,
4 relying on State v. Hendrix, and I have the site on these
5 cases as well. I would be happy to, if I my approach
6 briefly, pass these up, Your Honor, and give Mr. Barnette a
7 copy as well.

8 I believe that this would go to the heart of the
9 issue as to why a person in Mr. Jones' situation would react
10 in the manner that he did.

11 THE COURT: This is something witnessed by him,
12 I'm going allow you to do that.

13 MR. BROUGH: Yes, sir.

14 THE COURT: Because I understand the possible
15 argument about the apprehension he could have been put in
16 from some previous experience that he actually experienced.

17 MR. BROUGH: Yes, sir.

18 THE COURT: Okay.

19 MR. BROUGH: That would be fine.

20 MR. BARNETTE: Your Honor, that brings up one
21 other matter I talked with Mr. Brough about. I marked as
22 Court Exhibit No. 1. I don't know if the defendant plans to
23 testify or not in this case. His prior record, he has
24 pointing a firearm conviction, as well a MIPP, as well as a
25 failure to stop. I don't know if he is going to testify at

1 this point. I think I submit they are relevant. It depends
2 upon his testimony, they may become very relevant. And I
3 understand they are prejudicial, but I think the probative
4 value would outweigh the prejudicial effect.

5 THE COURT: I have to see how that develops, but
6 you are on notice.

7 MR. BROUGH: Your Honor, if I may, regarding the
8 1995 conviction for pointing a firearm, the defense would
9 assert that under South Carolina Rule of Evidence 609 (a)(1)
10 dealing with specifically, also under 609, section B, that
11 it falls outside the ten years. The court date on that was
12 July the 10th, 1995. He received a sentence. It's was my
13 understanding it was suspended to a fine and probation. It
14 would be our contention that that conviction is over ten
15 years old and the rule itself would prohibit its
16 introduction.

17 MR. BARNETTE: Your Honor, I would argue
18 differently. It's either the time of conviction or the time
19 of confinement. He got three years probation on it. It
20 goes to 1998. It's signed by Judge Eppes and he's given
21 three years probation on top of that, so I think it's well
22 within the ten year period.

23 THE COURT: All right. I agree with the State on
24 that, but, now, you know from my previous case that they
25 ruled on and affirmed me on, my position now, unless you can

1 show me something different, if he testifies and that comes
2 out, you are going to be limited to possibly having just to
3 say the date, felony, whatever. I mean, it might not
4 necessarily get the State the exam crime in your favor.

5 MR. BROUGH: Yes, sir, Your Honor, we were going
6 to argue if you decide with the State on the time limit,
7 that under the Green factors we would feel that it would
8 clearly prejudicial effect, given the charge here, would
9 outweigh its probative value.

10 MR. BARNETTE: And we may come to that, Your
11 Honor. I just want to make -- he's aware, and make the
12 court aware of it he may testify, that that may become an
13 issue up there.

14 THE COURT: All right. So I have adopted what I
15 have been affirmed on is my normal practice, unless there is
16 something unusual there that you show me.

17 MR. BARNETTE: Yes, sir.

18 THE COURT: Okay?

19 MR. BROUGH: Okay.

20 MR. BARNETTE: If I understand, if it's a felony
21 or a misdemeanor, I can ask him if you been convicted of a
22 felony on such and such a date; if you have been convicted
23 of a misdemeanor on such and such a date.

24 THE COURT: Yes.

25 MR. BARNETTE: Unless something develops in the

1 testimony.

2 THE COURT: As long as it meets the other
3 requirements of the rule.

4 MR. BARNETTE: Yes.

5 THE COURT: Whether it carries more than a year,
6 or whatever.

7 MR. BARNETTE: Yes, I think there is no question
8 about that.

9 There is one other issue, Your Honor.

10 He was not allowed to possess a weapon. I don't
11 know if that will come up in the case or not. I just want
12 to make sure the court is aware of that I have concerns
13 about his record, so -- I don't know if that will become an
14 issue or not. We will just have to leave it when he
15 testifies, if he does testify.

16 MR. BROUGH: Your Honor, I don't know what exact
17 bearing Mr. Barnette thinks that that really has on the
18 case, but in terms of self-defense, I know that there is
19 some case law out there. I would be happy to get it to you
20 at the break.

21 THE COURT: You won't have to.

22 MR. BARNETTE: I'm not talking about self-defense,
23 Your Honor. It may develop under other charges, but the
24 self-defense, I understand that part. Maybe accident or
25 something like that may affect it.

1 THE COURT: Even though you can't possess --
2 necessarily have on you or possess a pistol, that has
3 nothing to do with self-defense, because if you -- if
4 your -- say I have been convicted and I'm barred from
5 having -- I'm running my parents store, and my mother runs
6 the store too and she's got a pistol under there and
7 somebody tries to rob me and I use it, that certainly
8 doesn't bar you from using that pistol in self-defense.
9 That's come up over in Chester before. We had a long
10 discussion about it and I ruled in favor of the defense on
11 that. In fact, I directed a verdict in favor of the
12 defense.

13 MR. BARNETTE: And I understand that, Your Honor,
14 in that situation. The issue would be if they came up with
15 other charges. I just want to make the court aware of that,
16 not self-defense, per say.

17 THE COURT: Okay.

18 MR. BROUGH: Your Honor, he's not here on any
19 other charges, is that correct?

20 THE COURT: All I got before me is the murder?

21 MR. BARNETTE: That's correct.

22 THE COURT: All right, counsel, let's go forward,
23 and when you are satisfied, if you would let me know, if
24 reach that point, we will save some time, but I'm not trying
25 to rush you. I'm just trying to -- we have got a jury ready

1 to go, okay?

2 MR. BROUGH: All right. I understand.

3 MS. JORDAN: Thank you, Your Honor.

4 The State calls Officer Chris Taylor, please.

5 THE COURT: All the witnesses need to step out
6 now, except, of course, the defendant stays and whoever your
7 chief investigator you want to stay.

8 MR. BARNETTE: Your Honor, if I could ask Elaine
9 Mitchell. She's the mother of the victim. She's listed as
10 a witness, and her son is also a victim, probably be the
11 first witness in the case, so I would ask them to be able to
12 stay in the courtroom, if that's okay.

13 THE COURT: You don't have any problem about the
14 family, do you?

15 MR. BROUGH: As long as I believe Mr. Jones'
16 brother may be called at some point, we would ask that he be
17 afforded the same courtesy.

18 MR. BARNETTE: Which one is he?

19 MR. BROUGH: Sedrick Jones.

20 MR. BARNETTE: I don't mind Atiba going out. I
21 think every person should go out. Ms. Mitchell probably is
22 not going to testify anyway, but she's on the witness list,
23 but Mr. Long was. I don't know what he's going to testify
24 to, so we will ask Mr. Long to step out in the case.

25 OFFICER CHRIS TAYLOR, having been first duly

1 sworn, testified as follows:

2 DIRECT EXAMINATION BY MR. BARNETTE:

3 Q. Sergeant Taylor, if you would, state your full name for
4 the record, please.

5 A. Christopher Keith Taylor.

6 Q. And where do you work at, sir?

7 A. Spartanburg Public Safety Department.

8 Q. What's your position there, sir?

9 A. I am a sergeant in the criminal investigation division.

10 Q. Okay. And was you called in to interview the
11 defendant, that being Damion Jones in this case?

12 A. Yes, sir.

13 Q. And before interviewing him did you give him his
14 rights?

15 A. Investigator Russell Porter gave the rights. I watched
16 him give him his rights.

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

18 12-A. Is that a copy of the waiver form that y'all did on
19 Mr. Jones?

20 A. Yes, sir.

21 Q. And was Mr. Jones given his rights?

22 A. Yes, sir.

23 Q. And he was given them by Mr. Porter?

24 A. Yes, sir.

25 Q. Sergeant porter.

1 Did he initial all those rights?

2 A. Yes, he did.

3 MR. BARNETTE: Your Honor, I'm not going to have
4 him read the form, or whatever. I'm just going to enter it
5 at this time, if there is no objection, just for the court's
6 review.

7 MR. BROUGH: That would be fine.

8 MR. BARNETTE: This one is court exhibit at this
9 time, Your Honor.

10 BY MR. BARNETTE:

11 Q. And was the interview recorded on videotape, Sergeant
12 Taylor?

13 A. Yes, sir.

14 Q. And let me show you what's been marked as State's
15 Exhibit No. 12 for ID purposes. Is that the videotape?

16 A. Yes, sir.

17 Q. And on that tape was he given his rights and
18 everything?

19 A. Yes, sir.

20 Q. Was he promised anything for his testimony or for the
21 statement he made on this tape?

22 A. No, sir.

23 Q. Was he threatened in any way?

24 A. No, sir.

25 Q. Did he talk to you freely and voluntarily?

1 A. Yes, sir.

2 Q. Was there any threats or coercion or any force used on
3 this video during this time?

4 A. No, sir.

5 Q. And all the statements that he made to you is on this
6 videotape?

7 A. Yes, sir.

8 MR. BARNETTE: Your Honor, I'm just entering this
9 for ID purposes for this hearing, if there is no objection.

10 MR. BROUGH: No objection.

11 THE COURT: All right.

12 MR. BARNETTE: That would be all the questions for
13 Sergeant Taylor.

14 CROSS EXAMINATION BY MR. BROUGH:

15 Q. Sergeant Taylor, did you question Mr. Jones at any
16 point outside of that videotaped interview?

17 A. No, sir.

18 Q. During that videotaped interview, at some point did you
19 tell Mr. Jones that you couldn't help him out unless he told
20 you what was going on?

21 A. That's possible, sir.

22 Q. Okay. Do you know Mr. Jones?

23 A. I know him from his son attending daycare with my son.

24 Q. Do you feel that you offered to help him out if he told
25 you what happened?

1 A. I can't make any promises to him. That would be up to
2 the solicitor's office and the court. I can't make any
3 promises to anyone.

4 Q. But you may have said that?

5 A. I possibly told him that I couldn't help him unless he
6 told me.

7 Q. Thank you.

8 MR. BARNETTE: No further questions of this
9 witness, Your Honor.

10 THE COURT: You may step down.

11 MR. BARNETTE: I would have Investigator Porter to
12 come to the stand.

13 OFFICER R.D. PORTER, having been first duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION BY MR. BARNETTE:

16 Q. If you would, sir, state your full name for the record.

17 A. Russell D. Porter.

18 Q. Where do you work at, sir?

19 A. Spartanburg Public Safety Department.

20 Q. And what's your position there, sir?

21 A. I'm an investigator in the CID division.

22 Q. Was you called in to talk to Mr. Damion Jones to
23 investigate this case?

24 A. Yes, I was.

25 Q. And did you do a pre-interrogation waiver form

OFFICER R.D. PORTER - DIRECT BY MR. BARNETTE

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1 concerning his rights?

2 A. Yes, I did.

3 Q. And is that the form marked 12-A for ID purposes?

4 A. Yes, it is.

5 Q. It's already been entered for ID.

6 He was given his rights and everything. Did he
7 understand them?

8 A. Yes.

9 Q. Was he threatened in any way?

10 A. No, sir.

11 Q. Was he promised anything?

12 A. No, sir.

13 Q. Was any force used with him?

14 A. No, sir.

15 Q. Was you there for the whole interview or did Sergeant
16 Taylor do the whole interview?

17 A. I was there for first half and Sergeant Taylor took
18 over.

19 Q. And that was on videotape, is that right?

20 A. Yes, sir.

21 Q. And the statements he made is on this videotape that
22 you heard?

23 A. Yes, sir.

24 Q. Okay.

25 MR. BARNETTE: That would be all the questions

1 that I have. Please answer any questions Mr. Brough would
2 have for you.

3 CROSS EXAMINATION BY MR. BROUGH:

4 Q. Investigator Porter, is the time that you spoke with
5 Mr. Jones on videotape the only time that you discussed this
6 case with him?

7 A. Yes, sir.

8 Q. And while you were interviewing him, is it true he did
9 not talk to you until Sergeant Taylor came in the room?

10 A. Once Sergeant Taylor came in I was already gone.

11 Q. Okay. But Mr. Jones didn't tell you in response to
12 your questioning for some significant period of time what
13 was going on because he was too upset, is that correct?

14 A. That's correct.

15 Q. All right. Thank you.

16 MR. BROUGH: No further questions.

17 MR. BARNETTE: Your Honor, that would be the
18 State's showing concerning this videotape and any statements
19 that went on this videotape.

20 THE COURT: You may step down. Thank you.

21 MR. BROUGH: Your Honor, as long as there is no
22 other statements, I would just ask the court to review
23 briefly the portions where Sergeant Taylor entered the room.
24 I think there may have been a statement made regarding
25 helping Mr. Jones out. I just ask the court to review that

OFFICER M. HILLERS - DIRECT BY MS. JORDAN

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1 and make a determination based upon the court's findings.

2 THE COURT: Can we locate that very quickly?

3 MR. BARNETTE: I don't know if we can do it
4 quickly or not, Your Honor. I can get somebody to try to
5 look at it in our office in the meantime, Your Honor, if
6 that's okay with the court.

7 THE COURT: Okay. Unless you need an immediate
8 ruling on it, we can go ahead and start and they can locate
9 it and I can look at it later and as the cards will fall as
10 to wherever they fall, however I rule.

11 MR. BROUGH: That would be fine, Your Honor.

12 MS. JORDAN: Your Honor, the State would call
13 Officer Hillers.

14 OFFICER M. HILLERS, having been first duly sworn,
15 testified as follows:

16 DIRECT EXAMINATION BY MS. JORDAN:

17 Q. Please state your name for the record.

18 A. Mark Anthony Hillers.

19 Q. Where do you work?

20 A. Spartanburg Public Safety.

21 Q. What's your position there?

22 A. Senior patrol officer, patrol division.

23 Q. Okay. Were you working on February 25th of this year?

24 A. I was.

25 Q. Did you respond to a shooting on [REDACTED]

1 A. That's correct.

2 Q. When you arrived, did you see the defendant Damion
3 Jones?

4 A. I did.

5 Q. Where did you see him?

6 A. Mr. Jones was on the porch at [REDACTED]

7 Q. Did you approach him?

8 A. Not at first. At first I approached the victim on the
9 roadway.

10 Q. But you later approached the defendant?

11 A. I did.

12 Q. Did you ask any questions when you first approached?

13 A. I asked him if he had any weapons.

14 Q. Okay. Did he make any statements to you when you
15 approached?

16 A. When I approached, he, and I quote, stated "I didn't
17 mean to kill him. He was pulling me out of the car."

18 Q. Okay. At that point you had not asked him any
19 questions?

20 A. No.

21 Q. After you asked if he had any weapons and he stated no
22 on his person, he stated no, what did you do with him?

23 A. He was patted down for weapons and then he was
24 handcuffed and walked to the patrol vehicle.

25 Q. Once you were at the patrol vehicle, did you read him

1 his rights?

2 A. I did.

3 Q. Did you read those off of a card?

4 A. I did. It was a card given to me from Sergeant Billy
5 Mabry. I read it right off the card, Miranda card.

6 Q. When you gave him his rights, did he understand those
7 rights?

8 A. Yes, he did.

9 Q. Did he ask him any questions about his rights?

10 A. No, he didn't.

11 Q. Did he make any statements to you after, or did you ask
12 him any questions?

13 A. I asked him where the gun was located.

14 Q. Did he answer verbally?

15 A. He did. He said his grandmother's house and pointed to
16 [REDACTED]

17 Q. Was he promised anything?

18 A. No, he was not.

19 Q. Threatened in any way?

20 A. He was not.

21 Q. Did he give them freely and voluntarily the statements?

22 A. He did.

23 Q. Was there any force used?

24 A. No force.

25 Q. I'm going to show you what's been marked for

1 identification only as State's Exhibit No. 1 and ask if you
2 recognize it?

3 A. I do.

4 Q. Is this the car video?

5 A. The car video for unit 467, I believe.

6 Q. Does it contain the defendant being read his rights?

7 A. It does.

8 Q. And the statement regarding the weapons?

9 A. Correct.

10 MS. JORDAN: Your Honor, at this time I would like
11 to offer this to the court just as an exhibit only.

12 MR. BROUGH: No objection.

13 MS. JORDAN: Nothing further.

14 CROSS EXAMINATION BY MR. BROUGH:

15 Q. Officer Hillers, were you the first officer in terms of
16 taking Mr. Jones into custody?

17 A. I was.

18 Q. Okay. When you asked him, if he had any weapons, was he
19 in handcuffs at that time?

20 A. No, he wasn't.

21 Q. Okay. Did he do a pat-down search?

22 A. I did a pat-down on him.

23 Q. And that was the only statement that he made to you,
24 that he didn't mean to kill him, he was being pulled out of
25 the car?

1 A. He made that statement repeatedly.

2 Q. Okay. And that was the only statements that he made to
3 you, is that correct, outside of what's on the videotape?

4 A. Correct.

5 Q. Okay.

6 MR. BROUGH: Thank you. No further questions.

7 MS. JORDAN: Nothing further, Your Honor.

8 THE COURT: You may step down. Thank you.

9 MS. JORDAN: Your Honor, that's the State's
10 showing as to the statements that he made when the officer
11 arrived and when the officer read him his rights.

12 THE COURT: Okay.

13 THE COURT: Unless you see something, I don't see
14 any problem with it.

15 MR. BROUGH: The defense is satisfied with the
16 second one. I just ask the court to review the other tape,
17 Your Honor.

18 THE COURT: Okay.

19 All right. Anything else?

20 MR. BARNETTE: Nothing else from the State, Your
21 Honor.

22 MR. BROUGH: Nothing else from the defense, Your
23 Honor.

24 THE COURT: All right. We are going to go trial
25 here now. And, of course, the object of any trial is for

1 the jury to seek the truth, so let's put the truth out there
2 to them the best of our ability and let them decide it.

3 All right. Do we need a brief recess before we
4 get started?

5 MR. BARNETTE: Can we just have bathroom break,
6 Your Honor?

7 THE COURT: I'll give you five minutes and we will
8 come back and get started.

9 (Whereupon, proceedings were recessed)

10 (Whereupon, proceedings were reconvened)

11 THE COURT: We are ready,

12 Bring the jury in.

13 (The following takes place in the presence of the
14 jury panel)

15 THE COURT: Thank you, ladies and gentlemen, for
16 your patience.

17 Mr. Charles T. Coffman would be the foreperson of
18 the jury.

19 JUROR NUMBER 174: Yes, sir.

20 THE COURT: Mr. Foreman, if you will keep that
21 seat during the duration of the trial. The two alternates
22 will keep their seats. The rest of you it does not matter.
23 You can just -- however you file in, you can take the first
24 seat that you come to.

25 The first thing we need to do is put you under

1 oath and we will get started.

2 (Whereupon, the jury panel was sworn)

3 THE COURT: Once again I thank you for your
4 patience and we appreciate your willingness to serve on this
5 case, and I'm going to turn it over to the attorneys in just
6 a few minutes for the actual beginning of the trial. I just
7 have a few opening remarks to make to you to let you know
8 how we are going to proceed.

9 Both sides will be allowed to make opening
10 statements to outline their positions in the case to you.
11 After that will come the evidentiary portion of the trial
12 where you will receive the evidence. It is very important
13 that you listen and observe the evidence because you are the
14 triers of the fact in this case. I am the judge of the law.

15 The end result of any trial, ladies and gentlemen,
16 is a verdict. The word verdict is the Latin derivative word
17 which means a true saying, so it could said that a trial is
18 a search for the truth. And the way you reach a verdict,
19 you find the truth from the facts presented to you, apply
20 the law of the case that I will provide to you during my
21 charge of the law to those facts, and thus reach a verdict.

22 No one else in this courtroom will be allowed to
23 find the facts except you, the jury. I do not get involved
24 in that. I sit as a neutral trial referee. I have to rule
25 on admissibility of evidence and preside over the trial. I

1 do not become involved in the facts.

2 After the evidentiary portion of the trial will
3 come the closing arguments, where both sides will argue
4 their view of the evidence to you to try to persuade you to
5 see the evidence as they do. After that will come the
6 judge's charge of the law, where I will provide you the law
7 of the State of South Carolina concerning this case.

8 Only after all those phases are completed will you
9 be asked to deliberate. So in saying that, that means
10 please do not discuss this case. Don't even discuss it
11 among yourselves until you are asked to deliberate. Should
12 anybody try to approach you and discuss this case during the
13 trial or during a recess, do not discuss it with them and
14 immediately notify the court of such improper contact.

15 Now, the bailiffs are here for your service.
16 Anything that you need, you let us know. Especially after
17 lunch, you may be tempted to fall asleep, if you had a big
18 lunch. Please don't do that. Let me know if you get sleepy
19 and we will take a break and get a cup of coffee, or Coke
20 Cola, or something, where everybody can freshen up and we
21 can go forward. So if you feel yourself dozing off, don't
22 doze off. Let me know and we will take a break, okay?

23 If I were to fall asleep up here, I would hear
24 about it from Columbia. And if y'all fall asleep over
25 there, you are going to hear about it from me, so let's just

1 don't let that happen.

2 All right. This is a criminal case. You have
3 heard the charge. The burden of proof is on the State to
4 prove guilt beyond a reasonable doubt. Should the State
5 fail in its burden of proof, it would be your duty to acquit
6 the defendant; in other words, find the defendant not
7 guilty.

8 If the State proves the guilt of the defendant
9 beyond a reasonable doubt, then it would be your duty to
10 convict the defendant or find him guilty.

11 All right. With that said, I will assure you that
12 I will give you a full charge on that burden of proof and
13 explain some things to you and give you a charge about the
14 particular charge, and if any lesser included offenses that
15 might possibly be involved that you might make a finding on,
16 I will go over all that with you in my final charge to you.
17 So with that said, I will be quiet and I'll turn it over to
18 counsel for the actual trial, keeping in mind now that the
19 burden is on the State. Therefore, they get to go first.

20 Solicitor.

21 MS. JORDAN: Thank you, Your Honor. May it please
22 the court.

23 Ladies and gentlemen of the jury, my name is
24 Jennifer Jordan. I'm an assistant solicitor here in the
25 Seventh Circuit and I'll be representing the State of South

1 Carolina, along with Deputy Solicitor Barry Barnette.

2 It is our responsibility on behalf of the State,
3 as the judge has told you, to present evidence in this case
4 to prove the defendant guilty of the charge of murder beyond
5 a reasonable doubt.

6 We will talk very briefly about that. The burden
7 is ours. Beyond a reasonable doubt is a high burden and we
8 welcome that burden.

9 Second, let's talk about murder. Murder has been
10 defined in our state as being the unlawful killing of
11 another with malice forethought, whether it's expressed or
12 implied.

13 There is a couple different ways to look at
14 malice. Malice is the doing of a wrongful act intentionally
15 and without just cause or excuse. Or another way that it's
16 been defined here in the state is a general malignant
17 recklessness of a bias of others or a condition of the mind
18 that which shows a heart devoid of social duty and fatally
19 bent on mischief...

20 Ladies and gentlemen, malice can be express or
21 implied. It is implied where one intentionally and
22 deliberately does an act; or simply malice can be inferred
23 from the use of a deadly weapon.

24 The definition of murder also talks about having
25 malice aforethought. Now, aforethought doesn't specify a

1 specific time frame that malice has to come up. Malice only
2 has to be there. You know, malice has to accompany the act
3 of killing. Basically it has to be there when the killing
4 occurred, even if it came at the moment that the fatal blow
5 or pull was made. Basically it happened just like that.
6 That's when you need malice.

7 Just briefly as to what you are going to hear
8 about the trial of this case. This occurred on February the
9 25th of this year here in the City of Spartanburg at [REDACTED]
10 [REDACTED]. There Damion Jones, who is the defendant in
11 this case, he had pulled up in his car outside of a family
12 member's home and dropped off a family member and was
13 waiting on a friend to come back to the car to get in.

14 Right next door to [REDACTED] is [REDACTED]
15 Street. [REDACTED] Street is where Elaine Mitchell lived with
16 her son Sigida Long, the victim in the case. Damion was in
17 his car waiting. At the same time Sigida and his brother
18 Atiba pulled up in front of their home. Atiba -- I'm sorry,
19 Sigida got out of the car, went to [REDACTED] to speak
20 to a friend of his who lived there.

21 At some point in time an altercation occurred that
22 involved the defendant Damion Jones and the victim Sigida.

23 After the altercation Damion Jones pulled out a
24 .45 Bersa handgun, aimed it, pointed it at the defendant and
25 fired one single shot at Sigida Long. That one shot hit Mr.

1 Long in the right side of his head, went down at a 45 degree
2 angle, lodged here at the base of his skull.

3 Ladies and gentlemen, that one shot was the fatal
4 shot. He immediately fell to the ground and was pronounced
5 dead there on the street just below his home.

6 You are going to hear all this information from
7 the witness stand in various forms. You are going to hear
8 from eyewitnesses who were on the scene when this happened.
9 You are also going to hear from law enforcement officials
10 from the South Carolina Law Enforcement Division, or SLED is
11 how it's commonly known, and also from Spartanburg Public
12 Safety Department. You are also going to be able to see
13 photographs of the crime scene and you are going to hear
14 from Dr. David Wren from the Spartanburg Regional Medical
15 Center who performed the autopsy on Mr. Long.

16 The State is confident that the once you hear all
17 the evidence you will be able to return a verdict of guilty
18 in this case. We thank you for your time and your
19 attention..

20 THE COURT: Counsel.

21 MR. BROUGH: Thank you, Your Honor. May it please
22 the court.

23 THE COURT: Yes, sir.

24 MR. BROUGH: Good afternoon, ladies and gentlemen
25 of the jury. My name is Christopher Brough and I represent

1 Damion, who is sitting right over there.

2 I know it's getting on through the lunch hour, so
3 I will try to be brief.

4 What the State has told you about the case is not
5 evidence. What I tell you about the case is not evidence.
6 Why? Because Ms. Jordan wasn't there and I wasn't there, so
7 I'm going to ask each of you to pay very close attention to
8 the witnesses who were there, people that investigated and
9 things of that nature and developed the case. And you are
10 going to hear from a number of witnesses who were there. We
11 will talk about that in a minute.

12 Why are we here today? As the State told you, Mr.
13 Jones, Damion, was dropping off his uncle at his
14 grandmother's house. His grandmother lives next door to the
15 Longs. He dropped his uncle off, and then the Long
16 brothers, Sigida and Atiba, pulled up.

17 Atiba gets out of the car. He gets into an
18 argument with Damion's uncle, and then, just as the State
19 told you, Damion was in his car. Here are two gentlemen.
20 They come and they pull him out of his car and an
21 altercation ensued at that point. Damion didn't go looking
22 for trouble. Trouble came looking for him.

23 The evidence will also show that these are two
24 individuals that have harassed him in the past, have
25 threatened him, and he did what any reasonable person would

1 do, when confronted with a situation --

2 MR. BARNETTE: Objection, Your Honor. This is
3 argument at this time. This is just opening statement.

4 MR. BROUGH: I'll rephrase.

5 He acted, -- the evidence will show that he acted
6 in a reasonable manner. He was able to obtain a weapon. He
7 told them to back off. The evidence will show that he gave
8 them every opportunity to back off. Sigide Long rushed him.
9 There was a struggle for the gun. One gun shot went off.

10 The evidence will show that Damion Jones did not
11 run. He stayed until the officers got there. He stayed.
12 He didn't run anywhere. He was a man, and he will tell you
13 that he was in fear for his life and that's why we are here
14 today.

15 Now, the law gives you the ability to defend
16 yourself, and I'm going to ask all of you to consider that
17 throughout the case. Thank you very much.

18 MR. BARNETTE: The State would like to call Atiba
19 Long to the stand, Your Honor.

20 ATIBA LONG, having been first duly sworn,
21 testified as follows:

22 DIRECT EXAMINATION BY MR. BARNETTE:

23 Q. Mr. Long, if you would, state your full name for the
24 record, please.

25 A. Atiba Long. Atiba Long.

ATIBA LONG - DIRECT BY MR. BARNETTE

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- 1 Q. I know you are a little bit nervous and everything, but
2 I need you to speak loud enough for this jury to hear you.
- 3 A. Atiba Long.
- 4 Q. Okay. And where do you live at, sir?
- 5 A. Simpsonville.
- 6 Q. And where do you work at, sir?
- 7 A. It's a place called Royal Textiles in Travelers Rest.
- 8 Q. Now, what do you do there, sir?
- 9 A. Well, I dye cloth.
- 10 Q. And how long have you worked there, sir?
- 11 A. I worked there for about three years.
- 12 Q. And do you know Sigida Long?
- 13 A. Yes, he's my brother.
- 14 Q. And back on February 25th of this year --
- 15 A. Uh-huh.
- 16 Q. -- did you come visit your brother and mother that day?
- 17 A. Yes, I always do every weekend.
- 18 Q. And why do you do that every weekend, sir?
- 19 A. Huh?
- 20 Q. Why do you do that every weekend?
- 21 A. Because I come pick my brother up so me and my brother
22 can hang out.
- 23 Q. And are you off that day? Is that usually your days
24 off?
- 25 A. That's my days off.

- 1 Q. And was this a Friday?
- 2 A. Yes, it was a Friday.
- 3 Q. About what time did you arrive at your mother's house?
- 4 A. About one o'clock.
- 5 Q. And where does she live at?
- 6 A. She lives at [REDACTED] Street.
- 7 Q. Is that in the city of Spartanburg?
- 8 A. Yes.
- 9 Q. And is that down -- you go down Church Street? Is that
- 10 across or near Carver Junior High?
- 11 A. You go down Church Street. It's right across from
- 12 Pete's Drive-Inn and make that right.
- 13 Q. And take a right there and go on [REDACTED] Street?
- 14 A. Yes.
- 15 Q. And y'all's house, is it on the right or left?
- 16 A. It's on the right-hand side. Second one on the right.
- 17 Q. And is it like going down like a hill?
- 18 A. Yes.
- 19 Q. And when you arrived there at one o'clock, who did you
- 20 meet at your mother's house?
- 21 A. I met my mother and my brother.
- 22 Q. And what happened after that?
- 23 A. What happened was we had went out. We was going to do
- 24 some shopping, you know, look at clothes, or whatever, that
- 25 just came out. And then after that I was going to check on

ATIBA LONG - DIRECT BY MR. BARNETTE

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1 my car to get it fixed, try to get it fixed.

2 Q. And who did you go see about your car?

3 A. This guy named Chief's Mobile Mechanic.

4 Q. And where did you meet him at?

5 A. The Auto Zone over there by the Beacon on Reedville
6 Road, John C. White Boulevard.

7 Q. And how long did he work on your car?

8 A. He worked on it for about two hours.

9 Q. And after he worked on your car, what did y'all do
10 after that?

11 A. Well, we rode around for a little bit more. We checked
12 out a couple of people, a couple buddies we went to go see.
13 And then after that we had came back to the house because I
14 was getting ready to go home to meet my fiance.

15 Q. Had y'all got something to eat and drink that day too?

16 A. Yes.

17 Q. And about what time did you get back to your mother's
18 house that evening?

19 A. We got back about 6:30.

20 Q. When you got back at 6:30; where did you pull into or
21 pull from?

22 A. We pulled in front of the house, my mother's house.

23 Q. And what did Sigida do when you pulled in?

24 A. Well, he went next door to go see his friend Marvin
25 Moore.

1 Q. Where does Marvin live at?

2 A. He lives at [REDACTED]

3 Q. Is that the house right next to your mother's?

4 A. Yeah, it's the house right next to it.

5 Q. And what did you do when he went to go over to the
6 other house?

7 A. I went up to my mother's house on the porch and I
8 wanted to check on her.

9 Q. And as you was going up on the porch, or whatever, what
10 happened after that?

11 A. Well, when I got to the sidewalk, this guy named Gregg
12 Hardy asked me did I have any weed. I said I don't smoke
13 weed. I don't sell weed.

14 So then I was walking up to the porch. My brother got
15 into an argument with Gregg Hardy and Damion Jones. So I
16 came back down off from the porch. I figured there was
17 going to be like a fight, they was going to gang up on my
18 brother, so I went back to the car to put my phone up. And
19 the next thing I know, it was a scuffle in the car. I
20 walked back onto the walkway and it was a scuffle. Damion
21 Jones got out of the car with the gun, pulled it and shot my
22 brother in the head.

23 Q. How far was your brother away from Mr. Jones when he
24 shot the gun?

25 A. About three-fourth's of a car length away.

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1 Q. You don't know who started the scuffle or anything like
2 that?

3 A. No, I don't know who started the scuffle. I know who
4 started the argument. It was Gregg Hardy.

5 Q. And did your brother have any weapons in his hand or
6 anything?

7 A. No weapons.

8 Q. And when he shot your brother, what happened after
9 that?

10 A. He shot my brother. He stepped back in his yard. I
11 walked down to my brother. I had to proceed with caution
12 because the guy, he just shot my brother. He had the gun in
13 his hand, and I -- I didn't know whether he was going to
14 turn it on me, so I had to proceed with caution.

15 I went to go see about my brother and there was blood
16 bleeding out of his head and everything. And I looked up at
17 him. He had the gun pointed at me and he kept saying over
18 and over my brother tried to carjack him.

19 Q. What did you say to him?

20 A. I didn't say nothing because my brother was on the
21 floor bleeding. He was -- he was on the street bleeding.
22 Blood was coming out of his head.

23 Q. And where was the gun? What was he doing with the gun,
24 at that time?

25 A. He had the gun in his hand.

1 Q. What was he doing with it?

2 A. He had it pointed down at me. He was standing up. We
3 was in the street. He was standing up because their yard is
4 kind of like elevated and he was standing above me with the
5 gun in his hand saying that my brother tried to carjack him.

6 Q. And what did you say back to him?

7 A. I didn't say nothing back to him. The only thing I
8 said was "you did enough. You shouldn't have did what you
9 did." And then I went to go get my mother to call 9-1-1.

10 Q. And later on did you talk with 9-1-1?

11 A. Yes, I talked with 9-1-1.

12 Q. And you said that the defendant said that your brother
13 tried to carjack him?

14 A. Yes.

15 Q. Did y'all try -- did he try to carjack him?

16 A. No, he didn't try to carjack him. We didn't have no
17 reason to carjack nobody.

18 Q. And when he was on the phone with 9-1-1, did the police
19 come?

20 A. Yeah, they came shortly after.

21 Q. Did you ever pull a weapon out or anything?

22 A. No weapon. I didn't have a chance to do nothing.

23 Nobody had a chance to do nothing. He didn't say nothing.

24 All he did was pull that gun out and shot my brother. I

25 didn't even get a chance to tell him stop, don't do it, or

ATIBA LONG - DIRECT BY MR. BARNETTE

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1 anything.

2 Q. And this was in the city of Spartanburg where this
3 occurred?

4 A. Yeah, the city, Spartanburg.

5 Q. Do you see the man that shot and killed your brother in
6 the courtroom?

7 A. Yes, I do.

8 Q. Could you point him out in the court, please?

9 A. There you go right there.

10 Q. Is he the gentleman in the yellow shirt and tie sitting
11 beside his attorney?

12 A. Yes, sir.

13 MR. BARNETTE: Your Honor, I would like the record
14 to reflect he's identified the defendant.

15 One moment, Your Honor, please.

16 (Off the record).

17 (Back on the record)

18 THE COURT: I don't know who you are. I don't
19 personally care who you are, but there is nothing funny
20 about these proceedings. If I hear anybody else laugh back
21 there, make any facial gesture, if I don't throw you out of
22 the courtroom, I'm going to find you in contempt, so it
23 better stop now.

24 Go ahead, solicitor.

25 MR. BARNETTE: Thank you, Your Honor.

1 BY MR. BARNETTE:

2 Q. I don't have any further questions at this time.

3 Please answer any questions Mr. Brough may have.

4 MR. BARNETTE: Thank you, Your Honor.

5 CROSS EXAMINATION BY MR. BROUGH:

6 Q. Mr. Long?

7 A. Yes, sir.

8 Q. You said there was a scuffle at some point?

9 A. Yes, sir.

10 Q. And your brother was involved in that scuffle?

11 A. Yes, sir.

12 Q. You said that your brother had some words, I guess,
13 with a Mr. Hardy, is that correct?

14 A. Yes, sir.

15 Q. All right. But it is your testimony that Damion was
16 sitting in his car, is that correct?

17 A. Yes, sir.

18 Q. And your brother approached that car?

19 A. Not to my knowledge.

20 Q. Well, you said that there was a scuffle that took place
21 in the car. He had to get from point A to point B.

22 A. Yes, I seen the scuffle.

23 Q. Okay. And you saw that scuffle took place beginning in
24 the car, what you just testified to, is it not?

25 A. Yes, sir.

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1 Q. Okay. So at some point your brother approached the
2 car?

3 A. He had to walk by the car to get back to my mother's
4 house.

5 Q. Well, it's an adjoining yard, right?

6 A. Not an adjoining yard. You have to walk. It's next
7 door. The driveway in between there.

8 Q. All right. I'm sure there was another way that he
9 could have walked, right?

10 A. There is no other way.

11 Q. All right. Do you remember giving a statement to the
12 police at the time this occurred?

13 A. Yes, sir.

14 Q. And in that -- hold on.

15 Do you recognize this document, sir?

16 A. Yes, I do.

17 Q. And what is that document?

18 A. This is my statement saying what happened --

19 Q. Okay.

20 A. -- the night of.

21 Q. And in there did you not indicate that you didn't know
22 who threw the first punch?

23 A. Yes, sir.

24 Q. Is that what it says?

25 A. Yes, sir.

1 Q. And it also states that the scuffle began in the car,
2 is that correct?

3 A. Yes, it did.

4 Q. Now, you know Mr. Jones, don't you?

5 A. Yes, I do.

6 Q. Isn't it true that you had done some things in the past
7 to harass him?

8 MR. BARNETTE: Objection, Your Honor.

9 MR. BROUGH: These are things which Mr. Jones
10 personally witnessed. I believe we are allowed to get into
11 them.

12 MR. BARNETTE: May we approach the bench?

13 (Whereupon, the lawyers approached the bench for
14 an off-the-record discussion)

15 BY MR. BROUGH:

16 Q. Would it be fair to say that you had some difficulties
17 in the past?

18 A. Yes, sir.

19 Q. He did tell you at the time that your brother attempted
20 to carjack him. Is that what you just stated?

21 A. Yes, sir.

22 Q. Now, you were not physically present, is that what you
23 are telling me?

24 A. I was present, but I wasn't physically present as far
25 as being involved in it.

1 Q. Okay.

2 A. I was a bystander to what happened.

3 Q. How far away were you?

4 A. I was probably a car length and a half.

5 Q. Which way?

6 A. Up the street. In front of -- in front of my mother's
7 house. It happened in front of his grandmother's house, so
8 I was -- I was on my -- I was on my passenger's side when it
9 happened.

10 Q. Okay. Damion never shot at you, did he?

11 A. Huh?

12 Q. Damion never shot at you, did he?

13 A. Never shot me?

14 Q. That's what I'm asking.

15 A. No, sir, he never shot me.

16 Q. Okay. I just want to make sure.

17 So the only person that got shot was Sigida, is that
18 correct?

19 A. Yes, sir.

20 Q. And he had approached Damion's car, is that correct?

21 A. He walked by it.

22 MR. BROUGH: If I may have one minute, Your Honor?

23 THE COURT: Sure.

24 (Off the record)

25 (Back on the record)

1 MR. BROUGH: No further questions.

2 MR. BARNETTE: No further questions of this
3 witness, Your Honor.

4 THE COURT: You may step down.

5 MR. BARNETTE: Your Honor, I have talked to the
6 defense attorney. Freddie Thompson is going to come from
7 9-1-1, he's not here, but I don't think he has any objection
8 to the 9-1-1 tape we was going to play.

9 THE COURT: Is that correct, counsel?

10 MR. BROUGH: That's correct, Your Honor. I expect
11 to be more of the same than what we just heard.

12 MR. BARNETTE: It would be State's Exhibit No. 30,
13 Your Honor, and we would ask to enter it into evidence and
14 publish it to the jury at this time.

15 THE COURT: All right.

16 (Whereupon State's Exhibit No. 30 was published to
17 the jury panel)

18 MR. BARNETTE: Your Honor, our next witness would
19 be Investigator Talanges.

20 OFFICER R.C. TALANGES, having been first duly
21 sworn, testified as follows:

22 DIRECT EXAMINATION BY MR. BARNETTE:

23 Q. If you would, sir, please state your full name for the
24 record.

25 A. Robert Charles Talanges.

1 Q. And where do you work at, sir?

2 A. At the present time Spartanburg County sheriff's
3 office.

4 Q. And what is your position there?

5 A. Right now I'm a road deputy.

6 Q. And where would you be working in the future?

7 A. CID, at crime scene investigations.

8 Q. Okay. And before this was you with the Department of
9 Public Safety?

10 A. Yes, I was.

11 Q. And how long were you with them, sir?

12 A. 15 years, two months, and I think 11 days.

13 Q. And what was your position with them before you left?

14 A. I was working CID, crime scene investigator.

15 Q. And how long was you a crime scene investigator with
16 the Spartanburg Department of Public Safety?

17 A. A little over seven years.

18 Q. Back on February 25th, 2005, was you called out to a
19 crime scene on [REDACTED] Street?

20 A. Yes, I was.

21 Q. And when you responded there, did you collect evidence
22 and look at the scene, once you got there?

23 A. Yes, I did.

24 Q. Let me show you what's been marked as State Exhibit 6
25 and 7. Are these diagrams of the two areas that you looked

1 at, sir?

2 A. Yes, they are.

3 Q. Do these diagrams fairly represent what you saw there
4 at the crime scene?

5 A. Yes, they do.

6 Q. And also did you take some pictures there also, sir?

7 A. The photographs and also I videotaped the scene.

8 Q. If I could let you look at what's been marked as State
9 Exhibit No. 9, 10, 11, 13, 14, 18, 19, 22, and 23. If you
10 would take a look at those. Do these fairly represent what
11 you saw there at the crime scene, sir?

12 A. Yes, it does.

13 MR. BARNETTE: Your Honor, I would like to enter
14 State's Exhibit 6, 7, 9, 10, 11, 13, 14, 18, 19, 22, and 23
15 into evidence at this time.

16 THE COURT: Any objection?

17 MR. BROUGH: No objection.

18 THE COURT: They are in without objection.

19 MR. BARNETTE: Your Honor, I would like to publish
20 these to the jury, if you don't mind, at this time.

21 THE COURT: Sure.

22 MR. BARNETTE: Come down. Step down, if you
23 would, sir.

24 (Witness off the witness stand)

25 BY MR. BARNETTE:

OFFICER R. C. TALANGES - DIRECT BY MR. BARNETTE

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1 Q. Is this a picture at [REDACTED] or a diagram of
2 that, sir?

3 A. That's correct. That's a diagram of [REDACTED]

4 Q. That's it right there?

5 A. That's correct.

6 Q. And the victim was found where, sir? Was he found
7 here?

8 A. Yes, behind that vehicle in front of [REDACTED].

9 Q. And the house that they keep talking about next door,
10 is this the house that's next door right over here?

11 A. To the right, that's correct.

12 Q. And was this the car that was parked in front it?

13 A. Yes, it was.

14 Q. And during this time you collected pieces of evidence
15 around the car, is that correct?

16 A. Yes, I did.

17 Q. And what two items did you collect around the car,
18 other than obviously the victim?

19 A. Collected shell casing. Collected a green, they call
20 them like a scarf or dew rag. And there was -- I think, if
21 I recall, near the body was another piece of evidence, a
22 ball cap, I thought.

23 Q. And is this area a raised area right here?

24 A. Yes, it is. If you go all the way to the left up there
25 that solid line that comes down, and on across that's a

1 brick type wall that's raised approximately about -- I think
2 it measured about 20 inches.

3 Q. And is this a sidewalk right here?

4 A. Yes, it is.

5 Q. And is this like on a grade? Is it like on a slope?

6 A. Yes, it is.

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

8 No. 7. Is this a diagram of the area inside the house where
9 you went in and investigated, sir?

10 A. Yes, it is. It's [REDACTED]

11 Q. Now, this is the items that you found inside the
12 residence there?

13 A. That's correct.

14 Q. And what items did you find, sir? Use this laser
15 pointer, if you would like to.

16 A. Number 3 in the diagram says it's Beretta .45 Thunder,
17 serial number 582214. It was loaded, located on top of a
18 chest or cabinet.

19 Number 4 was a green chair. And inside the green chair
20 was a magazine with bullets, .45-caliber.

21 And number 5 is a live round, .45 auto bullet, which is
22 located right there.

23 Q. Is this a room, basically one room with a bathroom in
24 it?

25 A. This is a boarding-type house. This residence has

1 separate entrance, but it also has -- in this area here
2 there is a door that leads to the rest of the house, the
3 common area. This is a one room with a bath, this is what I
4 would consider it.

5 Q. So the bathroom is easily accessible in that room also?

6 A. Yes, it is.

7 Q. Is that the bathroom in that diagram right there?

8 A. That is the bathroom where the pointer is at at this
9 time.

10 Q. Let me show you what's been marked as State's Exhibit
11 No. 9 for evidence.

12 Is this a picture of [REDACTED] -- or [REDACTED]

13 A. Yes, sir, that's correct. That's [REDACTED]

14 Q. Is this the scene as you saw it that night?

15 A. Yes, it is.

16 Q. And is the sidewalk going on a slope?

17 A. The sidewalk slopes down. Here is that barrier or the
18 concrete brick wall that's raised up above the sidewalk.

19 Speaking of boarding house type house, there is a
20 separate entrance, which is to the right here, which room we
21 just got done talking about. That's how you would enter.
22 This other door here would enter the rest of the residence.

23 Q. Let me show you what's been marked as State's Exhibit
24 No. 10. If you would describe that picture, sir.

25 A. This is again -- once again, this is [REDACTED]

1 We are talking about the concrete barrier wall here, which
2 is raised up. The slope.

3 This is a Buick, four door, that's parked in front of
4 [REDACTED] facing the opposite direction, and our victim was
5 laying behind it.

6 Q. Is that a grassy area that's on top like a yard or on
7 top of the wall area?

8 A. Yeah, this area up in here is a grassy area. It's
9 divided by a sidewalk entrance into the residence and this
10 side also has a grassy area.

11 Q. Let me show you what's been marked as State's Exhibit
12 No. 11 for evidence purposes. If you would describe that
13 picture, sir.

14 A. This is also a picture of the scene showing the Buick
15 vehicle in the foreground.

16 The victim is laying in the street, and also the
17 evidence numbers are marked 2, 8, and I believe that's
18 number 1.

19 Q. And number 1, that's where the victim was at, is that
20 right?

21 A. That's correct.

22 Q. And number 2, was that -- what was that, sir?

23 A. Number 2 is a shell casing.

24 Number 8 is referring to the green nylon cap or dew rag
25 is what's referred to.

1 Q.. Let me show you what's been marked as State Exhibit No.
2 13. Is this a picture of the car that was in front of [REDACTED]
3 [REDACTED]?

4 A. Yes, it is. That's a Buick four door.

5 Upon my arrival, the door was open, as shown here, and
6 also the headlights were on.

7 Q. That's what it was when you got there? Nobody, as far
8 as you know, touched it, or moved it, or anything like that?

9 A. As far as I know, no one has touched it or disturbed it
10 in any way.

11 Q. This is State Exhibit No. 14. Is that the inside of
12 the same car?

13 A. That is the interior of the vehicle.

14 Q. Is there any blood found in the interior of the
15 vehicle?

16 A. I located no blood inside the car.

17 Q. I'll show you what's been marked as State's Exhibit No.

18 18. What was that, sir?

19 A. That is inside the room, and that is a magazine with
20 the .45 rounds that was located in the green chair.

21 Q. Okay. I'll show you State Exhibit No. 22. Is this the
22 same picture, just with the number 4 placard in it?

23 A. That's correct.

24 Q. And No. 23, what is that, sir?

25 A. That's an evidence number 5 and it's in the same room

1 where the weapon, as well as the magazine, was located and
2 it's a .45 round.

3 Q. Let me show you what's been marked as 21, 16 and 17.
4 Do these pictures fairly represent what you saw that night?

5 A. Yes, they do.

6 MR. BARNETTE: Your Honor, I would like to enter
7 these into evidence at this time.

8 MR. BROUGH: No objection.

9 THE COURT: They are in without objection.

10 MR. BARNETTE: Thank you.

11 BY MR. BARNETTE:

12 Q. And these placards, they correspond to your diagram, is
13 that right, where these items were located?

14 A. Yes, they do.

15 Q. I'll show you what's been marked as State's Exhibit No.
16 17. This is picture of the room?

17 A. Yes, that's a picture of the room showing the green
18 chair next to the bed, and right there is where the magazine
19 with the .45 rounds, .45 auto bullet rounds are located at.

20 Q. Where was the bullet in the gun approximately found at?

21 A. Looking at the chair, it would have been to the left of
22 the room. It would be on the side.

23 Q. Okay. Let me show you what's been marked as State's
24 Exhibit No. 16. Is that a picture of the gun, sir?

25 A. Yes, that's a picture of the weapon that we found on

1 top of the cabinet. It's a Bersa, also with the hammer
2 back.

3 Q. And I'm showing you State Exhibit No. 21. I believe
4 this is same picture just showing the placard number 3 where
5 it's on your diagram, is that correct?

6 A. That's correct.

7 Q. If you would, sir, please have your seat back.

8 (Witness back on the witness stand)

9 BY MR. BARNETTE:

10 Q. Let me show you what's been marked -- it hasn't been
11 marked yet, but is this the gun that you recovered along
12 with the bullets, sir?

13 A. Yes, it is.

14 Q. Okay.

15 MR. BARNETTE: Your Honor, I would like to enter
16 these items into evidence at this time; the shell casings
17 from the street, being State Exhibit No. 2; the magazine
18 would be No. 3; the pistol being No. 4; and the bullets that
19 was found on the floor would be State Exhibit No. 5.

20 MR. BROUGH: If I could peruse them briefly,
21 please?

22 No objection.

23 MR. BARNETTE: Your Honor, I would ask
24 investigator to open this, if that's okay with the court.

25 THE COURT: All right. They are in without

1 objection.

2 I'm going to let him make sure it's clear and
3 everything, sir, if you would.

4 I'm going to leave the chamber open on it.

5 BY MR. BARNETTE:

6 Q. Yes, sir.

7 (Bersa .45 Thunder pistol marked as State's
8 Exhibit No. 4 for identification)

9 A. I'm going to leave these in there they have been
10 printed and dust everywhere.

11 (Gun Magazine marked as State's Exhibit No. 3 for
12 identification)

13 (.45-Caliber Auto Bullet marked as State's Exhibit
14 No. 5 for identification)

15 MR. BARNETTE: Your Honor, I would like to publish
16 these to the jury at this time.

17 THE COURT: Okay.

18 BY MR. BARNETTE:

19 Q. Afterwards was you asked to take some pictures of Mr.
20 Jones, the defendant in this case?

21 A. Yes, I did.

22 Q. Let me show you what's been marked as State Exhibit No.
23 24, 25, 26, 27, 28 and 29. Do these pictures fairly
24 represent the pictures that you took of Mr. Jones?

25 A. Yes, they do.

OFFICER R. C. TALANGES - DIRECT BY MR. BARNETTE

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1 MR. BARNETTE: Your Honor, I would like to enter
2 these into evidence at this time.

3 THE COURT: No objection.

4 THE COURT: In without objection.

5 MR. BARNETTE: If you would, sir, step back down.

6 (Witness off the witness stand)

7 BY MR. BARNETTE:

8 Q. This is a picture of Mr. Jones taken right after this
9 occurred, is that right, sir?

10 A. I believe around 2200 hours, or close to it.

11 Q. And did you notice any marks on him anywhere?

12 A. I took facial photos. I took side photos, front and
13 side, and also I took pictures of his hands, and I didn't
14 find any marks.

15 Q. Is his clothes disheveled, torn, or anything like that?

16 A. No, they were not, but I did locate some looked to be
17 blood on his I think left shoe, as I stated in my report.

18 Q. State's Exhibit No. 25, is that another picture of him,
19 sir?

20 A. Yes, it is.

21 Q. State Exhibit No. 26, is that another picture of him on
22 his right side?

23 A. That's correct.

24 Q. Is that another picture of the left side of his face
25 and side?

1 A. Yes, it is.

2 Q. State Exhibit No. 28, is that a picture of the top of
3 his hand?

4 A. That's correct, it is.

5 Q. State Exhibit No. 29, is that a picture of his --

6 A. Palms, yes.

7 Q. There is no cuts or any marks on his hands or anything
8 of that nature?

9 A. I didn't see any.

10 Q. If you would, sir, please have a seat.

11 (Witness back on the witness stand)

12 BY MR. BARNETTE:

13 Q. Let me show he what's been marked as State Exhibit No.

14 8. What was that, sir?

15 A. It's going to be a green nylon dew rag that would be
16 evidence No. 8, located on the sidewalk in front of [REDACTED]

17 Q. That was the green item that was in the picture at
18 number 8?

19 A. That's correct.

20 Q. And if you would take a look and make sure that's the
21 item that you found.

22 A. It's got blood on it and stuff.

23 Q. Okay.

24 MR. BARNETTE: Your Honor, I would like to enter
25 State Exhibit No. 8 into evidence at this time.

1 MR. BROUGH: No objection.

2 THE COURT: In without objection.

3 BY MR. BARNETTE:

4 Q. Okay. And was there a bullet hole in this cap?

5 A. Yes, there is. You can see it up on top right there.

6 Q. Let me put it back here. I know where you are talking
7 about. Is that where the bullet hole is found, sir?

8 A. Yes.

9 Q. Is this blood around this bullet hole?

10 A. Yes, it is.

11 Q. And that was found where the picture of the diagram
12 showed, or the pictures showed I think on one of these
13 exhibit?

14 A. That's correct, on the sidewalk in front of [REDACTED]

15 [REDACTED]

16 Q. And this is in the city of Spartanburg, in Spartanburg
17 County, is that right?

18 A. Yes, it is.

19 MR. BARNETTE: Your Honor, I ask that I be able to
20 recall him at a later time, but we are finished asking any
21 questions at this time.

22 MR. BROUGH: Thank you, Your Honor.

23 CROSS EXAMINATION BY MR. BROUGH:

24 Q. Investigator Talanges, how are you doing, okay?

25 A. Pretty tired right now. It's been a long night.

1 Q. Now, do you remember doing any follow-up investigation
2 on this case as well after the 25th of February?

3 A. 25th? On 2-28, worked -- did some work on the vehicle,
4 the Buick.

5 3-1-05, processed the Bersa .45 auto.

6 3-11-05, worked on computer sketches, four total.

7 And 5-4-05, received SLED report.

8 Q. Okay. On March the 1st you said that you processed the
9 Bersa .45?

10 A. That's correct.

11 Q. For prints, I believe?

12 A. Yes.

13 Q. Did you find any prints on the gun?

14 A. I found what's called etched prints. As a matter of
15 fact, they sent that to SLED. An etched print is something
16 that where the oils in the skin actually etched themselves
17 into the metal and they can't be lifted. They got to be
18 photographed, scaled, and lifted basically on a picture.

19 Q. Okay. And that was on the magazine of the weapon, is
20 that correct?

21 A. Magazine, that's correct.

22 Q. But you didn't find -- no prints were lifted on the
23 weapon itself, outside of the magazine etched prints?

24 A. That's correct.

25 Q. And wasn't the weapon also swabbed for DNA?

1 A. Yup, as a matter of fact it was.

2 Q. Okay. Do you know if there were any results on that,
3 if you know?

4 A. I don't recall.

5 Q. Also I went to show you --

6 MR. BROUGH: I'm going to have this marked for
7 identification purposes as Defendant's Exhibit No. 1.

8 (Photograph marked as Defendant's Exhibit No. 1
9 for identification)

10 BY MR. BROUGH:

11 Q. All right. I'll show you what's been marked for
12 identification purposes as Defendant's Exhibit No. 1. Do
13 you recognize that, sir?

14 A. Yes, I do.

15 Q. And what is it?

16 A. That is my hands, actually. I removed all items from
17 the victim's pockets. That's a pocket knife and some cash.

18 Q. Okay.

19 MR. BROUGH: At this time I would like to move
20 Defendant's Exhibit No. 1 into evidence.

21 MR. BARNETTE: No objection, Your Honor.

22 THE COURT: In without objection.

23 MR. BROUGH: If I may publish it to the jury?

24 THE COURT: Sure.

25 BY MR. BROUGH:

1 Q. And you had found this on the victim at that time, is
2 that correct?

3 A. In his pocket, that's correct.

4 Q. Everything was turned over to the coroner's office and
5 that would have been, Coroner Wall, Brad Wall?

6 Q. Okay.

7 MR. BROUGH: I'm going to have this marked for
8 identification as Defendant's Exhibit No. 2.

9 (Envelope with hat, knife, credit card and cash
10 marked as Defendant's Exhibit No. 2 for identification)

11 BY MR. BROUGH:

12 Q. I'm going to hand you this envelope, sir, and ask if
13 you recognize the contents inside?

14 A. Yeah, this is contents removed from the victim's
15 pocket.

16 MR. BROUGH: At this time I would move Defense
17 Exhibit No. 2 into evidence.

18 MR. BARNETTE: Without objection, Your Honor, and
19 I assume he's going to do it all together and keep it in
20 evidence.

21 MR. BROUGH: That's fine.

22 BY MR. BROUGH:

23 Q. And is one of those items a pocket knife, sir?

24 A. Yeah, it's a black handled pocket knife.

25 Q. All right.

1 THE COURT: All that is in without objection.

2 BY MR. BROUGH:

3 Q. And I guess my last question, investigator, is would it
4 be fair to say that you came in after this happened and did
5 your best to collect and preserve all the evidence?

6 A. That's correct.

7 Q. Okay. Thank you.

8 MR. BROUGH: No further questions.

9 MR. BARNETTE: Just a couple on redirect, Your
10 Honor.

11 REDIRECT EXAMINATION BY MR. BARNETTE:

12 Q. The knife was found where at again, sir?

13 A. Inside his pocket, pants pocket.

14 Q. It was found inside of his pants pocket?

15 A. That's correct.

16 Q. Was it found closed?

17 A. Yes.

18 Q. It was found just the way it's shown on that picture
19 there?

20 A. That exact state it was there.

21 Q. So it wasn't opened or anything like that?

22 A. It was not open.

23 Q. Okay. And also I hate to have ask you to drag this
24 back out.

25 A. That's fine.

1 Q. Is there a business card found in there?

2 A. Yes.

3 Q. And if you could, read that business card for me?

4 A. Chief's Automobile Shop.

5 Q. And that was found also in his pocket, is that correct?

6 A. That's correct, everything came out of his pockets.

7 Q. And it says Chief's, is that right?

8 A. That's right.

9 Q. If you would, put it back in there, sir.

10 A. Everything to go back?

11 Q. Yes, sir.

12 A. Okay.

13 MR. BARNETTE: Thank you, sir. That's all
14 questions that I have.

15 MR. BROUGH: No recross.

16 THE COURT: Thank you, sir. You may step down.

17 MR. BARNETTE: We would ask this witness be
18 excused for right now, Your Honor. He's working on third
19 shift.

20 THE COURT: Subject to recall.

21 MR. BROUGH: That would be fine, Your Honor.

22 THE COURT: Excused, but subject to recall.

23 All right. We are going to recess for lunch. We
24 need everybody back at 2:30. Report back to the jury room
25 at 2:30.

1 Remember, don't discuss the case with anyone.

2 (The following takes place outside the presence of
3 the jury panel)

4 THE COURT: I'll be back about 2:10 or 2:15.

5 Would you arrange to have -- are we going to bring the video
6 here in the courtroom?

7 MR. BARNETTE: We can, Your Honor, wherever.

8 THE COURT: I'll just come in here and watch it,
9 if they will locate that portion.

10 MR. BARNETTE: Yes, sir.

11 (Whereupon, proceedings were recessed)

12 (Whereupon, proceedings were reconvened)

13 (Shell Casing from Victim marked as State's
14 Exhibit No. 31 for identification)

15 (Shell Casing on the street marked as State's
16 Exhibit No. 2 for identification)

17 (Gunshot residue kit marked as State's Exhibit No.
18 32 for identification)

19 (Gunshot residue kit marked as State's Exhibit No.
20 33 for identification)

21 (The following takes place in the presence of the
22 jury panel)

23 MR. BARNETTE: May it please the court, Your
24 Honor, I would like to recall Investigator Talanges to the
25 stand.

1 THE COURT: All right, you are still under oath.

2 REDIRECT EXAMINATION BY MR. BARNETTE:

3 Q. Sir, I know that you are still under oath. Sorry for
4 calling you back. I want to make sure a couple more pieces
5 of evidence.

6 A. Sure.

7 Q. If you would look at State Exhibit No. 2.

8 A. Shell casing. A Speer .45 auto shell casing.

9 Q. And was that the shell casing that you found at number
10 2 on the sidewalk?

11 A. I marked on it. Yeah, that's correct, found in front
12 of [REDACTED] Street, that's correct.

13 Q. And that was found on the sidewalk is that right, sir?

14 A. On the sidewalk.

15 Q. Let me show you what has been marked as State Exhibit
16 No. 31.

17 A. This is a bullet. I received this from Dr. Wren at the
18 morgue.

19 Q. Was that the bullet that came from Sigida Long?

20 A. That's correct, that's the one that he had -- he should
21 have a marking on here at the base. He usually puts one on
22 there.

23 Q. That's what was removed from his body, is that right?

24 A. That's correct.

25 MR. BARNETTE: Your Honor, I would like to enter

1 State's Exhibit 2 and 31 into evidence at this time.

2 MR. BROUGH: No objection.

3 THE COURT: Without objection.

4 BY MR. BARNETTE:

5 Q. Let me let you look at State's Exhibit No. 33 and 32.
6 Were these two GSR kits that were done on -- one of them I
7 believe was done on the defendant Damion Jones, and the
8 other one was done on the victim Sigida Long?

9 A. That's correct. Evidence State's Exhibit No. 33 was
10 done on Mr. Jones, and 32 was done on Mr. Long.

11 Q. And it was sent to SLED for analysis?

12 A. That's correct. As a matter of fact, I did the one on
13 Mr. Long, and Investigator Porter did the one on Mr. Jones.

14 MR. BARNETTE: I would like to enter State's
15 Exhibit No. 32 and 33 into evidence at this time.

16 MR. BROUGH: No objection.

17 THE COURT: Without objection.

18 MR. BARNETTE: I would like to publish these to
19 the jury at this time.

20 THE COURT: Okay.

21 BY MR. BARNETTE:

22 Q. If you would, please answer any questions that Mr.
23 Brough would have of you.

24

25 RECROSS EXAMINATION BY MR. BROUGH:

1 Q. Investigator Talanges, I know we just spoke a little
2 while ago. I wanted to ask you, you said that you did the
3 first gun residue kit on Sigida Kenyatta Long?

4 A. That's correct.

5 Q. That's correct?

6 A. That's correct.

7 Q. You did the collection of that, is that correct?

8 A. I did the collection of. I didn't do the analyzing of
9 it.

10 Q. Right. So you are the person that did the swabbing and
11 things of that nature?

12 A. That's correct.

13 Q. When you collected the evidence, did you do two forms
14 of evidence collection? In other words, did you use the
15 sticky tabs to collect evidence as well as just the general
16 swabbings, or did you just do the general swabbings?

17 A. This particular kit is a two test two part, if you want
18 to call it. It has -- we call them little blotter type
19 sticky tabs --

20 Q. Okay.

21 A. -- which are first done on any -- they are the first
22 thing that we do on any kit that we do on any person.

23 Q. Uh-huh.

24 A. After that's done we do a swab basically to go over --
25 explain it to you. Palms and back side of the hand is what

1 is considered. These are this big. I'll show you. This is
2 what they look like. And these little brownish colored cabs
3 has sticky sided tape on the inside. That's what I call it,
4 but that's what basically it is, and you dab the inner palm
5 area, and one of those say right palm, left palm, right
6 back, left back. These are done first.

7 And then secondly -- let me put them back in the kit.
8 You use swabs, and you do it in the same manner that you do,
9 but you do two swabs; two on the palm areas, both right and
10 left; and also two on the back.

11 Q. And when you do that original sticky tab test, the
12 point of the collection is to determine whether or not there
13 are any small amount of particles which would be consistent
14 with gunshot residue with having fired a weapon, is that
15 correct?

16 A. That's what they analyze for, that's correct.

17 Q. Do you know if these were ever analyzed?

18 A. Yes, they were. As a matter of fact, they were sent
19 back from SLED.

20 MR. BROUGH: Your Honor, may we approach for a
21 moment?

22 THE COURT: Sure.

23 (Whereupon, the lawyers approached the bench for
24 an off-the-record discussion)

25 MR. BROUGH: No further questions. Thank you.

1 MR. BARNETTE: We would ask for this witness to be
2 excused, Your Honor.

3 MR. BROUGH: That would be fine, Your Honor.

4 THE COURT: The witness is excused. Thank you,
5 sir.

6 MR. BARNETTE: I would to call Agent Simmons to
7 the stand, Your Honor.

8 SLED AGENT ILA SIMMONS, having been first duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION BY MR. BARNETTE:

11 Q. If you would, ma'am, please give your full name for the
12 record.

13 A. My name is Ila Simmons.

14 Q. And where do you work at, ma'am?

15 A. At the South Carolina Law Enforcement Division, also
16 known as SLED.

17 Q. What do you do there?

18 A. I'm employed in the forensics laboratory in the area of
19 trace evidence.

20 Q. And how long have you worked there, ma'am?

21 A. Almost six years.

22 Q. And do have expertise in gunshot residue?

23 A. Yes, I do.

24 Q. And what education have you received concerning that?

25 A. I have a Bachelors of Science in chemistry. I have

1 also undergone the training at SLED, which is approximately
2 a year and a half in the analysis of gunshot residue,
3 collection of gunshot residue. During this time period I
4 was tested both with written and practical examinations on
5 how to collect and analyze gunshot residue. I passed all of
6 my competency examinations. I have been on the symposium
7 with the Federal Bureau of Investigation in the area of
8 gunshot residue.

9 Q. And how many times have you been declared an expert in
10 gunshot residue in the state?

11 A. Probably about 40 times.

12 Q. That's been in the state court here in South Carolina?

13 A. Yes.

14 MR. BARNETTE: Your Honor, I would move her as an
15 expert in gunshot residue at this time.

16 THE COURT: Any objection or any questions?

17 MR. BROUGH: No, Your Honor.

18 THE COURT: So qualified.

19 MR. BARNETTE: Thank you, Your Honor.

20 BY MR. BARNETTE:

21 Q. I'll show you what's been marked as State's Exhibit No.
22 33 and 32. Did you get -- were these kits submitted to you,
23 ma'am? I'll let you have a chance to look at them there.
24 Did you have them for analysis?

25 A. Yes, sir, they are both marked with my initials. The

1 laboratory indication numbers and the number that's given to
2 evidence when it comes into our laboratory, as well as the
3 item number and the date in which the kits were taken.

4 Q. And one of them I believe is on Damion Jones?

5 A. Yes, it is.

6 Q. If you would, tell us the results of your findings and
7 tell the jury how you do the gunshot residue, how you test
8 for it, and what your findings were.

9 A. Gunshot residue is a mixture of microscopic chemicals
10 that come out of a gun when it's fired. It can get on the
11 hands of the person shooting the weapon or anything in the
12 proximity of a weapon five to six feet within the weapon
13 when it's fired.

14 This gunshot residue kit, two portions are collected.
15 Particle lifts, which are just little aluminum discs with a
16 piece of sticky two-sided tape. It's dabbed over the
17 different areas of the hands and it collects any gunshot
18 residue that may be there.

19 The second portion of the kit is a set of cotton swabs
20 that are treated by the acid. It's used after the particle
21 lifts that pick up any residue that may have been left by
22 the particles.

23 Q. And did you conduct tests on this one that came from
24 the defendant Mr. Jones?

25 A. I did.

SLED AGENT ILA SIMMONS - DIRECT BY MR. BARNETTE

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1 Q. Did you find any gunshot powder?

2 A. No, I did not. I did not find any gunshot residue.

3 Q. The weapon in this case was a Bersa .45-caliber weapon?

4 A. Yes.

5 Q. I'll show you what's been marked as State's Exhibit No.

6 4. What kind of gun residue does that gun give off when
7 it's shot?

8 A. This is known as a higher -- a high caliber handgun
9 and it does give off gunshot residue when it's fired, more
10 so than a smaller caliber, like a .22 or .32.

11 Q. Why didn't the defendant have any gun residue --

12 Do you have any idea what removes gunpowder residue
13 from someone's hands?

14 A. Gunshot residue can be removed by washing the hands.
15 If someone begins to sweat and sweats profusely, it can be
16 removed from the hands. It can also be if someone were to
17 put their hands in and out of their pocket, sort of wipe
18 their hands on a rag.

19 Q. They can be removed in many ways?

20 A. Yes.

21 Q. It's very fragile?

22 A. Yes, it is.

23 Q. On the other kit, which is Sigida Long's kit, did you
24 do a gunpowder residue test on that?

25 A. Yes.

1 Q. And what was your findings on that?

2 A. If I may refer to my notes here?

3 Q. Yes, ma'am.

4 A. On the back of the left hand we found what was maybe
5 associated with gunshot residue.

6 Q. So that would have been the back of the left hand here?

7 A. Correct.

8 Q. Now, could you get that from just a bullet merely
9 passing by your hand?

10 A. That is a possibility, or being in the vicinity of a
11 gun when it's fired.

12 Q. How far a range does the gunpowder residue blow from a
13 .45 caliber gun, such as that gun?

14 A. Approximately five or six feet. I can't say
15 specifically for this weapon, but in that caliber range
16 probably about five or six feet.

17 Q. So it goes out beyond what the shot is?

18 A. Yes, absolutely.

19 Q. Plus the bullet carries it with it?

20 A. It can be caught up in the convection of the bullet.

21 Q. If somebody grabbed ahold of that gun, or whatever --
22 if I grabbed ahold of that gun, would I have gunpowder
23 residue all over my hand?

24 A. Yes, you would have a tremendous amount, because your
25 hands -- the majority of gunshot residue is going to come

1 out the muzzle of the gun in a cone-shaped fashion. So if
2 someone were to grab directly around the muzzle of the
3 weapon, there would be a lot of gunshot residue on the
4 hands.

5 Q. Did you find that on Mr. Long?

6 A. No, I didn't. I found what just met our threshold
7 level for gunshot residue slightly.

8 Q. That could have been from the bullet passing his hands?

9 A. That's a possibility, or being within five feet of the
10 weapon when it was fired.

11 Q. Okay. But if he was right on top of the weapon, would
12 that --

13 A. I would expect to find much higher levels on the hands.
14 Probably -- maybe five times as much on the hands.

15 Q. And on Mr. -- going back to the defendant's, Mr. Jones,
16 you found none, is that right?

17 A. That's correct.

18 Q. But he could have got that done by rubbing his hands
19 and washing his hands?

20 A. That's correct.

21 Q. And putting them in his pockets? Any type of the wipe
22 of hand would remove it?

23 A. That's correct.

24 MR. BARNETTE: One moment, Your Honor, please.

25 (Off the record)

1 (Back on the record)

2 BY MR. BARNETTE:

3 Q. Please answer any questions that Mr. Brough has for
4 you. Thank you, ma'am.

5 CROSS EXAMINATION BY MR. BROUGH:

6 Q. Ms. Simmons, I have a few questions for you.

7 All right. I want you to explain gunshot residue to me
8 one more time to see if maybe I understand what you are
9 talking about.

Okay.

10 Q. When a weapon such as this is fired, it emits a cloud
12 of material. And in that cloud are three trace metals, are
13 they not?

14 A. That's correct.

15 Those metals are lead, barium and antimony, is that
16 not correct?

17 That is correct. Those are the primary components in
18 firing gunshot residue.

19 Q. And when you test for the presence of gunshot residue,
20 you look to find certain base numbers of those levels in
21 particles per billion, is that correct?

22 A. Yes, that's correct.

23 Q. Now, when you run these tests, there are some
24 situations where maybe two out of three trace metals are
25 present in sufficient quantity and one is sort of

1 borderline?

2 A. That's correct as well.

3 Q. And in that situation wouldn't it be accurate to say
4 that's why you would refer to the sticky tab test to
5 determine the presence of round metal particles?

6 A. It all depends on who is being tested. In a situation
7 of someone who actually has a gunshot wound on their person,
8 we would not go to the particle lift, because we would be
9 looking at the particle lift to confirm whether or not
10 someone fired a weapon or was shot. And in that situation
11 it would not confirm whether or not someone was fired upon
12 or whether they were shooting a weapon.

13 Q. So, in other words, you wouldn't take the extra step if
14 it was the victim, because you have already made some sort
15 of conclusion about the case, is that fair to say?

16 A. We have made a conclusion that the gunshot residue is
17 present. But even if we went the extra step, we wouldn't be
18 able to confirm if it came from being shot at, being that
19 they already had a gunshot wound on their person, or if they
20 were shooting a weapon. So it wouldn't -- it wouldn't be
21 any more conclusive.

22 Q. Isn't it true that even when you fire a weapon, that
23 the range of the emission is not five to six feet, but more
24 along between one foot and a foot and a half that emits
25 these particles? Wouldn't you say that's more accurate?

1 A. No, that's not exactly correct. It all depends on what
2 the caliber of the weapon is. It's been tested to show that
3 something like a .22, which is a very low caliber weapon,
4 handgun, it has less gunshot residue in the shell itself.
5 So, therefore, there is going to be less expelled. With a
6 higher caliber handgun, it could go out to five feet.

7 Q. Now, getting back to where we were before, talking
8 about the three metals?

9 A. Yes.

10 Q. Okay.

11 MR. BROUGH: I'm going to have these marked for
12 identification as Defense Exhibit 3 and Defense Exhibit 4.

13 (SLED Report marked as Defendant's Exhibit No. 3
14 for identification)

15 (SLED Report marked as Defendant's Exhibit No. 4
16 for identification)

17 BY MR. BROUGH:

18 Q. I'm showing you what's been marked for identification
19 purposes as Defendant's Exhibit 3 and Defendant's Exhibit 4.

20 MR. BARNETTE: Without objection.

21 MR. BROUGH: Okay.

22 BY MR. BROUGH:

23 Q. Do you recognize these?

24 A. I do. These are data sheets that I constructed from
25 the -- when I analyzed the gunshot residue kits.

1 Q. So would it be fair to say that those were your actual
2 raw data?

3 A. Yes, it is.

4 MR. BROUGH: Defense would move those exhibits
5 into evidence at this time.

6 MR. BARNETTE: No objection.

7 THE COURT: In without objection.

8 MR. BROUGH: Thank you.

9 BY MR. BROUGH:

10 Q. Now, these are the different levels that you found
11 regarding the antimony on the top one?

12 A. Yes.

13 Q. The lead and barium.

14 And what I'm showing you is Defendant's Exhibit No. 3,
15 which are the results from Sigida Long's gunshot residue
16 kit.

17 Now, you say in your report that the metals detected
18 the back of left hand may be associated with gunshot
19 residue.

20 Now, there is certain base levels of metal particles
21 that you would look for, is that correct?

22 A. That's correct.

23 Q. Dealing with the lead, would it be fair to say that
24 base is around 200 parts per billion, would that be correct?

25 A. Yes, that would be our lowest threshold level.

1 Q. What about the antimony? What's that?

2 A. In the antimony, 10 would be our base level..

3 And the barium, it would also be around 200, as the
4 lead.

5 Q. So looking at that, barium levels are significantly
6 higher; antimony levels would meet your criteria; and lead
7 levels would meet your criteria as well on the back of the
8 left hand, is that correct?

9 A. That's correct.

10 Q. Now, looking at the other samples, it seems that you
11 have got the presence of barium significantly in all areas,
12 the right back, the right palm, the left palm and left back,
13 but it would seem to indicate that the other levels are not
14 as strong as those areas of the hands, is that correct?

15 A. Yes, when you are concerned with the lead and the --
16 like on the back the right hand, the lead or the antimony
17 are at threshold level..

18 Q. Now, I'm going to show you what's been admitted into
19 evidence as Defendant Exhibit No. 4. These are the results
20 of the gunshot residue kit for Mr. Jones.

21 A. I can't quite see the writing. Move it over just a
22 little bit more so I can see the right palm area too.

23 Q. There we go. All right.

24 And none of the levels here -- it seems that we have
25 some negative levels. Those would essentially be zeros, is

1 that correct?

2 A. That's correct. What happens is they also take a
3 control within the kit with the swabs that's taken from an
4 area away from where the gunshot residue is expected to be
5 found. That way they can take into consideration any lead
6 that you may come in contact with in your every-day work.
7 Like if you work around lead or something like that that you
8 may have on your person at all times, and that is subtracted
9 from our raw data, and that's what you end up with.

10 Q. In other words, it's common that just doing day to day
11 things, that ought to have the presence of small amounts?

12 A. Yeah, in smaller amounts than what we have,
13 essentially.

14 Q. Okay. But none of these, upon looking at these levels,
15 could you say that Mr. Jones, on looking at these stats,
16 that he definitively fired a weapon, is that correct?

17 A. That's correct.

18 Q. Now, I also noticed in your report you never gave any
19 sort of conclusion as to how far the distance away it was,
20 is that correct?

21 A. That's correct.

22 Q. Thank you.

23 MR. BROUGH: No further questions.

24 MR. BARNETTE: Just a couple on redirect, Your
25 Honor.

1 REDIRECT EXAMINATION BY MR. BARNETTE:

2 Q. Well, obviously this man shot a gun, Mr. Jones. He's
3 wiped it off or done something to that?

4 A. Right, if he had fired a weapon within six hours of
5 this kit being collected, it was removed in some other way.

6 Q. So he either washed his hands, wiped his hands off, or
7 something like that?

8 A. That's correct.

9 Q. The other thing, obviously the distance this gun -- I
10 think you said five to six feet, is that correct?

11 A. Yes, that's possible, yes.

12 Q. And obviously it's a large caliber gun, is that
13 correct?

14 A. It is, yes.

15 Q. And it would give off more gunpowder residue than a
16 smaller gun?

17 A. Yes, say a .22.

18 Q. He kept talking about the barium amounts. Is that the
19 leading thing you look for is the lead, or the --

20 A. We look for all three in conjunction with one another.
21 However, we have to have all three to say the gunshot
22 residue may be -- the amount of the metals found were
23 consistent with gunshot residue or associated with gunshot
24 residue.

25 Q. Just because there is a high barium level on one

1 doesn't mean that he had gunshot residue?

2 A. No. No, they have to all be in conjunction with one
3 another.

4 Q. And that could be from like, say, from being exposed to
5 something at work or something like that?

6 A. That's also possible.

7 Q. Thank you.

8 MR. BROUGH: Just briefly.

9 RECROSS EXAMINATION BY MR. BROUGH:

10 Q. Agent Simmons, would it be fair to say that you have no
11 personal knowledge of the events that took place on February
12 the 25th?

13 A. Other than what I was submitted, the incident report,
14 and I read that. Otherwise, no, I did not.

15 Q. That came from a third-hand source here?

16 A. Correct.

17 Q. You have no personal knowledge?

18 A. No, I don't.

19 Q. You are just trying to figure these things out based
20 up --

21 A. Right, I'm just trying to report what the evidence was
22 that was submitted to me.

23 Q. So you don't actually know if Mr. Jones wiped his hands
24 off or not?

25 A. No.

1 Q. You are just merely coming up with some sort of theory?

2 A. Yes, that is a possibility.

3 Q. Thank you.

4 MR. BROUGH: No further questions.

5 MR. BARNETTE: Your Honor, we would ask this
6 witness be excused.

7 MR. BROUGH: No objection.

8 THE COURT: The witness is excused. Thank you.

9 MR. BARNETTE: Your Honor, I would like to call
10 Agent Dan DeFreese to the stand, please.

11 SLED AGENT FRANK DAN DEFREESE, having been first
12 duly sworn, testified as follows:

13 DIRECT EXAMINATION BY MR. BARNETTE:

14 Q. If you would, sir, please give your full name for the
15 record.

16 A. My name is Frank Dan DeFreese, D-E-F-R-E-E-S-E.

17 Q. And where do you work at, sir?

18 A. I work for the South Carolina Law Enforcement Division,
19 in the laboratory in Columbia.

20 Q. What do you do there, sir?

21 A. I'm assigned to the firearm and tool mark analysis
22 department and I examine firearms and tool mark evidence?

23 Q. And how long have you worked there, sir?

24 A. About 38 years.

25 Q. And what's your expertise, sir?

SLED AGENT DAN DEFREESE - DIRECT BY MR. BARNETTE

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1 A. Well, my expertise is in the field of firearm and tool
2 mark identification.

3 After I was hired at SLED, I was assigned to the
4 firearms laboratory, and I undertook about a two and a half
5 year course of study in the techniques of firearm and tool
6 mark identification. I was taught by a gentleman named
7 Millard Cate, who established the SLED laboratory when SLED
8 itself was established in 1947.

9 And after studying the techniques from him and from
10 another examiner employed at the same time, I began
11 accepting cases for analysis on my own and testifying as to
12 my results. I have been doing that since 1969.

13 Q. And how many times have you been qualified as an expert
14 in state courts?

15 A. I don't know exactly. Probably something in excess of
16 six hundred times.

17 MR. BARNETTE: Your Honor, I would move that he's
18 an expert in firearms examination at this time.

19 MR. BROUGH: No objection.

20 THE COURT: All right. So qualified.

21 MR. BARNETTE: Thank you, sir.

22 BY MR. BARNETTE:

23 Q. I don't know if you have had a chance to look at these,
24 sir. I'll let you look at State Exhibit No. 4, State
25 Exhibit No. 5, State Exhibit No. 3, as well as State Exhibit

1 No. 31, and see if you -- was those items submitted to you
2 for examination?

3 A. Yes, sir, they were.

4 Q. If you would look at I think it's State Exhibit No. 4,
5 can you tell the jury what that is, sir?

6 A. State's Exhibit No. 4 is a .45-caliber semiautomatic
7 pistol known as a Bersa, model Thunder, .45 ultra compact.

8 Q. And is that weapon in fairly good shape?

9 A. Yes, sir, it is. It's in excellent condition. It
10 shows very little wear.

11 Q. And what kind of action is on that gun?

12 A. This is what's called a double-action semiautomatic
13 pistol.

14 If I may, it has a type of action in which it can be
15 fired in two different manners. One of them is a
16 semiautomatic single action, and the other is double action.

17 In the double action mode -- and I have inspected the
18 gun to see that it's not loaded. In the double action mode
19 a long pull of the trigger will cause the hammer to be
20 cocked. And when I reach a certain point, the hammer will
21 be released. And if a cartridge had been in the chamber, it
22 would have been fired at this time.

23 After the first shot is fired, or if the hammer is
24 manually cocked, it switches to what's called a single
25 action mode of firing, which requires a much shorter and

SLED AGENT DAN DEFREESE - DIRECT BY MR. BARNETTE

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1 much lighter pull of the trigger to discharge the firearm.

2 In this case, just that much movement, after which the
3 slide would come to the rear, go back forward, reload the
4 firearm, and then I would simply let up on the trigger
5 slightly. You probably heard it click. And then another
6 pull, a single action pull. It fires the first shot double,
7 and all the succeeding shots in single action mode, until
8 it's reloaded, or until it's de-cocked.

9 It has a rather excellent de-cocking ambidextrous
10 safety. When it's cocked, you raise the safety lever
11 located on both sides the frame, it causes the hammer to be
12 lowered without the firearm discharging. And once it's in
13 that position, pulling the trigger will not cause it to
14 fire.

15 Q. Let me ask you, this is not a hair trigger gun then?

16 A. No, the double-action trigger pull, which is the amount
17 of weight placed in the mid part of the trigger to take to
18 fire it varied between 11 and a quarter and 11 and
19 three-quarters pounds.

20 The single action trigger pull, whether it's cocked,
21 took between six and a quarter and six and a half pounds of
22 pressure placed on the trigger to fire it.

23 Q. So that's like how many pounds of pressure you would
24 have to put on that trigger to fire it?

25 A. Correct.

1 Q. So in a single mode, if I heard you right, it's six
2 pounds and --

3 A. Between six and a quarter -- it sometimes would fire at
4 six and a quarter, sometimes not. It would always fire at
5 six and a half pounds.

6 And the double-action trigger pull, because it's
7 somewhat heavier, varied slightly more, and it would
8 sometimes fire with as little as 11 and a quarter pounds,
9 but it would always fire at 11 and three-quarters pounds.

10 Q. So to pull that -- I think you told me the long pull is
11 what you was telling us the jury here, if it's a double
12 action?

13 A. In double-action mode, because you are doing two
14 things. That's where the double action comes from. You are
15 both cocking and firing.

16 In the single action mode you are only doing one thing,
17 which is firing the already cocked hammer.

18 Q. So if this is in the double-action mode, to pull that
19 back, I have to pull it a long ways back and I would have to
20 have 11 pounds of force to move that back?

21 A. At least 11 and a quarters pounds applied over the
22 distance of the pull.

23 Q. And then if you cocked the hammer back, you would have
24 to physically cock it, then you could shoot, it would be six
25 pounds and a quarter?

SLED AGENT DAN DEFREESE - DIRECT BY MR. BARNETTE

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1 A. Between six and a quarter and six and a half.

2 Q. But you would have to physically pull that back to do
3 that?

4 A. Either that, or it would have to be a subsequent shot.
5 The pistol would have already had to have been shot or it
6 would have to have been manually cocked.

7 Q. So if there was one shot that was fired, the hammer
8 would have to be completely pulled back, or you would have
9 to do the long pull?

10 A. Correct.

11 Q. And you did an analysis, I believe, on the bullets that
12 was also found in the magazine, as well as the -- I believe
13 the bullet that was found in the house?

14 A. Yes, sir. In State's Exhibit 5, these are .45
15 automatic or .45 ACP caliber pistol cartridges. These are
16 the correct caliber of ammunition to use in the pistol,
17 State's Exhibit No. 4. And I examined these just to confirm
18 they were the correct caliber, and I observed that the
19 bullets that were loaded into the cartridges, the unfired
20 cartridges in State's Exhibit 5, were constructed in the
21 same way as the bullet fragments in State's Exhibit 3.

22 Q. 31?

23 A. 31.

24 Q. Okay.

25 A. State's Exhibit 31 contained two copper alloy jacketed

1 lead bullets fragments, the larger one of which is mostly a
2 core, the center part of the bullet. And the smaller one of
3 which is mostly jacket material.

4 As part of my test, I test fired the pistol, State's
5 Exhibit 4, and I have got test bullets that I knew it had
6 fired. And then I microscopically compared my test bullets
7 first with each other to see if they were consistent in
8 their markings, which they were; and then I took one of the
9 test bullets and compared that one test bullet under the
10 comparison microscope with the bullet fragments in State's
11 Exhibit 31.

12 The larger of the bullet fragments in State's Exhibit
13 No. 31 was so badly damaged, that it simply had no markings
14 left on it that were placed there by the gun in which it was
15 fired.

16 The smaller, the one that's mostly jacket material, but
17 more copper colored of the two, did have a very limited area
18 of marking, but it was not enough to determine whether the
19 fragment was fired by State's Exhibit 4 or by a similar
20 firearm.

21 Q. However, does those bullets compare to the bullet that
22 was found in the magazine of that weapon?

23 A. They are constructed in the same way. They are
24 consistent in their construction, and State's Exhibit 31
25 could have been fired by State's Exhibit 4.

1 Q. But they were destroyed so badly taken from the body
2 that you could find no markings on them?

3 A. Yes, they are -- the markings that we use for
4 identification that are placed on the bullet when the bullet
5 passes through the barrel were simply damaged as a result of
6 this bullet coming into contact with something.

7 Q. But those would be consistent -- they could have been
8 fired from this weapon, obviously?

9 A. Yes.

10 And the magazine in State's Exhibit 3 is a correct
11 magazine assembly for use in State's Exhibit 4.

12 Q. And does it fit inside that weapon?

13 A. It does. It may or may not fit with sticker on it. It
14 does.

15 Q. And the --

16 A. It did function and test fire.

17 Q. And the magazine actually goes inside of the handle of
18 the weapon, is that right?

19 A. It does. The grip has -- the frame in the grip has a
20 recess to accommodate the magazine.

21 Q. And the bullets in State's Exhibit No. 5 came from the
22 magazine of that weapon, is that right?

23 A. When I received them, they were in that packaging. I
24 did not physically remove them from the magazine. When I
25 received the magazine it had no cartridges in it.

1 Q. Those are consistent with going in that type weapon?

2 A. They are. When I received it, they were covered with
3 the black fingerprint powder. They had evidently been
4 removed by somebody else.

5 Q. And obviously this is a large caliber weapon,
6 .45-caliber gun?

7 A. Yes, sir, it is.

8 MR. BARNETTE: One moment, Your Honor, please.

9 (Off the record)

10 (Back on the record)

11 BY MR. BARNETTE:

12 Q. Please answer any questions that Mr. Brough may have
13 for you. Thank you, sir.

14 CROSS EXAMINATION BY MR. BROUGH:

15 Q. How are you doing today?

16 A. Doing fine, sir.

17 Q. A couple of quick questions.

18 So would it be fair to say that the bullets over there
19 could or could not have been fired from that weapon?

20 A. Yes, sir, that's correct.

21 Q. Okay.

22 A. It could have been fired by that gun, but I can't say
23 for certain that they were.

24 Q. Because of the damage to the bullet?

25 A. Correct.

SLED AGENT DAN DEFREESE - REDIRECT BY MR. BARNETTE

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1 Q. You have talked a lot about the pounds of pressure that
2 you need to put on the trigger.

3 A. Yes, sir.

4 Q. Would it be fair to say that an average person could do
5 that?

6 A. Yes, sir. Oh, yes, sir.

7 Q. That's why --

8 A. It doesn't require super human strength.

9 Q. If you did, I'm sure you wouldn't be in business very
10 long.

11 A. Correct.

12 Q. Thank you very much.

13 MR. BROUGH: No further questions.

14 MR. BARNETTE: Just one question on followup, Your
15 Honor.

16 REDIRECT EXAMINATION BY MR. BARNETTE:

17 Q. However, that's a lot of pounds of pressure, 11 pounds,
18 to pull a trigger?

19 A. It's within the range of what's normal for a pistol of
20 this type. Most of the double-action semiautomatic pistols
21 have a double-action pull in that range. It's a pull that's
22 not so light that a person picking it up would simply touch
23 it and it would go off. It's a pull that requires a
24 conscious effort to make the firearm discharge.

25 Q. So it's for safety reasons, to make sure that it

1 wouldn't actually go off with that kind of pounds of
2 pressure?

3 A. The manufacturer sets the trigger pull weights in a
4 range for most people to use and it is a range that they
5 consider to be safe and at the same time not so fatiguing
6 that the person can't use it.

7 Q. So I just couldn't merely brush up on that gun and it
8 would go off?

9 A. No, it's not the sort of thing that just barely
10 touching it would cause it to discharge. It would be
11 something that -- either at six pounds or 11 pounds, it
12 would take a conscious effort. One would be able to feel
13 something going on there. It wouldn't just be a brush
14 against it and it would discharge.

15 MR. BARNETTE: Thank you, judge.

16 MR. BROUGH: Quickly, if I may, Your Honor.

17 THE COURT: Yes, sir.

18 RECROSS EXAMINATION BY MR. BROUGH:

19 Q. Two people, theoretically, struggling over a weapon and
20 one of them had their finger inside there. Is it quite
21 possible that it could go off during the course of that
22 struggle?

23 A. Yes.

24 Q. Thank you.

25 MR. BROUGH: No further questions.

MIGNON WILLIAMS - DIRECT BY MS. JORDAN

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1 MR. BARNETTE: That's all the questions that we
2 have, Your Honor. We would ask for this witness to be
3 excused, Your Honor.

4 MR. BROUGH: No objection.

5 MS. JORDAN: Your Honor, the State calls Mignon
6 Williams.

7 MIGNON WILLIAMS, having been first duly sworn,
8 testified as follows:

9 DIRECT EXAMINATION BY MS. JORDAN:

10 Q. Ms. Williams, if I could just get you to speak into the
11 microphone so that everyone can hear you.

12 Can you state your name and spell your first name for
13 the court reporter?

14 A. My name is Mignon Williams. It's spelled M-I-G-N-O-N.

15 Q. Okay. Thank you, Ms. Williams.

16 Ms. Williams, where do you live?

17 A. I live on [REDACTED] Street.

18 Q. Okay. Can you tell the jury where [REDACTED] Street is
19 in relationship to [REDACTED]

20 A. It's at an angle this way.

21 Q. Is it across the street?

22 A. Across the street.

23 Q. How was [REDACTED] Street -- how is that street? Is it a
24 straight street, or is it sloped?

25 A. It's a slope.

- 1 Q. Does it run down from [REDACTED] to [REDACTED]?
- 2 A. Yes, it run down.
- 3 Q. And you are at an angle looking up to [REDACTED] :
- 4 A. Looking up.
- 5 Q. On the night of February the 25th of this year were you
- 6 at home?
- 7 A. Yes.
- 8 Q. Did you leave your house at any point?
- 9 A. No.
- 10 Q. Did you go outside?
- 11 A. I went outside.
- 12 Q. What were you doing out there?
- 13 A. I was talking to a friend of mine.
- 14 Q. What direction were you facing?
- 15 A. I was facing up, looking up the street.
- 16 Q. Looking up in the direction of [REDACTED]
- 17 A. Yes.
- 18 Q. Did anything draw your attention to that area?
- 19 A. Yes. Young men was making some noise and when I looked
- 20 up --
- 21 Q. You heard -- you heard men talking up there?
- 22 A. Yeah, I heard them making a loud notice, so I looked
- 23 up. I was talking to my friend, but when the boys started
- 24 making loud noises, I looked up at the street to see what
- 25 was going on.

1 Q. When you looked up, did you see Damion Jones?

2 A. He was in the yard. I mean, he was in the yard, but
3 the guy --

4 Q. In which yard?

5 A. He was in his grandmother's yard.

6 Q. Is that [REDACTED]?

7 A. [REDACTED].

8 Q. Okay. If you take one second to describe the yard for
9 me.

10 A. The yard is about 24 inches up off the ground. It's
11 got a wall around it. He was up in the yard near the steps.

12 Q. In the grassy area?

13 A. Yes.

14 Q. When you describe the wall, is that because of the
15 downward slope of the road?

16 A. No, it's a wall around the house.

17 Q. Okay.

18 A. Even though the road goes down, the wall is around the
19 yard.

20 Q. Did you also see Sigida Long that night?

21 A. Yes, he was running -- coming around the side of the
22 front of the car.

23 Q. Was Mr. Long in the road?

24 A. Yes.

25 Q. So Mr. Long was in the road. Mr. Jones was up in the

1 yard?

2 A. Yes.

3 Q. What did you see happen next?

4 A. Well, when he came around the front of the car, the
5 shot went off and I could see him shoot him. He fell to the
6 ground.

7 Q. Who did you see shoot?

8 A. Jones, the man in the yard shot him. He fell to the
9 ground.

10 Q. Did you see him raise his arm?

11 A. Yes.

12 Q. How did he raise his arm? He raised it like that, with
13 the gun in his hand?

14 A. Gun in his hand.

15 Q. And he was in the direction of Sigida Long?

16 A. Yes, he was in front of him.

17 Q. What was the distance would you say between Damion
18 Jones and Sigida Long?

19 A. About where you are standing, probably.

20 Q. And in between this distance you have got a portion of
21 the road?

22 A. You have got the sidewalk and the yard.

23 Q. And in the yard you are including the wall?

24 A. The wall.

25 Q. Was there any physical contact that you saw between

1 Damion Jones and Sigida Long right before that gun went off?

2 A. No.

3 Q. Okay. Could you see any physical contact between them
4 at all?

5 A. No.

6 Q. Did you see anything in Damion Jones' -- I'm sorry, did
7 you see anything in Sigida Long's hands?

8 A. No, I didn't.

9 Q. When the shot fired, what happened to Sigida Long?

10 A. He fell on the ground.

11 Q. Did anyone come up to him?

12 A. The guy that was behind him came up to him and picked
13 him up and then cradled him in his arms and said "man, you
14 didn't have to do this."

15 Q. Let me ask you this one question. At the time of the
16 shooting did it appear in any way that Sigida Long was going
17 towards Damion Jones?

18 A. He was going around the car. I'm not saying that he
19 was going -- he wasn't at the point where he could go up
20 into the yard. He was still in the front of the car.

21 Q. Behind the wall?

22 A. Behind the wall. Behind the sidewalk.

23 Q. Okay.

24 A. He was in the street.

25 Q. Let me ask you this. Damion Jones was standing in the

1 yard. Was he standing in the yard closer to the house or
2 closer to the sidewalk?

3 A. He was closer to the house.

4 Q. Would it be fair to say that he could have made it into
5 the house?

6 A. Yes.

7 Q. And he was closer to the house steps than he was to the
8 sidewalk?

9 A. Yes.

10 MS. JORDAN: Nothing further, Your Honor.

11 Please answer any questions Mr. Brough may have.

12 MR. BROUGH: If I may have one moment, Your Honor.

13 THE COURT: Sure.

14 (Off the record)

15 (Back on the record)

16 MR. BROUGH: Thank you, Your Honor.

17 CROSS EXAMINATION BY MR. BROUGH:

18 Q. Ms. Williams, I just got a couple of questions for you,
19 okay?

20 Now, you stated that Mr. Long was coming around the
21 front of the car?

22 A. Yes.

23 Q. And that's where he was shot?

24 A. Yes.

25 Q. At the front of the car?

1 A. Yes.

2 Q. And you are a hundred percent sure of that?

3 A. Yes.

4 Q. You never saw anybody -- I mean, his brother came up to
5 him and that's where he was, right, in front of the car?

6 A. Yes.

7 Q. And you are a hundred percent sure of that?

8 A. Yes.

9 Q. Would it surprise you to learn that when the officers
10 got there he was at the back of the car?

11 A. Well, I would say he was at -- I don't -- I can't
12 remember if -- where he fell is where he was.

13 Q. But you just told me he was at the front of the car,
14 right?

15 A. Well, that's --

16 Q. That's what you told Ms. Jordan.

17 A. Yes.

18 Q. But he was at the back of the car, isn't that right?

19 A. But he went around the car. And I can't remember if it
20 was the front or the back, but where he fell at is where he
21 died, where he got shot.

22 Q. All right. Now, you were distracted when this
23 happened. I mean, you were talking to your friend, right?

24 A. I wasn't that distracted. I heard the loud noise.

25 That's what made me look up.

- 1 Q. You heard a loud noise, but --
- 2 A. They were making enough noise --
- 3 Q. But it was loud?
- 4 A. They was making enough noise for me to pay attention --
- 5 Q. Okay.
- 6 A. -- to what was going on and around me.
- 7 Q. Now, you lived in that neighborhood, right?
- 8 A. Yes.
- 9 Q. Do you know Ms. Jones?
- 10 A. No, I don't.
- 11 Q. Do you know Mr. Long?
- 12 A. No, I didn't know Mr. Long either.
- 13 Q. Okay.
- 14 A. I just knowed they were my neighbors when I saw them in
- 15 passing, but I didn't really know them.
- 16 Q. It's dark out when this happened, wasn't it?
- 17 A. Well, seems to me it wasn't quite dark.
- 18 Q. So you are looking up across the street, right?
- 19 A. Yes.
- 20 Q. Several houses down, right?
- 21 A. Well, yeah.
- 22 Q. Several houses down?
- 23 A. Well, I would say from my angle it would have been --
- 24 it could have been several houses, but it was enough for me
- 25 to see the person in that yard.

1 Q. You say you are sure you saw him at the front of the
2 car?

3 A. I saw him where he fell at. I'm not sure --

4 Q. I'm asking you where that is. I wasn't there.

5 MS. JORDAN: Your Honor, I object. She's --

6 A. It's either front or back, but he fell where they found
7 him at.

8 MR. BROUGH: All right.

9 Thank you. No further questions.

10 MS. JORDON: A few questions, Your Honor.

11 REDIRECT EXAMINATION BY MS. JORDAN:

12 Q. Ms. Williams, when you are talking about the front of
13 the car, are you talking about the part of the car that's
14 facing you when you are looking up from your house?

15 A. Yes.

16 Q. And where he fell is where he was shot?

17 A. Yes.

18 Q. And you are referring to the front of the car as what
19 you saw as the front?

20 A. Yes.

21 Q. Looking up, that's what you saw?

22 A. Yes.

23 Q. Okay.

24 MS. JORDAN: Nothing further, Your Honor.

25 THE COURT: Counsel?

1 MR. BROUGH: Just briefly.

2 RECROSS EXAMINATION BY MR. BROUGH:

3 Q. If you see the back bumper of a car, that's the front?

4 A. No, I don't -- I saw where he fell at.

5 Q. Thank you.

6 MR. BROUGH: No further questions.

7 MS. JORDAN: Your Honor, may she be excused?

8 MR. BROUGH: No objection.

9 THE COURT: Thank you, ma'am. You are excused.

10 MR. BARNETTE: We would like to call Dr. Wren to
11 the stand, Your Honor.

12 DR. JOHN DAVID WREN, having been first duly sworn,
13 testified as follows:

14 DIRECT EXAMINATION BY MR. BARNETTE:

15 Q. If you would, sir, please give us your full name for
16 the record.

17 A. John David Wren.

18 Q. And where do you work at, sir?

19 A. I'm a pathologist at Spartanburg Regional Medical
20 Center.

21 Q. And how long have you worked there, sir?

22 A. I'm a member of the Spartanburg Pathology Associates,
23 who does the pathology there, and I have been working there
24 since October the 18th, 1982.

25 Q. And pathology, is that the study of how people die,

1 basically?

2 A. Not necessarily. Pathology is a study of disease
3 processes of the body, and it has several parts to it, but
4 that is one of the functions.

5 Q. And forensic pathology is another area that you work
6 in, is that correct?

7 A. It's a subspecialty of pathology, yes.

8 Q. And how many times have you been qualified as a
9 pathologist -- as a forensics pathologist in court?

10 A. I haven't kept a record, but probably about 200 times.

11 MR. BARNETTE: Your Honor, we would move him in as
12 an expert in forensic pathology at this time.

13 THE COURT: Any objection or any questions?

14 MR. BROUGH: A little bit of questioning, if I
15 may, Your Honor.

16 THE COURT: All right. Go right ahead.

17 VOIR DIRE EXAMINATION BY MR. BROUGH:

18 Q. Dr. Wren, are you board certified in pathology?

19 A. Anatomic and clinical pathology I passed on the first
20 attempt. On each -- I passed the first one in 1983,
21 anatomic portion. And then I took the clinical portion in
22 1987.

23 Q. And you stated pathology is the study of disease, is
24 that correct?

25 A. Disease processes, yes.

1 Q. And what is forensic pathology?

2 A. Forensic pathology is a subspecialty of anatomic
3 pathology that is basically concerned with medical legal
4 investigations, whether it be deaths or other type of
5 processes that are concerned with legal processes.

6 Q. And are you board certified in that, sir?

7 A. No, I have never taken the board.

8 Q. All right. Thank you.

9 MR. BROUGH: Defense would object, Your Honor.

10 We have no problem with Dr. Wren being qualified
11 as a pathologist, but we would object to qualifying him as a
12 forensic pathologist.

13 THE COURT: He's so qualified as a forensic
14 pathologist.

15 MR. BARNETTE: Thank you, Your Honor.

16 CONT'D DIRECT EXAMINATION BY MR. BARNETTE:

17 Q. Dr. Wren, were you asked to do an autopsy on Sigida
18 Long?

19 A. Yes, I did.

20 Q. In that autopsy did you find a -- was a bullet found
21 during the autopsy?

22 A. Yes.

23 Q. And let me let you look at State's Exhibit No. 31, I
24 believe.

25 Was that the bullet fragment that was collected from

1 Mr. Long?

2 A. The larger fragment is -- that was recovered from his
3 neck. I described it as a lead slug with small amount of
4 attached copper. It was from the right neck region inferior
5 to the base of the skull, just in the back of the neck,
6 almost in the midline. It measured .45 inches in diameter
7 at the base, and .55 inches in length, and I labeled it with
8 an arabic number 6 and a Greek letter Delta, because Delta
9 is a lot easier to make than a D, and I used that as my
10 signature mark. I examined it with a hand lens and there is
11 a 6 and Delta on this bullet fragment.

12 Q. And where did the bullet enter Sigida Long's head, sir?

13 A. The bullet entered his head about two and a half
14 centimeters or about an inch above the front of the ear,
15 directly above it. It actually entered 1.75 inches from the
16 top of his head, three and a half inches to the right of the
17 midline. And I measured from the midline -- from the center
18 of the forehead circumferentially around the head for
19 another dimension and it was five inches from there.

20 It measured .38 inches, or thirty-eight one-hundredths
21 of an inch in diameter, and it had abrasion border from 12
22 to six o'clock. If you are looking at the wound itself, if
23 you can imagine twelve o'clock on a clock, from 12 to six
24 o'clock there was an abrasion border, meaning the bullet was
25 entering the skin and actually drug and abraded the skin

1 along that border, and it was going at a rather steep angle,
2 because that abrasion border measured up to three-hundredths
3 -- I'm sorry, 30 one-hundredths of an inch or three-tenths
4 of an inch in width.

5 Q. So what degree angle did it go into the head, what you
6 found, Dr. Wren?

7 A. The bullet -- I did not use a protractor, but the
8 bullet actually passed 45 degrees downward front to back,
9 and from lateral to medial at about 15 degrees. It passed
10 through his brain and exited the skull at the base of the
11 skull and went into his neck, where I recovered the major
12 part of the bullet, which is the big part.

13 The smaller part I recovered from the brain tissues or
14 from the head itself.

15 Q. In the angle, whatever, would it be consistent with
16 somebody being higher up when they shot somebody, being
17 higher than the victim?

18 A. It's consistent with it, if the head is straight
19 forward, yes.

20 Q. Let's say, it could easily be if I was down at a lower
21 angle, like you was at a higher angle, or whatever, that
22 would be consistent with you shooting somebody in the head?

23 A. If you turn that way slightly.

24 Q. Right. They could be trying to dodge, or whatever, but
25 it would be consistent with that?

1 A. Yes.

2 Q. Would it be consistent with somebody fighting over a
3 gun going this direction or having their head down below
4 where that gun was?

5 A. It could be, because the head is actually located
6 almost at 360 degrees, so any position that you -- that one
7 could imagine where the bullet would be passing about at
8 this angle that I'm pointing to, and the barrel of the gun
9 being at that angle also could work. In fact, the person
10 could be laying on the ground and I could be sitting here
11 and I could shoot him the same way. So you have to go by
12 eyewitness accounts and see if it's consistent with that.

13 Q. But if an eyewitness said a person was above them and
14 shot from like on a hillside, or whatever, that would be
15 consistent with that, if the head was turned this way
16 slightly?

17 A. Slightly down, yes.

18 Q. Was this a contact wound?

19 A. No.

20 Q. So the gun was not placed against the skin, is that
21 right?

22 A. No.

23 Q. There was no stippling. If you could explain to the
24 jury what stippling is?

25 A. Well, the terms that are used with on gunshot wounds,

1 if -- and we will talk about all of them.

2 If a distant gunshot wound is applied to any part of
3 the body, the only -- just about the only thing that you
4 will see is a round hole. It can be oval. It's hardly ever
5 extremely irregular, unless the bullet has hit something in
6 between and started tumbling around or fragmenting as it
7 hits the head.

8 You can have an abrasion border, meaning that if
9 somebody shot me in the cheek straight on, it would be a
10 nice round hole there. But, on the other hand, if they shot
11 me and it was coming in at an angle, it would be the
12 abrasion border that I was talking about.

(13 As one gets closer and closer, soot, as well as burning
14 powder, comes out of the barrel following the bullet.

15 If one is close enough, that will -- the burning powder
16 will actually impact on the skin and stipple it or actually
17 what's -- it's either called stippling or tattooing. It
18 will cause little burn fragment. On occasion one can
19 identify those particles and the skin.

20 If one gets even closer, the soot, as it comes out of
21 the barrel, will actually -- depending on the surface, it
22 will deposit.

23 And as one gets closer and closer, there are two types
24 of contact wounds.

(25 The other two, by the way, were called intermediate.

1 The contact wounds are loose or tight contact.

2 Loose contact means that the barrel of the weapon is
3 just up against the skin. It's not pressed up against it.
4 It will usually leave a nice round border.

5 But if it's pressed up against it and there's something
6 hard beneath it, for instance, bone, the powder and soot
7 will go into the wound, fall into the wound itself and it
8 will actually blow back and tear the skin in what's called a
9 stellate-type appearance. It will be star shaped.

10 So, one can get an indication by examining the wound
11 close with a magnifying glass and observation of whether
12 which of those happened.

13 Q. .. And you didn't have any stippling in this case, did
14 you?

15 A. Not in this case.

16 Q. And so this was a distant gunshot wound? It obviously
17 wasn't a contact wound or very close?

18 A. It was not -- it was not tight contact. It wasn't any
19 evidence that there was loose contact, because there was no
20 soot or powder in the wound itself.

21 And although the place where it was applied could be
22 construed as interfering because of his hair, but his hair
23 was short. It could have masked some of the effects of
24 stippling or tattooing, but I did not see any.

25 Q. And did he die from this gunshot wound?

1 A. Without a doubt.

2 Q. And where did it go?

3 A. Pardon?

4 Q. And what -- when he was shot, did it -- how fast did he
5 die from this gunshot wound?

6 A. It's really hard to say how fast one dies without going
7 to the scene and seeing how much blood is there, but it did
8 not go through an immediately fatal area. He probably lost
9 consciousness as soon as it happened because of the
10 concussion effect, but he may have lived a few minutes.

11 Q. Okay.

12 A. He could have lived ten minutes, but he wouldn't be
13 moving.

14 Q. I understand.

15 A. Particularly his left side.

16 Q. Yes, sir.

17 MR. BARNETTE: One moment, Your Honor, please.

18 (Off the record)

19 (Back on the record)

20 BY MR. BARNETTE:

21 Q. Please answer any questions Mr. Brough would have for
22 you, sir. Thank you.

23 CROSS EXAMINATION BY MR. BROUGH:

24 Q. Doctor, just briefly.

25 I wanted to get back to in terms of the angle that you

1 were talking about dealing with the trajectory. You
2 mentioned that you did not use a protractor, is that
3 correct?

4 A. Yeah. You do know what a protractor is, don't you?

5 Q. Yes, sir.

6 A. Yes, sir, I didn't use one.

7 Q. Okay. So would it be fair to say that you sort of,
8 based upon your own experience, you guesstimated what that
9 angle was?

10 A. Well, it's an estimate of an angle, but it certainly
11 wasn't straight on.

12 Q. Okay. So it could be more, it could be less?

13 A. What?

14 Q. It could be more or less on the degrees, is that
15 correct?

16 A. Five or ten degrees, but not five degrees or ten
17 degrees less on the 15 degrees.

18 Q. Okay.

19 A. 45 degrees. It could have been 60. It could have been
20 35, but more than likely it was --

21 What I do is I draw an imaginary line with my --
22 visually between the two entrance and where I recover it,
23 and then with the head in an upright anatomic position, I
24 say, well, in my experience as a Ph.D. in chemical
25 engineering and doing a lot of math, then I know that that's

1 about 45 degrees.

2 Q. Okay.

3 A. Certainly not 90 degrees, and certainly not 360. As
4 close as an estimate that I can give.

5 Q. All right. You mentioned there was some fragmenting in
6 this case?

7 A. Pardon?

8 Q. That the bullet fragmented in this case?

9 A. Yeah, it's two fragments in here.

10 Q. Okay. And it's your testimony then in terms of exact
11 angle or things of that nature, that the eyewitness accounts
12 would be the best accounts to go by?

13 A. I hadn't heard the eyewitness accounts.

14 Q. Well, I'm just asking you if that would be your
15 opinion. I believe you just said that before.

16 A. Pardon?

17 Q. I'm asking you if it's your opinion that dealing with
18 the eyewitness accounts would be the proper way to look at
19 the angle in terms of the way the gun was?

20 A. The way the solicitor described -- the question he
21 asked me, I said it was consistent with that, but I also
22 said that the person could have been lying flat on the
23 ground. And if the -- if the person that did the shooting
24 was in a position to where they could shoot at that angle,
25 then that would be consistent too.

1 It's really hard to say with a head, because it rotates
2 about 360 degrees. And it's not like lying flat on the
3 ground and somebody being shot in the chest, or somebody
4 told me that somebody was shot in the chest and they -- in
5 the anterior chest and they had a hole in the middle of
6 their chest and they were lying face down on the ground, I
7 would say that would be a little bit impossible, but I can't
8 say that --

9 Q. I understand.

10 A. -- it's not other ways that he could have been shot.

11 Q. Okay. Thank you very much, sir.

12 MR. BARNETTE: Your Honor, that's all questions of
13 the doctor. We would ask for him to be excused.

14 THE COURT: Any objection?

15 MR. BROUGH: None.

16 THE COURT: Thank you, doctor. You are excused.

17 MR. BARNETTE: Your Honor, may we approach the
18 bench.

19 THE COURT: Yes.

20 (Whereupon, the lawyers approached the bench for
21 an off-the-record discussion)

22 MR. BARNETTE: Your Honor?

23 THE COURT: Go ahead.

24 MR. BARNETTE: We was going to ask for the jury to
25 view the scene.

1 THE COURT: All right. Ladies and gentlemen, what
2 we are going to do at this time, the sheriff's department
3 has arranged for a couple of vans and we are going to take
4 you out and let you view the scene. There won't be any
5 questioning. It would be no testimony. All you will do is
6 travel with them out to the scene, take a view of it. Don't
7 pose any questions to anyone. No one will be speaking with
8 you about it. Take a few minutes, look at the scene and
9 then come back and we will stop for the day.

10 Now, we have some scheduling problems for
11 tomorrow. We cannot resume this case until after lunch, so
12 I need you to come back at 2:30 tomorrow. In fact, if you
13 can, come on about 2:15 and be in your room and we will try
14 to promptly get started at 2:30.

15 Okay. Anybody got any questions of me before we
16 stop for the jury view?

17 (No response)

18 THE COURT: Remember my instructions. Don't
19 discuss the case with anybody. Should anybody try to
20 contact you, immediately notify the sheriff's department.
21 Okay.

22 All right. We will see you tomorrow. I will turn
23 you over to the --

24 Counsel, do you waive any oath, or do you want
25 some oath for the sheriffs or anybody?

1 MR. BARNETTE: The State would waive it, Your
2 Honor.

3 MR. BROUGH: We will just request that, you know,
4 they follow the court's instructions. That would be fine.

5 THE COURT: Okay.

6 MR. BARNETTE: May we approach for one second,
7 Your Honor?

8 (Whereupon, the lawyers approached the bench for
9 an off-the-record discussion)

10 THE COURT: Ladies and gentlemen, one other thing,
11 and I apologize. I should have covered this with you even
12 earlier. While we are trying this case, until we complete
13 it, avoid any local media coverage, whether it be TV, radio,
14 or news print. It's okay to watch the national news, but
15 avoid any local coverage until we complete the case. Okay.
16 All right.

17 We will see you tomorrow.

18 (Whereupon, proceedings were adjourned to November
19 30, 2005)

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23

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1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE)

5 -vs-)

TRANSCRIPT OF RECORD

2005-GS-42-3371

6 DANTON JACQUITSE JONES)

NOVEMBER 30, 2005

7 Defendant.)

Spartanburg, South Carolina

8
9 (VOLUME II)

10
11 B E F O R E:

12 THE HONORABLE PAUL BURCH, JUDGE, ; and a jury.

13
14 A P P E A R A N C E S:

15 BARRY BARNETTE, DEPUTY ASSISTANT SOLICITOR
16 Attorney for the State

17 JENNIFER JORDAN, ASSISTANT SOLICITOR
18 Attorney for the State

19 CHRISTOPHER BROUGH, ASSISTANT PUBLIC DEFENDER
20 Attorney for the Defendant

21 Michael B. Watts
22 Circuit Court Reporter

23

24

25

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1 (Proceedings, November 30, 2005)

2 MR. BARNETTE: Your Honor, there is a couple of
3 matters. I know we had a conference in chambers with
4 defense and Your Honor. What I have noticed too, I see the
5 defendant has a Bible out on the table. I would ask him to
6 remove that, from the standpoint, you know, I don't think
7 it's relevant in this case from that standpoint. I just
8 noticed it when I was standing here.

9 MR. BROUGH: That's fine.

10 Your Honor, the defense would make a motion to
11 allow its expert, Mr. Hollifield, to test the part two of
12 the evidence collection kit regarding the gunshot residue
13 collection kit on Sigida Long on the sticky tab test. We
14 would propose calling Mr. Hollifield subject to recall and
15 allow him the opportunity to have this sample tested. We
16 would be amenable to if the State would test those samples,
17 as well, it would be okay with that, knowing the type of
18 equipment needed and that our expert does not have personal
19 access to that equipment.

20 THE COURT: Is the State going to rest at this
21 point?

22 MR. BARNETTE: Yes, sir.

23 THE COURT: Have you narrowed down exactly how
24 much time -- do you think there is any way if we got him up
25 and off the stand, as you are proposing, that we could get

1 him on the way to do that, maybe to Greenville or somewhere?

2 MR. BROUGH: I can make him the first witness I
3 call, Your Honor. Hopefully that would allow him the
4 opportunity to get that done. I can bring him in the
5 courtroom and the court can inquire of him, if the court
6 wishes to do so.

7 THE COURT: Let's bring him in and talk to him to
8 see how quick he can do it.

9 MR. BROUGH: Thank you.

10 THE COURT: Y'all come on up here.

11 (Whereupon, the lawyers approached the bench for
12 an off-the-record discussion)

13 MR. BARNETTE: Your Honor, concerning the issue
14 about the testing, I was contacted by Mr. Brough
15 specifically with field notes, which I did on Ms. Simmons a
16 long period of time before this trial was even commenced.
17 They had that availability to them. I can't help that they
18 didn't anticipate the second test involved in this case.
19 The evidence has been available to them since this obviously
20 the charge was made. They had that -- obviously the one
21 test was in the packet. Their expert could have looked and
22 saw there wasn't a second test, asking for testing long
23 before this occurred. Now in the middle of trial after we
24 are getting ready to rest they would like a recess.

25 There's another problem we have got is obviously

1 that evidence must be removed out of the clerk's custody
2 into their custody, and I have got some real concerns about
3 that, from the standpoint of, you know, if one of our
4 experts would be allowed to evaluate or look at that
5 evidence, or whatever, once they come back there. I don't
6 know.

7 THE COURT: Okay. I might be confusing myself
8 now. I had it in mind that they were wanting to test the
9 one that hadn't been tested.

10 MR. BARNETTE: Right, they are going to, but they
11 have had access to that ever since. I mean, the test wasn't
12 done, but if their expert is truly an expert, surely he
13 would know there is a possibility of the second part of the
14 test, and most tests are second part tests. I know there is
15 still some just one part, but I would say the majority, you
16 know, people in this state, especially in this county use a
17 two-part test. And now in the middle of the trial they are
18 wanting to do this testing. I have got some real concerns.
19 I understand what the court's ruling is to try it, and
20 obviously because of the record and everything, but now we
21 are in the situation, you know, they are at least going to
22 have to at least see if the equipment is available, and it's
23 going to be their expert testing it. We have got chain
24 problems and things like that. I don't know if chain
25 problems, but that's one concern that we have from the

1 State's side.

2 THE COURT: Well, considering the time and all I'm
3 going to give him that chance. If they can't get it done
4 tonight, then it's a moot issue with me. We are not going
5 to wait in the morning.

6 MR. BARNETTE: Yes, sir.

7 THE COURT: When we fire up and 9:30, the jury
8 will most likely have it and that's it.

9 MR. BARNETTE: Yes, sir.

10 THE COURT: If they can't do it, it's just --

11 MR. BARNETTE: Yes, sir, I understand.

12 THE COURT: It's over with.

13 MR. BARNETTE: Yes, sir.

14 THE COURT: All right. Now, do we want to be
15 technical about this and bring the jury in, let you rest,
16 and then you make notions, or is it okay if we go ahead?
17 It's all right with me if you want to go ahead with any
18 motions that you have.

19 MR. BARNETTE: Just one other thing, Your Honor,
20 we talked about in chambers. They are going to call a
21 witness that was not on the witness list and we are
22 objecting just under the sequestration rule, and just put
23 that on the record.

24 MR. BROUGH: Your Honor, the witness list we
25 submitted to the court reserved the right to amend, should

1 anything in reply come up or unforeseen. Based upon an
2 unsolicited statement by State's witness Atiba Long, we have
3 someone that can directly contradict one of the statements,
4 and we would respectfully ask, even he is a key State's
5 witness and his credibility is centrally an issue in this
6 case, be allowed to call that witness. I don't believe
7 she's going to testify to any of the events on that day, and
8 I can instruct her as such, and we can instruct her as such,
9 if the court wishes to do so now, or there would be
10 testimony only to that, which is my intent.

11 THE COURT: I'm going to let you do it.

12 MR. BROUGH: Regarding the court's other question,
13 don't need to be technical. If Mr. Barnette wants to rest
14 here, that's fine, and we would just make a motion for a
15 directed verdict that the State has not put forth any
16 evidence of malice, specifically.

17 MR. BARNETTE: Your Honor, malice would be
18 inferred from the use of a deadly weapon. That alone, plus
19 the other things that have been shown here, malice, I
20 believe has been amply supplied by the evidence that we have
21 shown in this case.

22 THE COURT: All right. I'm going to have to deny
23 the motion.

24 MR. BROUGH: Yes, sir.

25 THE COURT: Okay. We are ready.

1 (The following takes place in the presence of the
2 jury panel)

3 THE COURT: Good afternoon ladies and gentlemen.

4 THE JURY: Good afternoon.

5 THE COURT: Appreciate you coming back. We will
6 once again thank you for your patience with us.

7 Counsel, y'all waive polling the jury.

8 MR. BARNETTE: State waives it, Your Honor.

9 MR. BROUGH: We will waive polling of the jury,
10 Your Honor.

11 THE COURT: Okay.

12 Ladies and gentlemen of the jury, the State has
13 just rested.

14 Therefore, Mr. Brough.

15 MR. BROUGH: Thank you, Your Honor.

16 Defense calls Jeffrey Hollifield to the stand.

17 JEFFREY HOLLIFIELD, having been first duly sworn,
18 testified as follows:

19 DIRECT EXAMINATION BY MR. BROUGH:

20 Q. Would you please state your name for the record, sir?

21 A. My name is Jeffrey Morris Hollifield.

22 Q. And how are you employed, sir?

23 A. I own and operate MicroAnalytical, which is a private
24 forensics lab in Greenville. And I also teach as an adjunct
25 instructor at Greenville Technical College chemistry and

1 forensic science.

2 Q. Okay. And as part of that are you familiar with
3 gunshot residue?

4 A. I am.

5 Q. And have you had any education regarding that?

6 A. I have.

7 Q. And what is that education, sir?

8 A. I have a Bachelor's Degree in chemistry from Furman
9 University.

10 Masters in chemistry from Furman University.

11 Masters in chemical microscopy from McCrohn Institute,
12 research institute, in Chicago.

13 I worked for the state crime lab at SLED for ten years
14 in the trace evidence department. And part of my
15 responsibility during that time was to perform gunshot
16 residue analysis.

17 Q. Have you ever been qualified as an expert in court in
18 the field of gunshot residue?

19 A. I have.

20 Q. And about how many times, sir?

21 A. Gunshot residue, probably about -- probably 120 times.

22 MR. BROUGH: At this time the defense would seek
23 to move Mr. Hollifield as an expert in the field of gunshot
24 residue.

25 MR. BARNETTE: No objection, Your Honor.

1 THE COURT: Okay. He's so qualified.

2 MR. BROUGH: Thank you, Your Honor.

3 BY MR. BROUGH:

4 Q. Mr. Hollifield, at some point in time did you analyze
5 the results regarding two gunshot residue kits in this case?

6 A. I did. You contacted me in May of this year to review
7 the laboratory data from two kits in this particular case,
8 yes, sir.

9 Q. And as part of your review did you review all of the
10 raw data produced by the state crime lab?

11 A. I did.

12 Q. And what is your opinion that that data showed?

13 A. There are two sets of data; the one from -- one from
14 Damion Jones and one from Sigida Long.

15 The gunshot residue data from Jones indicates that the
16 test for the presence of gun primer residue is negative.

17 Q. Okay.

18 A. The results for Long indicate elevated levels of lead
19 and barium on the back of the left hand and elevated levels
20 of barium on the right palm, the back of the right hand and
21 the left palm.

22 Q. Okay. And I'm going to be -- I'm trying to do my best
23 to get this just right.

24 Now, I'm displaying what's been admitted into evidence
25 as Defense Exhibit No. 3.

1 THE COURT: Counsel, can you hold up just a
2 minute?

3 Madam Juror, can you see that?

4 THE JUROR: Not very well.

5 THE COURT: Mr. Bailiff, if you would pull one of
6 those chairs around.

7 How about the other jurors, can you see?

8 Okay. Thank you.

9 BY MR. BROUGH:

10 Q. Do you recognize this, sir?

11 A. I do. That's the computer printout from the ICP data,
12 gunshot residue data, from the Q-Tip swab test for Long.

13 Q. Before I jump the gun, how do you determine the
14 presence of gunshot residue?

15 A. The standard test to check for the presence of gun
16 primer residue on someone's hand, whether it's a subject or
17 a victim, is to run elemental analysis, using one of several
18 instruments that are available for that.

19 Q-Tip swabs that are taken from the hands are dissolved
20 in acid, and those samples are subjected to instrumental
21 analysis. And what the analyst is looking for are the
22 presence of three metal - lead, barium and antimony. Those
23 are all heavy metals.

24 Now, those metals are found in other consumer and
25 commercial products. So to indicate the presence of gun

1 primer residue, one would expect to find those -- all three
2 of those metals present, but also in elevated levels,
3 meaning above the environmental or normal environmental
4 levels.

5 Q. And what would you deem to be elevated levels for each
6 of the metals?

7 A. The elevated level cutoffs -- or my understanding of
8 the levels that SLED uses to make the determination is 20
9 parts per billion for antimony. That would be the first row
10 of numbers across the top there.

11 200 would be the elevated level limit for lead.

12 And also 200 parts per billion for barium.

13 So 20 for antimony, 200 for lead and barium.

14 Q. Okay. Now, in a situation where, say, two out of the
15 three metals are present in elevated levels, what would you
16 look for to determining whether or not gunshot residue is
17 present?

18 A. If only two of the metals are present -- for example,
19 on the back of the left hand in this case you have elevated
20 levels of lead and barium, because the lead is over 200 and
21 the barium is over 200, but you do not have elevated levels
22 of antimony because it's less than 20. In that case what I
23 would -- what I would recommend or like to see would be an
24 analysis of the adhesive samples, which are also taken in
25 the combination kit, GSR collection. And with those samples

1 those are examined with a scanning electron microscope, a
2 high powered microscope, and x-rayed. And what you can
3 determine there is if you have all three metals - lead,
4 barium and antimony - present in a single entity or a single
5 particle. And you can also with a microscope look at the
6 shape and size of that particle. And what you are looking
7 for is a spherical or ball-shaped particle. The metals come
8 out of the weapon, they are going to be molted and hot and
9 they are going to form a sphere and solidify.

10 So what I look for in a questionable case like this
11 would be all three metals present on a single spherical
12 particle, and that can only be determined with the scanning
13 electron microscope.

14 Q. Now, based upon looking at these numbers, what does
15 this seem to indicate to you?

16 A. It's not a definitive positive for gunshot residue,
17 because we simply don't have the elevated levels of
18 antimony.

19 Q. Uh-huh.

20 A. Because of the extremely high levels of barium, it
21 leads me to believe that that barium came from something
22 other than -- other -- you know, other miscellaneous
23 commercial sources of barium. Barium is present in paints
24 and cosmetics and rubber gloves and a lot of other things.
25 Wood, but you wouldn't expect to see those high of levels,

1 unless it was from gunshot residue.

2 So the barium in this case and the lead on the back of
3 the left hand leads one to believe that it's possible that
4 that came from gunshot residue, but it's not definitive,
5 because we don't have the -- we don't have elevated levels
6 of antimony.

7 Q. Okay. And looking at what's been admitted as
8 Defendant's Exhibit No. 4, and looking at the levels here,
9 looking at the same metals, what does this suggest to you?

10 A. In this case all -- for all three metals on all areas
11 of the hands they are below threshold.

12 The negative 297 simply indicates that would be
13 considered equivalent to zero. It's off the scale.

14 Q. Okay.

15 A. That's not 297. It's a negative number, so that's also
16 negative.

17 So all of those values for all three metals are all
18 negative. And that indicates to me that those samples are
19 simply negative for the presence of gun primer residue.
20 None of the metals are present in elevated levels.

21 Q. Could you envision a scenario where these levels would
22 seem to make sense, theoretically speaking, if there was a
23 struggle for a weapon between two individuals?

24 A. I'm not sure what you are asking me. Just --

25 Q. If there happened to be a struggle between two

1 individuals given -- and you were to take these gunshot
2 residue kits as a test performed on those two individuals,
3 what potentially could that suggest to you?

4 A. For the one that is negative, it would suggest that
5 that individual's hands are not around the weapon or near
6 the weapon when it was discharged, or that the levels were
7 diminished through activity after the shooting.

8 These samples were collected within an hour after the
9 incident, so I wouldn't think that that would be a
10 significant amount of time for that much of the metal to
11 diminish away.

12 One question that may be raised is whether the hands of
13 Long were covering or around the outside of the hands of
14 Jones. That's possible. That would protect to some degree
15 the back of the hands of Jones, but I would expect to still
16 see some levels, probably elevated levels, on the palms of
17 Jones in that case.

18 Q. If he was, say, rubbing his hands on his pants or palms
19 of his hands on his pants, would that explain for some of
20 the diminished levels there?

21 A. That is -- that's certainly going to decrease the
22 levels that are on the hands. I have watched the videotape
23 of the sample collection from Jones and he rubs his hands on
24 his head and the pants a significant amount. It would
25 diminish the levels. I have a hard time believing, though.

1 that it would diminish them to the degree that you would
2 have a completely negative gunshot residue test, with all
3 levels being less than the threshold.

4 Q. Okay. But looking at this, can you definitively say
5 that either party fired the weapon, looking at these
6 results?

7 A. Just with these results, no, you cannot -- I cannot say
8 definitively that either one of these individuals either
9 fired a weapon or had their hands around a weapon when it
10 was fired. Not based on this data, no.

11 Q. All right. When you fire a weapon as opposed to
12 something else, would you look to a certain portion of the
13 hands to be more definitive than the other?

14 A. It is -- it is important and significant what areas of
15 the hands the primer was found on. If it's only found on
16 the palms and not the back, that's indicative of someone
17 handling a dirty weapon, loading a weapon, or handling a
18 fired weapon, or moving and picking up a weapon.

19 If it's on the backs of the hands, then that's more
20 indicative of someone actually firing a weapon or having
21 their hands around a weapon when it was fired.

22 Q. Okay.

23 A. Because their hands would be in the midst of the cloud
24 that's formed around the gun.

25 Q. And when the cloud is formed around the gun, how far

1 around does that cloud extend?

2 A. It's going to vary from weapon to weapon, depending on
3 the ammunition of the weapon, caliber of the weapon, what
4 type of weapon, but roughly probably about a two foot -- one
5 and a half to two feet spherical cloud around the gun.

6 And what comes out the muzzle of the gun is going to be
7 projected possibly five or so feet in front of the weapon.

8 Q. Okay. Thank you very much, sir.

9 MR. BROUGH: I have no further questions.

10 We would reserve the right to recall this witness.

11 MR. BARNETTE: May it please the court, Your
12 Honor:

13 CROSS EXAMINATION BY MR. BARNETTE:

14 Q. Mr. Hollifield, let me ask you a question. You said if
15 he was in front of the muzzle of the gun that extends five
16 feet or more, is that right?

17 A. Five or six feet, depending upon what type of weapon,
18 right.

19 Q. So if somebody was in front of you and put your hand
20 like this, that bullet goes by that hand, that would explain
21 why there could be gunpowder residue on the back of the
22 hand?

23 A. It could be, sure.

24 Q. And you reviewed Ms. Simmons', Agent Simmons' findings,
25 is that right?

1 A. That's correct.

2 Q. And she did everything according to the guidelines at
3 SLED, isn't that right?

4 A. I have no reason to believe that everything was not
5 done according to protocol.

6 Q. And her examination, her findings are correct
7 concerning the numbers, isn't that correct?

8 A. I have read her written report, her formal report, and
9 it is consistent with the data that's provided, yes, sir.

10 Q. And you got to see her field notes too, is that right?

11 A. Yes.

12 Q. So she's consistent in -- her findings are correct
13 concerning what she had that you examined, is that right?

14 A. Her report for Jones states that quantities of metals
15 do not indicate a presence of gunshot residue. I agreed
16 with that. It's negative.

17 Her report for Long says that metals detected --
18 quantities of metals detected on the back of the left hand
19 may be associated with gunshot residue.

20 And I would add to that that the elevated levels of
21 barium on the other three areas of the hands may also be
22 associated with gunshot residue.

23 Q. However, if you was working, like you said, with
24 household products, motor parts, other things create barium
25 on hands, is that correct?

1 A. That's correct.

2 Q. So if they were working with auto parts or anything
3 like it, or household items, those would account for the
4 barium levels, or could account?

5 A. Those things have barium in them, but I wouldn't expect
6 to see these elevated -- those high a levels of barium just
7 from handling commercial products.

8 Q. But there is items that have that level of barium in
9 them?

10 A. Sure.

11 Q. Okay. Talking about Mr. Jones' GSR, it's negative?

12 A. It's negative.

13 Q. Now, I don't know if you know what weapon was used
14 here. A .45-caliber Bersa, that puts off a lot more
15 gunpowder residue than a .22 would, wouldn't it?

16 A. It would, yes.

17 Q. And like you said, if he fired -- he fired this weapon,
18 is that your understanding?

19 A. I don't know.

20 Q. But if you fire this weapon, you are going to get
21 gunpowder residue all over your hands inside and outside, is
22 that right?

23 A. If you fire a weapon under normal conditions with
24 typically both hands around the weapon, you would expect to
25 see elevated levels of all three metals on the palms and on

1 the backs of both hands.

2 Q. And obviously wiping the hands and things like that
3 helps remove that off there?

4 A. Well, from the palms.

5 Q. Uh-huh.

6 A. Wiping -- what I saw on the video was he was wiping his
7 palms on his head and his pants legs for a lengthy amount of
8 time, significant amount of time. I never -- I never saw
9 him wipe the back of his hands on anything.

10 These samples were collected within an hour, which is
11 unusually quick. That's an excellent time frame to obtain
12 the samples, and yet everything is negative.

13 Q. Let me ask you this question. For it to be so
14 negative, I mean, there is really hardly nothing in barium
15 or anything that you would get off, like you said, household
16 products, from other things, if I understood your testimony
17 right, it would be unusual to be able to wipe it off in that
18 situation to that level?

19 A. That's what I would say. It's -- I would not expect
20 even with wiping the hands that it would be diminished.
21 With a .45-caliber weapon less than an hour, I just have a
22 hard time believing it would be diminished to that degree.

23 Q. So a more likely scenario would be washing your hands
24 or something like that? That would clearly remove it?

25 A. I don't believe these hands were washed.

1 Q. But you don't know?

2 A. Well, the levels -- the levels are not zero.

3 Q. Well, the barium levels are even negative, I think 297,
4 isn't it?

5 A. If these hands were washed, the levels would literally
6 be zero. We have levels that are 5, 10, 17, 33, 70, 60.
7 They are consistent -- my opinion is they are most
8 consistent with environmental levels like you would find on
9 your hands, or my hands, or anybody's hands in this room
10 right now. That's what these levels are consistent with.

11 Q. And you don't know if he washed his hands or not, but
12 that hour afterwards could he have handled other things that
13 could have had --

14 A. The collection sheets indicates his hands were not
15 washed.

16 From the incident report it appears that he was sitting
17 on the porch and then in custody or being investigated or
18 questioned until the samples were collected. So -- but I
19 personally have no knowledge as to whether or not he washed
20 his hands.

21 Based on this data, I would say that he did not, and
22 the collection sheet indicates that he did not.

23 Q. If I understand the defense right, he was asking the
24 question if somebody like you were handling the gun, and I
25 put my hands on the top of that gun like this.

1 A. Okay.

2 Q. He was saying is that a likely scenario in this
3 situation? Is that what he was asking you?

4 A. Right.

5 Q. Well, if you had that kind of scenario, wouldn't you
6 have elevated levels on both back of the hands, the palms,
7 and even the fellow that's shooting it would have it all
8 over his hands too?

9 A. I would expect to see -- I would expect to see elevated
10 levels on -- really on both individual's hands.

11 The key I think on that question is that I would expect
12 to see elevated levels on the palms, at least, of the
13 individual who has their hands against the gun.

14 Q. What I mean is you should have gunpowder residue on
15 both sets of hands, is that right, elevated levels?

16 A. I would expect it, yes.

17 Q. Okay.

18 MR. BARNETTE: One moment, Your Honor, please.

19 (Off the record)

20 (Back on the record)

21 MR. BARNETTE: Thank you, sir.

22 Thank you, Your Honor.

23 MR. BROUGH: No further questions.

24 THE COURT: All right. You may step down. Thank
25 you.

1 MR. BROUGH: Your Honor, may I have just one
2 moments?

3 THE COURT: Sure.

4 Ladies and gentlemen of the jury, will y'all step
5 back to your room just a second, please.

6 (The following takes place outside the presence of
7 the jury panel)

8 THE COURT: Counsel, let me go over his rights
9 real quick.

10 MR. BROUGH: That's fine. I'm sorry, Your Honor.

11 THE COURT: Mr. Jones?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: I need to talk with you just a minute
14 before we go forward.

15 I want to make sure that you and counsel have
16 talked about your Fifth Amendment Rights, about your right
17 to testify or not testify.

18 Do you realize that under our Fifth Amendment to
19 the Constitution of the United States, and similar
20 counterpart provision of our State Constitution, you have a
21 right not to testify; in other words, the Fifth Amendment to
22 the Constitution of our United States provides, in part,
23 that no person shall be compelled in any criminal case to be
24 a witness against himself.

25 This provision of Constitutional law means that

1 you cannot be compelled or required to testify in this case.
2 It is a right and privilege which the law extends to you and
3 it is a personal privilege that no one can waive, except
4 you.

5 You have a right not to testify, but you also have
6 a right to testify.

7 If you need a little time to talk with counsel
8 about this, I will certainly grant that to you.

9 I can tell you now if you elect not to testify,
10 this cannot be used by the State as an inference of guilt,
11 and your election not to testify cannot be considered by the
12 jury in its deliberations.

13 If you elect to testify and waive the privilege
14 extended to you by the Fifth Amendment of the Constitution,
15 I advise you now that you will then assume the role of a
16 witness in the case and you then waive or give up your
17 Constitutional privilege against self-incrimination. This
18 means that if you voluntarily take the witness stand and
19 testify, you will then subject yourself to the same rules
20 that govern other witnesses and you may be examined and
21 cross-examined on any relevant issue in the case and you may
22 be impeached to the same extent as any other witness, all of
23 which is subject, however, to the Rules of Evidence and
24 procedure.

25 I further advise you that if you elect to take the

1 witness stand and testify, this decision on your part must
2 be made freely, voluntarily, intelligently and with
3 knowledge of the protections given to you by the Fifth
4 Amendment of the Constitution of the United States and with
5 knowledge of the consequences of your election to testify.

6 Do you wish to consult with your attorney before
7 you respond to me concerning this?

8 THE DEFENDANT: Yes.

9 MR. BROUGH: May I approach the witness?

10 THE COURT: Sure. You can step down, if you need
11 to.

12 (Off the record)

13 (Back on the record)

14 THE COURT: Have you -- excuse me, have you --

15 MR. BROUGH: Just one more moment.

16 THE COURT: Okay.

17 (Off the record)

18 (Back on the record)

19 MR. BROUGH: Okay.

20 THE COURT: Have you discussed with your attorney
21 these issues?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And do you understand what he's
24 explained to you?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand what I went over
2 with you?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And you wish to testify?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Come on around.

7 We need the jury back. Thank you, sir.

8 MR. BARNETTE: Your Honor, one other thing before
9 the jury comes back out. I know we had talked about his
10 previous convictions for failure to stop, for pointing a
11 firearm, and for --

12 MR. BROUGH: Malicious injury --

13 MR. BARNETTE: -- of personal property more than a
14 thousand.

15 If I understand the court correctly, I think I
16 would be able to ask him have you been convicted of a felony
17 that carries more than one year; you have been convicted of
18 two misdemeanors that carries more than one year, and that
19 would be the extent of it.

20 THE COURT: I think that's the safest path under
21 the way the rulings of the appellate court have gone.

22 MR. BARNETTE: Yes, sir. I just wanted to make
23 sure that that's still the court's ruling there and make
24 sure I'm correct before I have ask those questions.

25 THE COURT: Okay.

1 (The following takes place in the presence of the
2 jury panel)

3 THE COURT: Thank you, counsel. You may proceed.

4 MR. BROUGH: Thank you, Your Honor.

5 The defense calls Damion Jones to the stand.

6 DAMION JONES, having been first duly sworn,
7 testified as follows:

8 DIRECT EXAMINATION BY MR. BROUGH:

9 Q. Please state your name for the record, sir.

10 A. Damion Jaccquise Jones.

11 Q. And how old are you, sir?

12 A. I'm 31.

13 Q. I'm going to direct your attention back to the evening
14 of February the 25th of this year. Do you remember that
15 evening, sir?

16 A. Yes, I do.

17 Q. Why don't you tell me -- begin by telling me what you
18 were doing that evening at around 6:30.

19 A. Around 6:30 I, myself, and Ben and Gregg, we were at
20 Gregg's sister house, [REDACTED], on our way for me to
21 drop Ben off [REDACTED]

22 Q. And what's Ben's last name?

23 A. Foster.

24 Q. And what's Gregg's last name?

25 A. Hardy.

1 Q. And what happened as a result of that?

2 A. Dropping Ben off?

3 Q. Yes, sir.

4 A. Well, Gregg walked Ben to the door.

5 The Longs pulled up. Sigida got out, followed by

6 Atiba. Sigida came down, banged on both doors of my

7 grandmother's house, enraged, trying to get Ben out of the

8 house. Unable to do so, he turned his wrath on me. Came up

9 and pulled me out of my car.

10 Q. Okay. Now, do you know the Longs?

11 A. Yeah, I know of them. I know all the things that they
12 have done to me.

13 Q. And what is that?

14 A. Other assaults in the past, death threats.

15 Q. Why don't you explain to me specifically what you are
16 talking about.

17 A. Well, the very first time they assaulted me, it was

18 2002, Thanksgiving. I was with my four year old son. I was

19 over my grandmother's house to get a haircut. My son,

20 Forquan, after getting the haircut we was leaving out.

21 Atiba and Sigida were on the street. As me and my son were

22 walking to the store, they were cursing both of us and

23 threatening me.

24 Upon getting to the store, they had followed us to the

25 store, the Little Cricket. Upon coming into the store,

1 Sigida was stating a lot of, you know, cursing and
2 threatening.

3 Q. What did he say to you?

4 A. Exact words?

5 Q. Yes, sir.

6 A. Well, he came in, he said "ain't nobody going to mess
7 with me and ain't going to mess with Q." He was speaking of
8 Atiba. He said "that's my brother," you know. "I don't
9 give a -- you know -- you know what I mean. And F me and my
10 son. "I don't give an F if it is Thanksgiving, you know."

11 Atiba grabbed me around the neck stating if I come back
12 down that street or come back around that house or come
13 around, do something to his car, he would blow my F'in head
14 off in front of my son, to my put my son in harm's way.

15 And I left, me and my son, and went back down to my
16 grandmother's house.

17 Q. Was there more than one incident?

18 A. That was the first incident.

19 Q. All right. Why don't you tell me about the other
20 incidents?

21 A. The second one was 2003, the summer. My wife and
22 myself, we were having a cookout for one of the boys. I
23 can't remember which one. And Sigida and Atiba, they rode
24 through. They were yelling out the window. They just kept
25 riding through. You know, stopping, you know, yelling out,

1 the window, pointing at us. Actually say, "you know, we are
2 still watching you, you and your family. You know we are
3 watching you. We are watching." This repeated -- this went
4 on for about five to ten minutes, circling of the block,
5 stopping, yelling, yelling out the window. Waiting at one
6 end of the street.

7 Q. So I'm going to take you back to February the 25th of
8 this year.

9 Now, you said they approached the car. What happened?
10 What were you thinking?

11 A. Danger. Street danger, because I know I have been -- I
12 mean, I have been harmed before and issued death threats,
13 you know.

14 Sigida pulled me out of the car. You know, like I
15 said, he stated that I would -- "you know, I would kick your
16 you know what." He hit me once -- two or three times on the
17 side of the head. I fell back in the car. I grabbed the
18 gun out of the glove, jumped back out, cocked it, and told
19 both of them to back up.

20 Well, Atiba started to move toward the other side of
21 the car. Sigida rushed me and there is a struggle over of
22 weapon. I had the weapon down towards the ground when I
23 jumped back out and told them to back up. There is a
24 struggle good over the weapon. The gun discharged.

25 Q. Do you remember all the details of that struggle, sir?

1 A. Well, like I said, when -- it was just so -- words
2 really can't describe it. You are encompassed with death
3 and you are not really -- you are not stationary. You are
4 not -- the gun is going up and down, side to side. Both
5 hands grasping for position of -- you know, sole position of
6 the weapon.

7 Q. When the gun went off, what were you thinking?

8 A. I was thinking that I was hit at the time, because I
9 didn't see a flash from the gun.

10 Q. What did you do after that?

11 A. I ran into my grandmother's house.

12 Q. What's the address of your grandmother's house, sir?

13 A. It's [REDACTED]

14 Q. Now, what did you do after that?

15 A. I told my aunt to call the police. I had been pulled
16 out of my car.

17 And I looked back out the door to see Sigida laying on
18 the sidewalk.

19 The police arrived. The first one that I saw, I ran up
20 to him and I told him to help him, you know. He pulled me
21 out of my car and tried to rob me. And I collapsed in front
22 of whichever officer it was, you know.

23 Q. Were you -- would it be fair to say that you were very
24 distraught after this?

25 A. Distraught? Overwhelmed.

1 Q. Were you ever interviewed by the police after this
2 incident?

3 A. Yes.

4 Q. And once you finally calmed down, did you tell them
5 what happened?

6 A. I tried to tell them to Officer Taylor.

7 Q. Now, was there another officer that talked to you
8 before him?

9 A. It was I believe Investigator Porter.

10 Q. All right.

11 MR. BROUGH: Your Honor, at this time the defense
12 would seek to admit into evidence --

13 MR. BARNETTE: Objection, Your Honor.

14 MR. BROUGH: May we approach?

15 (Whereupon, the lawyers approached the bench for
16 an off-the-record discussion)

17 THE COURT: Ladies and gentlemen of the jury, if
18 you step back to your jury room, please.

19 (The following takes place outside the presence of
20 the jury panel)

21 MR. BARNETTE: Your Honor, my objection is we had
22 discussion this at the bar. He's getting ready to ask this
23 witness, which is not the proper witness to ask, about the
24 videotape of any interviews, or anything like that, from the
25 standpoint -- well, the first thing it's self-serving

1 hearsay under the law. Obviously he has right to testify to
2 it. I would object to its admission.

3 The other thing, he's not the proper witness to
4 introduce any videotapes through. From that situation it
5 would be the people that was in charge of that or people in
6 possession of it, which are the police officers, but the
7 main objection is I think there is countless types of law
8 you can talk about. I'll be glad to hand it up, from State
9 v. Cabrera, all the way down the line through our Supreme
10 Court, self-serving hearsay cannot be introduced properly to
11 bolster a defendant's testimony.

12 THE COURT: Counsel?

13 MR. BROUGH: Yes, sir, Your Honor.

14 First of all, regarding the witness use, at the
15 pretrial hearing the State had called those witnesses. We
16 have that testimony already on the record. I was just
17 trying to save us all some time regarding that, and I
18 believe the State had actually admitted those videotapes
19 into evidence at that Jackson v. Denno hearing.

20 Secondly, in regards to it being self-serving
21 hearsay, first of all, a statement by the defendant, which I
22 believe is an exclusion to the hearsay rule.

23 And second of all in regards to that, while the
24 defendant makes several admissions on that tape, I don't
25 deem it to be self-serving in any way, shape or form. I

1 think that the State's main concern is the emotional state
2 of the defendant during the tape and not what was actually
3 said. And I think that that's the reality of why they are
4 objecting to it.

5 MR. BARNETTE: Your Honor, I think under the
6 law -- I will be glad to hand this up to you, State v.
7 Cabrera opinion, which is case number 605 S.E. 2d 522;
8 United States v. Young, which is a federal case, 248 F.3d
9 260. This is a perfect reason why self-serving hearsay --
10 obviously if we would have introduced it -- we did not
11 introduce those exhibits. They were just made a Court's
12 Exhibit for the hearing for the Jackson v. Denno to check on
13 the voluntariness of the statement.

14 United States v. Beltre, which is also another
15 federal case from 1999, number 98-4162.

16 State v. Golson, which is 562 S.E. 2d 663, also a
17 2002 case, Your Honor. Also give copies of these to defense
18 counsel also, Your Honor.

19 I believe under our present case law, I'm sure the
20 court is familiar with it, self-serving hearsay -- and I
21 know he's saying emotional, or whatever -- there is all
22 kinds of statements he made in there that is self-serving
23 hearsay throughout the tape. We didn't introduce any of
24 those statements. If we had introduced part of it, like
25 under Cabrera, I think he would entitled to enter all the

1 statements, but none of those self-serving statements were
2 entered, the good or the bad, whether inculpatory or
3 exculpatory. So obviously they can be use to cross-examine
4 the defendant, since he's taken the stand, but I don't think
5 they could be played by the defense to help bolster his
6 testimony.

7 MR. BROUGH: Your Honor, the crux of the hearsay
8 rule has been well established is to eliminate the situation
9 where a person does not have the right to cross-examine the
10 witness. Here we have a situation where the State is the
11 only people asking questions on the tape.

12 Furthermore, in regards to this, this is not the
13 statement of a third party as heard for the truth of the
14 matter. Rather they have the opportunity to ask Mr. Jones
15 about anything that happened on that tape. He is sitting
16 right here. They do not have any sort of cross-examination
17 issues, and we would seek the tape to be admitted into
18 evidence.

19 THE COURT: I'm going to have to -- I'm going to
20 have to sustain the objection on that, because obviously
21 from what's the developed here, I mean his testimony is
22 exactly or quite similar to what he gave his statement to,
23 and you are certainly not trying to impeach your own witness
24 to try to get it in that way. Otherwise I think the State
25 is exactly on point with it. I'm going to have to sustain.

1 the objection.

2 MR. BARNETTE: Your Honor, State v. Cheeseboro
3 also says that. I'll hand that case up to the court.

4 MR. BROUGH: Your Honor, then we would seek the
5 limited portion of the tape before the defendant makes any
6 statements to be admitted.

7 MR. BARNETTE: No, sir, you can't do that. That's
8 the problem with self-serving hearsay.

9 MR. BROUGH: It's not hearsay. He never said
10 anything.

11 THE COURT: I have ruled. I have ruled.

12 MR. BROUGH: Yes, sir.

13 THE COURT: All right. Do you need a brief recess
14 or are we ready to go on? Everybody all right?

15 MR. BARNETTE: Yes, sir.

16 MR. BROUGH: Yes, sir.

17 THE COURT: Okay. Bring them back.

18 (The following takes place in the presence of the
19 jury panel)

20 THE COURT: Okay, Mr. Brough, go ahead.

21 BY MR. BROUGH:

22 Q. Mr. Jones, how are you doing?

23 A. All right.

24 Q. Would it be fair to say that you were distraught at the
25 time afterwards?

1 A. Very much.

2 Q. Please answer any of the State's questions, sir.

3 THE COURT: Your witness.

4 MR. BARNETTE: If it please the court, Your Honor.

5 CROSS EXAMINATION BY MR. BARNETTE:

6 Q. Mr. Jones --

7 A. Yes.

8 Q. -- I'm showing you State's Exhibit No. 4. Was that the
9 gun that you used that night?

10 A. Yes, sir.

11 Q. That was the gun that you used to shoot Sigida Long
12 that night?

13 A. That's the gun that went off.

14 Q. And your testimony is how many times did Mr. Long hit
15 you?

16 A. Two, three.

17 Q. Where did he hit you at?

18 A. Side of the head.

19 Q. Hit you with his fist?

20 A. That's what I remember.

21 Q. And hit you with the fist three times on the side of
22 your face?

23 A. Side of the head.

24 Q. Side of the head. Okay.

25 When did that happen?

- 1 A. When did that happen?
- 2 Q. Yes, sir.
- 3 A. After I was pulled out.
- 4 Q. After you were pulled out, he hit you three times. How
- 5 did he pull -- what did he pull you out by, sir?
- 6 A. What did he pull me out by?
- 7 Q. Yeah, how did he pull you out?
- 8 A. By the arms and by the sweater that I had on.
- 9 Q. If you would, show me how he grabbed you on my clothes.
- 10 A. He just grabbed normal and pulled me out.
- 11 Q. How did he grab you?
- 12 A. Just grabbed me and pulled me out.
- 13 Q. Can you show me where he grabbed you?
- 14 A. Grabbed me all over when he pulled me out.
- 15 Q. Can you show me how?
- 16 A. He just grabbed me and pulled me out.
- 17 Q. Where did he grab you?
- 18 A. Grabbed me right here and grabbed like this.
- 19 Q. He pulled you out. How did he pull you out of the car?
- 20 A. What do you mean how did he pull me out?
- 21 Q. Yes, sir, how did he pull you out of the car?
- 22 A. That's how he pulled me out.
- 23 Q. Where and how did he pull you out?
- 24 A. I just showed you.
- 25 Q. Well, how did he pull you out of the car, if you was in

1 the car?

2 A. I just showed you that.

3 Q. Where did he pull -- which part of the car was you
4 pulled out of?

5 A. Oh, I was in the front seat, driver's side.

6 Q. Okay. How did he pull you out of the driver's side?

7 A. How? By my sweater that I had on. He was grabbing my
8 arms and sweater.

9 Q. Was the car door open or shut?

10 A. It was open.

11 Q. So the car door was open?

12 A. (Shaking head yes)

13 Q. Why did you have the car door open?

14 A. For one, I was about to help -- I was about to help
15 Gregg escort Ben to the door, but I never got out.

16 Q. So you were going to help Ben escort --

17 A. Help Gregg escort.

18 Q. Ben to the door?

19 A. Right.

20 Q. Why was you going to help? Why did they have to escort
21 Ben to the door?

22 A. One, Ben was pretty intoxicated.

23 Q. As a matter of fact, all of y'all had been drinking
24 beer and liquor that day, hadn't you?

25 A. No, I didn't drink any liquor.

1 Q. You didn't drink any liquor?

2 A. No, I did not.

3 Q. Your testimony is you drank no liquor or no beer that
4 day?

5 A. I drunk a few beers.

6 Q. You drunk a few beers now?

7 A. I said beers, not liquor.

8 Q. Where did you drink them at?

9 A. At Gregg's sister's.

10 Q. So at Gregg's sister's weren't you on the front porch
11 drinking liquor and beer that day?

12 A. I didn't drink any liquor.

13 Q. How long did y'all -- did they drink liquor?

14 A. I assume. I don't know.

15 Q. Ben was pretty smashed, wasn't he?

16 A. Yeah.

17 Q. Gregg was pretty drunk too, wasn't he?

18 A. I don't know about Gregg, but Ben was.

19 Q. Okay. How many beers had you had that day?

20 A. I drink probably about six beers.

21 Q. You drank six beers that day. Okay.

22 If I understand your testimony -- if you would, step
23 down for a second.

24 If you would, go ahead and get the gun. It's unloaded.

25 MR. BROUGH: Your Honor, I'm going to object --

1 A. No.

2 MR. BROUGH: -- at this point to any sort of
3 reenacting.

4 MR. BARNETTE: I'm just asking him how he was
5 holding the gun when supposedly it was grabbed.

6 MR. BROUGH: Okay. I don't know why he needs to
7 step down, but --

8 MR. BARNETTE: You can step down, sir.

9 (Witness off the witness stand)

10 BY MR. BARNETTE:

11 Q. You said that you cocked the gun, is that right?

12 A. Yes.

13 Q. How did you cock it?

14 A. (Witness demonstrating)

15 Q. And you said that you held the gun down when he came at
16 you and was telling him to back off?

17 A. Yeah.

18 Q. And you said Sigida rushed you?

19 A. Right.

20 Q. How did he grab -- show me where the gun was and how he
21 grabbed it.

22 A. The gun was still down.

23 Q. So he grabbed it like this?

24 A. He grabbed it, yeah.

25 Q. And did he -- show me -- you got -- grab my hand.

1 A. I can't do that. It was all so fast. I can't go into
2 all that with you. I mean, it was all so fast.

3 Q. So he rushes you, but -- come back. I want you to show
4 me. You show me where the hands was and where the gun was
5 and everything.

6 A. The gun was down.

7 Q. The gun was down?

8 A. Right.

9 Q. Does he grab you? Does he grab the gun?

10 A. He grabbed right around in there.

11 Q. So which hand did he use?

12 A. Both hands.

13 Q. Both hands. He's got you like this?

14 A. Yeah. Right.

15 Q. Okay. Then when did the gun go off?

16 A. When did it go off?

17 Q. Yes, sir?

18 A. It went off during the struggle.

19 Q. So you are struggling like this. He's struggling to
20 grab the gun from you or hold it down?

21 A. No, we was struggling. Struggling.

22 Q. You are struggling like this. So the gun goes off.
23 Where does it go off at?

24 A. The gun goes off.

25 Q. Okay. Where --

1 A. During the struggle.

2 Q. -- during the struggle? Where does it go when it goes
3 off?

4 A. Down and we were struggling.

5 Q. So it's down when you were struggling like that?

6 A. We was struggling all over. You know what I mean?

7 Q. And the gun goes off?

8 A. It went off in the struggle.

9 Q. So it's pointed down?

10 A. It went off during the struggle.

11 Q. Okay.

12 (Witness back on the witness stand)

13 BY MR. BARNETTE:

14 Q. So after -- how close was he to you during this
15 struggle when the gun went off?

16 A. I can't give you actual feet, you know. I mean, it
17 was -- it was full contact. It was full contact.

18 Q. Full contact. So he was still holding on you when the
19 gun went off?

20 A. From what I remember. Like I said, it was full
21 contact.

22 Q. Full contact, what do you mean? This jury wants to
23 know what you mean by full contact and what happened.

24 A. I mean his hands were still, from what I remember.

25 Q. So his hands are still on top of your hands, is that

1 what you are saying, with this gun in it?

2 A. From what I remember.

3 Q. Okay. How long did y'all struggle before the gun went
4 off?

5 A. I can't answer that.

6 Q. How fast did this happen?

7 A. I mean, it was intense, the whole weapon experience.
8 Like I said, we was struggling over the gun and it went off.
9 And to give you the actual number in feet, I'm not inclined
10 to do that, because, you know --

11 Q. Well, if he's got ahold of your hands, he's pretty
12 close to you, isn't he?

13 A. Yeah, pretty much, but your arms can extend, though.
14 Like I said, it was a struggle. That's all that I -- that's
15 all that I know happened was a struggle and the gun went
16 off.

17 Q. So is it -- isn't the truth of the matter that he was
18 back here when you shot him?

19 A. What?

20 Q. Wasn't he away from you when you actually shot him?

21 A. Was I away from him?

22 Q. Yes, sir. Were you this far away from him when you
23 shot him?

24 A. Like I said, it was still contact.

25 Q. So you are saying that he was on top of you like this?

1 Show me how close he was to you when -- if you would
2 step down.

3 Show me how close he was to you when the gun went off.

4 (Witness off the witness stand)

5 A. Like I said, I can't really remember. I know it was
6 still contact, you know.

7 BY MR. BARNETTE:

8 Q. Well, you show me. You grab my hands, or whatever.
9 You show me.

10 A. Like I said, we were struggling.

11 Q. Uh-huh.

12 A. The gun was going up and down and side to side, you
13 know.

14 Q. And that's not pointing down?

15 A. At this point it was down like that. I mean, it was
16 going all over the place.

17 Q. Okay. So what was he trying to do with the gun?

18 A. What?

19 Q. What was he trying to do with the gun?

20 A. What do you think he was trying to do with the gun?

21 Q. I'm asking you.

22 (Witness back on the witness stand)

23 A. (No response)

24 BY MR. BARNETTE:

25 Q. Had he grabbed ahold of your clothes and all that too?

1 A. During the struggle?

2 Q. Yes, sir.

3 A. It was intense. It was fast, but --

4 Q. What do you mean by intense? It was a hard struggle is
5 what you are saying?

6 A. It was intense.

7 Q. Have you seen State's Exhibit No. 29, 28, 27, 26, 25,
8 or 24?

9 A. I see them.

10 Q. Where is the marks on you, Mr. Jones, from this intense
11 struggle from Sigida Long hitting you in the face, from him
12 pulling you out of the car?

13 A. Side of the head.

14 Q. Where are they? Show me. Show me your ruffled
15 clothes. Show me the marks from this fight.

16 A. It wasn't a fight. I was pulled out of my car and hit
17 two or three times on the side of the head. I didn't know
18 that you have to have marks, you know.

19 Q. Were those the clothes that you were wearing that day?

20 A. The sweater that I had on.

21 Q. It wasn't torn, it wasn't messed up, or anything, was
22 it, sir?

23 A. (No response)

24 Q. You are welcome to look at the pictures.

25 A. What?

1 Q. You are welcome to look at the pictures, if you would
2 like to.

3 A. I see it.

4 Q. Where was this gun located at again?

5 A. It was in the dash.

6 Q. Where at in the dash?

7 A. It was in the dashboard.

8 Q. The dashboard?

9 A. (Shaking head yes)

10 Q. Which side of the car was that on?

11 A. It's on the passenger's side.

12 Q. So you are telling this jury that this gentleman
13 grabbed you out of the car; hit you two or three times; let
14 you go; jumped back into the car, across the driver's side
15 into the passenger's side; you opened up the dashboard and
16 you pull this gun out?

17 A. Yes.

18 Q. And he gives you time to click it back?

19 A. As I was jumping out.

20 Q. Was it already loaded?

21 A. You mean the clip?

22 Q. Yes, sir. The clip was already in it?

23 A. Yes.

24 Q. It was already loaded?

25 A. The clip was already in there.

1 Q. When you got out of the car, where was Mr. Long at?

2 A. He was standing at the doorway in my car.

3 Q. So he's at the doorway in your car. So what happened
4 then?

5 A. I jumped out with the gun and pointed towards the
6 ground.

7 Q. So you jump out of the car with him in the doorway of
8 the car?

9 A. He was at the doorway.

10 Q. He's standing in the doorway. He's blocking your way
11 out?

12 A. Not in the doorway. He was at the doorway.

13 Q. So he's at the doorway.

14 You jump out and you got the gun and you show it to
15 him?

16 A. He saw it.

17 Q. He saw it.

18 So what did he do then?

19 A. I told them to back up, both of them.

20 Q. Did he back up?

21 A. He rushed me.

22 Q. So you jump out of the car; he rushes you; you have the
23 struggle right there in the doorway of the car?

24 A. It was right at the doorway. Right around the doorway
25 area.

1 Q. Okay. Why isn't there any blood there?

2 A. I can't answer that.

3 Q. Isn't it true Mr. Long was killed at the end of your
4 car on the sidewalk near the roadway?

5 A. I can't answer that.

6 Q. And the truth is he was shot in the head by you at the
7 end of the car, right?

8 A. It was during the struggle.

9 Q. So this man that you are having to struggle with in the
10 doorway of your car near the door of your car --

11 A. Uh-huh.

12 Q. -- you shoot him, he winds up falling at the end of the
13 car and you shoot him in the head and kill him?

14 A. It was a struggle over the gun.

15 Q. You are saying that he maintained contact with you the
16 whole time during that time?

17 A. It was a struggle over the gun. And, like I said, the
18 gun went off.

19 Q. Isn't it true that you wanted to leave the scene after
20 the shooting?

21 A. If I wanted to, I would have left.

22 Q. Didn't Gregg Hardy tell you to stay at the scene?

23 A. I don't remember that.

24 Q. You don't know if he did or not?

25 A. No.

1 Q. Didn't they tell you to stay at the scene and wait for
2 the police, the people there?

3 A. I don't remember anybody telling me anything, but
4 that's where I remained, at the scene.

5 Q. Isn't it true, sir, that you have been convicted of a
6 felony that carries more than one year?

7 A. Yes.

8 Q. And you have been convicted of a misdemeanor that
9 carries more than one year?

10 A. Yes.

11 Q. One other question. Whose gun is this?

12 A. That's my wife's.

13 Q. Your wife's gun?

14 A. Yes.

15 Q. Is this something that she carries with her?

16 A. It's something that we keep in the vehicle.

17 Q. You keep this type weapon in your car?

18 A. Yes.

19 Q. Isn't it true that you carry that kind of weapon with
20 you?

21 A. It's in the car. It's not on me. It's a family
22 vehicle and that's a registered gun, registered in my wife's
23 name.

24 Q. You don't have a weapon registered to you?

25 A. No.

1 Q. Isn't it true that Mr. Long never showed you any weapon.
2 or anything to you?

3 A. That is true.

4 Q. And you don't know how long y'all struggled before this
5 gun went off?

6 A. No, I do not.

7 Q. Isn't it true that your yard -- or whose house is that
8 you was -- it wasn't your house, is that right?

9 A. It was my grandmother's house.

10 Q. Okay. Isn't it true that it's an elevated slope? I
11 think the jury has been out there. It's on a hillside, or
12 on a hill, I guess a -- I'm used to seeing San Francisco,
13 like they see on TV, they have a hill?

14 A. It's a house on the incline?

15 Q. Yes, sir.

16 A. Yeah.

17 Q. And obviously you would have been higher up. Was you
18 more up the hill than Mr. Long was?

19 A. No.

20 Q. Wasn't you on the upper side of the hill compared to
21 him?

22 A. You mean like facing towards [REDACTED] Street?

23 Q. Yes, sir. Let's say we have got [REDACTED] Street there.

24 A. You mean up Church Street?

25 Q. Yeah, or was you closer to Church Street, or was he

1 closer to Church Street?

2 A. I would have been -- I would have been toward Church
3 Street from jumping out of the car, from what I remember.

4 Q. Okay. And when you jumped out of the car --

5 (Solicitor Barnette's Cell phone ringing)

6 MR. BARNETTE: I apologize, Your Honor.

7 THE COURT: I'm going to let you by with that
8 because I caused that when y'all were in chambers.

9 MR. BARNETTE: Yes, sir, I apologize.

10 THE COURT: It's my fault.

11 BY MR. BARNETTE:

12 Q. So he was lower on the incline than you were, or was
13 you up higher than him, or do you know where you was?

14 A. No. Like I said, when I jumped out, I would have been
15 more -- I would have been on the -- yeah, he would have been
16 higher up.

17 Q. Let me ask you a question. Why didn't you just go
18 straight to your house, run to your house, or whatever, or
19 to your grandmother's house?

20 A. Running wasn't an option at that time.

21 Q. Isn't it true that you made a comment "it doesn't look
22 good" to people afterwards?

23 A. I don't remember.

24 Q. Didn't you make a comment that "stuff happens, stuff
25 like that happens at times"?

1 A. Definitely not.

2 Q. Didn't you tell people afterwards that you thought you
3 had been carjacked, and no, you weren't being carjacked?

4 A. Did I tell people that I thought I was being carjacked?

5 Q. Then later on you said "no, I wasn't being carjacked."

6 A. I was in danger of having anything taken from me.

7 Q. You was in danger of having something taken away from
8 you?

9 A. Right.

10 Q. Why was you afraid he was going to take from you?

11 A. Why was I afraid?

12 Q. Yes.

13 A. Why was I afraid? Because of all the incidents in the
14 past.

15 Q. Let's talk about those incidents in the past. Did you
16 ever call the police about those incidents?

17 A. No, I did not.

18 Q. You didn't tell anybody about those incidents, did you?

19 A. Several people knew.

20 Q. But you didn't call the police?

21 A. No, just like I don't retaliate or did anything to
22 them. For one, you know, I was trying to let everything go.
23 I was letting it go.

24 Q. When you talked about this incident of 2002, you are
25 saying that these two men - this one and his brother - just

1 goes up and starts talking to you and your four year old?

2 A. Yes, that is true. That is true.

3 Q. But you never reported that?

4 A. No, I did not.

5 Q. If somebody threatened my four year old, wouldn't you
6 think you should call the police or somebody?

7 A. Well, like I said, I did not. And that is true.

8 Q. Okay. You didn't call the police either time?

9 A. No, I did not.

10 Q. And the other time they were driving around the block.
11 Which block were they driving around?

12 A. It was [REDACTED].

13 Q. So it wasn't even around [REDACTED], or where you are,
14 or anybody like that?

15 A. I didn't understand.

16 Q. Let me re-ask the question.

17 You said it was on [REDACTED] where this other
18 incident occurred?

19 A. Right.

20 Q. And they were driving around?

21 A. I mean, they were just driving by, stopping and looking
22 and yelling out the window, you know. Stopping at one end
23 of the street, you know, pointing over at me.

24 Q. Okay. And you was by yourself?

25 A. No, this was a cookout. It was several people out

1 there.

2 Q. Okay. But you didn't call the police on that one?

3 A. No, I did not.

4 MR. BARNETTE: One moment, Your Honor.

5 (Off the record)

6 (Back on the record)

7 BY MR. BARNETTE:

8 Q. Let me ask you a question, Mr. Jones. If you are so
9 scared of the Longs -- you know where Ms. Mitchell lives and
10 you know where the Longs live, don't you?

11 A. Right.

12 Q. Why are you driving to the house right beside of them
13 to drop somebody off, if you are so scared of them?

14 A. Number one, that's my family's house. That's my
15 grandmother's house.

16 Q. I understand that.

17 A. Right.

18 Q. But why drive there? If you are so scared of these
19 folks, why drive right there in front of the house?

20 A. You know what? It's been several times where I didn't
21 stop.

22 Q. But you stopped that night?

23 A. Right, I was taking -- I was dropping Ben off.

24 Q. Okay. And the keys was still in the car?

25 A. Yeah. Yeah.

1 Q. Why didn't you just shut the door and drive off?

2 A. It was all too quick.

3 Q. But instead you grabbed the gun?

4 A. It was all too quick.

5 Q. But instead you grabbed the gun that was in your hip,
6 right, in your pocket?

7 A. No.

8 Q. The honest truth was he was getting on your buddies out
9 there. You got -- you jumped out to help. You got into an
10 altercation and say I'll take care of this and backed them
11 off and shot him, didn't you?

12 A. Wrong.

13 Q. The truth of it is he never had ahold of your hand on
14 that gun, did he?

15 A. Yes, he did.

16 Q. Well, let me ask you one question, Mr. Jones. How in
17 the world did the lady across the street see you and --

18 MR. BROUGH: Objection. It calls for speculation.

19 Mr. Jones couldn't possibly know that.

20 THE COURT: Sustained.

21 MR. BARNETTE: I'll withdraw the question, Your
22 Honor.

23 Thank you, Your Honor. That's all the questions.

24 MR. BROUGH: Briefly, Your Honor.

25 THE COURT: Yes, sir.

1 REDIRECT EXAMINATION BY MR. BROUGH:

2 Q. Mr. Jones --

3 A. Yes.

4 Q. -- were you in fear for your life that night?

5 A. Yes.

6 Q. And is there any doubt in your mind that if it wasn't
7 Mr. Long, it would have been you?

8 A. Correct.

9 Q. Thank you.

10 MR. BROUGH: No further questions.

11 MR. BARNETTE: Just one question.

12 RECROSS EXAMINATION BY MR. BARNETTE:

13 Q. You shot and killed Sigida Long that night, didn't yo
14 sir?

15 A. Struggle.

16 Q. And you are saying during the struggle the gun went
17 off?

18 A. You done asked me that question before.

19 MR. BARNETTE: No more questions.

20 THE COURT: Anything else?

21 MR. BROUGH: No, Your Honor.

22 THE COURT: The witness may step down.

23 MR. BROUGH: Defense calls Wendy Alley to the
24 stand.

25 MR. BARNETTE: Your Honor, we stipulated to the

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1 chain. I don't know if he needs to call her or not, if
2 defense just wants to -- for the blood.

3 MR. BROUGH: That would be fine.

4 THE COURT: All right. So the jury would be
5 clear, state what you are stipulating to.

6 MR. BARNETTE: What it is, Your Honor, there was
7 blood that was drawn from the victim in this case, I think,
8 and I will stipulate to the chain on that. I think she
9 would just be part of the chain from where the blood was
10 drawn and taken to SLED.

11 MR. BROUGH: That would be fine.

12 In that case we would call Dustin Smith to the
13 stand, Your Honor.

14 SLED AGENT DUSTIN SMITH, having been first duly
15 sworn, testified as follows:

16 DIRECT EXAMINATION BY MR. BROUGH:

17 Q. Please state your name for the record, sir.

18 A. My name is Dustin Smith.

19 Q. And where are you currently employed, sir?

20 A. I work for the South Carolina Law Enforcement Division,
21 more commonly known as SLED.

22 Q. And what do you do there?

23 A. I'm a forensic toxicologist.

24 Q. And do you have any education regarding that field,
25 sir?

1 A. Yes, I have a Bachelors of Science in biology and a
2 minor in chemistry from the College of Charleston.

3 Q. And approximately how long have you worked as a
4 forensic toxicologist?

5 A. I have been a toxicologist for approximately seven
6 years.

7 Q. And during that period of time have you ever been
8 called to testify in court?

9 A. Yes, I have.

10 Q. And have you ever been qualified as an expert in the
11 field of forensic toxicology?

12 A. Yes, I have.

13 Q. Approximately how many times?

14 A. Approximately 30 times.

15 MR. BROUGH: At this time the defense would move
16 that Dustin Smith is an expert in the field of forensic
17 toxicology.

18 MR. BARNETTE: No objection, Your Honor.

19 THE COURT: So qualified.

20 MR. BROUGH: Thank you.

21 BY MR. BROUGH:

22 Q. Mr. Smith, regarding this case, did you receive a blood
23 sample from the victim?

24 A. Yes, I did.

25 Q. And what did you do with that sample, sir?

1 A. Once I received this sample, I did what we normally do
2 on a homicide case, which would be to run a blood alcohol
3 and also do a series of drug screens.

4 For a homicide case we screen for amphetamines,
5 methamphetamines, barbiturates; benzodiazepines, which
6 includes drugs such as Xanax, Valium; cannabonoids, which is
7 marijuana; cocaine and cocaine metabolites; and opiates,
8 which includes drugs such as Lortab or Oxycotton.

9 Q. And what were the results of your findings?

10 A. I found a 0.071 percent weight per volume blood
11 alcohol. And all of the drug screens which I mentioned
12 previously were negative.

13 Q. So you found a .07 blood alcohol content, sir?

14 A. Yes, that's correct.

15 Q. Okay. Thank you very much. Please answer any of the
16 State's questions.

17 A. Okay.

18 MR. BARNETTE: May it please the court, Your
19 Honor.

20 THE COURT: Yes.

21 CROSS EXAMINATION BY MR. BARNETTE:

22 Q. Mr. Smith, do you have a copy of your report, sir?

23 A. Yes, I do.

24 Q. Thank you.

25 MR. BARNETTE: Your Honor, I would like to enter

1 this report as a State's Exhibit. I believe it would be No.
2 34.

3 (SLED Report marked as State's Exhibit No. 34 for
4 identification).

5 MR. BARNETTE: I would think like to enter this
6 into evidence, Your Honor.

7 THE COURT: Any objection?

8 MR. BROUGH: None.

9 THE COURT: Without objection.

10 BY MR. BARNETTE:

11 Q. Looking at it, sir, there was no drugs found in his
12 system?

13 A. No drugs in the six panels of drugs that we screened
14 for.

15 Q. And you found a blood alcohol of .07?

16 A. That's correct.

17 Q. That's commonly known as a 7, is that right?

18 A. Yes, it is.

19 Q. And how many beers would you have to drink to get to a
20 .07?

21 A. That's approximately three drinks. Three beers.

22 Q. So three beers would get to a .07, is that right?

23 A. Approximately three beers, yes.

24 Q. So at .07, isn't the level that you can infer somebody
25 is under the influence of alcohol is .08?

1 A. That's correct. That's for South Carolina.

2 Q. So it's not a level that's inferred that somebody was
3 under the influence of alcohol?

4 A. That's correct. In relation to driving, that's
5 correct.

6 Q. So a person may be feeling the effects of it, would
7 they be intoxicated at .07?

8 A. There may be some mild intoxication, but it's not so
9 there is going to be an impairment that I would consider a
10 lot. I mean, it's -- it would be some slight amount of
11 impairment.

12 Q. Okay. So this was from Mr. Long, is that correct?

13 A. This is from Mr. Long, yes.

14 Q. Now, if somebody drank six beers, what would their
15 approximate blood alcohol level be?

16 A. It would be approximately a 0.15.

17 Q. Would that be under the influence of alcohol?

18 A. It certainly would, yes.

19 Q. And that would definitely be -- then that would be
20 commonly known as a 15?

21 A. Yes, that's correct.

22 Q. And obviously .08 and -- an 8 is the level that may be
23 inferred you are under the influence of alcohol?

24 A. That's correct.

25 Q. So that's almost double that.

1 A. A .15 would be, yes.

2 MR. BARNETTE: Your Honor, I would like to pass
3 this to the jury.

4 THE COURT: Yes.

5 MR. BARNETTE: Thank you, sir.

6 MR. BROUGH: Just briefly on the redirect, Your
7 Honor.

8 THE COURT: Yes, sir.

9 REDIRECT EXAMINATION BY MR. BROUGH:

10 Q. Now, Mr. Barnette just asked you about a certain
11 quantity of beers as being a certain blood alcohol content.

12 Would it be fair to say that over the course of time
13 that the blood alcohol content in one's blood decreases?

14 A. Yes, that's certainly true.

15 Q. Okay. So the number that you gave him assumes that all
16 of that was in that person's blood at that period of time?

17 A. That's correct, if you drank six beers in approximately
18 one hour.

19 Q. We don't have a measurement here, is that correct?

20 A. Yes, I have no idea of how many drinks were taken in
21 what kind of time frame.

22 Q. Okay. But we do know what the other level is from Mr.
23 Long, correct?

24 A. I do know what was in the blood at the time of death.

25 Q. And he could have had more or less to drink, but that

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1 was at the time of death what the blood alcohol content was?

2 A. Right. Certainly could have had more, that's correct.

3 Q. Thank you.

4 MR. BROUGH: No further questions.

5 MR. BARNETTE: Just one followup.

6 RECROSS EXAMINATION BY MR. BARNETTE:

7 Q. But that would be three beers to reach that level of
8 .07, is that right?

9 A. Approximately three beers in an hour to reach that
10 level, that's correct.

11 MR. BARNETTE: Thank you.

12 THE COURT: Is that it?

13 MR. BROUGH: Yes, sir, Your Honor.

14 THE COURT: Okay. The witness may step down.

15 Thank you, sir.

16 MR. BROUGH: Defense calls Helen Mae Cole to the
17 stand, Your Honor.

18 MAE H. COLE, having been first duly sworn,
19 testified as follows:

20 DIRECT EXAMINATION BY MR. BROUGH:

21 Q. Please state your name for the record, ma'am.

22 A. Mae H. Cole.

23 Q. I'm just going to ask you if you would respond to the
24 questions I ask.

25 A. I will.

1 Q. Okay. Thank you.

2 Do you know Atiba Long, ma'am?

3 A. He's my next door neighbor. The only thing I know is
4 Atiba, he sold drugs. He stood in front of my mother's
5 house. He had sold to my daughter, my brother's girlfriend.
6 And Atiba have a bunch of people in front of my house. And
7 I would ask him why doesn't he go in front of his house and
8 sell drugs, you know. Then he manufactured them.

9 Q. Thank you very much, ma'am.

10 MR. BROUGH: No further questions.

11 MR. BARNETTE: May it please the court, Your
12 Honor.

13 CROSS EXAMINATION BY MR. BARNETTE:

14 Q. What relation are you to Mr. Jones, ma'am?

15 A. I'm his aunt.

16 Q. So you are the aunt of the defendant, is that right,
17 ma'am?

18 A. I beg your pardon?

19 Q. You are the aunt of the defendant?

20 A. Uh-huh.

21 Q. And did you ever call the police or anything about any
22 of these matters that you just testified to?

23 A. No, I never did.

24 Q. Thank you.

25 MR. BARNETTE: Your Honor, no further questions.

1 MR. BROUGH: No redirect, Your Honor.

2 THE COURT: You may step down. Thank you.

3 MR. BROUGH: Your Honor, if I may have just one
4 moment.

5 (Off the record)

6 (Back on the record)

7 MR. BROUGH: Your Honor, the defendants calls
8 Officer Mabry to the stand.

9 MR. BARNETTE: Your Honor, may we approach the
10 bench for a second?

11 (Whereupon, the lawyers approached the bench for
12 an off-the-record discussion)

13 THE COURT: Ladies and gentlemen of the jury, it's
14 time for a recess. Let me let y'all go back and relax about
15 10 or 15 minutes and we will come back in a few minutes.

16 (The following takes place outside the presence of
17 the jury panel)

18 MR. BARNETTE: Your Honor, I know they have called
19 Officer Mabry. I know I asked for the bench conference.
20 Briefly the reason why I inquired the bench conference is
21 because of an objection is concerning the self-serving
22 hearsay that he may testify to from the defendant. I know
23 Mr. Brough mentioned why -- maybe he can put on the record
24 why he may be calling him. In there I think I probably
25 still have objection to it. I'd like to put that on the

1 record and may ask for an in-camera hearing just to
2 determine the testimony is relevant or not. That's the
3 situation.

4 MR. BROUGH: Sir, Your Honor, the defense intends
5 to call Officer Mabry because he had indicated that part of
6 the thing that he did when he responded on February the 25th
7 is that he had -- peace to the victim's family being
8 extremely upset. Given Mr. Jones' testimony that he was
9 approached by both Sigida and Atiba initially on the
10 struggle that resulted with Sigida Long, the defense feels
11 that it's very relevant to indicate the frame of mind of
12 people that initially confronted Mr. Jones.

13 MR. BARNETTE: Your Honor, I would object to that.
14 That has nothing --

15 THE COURT: Nothing that happened afterwards. No,
16 I can't allow that. Now, if it was something before, it
17 maybe would go to motive, or something like that, but not
18 afterwards.

19 MR. BROUGH: Yes, sir.

20 In that case, we have another witness.

21 THE COURT: Okay. Let's take ten minutes.

22 (Whereupon, proceedings were recessed)

23 (Whereupon, proceedings were reconvened)

24 THE COURT: Are y'all ready.

25 MR. BROUGH: Yes, sir.

1 MR. BARNETTE: The State is ready, Your Honor.

2 (The following takes place in the presence of the
3 jury panel)

4 THE COURT: Okay.

5 MR. BROUGH: Defense calls Sedrick Jones to the
6 stand.

7 SEDRICK JONES, having been first duly sworn,
8 testified as follows:

9 DIRECT EXAMINATION BY MR. BROUGH:

10 Q. Please state your name for the record, sir.

11 A. Sedrick Omar Jones.

12 Q. And do you know Mr. Jones seated beside me?

13 A. Yes, I do.

14 Q. And how do you know him?

15 A. He's my brother.

16 Q. I would like to direct your attention to an incident
17 that occurred at a cookout in 2003. Do you remember what
18 I'm talking about?

19 A. Yes, I do.

20 Q. Were you present there?

21 A. Yes.

22 Q. Would you please tell me what happened?

23 A. Well, we was outside, me and my brother and a couple
24 more other friends out there, you know what I'm saying, with
25 the kids and stuff, and we noticed this blue four-door car

1 just ride by and stop. He sat there for like maybe 30
2 seconds to a minute and pulled off. And within the time
3 frame of about five minutes came back again and did the same
4 thing. My brother brought it to my attention and I seen it
5 and he did it like three or four times.

6 Q. Could you recognize the people in the car?

7 A. It was like halfway and it was tinted, but I know I
8 seen like two heads up in there.

9 Q. Thank you very much, sir. Please answer any of the
10 State's questions.

11 CROSS EXAMINATION BY MR. BARNETTE:

12 Q. Did you call the police?

13 A. There was no need to call the police because there
14 wasn't no commotion.

15 Q. Wasn't any commotion or anything?

16 A. Uh-uh.

17 MR. BARNETTE: No further questions.

18 MR. BROUGH: No redirect.

19 THE COURT: You may step down. Thank you.

20 MR. BROUGH: Defense calls Gregg Hardy to the
21 stand.

22 A. , , , GREGG HARDY, having been first duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION BY MR. BROUGH:

25 Q. Please state your name for the record, sir.

1 A. Gregg Hardy.

2 Q. Mr. Hardy, do you know Mr. Jones?

3 A. Yes, I do.

4 Q. And do you know the Longs?

5 A. Yes, I do.

6 Q. I would like to direct your attention to the evening of
7 February the 25th of 2005. Could you please tell me what
8 you were doing, sir?

9 A. Well, at what point of the day do you want me to start
10 at?

11 Q. Why don't you begin around six o'clock or so.

12 A. I think we were on our way taking and dropping Ben off.
13 Me and Damion was dropping Ben off at his house.

14 Q. Okay.

15 A. And when we -- we had to help Ben in the house because
16 he was intoxicated.

17 Q. Uh-huh.

18 A. When we got him in the house, we was going back to the
19 car and at that time Mr. Long and his brother pulled up in
20 front of their house. Mr. Long got out yelling, whooping
21 and hollering and cussing. You know, we were still going to
22 the car, not paying them no attention.

23 Q. When you were referring to Mr. Long, who are you
24 referring to?

25 A. Skeet.

1 Q. Thank you.

2 A. You are welcome.

3 And so, you know, we was getting in the car. He walked
4 on his porch first and then he came off his porch and walked
5 on the Foster's porch, knocking on the door. We was in the
6 car getting ready -- trying to leave. And, you know, I
7 mean, in a split second he jumped off the porch and I think
8 he smacked him or punched Damion up side the head and was
9 trying to -- I think I heard him holler "give it up", and
10 was trying to drag him out of the car. And then in a split
11 second I just heard a gunshot. And I ran around the other
12 side of the car and went up on the porch and knocked on the
13 door and told them they needed to call the ambulance or
14 police. And, you know, when I walked back off the porch, I
15 seen Skeet laying out there in the road.

16 Q. I'm sorry, who is Skeet?

17 A. Long.

18 Q. Which Long?

19 A. Skeet. I mean, it was -- I don't know his real name.
20 That's all I knew him by is Skeet.

21 Q. Is that a street name?

22 A. I guess so. Nickname.

23 Q. All right. So at some point you were trying to get
24 away from them then?

25 A. Oh, yeah. Oh, yeah. He was going to drop me off at

1 the house.

2 Q. When you witnessed the approach of the Longs, were you
3 scared, sir?

4 A. Oh, of course, I didn't know if this man had a gun or
5 not, you know.

6 Q. Thank you very much. Please answer any of the State's
7 questions.

8 A. Okay.

9 CROSS EXAMINATION BY MS. JORDAN:

10 Q. Mr. Hardy, you said that we tried to help him or we
11 took Ben to the house?

12 A. Yes.

13 Q. Who is we?

14 A. Me and Damion.

15 Q. So you and Damion actually walked Ben Foster up to the
16 house?

17 A. Yes.

18 Q. Why did you have to walk him up to the house?

19 A. Because he was intoxicated. That's what I just said,
20 he was intoxicated.

21 Q. It took both of you to walk him up to the house?

22 A. Of course.

23 Q. Okay. So Ben got out of the car. Damion got out of
24 the car when you guys pulled up?

25 A. Both of us. We had to help Ben. He was going up his

1 steps and he stumbled, so we got out and helped him up to
2 his front door.

3 Q. So you guys both pulled up to [REDACTED] Who is
4 driving?

5 A. Damion.

6 Q. Where are you?

7 A. In the passenger's seat.

8 Q. In the front or back?

9 A. Front.

10 Q. Where was Ben?

11 A. In the back. I mean he was in the back when he was in
12 the car.

13 Q. In the back where, behind the driver or passenger?

14 A. I don't know approximately.

15 Q. Okay.

16 A. I know he was in the car.

17 Q. So it's your testimony today that you got out of the
18 car and Damion got out of the car and y'all helped Ben, who
19 was intoxicated --

20 A. That's right.

21 Q. -- up to [REDACTED]

22 A. That's right.

23 Q. Before the Longs even pulled up?

24 A. That's right.

25 Q. Let's go back a little bit further in the day. You

GREGG HARDY - CROSS BY MS. JORDAN

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1 guys, I believe, were at your sister's house?

2 A. Uh-huh.

3 Q. What were y'all doing there?

4 A. Drinking. Me and Ben was, you know. Damion was across
5 the street. You know, me and Ben was drinking liquor.

6 Q. You and Ben were drinking liquor?

7 A. That's right.

8 Q. Did Damion drink anything?

9 A. I think he might have drunk a beer or so.

10 Q. A beer or so?

11 A. I don't even know. I wasn't counting them.

12 Q. You weren't counting?

13 A. No.

14 Q. But maybe a beer or so?

15 A. Yes. Maybe more, you know.

16 Q. You are not sure. How long were you at your sister's?

17 A. Probably approximately about two hours, two hours and a
18 half.

19 Q. How much did you have?

20 A. About -- we drink about -- me and Ben drunk about a
21 pint and a half.

22 Q. Pint and a half of what?

23 A. Gin, liquor.

24 Q. Pint and a half of gin?

25 A. Yes.

- (- 1 Q. In about two hours?
- 2 A. Yeah.
- 3 Q. Between two people?
- 4 A. That's right.
- 5 Q. Okay. You also had beer present?
- 6 A. That's right.
- 7 Q. Did you drink any beer?
- 8 A. Yes, I had.
- 9 Q. How much beer did you have?
- 10 A. I did about two 24-ounce cans.
- 11 Q. So two 24-ounce cans --
- 12 A. That's right.
- (13 Q. -- and at least half of a gin and a half?
- 14 A. Uh-huh.
- 15 Q. All in a two-hour span?
- 16 A. That's right.
- 17 Q. Okay. So did you ever get back in the car?
- 18 A. Yes.
- 19 Q. When did you get back in the car? You guys help out
- 20 Ben, take him up to [REDACTED]
- 21 A. That's right.
- 22 Q. At that point there is nobody in front of you guys?
- 23 A. No. As soon as we got back to the car, that's when
- 24 they pulled up in front of their house.
- (25 Q. Okay. Did y'all get back in the car?

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1 A. Yeah.

2 Q. Where -- did you get in the passenger's seat?

3 A. Yes, of course.

4 Q. Damion got in the driver's seat?

5 A. That's right.

6 Q. The Longs pulled up?

7 A. (Shaking head yes)

8 Q. Take me through that again.

9 A. I mean, what do you want me to take you through it?

10 Q. Take me through what happened. Let the jury hear what
11 happened that day. We weren't there. Tell us what
12 happened.

13 A. I told you that as soon as, you know, when we got back
14 to the car, Skeet -- Mr. Long got out of the car whooping
15 and hollering and cussing and walked on his porch. He come
16 back off his porch, walked on the Foster's porch. And then,
17 like I say, I guess he looked like he leaped off the
18 Foster's porch.

19 Q. Now he leaped off the Foster's porch?

20 A. Well, I mean, he come off the porch. He lunged off the
21 porch. That's when he was using his force because he struck
22 Mr. Jones up side the head and he was trying to drag him out
23 of the car, told him to "give it up, give it up."

24 Q. So he leaps off the porch?

25 A. I mean, it happened so fast. I guess he ran, or

- 1 leaped, or something.
- 2 Q. But isn't it true that there is the porch, then there
- 3 is a walkway --
- 4 A. Yes.
- 5 Q. -- with a grassy area?
- 6 A. That's what I say, he had to leap.
- 7 Q. And then there's another set of steps?
- 8 A. That's why I said he had to leap.
- 9 Q. And that was all in a split second?
- 10 A. That's right.
- 11 Q. When you guys were inside the car, was the car door
- 12 open?
- 13 A. I don't recall.
- 14 Q. Was the window down?
- 15 A. I don't recall.
- 16 Q. But y'all were inside the car?
- 17 A. That's right.
- 18 Q. You don't know if the car door is open?
- 19 A. No.
- 20 Q. You don't know if the window was down?
- 21 A. No, I do not.
- 22 Q. But somehow Sigida Long was able to reach in and hit
- 23 the defendant?
- 24 A. That's right.
- 25 Q. Inside of the car?

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- 1 A. That's right.
- 2 Q. And Damion Jones was sitting in the car?
- 3 A. Yes.
- 4 Q. The car worked correctly, right?
- 5 A. Yeah.
- 6 Q. You guys got there?
- 7 A. Of course, we were there.
- 8 Q. Okay. Did Damion still have the keys to the car?
- 9 A. Of course he did.
- 10 Q. Were they in the car?
- 11 A. I don't know.
- 12 Q. But he still had them?
- 13 A. Of course he did.
- 14 Q. Y'all were sitting in the car minding your own
- 15 business?
- 16 A. That's right.
- 17 Q. He could have easily just pulled away?
- 18 A. Hey, it happened so fast. Like I said, it happened so
- 19 fast.
- 20 Q. Well, let's go back to the happened so fast. How did
- 21 Damion get out of the car?
- 22 A. What do you mean how did he get out of the car?
- 23 Q. How did he get out of the car?
- 24 A. When? At what time? When we helped Ben?
- 25 Q. No, no, we're past when he helped Ben.

- 1 Let's go back to when he's in the car and Sigida leaps
2 off the porch, comes down, comes to the car. Start back
3 there. Let's go back to the smack.
- 4 A. I mean, I just said it a minute ago. He smacked him.
5 You know, tried to pull him out of the car.
- 6 Q. Okay.
- 7 A. And that's when I seen -- you know, I guess they
8 struggled for the gun. I don't know where it come from.
- 9 Q. Let's go back to this. How -- how was there a struggle
10 for the gun?
- 11 A. I don't know.
- 12 Q. But you are sitting there in the passenger's seat?
- 13 A. That's right. That's right.
- 14 Q. You are sitting in the passenger seat of the car?
- 15 A. (Shaking head yes)
- 16 Q. Damion is sitting right next to you?
- 17 A. Yes.
- 18 Q. Or right beside you?
- 19 A. That's right.
- 20 Q. And there is a struggle for the gun. Where did the gun
21 come from?
- 22 A. I don't know. I just said I don't have any idea. I
23 don't have a clue.
- 24 Q. You don't have a clue --
- 25 A. No, I do not.

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1 Q. -- where the gun came from at all?

2 A. (Shaking head no)

3 Q. Where is -- how did -- how did Sigida slap Damion?

4 A. What do you mean how he slapped him?

5 Q. How did he slap him? How did he get to him?

6 A. I don't know if he come through the window or through
7 the door, if the door was open, I don't know, but I know he
8 hit him.

9 Q. You don't know if he was coming through the window or
10 if door was open?

11 A. That's right. I just said that.

12 Q. How much -- did he have to lean in to hit him?

13 A. Yeah, of course he did.

14 Q. How did he lean in?

15 A. I don't know. I don't recall. I know he was trying to
16 drag him out of the car, telling him to give it up.

17 Q. He was trying to drag him out of the car.

18 You don't recall if he was trying to drag him out of
19 the open door or the open window?

20 A. I guess it would have to be the door was open.

21 Q. Now you guess it would have to be the door?

22 A. Dragging him out the car, unless he was trying to drag
23 him out of the window.

24 Q. So he could have dragged him out of the car or dragged
25 him out of the window somehow?

- 1 A. That's right.
- 2 Q. So he was sitting in the seat when Damion pulled up?
- 3 A. Of course.
- 4 Q. I'm sorry, he was sitting in the seat when Sigida
- 5 walked over and apparently hit him?
- 6 A. (Shaking head yes)
- 7 Q. When the gun went off, were you all still sitting in
- 8 the car?
- 9 A. Yeah. Well, I mean Skeet wasn't. Me and Damion were.
- 10 Q. Okay. So Skeet wasn't in the car?
- 11 A. No. I mean he was -- his body might have been halfway.
- 12 Of course, you know, he was grabbing Damion, like he was
- 13 grabbing Damion, trying to grab him out of the car.
- 14 Q. How was his body halfway in the car? I'm just trying
- 15 to picture it. Just show me.
- 16 A. I mean, if you are trying to drag somebody out, you
- 17 know, you are leaning forward and trying to lean back with
- 18 them, you know.
- 19 Q. So he is -- Sigida -- if I were Sigida, I'm leaning in
- 20 and trying to pull him out?
- 21 A. Yes, trying to drag him out.
- 22 Q. Trying to drag him out?
- 23 A. That's right.
- 24 Q. How does he have -- how does --
- 25 A. I don't know.

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1 Q. -- Sigida have Damion?

2 A. I don't know. I don't know.

3 Q. You don't know where his hands were?

4 A. They was on him, you know, if he was trying to drag him
5 out of the car.

6 Q. On him where?

7 A. I don't know.

8 Q. Okay. You were in the car. Damion was in the car and
9 the gun went off?

10 A. That's right.

11 Q. Inside the car?

12 A. It happened so -- I guess it did.

13 Q. You guess it did?

14 A. (Shaking head yes)

15 Q. What kind of noise did it make when it went off inside
16 the car?

17 A. A pop. You know, a pop, just -- you know, it was --
18 the sound was so deafening, it more or less was a flash.

19 Q. So the flash that went on inside the car?

20 A. Yeah.

21 Q. Let's step back. Let's go a little bit further on.

22 What happened after this pop, flash?

23 You are in the car. Damion is in the car with you.

24 Where is Sigida?

25 A. Laying on the ground.

- 1 Q. On the ground where?
- 2 A. Behind -- I think behind the driver's back wheel, or
- 3 the back door.
- 4 Q. How did he get from hanging halfway through the window
- 5 or the car door --
- 6 A. I don't have no idea.
- 7 Q. -- to back there?
- 8 A. I don't have no idea.
- 9 Q. You don't have any idea?
- 10 A. I don't have any idea.
- 11 Q. Okay. But you are sure the gun went off inside the
- 12 car?
- 13 A. I'm positive of that.
- 14 Q. So you're positive?
- 15 A. I'm positive of that.
- 16 Q. What did Damion do after the gun went off?
- 17 A. I mean, he was in shock, I mean, really.
- 18 Q. He was still sitting in the car seat?
- 19 A. Yeah, but --
- 20 Q. In shock?
- 21 A. -- then he got out and I took him up to -- he walked to
- 22 his grandmother's house.
- 23 Q. Okay. You took him up there and walked him to his
- 24 grandma's house?
- 25 A. You see, I went up and knocked -- I rung the doorbell

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1 to tell somebody to call the ambulance or police.

2 Q. When you got out of the car to go up and call the
3 police, did you notice --

4 A. I didn't -- I didn't even see him. I didn't see him
5 until I come back off the porch. That's when I -- because I
6 had tracked blood up on the porch. When I come back, that's
7 when I noticed he was on the ground.

8 Q. How did you get blood on your feet?

9 A. When he -- I walked -- when I walked -- when I got out
10 of the car, walked around the back end of the car. That's
11 where he was laying on the -- but I walked around the
12 passenger's side and he was on the driver's side back there.

13 Q. You got blood on your feet?

14 A. That's right.

15 Q. And you tracked it up?

16 A. On the porch, that's right.

17 Q. You tracked it up on the porch?

18 A. Yes, ma'am.

19 Q. How do you walk to the porch?

20 A. What do you mean how did I walk to the porch? With my
21 feet.

22 Q. That's not what I'm asking. I'm asking the path that
23 you took to go from the car --

24 A. Around the back end -- that's what I just told you:

25 Around the back end of the car and to the porch.

1 Q. And you are stating that you had blood all over your
2 feet?

3 A. I had blood on one of my shoes.

4 Q. You had blood on one of your shoes?

5 A. Yes, I did.

6 Q. And you tracked it all over the porch?

7 A. I tracked some on the porch.

8 Q. Some on the porch?

9 A. Yes.

10 Q. Did you track any on the sidewalk?

11 A. I don't recall. I didn't look.

12 Q. You didn't look, but you know you tracked some on the
13 porch?

14 A. Yeah, I put some on the porch.

15 Q. Okay. Let's go back. What was Damion doing after all
16 of this?

17 A. I took him -- got him in the house. When he got in the
18 house, you know, a few minutes later, like I said, I went
19 down there and checked Skeet. He didn't have no pulse, so I
20 told his brother, which was standing there.

21 Q. A few minutes later?

22 A. Yeah.

23 Q. So you went inside the house with Damion and stayed for
24 a few minutes?

25 A. No, I came right back out.

1 Q. Okay.

2 A. That's when I -- when I come back out is when I noticed
3 Skeet was laying on the ground. I checked his pulse and he
4 didn't have a pulse, so I told his brother to go get me
5 something to lay on his brother's face because his brother
6 was dead.

7 Q. Okay. What was Damion doing at the time?

8 A. He was in the house.

9 Q. He was in the house?

10 A. That's right. I was still outside.

11 Q. Did Damion ever come out?

12 A. When the police came.

13 Q. Did he ever come out before that?

14 A. When the police came.

15 Q. Did you ever have to say anything to Damion?

16 A. What do you mean?

17 Q. Did you have to tell Damion anything? Did you ever
18 have to say "Damion, you need to stay until the police
19 come"?

20 A. Of course, you know, we -- he wasn't getting ready to
21 run nowhere, but he was going to stay there, I guess,
22 himself.

23 Q. He wasn't getting ready to leave anywhere?

24 A. No.

25 Q. Mr. Hardy --

1 MS. JORDAN: May I approach the witness, Your
2 Honor?

3 THE COURT: Yes.

4 BY MS. JORDAN:

5 Q. I'm going to show you this and ask you if you recognize
6 this? Can you look at all the pages?

7 A. Uh-huh. Yeah, I recognize it.

8 Q. Do you recognize it?

9 A. Uh-huh.

10 Q. What is it?

11 A. That's my statement.

12 Q. Okay. When did you give the statement?

13 A. After the shooting. After that incident happened.

14 Q. On that night?

15 A. Yes, ma'am.

16 Q. Did you give it pretty close in time to that night?

17 A. What do you mean?

18 Q. Like how soon after Mr. Long was killed did you give
19 that statement?

20 A. I don't know.

21 Q. Let me direct your attention to this. Can you tell me
22 what you said starting here?

23 A. Right here?

24 Q. Yes, sir.

25 A. "Gregg got out of the car --

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1 Q. And by Gregg, you mean yourself?

2 A. That's right.

3 Q. Okay. What did you say next?

4 A. "Shaking Ben's hand and hugging Ben, telling him I
5 would see him tomorrow."

6 Q. Okay.

7 A. "Damion didn't get out of the car."

8 Q. So Damion did not get out of the car?

9 A. But he did. Yeah, he walked him.

10 Q. Now he did?

11 A. Yeah, he did.

12 Q. Keep reading for me.

13 A. "Gregg got back in the car in the front seat of the car
14 with Damion. Jones and his brother Skeet pulled --

15 MR. BROUGH: Your Honor, I'm going to object to --
16 if Ms. Jordan has a question, she's free to ask him, but I
17 don't think it's proper to have the witness read the
18 statement into evidence.

19 BY MS. JORDAN:

20 Q. Here, I'll tell you what. Flip to the fourth page
21 here. I would ask you to read starting right here.

22 THE COURT: I'll overrule the objection.

23 Go ahead.

24 A. "Damion was going to leave when Gregg told Damion --

25 BY MS. JORDAN:

1 Q. By Gregg you mean yourself?

2 A. Yeah. " -- he had to stay. When the police came, they
3 put handcuffs on Damion at [REDACTED]."

4 Q. Okay. So he was going to leave?

5 A. Yeah, he was going to the house. You know, I didn't
6 know what he was going to do, you know, where his mind was
7 at the time, but I know he was in shock.

8 Q. You know he was in shock?

9 A. That's right.

10 Q. He was going to leave?

11 A. I didn't know if he was going to the house. You know,
12 at that time I didn't know if he -- like I said, he was
13 hysterical. You put yourself in that position.

14 Q. I thought y'all had already gone up to the house?

15 A. No, this is, you know, after the shot.

16 Q. Okay. After the shot?

17 A. Yeah.

18 He was in the house, you know, after the shot. I told
19 him "man, look, you ain't got nothing to worry about. I'm
20 with you. I seen everything." It was more or less
21 self-defense, because I know if I would have been put in the
22 same predicament, the thing probably would have happened.

23 Q. Mr. Hardy --

24 A. Uh-huh.

25 Q. -- you have two prior misdemeanor convictions?

1 A. Yes, I do.

2 Q. You do?

3 A. Yes, I do.

4 Do you want to know what they are?

5 Q. Sure, tell me.

6 A. You got my record. You should know.

7 Q. Did you want to tell me?

8 A. No. You should know. You already know, don't you?

9 Q. Well, do you want to tell me?

10 A. No. You know. Why should I tell you something that
11 you already know?

12 MS. JORDAN: Nothing further, Your Honor.

13 THE COURT: Counsel, anything else?

14 MR. BROUGH: Just briefly, Your Honor.

15 REDIRECT EXAMINATION BY MR. BROUGH:

16 Q. I'm going to ask you couple of questions, Mr. Hardy.

17 A. Go ahead.

18 Q. Are you sure Damion was sitting in the car when he was
19 approached?

20 A. Yeah. Oh, yeah.

21 Q. Absolutely positive?

22 A. I'm positive.

23 Sir, we were trying to leave.

24 Q. Were you afraid in this situation?

25 A. Of course I was. I didn't know if this man had a gun

1 or not.

2 Q. Okay. And you were questioned by the police when you
3 stayed?

4 A. Yes.

5 Q. And Damion stayed as well?

6 A. (Shaking head yes)

7 Q. Thank you.

8 MR. BROUGH: No further questions.

9 MS. JORDAN: Nothing further, Your Honor.

10 THE COURT: You may step down. Thank you.

11 MR. BROUGH: Your Honor, if we may approach the
12 bench briefly.

13 (Whereupon, the lawyers approached the bench for
14 an off-the-record discussion)

15 THE COURT: All right. It's after five. We will
16 stop for the evening. I was just talking with counsel here.
17 We will be ready to go forward in the morning with arguments
18 and charge and we will have it to you as soon as we can
19 complete that.

20 Remember my instructions about the news media, and
21 if anybody should try to contact you. We will see you at
22 9:30 in the morning in the jury room, if you will report
23 back there. Y'all have a good evening.

24 Everybody else remain seated while the jury
25 departs for the evening.

1 (The following takes place outside the presence of
2 the jury panel)

3 MR. BROUGH: Your Honor?

4 THE COURT: Yes, sir.

5 MR. BROUGH: Just briefly, I don't know if the
6 court wants to have the charging conference now or not, but
7 I have prepared a couple of jury instructions, as well as
8 some case law that I attached to those instructions. I have
9 got a copy for the prosecution, so I'll hand one up. And we
10 would request these, that the court issue these
11 instructions.

12 THE COURT: Have you got one in here for
13 self-defense?

14 MR. BROUGH: Yes, sir, Your Honor. On the third
15 one.

16 THE COURT: Okay.

17 MR. BROUGH: Following the line of cases in State
18 v. McCaskill, we would ask the court issue a more tailored
19 charge and not issue the State v. Davis charge. And I
20 believe that's been held that in a situation where the
21 defendant claims to have armed himself in self-defense, but
22 the actual shooting was an accident, that that is the proper
23 charge to give on self-defense.

24 THE COURT: All right. My policy in any homicide
25 case where we have got self-defense, my earlier experience

1 not long on the bench, if you would, please prepare me that
2 tailored charge tonight.

3 MR. BROUGH: Yes, sir.

4 THE COURT: I know that you wouldn't sandbag me,
5 but I don't want to get in the position of getting sand
6 wedged on it, so I require that of all self-defense charges
7 and ask that the defense counsel to prepare for it.

8 MR. BROUGH: Yes, sir.

9 And we would ask in regard to the other two
10 instructions, one trying to incorporate them as well into
11 this tailored charge.

12 THE COURT: Okay.

13 MR. BARNETTE: Your Honor, I was going to ask one
14 thing was about duty to retreat. Under State v. McGee,
15 obviously it happened on a public roadway, or whatever, but
16 both parties have a duty to retreat. State v. McGee.

17 Another thing, Your Honor, I wanted to check with
18 is your malice charge. I know that I have been in front of
19 Your Honor. I think the last murder case I did before Your
20 Honor was back in 1994, or '95. I'm trying to remember, but
21 I don't know if you had modified your malice charge since
22 then.

23 THE COURT: They are the same.

24 MR. BARNETTE: If I -- I don't know if you have
25 got copy of it, or whatever. I would like to take a look at

1 it, if I could.

2 And on your reasonable doubt charge, do you do the
3 firmly convinced, Your Honor, part of it?

4 THE COURT: I do Victor v. Nebraska.

5 MR. BARNETTE: Okay.

6 MR. BROUGH: Your Honor, additionally we would ask
7 for instructions on voluntary manslaughter and also
8 involuntary manslaughter.

9 If the defendant was acting in self-defense at the
10 time he armed himself legally, he was legally acting in
11 self-defense at that time, I believe that the facts could
12 possibly support that charge.

13 MR. BARNETTE: Your Honor, involuntary I have got
14 a problem with. The reason why I would object to it, if I
15 remember the testimony correctly, was that he said he pulled
16 out the gun, had it up, and there was a struggle occurred.
17 Well, he didn't say he accidentally shot him. He said that
18 he was defending himself with that gun. Obviously during
19 the heat of passion I can see a voluntary manslaughter, but
20 the involuntary I don't see the accident or -- there wasn't
21 any testimony to that.

22 MR. BROUGH: I believe he stated that the gun went
23 off. I don't think he actually stated that he intentionally
24 shot Sigida Long, but that was the crux of the testimony.

25 THE COURT: Let me look at that one tonight.

1 MR. BARNETTE: And another point on the accident
2 part, Your Honor, he did not under the law seem to be able
3 to possess a gun. I realize under self-defense somebody
4 may, but the accident part I would ask that that wouldn't
5 apply because of that. I really with involuntary
6 manslaughter doesn't affect it, but I think an accident it
7 does affect, possibly, and we would like to keep that in
8 mind.

9 MR. BROUGH: Under State v. McCaskill. I would be
10 happy to provide the other tomorrow.

11 MR. BARNETTE: Your Honor, do you want us to meet
12 a little bit earlier than 9:30, or just -- or meet you at
13 9:30 to make sure on the charges?

14 THE COURT: Oh, yeah, we will be fine at 9:30.

15 MR. BROUGH: Your Honor, regarding State v. McGee,
16 that was what Mr. Barnette brought up, the arming in
17 self-defense actually occurred in the defendant's car. I
18 believe that's undisputed. It did not occur in the roadway.

19 MR. BARNETTE: Well, in his automobile also is
20 covered by -- if you read on page four, Your Honor, head
21 note number one, talks about State v. Babb, "under the law
22 of self-defense, it was the duty of the defendant to
23 retreat, unless, by so doing, it apparently increased his.
24 The fact that the defendant was on a public highway, where
25 all men have equal rights, and in his automobile, did not

1 constitute any one of those special privileges obviating the
2 necessity of retreating before killing." His automobile is
3 also covered on that.

4 THE COURT: Okay.

5 MR. BROUGH: Duty to retreat also implies that you
6 not endanger yourself by doing so.

7 THE COURT: Y'all can step up here and look at the
8 malice charge.

9 MR. BARNETTE: Yes, sir.

10 I know I have heard it before, but it's been
11 awhile.

12 (Off the record)

13 (Back on the record)

14 THE COURT: First of all, all witnesses hear,
15 anybody concerned with the State's side may leave now,
16 unless you have been asked to stay.

17 Anybody with the defense side would like to leave.
18 Unless you have been asked to stay by Mr. Brough, you may
19 leave.

20 We are in recess until 9:30.

21 (Whereupon, proceedings were adjourned to December
22 1, 2005)

23

24

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS
3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 DAMION JACCQUISE JONES,) 2005-GS-23-3371
7 Defendant.) DECEMBER 1, 2005
8) Spartanburg, South Carolina
9

(VOLUME III)

10
11 B E F O R E:

12 THE HONORABLE PAUL M. BURCH, JUDGE. ; and a jury.
13

14
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24
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1 (Proceedings, December 1, 2005).

2 MR. BROUGH: Your Honor, may it please the court?

3 THE COURT: Yes, sir.

4 MR. BROUGH: Defense would just like to put on the
5 record that after we broke yesterday, the court had allowed
6 the defense some time if it was able to arrange to have Mr.
7 Jeff Hollifield test the gunshot residue kit of Sigida Long
8 on the sticky tab analysis. Mr. Hollifield was unable to
9 arrange the time at the Greenville lab in order to do that.
10 He called over there. He was told that they would need to
11 get clearance from the sergeant over there. He did not take
12 the sample with him. I was going to get to him after we
13 broke last night, upon receiving a call from Ms. Jordan
14 indicating it's still in the court's custody, but the
15 reality is that it would not be able to be tested until
16 sometime today. And given the court's ruling, that's too
17 late, so with that being said, we're prepared to go forward
18 and the defense would rest and renew our motion for a
19 directed verdict.

20 THE COURT: And I thought about what all we
21 discussed about that situation. And since the State is not
22 contesting your witness or their witness in reality on that,
23 I don't see that the further testing would have been of any
24 benefit.

25 MR. BROUGH: Yes, sir.

1 THE COURT: Okay. Bring them in.

2 MR. BARNETTE: Your Honor, on the motion, do you
3 need to rule on that?

4 MR. BROUGH: On the renewal of the directed
5 verdict we just referred to.

6 THE COURT: Oh, I'll deny that. Sorry.

7 MR. BARNETTE: Okay.

8 THE COURT: Well, I may be jumping the gun. Y'all
9 do have any rebuttal, do you?

10 MR. BARNETTE: No.

11 THE COURT: Okay.

12 (The following takes place in the presence of the
13 jury room)

14 THE COURT: I'm going to publish these questions.
15 I think most of them I can take care of here. And counsel,
16 you may be able to take care of them some of it in closing
17 argument.

18 Ladies and gentlemen, the evidence is now in in
19 this case and the defense has rested.

20 The first one is very straightforward. "When an
21 attorney sets evidence in front of us, are we supposed to
22 pick it up and pass it around, or just let it sit there?"

23 You are more than welcome to pick it up and look
24 at it. In fact, when I give this case to you to deliberate,
25 y'all will have all the evidence back there with you.

1 "Height and weight of the victim."

2 "Definition of murder, manslaughter, etcetera."

3 I'm going to give you a charge on all that law.

4 "Is there a toxicology report for the defendant
5 other than the alcohol level?"

6 Okay. There's a request for a chart or a drawing
7 board. We can arrange that.

8 "Review of the gun laws in South Carolina."

9 Counsel, you may want to think about that on
10 closing argument.

11 "Will you have access to court transcripts."

12 THE COURT: Yes. The answer to that is yes. You
13 let me know which one you need as the time comes.

14 I think through the closing arguments and by the
15 time I give the charge to you, that some of this will be a
16 lot clearer to you.

17 Counsel y'all want to approach.

18 (Whereupon, the lawyers approached the bench for
19 an off-the-record discussion)

20 THE COURT: Ladies and gentlemen of the jury, even
21 though the evidence is now at a close, I have spoken with
22 the counsel here at the bench and we do have a stipulation
23 that we have an agreement on that we can give to you
24 concerning the height and weight of the victim.

25 MR. BARNETTE: It's 6 feet.

1 THE COURT: 6 feet.

2 MR. BARNETTE: 173 pounds.

3 THE COURT: 173 pounds.

4 THE COURT: Okay, solicitor, I believe you are
5 going to waive opening?

6 MR. BARNETTE: I am, Your Honor, and close.

7 THE COURT: Mr. Brough, the floor is yours.

8 MR. BROUGH: Thank you, Your Honor. May it please
9 the court.

10 Good morning ladies and gentlemen of the jury.

11 THE JURY: Good morning.

12 MR. BROUGH: I hope y'all had a good night.

13 Today I want to discuss with you the case in terms
14 of the evidence that's been presented.

15 Now, at the beginning of this case the State came
16 forward and they told you that they were going to prove
17 beyond a reasonable doubt that Mr. Jones murdered Sigida
18 Long. And the definition of murder is the unlawful killing
19 of somebody with malice aforethought.

20 Malice could be described as a wicked, depraved,
21 indifferent heart. The judge will give you a very
22 definitive instruction on it. I'm not going to dwell too
23 much on it.

24 What I would like to do is review the evidence.
25 We are going to start with the forensic evidence that we had

1 discussed -- that the lawyers had discussed with the
2 witnesses, and let's begin by looking at Investigator
3 Talanges. Now, I think he was pretty straightforward and he
4 said that everything that he did, but there were number of
5 things that he did that were not followed up on in this
6 case. One thing is, for instance, he swabbed the gun for
7 DNA. Those results, they sent them off to SLED. We don't
8 have the results. They were not in evidence.

9 There were etched fingerprints on the magazine.
10 Again, we don't have the results. They are not in evidence.

11 There was also the testimony of Dr. Wren, the
12 coroner in this case. Now, he told you that he was board
13 certified in pathology. However, he was not board certified
14 in forensic pathology. Now, he attempted to indicate what
15 the angle of the bullet's path was. However, he also
16 admitted that he never actually measured that angle. Sort
17 of eyeballed it. He looked at it and said I can't tell what
18 this is, you know, but I'll say it's 45 degrees. Now, how
19 certain of that is he? Well, when I asked him some
20 questions about it, he said it could be up to 60 degrees; it
21 could be 35 degrees. In other words, that's a huge range of
22 motion.

23 Now, the State is banking quite a bit on that
24 testimony. In fact, Mr. Barnette got up here and he tried
25 to demonstrate certain angles and things with the witness,

1 but the reality is that angle was never measured. Never
2 measured. Now, they expect you to believe that testimony
3 beyond a reasonable doubt, and he can't even tell you what
4 that angle is, because he never measured it.

5 Let's talk about gunshot residue, soot, just
6 briefly.

7 Now, Dr. Wren said there was no soot in the wound.
8 We heard from the gunshot residue expert, and there were two
9 in this case, the State's expert and the defendant's expert.
10 We had Ila Simmons from SLED you have Jeff Hollifield who
11 works for MicroAnalytical, and used to work for SLED for a
12 number of years. And you heard the testimony basically
13 indicates that in terms of looking for certain types of
14 particles that you need a microscope to see something and
15 you need to do swabbings.

16 Now, Dr. Wren never looked inside the wound with
17 any of the equipment. Never did it. Never testified to it.
18 Just said looked at it, I don't see it, so it must not be
19 there. Of course, we are relying upon a person that eyes
20 angles and could be either way. Again, I don't think that
21 that testimony is credible.

22 Let's look at the gunshot residue results briefly.
23 Now, the importance of gunshot residue results is quite
24 simply one thing. It's to determine whether or not you can
25 definitively say a weapon has been fired. How do we do

1 that? Look at the levels of three metals and make a
2 determination.

3 Mr. Hollifield told you that the level of antimony
4 is 20, or more, that would indicate positive for antimony.
5 A level of lead is 200, or more, and that would indicate
6 positive for lead. And if the level of barium 200, or more,
7 that would indicate a positive for barium. If you have all
8 three, you could definitively say that that is gunshot
9 residue. Okay.

10 Looking at Mr. Jones' results, you see right here
11 that all the results are negative.

12 Now, we have talked about briefly, and Ms. Simmons
13 talked about it, and Mr. Hollifield talked about it, what
14 could potentially cause a result to be negative? Here we
15 know that he was in the presence of the gun when it was
16 fired, and the State went to great lengths to say that well,
17 Mr. Jones must have washed his hand. I want you to think
18 back to Ms. Simmons' testimony just briefly. She indicated
19 that they take out the normal levels and they subtract them.
20 If it's normal levels on your hands, it would be zero, every
21 day wear, because they take a test sample.

22 Now, had Mr. Jones washed his hands, he would have
23 zeros on all of these. It would have all been off, but he
24 doesn't have this here. It doesn't make sense that he
25 washed his hands.

1 Additionally, their own evidence collection sheet
2 indicated that he did not wash his hands. These samples
3 were taken within an hour, which as Mr. Hollifield told you,
4 was a very good time to get the sample.

5 Now, how do we explain how all these results are
6 negative? One possible explanation is is that when Mr.
7 Jones was in the interview room, as Mr. Hollifield told you,
8 and he was rubbing the palms of his hands on his pants, that
9 some of the materials could have come off there, and that
10 the backs of his hands could have been protected to a degree
11 when the cloud formed by the victim's hands covering the
12 gun. I think that that makes some sense, looking at the
13 evidence, which is also very interesting when you
14 consider -- I'm just going to put that one right over it.
15 This is Defendant's Exhibit No. 3. These are the levels of
16 Sigida Long. Looking at the levels here, Ila Simmons said
17 10 on the aptimony. Mr. Hollifield said 20, but you got a
18 positive on the other two. You have got huge levels of
19 barium across all the hands. They can't explain why that's
20 there. They are trying to say that it was some sort of
21 defensive thing, but that doesn't explain both sets of
22 gunshot residue kits in conjunction with one another. They
23 are trying to explain each one separately, but they can't
24 count for the two together. So that's what we are looking
25 at in terms of forensic evidence.

1 Let's go to the eyewitnesses, probably the most
2 key important witnesses in this case. The State has given
3 you two eyewitnesses. They gave you Atiba Long, who is the
4 victim's brother in this case. They gave you his brother.
5 And what's very interesting about that, there is number of
6 things. Well, one, obviously he's the brother of the
7 deceased, so he has some motive to the slant his testimony.
8 But aside from that, let's throw that out for a minute,
9 okay. Let's not even look at that. Now, the individual
10 who, as Mr. Jones told you, had been involved in assault on
11 him, threats on his family, things of that nature.

12 Atiba Long told you, I don't sell weed, I don't
13 smoke weed. Mr. Barnette never asked him about that.
14 That's how he stated it. And as Ms. Cole told you, she has
15 personally seen him dealing drugs right at her house. They
16 want you to believe the word of a drug dealer.

17 Now, one thing that really strikes home with me is
18 this. When he is telling you about what happened, he says
19 Sigida Long approached Damion Jones. Where is Mr. Jones?
20 He's in his car. Now, that's the deceased brother telling
21 you that. He says there is a scuffle. He doesn't know who
22 threw the first punch. Now, come on your own brother
23 doesn't know if you threw the first punch? What does that
24 mean? I think it's pretty clear.

25 Then the State put up another witness, Mignon

1 Williams, to try and assert that she saw what happened from
2 down the street. Now, looking briefly at the State's
3 diagram that they entered into evidence as State Exhibit No.
4 6, which has the locations. I'll one day learn how to get
5 this right on this overhead, but it has the locations of the
6 various places that they are talking about. Where is her
7 house? Not even on this diagram.

8 Now, it is 6:30 at night in February. Now, we all
9 know that days are shorter in winter, nights are longer. We
10 all went home last night. We all saw that about 6:30 very
11 dark out. How do we know that that plays into it? How do
12 we know that she could even see what she said she saw?
13 Because she stated that if you look at this diagram, the
14 victim was found in front of the car. That's what she
15 stated. Now, she tried later to say that the front of the
16 car is whatever is facing her, but come on. Let's be real.
17 The front of the car is the front of the car. The front of
18 the car is place where headlights are. The rear of the car
19 is where the rear bumper is. Everybody knows that. She
20 backed up on cross-examination and what she told you was
21 well, where he was shot is where he fell. How informative
22 is that? They want you to believe this lady and they want
23 you to believe her beyond a reasonable doubt. I don't think
24 she's stands up very well either.

25 Now, I want to talk to you about self-defense.

1 It's dark out. There is two gentlemen that approached Mr.
2 Jones' car, sitting in his car. Where is his car parked?
3 Beside his grandmother's house. The next door neighbors of
4 his grandmother. These are people that he met on numerous
5 occasions. 2002, he's threatened. Came out of the store
6 with his son present, threatened with death. He's
7 threatened with violence against him and his family, son
8 included.

9 Go back to 2003, he's at a barbecue with one of
10 the kids and a car driving by. He knows who it is.

11 Now, here he is February the 25th, 2005, he is
12 sitting in his car. These gentlemen approached him and
13 started to hit him. He doesn't know if they are armed or if
14 they are not. He just knows that he's in trouble. He grabs
15 a gun and gives them the opportunity to back off. If they
16 backed off, none of this would have never happened. But
17 instead he's rushed. There is a struggle for the gun, and
18 the gun went off.

19 What's amazing to me is the how well he withstood
20 the State's questions. Now, look at it, Mr. Barnette was
21 questioning him for God knows how long. It was a long time.
22 He never changed his story.

23 You know what else we heard? We heard there was a
24 videotaped interview of the defendant at the scene at the
25 time that this occurred. And I can bet you that had he sa

1 anything different on that videotape to help the State, they
2 would have played it for you, but they didn't, because he
3 didn't change his story. He's just said the same thing all
4 along. And, ladies and gentlemen, that's what we call
5 credibility. That is the crux of what we are dealing with
6 here.

7 Now, Mr. Jones told you he was afraid. The
8 gentlemen had assaulted him before. Was he right to be so?
9 While he may have never seen it, that was in the victim's
10 back pocket, the man who approached his car and assaulted
11 him.

12 Ladies and gentlemen, this is a case that cries
13 out for justice. It's a case of self-defense. Mr. Jones
14 has been the victim of the attempted carjacking. Don't make
15 him the victim again. Don't take his freedom away. Return
16 a verdict of not guilty. Thank you.

17 THE COURT: Solicitor.

18 MR. BARNETTE: May it please the court, Your
19 Honor.

20 Mr. Foreman, ladies and gentlemen of the jury, the
21 one thing which I thought was interesting about that closing
22 argument was he didn't try to talk about what happened that
23 night.

24 The State brought you the witnesses that came that
25 night. You heard from Atiba Long. You heard from Ms.

1 Williams. Their stories are consistent. The evidence is
2 consistent with their stories.

3 You heard Atiba Long testify to what he saw that
4 night; when his brother got up to go see his friend next
5 door; when Gregg Hardy started an argument with him; that
6 led to the altercation which involved this defendant. You
7 heard him tell how quickly it happened. He just pulled a
8 gun out and shot him. I couldn't even tell him stop.

9 And then you hired the 9-1-1 tape which happens
10 seconds immediately afterwards. It's the same story that he
11 told on this stand.

12 You had Ms. Williams. She doesn't have any dog in
13 this fight. She don't know anybody. She's just a neighbor
14 She's down the street and she sees what she considered the
15 front of the car. The car is pointed towards her. Both
16 cars -- cars have bumpers on both front and the rear. She
17 says she sees a man standing up in his yard. Y'all have
18 been fortunate enough to go out to the scene. Pulls a gun
19 standing on that hill where he's closer to his house, or to
20 somebody's house, not his house, but closer to the house;
21 shoots a man on the sidewalk in the road and he drops where
22 he's shot. That's what she saw. She came in here and
23 testified. She told you.

24 Atiba Long said it was at least three-quarters of
25 a car length. There was no contact. That's credibility,

1 ladies and gentlemen. That's what happened that night.

2 Now, the defense brings in the defendant's
3 testimony and his friend Gregg Hardy. They want you to
4 believe that testimony. Well, if you believe that
5 testimony, there is nothing consistent about theirs.
6 Nothing. Mr. Jones says he never got out of the car.

7 Mr. Hardy said, yeah, he got out of the car and he
8 helped me carry Ben up there. Ben was so smashed. Ben had
9 drank all that liquor and beer.

10 Mr. Hardy said he had drank a pint and a half with
11 him plus two beers, 24 ounce beers on top of it.

12 He says that the defendant even had six beers.
13 The defendant told you that. Said well, we will help him
14 carry him up. They are not consistent on that.

15 He says they come back, we are on the passenger
16 side. He says Damion is sitting there, he slaps him while
17 he's sitting in the driver's side of the car. Well, Damion
18 Jones says he pulls him out and hits him two or three times
19 with his fist. There is nothing consistent about that.

20 Then the defendant tells you that I broke away
21 from him, I jumped back in the car, I reached across in the
22 dashboard or the glove compartment and pulled the gun out.

23 Well, if Mr. Hardy is sitting in the passenger's
24 seat, don't you think that he could see somebody reach
25 across him and go into that dashboard and grab that gun out

1 of there? .

2 He says well, I pulled it out of the dashboard and
3 I go back and I tell him to get back. Well, the funny thing
4 was if you were threatened with your life, ladies and
5 gentlemen -- and you will have these exhibits. Let me show
6 you State Exhibit No. 14. You got enough time to close the
7 glove compartment if you are pulling a gun out of the car?
8 You are scared to death? So you go ahead and shut it back
9 after you pull that gun out of there? But this gentleman,
10 that don't know where he got the gun from, sitting in the
11 passenger's side? He didn't get that gun out of no glove
12 box. You don't take the time that somebody is threatening
13 to kill you to shut the glove box back. That's evidence,
14 ladies and gentlemen. Take a look at it.

15 Mr. Jones says I get out of the car and I hold the
16 gun down and I tell him to get back.

17 Well, Mr. Hardy says Mr. Jones is in the car. The
18 victim, Mr. Long, goes inside the car, goes in after him.
19 He's halfway in. Then I see a flash and shoots him.

20 Well, if that happened, where is the blood in the
21 car, if he shot him in the car? There is no blood, ladies
22 and gentlemen. There is no blood in the car. There is no
23 blood beside the driver's side door of the car.

24 So then he says I was in the driver's side door.
25 I had my gun down. I kept asking him show me. He never

1 could tell me exactly where he was grabbed at, where he was
2 done. He couldn't tell you anything. He kept telling you
3 he had the gun in his intense struggle. It was -- I mean so
4 intense. He says he's grabbing for this gun and he's
5 holding down.

6 And another thing I thought was interesting is,
7 and you will be able to look at this gun, ladies and
8 gentlemen. I guess I'm a little bit old fashion. I'm used
9 to using revolvers. I'm used to pulling it back like that,
10 which would just take one hand. He showed you how he did
11 it. That takes two hands to do that. So he's fighting with
12 him, two hands holding it like that?

13 And he says he holding it down like this, we are
14 fighting. He never could tell me how when it went off or
15 anything. Ladies and gentlemen, he was right handed.
16 Sigida Long, you heard Dr. Wren's testimony, was shot
17 through the right side of his head. How in the world, if
18 I'm facing you like this and we are struggling over this gun
19 and I'm going to shoot you in a downward angle in the right
20 side of the head over here, going to the back of back of
21 your neck. There is no way. There is no way that could
22 happen. No way the defendant said it happened.

23 It is very consistent with the way Mr. Williams
24 and Mr. Long described it. It was on a hillside where they
25 were above, shooting down at an angle. There is no way that

1 this gun is going to be down here, that he could shoot him
2 in that side. He would have to turn and -- he would have to
3 turn into it, or whatever. There is just no way, not when
4 the gun is down below you.

5 He talks about this intense struggle. You will
6 have these pictures with you, ladies and gentlemen. You
7 will have them all back there with you. He doesn't have a
8 mark on him. And believe me, if somebody is grabbing for a
9 gun, wouldn't you have mark on your hands? Wouldn't you
10 have bruises, cuts, scratches, or something? He's got
11 neither. That's because the victim never touched him.
12 There is no torn clothes. There is nothing unraveled about
13 him, or pulled, or anything like that. Nothing torn.

14 They keep talking about this knife. It was folded
15 in the back pocket, or in the pocket, and never was brought
16 out. Even the defendant said he never had a weapon.

17 What's interesting is that, one, the card in his
18 pocket Chief's Auto-Mobile Shop, where his brother and him
19 had been that day to get his car fixed.

20 And another thing that's interesting about this
21 card is that, you know, if you have a fight or something and
22 this was in your pocket, don't you think it would be bent?
23 Don't you think it would be. This is very clean. It was in
24 the pocket.

25 Another thing they called this toxicologist and

1 made a big deal -- trying to make a big deal about the
2 victim's blood alcohol being .07. That's three beers.
3 That's not even -- in our state .08, more commonly called 8,
4 where you may inferred under the influence. Under our state
5 he's inferred at that point.

6 Another interesting thing. They keep making this
7 big deal about his brother being a drug dealer and he's a
8 drug dealer. Well, the amazing thing is there is nothing in
9 his system except alcohol, and you can check the drugs they
10 checked for. They checked for the whole range. They
11 checked for meth. They checked for barbiturates, which
12 could be any kind of drug, prescription drugs, so forth.
13 Diazepam, which is basically valiums and things of that
14 nature. They checked for what they call THC, which is the
15 common component of marijuana. They checked for cocaine.
16 They checked for opiates. They did a screen for about every
17 major type of drug that you could do and he was completely
18 negative.

19 But you know what the interesting thing is? The
20 defendant had a higher -- had more alcohol in his system.
21 It was six beers. If you drink six beers within an hour
22 period, his alcohol could have been as high as 16.

23 If you remember Gregg Hardy's testimony, he said
24 well, we were there for an hour, two hours, his alcohol
25 level is higher than the victim's was. And we don't know

1 what else he had in his system either.

2 You will have these exhibits with you, too, ladies
3 and gentlemen. You got State Exhibit No. 11. It shows
4 where Sigida Long was shot and killed at. This is where Ms.
5 Williams testified he dropped right where he fell. The
6 blood is there. It's not up at the driver's side door.
7 It's not up beside the car. You can see the dew rag, which
8 is number 8, which is where the blood was found on the
9 bullet hole was found. It's found right there at the end of
10 the car.

11 They keep calling about the GSR test, the gun
12 residue test. Well, the interesting thing about this is
13 it's a negative GSR on the man we knew shot the gun. We
14 know he shot the gun. They make a big deal about this
15 saying that they grabbed it, or whatever. And even their
16 expert can't explain it. He agrees with the findings of the
17 State expert. The one thing that was different, he said
18 that those are the front of the gun, the muzzle, that it
19 could spread five to six feet. Very consistent with
20 somebody trying to move out of the way with the bullet goes
21 by and with their hand up. They both agreed if I had my
22 hands around this weapon, you would have gunpowder residue.
23 This is a big gun, ladies and gentlemen. This is something
24 that you don't carry in your family car with a four year old
25 in the car. This is something that is only meant to do on

1 thing. This is not for protection. This is --

2 MR. BROUGH: Your Honor, I'm going to object to
3 that last statement. No evidence.

4 MR. BARNETTE: That's what I submit to you, ladies
5 and gentlemen.

6 Then they talk about these instances that occurred
7 earlier. If the defendant is so scared to death of him, why
8 go back to house that they know that they lived right beside
9 of going there? He talked about this 2002 incident. If my
10 four year old had been threatened that way, I submit to you
11 people don't threaten four year olds that way. That four
12 year old hadn't done anything, if it did occur, but I
13 definitely would have called the police, or I would have let
14 somebody know that that happened.

15 Then they bring up the second incident of 2003,
16 and the defendant's own brother gets up here and testifies
17 and says well, we saw two people in a car. Didn't say who
18 they were. I said why didn't you call the police? He said
19 they weren't causing any commotion. That's what kind of
20 evidence they want you to believe that they are afraid of.

21 He drove up to that house, had this gun in his
22 side. He didn't have it in the glove compartment. He had
23 it on him to get it that quickly.

24 He keeps talking about, you know, I just couldn't
25 do anything else. Well, if he had time to put the gun in

1 there and grabbed the gun, reach across and everything, why
2 didn't you just go in the car and shut the door and lock it
3 and turn it on and drive away? He had every opportunity to
4 do that. If you believe his testimony, he didn't do it. He
5 stayed there.

6 But I submit to you, ladies and gentlemen --
7 please remember the evidence as you remember it, not the way
8 that I'm describing it. You remember it the way that you
9 remember it.

10 What I submit to you what happened was Gregg Hardy
11 got in an argument with Sigida Long. Mr. Jones says he's
12 not going to do anything to my buddy. He got involved and
13 he finished it. Sigida Long wasn't even close to him.
14 There was no threat to him. He could have went in the
15 house. He could have drove the car away, but, no, he's
16 going to show them that don't happen to my friend. If you
17 remember what Gregg Hardy said, he says I got your back,
18 man. I got your back. Mr. Jones' had his back. Mr. Jones
19 got into it and blew Sigida Long away on that road on the
20 sidewalk.

21 And the judge will tell you that on a public area,
22 like a road, sidewalk, when there is an automobile involved,
23 that both parties have a duty to retreat. Not one. Both
24 have the duty to retreat.

25 He had every opportunity to retreat. He didn't.

1 He is going to say that this man rushed him. If you are
2 going to rush somebody and you got a gun facing you?

3 No, Sigida Long was backing up. He blew him away
4 in that road at the end of that car. He wasn't going
5 towards him. The evidence shows he was going away from him.

6 They keep talking about this GSR. The experts
7 can't explain why he doesn't have the GSR on there. Could
8 he have been washing his hands? It could be from rubbing
9 his hands. He can't explain why there is not gunpowder
10 residue all over when he grabbed the gun, because he didn't
11 grab the gun.

12 They keep talking about this fingerprint that's on
13 the magazine. Well, the magazine goes inside the gun. So
14 even if Mr. Long grabbed it, that wouldn't be his
15 fingerprint, because the magazine is inside the gun.

16 Ladies and gentlemen, this is a situation where
17 malice is shown. This is a situation that the judge will
18 tell you malice is the wicked, doing something evil,
19 depraved heart. Malice can happen. There is no time limit
20 to it. It could happen in a split second. It could happen
21 that quick.

22 And you can infer malice from the use of a deadly
23 weapon. It's an inference that you can use to apply to the
24 facts anytime a deadly weapon is used. The malice is shown
25 in the way he shot and killed Sigida Long.

1 And do you remember what Dan DeFreese talked
2 about, the SLED agent that examined the weapon. He said
3 they have to make a conscious effort to pull this trigger.
4 This is not an easy trigger to pull. It takes six and
5 quarter to six and a half pounds of pressure to pull this
6 gun, to pull this trigger. I know the ladies, especially,
7 you handle sugar. Imagine you got a five pound bag of sugar
8 that you lift up in your kitchen. This is six and quarter
9 to six and a half pounds of pressure that you have got to
10 fire with this pistol to get it cocked. You have to take
11 that much pressure to pull it before it goes off. And when
12 it's not cocked, it takes 11 pounds of pressure to pull it.
13 That's a conscious effort to use this weapon. This is not
14 something that just accidentally goes off. This is not a
15 hairline trigger. You will have this gun back there with
16 you. Work it and see how much force it takes to pull that
17 back, and how much force it takes to shoot it. It's not a
18 hairline trigger. You have to make a conscious effort to
19 pull that trigger.

20 He made that conscious effort, because he meant to
21 kill Sigida Long that night. In that split moment where Mr.
22 Long couldn't do anything to save his brother, couldn't even
23 say stop. Ms. Williams saw how quickly it happened. This
24 was not minutes. This was seconds, and it happened that
25 quick.

1 Ladies and gentlemen, if you believe the State's
2 witnesses, the State's evidence, this defendant is guilty of
3 murder. He did the unlawful killing of an individual with
4 malice aforethought.

5 If you believe their version, their two witnesses,
6 Gregg Hardy and the defendant, their inconsistent story,
7 it's not murder.

8 But you will have the credibility of witnesses,
9 and the judge will tell you you are the judges of the facts.
10 You determine the facts and you determine the credibility of
11 the witnesses. The physical evidence matches up with them.

12 I ask you the one thing that you bring to court
13 with you, every one of you, is your common sense. And
14 that's a great weapon, ladies and gentlemen, that common
15 sense that you bring to court with you today, and common
16 sense will lead you to find that it occurred exactly the way
17 Ms. Williams saw it. The lady don't have anything to do
18 with this case, the way that it happened.

19 And the one thing that I remember what Mr. Long
20 and Ms. Williams said, both of them, she was close enough to
21 hear this, man, you didn't have to do this. Mr. Long said
22 it and Ms. Williams heard it. He didn't have to do that.

23 He had the gun out. There wasn't any threat to
24 him, get away from him, he went ahead and did it anyway. He
25 shot and killed him. He shot him right in the head and

1 killed him. Ladies and gentlemen, that's murder. I'm
2 asking you to return a verdict of murder in this case.
3 Thank you.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 (Whereupon, at 10:32 a.m., the court instructed
7 the jury panel)

8 THE COURT: Everybody okay? Anybody need a brief
9 recess?

10 (No response)

11 THE COURT: Okay. I'm going to proceed with the
12 charge in this case and I'm going to ask for y'all's
13 patience with me. I have got a very bad throat cold and I
14 may have to stop every so often to settle it down with some
15 water, so please be patient with me. It's going to take a
16 little while to do this charge, and I ask that you pay close
17 attention to the law that I'm about to give you.

18 I want to thank counsel, both the State and the
19 defense, for their very able arguments and their
20 presentation in the case, and I appreciate their cooperation
21 with the court.

22 Now, it's my duty at this time to charge you and
23 instruct you the law applicable to the case, and it is your
24 duty as jurors to accept and apply the law as I state it to
25 you.

1 As jurors it's your exclusive duty to decide all
2 the issues of fact in the case, and for that purpose, to
3 determine the effect, the value, the weight, and the truth
4 of the evidence.

5 Both the State and the defendant have a right to
6 expect that you will conscientiously consider and evaluate
7 the evidence and apply the law of the case thereto, to the
8 end that both the State of South Carolina and the defendant
9 will receive and obtain a fair and impartial trial in this
10 case.

11 When I use the word defendant, I'm referring to
12 Damion Jones.

13 The State of South Carolina, by the Bill of
14 Indictment in this case, charges the defendant Damion Jones
15 with the offense in the law known as murder.

16 To this charge and to the indictment the defendant
17 has entered a plea of not guilty. A plea of not guilty by
18 the defendant places the burden of proof on the State to
19 prove by evidence the guilt of the defendant beyond a
20 reasonable doubt before you, the jury, can find the
21 defendant guilty.

22 The defendant is presumed in law innocent of the
23 charge contained in the indictment. It is a cardinal and
24 fundamental rule of law of evidence that a defendant,
25 irrespective of the enormity of the charge against him, will

1 always be presumed innocent of the crime for which he's
2 indicted, unless and until the guilt of the defendant has
3 been proved by evidence that satisfies you, the jury, of his
4 guilt beyond a reasonable doubt.

5 Presumption of innocence is not a mere legally
6 theory and it's not just a legal phrase. The presumption of
7 innocence is a substantial right to which every accused is
8 entitled.

9 Our Supreme Court has declared that the
10 presumption of innocence is like a robe of righteousness
11 placed about the shoulders of the defendant, and it remains
12 with him and assigns him to that class - the innocent -
13 until that presumptive robe of righteousness has been
14 stripped from his person by evidence satisfying you, the
15 jury, of the guilt of the defendant beyond a reasonable
16 doubt.

17 Presumption of innocence accompanies the defendant
18 from the time of his arraignment and appearance in the
19 court, and continues with the defendant throughout every
20 stage of the trial, and continues with the defendant after
21 you retire to the jury room to deliberate your verdict. The
22 presumption of innocence continues in existence to the
23 benefit of the defendant until you, the jury, reach a
24 conclusion that the State has proved the guilt of the
25 defendant beyond a reasonable doubt.

1 The State is not required to prove the guilt of a
2 defendant beyond all doubt, or beyond every doubt, but
3 beyond a reasonable doubt.

4 As I told you, the Government has the burden of
5 proving the defendant guilty beyond a reasonable doubt.
6 Some of you may have served as jurors in civil cases where
7 you were told that it is only necessary to prove that a fact
8 is more likely true than not true. In a criminal case the
9 Government's proof must be more powerful than that. It must
10 be beyond a reasonable doubt.

11 Proof beyond a reasonable doubt is proof that
12 leaves you firmly convinced of the defendant's guilt. There
13 are very few things in this world that we know with absolute
14 certainty, and in criminal cases the law does not require
15 proof that overcomes every possible doubt.

16 If, based on your consideration of the evidence,
17 you are firmly convinced that the defendant is guilty of the
18 crime charged, you must find him guilty.

19 If, on the other hand, you think there is a real
20 possibility that he is not guilty, you must give him the
21 benefit of the doubt and find him not guilty.

22 A defendant, ladies and gentlemen, is not required
23 to prove his innocence, but the State is required in law to
24 prove every essential element of the offense charged against
25 the defendant by evidence which satisfies you, the jury, of

1 the guilt of the defendant beyond a reasonable doubt before
2 you can convict the defendant and find him guilty.

3 If then upon the whole case you have a reasonable
4 doubt as to the guilt or the innocence of the defendant, he
5 is entitled to that reasonable doubt and would be entitled
6 to an acquittal and a verdict of not guilty.

7 But, on the other hand, if upon the whole case you
8 find that the State has proved by evidence that satisfies
9 you, the jury, of the guilt of the defendant beyond a
10 reasonable doubt, then in such circumstance it would equally
11 be your duty to convict the defendant and find him guilty.

12 Now, in some cases in law we have an original
13 charge, such as the charge of murder in this indictment, and
14 there may be lesser included offenses to that charge.

15 If you find the defendant guilty, but you have a
16 reasonable doubt as to whether the defendant be guilty of
17 the greater crime charged or the lesser crime charged, then
18 you would resolve that reasonable doubt in favor of the
19 defendant and write a verdict of guilty only as to the
20 lesser charge.

21 But, of course, you could not write a verdict of
22 guilty to any charge, unless as to that charge you found all
23 elements of the charge has been proven by the State beyond a
24 reasonable doubt.

25 Now, I tell you that the indictment in this case

1 which you will have a little later, is not evidence and
2 cannot be considered by the jury as evidence in the case.
3 An indictment is simply the formal written instrument which
4 contains the charge against the defendant and it serves as
5 the formal document by which the case is processed into the
6 court.

7 During the trial each of us - you and I - have
8 certain duties to perform. As the trial judge it is my
9 responsibility to preside over the trial of this case, and I
10 also have the duty to rule upon or pass upon the
11 admissibility of the evidence offered during the progress of
12 this trial. You are to consider only the competent evidence
13 before you and you are to disregard and disabuse from your
14 mind any testimony ordered stricken from the record of this
15 case during the progress of the trial, if there be any. And
16 you are to consider only the testimony which has been
17 presented from the witness stand, together with any exhibits
18 admitted into the record in the case and any stipulations of
19 counsel made into the record, if there be any.

20 I have the additional duty to charge you the
21 applicable law of a case. As the presiding judge, I'm the
22 sole judge of the law in a case, and it is your duty to
23 accept and apply the law as I state it to you.

24 If you have a preconceived idea as to what the law
25 is, or what the law ought to be in this case, and it should

1 not agree with what I tell you the law is, you are obligated
2 under your oath to abandon this preconception on your part,
3 because you are sworn to accept the law precisely as I state
4 it to you.

5 In every case tried in this court before a jury
6 the jury becomes the sole and exclusive judge of the facts
7 of the case. You, the jury, are the judge of the facts in
8 this case. The court is the judge of the law in the case.
9 The Constitution of this state has declared that a trial
10 judge shall not intimate, state, comment upon, or make any
11 statement to a trial jury about the facts in the case.

12 Since you are the sole judge of the facts, you are
13 not to infer from anything that I have said during the
14 progress of this trial in ruling upon admissibility of
15 evidence, or otherwise, or anything that I say to you during
16 the course of this charge that I have an opinion about the
17 facts. The law doesn't permit me to have an opinion. That
18 is a matter solely for you, the jury, to determine.

19 It is your duty to determine, as I have stated to
20 you, the effect, the value, the weight, and the truth of the
21 evidence presented during the course of this trial.

22 Necessarily then you must assess the credibility of the
23 witnesses who have testified in this case. Credibility is
24 simply a legalistic term which means believability. It
25 becomes your duty then to analyze and evaluate the evidence

1 and determine that evidence which convinces you of its
2 truth.

3 I charge you that in determining the question of
4 the credibility or believability of witnesses, you may
5 believe one witness as against several witnesses, or several
6 witnesses as against one witness.

7 You may believe a part of the testimony of a
8 witness and eject the remaining part of the testimony of
9 that same witness.

10 You may believe the testimony of a witness in its
11 entirety or reject the testimony of a witness in its
12 entirety.

13 You may consider whether any witness has exhibited
14 any interest, any bias, or any prejudice in the case.

15 You may consider the demeanor of a witness and the
16 appearance of a witness upon the witness stand, and you may
17 consider the opportunity for knowledge concerning those
18 things about which a witness testified. And in doing so in
19 exercising your mental processes, in determining what you
20 consider to be true, the law simply requires that you
21 exercise your good judgment, your common sense, your sense
22 of logic and reason, and your experiences in life.

23 You have often heard the comment, statement, you
24 don't leave your common sense at the courthouse door.

25 Common sense is to be used when you try this case upon the

1 evidence that's been presented to you, not from anything
2 that you may have heard outside of court; not anything that
3 you have seen on television, in a movie, or at a theater.
4 This case is to be tried upon the evidence that's been
5 presented to you during the progress of this trial.

6 You may apply the attributes of your ability to
7 the evidence and determine what you consider the truthful
8 evidence, and to these true state of facts, as determined by
9 you, the jury, you take and follow the law as I state it to
10 you, and thus arrive at a true verdict in the case.

11 Now we are going to get into the specific law of
12 the case.

13 All right. I have already told you this
14 indictment is for murder. I'm going to read to you Section
15 16-3-10 of the Code of Laws of South Carolina, which states,
16 murder is the killing of any person with malice
17 aforethought, either express or inferred.

18 And I point out to you implied means the same
19 thing as inferred.

20 Now, upon the principle and theory of our law that
21 any greater offense includes a lesser offense, the charge of
22 murder also includes the lesser offense of voluntary
23 manslaughter and also involuntary manslaughter, even though
24 these are not written into the body of the indictment.

25 I'm going to define for you the law of murder, and

1 then I'm going to define for you the law of voluntary
2 manslaughter, and then I'm going to define for you the law
3 of involuntary manslaughter.

4 Murder is the unlawful killing of any person with
5 malice aforethought, either expressed or inferred.

6 Hence, in order to convict one of murder, the
7 State must not only prove the killing of the deceased by the
8 defendant, but that it was done with malice aforethought.
9 Such proof must be beyond a reasonable doubt. Malice
10 aforethought is an essential element in the crime of murder.

11 Malice is a word suggesting wickedness, hatred,
12 and determination to do what one knows to be wrong without
13 just cause, or excuse, or legal provocation.

14 Malice need not be in the mind of the one doing
15 the killing any particular length of time before the act of
16 killing in order to render the killing murder. If it is
17 present in the mind of the one doing the killing any length
18 of time before the act, then its presence would be
19 sufficient to render the killing murder.

20 Malice is said to be express where there is a
21 manifested violent, deliberate intention unlawfully to take
22 away the life of another human being. Malice is implied
23 where one intentionally and deliberately does an unlawful
24 acts which he then knows to be wrong and in violation of the
25 his duty to another and where no excuse or legal provocation

1 appears, and when the circumstances attending a killing show
2 an abandoned heart, a malignant heart fatally bent upon
3 mischief.

4 The words express and implied do not mean two
5 different kinds of malice. Rather the terms signify the way
6 in which malice may be proved.

7 Express malice is where a person by word of mouth
8 expressed hatred or will for another, or ill will for
9 another, or where the State proves beyond a reasonable doubt
10 that the defendant was making preparation before the event
11 to accomplish the event.

12 The jury may also conclude by deductive reasoning
13 that under certain circumstances malice may arise, even
14 though there is no express or direct evidence of an intent
15 to kill.

16 Malice may be implied or inferred if it is proved
17 beyond a reasonable doubt that there was a willful,
18 deliberate and an intentional doing, that there was a
19 willful deliberate and intentional doing of an unlawful act
20 without just cause or excuse. The proof of this act,
21 however, is merely a piece of evidence from which the
22 inference or implication to malice may arise. In other
23 words, the inferences would be simply an evidentiary fact to
24 be taken into consideration by you, the jury, along with
25 other evidence in the case, and you may give it such weigh

1 as you determine it should receive.

2 Furthermore, even where there is an absence of
3 specific fixed and deliberate intent to take the life of a
4 particular person, or that of any person, the law says that
5 if it is proved beyond a reasonable doubt that one
6 intentionally killed another with a deadly weapon or with a
7 dangerous instrumentality, such as a gun, an implication of
8 malice may arise. The use of a deadly weapon permits to
9 infer malice, but it does not require you to infer malice.

10 If facts are proved beyond a reasonable doubt
11 sufficient to raise an inference of malice to your
12 satisfaction, this inference would be simply an evidentiary
13 fact to be taken into consideration by you, the jury, along
14 with other evidence in the case, and you may give it such
15 weight as you find it should receive. You, as jurors, are
16 free to accept or reject this permissive inference,
17 depending on your view of the facts.

18 Further, there must be malice aforethought, which
19 means that the malice must have been conceived in the mind
20 of the defendant prior to the fact producing the fatal
21 result. However, the law does not require that the malice
22 must exist for any appreciable length of time before the
23 commission of the act.

24 I also charge you at this time that the State is
25 not required to prove a motive for homicide.

1 Now, I am going to define for you the law of
2 voluntary manslaughter. I have already talked to you,
3 ladies and gentlemen, and instructed you that an indictment
4 for murder includes the lesser crimes of voluntary
5 manslaughter and involuntary manslaughter, even though it's
6 not physically written into the indictment. In other words,
7 a defendant indicted for murder may be convicted of
8 voluntary manslaughter or involuntary manslaughter, if the
9 evidence warrants it.

10 Manslaughter is an unlawful killing of a human
11 being, without malice, expressed or inferred. You will
12 notice then, ladies and gentlemen, that the absence of
13 malice is what distinguishes voluntary manslaughter from
14 murder. I have instructed you that malice is an essential
15 element of the crime of murder. Malice is not an essential
16 element of the crime of voluntary manslaughter. The
17 presence of malice in murder in the absence of malice in
18 voluntary manslaughter is what distinguishes these two
19 offenses.

20 Manslaughter is divided into two classes;
21 involuntary manslaughter and voluntary manslaughter.

22 Now, what is voluntary manslaughter? It is the
23 felonious taking of a life of another human being, in sudden
24 heat and passion, upon a sufficient legal provocation.

25 The law recognizes the fact that sudden heat and

1 passion may for the time being affect one's self control,
2 temporarily disturbs the sway of reason, and, hence, reduces
3 the crime of murder to voluntary manslaughter, where the
4 homicide was done in sudden heat and passion, provided there
5 was a sufficient legal provocation. Sufficient legal
6 provocation must be such as would be calculated to cause a
7 person of ordinary reason and prudence, sometimes described
8 as the average person, to become enraged; that is, to
9 experience sudden heat and passion and, hence, to lose
10 control of himself temporarily, and frequently it involves
11 some physical aggression or assault.

12 Merely by way of illustration, and illustration
13 alone, I say that when an unjustifiable assault is made with
14 violence or with circumstances of indignity upon a man's
15 person, and the party so assaulted kills the aggressor, the
16 crime will be reduced to manslaughter, if it appears that
17 the assault was resented immediately and the aggressor was
18 killed in the heat of blood, for it will be observed that
19 the killing must be in sudden heat and passion, and if, in
20 fact, passion had cooled, or if there was sufficient time
21 between the provocation and the killing for passion to cool,
22 the killing would not be attributed to heat of passion but
23 to malice. The sufficiency of cooling time would depend
24 upon whether there was time, all circumstances being
25 considered, for a person of ordinary reason and prudence to

1 cool.

2 Now, involuntary manslaughter. It's the unlawful
3 killing of another without malice, expressed or implied, by
4 some act or omission constituting criminal negligence.

5 Criminal negligence is the reckless disregard of
6 the safety of others. Thus, mere negligence will not
7 suffice to support a conviction of involuntary manslaughter.
8 The burden is upon the State to prove heedlessness and
9 willfulness. Recklessness implies the doing of a negligent
10 act knowingly. When a man, in fact, acts negligently and he
11 realizes that he is acting negligently, the law says that he
12 is reckless, heedless or willful and wanton. Thus,
13 involuntary manslaughter involves an intentional killing
14 that is accomplished by means of some intentional act.

15 The criminal negligence must be the proximate
16 cause of death.

17 Furthermore, what constitutes criminal negligence
18 depends on the facts and circumstances of each case.

19 Finally, the violation of a statute, if it is the
20 proximate contributing cause of an injury, constitutes
21 negligence per say, that is negligence in itself, and is
22 evidence of recklessness.

23 In order to make out the offense of involuntary
24 manslaughter, the State must prove the following elements
25 beyond a reasonable doubt:

1 One, that the victim died in the county, in this
2 case Spartanburg County, on a date;

3 And two, that the defendant did unlawfully and
4 unintentionally kill the victim;

5 And three, that the defendant's conduct was
6 criminally negligence, which is defined by Section 16-3-60
7 as a reckless disregard of the safety of the others;

8 And four, that the alleged criminal negligence of
9 the defendant was the proximate cause of the death of the
10 victim.

11 The first element of the crime of involuntary
12 manslaughter is the victim must have died at the time and in
13 the place alleged in the Bill of Indictment.

14 The second element of the crime of involuntary
15 manslaughter requires that there must be an unlawful killing
16 of another, unintentionally by the defendant, without
17 malice.

18 Involuntary manslaughter is defined as the
19 unintentional killing of another, without malice, and in
20 doing some unlawful act, not amounting to a felony and not
21 likely or naturally tending to endanger life, or in doing a
22 lawful act in an unlawful manner.

23 Involuntary manslaughter is an intentional killing
24 without malice. Malice in the law of homicide denotes
25 wickedness and excludes just cause or excuse, as I told you.

1 The third element of involuntary manslaughter is
2 that the defendant's conduct be criminally negligent.

3 The law defines involuntary manslaughter as the
4 unlawful killing of another, without malice, express or
5 implied, by some act or omission constituting criminal
6 negligence.

7 Criminal negligence is defined by the same law as
8 the reckless disregard for the safety of others. Thus, mere
9 negligence will not suffice to support a conviction of
10 involuntary manslaughter.

11 The burden is upon the State to prove heedlessness
12 or willfulness.

13 Recklessness implies the doing of a negligent act
14 knowingly. When a man actually acts negligently and he
15 realizes that he's acting negligently, the law says that he
16 is reckless, heedless, or willful and wanton. Thus,
17 involuntary manslaughter involves an unintentional killing
18 that is accomplished by means of some intentional act.

19 The last element is that the criminal negligence
20 must be the proximate cause of the death.

21 Furthermore, what constitutes criminal negligence
22 depends on the facts and circumstances of each case.

23 Finally, the violation of the statute, if it is
24 the proximate or contributing cause of an injury constitutes
25 negligence, per say; that is, negligence in itself, and is

1 evidence or recklessness.

2 Willfulness is the intentional doing or omitting
3 to do something in disregard to the rights of others after
4 notice of those rights.

5 Wantonness or wanton negligence is recklessness
6 indifference to the consequences of an act or omission.

7 Willful is further defined to mean intending the
8 result which actually comes to pass, not accidental or
9 involuntary.

10 Once again now, in discussing lesser included
11 offenses within the original alleged offense, if you find
12 the defendant guilty, but you have a reasonable doubt as to
13 whether the defendant be guilty of the greater crime charged
14 or the lesser crime charged, then you would resolve that
15 reasonable doubt in favor of the defendant and write a
16 verdict of guilty only as to the lesser charge. But, of
17 course, you could not write a verdict of guilty to any
18 charge, unless as to that charge you find all elements of
19 the charge have been proven by the State beyond a reasonable
20 doubt.

21 Now, the defendant has raised a defense that we
22 know in the law as self-defense. I'm going to charge you
23 concerning that.

24 A homicide is excused when caused by the discharge
25 of a gun where the accused is lawfully acting in

1 self-defense and the victim meets death by accident through
2 the unintentional discharge of a gun, or the like.

3 Traditionally to establish self-defense in a
4 murder prosecution four elements must be present.

5 The defendant must be without fault in bringing on
6 the difficulty.

7 Two, the defendant must have been in actual
8 imminent danger of losing his life or sustaining serious
9 bodily harm, or the defendant must have actually believed he
10 was in imminent danger of losing his life or sustaining
11 serious bodily injury.

12 Three, if his defense is based upon the belief of
13 imminent danger, the defendant must show that a reasonably
14 prudent person of ordinary firmness and courage would have
15 believed that he was in imminent danger and that the
16 circumstances were such as to would warrant a person of
17 ordinary prudence, firmness, and courage to strike the fatal
18 blow in order to save himself from serious bodily harm or
19 the loss of life.

20 And four, the defendant had no other probable
21 means of avoiding the danger.

22 Once these elements have been established, the
23 State has the burden of disproving self-defense beyond a
24 reasonable doubt.

25 In assessing the presence of whether or not the

1 defendant had a reasonable apprehension of bodily harm,
2 given the circumstances, you may look to prior threats and
3 acts of violence by the deceased against the defendant, any
4 intoxication of the victim, and any prior bad blood between
5 the parties.

6 In reference to having no other probable means of
7 avoiding the danger, the defendant has no duty to retreat,
8 if to do so it would apparently increase his danger. He
9 doesn't have to wait until his assailant gets the drop on
10 him. He has a right to act under the law of
11 self-preservation and prevent his assailant from getting the
12 drop on him.

13 It should be noted that self-defense is a complete
14 defense under the law, and that should the State fail to
15 disapprove beyond a reasonable doubt the defendant acting in
16 self-defense, the defendant is entitled to a verdict of not
17 guilty.

18 The verdict -- correction. The burden of proof is
19 never on the defendant to prove that he acted in
20 self-defense.

21 One may act on appearances. He may be mistaken.
22 The law does not hold him to a refined assessment of the
23 danger, provided, of course, he acted as the person of
24 ordinary coolness and courage would have acted or should
25 have acted in meeting the appearance of danger. He doesn't

1 have to wait until his assailant gets the drop on him, and
2 he has the right to act under the law of self-preservation
3 and prevent his assailant getting the drop on him. If it is
4 apparent or reasonably apparent his assailant is taking
5 steps to get the drop on him, he must take steps first to
6 prevent such assailant from getting the drop on him.

7 Further, in assessing whether or not the defendant
8 had a reasonable apprehension of bodily harm, given the
9 circumstances, you may look to prior threats by the
10 deceased, intoxication of the victim, and any prior bad
11 blood between the parties. Where the defendant claims that
12 he armed himself in self-defense, while also claiming that
13 the actual shooting was accidental, this combination of
14 events can place the shooting in the context of
15 self-defense.

16 A homicide is excused when caused by the discharge
17 of a gun where the accused is lawfully acting in
18 self-defense and the victim meets death by accident through
19 the intentional discharge of a gun, or the like.

20 I charge you under the law of self-defense is the
21 duty of the defendant to retreat, unless by doing so it
22 apparently increased his danger. The fact that the
23 defendant was on a public highway where all men have equal
24 rights, and in his automobile, does not constitute any one
25 of those special privileges of obviating the necessity of,

1 retreating before killing.

2 Let me speak to you about prior records of a
3 defendant. You cannot, and you must not consider a prior
4 record, if any, of a defendant as any evidence of his guilt
5 of the charge for which he's being now tried. You may give
6 to this evidence such weight and such value, if any, to
7 which you find it is entitled on the sole issue of the
8 credibility or believability of the testimony offered by the
9 defendant himself, but not as any evidence of his guilt of
10 the crime for which he is now being tried.

11 Ladies and gentlemen of the jury, you are not
12 partisans or advocates for the State of South Carolina or
13 the defendant. You do not serve as jurors to reward friends
14 or punish enemies. Obviously such a perverted system of
15 justice would be intolerable in our society. You have been
16 selected by both the State and the defendant to be fair and
17 impartial jurors, and it is your duty then, by your joint
18 deliberations, to determine the truth in this case, giving
19 to the defendant the benefit of every reasonable doubt on
20 each and every issue. Then to the facts to which you
21 determine to be true, you then take and apply the law which
22 has been given to you by the court, and thus arrive at a
23 verdict which does speak the truth of this case, for the
24 word verdict, which is a Latin derivative, means a true
25 saying. And when you have accomplished these

1 responsibilities, you will have satisfied your oath as
2 jurors and you will have discharged your duty to the court.

3 I will now instruct you in the forms of the
4 verdict in this case.

5 If the State has failed to prove the guilt of this
6 defendant beyond a reasonable doubt, your verdict would be
7 two words - not guilty.

8 If the State has proved the guilt of this
9 defendant beyond a reasonable doubt, your verdict could be,
10 according to how you find the facts in the case, guilty of
11 murder; guilty of voluntary manslaughter; guilty of
12 involuntary manslaughter.

13 Ladies and gentlemen, the verdict that you render
14 in this case must be the verdict of each and every juror and
15 it must be a unanimous verdict. All twelve deliberating
16 jurors must agree on the verdict which you authorize the
17 foreman to write for the jury.

18 In review, four possible verdicts. Don't give any
19 weight to how I list them, okay? Four possible verdicts:
20 Guilty of murder; guilty of voluntary manslaughter; guilty
21 of involuntary manslaughter; not guilty.

22 Mr. Foreman, you will have the indictment that I'm
23 going to give to you in just a minute. It will be your duty
24 to write in the appropriate verdict, and date the verdict
25 form, and sign your name, and that will all be done in thi

1 space on the back left corner, which has the word verdict
2 written, and your signature line and date, okay.

3 All right. The bailiffs will be stationed close
4 by, if you need any assistance. If any of you want to take
5 a break, a smoke break, bathroom break, whatever, you need
6 to cease your deliberations until all twelve are back.
7 Okay? In other words, make sure, Mr. Foreman, that all
8 twelve are present whenever you are deliberating.

9 Do not begin your deliberations until I send the
10 verdict form back with the exhibits to you.

11 Now, Mr. Bailiff, I need the two alternates to be
12 placed into a separate room where they --

13 THE BAILIFF: Across the hall, yes.

14 THE COURT: To where they can relax. Make sure
15 that they got coffee, Coca Cola, whatever they need.

16 THE BAILIFF: Yes, sir.

17 THE COURT: And we will try to get the twelve
18 jurors to work.

19 Mr. Foreman, it is seven minutes after eleven now.
20 As you proceed, if you desire lunch, keep in mind that it
21 will probably take 45 minutes for us to get it in here,
22 okay? So leave that up to you. If you determine you know
23 when and if you need lunch.

24 I think I have covered all I needed to talk with
25 you about.

1 MR. BROUGH: Your Honor, may we approach?

2 THE COURT: Yes, sir.

3 MR. BROUGH: Briefly.

4 THE COURT: Yes, sir.

5 (Whereupon, the lawyers approached the bench for
6 an off-the-record discussion)

7 THE COURT: All right. Y'all may step back. Do
8 not deliberate now until I can get this evidence back to
9 you.

10 (Whereupon, at 11:08 a.m., the jury panel retired
11 to the jury room, awaiting instructions to begin
12 deliberations)

13 (Jury Note marked as Court Exhibit No. 2 for
14 identification)

15 THE COURT: All right. All jurors are clear.
16 Anything for the record at this time?

17 MR. BROUGH: Not at this time, Your Honor, no.

18 MR. BARNETTE: Nothing from the State, Your Honor.

19 THE COURT: Lady and gentlemen, if y'all will
20 check off the exhibits, we well put them to work.

21 (Off the record)

22 (Back on the record)

23 MR. BARNETTE: Your Honor, I think we have
24 reviewed them and I think both sides agree that those are
25 the exhibits.

1 MR. BROUGH: Yes.

2 THE COURT: Everything is accounted for?

3 MR. BROUGH: Yes, that's fine.

4 THE COURT: All right. We will stand in recess
5 until we get a verdict or either have any other business for
6 the court.

7 (Whereupon, at 11:14 a.m., the jury was instructed
8 to begin deliberations)

9 (Whereupon, at 11:14 a.m., proceedings were
10 recessed, pending the verdict of the jury panel).

11 (Whereupon, at 3:10 p.m., proceeding were
12 reconvened)

13 (Jury Note marked as Court Exhibit No. 3 for
14 identification)

15 THE COURT: Pursuant to an in-chambers, a copy of
16 the written instructions were sent back to the jury panel by
17 agreement of both attorneys.

18 (Whereupon, at 3:15 p.m., proceedings were
19 recessed, pending the verdict of the jury panel)

20 (Whereupon, at 3:42 p.m., proceedings were
21 reconvened)

22 (Jury Note marked as Court Exhibit No. 4 for
23 identification)

24 THE COURT: Okay, gentlemen, y'all know what the
25 note was. It was my understanding it has appeared in the

1 past that you have allowed the transcript to be sent back,
2 since you are fortunate enough to have the court reporter
3 set up with realtime and get these things produced. The
4 only concern I would have about it, and I didn't remember
5 anything. Was there anything stricken from the record or
6 any objection that would be on there that was outside the
7 presence of the jury.

8 MR. BROUGH: That would be fine with us, Your
9 Honor.

10 THE COURT: Okay. One of them is fairly thin and
11 the other one is 27 pages, and Williams is 9.

12 Anything else?

13 MR. BARNETTE: No, sir, not from the State.

14 MR. BROUGH: All right.

15 THE COURT: Mr. Bailiff, if you will deliver
16 those.

17 Okay. We'll stand at ease.

18 (Whereupon, at 3:47 p.m., proceedings were
19 recessed, pending the verdict of the jury panel)

20 (Whereupon, at 5:30 p.m., proceedings were
21 reconvened)

22 THE COURT: They have been deliberating now for
23 well over six hours and I have got these two alternates back
24 here in the other room. What I'm going to do, I'm going to
25 free these two alternates up. I don't see any point in

1 keeping them any later. So what I'm going to do, I'm going
2 to send Mr. Bailiff back and ask the foreman to step out
3 here to answer one specific question, and that is to make
4 sure that all twelve jurors are actively deliberating, with
5 a yes or no answer. And we will assume that it would be
6 yes, and then I'm going to cut these two loose, because they
7 already getting antsy back there, okay?

8 MR. BARNETTE: No objection from the State, Your
9 Honor.

10 MR. BROUGH: No objection.

11 THE COURT: All right. Tell them to cease
12 deliberating and tell him to step out here, please, sir.

13 (Whereupon, the Jury Foreman was brought into the
14 courtroom)

15 THE COURT: Mr. Foreman, I need to pose a question
16 to you, please, and I just need a simple yes or no answer.
17 Are all twelve jurors actively deliberating?

18 JURY FOREMAN: Yes, they are.

19 THE COURT: Very good. Thank you very much. You
20 may return and continue your deliberations.

21 JURY FOREMAN: Thank you.

22 (Whereupon, the jury foreman returned to the jury
23 room)

24 THE COURT: Mr. Bailiff, if you will get the two
25 alternates and bring them in, we will cut them loose.

1 (Whereupon, the two alternate jurors were brought
2 into the courtroom)

3 THE COURT: Good afternoon. I want to thank you
4 for your patience of working with us on this case. And as
5 you know, alternate jurors sit in case one of the regular
6 jurors becomes incapacitated. Of course, that has not
7 happened, and I have than assured by the foreman that all
8 twelve are actively deliberating. So with that assurance
9 I'm going to go ahead and cut y'all loose and let you go.

10 Now, of course, nobody knows when they will reach
11 a verdict, and if they will reach a verdict, but you are
12 welcome to stay, if you would like. Otherwise, I'm going to
13 dismiss you. They don't need to come back tomorrow, do
14 they?

15 THE CLERK: No.

16 THE COURT: So that will end the service for the
17 week.

18 I know you would probably like to get back there
19 and help them, but the law won't allow me to let you go back
20 there because we would have to retry the case. So with that
21 said, thank you very much, and y'all are free to go.

22 JURY ALTERNATES: Thank you.

23 (Whereupon, the alternate jurors were discharged)

24 THE COURT: Okay. Stand at ease.

25 (Whereupon, at 5:38 p.m., proceedings were

1 recessed, pending the verdict of the jury panel)

2 (Whereupon, at 6:55 p.m., proceedings were
3 reconvened)

4 THE COURT: All right. The bailiff has informed
5 the court that it has reached a verdict.

6 We will receive the jury, Mr. Bailiff.

7 (Whereupon, at 6:57 p.m., the jury panel returned
8 to open court to report its verdict)

9 THE CLERK: Mr. Foreperson, have you and your
10 fellow jurors reached a verdict?

11 JURY FOREMAN: Yes, we have.

12 THE COURT: And have you unanimously agreed?

13 JURY FOREMAN: Yes, we have.

14 THE CLERK: Would you pass it to the bailiff,
15 please.

16 THE COURT: Madam Clerk, if you will publish the
17 verdict.

18 THE CLERK: State of South Carolina, County of
19 Spartanburg, Indictment Number 2005-GS-42-3371, the State
20 versus Damion Jacquise Jones, indictment for murder, and the
21 verdict is guilty of murder.

22 Signed Charles T. Coffman, foreperson, dated
23 12-1-05.

24 Ladies and gentlemen of the jury, if this is your
25 verdict and still your verdict, if so, please answer by

1 saying yes.

2 THE JURY PANEL: Yes.

3 THE CLERK: So say you all.

4 THE COURT: Thank you, madam clerk.

5 Anything further of the jury from the State?

6 MR. BARNETTE: Not from the State, Your Honor.

7 THE COURT: From the defense?

8 MR. BROUGH: I request polling the jurors.

9 THE COURT: All right. Madam Clerk, if you would
10 proceed to poll the jury.

11 THE CLERK: Ladies and gentlemen, I'll ask you a
12 question. That question would be is this your verdict and
13 still your verdict... Once I call your name, if you will just
14 stand and answer yes or no.

15 Katherine Henson.

16 JUROR NUMBER 54: Yes.

17 THE CLERK: Penny Lawson.

18 JUROR NUMBER 154: Yes.

19 THE CLERK: Linda Jackson.

20 JUROR NUMBER 64: Yes.

21 THE CLERK: Pamela Marshall.

22 JUROR NUMBER 84: Yes.

23 THE CLERK: Heather Robertson.

24 JUROR NUMBER 116: Yes.

25 THE CLERK: Mark Holden.

1 JUROR NUMBER 58: Yes.

2 THE CLERK: Elese Edwards.

3 JUROR NUMBER 37: Yes.

4 THE CLERK: Charles Coffman.

5 JUROR NUMBER 174: Yes.

6 THE CLERK: Sandra McGraw.

7 JUROR NUMBER 86: Yes.

8 THE CLERK: Richard Kershner.

9 JUROR NUMBER 70: Yes.

10 THE CLERK: Terry Moore.

11 JUROR NUMBER 155: Yes.

12 THE CLERK: And Hazel Mills.

13 JUROR NUMBER 89: Yes.

14 THE COURT: Anything further of the jury?

15 MR. BROUGH: No, Your Honor. However, we do have
16 a motion. We will take that up later.

17 THE COURT: All right. Ladies and gentlemen of
18 the jury, I want to take a moment to thank you for your
19 service on the jury. I know it's not easy to serve on a
20 jury, no matter what type of case it is. It can be
21 difficult for some jurors, easier for others, but I think
22 everybody will agree that it's very serious duty, and we
23 appreciate y'all being willing to come and help and do your
24 Constitutional duty.

25 I know the hour is getting late and you probably

1 want to get on home, and I don't want to hold you up, but I
2 did want to take just a minute or two to thank you for your
3 service, and I have also want to thank you for your patience
4 with the court, because I know we sent you back several
5 times. And as I told you, I am the judge of the law, and
6 y'all are the judge of the facts, and sometimes I have to
7 sort things out outside of your presence and rule on matters
8 of law.

9 Now, I'm a little different from other judges, in
10 that some judges would dismiss you at this time and that
11 would -- you know, you would be free to go. That's going to
12 be the case tonight. However, I'm different that if you
13 would like to stay, you are more than welcome to stay and
14 listen to the rest of the proceedings. I got to handle some
15 matters of law, which at this point, you know, it doesn't
16 matter whether you are in the courtroom or not. You can
17 stay, and also going to what we call the mitigation and
18 sentencing phase. So if you would like to stay and watch
19 that, you are more than welcome to. If you would be more
20 comfortable back in the back of the courtroom, you can ease
21 back there and have a seat, or you can stay in the box if
22 you would like. Or, as I said, the other alternative is you
23 may return to your respective homes. Before you go, I want
24 to wish all of you a very good weekend and a holiday season
25 coming up, and I hope to see you again and be willing to

1 serve on a jury, if so called. Thank you very much.

2 I will have the bailiffs staff and the sheriff's
3 department to help you or escort you to your cars at this
4 time, if anyone would like assistance. Okay. All right.

5 (Whereupon, at 7:10 p.m., the jury panel was
6 discharged)

7 THE COURT: Mr. Brough?

8 MR. BROUGH: Your Honor, the defense would make a
9 motion for a new trial. We would argue that no reasonable
10 juror could have come to the conclusion that this case was a
11 murder case. Your Honor, we would state that this case, at
12 best, is a voluntary manslaughter case, given deemed to be
13 pretty much undisputed fact that the incident arose from the
14 scuffle that occurred at Mr. Jones' car in which he was hit.
15 We would ask the court to consider that motion.

16 THE COURT: Be glad to hear from the State.

17 MR. BARNETTE: Your Honor, I think there is plenty
18 of evidence in this case. The inference of malice is all
19 through it. Obviously the use of a deadly weapon can be
20 inferred. From the evidence shown, the credible evidence in
21 this case shown was there is no question that the victim was
22 standing at the end of the car near that area. He was shot.
23 Do you remember, Dr. Wren's testimony, this was a distant
24 wound. This was not a contact wound. There was no
25 stippling in the wound.

1 Also there is no question from the angle of the
2 bullet there is no way it could have occurred the way the
3 defendant said. The angle of the bullet was very consistent
4 with the way Ms. Williams testified, as well as Mr. Long.
5 And I know Your Honor didn't get a chance, but the jury got
6 a chance to see it, the reason why I asked that was
7 obviously the slope out there. There was no question. I
8 was shocked when I went out to the scene when I looked at
9 it. In the City of Spartanburg I thought everything was
10 fairly flat. This is a good-sized hill, just like the hills
11 in San Francisco. You see that show, Streets of San
12 Francisco, the hill going down, and that's angled very
13 consistent with what Dr. Wren testified and the angle of
14 that bullet.

15 I think the physical evidence shows there is no
16 question that he killed this person. Of course, you know,
17 that's why I think the facts show I think what happened was
18 he got embarrassed in front of a friend and decided to shoot
19 him. I don't know exactly what happened that night, but
20 what the evidence showed. There is no question there was no
21 struggle for that gun.

22 MR. BROUGH: Your Honor, if I may respond briefly.
23 Regarding the angle that Mr. Barnette talked about, I
24 believe Dr. Wren testified under cross-examination that he
25 never actually measured that angle and that angle had a

1 great degree of variance in that.

2 Regarding the physical evidence, I think the
3 gunshot residue kits ultimately here were inconclusive in
4 terms of any sort of distance. Given the fact that Dr. Wren
5 did not do any sort of microscopic analysis on the gunshot
6 wound, I would question that result.

7 Here we have a situation in which an individual
8 sitting in his car and the altercation occurs there, in
9 terms of a sudden heat of passion killing, I would think
10 that it would be, you know, potentially that, if not
11 self-defense, but at the most it would be that. I think
12 that there was legal provocation and that there was fault.
13 And as I understand the State's theory of the case is that
14 the altercation occurred. And even if you were to take the
15 State's evidence as true, the individual backed off and then
16 the weapon was fired then. There is still no cooling down
17 period. You know, I think it would fall in that category,
18 even in the State's evidence at its best.

19 THE COURT: Based on the evidence presented,
20 eyewitness testimony, positioning of the body, type of
21 wound, I'm going to have deny your motion.

22 MR. BROUGH: Yes, sir.

23 THE COURT: Okay. Anything from the State in
24 mitigation for sentencing?

25 MR. BARNETTE: Yes, sir, I would like to hand this

1 over to the defense, the sentencing sheet, Your Honor.

2 MR. BARNETTE: Your Honor, the defendant's record
3 started back in 1994. He had disorderly conduct then.

4 1995, he was convicted of pointing a firearm in
5 that situation.

6 I believe you have got a copy of the indictments
7 as Court Exhibit No. 1, Your Honor.

8 He was convicted for failure to stop for a blue
9 light, and also malicious injury to personal property
10 between 1,000 and \$5,000. Within that case, Your Honor, he
11 also had a violation of probation with that in 1998.

12 Your Honor, I do think the family would like to
13 speak to you at the appropriate time, and I just to calm it
14 down, but I have tried several cases, but I have never seen
15 a more inconsistent story told by witnesses on the defense
16 side. Even their own witnesses was completely -- I mean, it
17 had to be -- I mean, somebody was lying on their own
18 witness, because it's just completely different. I have
19 never seen anything like it. And I know the court seen that
20 and that's part of the evidence obviously.

21 I know Elaine Mitchell, the mother of the victim,
22 would like to address the court at the appropriate time, as
23 well as Atiba Long, and Lucinda Ann would probably like to
24 address the court, Your Honor. We do have the victim impact
25 statement to hand up to the court.

1 THE COURT: Be glad to hear from whoever would
2 like to go first.

3 MR. BARNETTE: May I pass this up to the court,
4 Your Honor.

5 THE COURT: Sheriff, you can go ahead and handcuff
6 the defendant.

7 MR. BARNETTE: Your Honor, this is Elaine
8 Mitchell, Your Honor.

9 ELAINE MITCHELL: Your Honor, Sigida Long was the
10 youngest of my two sons and we were a very close family and
11 we loved Sigida and Sigida loved us.

12 Mother's Day for me was one of the most agonizing
13 days there is. There is no words to describe what it is.
14 Mr. Jones took my son's life, and the only memories I have
15 of my son is watching him laying dead on the ground with a
16 big bullet hole in his head. That's the last memory that I
17 have of him here on earth.

18 My life has changed so much drastically for what
19 Mr. Jones has done to my family. It was just my sons and I
20 and now Sigida is gone. Sigida was the one that lived with
21 me. He was the one that I depended on. He helped me to
22 make in all my decisions. He helped me. He always looked
23 out for mommy, and he cared for my grand -- for his
24 grandmother, my mother. She was a stroke victim for four
25 years, so that I, being the head of the household, could go

1 to work and he took care of my -- he took care of my mother
2 and also his grandfather.

3 I know that whatever time sentence this is is
4 never going to bring my son back, but I am asking that you
5 give the maximum of whatever it is, so that this man would
6 not be allowed to do to anybody else and destroy a family
7 like he has destroyed mine and as he has destroyed me. He
8 took my son's life, but he wounded me in my heart and there
9 is a void here that I will live with for the rest of my
10 life. Thank you for this time.

11 THE COURT: Thank you for coming and being here.

12 MR. BARNETTE: This is Mr. Long, Mr. Atiba Long.

13 ATIBA LONG: Yes, my brother, he was my only
14 brother, and I don't have another brother. This guy, Mr.
15 Jones, took his life. I would never know how it is to be an
16 uncle because of him. I have nightmares every time that I
17 close my eyes and I think about my brother laying on the
18 concrete bleeding and I'm over him cradling him in my arms
19 and his face is just dead with no life in it or nothing.
20 You know, it was just so wrong what he did. It's -- he just
21 took everything away from me. He took all -- my brother was
22 like the best part of me of my excitement in life. We
23 always had a good time together, and now my life -- my
24 weekends are just nothing now without my brother.
25 Nothing -- nothing is the same and nothing will ever be the

1 same.

2 I got kids myself and it's hard on them, Your
3 Honor. And all I can say is, like my mother said, that he
4 needs to have the maximum sentence. It's not going to bring
5 my brother back, but he needs to be punished. Thank you
6 Your Honor.

7 THE COURT: Thank you.

8 ATIBA LONG'S FIANCE: Your Honor, I'm Atiba Long's
9 fiance and I met him and Sigida three years ago, and Sigida
10 was a very big part of our relationship. He introduced us.
11 He was my friend and my confidant. We would shop for Atiba
12 together. We would go places; just he and I together. I
13 could talk to him about things that were going on in my life
14 at that time. I had one class left to go in school before I
15 got my Bachelor's Degree. He encouraged me to finish. He
16 encouraged me to go after a highest position at work.
17 Shortly after I got it, I purchased a new apartment. The
18 week before he was killed, the Friday before he was killed
19 he helped me move into that new apartment. So he did get to
20 see that apartment, but what he didn't get to see was the
21 fact that we bought a four bedroom house this year. He
22 won't get to see us get married next year. He won't ever
23 get to see us have kids, and those are things that we had
24 talked about, things that he wanted for both of us. This
25 Mr. Jones snatched away from us, and he hasn't offered us

1 any sympathy. His family hasn't offered any sympathy.

2 MR. ATIBA LONG: No remorse.

3 ATIBA LONG'S FIANCE: None.

4 I would ask that the court give him the maximum
5 sentence that he can get; because he has destroyed our
6 lives.

7 THE COURT: Thank you.

8 MR. BARNETTE: Thank you, Your Honor.

9 THE COURT: Mr. Brough.

10 MR. BROUGH: Thank you, Your Honor.

11 May it please the court. Your Honor, Mr. Jones is
12 31 years old. He's married to his wife Michelle. Mr. Jones
13 has four children, ages 13, 10, seven and four, two of whom
14 live with him, and he pays child support to the other two
15 children, Your Honor.

16 Your Honor, Damion has worked consistently up
17 until December of 2004. He worked for Sam's Club doing
18 stocking. He was making \$10.60 an hour. He was getting 40
19 hours a week. He had worked there two and a half to three
20 years, and during that time had actually received three
21 separate raises before he was laid off due to cutbacks on
22 budget.

23 Your Honor, his last criminal conviction was from
24 over seven years ago. It was from 1998. Throughout the
25 course of the trial, though not everybody is here today,

1 he's had a number of support from family, friends.

2 He's been incarcerated on this charge since
3 February the 25th of 2005. I believe that's 280 days,
4 including today, by my calculations, Your Honor.

5 Your Honor, in regard to this case, you know, I
6 know Mr. Barnette talked about the consistency of the
7 witnesses. To be quite frank, I don't know that any of the
8 witnesses on either side were necessarily a hundred percent
9 consistent. I know that everybody said something a little
10 bit different there.

11 What I can tell the court is that through my time
12 meeting with Mr. Jones that he has been very remorseful
13 about having taken a life. In fact, sometime ago, around
14 when this first happened, Mr. Jones was actually seen by a
15 psychiatric counselor in the jail because he was having
16 trouble sleeping due to nightmares from these events. They
17 recommended he take medication for that, but since he
18 doesn't believe in taking medication, he chose not to. I
19 did want the court to know that.

20 Your Honor, with him here today is his mother
21 Marlene. I know that she wants to speak on his behalf, as
22 well as his wife's cousin would also like to speak on his
23 behalf.

24 Your Honor, given the fact that this is a
25 conviction for murder, Mr. Jones is going to have to serve

1 day for day, and not even 85 percent, of whatever the court
2 imposes, and we would respectfully request that the court
3 impose the minimum 30 year sentence. Even with that Mr.
4 Jones won't see light of day again until the time that he's
5 61 years old. Thank you, Your Honor.

6 THE COURT: All right.

7 ARLENE JONES: I'm Marlene Jones. I'm Damion's
8 mother, and I would like to say, Your Honor, that, yes, what
9 happened is a tragedy, but up under the circumstances I
10 don't see how a murder conviction could be turned over
11 against my son. Someone trying to attack you, I mean, are
12 you supposed to defend yourself or what? I mean, it was
13 senseless what happened, and why these young men decided to
14 do that I have no idea, but as God as my witness justice
15 will be served. It may not be served here today, but it
16 will be served. But, like I say, it is a tragedy, and I
17 love my son and I hate the whole situation. And I ask that
18 you would not give him the maximum sentence. Because it's
19 just senseless. Thank you, Your Honor.

20 THE COURT: Thank you.

21 Mr. Jones:

22 THE DEFENDANT: Yes, Your Honor, I just want to
23 say this before you impose any sentence. I went through a
24 lot with the Long brothers, you know, and I tried with all
25 my heart and soul to stay clear, you know, and let things

1 go, or whatnot, and, you know, I'm just not this straight-up
2 killer, you know, as being portrayed. I am a hard -- I have
3 and family, my wife, you know. That's all I can say. I
4 mean, I'm real remorseful. That could have been me out
5 there, you know. I mean, I know Atiba got put in that
6 position. I never --

7 THE COURT: Okay, Mr. Jones.

8 Mr. Brough, are you aware that the defendant has a
9 right to appeal the conviction and sentence, right of
10 appeal. You need to file a notice of appeal within ten days
11 of sentencing.

12 MR. BROUGH: Yes, sir.

13 THE COURT: The sentence I'm going to pass is made
14 somewhat easier by the past record that you have, Mr. Jones.
15 You had no business being around a pistol. You already had
16 a brush with the law, a conviction for pointing a pistol.
17 It's the last thing that you needed to be around.

18 There is an old saying about if you live by the
19 sword, you are going to perish by the sword. You are not
20 dead. You are still here on earth with us, but that saying
21 still applies, and you have ruined your life, as well as
22 taking someone else's life. You have caused your family a
23 lot of heartache. But what's been done in the past and from
24 the evidence presented and the way I heard it, the sentence
25 of the court is that Damion Jones be confined to the State

1 Department of Corrections for a period of his natural life.

2 Okay. We will close out. Before recessing, I
3 want to thank counsel for their very able trial of the case
4 and your preparation and for the way you worked together to
5 get it presented, worked with the court. The jury has
6 spoken and what's done is done. All right.

7 This particular term of General Sessions Court, as
8 far as this court is concerned, is now adjourned sine die.

9 MR. BARNETTE: Thank you, Your Honor.

10 MS. JORDAN: Thank you, judge.

11 (END OF REQUESTED TRANSCRIPT OF RECORD)

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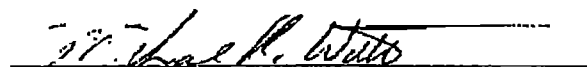
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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for SPARTANBURG County, South Carolina, on November 29, 2005; November 30, 2005; December 1, 2005.

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

APRIL 10, 2005



Michael R. Watts
Circuit Court Reporter

WITNESSES

1. **Computer**

2. **Computer**

3. **Computer**

4. **Computer**

5. **Computer**

6. **Computer**

7. **Computer**

8. **Computer**

ARREST WARRANT NUMBER

H682321

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 8-25-05

VERDICT

Guilty of Murder
Charles T. Coffman
Foreman

Foreperson of Petit Jury
Date: 12-1-05

DOCKET NO
05-GS-42-3371

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 7 2005

TERM

THE STATE

vs.

Damion Jaccquise Jones

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

FILED
CLERK OF COURT

2005 AUG 31 PM 3:16

MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

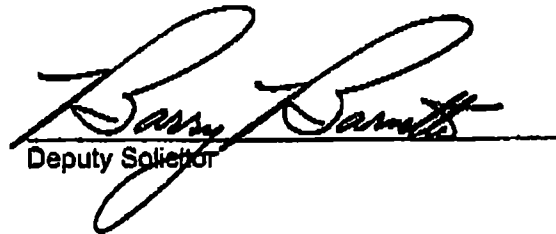
AUG 25 2005

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

The Defendant, Damion Jacquise Jones did in Spartanburg County on or about February 25, 05, feloniously, willfully, and with malice aforethought, kill one Sigida Kenyatta Long, by shooting the victim with a handgun, and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


Deputy Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMON JACQUISE JONES,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK

Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense

Division of Appellate Defense

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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to admit appellant's videotaped interrogation with the police to corroborate his self-defense claim by showing how clearly distraught appellant was after the shooting on the tape, since appellant testified at trial, was subject to cross-examination about any "statements" he made during interrogation, and the judge earlier ruled the videotaped interrogations were admissible?

2.

Whether the judge erred by refusing to admit a portion of appellant's videotaped interrogation following the shooting, and before he was ever questioned, since this was relevant to show his extreme emotionally distraught state, it was not hearsay as the solicitor urged, and it corroborated his self-defense claim?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County grand jury for the offense of murder. R. 255. His case was called to trial on November 29, 2005 before the Honorable Paul Burch and a jury. Christopher Brough represented appellant. Barry Barnette and Jennifer Jordon were the Solicitors. R. 1.

At the conclusion of the trial on December 1, 2005 the jury found appellant guilty. R. 242, ll. 18 – 21. Judge Burch sentenced appellant to life imprisonment. R. 253, l. 23 – 254, l. 1.

This appeal follows.

ARGUMENT

The judge erred by refusing to admit the videotaped interrogation of appellant to corroborate his self-defense claim. This evidence was relevant to show what appellant emotional state was during the taping which followed the shooting, and the state feared that evidence. Further, appellant testified and was subject to cross-examination, and this evidence, which was offered during the *Jackson v. Denno* hearing, was necessary to corroborate appellant's defense. In the alternative, if the interrogation on the videotape was inadmissible, the judge erred by then refusing to admit a portion of the tape which depicted appellant before he spoke. This evidence as not hearsay, and it corroborated his emotional state where the state maintained appellant murdered the decedent. (Issues 1 and 2)

Relevant Facts

Prior to trial a *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing was held on appellant's statements to the police. The videotaped questionings of appellant that were the subject of the hearing are now on file with this Court. Spartanburg Police Department Investigator Chris Taylor testified that Investigator Russell Porter gave appellant his rights prior to questioning him. R. 13, l. 3 – 15, l. 7. See waiver of rights form. R. 257.

Taylor acknowledged he may have told appellant, who he knew because their children attended daycare together, that he could not help him unless he told the police what happened during the incident wherein appellant shot the decedent. Defense counsel asked the judge to review the portion of the videotape where "Sergeant Taylor entered the room. I think there may have been a statement made regarding helping Mr. Jones out." R. 15, l. 15 – 19, l. 10.

As will be seen infra, appellant testified the decedent, who had threatened him in the past, hit appellant and was attempting to drag him out of the car at the time he shot him. Appellant said the gun discharged while he was acting in self-defense. There was clear evidence of past difficulties between the parties involved, and the decedent's brother even admitted that fact. R. 40, ll. 16-19; R. 129, l. 13 -131, l. 19.

Police Officer Mark Hillers testified that on February 25, 2005 he responded to a shooting at [REDACTED] R. 19, l. 14 – 20, l. 11. Appellant told Hillers: "I didn't mean to kill him. He was pulling me out of the car." R. 20, ll. 14 – 17. The judge ruled the videotapes were admissible. Defense counsel then stated, "the defense is satisfied with the second one. I just ask the court to review the other tape, Your Honor." The judge responded, "Okay," and his later comments illustrated he had reviewed the tapes. R. 23, ll. 10 – 15.

The judge then stated: "we're going to trial here now, of course, the object of any trial is for the jury to seek the truth, *so let's put the truth out there* to them to the best of our ability and let them decide it." R. 23, l. 24 – 24, l. 2. (emphasis added).

Jury in

Atiba Long was the brother of the decedent. R. 30, l. 20 –31, l. 13. Long testified that they got back to his mother's house at about 6:30 p.m. that September 25, 2005 evening. R. 33, ll. 17 – 25.

Long remembered that the decedent then got into an argument with "Gregg Hardy and Damion Jones." Long said there was a "scuffle in the car and that appellant got out of the car and shot the decedent in the head." R. 34, ll. 9 – 22. Long said appellant kept saying

"over and over my brother tried to carjack him." R. 35, ll. 8 – 18. Long admitted there had been difficulties between the men in the past. R. 40, ll. 16 – 25.

Deputy R.C. Talanges testified he was dispatched to the [REDACTED] Street scene on February 25, 2005. R. 43, ll. 18 – 20. The deputy said he found a four-door Buick parked in front of [REDACTED] with the doors open and the headlights on. The decedent was lying beside the vehicle. R. 48, l. 3 – 49, l. 6. The decedent had gunshot residue on his hands, and he had been shot once above the ear. R. 68, l. 23 – 72, l. 21; R. 102, ll. 12-17.

Mignon Williams remembered looking out the window early that February evening after hearing loud noises outside. She saw the decedent running "coming around the side of the front of the car." R. 91, l. 5 – 93, l. 2. Williams recalled when the decedent went around the front of the car a shot was fired. R. 93, l. 2 – 95, l. 3.

Appellant testifies

Appellant took the stand in his own defense. He testified he had been the victim of other assaults at the hands of the decedent and his brother in the past. They had also made death threats against him. R. 129, ll. 11 – 14. For example, appellant told of an incident in the Thanksgiving 2002, and another in the summer of 2003. R. 129, l. 15 – 131, l. 6.

Appellant said he was in danger when the decedent and his brother approached his automobile on February 25, 2005. Appellant noted: "I've been harmed before and issued death threats." Appellant detailed how the decedent pulled him out of the car and began hitting him on the side of his head. Appellant recalled: "I fell back in the car. I grabbed the gun out of the glove [compartment], jumped back out, cocked it, and told both of them to back up." R. 131, l. 9 – 132, l. 6.

Appellant said Atiba started to move towards the other side of the car. The decedent “rushed me,” and that there was a struggle over the gun. The gun discharged during the struggle. R. 131, l. 9 – 132, l. 6.

Appellant thought he had been shot when the gun went off. He then told “my aunt to call the police. I’ve been pulled out of my car.” Appellant told the responding police officer that the decedent “pulled me out of my car and tried to rob me. And I collapsed in front of whichever officer it was, you know.” Appellant said he was distraught and overwhelmed following the shooting. R. 132, l. 17 – 133, l. 6.

Videotape

Defense counsel then moved to introduce the videotape of appellant’s interrogation. The solicitor objected and the jury was sent out. R. 131, ll. 7 – 20.

The solicitor then argued that the videotaped interrogation was “self-serving.” The solicitor argued it was hearsay and that appellant was not a proper witness to introduce the videotapes to “bolster” his testimony. R. 133, l. 21 – 134, l. 11.

The solicitor also argued that if the state had introduced part of the videotape that under State v. Cabera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004) the defense could introduce “all of the statements.” However, he argued since the state did not put any part of “the statement in evidence” that it was inadmissible to “bolster” appellant’s testimony. R. 135, l. 5 – 136, l. 6.

Defense counsel noted that appellant had taken the stand, and he was subject cross-examination about everything that happened on the videotape. Defense counsel correctly argued: “I think the State’s main concern is *the emotional state of the defendant during the tape and not what was actually said*. And I think that the reality of why they are objecting

to it.” R. 136, ll. 6 – 18. (emphasis added). Again, the videotape is on file with this Court, and it shows appellant’s emotional state.

The judge stated that appellant’s statements on the videotape was apparently “exactly or quite similar to what” his testimony. R. 136, l. 19 – 137, l. 1. The judge sustained the solicitor’s objection

Limited part of the videotape

Defense counsel then asked the judge to admit “the limited portion of the tape before the defendant makes any statements.” The solicitor then objected that this was still “self-serving hearsay.” R. 133, ll. 4 – 11. Defense counsel responded: “It’s not hearsay. He never said anything.” The judge refused to allow even the portion of the tape before appellant began talking into evidence. The judge stated: “I have ruled. I have ruled.” R. 133, ll. 4 – 11.

When the jury was brought back in appellant again stated he was distraught after the shooting. Of course, what the jury did not know was that the videotape corroborating that fact had just been excluded. R. 137, l. 22 – 138, l. 4.

The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter, and self-defense. R. 215, l. 11 – 238, l. 12. The jury began deliberations at 11:14, and the verdict of guilty of murder was returned at 6:57 p.m. R. 239, l. 7 - 242, l. 23

Discussion

The misunderstanding regarding self-serving *statements* goes back to State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (1999), *cert. denied*, 531 U.S. 882, 121 S.Ct. 197 (2000). In State v. Terry the trial judge ruled appellant’s inculpatory statements were admissible

against him. The defense then told the jury in opening statements that appellant had confessed to the crime.

The solicitor then decided, given the defense admission that Terry had confessed, that it did not to introduce Terry's confession into evidence. The reason was that Terry's confession would have entitled him to an instruction on voluntary manslaughter which potentially could have ended the death penalty case at the conclusion of the guilt phase.

The defense in Terry then attempted to introduce Terry's confession as a statement against penal interest. The Supreme Court essentially noted, agreeing with other jurisdictions, that unless a defendant essentially confessed to capital murder, he could not introduce his own statement as a statement against penal interest. This was largely true because a defendant could get his version of what occurred across to the jury *without being subject to cross-examination*. See State v. Golson, 349 S.C. 421, 562 S.E.2d 663 (2002).

In State v. Cabera-Pena, *supra*, the Supreme Court held that where the state introduced part of the defendant's statement stating that he shot the decedent -- which the state argued meant on purpose -- the defendant was entitled to introduce the other portion of his statement wherein he stated the victim grabbed the gun and it accidentally discharged. The remainder of the statement -- the accident portion -- was admissible under the "rule of completeness," Rule 106, SCRE, in fairness to the defendant.

Prior to the Supreme Court's opinion in State v. Cabera-Pena, solicitors were largely successful in keeping any portion of a defendant's statement from the jury which it argued was "self-serving." Here, the solicitor argued he did not introduce any part of appellant's statement, and appellant was therefore not entitled to introduce any part of the videotape.

Defense counsel correctly noted that appellant had taken the witness stand, and was subject to cross-examination. The state would have the opportunity to fully cross-examine appellant about not only the videotaped interrogation but his trial testimony.

The state in this case takes the "self-serving" one step further by keeping from the jury corroborating evidence of a defendant's mental state from the jury. The defense here clearly wanted to corroborate the fact that appellant was very distraught following the shooting. That was clearly consistent with self-defense and involuntary manslaughter, and inconsistent with the state's contention that he was a cold blooded murder.

A person who was attacked, and who he armed himself in self-defense, and whose gun discharged in self-defense was much more likely to act as the distraught appellant did on the videotape than a person who was calculating a cover-up of a murder. See State v. Burriess, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990). Defense counsel correctly argued that appellant's emotional state on the videotape was really what the state was scared of in this case. See videotape. Surely if appellant was smug and deceptive on the videotape the state would have wanted it played for the jury.

The state charged appellant with murder. The state alleged appellant acted with malice aforethought - - that he killed the decedent in cold blood. Appellant had the right to present a complete defense. See Holmes v. South Carolina, ___ U.S. ___, 126 S.Ct. 1727 (2006); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986).

Corroboration is the key to any criminal defense since a defendant's testimony will almost always be viewed as self-serving. The state's bolstering argument regarding a "statement" rings hollow when compared to appellant's right to corroborate his testimony

and to present a defense using the videotaped interrogation. That is particularly true given the purpose for which the evidence was offered.

The wrongful exclusion of any evidence that would tend to corroborate a defendant's testimony or lend credence to his defense is prejudicial to his substantial rights. See Wejand v. State, 732 So.2d 1044, 1047 – 1048 (Fla. 1991). It is fundamentally unfair for the prosecution to prevent the defense from corroborating defense testimony and then attack the defendant as being a liar, and his testimony as being untrue. See State v. Turner, 62 Conn. App. 376, 77 A.2d 206, 215 (2001); State v. McCoy, 219 W.Va. 130, 632 S.E.2d 70 (2006).

In the alternative, the portion of the tape showing only appellant's demeanor, without questions and answers was admissible (Issue two).

In the alternative, appellant strongly submits that the portion of the tape showing appellant's demeanor, before he spoke, was admissible. The solicitor incorrectly argued this portion of the videotape was inadmissible hearsay since it was not even "a statement." See Rule 801, SCRE.

Appellant had the right to corroborate the fact he was very distraught following the shooting which was consistent with his defense and inconsistent with cold blooded murder. Further, the solicitor naturally argued appellant was not worthy of belief and that crime here was murder, and that it was not excusable as self-defense or even mitigated to the level of involuntary manslaughter. "This [the gun] is not something that accidentally goes off . . . "He made that conscious effort [to pull the trigger] because *he meant to kill Sigida Long* that night." R. 213, ll. 13-21. "He had the gun out. There wasn't any threat to him, get away from him, he went ahead and did it anyway. He shot and killed him.

He shot him right in the head and killed him. Ladies and Gentleman, that's murder." R. 214, l. 23 – 215, l. 2.

Whatever argument the state may attempt to now advance about prior consistent statements, it has no applicability to the portion of the tape wherein appellant did not even speak. Cf. State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002).¹

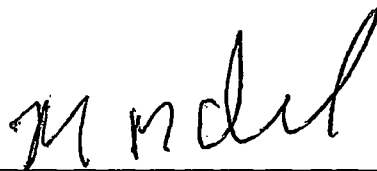
The state presented evidence and argument that appellant shot and killed the decedent out of hatred and with malice. Appellant had the right to rebut that evidence and corroborate his own testimony that he was very distraught following the shooting which was in self-defense. Appellant should be granted a new trial.

¹ Certiorari denied May 14, 2003.

CONCLUSION

By reason of the forgoing arguments, appellant's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

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

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

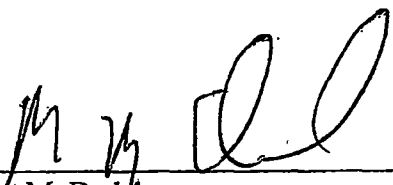
ATTORNEY FOR APPELLANT.

October 29, 2007

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 29, 2007



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

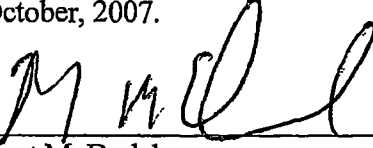
V.

DAMION JACQUISE JONES,

APPELLANT

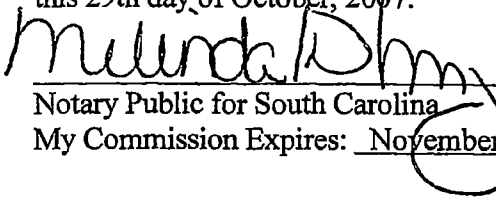
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 29th day of October, 2007.


Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 29th day of October, 2007.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMON JACQUISE JONES,

APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the court erred by refusing to admit Appellant's videotaped interrogation with the police to corroborate his self-defense claim by showing how clearly distraught Appellant was after the shooting on the tape, since Appellant testified at trial, was subject to cross-examination about any 'statements' he made during interrogation, and the judge earlier ruled the videotaped interrogations were admissible?**
- II. Whether the judge erred by refusing to admit a portion of Appellant's videotaped interrogation following the shooting, and before he was ever questioned, since this was relevant to show his extreme emotionally distraught state, it was not hearsay as the solicitor urged, and it corroborated his self-defense claim?**

STATEMENT OF THE CASE

Appellant is currently confined in the South Carolina Department of Corrections pursuant to commitment orders from the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury indicted him at the August 2005 term of court for murder, stemming from the February 2005 homicide of Sigida Kenyatta Long.

Appellant received a jury trial before the Honorable Paul Burch on November 29-December 1, 2005. Christopher Brough, Esquire, represented him. Assistant Solicitors Barry Barnette and Jennifer Jordan, of the Seventh Circuit Solicitor's Office, represented the State. The jury found Appellant guilty of murder; and Judge Burch sentenced him to life imprisonment.

Appellant timely served and filed a Notice of Appeal. This appeal follows.

ARGUMENT I.

The trial judge properly ruled that all of Appellant's self-serving, videotaped hearsay statements to police, given after his arrest on February 25, 2005 (State's Ex. 1 and State's Ex. 12 for I.D.), as well as the portion of the portion of State's Ex. 1 for I.D. showing his demeanor, were inadmissible because they were not admissible pursuant to Rule 804(b)(3), Rule 801(d)(1), or Rule 106, SCRE; and Appellant cannot point to any evidentiary basis for introducing them.

Prior to enactment of the South Carolina Rules of Evidence, the South Carolina Supreme Court consistently held that a criminal defendant could not introduce out-of-court and self-serving hearsay statements which he may have made to others. *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); *State v. Sweet*, 270 S.C. 97, 98, 240 S.E.2d 648, 649 (1978); *State v. Atchison*, 268 S.C. 588, 594-95, 235 S.E.2d 294, 296-297 (1977). In *State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 276-77 (S.C. 2000), *cert. denied*, 531 U.S. 882 (2000), the Court held that an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE.¹

Appellant conveniently ignores this well-settled precedent and maintains that his February 25, 2005 custodial, videotaped statements to police (State's Ex. 1 for I.D. and State's Ex. 12 for I.D.) were admissible because he was not an unavailable witness, since he exercised his right to testify and was subject to cross-examination. He further contends that he had the "right" to corroborate his trial testimony with his out-of-court statements and demeanor. Alternatively, Appellant maintains that a portion of the videotape of him at the crime scene and in a patrol car (State's Ex. 1) should have been admitted to show his demeanor. The State submits that the trial judge properly excluded both videotapes because they were not admissible pursuant to either Rule 804(b)(3), SCRE, or Rule 106, SCRE; and Appellant cannot point to any evidentiary basis for introducing them.

¹The undersigned counsel for Respondent represented the State on appeal in *Terry*, while Mr. Dudek represented the appellant, Terry.

A. How the issue developed at trial.

At Appellant's request (R. p. 6, l. 3-p.7, l. 13), the trial judge held a pre-trial *Jackson v. Denno*² hearing to determine the admissibility of Appellant's statements to law enforcement following his arrest on February 25, 2005, the evening of the victim's murder. The only three witnesses who testified *in camera* were from the Spartanburg Public Safety Department. Sergeant Christopher K. Taylor testified that he was called in to interview Appellant. Investigator Russell Porter read Appellant's *Miranda*³ rights to him in Sergeant Taylor's presence, utilizing a waiver of rights form, State's Ex. 12A for ID, R. p. 257. Appellant initialled each of his rights as they were read to him by Sgt. Porter. The subsequent interview was videotaped. See State's Ex. 12 for ID. Appellant was again advised of his rights on State's Ex. 12 for ID. He was not promised anything or threatened in any manner, in order to obtain a statement; and he agreed to speak freely and voluntarily. Sgt. Taylor did not question him at any point outside of the videotaped interview; and all of the statements Appellant made to Sgt. Taylor are on the videotape⁴

Investigator Russell D. Porter works in the Public Safety Department's CID division. He was also called in to interview Appellant and investigate the case. He prepared the pre-interrogation waiver of rights form (State's Ex. 12A for ID.) Appellant received his rights and understood them. No force or threats were used and he was not promised anything, in exchange for a statement. Inv. Porter was present for the first half of the interview. Then, Sgt. Taylor "took over." All of the

² *Jackson v. Denno*, 378 U.S. 368 (1964).

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ Sgt. Taylor testified on cross-examination that he might have told Appellant he could not help Appellant unless Appellant told him what was going on. However, this is not reflected by the videotape and Sgt. Taylor testified that he did not make any promises to Appellant because "[t]hat would be up to the Solicitor's Office and the court." R. pp. 15-16.

statements Appellant made were on the videotape, and Inv. Porter only spoke to Appellant about the case on the videotape. Inv. Porter further testified that Appellant did not respond to his questioning for some period of time and tell Inv. Porter what had occurred "because he was too upset." **R. pp. 16-18.**

At the conclusion of Inv. Porter's testimony, Appellant's counsel asked the trial judge to review the portion of State's Exhibit 12 for ID where Sgt. Taylor entered the interview room "I think there may have been a statement made regarding helping [out] Mr. Jones." The trial judge agreed to defer his ruling until he could review that portion of the videotape. **R. pp. 18-19.**

The remaining witness, Senior Patrol Officer Mark Hillers, testified that he was the first officer who responded to the shooting at [REDACTED] on February 25, 2005. When he arrived, Appellant was on the porch. After first approaching the victim, Officer Hillers walked up to Appellant. When Officer Hillers asked Appellant if he had any weapons, "he ... stated 'I didn't mean to kill him. He was pulling me out of the car.'" Officer Hillers then patted down Appellant for weapons, handcuffed him and walked him to the patrol car. Once they were at the car, Officer Hillers advised Appellant of his *Miranda* rights from a printed card. Appellant appeared to understand his rights and did not ask any questions about his rights. **R. pp. 19-22.**

Officer Hillers asked Appellant where the gun was; and Appellant said it was in his grandmother's house, pointing to [REDACTED] A videotape for unit 467 (State's Ex. 1 for ID) reflects Appellant receiving his rights and his statement regarding the weapon. Finally, Officer Hillers testified that Appellant repeated the statement that he did not mean to kill the victim and he was being pulled out of the car by the victim. **R. pp. 21-23**

The State indicated "that's the State's showing as to the statements that he made when the officer arrived and when the officer read him his rights." Appellant indicated he was satisfied with

this statement but again asked the trial judge to review State's Ex. 12 for ID. The trial judge did not rule on the admissibility of the statements at that point. **R . p. 23.**

Appellant subsequently testified in his own defense. He testified he knew Atiba and Sigida (the victim) Long. They had supposedly assaulted him on Thanksgiving 2002.⁵ A second incident occurred in the Summer of 2003, while Appellant and his wife "were having a cookout for one of the boys." Again, the Longs repeatedly threatened him. **R . pp. 129-31.**

On the afternoon of February 25, 2005, Appellant and his friends, Ben Foster and Greg Hardy, were at the home of Hardy's sister. Hardy and Foster were drinking liquor; and Foster was intoxicated. Appellant admitted that he drank "about six beers." **R . p.129; 140-41.** Around 6:30 p.m., Appellant and Hardy dropped off Foster at [REDACTED]. Appellant was driving. After Foster was in his grandmother's house, the Long brothers pulled up. The victim got out of his vehicle, followed by Atiba. The victim "came down, banged on both doors and my grandmother's house, enraged, trying to get [Foster] out of the house. Unable to do so, he turned his wrath on me." **R. pp. 128-29.**

Appellant claimed that he immediately thought that he was in danger based upon the previous incidents. The victim pulled Appellant from the car, and told him that he "would kick your you know what." Then, the victim hit Appellant "two or three times on the side of the head." Appellant fell back into the car, grabbed his wife's gun out of the glove compartment of the car, cocked it and, while holding it down, told both of the Longs to "back up."⁶

⁵Aside from Appellant and his son being threatened and cursed by Sigida. Atiba grabbed Appellant around the neck, telling him that if Appellant ever came back around their house or his car, Atiba "would blow my F'in head off in front of my son, to put my son in harm's way." **R. p. 130.**

⁶Appellant claimed the gun belonged to his wife and they kept it in the vehicle. **R. pp. 151-152.**

Atiba, however, began moving toward the outer side of the car and the victim rushed him. A struggle then ensued between Appellant and the victim, the end result of which was that the victim was shot. **R. pp. 131-32.** Appellant then went to his grandmother's house at [REDACTED] and asked his aunt to call police. When the first officer arrived, Appellant said he told the officer "to help [the victim], you know. He pulled me out of my car and tried to rob me. And I collapsed in front of whichever officer it was." **R. p. 132.** Appellant said that he was "[d]istraught" and "overwhelmed." He also said that he tried to tell Officer Taylor what had occurred. Inv. Porter, however, spoke to him first. **R. pp. 132-33.**

At this point, the State raised an objection, and the trial judge heard *in camera* arguments following a bench conference. **R. p. 133.** The State argued *in camera* that Appellant's trial counsel was preparing to question Appellant about the videotaped interviews. The State objected because this was self-serving hearsay and hearsay could not be introduced to bolster a defendant's testimony.⁷ **R. pp. 133-34.**

Appellant argued that "a statement by the defendant ... is an [exception] to the hearsay rule." He further argued that it was not self serving because he made several admissions on the tape. He further speculated that "the State's main concern is the emotional state" of Appellant "during the tape and not what was actually said. And I think that that's the reality of why they are objecting to it." **R. pp. 134-35.**

In response, the State handed up copies of several cases which supported its position, including *State v. Cabrera-Pena*, 361 S.C. 372, 377-80, 605 S.E.2d 522, 524-26 (S.C. 2004). It also argued that there were a number of self-serving hearsay statements throughout the videotapes. The

⁷The State further argued that Appellant was not the proper witness, through whom to elicit testimony regarding the videotapes.

State did not introduce any of the statements, and it noted that Appellant would have had the right to introduce the entire statement if it had introduced only a part of it under *Cabrera-Pena*. Appellant contended that the State was the only interrogator. He further argued that the State had the opportunity to cross-examine him about anything on the videotape because he testified. **R . p. 136.**

The trial judge sustained the State's objection. He noted that his testimony was "exactly or quite similar to" his statement. Nor was Appellant trying to impeach his testimony with a prior inconsistent statement. **R . pp. 136-37.** Appellant then asked the trial judge to allow introduction of "the limited portion of the tape before [he] makes any statements." **R . pp. 137, ll. 4-6.**

The State objected, and Appellant contended that this portion of the tape was not hearsay because he did not make a statement. **R . pp. 137, ll. 7-10.** However, the trial judge stated, "I have ruled. I have ruled." **R . pp. 137, l. 11.**

Appellant concluded his testimony by testifying that he was very distraught after the shooting. On cross-examination, he testified that the struggle was "full contact" and "intense." It happened "all to quick" for him to drive away from the victim. *E.g.*, **R . pp. 144-45; 146; 156-57.** However, he admitted that the victim never produced a weapon. **R . p. 152.**

B. Appellant's statements to police on State's Exhibits 1 and 12 for I.D. were not admissible under Rule 804(b)(3), Rule 801(d)(1) or Rule 106, SCRE.

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." *Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible as evidence unless an exception applies. *State v. Washington*, 367 S.C. 76,

82, 623 S.E.2d 836, 839 (Ct.App. 2005); *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996).

1. Appellant's statements were not admissible under Rule 804(b)(3), SCRE.

Rule 804, SCRE, permits the introduction of statements, which would otherwise constitute hearsay, where the declarant is "unavailable." The last paragraph of Rule 804(a) prevents the proponent of evidence proffered thereunder from creating the condition of unavailability and then benefitting therefrom. It was designed to ensure access to testimony where a desired witness becomes unavailable through no fault or wrongdoing of the testimony's proponent. *United States v. Kimball*, 15 F.3d 54, 55-56 (5th Cir. 1994), *cert. denied*, 513 U.S. 999 (1994). Therefore, the Supreme Court in *Terry* held that an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE. 339 S.C. at 356, 529 S.E.2d at 276-77. *See also Stewart v. State*, 63 Ala. 199, 200 (1879) ("As a general rule, one charged with crime can not make evidence for himself, by proof of his own declarations"); *Lewis v. State*, 815 S.W.2d 560, 568 (Tex.Cr.App.1991) (defendant's hearsay expressions of remorse not admissible at punishment phase of capital murder trial); *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976) (rejecting defendant's claim that he was unavailable witness because he invoked his Fifth Amendment privilege against self-incrimination and did not testify; thus, prior testimony was not admissible under Rule 804(b)(1)); *De La Beckwith v. State*, 707 So.2d 547, 586 (Miss. 1997) (same); *State v. Walters*, 630 So.2d 1371, 1375, 25-1376, 25,587 (La.App. 1994) ("Even though the defendant attempts to characterize the statement, with its "crying" and "inaudible" notations, as proving only his emotional state, the statement in its entirety is clearly exculpatory. Throughout the statement, Walters maintains his innocence, asserting he had been robbed in the past and feared for his property and claiming the killing was purely unintentional, even suggesting that Benton somehow hit the trigger and the gun

fired. Walters's emotional outbursts are not distinct from the statement itself and cannot be severed to prove only the defendant's state of mind. The trial court did not err in excluding Mr. Walters's own self-serving exculpatory statement"); *cf. Williamson v. United States*, 512 U.S. 594, 600 (1994) (when the statement is actually self-exculpatory, "the generalization on which Rule 804(b)(3) is founded becomes even less applicable ... [because] [s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false"); *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998) (letter written by tax agent for railway company, in an effort to avoid payment of taxes, was statement in interest to avoid payment of property taxes, rather than statement against interest; hence, it was inadmissible as statement against interest).

Thus, Appellant could not avail himself even if he had not testified.. Because he did testify, the Rule cannot be relied upon by him to support his self-serving and rank hearsay statements to police because, as the title to that Rule indicates, it only creates exceptions where the declarant is unavailable.

2. Appellant's statements were not admissible under Rule 801(d)(1), SCRE.

Likewise, his statement is inadmissible under Rule 801(d)(1), SCRE. Rule 801(d)(1) provides that a statement is not hearsay if:

Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, *and* the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose, or (C) one of identification of a person made after perceiving the person, or (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

As the Notes to Rule 801 state:

[s]ubsection (d)(1) changes the law in South Carolina. Previously, where the declarant testified at trial and was subject to cross-examination, the general rule was that prior statements made by the declarant/witness were admissible regardless of the hearsay nature of the statements. See *State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991); *State v. Caldwell*, 283 S.C. 350, 322 S.E.2d 662 (1984); *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980); but see *State v. Munn*, 292 S.C. 497, 357 S.E.2d 461 (1987) (all out-of-court statements made by alleged victim not necessarily admissible simply because victim testifies at trial). Subsection (d)(1), however, treats prior statements of a witness as not being hearsay in only four instances.

See also *State v. Saltz*, 346 S.C. 114, 124-25, 551 S.E.2d 240, 245-46 (2001).

Here, Appellant did testify and subject himself to cross-examination, but he did not proffer his statements under Rule 801(d)(1)(A), as a statement that was inconsistent with his testimony (which it unequivocally is not), or under Rule 801(d)(1)(B), as consistent with his “testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” Thus, he may not avail himself of either subsection in support of his current argument. Therefore, this argument is not preserved for appellate review. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); see also *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party may not argue one ground at trial and then an alternative ground on appeal).

Furthermore, Rule 801(d)(1)(B) does not support introduction of the videotaped statements because his statements not made “before the alleged fabrication, or before the alleged improper influence or motive arose.” See *State v. Foster*, 354 S.C. 614, 582 S.E.2d 426 (2003) (finding Rule 801(d)(1)(B), SCRE is the sole means by which a prior consistent statement may be introduced);

State v. Fulton, 333 S.C. 359, 374, 509 S.E.2d 819, 827 (Ct.App.1998) (“[W]hen a prior consistent statement is offered for the purpose of rebutting an express or implied charge that the witness's testimony is the result of a recent fabrication or improper influence or motive, the statement must predate any alleged improper influence or motive”). To the contrary, Appellant’s statements were made following his arrest. Given that he had been arrested for murder, the most serious offense punishable in this State, any such statements were “dripping with motivations to misrepresent.” See *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir.1942). See also *Terry, supra*; *People v. Perry*, 223 A.D.2d 479, 637 N.Y.S.2d 75 (N.Y. A.D. 1996) (a person involved in criminal activity has a strong incentive to feign nonchalance upon contact with the authorities, and such conduct would constitute a self-serving assertion of innocence that would constitute inadmissible hearsay). *Contra State v. Jeffcoat*, 350 S.C. 392, 398, 565 S.E.2d 321, 324-25 (Ct.App. 2002) (because Victim’s statement constituted her initial disclosure of appellant’s abuse, “it obviously was made prior to any contact with the judicial system and thus could not have been the result of either Mother or the solicitor’s alleged coaching of her court testimony. Similarly, Victim’s prior consistent statements related in Taylor’s testimony predate the family’s exposure to the judicial branch; Mother testified the family only became involved with the solicitor’s office and subsequent prosecution after Victim stopped seeing Taylor for therapy. Accordingly, the trial court properly found Victim’s statements to Taylor admissible to rebut the charges of improper influence”).

Moreover, “[t]he plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent statement does call the witness’s credibility into question, that is not the same as charging the witness with ‘recent fabrication’ or ‘improper influence or motive.’” *Foster*, 354 S.C. at 622, 582 S.E.2d at 430.

Appellants statements thus cannot be admitted pursuant to Rule 801(d)(1)(B) because he sought to introduce them before he was cross-examined by the prosecution; and, subsequently, there was no express or implied charge against him of recent fabrication or improper influence or motive. The prosecution's cross-examination "did not rise to the level of charging fabrication, but instead amounted to calling her credibility into question, i.e., simple impeachment." *Id.*

3. Appellant's statements were inadmissible under Rule 106, SCRE, and Appellant has not argued any proper evidentiary basis to support their introduction.

Although Appellant did not argue that his statements were admissible under Rule 106, SCRE, and any argument is procedurally barred under *Bailey*, it is clear that Rule 106 cannot support introduction of the statements. In *State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975), the Court held that:

When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it."

In this case, Rule 106 does not apply because the prosecution did not offer any portion of his self-serving statements into evidence. *Contra State v. Cabrera-Pena*, 361 S.C. 372, 377-80, 605 S.E.2d 522, 524-26 (S.C. 2004) (finding that the trial court erred by prohibiting Cabrera-Pena from cross-examining officer as to the remaining self-serving statements made to him after State had presented some statements through the officer, but concluding that the error was harmless). *See also United States v. Collicott*, 92 F.3d 973, 983 (9th Cir.1996) ("Rule 106 does not compel admission of otherwise inadmissible hearsay evidence") (internal quotation omitted).

Further, the only other argument in support of the admissibility that was raised at trial was that a defendant's statement is an exception to the rule prohibiting the introduction of hearsay. However, this argument has been abandoned because Appellant has not argued it on appeal. *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (issue not argued in brief is deemed abandoned and precludes consideration on appeal); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct.App.1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court"). More importantly, the argument is simply wrong and ignores that the prosecution has the ability to introduce such statements as admissions by a party-opponent under Rule 801(d)(1).

Finally, Appellant raises several arguments which are procedurally barred under *Bailey* because they are being raised for the first time on appeal. For instance, he mistakenly contends that the the trial judge's ruling impacted upon his "right to present a complete defense." His argument ignores, however, he has never presented either this Court or the trial judge with an acceptable basis under the South Carolina Rules of Evidence to support the introduction of his statements. Also, neither *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006) (dealing with the propriety of South Carolina's standard for admission of evidence of third party guilt) nor *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that exclusion of testimony at trial concerning circumstances of defendant's confession, on ground that the testimony pertained solely to issue of voluntariness resolved against defendant in pretrial ruling, deprived him of a fair trial) have any applicability to the present case).

Also, like his trial testimony, his statements did not bear were not an admission to the charge of murder.⁸ Rather, much like the exculpatory statement given in *Terry*, his statement was exculpatory. He repeatedly indicated that he shot his victim in "self-defense," after the victim had

⁸For that matter, his statements did not even admit guilt to a homicide.

attacked him and pulled him from his car. Thus, there are no indicia of reliability surrounding his statements.

Additionally, the statements would only corroborate Appellants trial testimony, as he concedes in his brief. However, he does not have any constitutional right to present otherwise inadmissible evidence merely because it corroborates his testimony. If anything, an error in excluding such evidence is non-prejudicial and harmless. Thus, it cannot serve as a basis for reversing a conviction. *E.g.*, *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (exclusion of testimony is harmless where it is cumulative to other testimony in the record); *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004) (same); *State v. Curry*, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct.App. 2006) (“To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCRE; *State v. Johnson*, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). However, error is harmless where it could not reasonably have affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)”).

Further, his testimony as to what occurred at the time he shot the victim - *i.e.*, that he acted in self defense - was generally corroborated by his friend, Greg Hardy. *See R . pp. 163-92*. Hardy also testified to his demeanor after the crime, saying that Appellant “was in shock” and “was hysterical.” *R.p. 190*. Further, the State introduced a series of photographs of Appellant, taken the night of the murder as State’s Exs. 24-29. Included in these are photos of his face. *See R . pp. 52-54*. Therefore, even assuming that his demeanor was relevant and not feigned, it was already before the jury. This argument lacks merit.

C. The portion of State’s Ex. 1 for I.D., showing Appellant’s demeanor after his arrest, was likewise inadmissible hearsay.

Likewise, there is no merit to Appellant’s argument that he should have been permitted to

introduce the portion of State's Ex. 1 for I.D. that shows his demeanor when arrested. Contrary to his argument, that was likewise inadmissible hearsay.

A 'statement' as defined by Rule 801(a), SCRE, includes "nonverbal conduct of a person, if it is intended by the person as an assertion." *State v. Roach*, 364 S.C. 422, 427, 613 S.E.2d 791, 794 (Ct.App. 2005), citing *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996) (finding the gesture of pointing to be an assertion). In the present case, Appellant's demeanor on the videotape was nonverbal conduct which could have easily been feigned and was properly excluded as rank hearsay. See *State v. Rowe*, 77 Wash. 2d 955, 958-59, 468 P.2d 1000 (1970) ("[s]ince it is generally held that polygraph tests are not judicially acceptable, it is obvious that a defendant should not be permitted to introduce evidence of his professed willingness to take such a test. At best such an offer is a self-serving act or declaration which is made without any possible risk. If the offer is accepted and the test given, the results cannot be used in evidence whether they were favorable or unfavorable. *In short, a defendant has everything to gain and nothing to lose by making the offer, so the conduct underlying the so-called inference of innocence can well be feigned, artificial and wholly unreliable*"). (citations omitted and emphasis added); *Perry*, 223 A.D.2d at 479, 637 N.Y.S.2d at 75 (a person involved in criminal activity has a strong incentive to feign nonchalance upon contact with the authorities, and such conduct would constitute a self-serving assertion of innocence that would constitute inadmissible hearsay); *West v. State*, 53 Fla. 77, 43 So. 445, 446 (1907) ("Evidence of self-serving declarations and conduct ... when they form no part of the conduct or conversations introduced by the prosecution, should not, as a rule, be admitted in a criminal prosecution...."); *People v. Jardin*, 154 Misc.2d 172, 175-77, 584 N.Y.S.2d 732 (N.Y. Sup. 1992) ("consciousness of innocence" evidence "sought to prove the fact of 'innocence' by [the defendant's] conduct" is a "nonverbal assertion clearly constitut[ing] hearsay and can be admitted

into evidence only if it falls within a recognized exception to the hearsay rule"); *Lewis*, 815 S.W.2d at 568 (defendant's hearsay expressions of remorse not admissible at punishment phase of capital murder trial).

Indeed, the demeanor is so commingled with his statements it must be regarded as hearsay. *See Walters, supra*. There is also no merit to Appellant's suggestion, which is also barred under *Bailey* because no raised below, that his demeanor made it more likely that he acted in self-defense. Rather, it is equally plausible that it might have simply dawned upon him - after the police were summoned - that he was looking at serving the rest of his life in prison because he had savagely and maliciously took the life of his unarmed neighbor. Moreover, any error was non-prejudicial because evidence of his demeanor was already before the jury, as discussed.

CONCLUSION

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

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

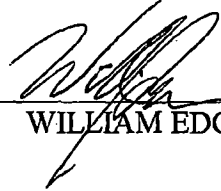
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By: 

WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

October 29, 2007

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Spartanburg County
The Honorable Paul M. Burch, Circuit Court Judge**

THE STATE,

Respondent,

vs.

DAMION JACQUISE JONES,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR 211(b).

**HENRY D. McMASTER
Attorney General**

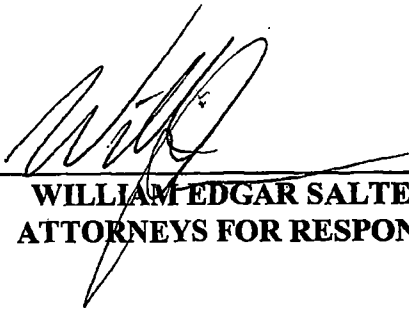
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By: 

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THE STATE,

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DAMION JACQUISE JONES,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Counsel on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, 1330 Lady Street, Suite 401, Columbia, South Carolina 29211.

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

This 29TH day of October, 2007.



WILLIAM EDGAR SALTER, III

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May 8, 2008

Division of Appellate Defense
 1330 Lady Street, Suite 401
 Columbia, SC 29201-1589

Robert M. Dudek
 Deputy Chief Appellate Defender for Capital Appeals

03-28-08 Met with Attorney Chris Brough at his office to discuss the trial and the letter he had received from Richard Vaughn Kershner. I obtained copies of the jury list and notes from the trial. I reviewed the case file at that time.

03 Hours 12 Miles

03-31-08 Left am message with Mr. Vaughn Kershner for a possible interview.

04-09-08 Left another message with Mr. Vaughn Kershner for possible interview.

04-10-08 Received a return call from Mr. Vaughn Kershner and set a meeting for April 12, 2008.

04-12-08 Met with Richard Vaughn Kershner, juror #70. We discussed the letter he wrote to the attorney. We also discussed the trial in detail from his view. He drew pictures of the crime scene as he remembered. He discussed the jurors and their actions in the jury room. Mr. Vaughn Kershner was very descriptive and very through during the interview. He was very clear about one of the lady jurors talking about a gun being pointed at her

during some time in her life. He expressed being pressured in his decision and the remorse he felt.

After meeting with Mr. Vaughn Kershner I was able to determine by process of elimination the few jurors that may have talked about the gun by the descriptions he gave.

Katherine Henson, juror #54
 Pamela A. Marshall, juror #84
 Sandra T. McGraw, juror #86
 4 Hours 19 Miles

04-13-08 Worked on the address and printed maps of the locations of the three (3) possible jurors in question.

1.5 Hours

04-28-08

Pamela Marshall

Juror #84

Alverson Rd.

Inman, SC 29349

I made three attempts to locate Mrs. Marshall. The address she used on the jury list was he sons. On 05-02-08 I was able to talk with Mrs. Marshall briefly at her sons residence as she was leaving when I arrived. She seemed very unclear about her reasoning. Her comments below:

1. I hope he doesn't get out
2. It happened in a car and there was no blood in the car
3. His friend tried to justify the shooting

Mrs. Marshall set up an appointment with me at that time for Monday 05-05-08 at 10:30 P.M.

I arrived at the set time on 05-05-08 and Mrs. Marshall was not at the residence. I was told she was at the doctor. I left my card with phone numbers. On 05-06-08 an Investigator from the Spartanburg City Police Dept. called and inquired as to my business with Mrs. Marshall. After I explained the Investigator understood and called Mrs. Marshall. On 05-07-08 Mrs. Marshall called me to make another appointment. I met with her on 05-08-08. At that time Mrs. Marshall seemed to be impaired in some way. Her speech was slurred and she had the attitude that she didn't remember anything. Mrs. Marshall was unable to tell me where she sat at the jury table during deliberation

Mrs. Marshall is in the process of moving to Michigan.

5 Hours 138 Miles

04-21-08

Sandra T. McGraw

Juror #86

████ Loblolly Dr.

Spartanburg, SC 29303

████-8768

I went to this residence on five (5) different occasions all at different times to attempt to talk with Mrs. McGraw. Each time there were vehicles in the driveway and in the carport, but no one would come to the door. I obtained the phone number and was able to set up an interview on May 5, 2008. Present during the interview was Mrs. McGraw and her present husband. We discussed the Voir Dire from the court. She did disclose the CDV her son was convicted of with his x-wife in detail. Below are statements she made about the trial:

1. Jones did not show any fear.
2. Jones continued to talk about his son as if he was a good father.
3. The alcohol consumption was not discussed until about half way through the deliberation.
4. She thought that the two (2) holdouts were the two (2) black females on the jury.
5. Thought that the Forman, the Teacher, Vaughn Kershner, and one other juror were very smart.
6. Made the comment that Jones was dangerous to society, and that if he did this once he would do it again.
7. Her theory was that Jones was close enough to the house and the door to get away. She also thought that the gun may have come from inside the house, not the car.
8. There was no discussion of the criminal past or history of Jones.

When I asked Mrs. McGraw about any discussion of a gun being pointed at anyone or anyone talking about this during deliberation, she first looked at her husband with no response. As our conversation continued she began to tell me that she didn't remember saying anything about a gun, but she told me of her x-husband pointing and holding a 357 magnum with the hammer back at her for a period of

time. She expressed fear for her life and said it was for some time that he did this. She was able to talk him down and eventually get the gun from him. She said she did not try to grab the gun because she was afraid he would shoot her.

Mrs. McGraw did not disclose this during the Voir Dire
6 Hours 62 Miles

04-21-08
Katherine Henson
Juror #54
■ Sean Court
Lyman, Sc 29365

After my second attempt to locate Mrs. Henson I confirmed from a neighbor that she still lived here. On May 6, 2008 I made contact with Mrs. Henson. Mrs. Henson was firm that she had made the correct decision based on the information she had been provided. She did not recall anyone talking about a gun being pointed in open decision. She was able to show me where she was sitting during deliberation. Mrs. Henson appeared to be stable and remember some of the facts of the trial.

2.5 Hours 88 Miles

Report Prepared By: Calvin E. "Skip" Smith III

STATE OF SOUTH CAROLINA	)	
	)	IN THE SOUTH CAROLINA COURT OF APPEALS
COUNTY OF SPARTANBURG	)	
THE STATE,	)	
	)	
Respondent,	)	
	)	
v.	)	AFFIDAVIT OF CALVIN E. "SKIP" SMITH, III
	)	
DAMION JACQUISE JONES	)	
	)	
Appellant.	)	
	)	
_____	)	

PERSONALLY appeared before me, Calvin E. "Skip" Smith, III, who being duly sworn, deposes and says:

1. I am a licensed private investigator in South Carolina, number 1754, and a licensed private investigator in North Carolina, number 3591.

2. I was retained by the Office of Indigent Defense, and Robert M. Dudek, to work on the murder case of State v. Damion Jones which I understand is on appeal this date in the South Carolina Court of Appeals.

3. On July 18, 2008 I received three (3) affidavits to review and take to members of the jury in the Damion Jones trial which I had conducted interviews with to review and sign.

4. On the same date above I contacted juror #70 Vaughn Kershner by telephone and set up a meeting with him for the following morning of July 19, 2008.

5. Mr. Kershner and I met at 8:30 A.M. and he reviewed the affidavit as well as signing it with no hesitation or changes.

6. On July 19, 2008 I drove to the residence of juror #86 Sandra McGraw at

7. Again as before after knocking on the door several times with three (3) vehicles in the carport

and driveway and NO one answering I returned to my vehicle and departed the area.

8. I drove around the corner from the residence of Mrs. McGraw and called () from my cell phone and Mrs. McGraw answered the phone.

9. At that time I explained to Mrs. McGraw the purpose of my visit and the phone call and asked her if she would read the affidavit and sign it.

10. Mrs. McGraw asked what was on the affidavit?

11. I explained that there was some question that during the Voir Dire questioning that maybe something had not been disclose.

12. Mrs. McGraw at that time got very defensive as her voice got loud.

13. Mrs. McGraw told me that she did not disclose the fact of a gun being pointed at her because it was no ones business.

14. Mrs. McGraw was getting very upset on the phone as I was trying to comfort and calm her down, and I would come to her residence at her convenience.

15. She asked me to read her the part of the Voir Dire that would require her to disclose the fact that she had a .357 pointed at her.

16. I read question #5, Have you or anyone you know ever been the victim of a violent crime?

17. Mrs. McGraw went on to say that she had done her job during the trial and that I was just trying to get that guy off.

18. I expressed to Mrs. McGraw that I had no connection to the trial and that I was only contracted to conduct the interviews based on information provided during the trial.

19. Mrs. McGraw asked me several times which jurors were talking about what she had said in the jury room.

20. I explained that I was not able to disclose that information and that if she would like to read the affidavit she could sign it or I would send it back unsigned.

21. Mrs. McGraw said to me at that time, "so if I had not told the truth about the gun being pointed at me this would not be happening".

22. I then explained to Mrs. McGraw that it is very important to always tell the truth.

23. At that time Mrs. McGraw told me to call her on Monday July 21, 2008, and agreed that I would be glad to wait until Monday.

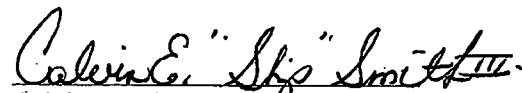
24. On Monday July 21, 2008 I began calling at approximately 11:30 A.M. and I received a busy signal throughout the afternoon until approximately 7:05 P.M. when Mr. McGraw answered the phone.

25. Mr. McGraw asked me to read the affidavit to him over the phone, which I did read it to him word for word.

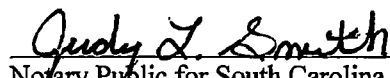
26. Mr. McGraw went on to say to me that I/we were only trying to get this guy off.

27. Again I explained to Mr. McGraw that I had connection to the trial and that I was only conducting the interviews as well as the follow up to the interviews.

28. Mr. McGraw told me that he was waiting on a call from his attorney and that Mrs. McGraw would not sign the affidavit.


Calvin E. "Skip" Smith, III

SWORN TO before me this 23rd
day of JULY, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-21-2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE SOUTH CAROLINA COURT OF APPEALS
COUNTY OF SPARTANBURG	)	
THE STATE,	)	
	)	
Respondent,	)	
	)	
v.	)	AFFIDAVIT OF CALVIN E. "SKIP" SMITH, III
	)	
DAMION JACQUISE JONES	)	
	)	
Appellant.	)	
	)	
	)	

PERSONALLY appeared before me, Calvin E. "Skip" Smith, III, who being duly sworn, deposes and says:

1. I am a licensed private investigator in South Carolina, number 1754. I am also worked undercover for law enforcement.
2. I was retained by the Office of Indigent Defense, and Robert M. Dudek, to work on the murder case of State v. Damion Jones which I understand is on appeal this date in the South Carolina Court of Appeals.
3. I was provided information about a juror, Vaughn Kershner, who had written to trial counsel, Christopher Brough, following the defendant's murder conviction in this case. Mr. Kershner was raising to trial counsel the issue of misconduct in the deliberations because one woman juror had not revealed she was the victim of a violent crime. She said her ex-husband held a gun to her head. I understand that Mr. Brough would have struck her from the jury if she had revealed, when asked, during *voir dire*, if she had ever been the victim of a violent crime.
4. I interviewed Mr. Kershner who vividly remembered what occurred in the jury room during deliberations. Mr. Kershner described a blonde lady in her forties who was very talkative. Mr. Kershner heard this woman talking about being a victim of a violent domestic crime where her ex-husband put a gun

to her head. This juror was very adamant in talking about that incident.

5. My next duty was to investigate, and attempt to find this woman juror. I was able to identify her through my investigation as Sandra T. McGraw. I went to her house on five different occasions and each time there were vehicles in the driveway, but no one would come to the door.

6. Finally, I was able to set up an interview with her for May 5, 2008. Ms. McCraw was interviewed in the presence of her husband about the State v. Damion Jones case. Ms. McCraw told me that she remembered there was two holdout jurors who she thought were black females. She commented that Vaughn Kershner and the foreman or a teacher were very smart people.

7. Ms. McGraw was eventually asked directly if she remembered any discussion about a gun being pointed at anyone in the past being discussed during the jury deliberations in this case. Ms. McGraw told me she did not remember saying anything about a gun, but she acknowledged in the presence of her husband that her ex-husband had pointed a held a .357 magnum with the hammer back at her for a period of time. She expressed to me that she feared for her life, and that he had held the gun on her for some time. She ultimately was able to talk him down and get the gun away from him.

8. I already knew from interviewing Christopher Brough that Ms. McGraw, who we could not located by name at that time, had not revealed during voir dire that she was the victim of a violent crime, and that he would have struck her if she would have answered the question posed to all of the jurors.

9. I am available to testify if Mr. Jones is given a hearing on this issue in the future.

Calvin E. "Skip" Smith, III
Calvin E. "Skip" Smith, III

SWORN TO before me this 18TH
day of JULY, 2008.

Judy L. Smith (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-21-2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE SOUTH CAROLINA COURT OF APPEALS
COUNTY OF SPARTANBURG	)	
THE STATE,	)	
	)	
Respondent,	)	
	)	
v.	)	AFFIDAVIT OF CALVIN E. "SKIP" SMITH, III
	)	
DAMION JACQUISE JONES	)	
	)	
Appellant.	)	
	)	
_____	)	

PERSONALLY appeared before me, Calvin E. "Skip" Smith, III, who being duly sworn, deposes and says:

1. I am a licensed private investigator in South Carolina, number 1754, and a licensed private investigator in North Carolina, number 3591.

2. I was retained by the Office of Indigent Defense, and Robert M. Dudek, to work on the murder case of State v. Damion Jones which I understand is on appeal this date in the South Carolina Court of Appeals.

3. On July 18, 2008 I received three (3) affidavits to review and take to members of the jury in the Damion Jones trial which I had conducted interviews with to review and sign.

4. On the same date above I contacted juror #70 Vaughn Kershner by telephone and set up a meeting with him for the following morning of July 19, 2008.

5. Mr. Kershner and I met at 8:30 A.M. and he reviewed the affidavit as well as signing it with no hesitation or changes.

6. On July 19, 2008 I drove to the residence of juror #86 Sandra McGraw at [REDACTED] Loblolly Dr. in Spartanburg, SC.

7. Again as before after knocking on the door several times with three (3) vehicles in the carport

and driveway and NO one answering I returned to my vehicle and departed the area.

8. I drove around the corner from the residence of Mrs. McGraw and called [REDACTED]-8768 from my cell phone and Mrs. McGraw answered the phone.

9. At that time I explained to Mrs. McGraw the purpose of my visit and the phone call and asked her if she would read the affidavit and sign it.

10. Mrs. McGraw asked what was on the affidavit?

11. I explained that there was some question that during the Voir Dire questioning that maybe something had not been disclose.

12. Mrs. McGraw at that time got very defensive as her voice got loud.

13. Mrs. McGraw told me that she did not disclose the fact of a gun being pointed at her because it was no ones business.

14. Mrs. McGraw was getting very upset on the phone as I was trying to comfort and calm her down, and I would come to her residence at her convenience.

15. She asked me to read her the part of the Voir Dire that would require her to disclose the fact that she had a .357 pointed at her.

16. I read question #5, Have you or anyone you know ever been the victim of a violent crime?

17. Mrs. McGraw went on to say that she had done her job during the trial and that I was just trying to get that guy off.

18. I expressed to Mrs. McGraw that I had no connection to the trial and that I was only contracted to conduct the interviews based on information provided during the trial.

19. Mrs. McGraw asked me several times which jurors were talking about what she had said in the jury room.

20. I explained that I was not able to disclose that information and that if she would like to read the affidavit she could sign it or I would send it back unsigned.

21. Mrs. McGraw said to me at that time, "so if I had not told the truth about the gun being pointed at me this would not be happening".

22. I then explained to Mrs. McGraw that it is very important to always tell the truth.

23. At that time Mrs. McGraw told me to call her on Monday July 21, 2008, and agreed that I would be glad to wait until Monday.

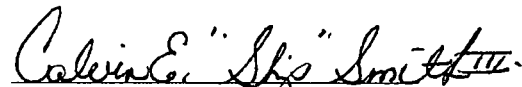
24. On Monday July 21, 2008 I began calling [REDACTED] 8768 at approximately 11:30 A.M. and I received a busy signal throughout the afternoon until approximately 7:05 P.M. when Mr. McGraw answered the phone.

25. Mr. McGraw asked me to read the affidavit to him over the phone, which I did read it to him word for word.

26. Mr. McGraw went on to say to me that I/we were only trying to get this guy off.

27. Again I explained to Mr. McGraw that I had connection to the trial and that I was only conducting the interviews as well as the follow up to the interviews.

28. Mr. McGraw told me that he was waiting on a call from his attorney and that Mrs. McGraw would not sign the affidavit.


Calvin E. "Skip" Smith, III

SWORN TO before me this 23rd
day of JULY, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-21-2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE SOUTH CAROLINA COURT OF APPEALS
COUNTY OF SPARTANBURG	)	
THE STATE,	)	
	)	
Respondent,	)	
	)	
v.	)	AFFIDAVIT OF CHRISTOPHER BROUGH
	)	
DAMION JACQUISE JONES	)	
	)	
Appellant.	)	
	)	
	)	

PERSONALLY appeared before me, Christopher Brough, who being duly sworn, deposes and says:

1. I am an attorney in private practice in Spartanburg, South Carolina.

2. I was an Assistant Public Defender at the time I represented Damion Jones in his murder trial. After the trial I received a letter from Juror Vaughn Kershner, who was upset about the trial. Mr. Kershner informed me in his letter about a woman juror who talked about her ex-husband having put a gun to head. Mr. Kershner described how this woman juror discussed this graphic incident adamantly during jury deliberations.

3. This incident very much concerned me because I would have used a peremptory challenge to remove any juror who had been the victim of a violent crime. The question of whether anyone on the panel had ever been the victim of a violent crime or had a close personal friend or a family member had ever been the victim was clearly asked during voir dire, and I remembered the question. (See, also, the trial transcript at p. 25-26) Two potential jurors, both men, responded to this inquiry. This unknown woman juror obviously did not respond to this broad question. As stated, she would have been struck by me if she had revealed this incident during voir dire, which she was under an obligation to do, since it was unquestionably a violent crime. I spoke to Mr. Kershner on the phone about the matter in more detail in search of a remedy.

4. The procedural problem was that the case was already on appeal because I was obligated to file the notice of intent to appeal within ten days of the conviction. Appellate Defense was handling the appeal for Damion Jones at this point. I contacted the Court of Appeals but the Court refused to deal with me since I was the trial attorney, and no longer the attorney of record. I later talked with Robert Dudek of that office who now represented Mr. Jones. Mr. Dudek informed me that since the trial or circuit court no longer had jurisdiction over the case that all we could procedurally do at the appellate level would be to move that the appellate court suspend the appeal, hold it in abeyance, and remand for a hearing in the circuit court on a motion for a new trial. However, we first had to have affidavits under the case law to convince an appellate court that we had a meritorious issue justifying holding the appeal in abeyance, and remanding to the Circuit Court, a fact-finding Court for a hearing.

5. Mr. Dudek and I discussed possible private investigators that he could retain to justify such a motion. He informed me that his office, as an appellate office, was really not equipped to deal with such a fact finding intensive investigative issue. I understand that he received permission to retain Skip Smith from Indigent Defense, and I was later interviewed by Mr. Smith about this case.

6. I also learned that Mr. Smith interviewed Mr. Kershner, and that he was able to identify the woman juror who did not respond to the voir dire victim of a violent crime question as Sandra McGraw. Again, if Ms. McGraw had identified herself as having been the victim of a violent crime during voir dire I would have struck her. That was an absolute certainty.

7. I am available to further discuss this matter, and provide additional information to the Court. I understand that Mr. Jones case is still pending on appeal, but I am available to testify at an evidentiary hearing regardless of the procedural posture of the case at the time. I very much bothered by this case since I respectfully do not think Mr. Jones received a fair trial.

Christopher Brough

SWORN TO before me this ____
day of _____, 2008.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE SOUTH CAROLINA COURT OF APPEALS

THE STATE,)
Respondent,)

v.)

AFFIDAVIT OF SANDRA T. MCGRAW

DAMION JACQUISE JONES)
Appellant.)

PERSONALLY appeared before me, Sandra T. McGraw, who being duly sworn, deposes and says:

1. I was a juror during the murder trial of Damion Jones in Spartanburg, County. I voted to convict Mr. Jones.

2. I was later contacted by Private Investigator, Skip Smith, who wanted to interview me about the case. I agreed to be interviewed.

3. I was interviewed by Mr. Smith at my home, [REDACTED] Loblolly Drive, in Spartanburg in the presence of my husband.

4. Mr. Smith questioned me about jury deliberations, and he asked me if I remembered an incident being mentioned during jury deliberations of someone having held a gun to someone's head in the past.

5. I told Mr. Smith while I did not remember the incident being mentioned at trial that my ex-husband had indeed once held a .357 magnum to my head with the hammer cocked. I was obviously afraid for my life at the time since I thought he was going to shoot me. I did not try to grab the gun because I thought he would shoot me. I was able to finally talk him into giving me the gun.

Sandra T. McGraw

SWORN TO before me this _____
day of _____, 2008.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: _____

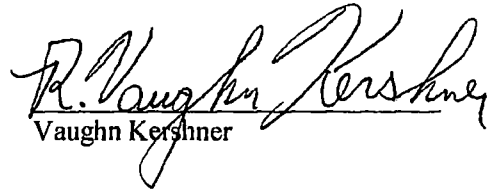
STATE OF SOUTH CAROLINA	)	
	)	IN THE SOUTH CAROLINA COURT OF APPEALS
COUNTY OF SPARTANBURG	)	
THE STATE,	)	
	)	
Respondent,	)	
	)	
v.	)	AFFIDAVIT OF VAUGHN KERSHNER
	)	
DAMION JACQUISE JONES	)	
	)	
Appellant.	)	
	)	
	)	
	)	

PERSONALLY appeared before me, Vaughn Kershner, who being duly sworn, deposes and says:

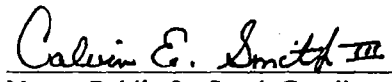
1. I was a juror in the murder case of State v. Damion Jones. The state's case was that Mr. Jones shot the victim in cold blood, and not out of self-defense.
2. The jury struggled to reach a verdict in this case. However, we ultimately found Mr. Jones guilty.
3. I subsequently wrote to trial counsel to notify him that I thought one woman juror, who I later described as being in her 40's with "big blonde hair," had improperly brought her own dealing with domestic violence and guns into the jury deliberations. Specifically, this juror was talking with another woman juror during deliberations about a gun being pointed at her head by her former husband, and that she knew how it felt.
4. I felt this invited a verdict on an emotional basis based on this woman's prior dealings with having a gun pointed at her head by her ex-husband. I later learned, after an investigation, that this woman has now been identified as Juror Sandra T. McGraw. I very much regret that I "caved in," and ultimately voted to convict Mr. Jones.
5. I later learned that Ms. McGraw did not answer the *voir dire* question about anyone having been a victim of a violent crime. Although I am an engineer and not a lawyer, I understand that lawyers cannot intelligently choose to seat or dismiss jurors unless they are honest and reveal important facts about

their life's experiences.

6. Finally, I would like to add that I am a law and order citizen and certainly not a person prone to have any sympathy for criminals. However, in this case, in my opinion, what happened to the accused, Mr. Jones, was very unfair. I am available to testify and to be cross-examined about the above if it will assist in righting this injustice.


Vaughn Kershner

SWORN TO before me this 19TH
day of JULY, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-06-2014

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

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

The State Respondent,

v.

Damon Jacquise Jones, Appellant.

Appeal From Spartanburg County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2008-UP-424
Submitted June 2, 2008 – Filed July 23, 2008

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert
M. Dudek, South Carolina Commission on
Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Senior Assisant Attorney General
William Edgar Salter, III, all of Columbia; and
Solicitor Harold W. Gowdy, III, of Spartanburg, for
Respondent.

PER CURIAM: Damon Jacquise Jones (Jones) appeals his conviction for murder, contending the trial court erred by not admitting his videotaped interrogation into evidence. We affirm.

FACTS

In late 2005, Jones stood trial for the murder of Sigida Long (Sigida). Jones testified to the events surrounding this incident. According to his testimony, on February 25, 2005, Jones,

Ben Foster (Foster), and Gregg Hardy (Hardy) were at Hardy's sister's house drinking beer. Subsequently, Jones drove Hardy and Foster to Jones' grandmother's house to drop off Foster. Upon arrival, Hardy helped Foster, who was intoxicated, to the door. While Jones remained in the car, the victim, Sigida, and his brother, Atiba Long (Atiba), drove into their driveway next door.[1] Sigida and Atiba then exited their vehicle and knocked on the door of Jones' grandmother's house in an attempt to get Foster to come outside. Unable to get Foster outside, Sigida walked over to Jones' vehicle and pulled Jones out of the car.

Sigida hit Jones in the head a few times, causing Jones to fall back into his vehicle. Jones then grabbed a gun out of the glove compartment, exited the vehicle, cocked the weapon and told Sigida and Atiba to back up. Sigida rushed Jones, and a struggle ensued. During the struggle, the gun discharged, striking and fatally wounding Sigida. Jones then ran into his grandmother's house and instructed his aunt to call the police.

Following the shooting, Sergeant Christopher Taylor, of the Spartanburg Public Safety Department, questioned Jones about the incident, and this interrogation was videotaped. After Jones testified about the events of the incident and his distraught and overwhelmed emotional state following the shooting, Jones' counsel attempted to admit the videotaped interrogation into evidence. The State objected to the videotape's admission, characterizing the evidence as self-serving hearsay. Additionally, the State argued because it did not introduce any statements from the videotape, Jones could not introduce it to bolster his testimony. The trial court sustained the State's objection, finding Jones' statements on the tape "exactly or quite similar" to his testimony.

Defense counsel later called Hardy to testify. Hardy gave his recollection of events and also described Jones as being "in shock" and "hysterical" following the shooting.

The jury found Jones guilty of murder, and he was sentenced to life imprisonment. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id.

LAW/ANALYSIS

Jones contends the trial court erred by excluding his videotaped interrogation from evidence. In the alternative, Jones argues the portion of the videotape prior to his interrogation is not hearsay and was, therefore, improperly excluded. We disagree.

The improper exclusion of evidence is harmless when it is cumulative to other testimony in the record. State v. Sapp, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (2005). Thus, even if the exclusion of cumulative evidence is erroneous, it will not warrant a reversal by this Court. State v. Pipkin, 359 S.C. 322, 328, 597 S.E.2d 831, 834 (Ct. App. 2004).

At trial, Jones argued the shooting took place while he was acting in self-defense. Jones

testified as to the events surrounding the incident as well as his mental state following the shooting. Additionally, Hardy gave his recollection of the incident and testified Jones was "in shock" and "hysterical" following the shooting.

Due to this testimony, the videotape would have been merely cumulative to evidence in the record. The statements on the videotape were found to be "exactly or quite similar" to Jones' testimony, and the jury was told multiple times about Jones' mental state following the shooting. Jones' counsel sought to admit the videotape into evidence to corroborate Jones' testimony rather than to present any new evidence to the jury.[2] Because of its cumulative nature, even if the evidence was improperly excluded, the error was merely harmless. See Sapp, 366 S.C. at 294, 621 S.E.2d at 888 (finding the exclusion of evidence is harmless if it is cumulative to other testimony in the record).

We find no reversible error in the exclusion of the videotape and, therefore, do not address whether each portion of the videotape was inadmissible hearsay. See Hughes v. State, 367 S.C. 389, 408-09, 626 S.E.2d 805, 815 (2006) (finding appellate courts need not address remaining issues when determination of prior issue is dispositive).

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.[3]

WILLIAMS, THOMAS, and PIEPER, JJ., concur.

[1] The Longs lived beside Jones' grandmother.

[2] We additionally note the State never made an issue of Jones' statements on the videotape or his mental state following the shooting.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

COPY

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAMON JACQUISE JONES,

PETITIONER

Appeal from Spartanburg County

Paul M. Burch, Circuit Court Judge

Opinion No. 2008-UP-424

PETITION FOR REHEARING

RECEIVED

AUG 07 2008

SC Court of Appeals

Petitioner Damon Jones requests rehearing pursuant to Rule 221(a), SCACR, because this Court may have overlooked the fact that the videotape was key corroborating evidence of his mental state following the shooting, and because petitioner's and Gregg Hardy's testimony should not be considered as cumulative to the videotape, as this Court held, since the jury was going to be skeptical of that testimony since petitioner and Hardy were together at the time of the fatal incident. Respectfully, a criminal defendant's testimony is almost always going to be considered self-serving, and a jury will be very wary of that testimony. What better corroborating evidence can there be of petitioner's mental state following the shooting than a videotape of petitioner after the shooting?

The videotape does not lie, and it is unquestionably relevant. The testimony of petitioner and witness Hardy at trial was not in any way comparable to a videotape of the actual event.

Further, as stated, Hardy was also going to be suspect in the minds of the jurors. This Court wrote of the struggle before the shooting that Sigida: “[H]it Jones in the head a few times causing Jones to fall back into his vehicle. Jones then grabbed a gun out of the glove compartment, exited the vehicle, cocked the weapon, and told Sigida to back up. Sigida rushed Jones, and a struggle ensued. During the struggle, the gun discharged, striking and fatally wounding Sigida. Jones then ran into grandmother’s house and instructed his aunt to call the police.”¹ State v. Damon Jacquise Jones, 2008-UP-424 (July 23, 2008) at p. 2.

Atiba Long, the decedent’s brother, testified that they got back to his mother’s house at about 6:30 p.m. that September 25, 2005 evening. R. 33, ll. 17 – 25. Long remembered that the decedent then got into an argument with “*Gregg Hardy and Damion Jones*.” (emphasis added). Long said there was a scuffle in the car and that petitioner “got out of the car and shot the decedent in the head.” R. 34, ll. 9 – 22. Long said petitioner kept saying “over and over my brother tried to carjack him.” R. 35, ll. 8 – 18. Long admitted there had been difficulties between the men in the past. R. 40, ll. 16 – 25.

Thus, appellant and Hardy were on the opposite side of the decedent and his brother in this case. Both stories could not be true. The fact Hardy testified petitioner was in shock and hysterical following the shooting was no substitute for a videotape of petitioner following the shooting given that petitioner and Hardy were naturally going to be suspect in the juror’s eyes.

How the issue was raised

As this Court will recall, the solicitor argued that the videotaped interrogation was “self-serving.” The solicitor argued it was hearsay and that appellant was not a proper witness to introduce the videotapes to “bolster” his testimony. R. 133, l. 21 – 134, l. 11.

The solicitor also argued that if the state had introduced part of the videotape that under State v. Cabera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004) the defense could introduce “all of the statements.” However, he argued since the state did not put any part of “the statement in evidence” that it was inadmissible to “bolster” appellant’s testimony. R. 135, l. 5 – 136, l. 6.

Defense counsel noted that appellant had taken the stand, and he was subject cross-examination about everything that happened on the videotape. Defense counsel correctly argued: “I think the State’s main concern *is the emotional state of the defendant during the tape and not what was actually said*. And I think that the reality of why they are objecting to it.” R. 136, ll. 6 – 18. (emphasis added). That videotape is on file with this Court, and it shows appellant’s emotional state.

The judge stated that appellant’s statements on the videotape was apparently “exactly or quite similar to” his testimony. R. 136, l. 19 – 137, l. 1. The judge sustained the solicitor’s objection. This Court affirmed that ruling, and petitioner requests that this Court reconsider and grant rehearing because the state charged petitioner with murder. The state alleged petitioner acted with malice aforethought - - that he killed the decedent in cold blood. Appellant had the right to

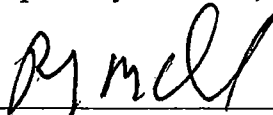
¹ The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter, and self-defense. R. 215, l. 11 – 238, l. 12. The jury began deliberations at 11:14 a.m., and the

present a complete defense. See Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986).

Further, the wrongful exclusion of any evidence that would tend to corroborate a defendant's testimony or lend credence to his defense is prejudicial to his substantial rights. See Wejand v. State, 732 So.2d 1044, 1047 – 1048 (Fla. 1991). It is fundamentally unfair for the prosecution to prevent the defense from corroborating defense testimony and then attack the defendant as being a liar, and his testimony as being untrue. See State v. Turner, 62 Conn. App. 376, 77 A.2d 206, 215 (2001); State v. McCoy, 219 W.Va. 130, 632 S.E.2d 70 (2006).

Petitioner also submits, in the alternative, that the portion of the tape showing only appellant's demeanor, without questions and answers was admissible. There can be no objection on the grounds of the videotape being a prior consistent statement where the portion of the tape which would have been played for the jury did not have petitioner speaking.. Cf. State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). Petitioner requests rehearing.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

This 7th day of August, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 07 2008

SC Court of Appeals

Appeal from Spartanburg County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

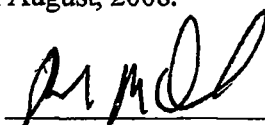
V.

DAMON JACQUISE JONES,

APPELLANT

CERTIFICATE OF SERVICE

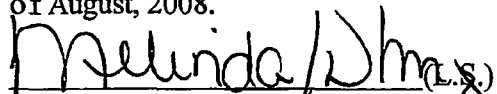
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 this 7th day of August, 2008.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of August, 2008.



Notary Public for South Carolina

My Commission Expires: November 16, 2008.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Damon Jacquise Jones,

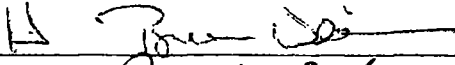
Appellant.

The Honorable Paul M. Burch
Spartanburg County
Trial Court Case No. 2005-GS-42-03771

ORDER DENYING PETITION FOR REHEARING

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

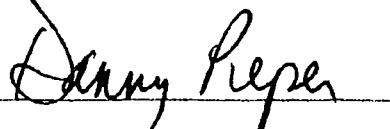
It is, therefore, ordered that the Petition for Rehearing be denied.



J. Williams



J. Thomas



J. Pieper

10
Columbia, South Carolina
September 23, 2008

cc: Appellate Defender Robert M. Dudek
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Senior Asst. Atty General William Edgar Salter, III
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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

Opinion No. 2008-UP-424 (S.C. Ct. App. filed 7/23/2008)

05-GS-42-3771.

THE STATE,

RESPONDENT,

V.

DAMION JACQUISE JONES,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 23, 2008.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding videotaped evidence of petitioner's distraught mental state on the videotaped interrogation, both before and during his interrogation with the police, and which corroborated his self-defense claim, was cumulative to other evidence of his mental state since the videotape was made after the shooting, it was powerful corroborating evidence petitioner had a right for his jury to consider where he testified and was subject to cross-examination?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Spartanburg County grand jury for the offense of murder. R. 255. His case was called to trial on November 29, 2005 before the Honorable Paul Burch and a jury. Christopher Brough represented petitioner. Barry Barnette and Jennifer Jordon were the Solicitors. R. 1.

At the conclusion of the trial on December 1, 2005 the jury found petitioner guilty. R. 242, ll. 18 – 21. Judge Burch sentenced petitioner to life imprisonment. R. 253, l. 23 – 254, l. 1.

The Court of Appeals affirmed in State v. Damon Jacquise Jones, 2008 UP-424 (July 23, 2008). App. 1-3. Petitioner sought rehearing. App. 4-8. Rehearing was denied. App. 9.

This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by holding videotaped evidence of petitioner's distraught mental state on the videotaped interrogation, both before and during his interrogation with the police, and which corroborated his self-defense claim, was cumulative to other evidence of his mental state since the videotape was made after the shooting, it was powerful corroborating evidence petitioner had a right for his jury to consider where he testified and was subject to cross-examination.

Relevant Facts

Prior to trial a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing was held on petitioner's statements to the police. The videotaped questionings of petitioner that were the subject of the hearing were on file with the Court of Appeals, and now this Court.

Spartanburg Police Department Investigator Chris Taylor testified that Investigator Russell Porter gave petitioner his rights prior to questioning him. R. 13, l. 3 – 15, l. 7. See waiver of rights form. R. 257. Taylor acknowledged he may have told petitioner, who he knew because their children attended daycare together, that he could not help him unless he told the police what happened during the incident where petitioner shot the decedent. Defense counsel asked the judge to review the portion of the videotape where "Sergeant Taylor entered the room. I think there may have been a statement made regarding helping Mr. Jones out." R. 15, l. 15 – 19, l. 10.

As will be seen infra, petitioner testified the decedent, who had threatened him in the past, hit petitioner and was attempting to drag him out of the car at the time he shot him. Petitioner said the gun discharged while he was acting in self-defense. There was clear evidence of past difficulties between the parties involved, and the decedent's brother even admitted that fact. R. 40, ll. 16-19; R. 129, l. 13 -131, l. 19.

Police Officer Mark Hillers testified that on February 25, 2005 he responded to a shooting at [REDACTED] R. 19, l. 14 – 20, l. 11. Petitioner told Hillers: “I didn’t mean to kill him. He was pulling me out of the car.” R. 20, ll. 14 – 17. The judge ruled the videotapes *were admissible*. Defense counsel then stated: “the defense is satisfied with the second one. I just ask the court to review the other tape, Your Honor.” The judge responded, “Okay,” and his later comments illustrated he had reviewed the tapes. R. 23, ll. 10 – 15.

The judge then stated: “we’re going to trial here now, of course, the object of any trial is for the jury to seek the truth, *so let’s put the truth out there* to them to the best of our ability and let them decide it.” R. 23, l. 24 – 24, l. 2. (emphasis added).

Jury in

Atiba Long was the brother of the decedent. R. 30, l. 20 – 31, l. 13. Long testified that they got back to his mother’s house at about 6:30 p.m. that September 25, 2005 evening. R. 33, ll. 17 – 25.

Long remembered that the decedent then got into an argument with “Gregg Hardy and Damion Jones.” Long said there was a “scuffle in the car and that petitioner got out of the car and shot the decedent in the head.” R. 34, ll. 9 – 22. Long said petitioner kept saying “over and over my brother tried to carjack him.” R. 35, ll. 8 – 18. Long admitted there had been difficulties between the decedent and petitioner in the past. R. 40, ll. 16 – 25.

Deputy R.C. Talanges testified he was dispatched to the [REDACTED] Street scene on February 25, 2005. R. 43, ll. 18 – 20. The deputy said he found a four-door Buick parked in front of [REDACTED] with the doors open and the headlights on. The decedent was lying beside the vehicle. R. 48, l. 3 – 49, l. 6. The decedent had gunshot residue on his hands, and he had been shot once above the ear. R. 68, l. 23 – 72, l. 21; R. 102, ll. 12-17.

Petitioner testifies

Petitioner testified he had been the victim of other assaults at the hands of the decedent and his brother in the past. They had also made death threats against him. R. 129, ll. 11 – 14. For example, petitioner told of an incident in the Thanksgiving 2002, and another in the summer of 2003. R. 129, l. 15 – 131, l. 6.

Petitioner said he was in danger when the decedent and his brother approached his automobile on February 25, 2005. Petitioner noted: “I’ve been harmed before and issued death threats.” Petitioner detailed how the decedent pulled him out of the car and began hitting him on the side of his head. Petitioner recalled: “I fell back in the car. I grabbed the gun out of the glove [compartment], jumped back out, cocked it, and told both of them to back up.” R. 131, l. 9 – 132, l. 6.

Petitioner said Atiba started to move towards the other side of the car. The decedent “rushed me,” and that there was a struggle over the gun. The gun discharged during the struggle. R. 131, l. 9 – 132, l. 6.

Petitioner thought he had been shot when the gun went off. He then told “my aunt to call the police. I’ve been pulled out of my car.” Petitioner told the responding police officer that the decedent “pulled me out of my car and tried to rob me. And I collapsed in front of whichever officer it was, you know.” Petitioner said he was distraught and overwhelmed following the shooting. R. 132, l. 17 – 133, l. 6.

The videotape

Defense counsel then moved to introduce the videotape of petitioner’s interrogation. The solicitor objected and the jury was sent out. R. 131, ll. 7 – 20.

The solicitor then argued that the videotaped interrogation was “self-serving.” The solicitor argued it was hearsay and that petitioner was not a proper witness to introduce the videotapes to “bolster” his testimony. R. 133, l. 21 – 134, l. 11.

The solicitor also argued that if the state had introduced part of the videotape that under State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004) the defense could introduce “all of the statements.” However, he argued since the state did not put any part of “the statement in evidence” that it was inadmissible to “bolster” petitioner’s testimony. R. 135, l. 5 – 136, l. 6.

Defense counsel noted that petitioner had taken the stand, and he was subject cross-examination about everything that happened on the videotape. Defense counsel argued: “I think the State’s main concern is the emotional state of the defendant during the tape and not what was actually said. And I think that the reality of why they are objecting to it.” R. 136, ll. 6 – 18. (emphasis added). Again, the videotape is on file with this Court, and it shows petitioner’s emotional state.

The judge stated that petitioner’s statements on the videotape was apparently “exactly or quite similar to what” his testimony. R. 136, l. 19 – 137, l. 1. The judge sustained the solicitor’s objection

Limited part of the videotape

Defense counsel then asked the judge to admit “the limited portion of the tape before the defendant makes any statements.” The solicitor then objected that this was still “self-serving hearsay.” R. 133, ll. 4 – 11. Defense counsel responded: “It’s not hearsay. He never said anything.” The judge refused to allow even the portion of the tape before petitioner began talking into evidence. The judge stated: “I have ruled. I have ruled.” R. 133, ll. 4 – 11.

When the jury was brought back in, petitioner again stated he was distraught after the shooting. Of course, what the jury did not know was that the videotape corroborating that fact had just been excluded. R. 137, l. 22 – 138, l. 4.

The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter, and self-defense. R. 215, l. 11 – 238, l. 12. The jury began deliberations at 11:14 a.m. and the verdict of guilty of murder was returned at 6:57 p.m. R. 239, l. 7 - 242, l. 23

Discussion

Petitioner argued in the Court of Appeals that the misunderstanding regarding self-serving *statements* went back to many solicitors not understanding, or conveniently choosing not to understand, this Court's opinion in State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (1999), *cert. denied*, 531 U.S. 882, 121 S.Ct. 197 (2000). In State v. Terry, the trial judge ruled petitioner's inculpatory statements were admissible against him. The defense then told the jury in opening statements that petitioner had confessed to the crime.

The solicitor then decided, given the defense admission that Terry had confessed, that it would not introduce Terry's confession into evidence. The reason was that Terry's confession would have entitled him to an instruction on voluntary manslaughter which potentially could have ended the death penalty case at the conclusion of the guilt phase.

The defense in Terry then attempted to introduce Terry's confession as a statement against penal interest. This Court essentially noted, agreeing with other jurisdictions, that unless a defendant essentially confessed to capital murder, he could not introduce his own statement as a statement against penal interest. This was largely true because a defendant could get his version of what occurred across to the jury *without being subject to cross-examination*. See State v. Golson, 349 S.C. 421, 562 S.E.2d 663 (2002).

In State v. Cabrera-Pena, *supra*, this Court held that where the state introduced part of the defendant's statement stating that he shot the decedent -- which the state argued meant on purpose -- the defendant was entitled to introduce the other portion of his statement, in which he stated the victim grabbed the gun and it accidentally discharged. The remainder of the statement -- the accident portion -- was admissible under the "rule of completeness," Rule 106, SCRE, in fairness to the defendant.

Prior to this Court's opinion in State v. Cabrera-Pena, solicitors were largely successful in keeping any portion of a defendant's statement from the jury while simply arguing it was "self-serving." Here, the solicitor argued he did not introduce any part of petitioner's statement, petitioner was therefore not entitled to introduce any part of the videotape.

Defense counsel correctly noted that petitioner had taken the witness stand, and was subject to cross-examination. The state would have the opportunity to fully cross-examine petitioner about not only the videotaped interrogation but his trial testimony.

The state in this case took the "self-serving" argument one step further by keeping from the jury corroborating videotaped evidence of petitioner's distraught mental state from the jury. Petitioner after the shooting immediately had the police called, and he gave a statement to the police consistently stating the shooting was self-defense, and he was very distraught about it. A person who was attacked, and who he armed himself in self-defense, and whose gun discharged in self-defense was much more likely to act as the distraught petitioner did on the videotape than a person who was calculating a cover-up of a murder. See State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990). Defense counsel correctly argued that petitioner's emotional state on the videotape was really what the state was afraid of in

this case. See videotape. Surely if petitioner was smug and deceptive on the videotape the state would have wanted it played for the jury.

Court of Appeals holding.

The Court of Appeals respectfully dispatched what petitioner respectfully submits is a significant legal issue in an unpublished opinion which found the videotaped evidence was cumulative to the testimony of petitioner and his friend Hardy that petitioner was "in shock" and "hysterical following the shooting." App. 3. The Court of Appeals ruled "[t]he jury was told multiple times about Jones' mental state following the shooting." The Court therefore held this evidence was cumulative, and its exclusion harmless. App. 3. Given its holding the Court stated it was not necessary to address whether each portion of the videotape was inadmissible hearsay.

Petition for rehearing

Petitioner on rehearing again noted that the state charged petitioner with murder. The state alleged petitioner acted with malice aforethought - - that he killed the decedent in cold blood. Petitioner had the right to present a complete defense. See Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986). App. 7.

Credible corroboration is the key to any criminal defense since a defendant's testimony will almost always be viewed as self-serving, as here so would his friend Hardy's testimony.

Petitioner's submission to this Court remains the same as was the one rejected by the Court of Appeals. That is that the wrongful exclusion of evidence -- here a powerful videotape -- that would tend to corroborate a defendant's testimony or lend credence to his defense is prejudicial to his substantial rights. See Wejand v. State, 732 So.2d 1044, 1047-1048 (Fla. 1991). It was fundamentally unfair for the prosecution here to prevent petitioner from presenting powerful corroborating videotaped evidence, and then attack petitioner's claim of self-defense as

unworthy of belief, and defense testimony as being untrue. See State v. Turner, 62 Conn. App. 376, 77 A.2d 206, 215 (2001); State v. McCoy, 219 W.Va. 130, 632 S.E.2d 70 (2006).

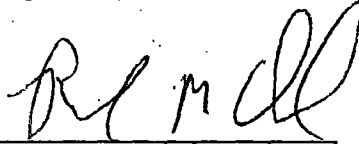
A picture can paint a thousand words. There is a no better recent example of that truism than the unfortunate incident showing a police officer allegedly attempting to run over, or "bump," a fleeing suspect on videotape. Rodney King's case is also still remembered by many, and respectfully no words or testimony from witnesses with an alleged motive to misrepresent -- on both sides -- could ever have had the power of the videotaped evidence in those two cases.

The police often do not videotape an interrogation or statement because they maintain it makes suspects more wary of what is occurring, and lessens the number of suspects who would otherwise confess. However, this renders unavailable a credible contemporaneous picture for the jury of what occurred. Here, there was a videotape that constituted significant corroborating evidence, and petitioner had the right to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986).

CONCLUSION

A writ of certiorari should be granted to allow full briefing on this issue.

Respectfully submitted,

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

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER.

This 29th day of December, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

Opinion No. 2008-UP-424 (S.C. Ct. App. filed 7/23/2008)
05-GS-42-3771.

THE STATE,

RESPONDENT,

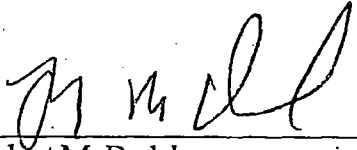
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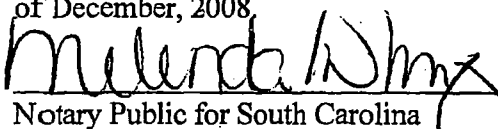
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, and the S.C. Court of Appeals this 29th day of December, 2008.


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018

The Supreme Court of South Carolina

The State,

Respondent,

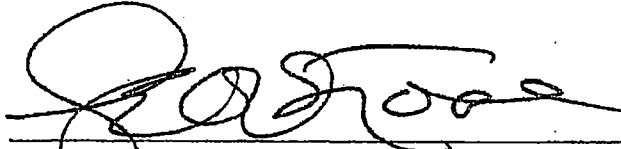
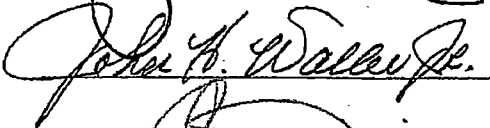
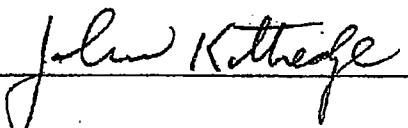
v.

Damon Jacquise Jones,

Petitioner.

ORDER

We grant Damon Jacquise Jones' petition for a writ of certiorari to review the Court of Appeals' decision in State v. Jones, Op. No. 2008-UP-424 (S.C. Ct. App. filed July 23, 2008). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C. J.
 J.
 J.
 J.

Columbia, South Carolina

December 2, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMON JACQUISE JONES,

APPELLANT

BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether the Court of Appeals erred by holding videotaped evidence of petitioner's distraught mental state on the videotaped interrogation, both before and during his interrogation with the police, and which corroborated his self-defense claim, was cumulative to other evidence of his mental state since the videotape was made after the shooting, it was powerful corroborating evidence petitioner had a right for his jury to consider where he testified and was subject to cross-examination?

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Petitioner sought certiorari which was granted by this Court.

ARGUMENT

The Court of Appeals erred by holding videotaped evidence of petitioner's distraught mental state on the videotaped interrogation, both before and during his interrogation with the police, and which corroborated his self-defense claim, was cumulative to other evidence of his mental state since the videotape was made after the shooting, it was powerful corroborating evidence petitioner had a right for his jury to consider where he testified and was subject to cross-examination.

Relevant Facts

Prior to trial a Jackson v. Denno, 378 U.S. 368 (1964), hearing was held on petitioner's statements to the police. The videotaped questionings of petitioner that were the subject of the hearing were on file with the Court of Appeals, and now this Court.

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As will be seen infra, petitioner testified the decedent, who had threatened him in the past, hit petitioner and was attempting to drag him out of the car at the time he shot him. Petitioner said the gun discharged while he was acting in self-defense. There was clear evidence of past difficulties between the parties involved, and the decedent's brother even admitted that fact. R. 40, ll. 16-19; R. 129, l. 13 -131, l. 19.

Police Officer Mark Hillers testified that on February 25, 2005 he responded to a shooting at [REDACTED] R. 19, l. 14 – 20, l. 11. Petitioner told Hillers: “I didn’t mean to kill him. He was pulling me out of the car.” R. 20, ll. 14 – 17. The judge ruled the videotapes *were admissible*. Defense counsel then stated: “the defense is satisfied with the second one. I just ask the court to review the other tape, Your Honor.” The judge responded, “Okay,” and his later comments illustrated he had reviewed the tapes. R. 23, ll. 10 – 15.

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Discussion

Petitioner argued in the Court of Appeals that the misunderstanding regarding self-serving *statements* went back to many solicitors not understanding, or conveniently choosing not to understand, this Court's opinion in State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (1999), *cert. denied*, 531 U.S. 882 (2000). In State v. Terry, the trial judge ruled petitioner's inculpatory statements were admissible against him. The defense then told the jury in opening statements that petitioner had confessed to the crime.

The solicitor then decided, given the defense admission that Terry had confessed, that it would not introduce Terry's confession into evidence. The reason was that Terry's confession would have entitled him to an instruction on voluntary manslaughter which potentially could have ended the death penalty case at the conclusion of the guilt phase.

The defense in Terry then attempted to introduce Terry's confession as a statement against penal interest. This Court essentially noted, agreeing with other jurisdictions, that unless a defendant essentially confessed to capital murder, he could not introduce his own statement as a statement against penal interest. This was largely true because a defendant could get his version of what occurred across to the jury *without being subject to cross-examination*. See State v. Golson, 349 S.C. 421, 562 S.E.2d 663 (2002).

In State v. Cabrera-Pena, *supra*, this Court held that where the state introduced part of the defendant's statement stating that he shot the decedent -- which the state argued meant on purpose -- the defendant was entitled to introduce the other portion of his statement, in which he stated the victim grabbed the gun and it accidentally discharged. The remainder of the statement -- the accident portion -- was admissible under the "rule of completeness," Rule 106, SCRE, in fairness to the defendant.

Prior to this Court's opinion in State v. Cabrera-Pena, solicitors were largely successful in keeping any portion of a defendant's statement from the jury while simply arguing it was "self-serving." Here, the solicitor argued that since he did not introduce any part of petitioner's statement, petitioner was therefore not entitled to introduce any part of the videotape.

Defense counsel correctly noted that petitioner had taken the witness stand, and was subject to cross-examination. The state would have the opportunity to fully cross-examine petitioner about not only the videotaped interrogation but his trial testimony.

The state in this case took the "self-serving" argument one step further by keeping from the jury corroborating videotaped evidence of petitioner's distraught mental state from the jury. Petitioner after the shooting immediately had someone call the police, and he gave a statement to the police consistently stating the shooting was self-defense, and he was very distraught about it. A person who was attacked, and who he armed himself in self-defense, and whose gun discharged in self-defense was much more likely to act as the distraught petitioner did on the videotape than a person who was calculating a cover-up of a murder. See State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990). Defense counsel correctly argued that petitioner's emotional state on the videotape was really what the state was afraid of in

this case. See videotape. Surely if petitioner was smug and deceptive on the videotape the state would have wanted it played for the jury.

Court of Appeals holding.

The Court of Appeals summarily dispatched what petitioner respectfully submits is a significant legal issue in an unpublished opinion which found the videotaped evidence was cumulative to the testimony of petitioner and his friend Hardy that petitioner was “in shock” and “hysterical following the shooting.” App. 3. The Court of Appeals ruled “[t]he jury was told multiple times about Jones’ mental state following the shooting.” The Court therefore held this evidence was cumulative, and its exclusion harmless. App. 3. Given its holding, the Court stated it was not necessary to address whether each portion of the videotape was inadmissible hearsay.

Petition for rehearing

Petitioner on rehearing again noted that the state charged petitioner with murder. The state alleged petitioner acted with malice aforethought - - that he killed the decedent in cold blood. Petitioner had the right to present a complete defense. See Holmes v. South Carolina, 547 U.S. 319 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986). App. 7.

Credible corroboration is the key to any criminal defense since a defendant’s testimony will almost always be argued by the state as self-serving, as here so would his friend Hardy’s testimony.

Petitioner’s submission to this Court remains the same as was the one rejected by the Court of Appeals. That is that the wrongful exclusion of evidence -- here a powerful videotape -- that would tend to corroborate a defendant’s testimony or lend credence to his defense is prejudicial to his substantial rights. See Weiland v. State, 732 So.2d 1044, 1047–1048 (Fla. 1991); Prewitt v. State, 150 Ark. 279, 234 S.W.2d 35, 38-39 (1921). The solicitor strongly challenged petitioner’s defense of self-defense: “Now, the defense brings in the defendant’s testimony and his friend

Gregg Hardy. They want you to believe that testimony. Well, if you believe that testimony, there is nothing consistent about theirs. Nothing. Mr. Jones says he never got out of the car.” R. 204, 11.2-6.

It was fundamentally unfair for the prosecution here to prevent petitioner from presenting powerful corroborating videotaped evidence, and then attack petitioner’s claim of self-defense as unworthy of belief, and defense testimony as being untrue.¹ See State v. Turner, 62 Conn. App. 376, 77 A.2d 206, 215 (2001); State v. McCoy, 219 W.Va. 130, 632 S.E.2d 70 (2006).

A picture can paint a thousand words. There is a no better recent example of that truism than the unfortunate incident showing a police officer allegedly attempting to run over, or “bump,” a fleeing suspect on videotape. Rodney King’s case is also still remembered by many, and respectfully no words or testimony from witnesses with an alleged motive to misrepresent -- on both sides -- could ever have had the power of the videotaped evidence in those two cases.

“[E]vidence explaining an apparent contradiction in prior evidence is not merely cumulative, nor is evidence verifying the facts or opinions given by a witness whose testimony is disputed or whose credibility is called into question. Here the videotape would have strongly corroborated and verified petitioner’s testimony. See, Collins, South Carolina Evidence (2000 ed) at p. 16 citing State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1984). As it related to a contested matter, it was therefore not cumulative. This is particularly important since anything a defendant on trial for his life or freedom says tends to be viewed as self-serving and suspect.

The police often do not videotape an interrogation or statement because they maintain it makes suspects more wary of what is occurring, and lessens the number of suspects who would

¹ The solicitor also stressed the powerful inference of malice from the use of a deadly weapon: “And you can infer malice from the use of a deadly weapon. It’s an inference that you can use to apply to the facts

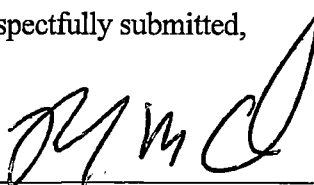
otherwise confess. However, this renders unavailable a credible contemporaneous picture for the jury of what occurred. Here, there was a videotape that constituted significant corroborating evidence, and petitioner had the right to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986).

anytime a deadly weapon is used. The malice is shown in the way he shot and killed Sigida Long.” R. 212, ll. 22-25.

CONCLUSION

By reason of the foregoing argument, the decision of the Court of Appeals should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

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

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of March, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

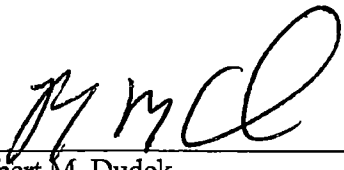
V.

DAMON JACQUISE JONES,

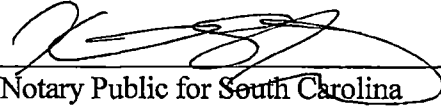
APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner in this case has been served on William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of March, 2010.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of March, 2010.


Notary Public for South Carolina (L.S.)
My Commission Expires: July 1, 2019.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Spartanburg County
The Honorable Paul M. Burch, Circuit Court Judge**

THE STATE,

Respondent,

vs.

DAMION JACQUISE JONES,

Appellant.

BRIEF OF RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals erred by holding evidence of petitioner's distraught mental state on the videotaped interrogation with the police, both before and during his interrogation with the police, and which corroborated his self-defense claim, was cumulative to other evidence of his mental state since the videotape was made after the shooting, it was powerful corroborating evidence petitioner had a right for the jury to consider where he testified and was subject to cross-examination?

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

- I. Whether the trial judge properly ruled that all of Petitioner's self-serving, videotaped hearsay statements to police, given after his arrest on February 25, 2005 (State's Ex. 1 and State's Ex. 12 for I.D.), as well as the portion of the portion of State's Ex. 1 for I.D. showing his demeanor, were inadmissible because they were not admissible pursuant to Rule 804(b)(3), Rule 801(d)(1), or Rule 106, SCRE; and Petitioner cannot point to any evidentiary basis for introducing them?**
- II. Whether the Court of Appeals correctly found that Petitioner was not prejudiced by the exclusion of the hearsay videotaped statement where it was merely cumulative to sworn testimony concerning his demeanor after the crime, including his demeanor while giving his statement?**

STATEMENT OF THE CASE

Petitioner is currently confined in the South Carolina Department of Corrections pursuant to commitment orders from the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury indicted him at the August 2005 term of court for murder, stemming from the February 2005 homicide of Sigida Kenyatta Long.

Petitioner received a jury trial before the Honorable Paul Burch on November 29-December 1, 2005. Christopher Brough, Esquire, represented him. Assistant Solicitors Barry Barnette and Jennifer Jordan, of the Seventh Circuit Solicitor's Office, represented the State. The jury found Petitioner guilty of murder; and Judge Burch sentenced him to life imprisonment.

Petitioner timely served and filed a Notice of Appeal. After briefing by the parties, the South Carolina Court of Appeals filed an unpublished Opinion on July 23, 2008, affirming his conviction and sentence. *State v. Damon Jacquise Jones*, 2008-UP-424 (S.C. Ct. App., July 23, 2008). **App. 1-3.** Petitioner filed a timely Petition for Rehearing on August 7, 2008. **App. 4-8.** The Court of Appeals denied rehearing in a September 23, 2008 Order. **App. pp. 9-10.**

Petitioner thereafter filed a Petition for Writ of Certiorari dated December 29, 2008. Respondent made a Return to Petition for Writ of Certiorari on March 30, 2009. This Court filed an Order granting certiorari on December 2, 2009. Petitioner filed his Brief of Petitioner on March 4, 2010.

ARGUMENT

The trial judge properly ruled that all of Petitioner's self-serving, videotaped hearsay statements to police, given after his arrest on February 25, 2005 (State's Ex. 1 and State's Ex. 12 for I.D.), as well as the portion of the portion of State's Ex. 1 for I.D. showing his demeanor, were inadmissible because they were not admissible pursuant to Rule 804(b)(3), Rule 801(d)(1), or Rule 106, SCRE; and Petitioner cannot point to any evidentiary basis for introducing them.

Prior to enactment of the South Carolina Rules of Evidence, the South Carolina Supreme Court consistently held that a criminal defendant could not introduce out-of-court and self-serving hearsay statements which he may have made to others. *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); *State v. Sweet*, 270 S.C. 97, 98, 240 S.E.2d 648, 649 (1978); *State v. Atchison*, 268 S.C. 588, 594-95, 235 S.E.2d 294, 296-297 (1977). In *State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 276-77 (2000), *cert. denied*, 531 U.S. 882 (2000), the Court held that an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE.¹

In contravention of this well-settled precedent, Petitioner maintains that his February 25, 2005 custodial, videotaped statements to police (**State's Ex. 1 for I.D.** and **State's Ex. 12 for I.D.**) were admissible because he was not an unavailable witness, since he exercised his right to testify and was subject to cross-examination. He further contends that he had the "right" to corroborate his trial testimony with his out-of-court statements and demeanor. Alternatively, he maintains that a portion of the videotape of him at the crime scene and in a patrol car (**State's Ex. 1**) should have been admitted to show his demeanor. The State submits that the trial judge properly excluded both videotapes because they were not admissible pursuant to either Rule 804(b)(3), SCRE, or Rule 106, SCRE; and Petitioner cannot point to any evidentiary basis for introducing them. More importantly, the Court of Appeals correctly found that Petitioner was not prejudiced by the exclusion of the

¹The undersigned counsel for Respondent represented the State on appeal in *Terry* and continues to represent Respondent on certiorari from denial of Terry's post-conviction application. Petitioner's counsel, Mr. Dudek, represented Terry on direct appeal.

hearsay videotaped statement because it was merely cumulative to sworn testimony concerning his demeanor after the crime, including his demeanor while giving his statement. *Jones*, *supra*, at 2-3, **App. pp. 2-3**.

A. How the issue developed at trial.

The trial judge held a pre-trial *Jackson v. Denno*² hearing, at Petitioner's request (**R. p. 6, l. 3-p.7, l. 13**), to determine the admissibility of Petitioner's statements to law enforcement following his arrest on February 25, 2005, the evening of the victim's murder. All three witnesses who testified *in camera* were from the Spartanburg Public Safety Department.

Sergeant Christopher K. Taylor testified that he was called in to interview Petitioner. Investigator Russell Porter read Petitioner's *Miranda*³ rights to him in Sergeant Taylor's presence, utilizing a waiver of rights form, **State's Ex. 12A for ID, R. p. 257**.

Petitioner initialed each of his rights as they were read to him by Sgt. Porter. The subsequent interview was videotaped, and the videotape was marked as **State's Ex. 12 for ID**. Petitioner was again advised of his rights on **State's Ex. 12 for ID**. He was not promised anything or threatened in any manner, in order to obtain a statement; and he freely and voluntarily agreed to speak. Sgt. Taylor did not question him at any point outside of the videotaped interview; and all of the statements Petitioner made to Sgt. Taylor are on the videotape. Sgt. Taylor testified on cross-examination that he might have told Petitioner he could not help Petitioner, unless Petitioner told him what was "going on." (Sic). However, this is not reflected by the videotape; and Sgt. Taylor testified that he did not make any promises to Petitioner because "[t]hat would be up to the Solicitor's Office and the court." **R. pp. 15-16**.

² *Jackson v. Denno*, 378 U.S. 368 (1964).

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Investigator Russell D. Porter works in the Public Safety Department's CID division. He was also called in to interview Petitioner and investigate the case. He prepared the pre-interrogation waiver of rights form (**State's Ex. 12A for ID**). Petitioner received his rights and he understood them. No force or threats were used, and Petitioner was not promised anything in exchange for a statement. Inv. Porter was present for the first half of the interview. Then, Sgt. Taylor "took over" questioning. All of the statements Petitioner made were on the videotape, and Inv. Porter only spoke to Petitioner about the case on the videotape. Inv. Porter further testified that Petitioner did not respond to his questioning for some period of time and tell Inv. Porter what had occurred "because he was too upset." **R. pp. 16-18.**

At the conclusion of Inv. Porter's testimony, Petitioner's counsel asked the trial judge to review the portion of **State's Exhibit 12 for ID** where Sgt. Taylor entered the interview room because "I think there may have been a statement made regarding helping [out] Mr. Jones." The trial judge agreed to defer his ruling until he could review that portion of the videotape. **R. pp. 18-19.**

The remaining witness, Senior Patrol Officer Mark Hillers, testified that he was the first officer who responded to the shooting on February 25, 2005. When he arrived, Petitioner was on the porch. After first approaching the victim, Officer Hillers walked up to Petitioner. When Officer Hillers asked Petitioner if he had any weapons, "he ... stated 'I didn't mean to kill him. He was pulling me out of the car.'" Officer Hillers then patted down Petitioner for weapons, handcuffed him and walked him to the patrol car. Once they were at the car, Officer Hillers advised Petitioner of his *Miranda* rights from a printed card. Petitioner appeared to understand his rights and did not ask any questions about his rights. **R. pp. 19-22.**

Officer Hillers asked Petitioner where the gun was; and Petitioner said it was in his grandmother's house, pointing to the residence. A videotape for unit 467 (**State's Ex. 1 for ID**)

reflects both that Petitioner received his rights and his statement regarding the weapon. Finally, Officer Hillers testified that Petitioner repeated the statement that he did not mean to kill the victim and that he was being pulled out of the car by the victim. **R . pp. 21-23.**

The State indicated “that’s the State’s showing as to the statements that he made when the officer arrived and when the officer read him his rights.” Petitioner stated that he was satisfied with this statement but he again asked the trial judge to review **State’s Ex. 12 for ID**. Contrary to Petitioner’s representation that the trial judge had ruled that the statements were admissible at this juncture (**Brief of Petitioner, p. 6**), the trial judge did not rule on the admissibility of the statements at that point. **R . p. 23.**

Petitioner subsequently testified in his own defense that he knew Atiba and Sigida (the victim) Long. They had supposedly assaulted him on Thanksgiving 2002. The victim threatened and cursed Petitioner and Petitioner’s son. Also, Atiba supposedly grabbed Petitioner around the neck. The victim also told Petitioner that if he ever came back around their house or the victim’s car, Atiba “would blow my F’in head off in front of my son, to put my son in harm’s way.” **R. p. 130.** A second incident occurred in the Summer of 2003, while Petitioner and his wife “were having a cookout for one of the boys.” Again, the Longs repeatedly threatened him. **R . pp. 129-31.**

On the afternoon of February 25, 2005, Petitioner and his friends, Ben Foster and Greg Hardy, were at the home of Hardy’s sister. Hardy and Foster were drinking liquor; and Foster was intoxicated. Petitioner admitted that he drank “about six beers.” **R . p.129; 140-41.**

Around 6:30 p.m., Petitioner and Hardy dropped off Foster at the home of Petitioner’s grandmother. Petitioner was driving. The Long brothers pulled up in the victim’s car after Foster was in the house. The victim got out of his vehicle, followed by Atiba. The victim “came down, banged on both doors of my grandmother’s house, enraged, trying to get [Foster] out of the house. Unable

to do so, he turned his wrath on me.” **R. pp. 128-29.**

Petitioner claimed that he immediately thought that he was in danger based upon the previous incidents. The victim pulled Petitioner from the car, and told him that he “would kick [Petitioner’s] you know what.” Then, the victim hit Petitioner “two or three times on the side of the head.” Petitioner fell back into the car, and he grabbed his wife’s gun out of the glove compartment of the car. He cocked it and, while holding it down, told both of the Longs to “back up.”⁴ (Sic). Atiba, however, began moving toward the outer side of the car and the victim rushed him. A struggle then ensued between Petitioner and the victim, the end result of which was that Petitioner shot the victim. **R. pp. 131-32.**

Petitioner then went into his grandmother’s house at and he asked his aunt to call police. When the first officer arrived, Petitioner testified that he told the officer “to help [the victim], you know. He pulled me out of my car and tried to rob me. And I collapsed in front of whichever officer it was.” **R. p. 132.** Petitioner said that he was “[d]istraught” and “overwhelmed.” He also said that he tried to tell Officer Taylor what had occurred. Inv. Porter, however, spoke to him first. **R. pp. 132-33.**

At this point, the State objected, and the trial judge heard *in camera* arguments following a bench conference. **R. p. 133.** *In camera*, the State argued that Petitioner’s trial counsel was preparing to question Petitioner about the videotaped interviews. The State objected because this was self-serving hearsay, and that hearsay could not be introduced to bolster a defendant’s testimony.⁵ **R. pp. 133-34.**

⁴Petitioner claimed the gun belonged to his wife and that they kept it in the vehicle. **R. pp. 151-152.**

⁵The State further argued that Petitioner was not the proper witness, through whom to elicit testimony regarding the videotapes.

Petitioner argued that “a statement by the defendant ... is an [exception] to the hearsay rule.” He further argued that it was not self serving because he made several admissions on the tape. He further speculated that “the State’s main concern is the emotional state” of Petitioner “during the tape and not what was actually said. And I think that that’s the reality of why they are objecting to it.” **R. pp. 134-35.**

In response, the State handed up copies of several cases that supported its position, including *State v. Cabrera-Pena*, 361 S.C. 372, 377-80, 605 S.E.2d 522, 524-26 (2004). It also argued that there were a number of self-serving hearsay statements throughout the videotapes. The State did not introduce any of the statements, and it noted that, under *Cabrera-Pena*, Petitioner would have had the right to introduce the entire statement if the State had introduced only a part of it. Petitioner contended that the State was the only interrogator. He further argued that the State had the opportunity to cross-examine him about anything on the videotape because he testified. **R . p. 136.**

The trial judge sustained the State’s objection. He noted that his testimony was “exactly or quite similar to” his statement. Also, Petitioner was not trying to impeach his testimony with a prior inconsistent statement. **R . pp. 136-37.** Petitioner then asked the trial judge to allow him to introduce “the limited portion of the tape before [he] makes any statements.” **R . pp. 137, ll. 4-6.**

The State objected, and Petitioner contended that this portion of the tape was not hearsay because he did not make a statement. **R . pp. 137, ll. 7-10.** However, the trial judge stated, “I have ruled. I have ruled.” **R . pp. 137, l. 11.**

Petitioner concluded his testimony by again testifying that he was very distraught after the shooting. On cross-examination, he testified that the struggle was “full contact” and “intense.” Also, it happened “all too quick” for him to drive away from the victim. *E.g.*, **R . pp. 144-45; 146; 156-57.** However, he admitted that the victim never produced a weapon. **R . p. 152.**

B. Petitioner's statements to police on State's Exhibits 1 and 12 for I.D. were not admissible under Rule 804(b)(3), Rule 801(d)(1) or Rule 106, SCRE.

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." *Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible as evidence unless an exception applies. *State v. Washington*, 367 S.C. 76, 82, 623 S.E.2d 836, 839 (Ct.App. 2005); *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996).

1. Petitioner's statements were not admissible under Rule 804(b)(3), SCRE.

Rule 804, SCRE, permits the introduction of statements, which would otherwise constitute hearsay, where the declarant is "unavailable." The last paragraph of Rule 804(a) prevents the proponent of evidence proffered thereunder from creating the condition of unavailability and then benefitting therefrom. It was designed to ensure access to testimony where a desired witness becomes unavailable through no fault or wrongdoing of the testimony's proponent. *United States v. Kimball*, 15 F.3d 54, 55-56 (5th Cir. 1994), *cert. denied*, 513 U.S. 999 (1994). Therefore, this Court in *Terry* held that an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE. *Terry*, 339 S.C. at 356, 529 S.E.2d at 276-77.⁶ *See also Stewart*

⁶ At this point, Respondent would note that on page 9 of the Petition, Petitioner argues wildly outside of the record in this case in discussing *Terry*. He makes the assertion that the State in *Terry* made the decision not to introduce Terry's statement after his counsel's reference to a confession in opening statement. However, his assertion is not preserved for appellate review because the same argument was not made in the trial court. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal). *See also State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same).

Worse, Petitioner's representation as to what occurred in *Terry* is factually incorrect; and

v. State, 63 Ala. 199, 200 (1879) (“As a general rule, one charged with crime can not make evidence for himself, by proof of his own declarations”); *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976); *De La Beckwith v. State*, 707 So.2d 547, 586 (Miss. 1997) (same); *State v. Walters*, 630 So.2d 1371, 1375, 25-1376, 25,587 (La.App. 1994); *cf. Williamson v. United States*, 512 U.S. 594, 600 (1994) (when the statement is actually self-exculpatory, “the generalization on which Rule 804(b)(3) is founded becomes even less applicable ... [because] [s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false”); *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998) (letter written by tax agent for railway company, in an effort to avoid payment of taxes, was statement in interest to avoid payment of property taxes, rather than statement against interest; hence, it was inadmissible as statement against interest).

Thus, Petitioner could not avail himself even if he had not testified. Because he did testify, the Rule cannot be relied upon by him to support his self-serving and rank hearsay statements to police because, as the title to that Rule indicates, it only creates exceptions where the declarant is unavailable. The decision of the Court of Appeals in *State v. Golson*, 349 S.C. 421, 562 S.E.2d 663 (Ct. App. 2002), is distinguishable because the prosecution in that case had introduced subsequent statements that Golson had given to law enforcement. In this case, however, the State did not introduce any portion of Petitioner’s statements. Additionally, the State submits that the Court in

it is contradicted by the testimony and the factual findings of the PCR judge in *Terry v. State*, 2000-CP-32-3470. Terry has served and filed a notice of appeal. Also, he has now filed a petition for writ of certiorari and the State had made a return to the certiorari petition. Therefore, the Order in *Terry* is now before this Court. *See* Rule 203(d)(1)(B). Rather than further address Petitioner’s mis-statement of the facts in *Terry*, Respondent would direct the Court to pages 13-30 of the Order of Dismissal in *Terry*, which discusses whether trial counsel was ineffective for making the remark about a confession in opening statement. Also, Respondent would note that the findings of fact and conclusions of law are on pages 23-30 of the Order in *Terry*.

Golson improperly extended Rule 804(b)(3) to permit introduction of because the State did not introduce any portion of the actual conversation *Golson* had with Deputy Bryant at the crime scene, and the excluded statement could not have placed anything *Golson* said to Deputy Bryant in context. Also, the excluded statement did not and could not place the separate statements made to other officers, at a different location, later that morning in context. More importantly, the Court of Appeals' decision ignores that the statement excluded in that case was hearsay and inadmissible under the other Rules cited in this Brief.

2. Petitioner's statements were not admissible under Rule 801(d)(1), SCRE.

Likewise, his statement is inadmissible under Rule 801(d)(1), SCRE. Rule 801(d)(1) provides that a statement is not hearsay if:

Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, *and* the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose, or (C) one of identification of a person made after perceiving the person, or (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Petitioner repeatedly emphasizes that the State could have cross-examined him, as if this, alone, made the statements admissible.⁷ However true this may have been under old law, it is

⁷ His claim that the prosecution could effectively cross-examine him about his demeanor ignores that this Court stated almost twenty-three years ago that an accused's non-testimonial demeanor is irrelevant. *See State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987) ("It is best for the solicitor not to comment on the defendant's non-testimonial behavior").

unquestionably incorrect under the South Carolina Rules of Evidence. As the Notes to Rule 801 state:

[s]ubsection (d)(1) changes the law in South Carolina. Previously, where the declarant testified at trial and was subject to cross-examination, the general rule was that prior statements made by the declarant/witness were admissible regardless of the hearsay nature of the statements. See *State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991); *State v. Caldwell*, 283 S.C. 350, 322 S.E.2d 662 (1984); *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980); but see *State v. Munn*, 292 S.C. 497, 357 S.E.2d 461 (1987) (all out-of-court statements made by alleged victim not necessarily admissible simply because victim testifies at trial). Subsection (d)(1), however, treats prior statements of a witness as not being hearsay in only four instances.

(Emphasis added). See also *State v. Saltz*, 346 S.C. 114, 124-25, 551 S.E.2d 240, 245-46 (2001).

Here, Petitioner did testify and subject himself to cross-examination, but he did not proffer his statements under Rule 801(d)(1)(A), as a statement that was inconsistent with his testimony (which it unequivocally is not), or under Rule 801(d)(1)(B), as consistent with his testimony and “offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” Thus, he may not avail himself of either subsection in support of his current argument, and this argument is not preserved for appellate review. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); see also *Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party may not argue one ground at trial and then an alternative ground on appeal).

Furthermore, Rule 801(d)(1)(B) does not support introduction of the videotaped statements because his statements were not made “before the alleged fabrication, or before the alleged improper influence or motive arose.” See *State v. Foster*, 354 S.C. 614, 582 S.E.2d 426 (2003) (finding Rule

801(d)(1)(B), SCRE is the sole means by which a prior consistent statement may be introduced); *State v. Fulton*, 333 S.C. 359, 374, 509 S.E.2d 819, 827 (Ct.App.1998) (“[W]hen a prior consistent statement is offered for the purpose of rebutting an express or implied charge that the witness's testimony is the result of a recent fabrication or improper influence or motive, the statement must predate any alleged improper influence or motive”).

To the contrary, Petitioner's statements were made following his arrest. Given that he had been arrested for murder, the most serious offense punishable in this or any other State, any such statements were “dripping with motivations to misrepresent.” *See Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir.1942). *See also Terry, supra*; *People v. Perry*, 223 A.D.2d 479, 637 N.Y.S.2d 75 (N.Y. A.D. 1996) (a person involved in criminal activity has a strong incentive to feign nonchalance upon contact with the authorities, and such conduct would constitute a self-serving assertion of innocence that would constitute inadmissible hearsay). *Contra State v. Jeffcoat*, 350 S.C. 392, 398, 565 S.E.2d 321, 324-25 (Ct.App. 2002) (because Victim's statement constituted her initial disclosure of Petitioner's abuse, “it obviously was made prior to any contact with the judicial system and thus could not have been the result of either Mother or the solicitor's alleged coaching of her court testimony. Similarly, Victim's prior consistent statements related in Taylor's testimony predate the family's exposure to the judicial branch; Mother testified the family only became involved with the solicitor's office and subsequent prosecution after Victim stopped seeing Taylor for therapy. Accordingly, the trial court properly found Victim's statements to Taylor admissible to rebut the charges of improper influence”).

Moreover, “[t]he plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent statement does call the

witness's credibility into question, that is not the same as charging the witness with 'recent fabrication' or 'improper influence or motive.'" *Foster*, 354 S.C. at 622, 582 S.E.2d at 430. Petitioners statements thus cannot be admitted pursuant to Rule 801(d)(1)(B) because he sought to introduce and affirmatively use them on direct examination and before he was cross-examined by the prosecution. Also, subsequently, there was no express or implied charge against him of recent fabrication or improper influence or motive. The prosecution's cross-examination "did not rise to the level of charging fabrication, but instead amounted to calling h[is] credibility into question, *i.e.*, simple impeachment." *Foster*, 354 S.C. at 622, 582 S.E.2d at 430.

3. Petitioner's statements were inadmissible under Rule 106, SCRE, and Petitioner has not argued any proper evidentiary basis to support their introduction.

Although Petitioner did not argue in the trial court that his statements were admissible under Rule 106, SCRE, and any argument is procedurally barred under *Bailey*, it is clear that Rule 106 cannot support introduction of the statements. In *State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975), the Court held that:

When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it."

In this case, Rule 106 does not apply because the prosecution did not offer any portion of his self-serving statements into evidence. *Contra State v. Cabrera-Pena*, 361 S.C. at 377-80, 605 S.E.2d at 524-26 (finding that the trial court erred by prohibiting Cabrera-Pena from cross-examining officer as to the remaining self-serving statements made to him after State had presented some statements

though the officer, but concluding that the error was harmless). *See also United States v. Collicott*, 92 F.3d 973, 983 (9th Cir.1996) (“Rule 106 does not compel admission of otherwise inadmissible hearsay evidence”) (internal quotation omitted). Nor had the State commented his remorse or lack of it. *Contra Bellamy, supra*, and *State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007).

Furthermore, Rule 803(3), SCRE specifically excludes a statement of memory or belief to prove the fact remembered. Here, Petitioner seeks to improperly contravene both Rule 106 and Rule 803(3), in order to corroborate his testimony with inadmissible hearsay. *See State v. Tennant*, 383 S.C. 245, 256-57, 678 S.E.2d 812, 818 (Ct. App. 2009)

Further, the only other argument in support of the admissibility that was raised at trial was that a defendant’s statement is an exception to the rule prohibiting the introduction of hearsay. However, this argument has been abandoned because Petitioner has not argued it on appeal. *Video Gaming Consultants, Inc. v. South Carolina Dep’t of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (issue not argued in brief is deemed abandoned and precludes consideration on appeal); *Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct.App.1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court”). More importantly, the argument is simply wrong and ignores that the prosecution has the ability to introduce such statements as admissions by a party-opponent under Rule 801(d)(1).

Finally, Petitioner raises several arguments which are procedurally barred under *Bailey* because they are being raised for the first time on appeal. For instance, he mistakenly contends that the the trial judge’s ruling impacted upon his “right to present a complete defense.” This argument, however, ignores that he has never presented either this Court or the trial judge with an acceptable basis under the South Carolina Rules of Evidence to support the introduction of his statements. Also, neither *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006) (dealing with the propriety of South

Carolina's standard for admission of evidence of third party guilt) nor *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that exclusion of testimony at trial concerning circumstances of defendant's confession, on ground that the testimony pertained solely to issue of voluntariness resolved against defendant in pretrial ruling, deprived him of a fair trial) have any applicability to the present case.

Also, like his trial testimony, his statements did not bear indicia of reliability because they were not an admission to the charge of murder.⁸ Rather, much like the exculpatory statement given in *Terry*, his statement was exculpatory. He repeatedly indicated that he shot his victim in "self-defense," after the victim had attacked him and pulled him from his car. Thus, there are no indicia of reliability surrounding his statements.

Additionally, the statements would only corroborate Petitioners trial testimony, as he concedes in his brief. However, he does not have any constitutional right to present otherwise inadmissible evidence simply because it corroborates his testimony. If anything, an error in excluding such evidence is non-prejudicial and harmless. Thus, it cannot serve as a basis for reversing a conviction. *E.g.*, *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (exclusion of testimony is harmless where it is cumulative to other testimony in the record); *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004) (same); *State v. Curry*, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct.App. 2006) ("To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCORE; *State v. Johnson*, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). However, error is harmless where it could not reasonably have affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)").

Further, his testimony as to what occurred at the time he shot the victim - *i.e.*, that he acted in self defense - was generally corroborated by his friend, Greg Hardy. *See R. pp. 163-92*. Hardy

⁸For that matter, his statements did not even admit guilt to a homicide.

also testified to his demeanor after the crime, saying that Petitioner “was in shock” and “was hysterical.” **R .p. 190.** Further, the State introduced a series of photographs of Petitioner, taken the night of the murder as State’s Exs. 24-29. Included in these are photos of his face. *See R . pp. 52-54.* Therefore, even assuming that his demeanor was relevant and not feigned, it was already before the jury. This argument lacks merit.

C. The portion of State’s Ex. 1 for I.D., showing Petitioner’s demeanor after his arrest, was likewise inadmissible hearsay.

Likewise, there is no merit to Petitioner’s argument that he should have been permitted to introduce the portion of State’s Ex. 1 for I.D. that shows his demeanor when arrested. Contrary to his argument, this evidence of his demeanor was likewise inadmissible hearsay.

A ‘statement’ as defined by Rule 801(a), SCRE, includes “nonverbal conduct of a person, if it is intended by the person as an assertion.” *State v. Roach*, 364 S.C. 422, 427, 613 S.E.2d 791, 794 (Ct.App. 2005), citing *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996) (finding the gesture of pointing to be an assertion). In the present case, Petitioner’s demeanor on the videotape was nonverbal conduct that could have easily been feigned and was properly excluded as rank hearsay. *See State v. Rowe*, 77 Wash. 2d 955, 958-59, 468 P.2d 1000 (1970) (“[s]ince it is generally held that polygraph tests are not judicially acceptable, it is obvious that a defendant should not be permitted to introduce evidence of his professed willingness to take such a test. At best such an offer is a self-serving act or declaration which is made without any possible risk. If the offer is accepted and the test given, the results cannot be used in evidence whether they were favorable or unfavorable. *In short, a defendant has everything to gain and nothing to lose by making the offer, so the conduct underlying the so-called inference of innocence can well be feigned, artificial and wholly unreliable*”) (citations omitted and emphasis added); *Perry*, 223 A.D.2d at 479, 637 N.Y.S.2d

at 75 (a person involved in criminal activity has a strong incentive to feign nonchalance upon contact with the authorities, and such conduct would constitute a self-serving assertion of innocence that would constitute inadmissible hearsay); *West v. State*, 53 Fla. 77, 43 So. 445, 446 (1907) (“Evidence of self-serving declarations and conduct ... when they form no part of the conduct or conversations introduced by the prosecution, should not, as a rule, be admitted in a criminal prosecution....”); *People v. Jardin*, 154 Misc.2d 172, 175-77, 584 N.Y.S.2d 732 (N.Y. Sup. 1992) (“consciousness of innocence” evidence “sought to prove the fact of ‘innocence’ by [the defendant’s] conduct” is a “nonverbal assertion clearly constitut[ing] hearsay and can be admitted into evidence only if it falls within a recognized exception to the hearsay rule”); *Lewis*, 815 S.W.2d at 568 (defendant’s hearsay expressions of remorse not admissible at punishment phase of capital murder trial).

Indeed, the demeanor is so commingled with his statements it must be regarded as hearsay. *See Walters, supra*. There is also no merit to Petitioner’s suggestion, which is also barred under *Bailey* because no raised below, that his demeanor made it more likely that he acted in self-defense. Rather, it is equally plausible that it might have simply dawned upon him - after the police were summoned - that he was looking at serving the rest of his life in prison because he had savagely and maliciously took the life of his unarmed neighbor. Moreover, any error was non-prejudicial because evidence of his demeanor was already before the jury, as discussed.

For the first time, Petitioner contends that the excluded statements should have been admitted because they “explain[] an apparent contradiction in prior evidence.” **Brief of Petitioner, p. 12** (citing Collins, *South Carolina Evidence*, p. 16 (2000 ed.)). However, his argument must be rejected because it was not raised in the lower courts, *see Bailey, supra*; Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”); *Camp v. Springs*

Spartanburg County Courthouse
180 Magnolia Street, 3rd Fl
Spartanburg, SC 29306-2335
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By: 

WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

April 5, 2010

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Spartanburg County
The Honorable Paul M. Burch, Circuit Court Judge**

THE STATE,

Respondent,

vs.

DAMION JACQUISE JONES,

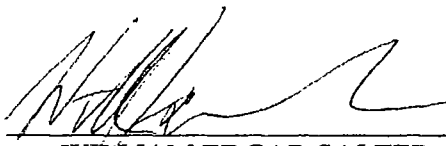
Petitioner.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, 1330 Lady Street, Suite 401, Columbia, South Carolina 29211.

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

This 5th day of April, 2010.



WILLIAM EDGAR SALTER, III

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

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 Supreme Court**

The State, Respondent,

v.

Damon Jacquise Jones, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Paul M. Burch, Circuit Court Judge

Memorandum Opinion No. 2010-MO-020
Heard June 24, 2010 – Filed August 23, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of
South Carolina Commission on Indigent Defense, of
Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Senior Assistant Attorney General William
Edgar Salter, III, all of Columbia, and Solicitor Harold
W. Gowdy, III, of Spartanburg, for Respondent.

PER CURIAM: Petitioner Damon Jones was convicted of the murder of Sigida Long and was sentenced to life in prison. At trial, Petitioner asserted that Long was shot when a gun discharged during a struggle. On certiorari, he argues the Court of Appeals erred in upholding the trial court's decision to refuse to admit into evidence his videotaped interrogation, which he contends corroborates his version of events. State v. Jones, Op. No. 2008-UP-424 (Ct. App. July 23, 2008). We affirm.

FACTS

Sigida Long was shot on the street in front of his mother's house in Spartanburg. At trial, Petitioner provided the following version of events: Petitioner was sitting in his car after dropping off a friend when Long approached Petitioner, pulled him from the vehicle, and struck him on the head. Petitioner fell back into the vehicle, retrieved a gun from the glove box, cocked the gun, and told Long to back away. Long rushed Petitioner, the two struggled, and the gun discharged during the struggle, fatally wounding Long in the head.

Petitioner's counsel attempted to introduce into evidence a videotape of a police interrogation of Petitioner after the incident, which Petitioner argued corroborated his version of events. The trial court sustained the State's objection to the videotape as self-serving hearsay. Petitioner then attempted to introduce only that portion of the tape before Petitioner makes any statements[1], but the trial judge declined to allow it.[2] Petitioner was convicted of murder and sentenced to life in prison.

On appeal to the Court of Appeals, Petitioner argued the trial court erred in refusing to admit the tape. The Court of Appeals affirmed, holding that even if the videotaped interrogation was improperly excluded, Petitioner was not prejudiced because the evidence would have been merely cumulative to the other evidence in the record. This Court granted Petitioner's petition for a writ of certiorari.

ISSUE

Did the Court of Appeals err in finding the trial court did not abuse its discretion in excluding the videotaped evidence?

DISCUSSION

A trial judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. See State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). Petitioner argues that he had a right to present the videotape as it is powerful corroborating evidence of his defense. We find that the Court of Appeals correctly affirmed the trial court's exclusion of the videotape.

Petitioner argued to the trial court that the videotape is admissible, in whole or in part, because it meets a hearsay exclusion and because he contended the hearsay was not self-serving hearsay. He now argues to this Court only that the tape is admissible because (1) the wrongful exclusion of corroborating evidence is prejudicial to the Petitioner's substantial rights, and (2) it is "fundamentally unfair" for the State to prevent Petitioner from presenting corroborating evidence and to then attack Petitioner's self-defense claim as unworthy of belief. As Petitioner did not present these latter arguments to the trial court, they are not properly before this Court. See On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court). Additionally, as the argument presented to the trial court is not presented in Petitioner's brief, it is also not before this Court. See Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76 (Ct. App. 2001) (issues not argued in the body of appellant's initial brief are deemed abandoned on appeal).

Consequently, we find Petitioner's arguments are not preserved for our review. Were we to reach the merits, we would find that the trial court did not err in excluding the videotape.

CONCLUSION

Petitioner's arguments are not preserved for our review. The opinion of the Court of Appeals is therefore

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[1] It is unclear what portion of the videotape Petitioner refers to. The videotaped interrogation filed with this Court begins with Petitioner responding to questions. If an essential portion of the tape has been omitted from the record, this Court cannot reverse on this ground. See Morris v. Donahue, 212 S.C. 122, 124, 46 S.E.2d 664, 665 (1948) (Supreme Court can act only on such matters as are contained in the record); Rule 210(h), SCACR (appellate court will not consider any fact which does not appear in the Record on Appeal). Petitioner may be referring to State's Exhibit 1, which is a video from a police cruiser camera on the night of the incident. An emotional Petitioner can be heard on the tape, but soon after the tape begins, Petitioner can be heard making statements regarding the events.

[2] Petitioner asserted at oral argument that he asked the trial court to allow him to play the videotape without audio, for the jury. The record does not support this assertion.

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Spartanburg)Damon Jones, #250332)

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

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institution; 386 Redemption Way; McCormick, S.C. 29899

2. Name and location of Court which imposed sentence Spartanburg County Court of General Sessions

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed: #2005-09-42-3371 - Murder

(a) _____

(b) _____

(c) _____

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

(a) December 1, 2005 - Life w/o Parole

(b) _____

(c) _____

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 DEC 15 PM 12:26
M. H. BLACKLEY

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? ✓ 12

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. Affirmed

iii. _____

(c) the date of each such result:

i. July 23, 2008

ii. August 23, 2010

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

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

(a) Ineffective Assistance of Trial Counsel

(b) Prosecutorial Misconduct

(c) Juror Misconduct / Due Process - Abuse of Discretion

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

(a) See attached Memorandum

(b) See attached Memorandum

(c) See attached Memorandum

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

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

Yes

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

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)

No

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

No

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

(a) the specific nature thereof:

i.

Petitioned For Rehearing - Direct Appeal

ii.

Petitioned For Rehearing - Writ of Certiorari

iii.

iv.

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

i.

South Carolina Court of Appeals

ii.

South Carolina Supreme Court

iii.

iv.

(c) the disposition thereof:

i.

Denied

ii.

Denied

iii.

iv.

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(d) the date of each such disposition:

- i. September 23, 2008
- ii. September 22, 2010
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

- (a) unavailable opportunity
- (b) unavailable opportunity
- (c) unavailable opportunity

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

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

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

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

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

i. Christopher D. Brough; 184 N. Daniel Morgan Ave.; Spart., S.C. 29308

ii. Robert M. Dudek; P.O. Box 11589; Columbia, S.C. 29211

iii. _____

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

i. Trial and Sentencing

ii. Direct Appeal and Certiorari

iii. _____

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

Dismissal of Charge/with prejudice

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

No

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STATE OF SOUTH CAROLINA)
COUNTY OF Spartanburg) VERIFICATION

I, Mr. Damon Jones, # 250332, 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.

Damon Jones

Sworn to and subscribed before me

This 14 day of Dec, 2010

Joyce R. Young L.S.
Notary Public for South Carolina

My Commission Expires 8 28 2011

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

I, Mr. Damon Jones, # 250332, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Damon Jones
Applicant

Sworn to and subscribed before me

This 14 day of Dec, 2010

Joyce R. Young L.S.
Notary Public for South Carolina

My Commission Expires: 8 28 2011

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS

)

) CASE# 05-65-42-3371

Damon Jones # 250332

)

)

VS

)

)

PROOF OF SERVICE

STATE OF SOUTH CAROLINA

)

To Respondent:

I certify that, Damon Jones #250332, has severed
a true copy of the post - conviction relief to
the Spartanburg County Clerk of Court, Hope
Blackley by placing a copy in the United States
Mail at listed address, PO BOX 3483, Spartanburg,
SC 29304-3483.

Sworn to and subscribed before

me this 14 day Dec 2010

Joyce L Young
NOTARY PUBLIC

My Commission Expires: 8-28-2011

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Damon Jones

386 Redemption Way

McCormick, SC 29889

Damon Jones # 250332

386 Redemption Way

McCormick SC 29889

Date: 12-14-10

PCR

ARGUMENT BRIEF

1. The respondent violated the petitioner's fifth (5th) amendment right by withholding "exculpatory" Brady material, and his due process right in the petitioner's case. In the petitioner's case there is exculpatory evidence which is "material" most favorable to the petitioner which was withheld by the prosecution, where the prosecution failed to disclose all the evidence in petitioner's case and there was a concerted effort between prosecution, Barry Barnette, and trial counsel, Chris Brough, to withhold critical evidence in petitioner's case. Had the petitioner's due process rights not been violated the petitioner's case would have been greatly enhanced to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

2. Trial counsel, and prosecution, violated the petitioner's due process rights when aiding state's witness, Atiba Long's, in construction of a second written statement which is falsified evidence. Had the petitioner's due process rights not been violated the petitioner's case would have been greatly enhanced to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

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3. Prosecution committed prosecutorial misconduct when entering and arguing false and altered evidence that, Sigida Long, had been shot at 45 degree angle, and blood was intentionally and digitally removed from the driver's side door of petitioner's car, and argued knowing false evidence of decedent. Had the prosecution not entered false testimony the petitioner's case would have been greatly enhanced to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

4. The petitioner submits that he received ineffective assistance of counsel prior to and, during the petitioner's trial. The sixth (6th) amendment to the United States constitution guarantees that every criminal defendant is entitled to effective assistance of counsel in presenting their defense. See also: S.C. Const., Art. 1, Section 14.

A. Trial counsel was ineffective for failing to enter and argue, Sigida Long's, criminal record.

B. Trial counsel was ineffective, when failing to enter and argue state's witness, Mignon Williams's, written statement for impeachment purposes.

C. Trial counsel was ineffective for failing to inform petitioner that the jury sent four notes to the court.

D. Trial counsel was ineffective for not moving for a mistrial or requesting that jury be sent home to reconvene the following day where jury had been deliberating for more than six (6) hours.

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Had the trial counsel not failed in his duties to perform to the standards of proper effectiveness of counsel the petitioner's case would have been greatly enhance to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

5. Trial Court abused its discretion when it failed to give, Allen, / Supplement instruction to a clearly deadlocked jury. Had the court not abused its discretion the petitioner's case would have been greatly enhance to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

6. Juror misconduct was committed where juror # (86) failed to reveal during voir dire that she was a victim of a violent crime. Had this been made known to the trial counsel during jurors' selection the juror would most likely been excluded from trial. Had this juror been excluded from trial the petitioner's case would have been greatly enhanced to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

Damon Jones
Damon Jones # 50

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Issue #1

Trial Counsel and solicitor conspired and withheld critical evidence in my case, as will be shown. I never received state witness Atiba Long's first written statement, blood analysis report, the finger prints analysis report, the signed coroners report and all of the Spartanburg Police Department investigative and supplemental reports. See attached exhibits # 1-14 and the petitioners numerous attempt to obtain my complete Rule 5 / Brady material, but to no avail. See also exhibit # 15 state witness Atiba Long's second written statement page two at the bottom shows and prove that their was a first written statement Emp. (I was allowed to make the needed changes). I do not have this first written statement, trial counsel never questioned state witness Atiba Long about making a first written statement, this manifest the concerted effort between solicitor and trial counsel to withhold critical exculpatory evidence from the petitioner, Citing US vs. Taylor 956 F. supplement 622 (D.S.C 1997) trial counsel letter to the petitioner, see Exhibit #5, states that trial counsel has only had one written statement , however trial counsel never brought this to the court attention about the solicitor withholding evidence, because it is clear that their was a concerted effort between the solicitor and the trial counsel. The DNA Analysis Report would prove a close proximity shot and that the decedent was in possession of the fire arm when it was discharged and that was blood from the decedent on top of the petitioners left sneaker. This evidence should have been presented to the jury, as the gun and sneaker was tested for DNA, trial counsel, Tr. 3 pg. 264 L 6-8 their not in evidence, again the defense did not want this in evidence. The fingerprint analysis reports that was done on the magazine, was not in evidence see tr. 3 pg. 264 L 9-10 as this was very exculpatory in nature. Who knows whom prints that is, also all of the supplemental and investigative report were not made available to the petitioner. The signed coroners report is very, very

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important and exculpatory, as it rules on the manner of death. Whether homicide, suicide, accident or undetermined, there is always this manner of ruling. I do not have this document and the decedent had a huge amount of GSR on his hand, I can only assume what the manner of death is. This document could excuse/ justify the death of Sigida Long. The trial counsel never asked the pathologist, Dr. Wren, what the manner of death was. Withholding such critical evidence on the part of the trial counsel and solicitor, resulting in an unlawful conviction and sentencing is a travesty of justice.

Issue #2

State witness Atiba long has two written statements. I was in possession of the second statement only. What information did solicitor and Spartanburg detective receive that prompted state witness, Atiba Long, to give a second statement. I was first interviewed by trial counsel approximately the first week in March 2005, and trial counsel took the petitioners account of the events that transpired on February 25, 2005. I told the trial counsel, that I was attacked and being pulled from the car. Then he fell back inside, grabbed the gun cocking jumping back out his car holding the gun waist side, EMP. "telling both the Long brothers to back up". I never during the interview with Spartanburg Police Department investigators told them that I told both the Long brothers to back up. This information came from defense counsel Chris Brough conspiring with the solicitor Barry Barnette to build a case against me. Now, all of a sudden state witness Atiba Long has a second written statement. Which is falsified evidence and it is saying my brother backed up and I shot him." Citing Riddle v. Ozmint OP#26153 (2006). There is no way on earth that Atiba Long could have given this second written statement, unless the solicitor along with public defender Chris Brough worked to ensure it was possible. See TR 1 PG 68 L 21-24 Atiba Long, I never said anything, I just shot". Again how did

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Atiba Long know to say this, as this was a concerted effort between solicitor Barry Barnette and public defender Chris Brough? This second written statement is dated 2-25-05, I was interviewed by public defender Chris Brough the first week I n march 2005 manifest the most egregious misconduct by Chris Brough and Barry Barnette to falsify evidence and withhold other evidence. As there is no way Atiba long made two different statements the night of 2-25-05 an which his second written statement, is saying his brother Sigida Long backed up and I shot him. It is clear however that sometime after March 05, Atiba Long was allowed to make the needed changes. See exhibit #15

Issue #3

At my Nov. 29, - Dec. 1, 2005 trial for murder, the solicitor argued to the jury that Sigida the decedent was shot at a 45 degree angle while kneeling down behind my car in mercy or pleading position. The solicitor also argued that I was standing on the 20in wall in my Grandmother's yard when Sigida Long was shot. This was very damaging to my case of self defense see, exhibit #17 Robert Talanges Report, it states that, "a large drop of blood is and was located on the driver's side roof of my car". This document makes it impossible for descendent Sigida Long to have been shot at a 45 degree angle while kneeling down behind my vehicle in a pleading position and I'm on the 20in wall in my grandmother's yard. Pathologist Dr. Wren testified to knowing false evidence and damaging expert testimony see TR 1 PG 136 L 17-19 C, "the bullet actually passed 45 degree downward front-back". This testimony and arguing false evidence was allowed by defense counsel Chris Brough citing, Bruce Tower v. Billy Glover 467 U.S. 914 (1984) to ensure my conviction. This is also why both lawyers wanted all autopsy photos suppressed see TR 1, PG 33 L 14-16, is because their was major scarring all over the body see exhibit 16 proves that Sigida Long was dragged from the place where he was shot, which was right at the driver's side door of the car. Atiba

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B. HOPKINS

Long would have had to drag Sigida to the back of my car. This testimony and argument being presented to the jury is a great injustice and due process violation of my right.

Issue #4

Solicitor Barry Barnette entire argument was Sigida long was shot at a 45 degree angle behind my car while in a pleading position and I'm on the twenty inch wall in my grandmother's yard. As I have already proven that the 45 degree angle argument was prosecutorial and defense counsel misconduct. The solicitor during his closing argument tr.3 pg. 274 L 22-23 "There is no blood beside the driver's side door of the car" besides, meaning next to but apart from the car the sidewalk. See also tr. 3 pg 278 L 2-10 Emp. On L 6 "It's not up at the driver's side door of the car there is no blood" at meaning in or on as defined by the dictionary and published a picture of my car with no blood on the driver's side door. The jury took those exhibits to the jury room with them. See exhibit # 19 proves that there was in fact blood smears on the driver's door of my car and this is where the struggle over the gun had taken place, and where, Sigida Long was shot at. Note, the photos that were taken at the scene 2-25-85, evidence tech Robert Talanges took them with digital camera and can be downloaded on computer and altered and manipulated at will. Citing Tower vs. Glover, and 104 S. CT 2820 (1984) again, both lawyers strategically worked in concert to ensure conviction.

Issue #5

Defense counsel did not introduce and argue Sigida Long's lengthy criminal record. Chris Brough never had plans on entering and arguing the decedent's criminal background see TR 1 PG 36 L 22-23 made it clear that he wasn't. As I understand the admittance or

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exclusion of a decedent's criminal back ground in trial Judge's discretion. See exhibits 21-28, particularly exhibit #27 where a one Mr. Arnold was attacked by Atiba and Sigida Long July 27, 1999 with what was believed to be a pocket knife at the same Lil. Cricket, where 2 ½ yrs later I would be threatened with death while with my son. I think this falls squarely in line with State vs. Day, 535 SE 2nd 431 (2000) and Sigida Long was in fact the night of 2-25-05 armed with a deadly weapon. The solicitor argued that I nor my late Aunt Mrs. Mae Cole had never called the police TR 2 PG 218 L 21-24 and TR 2 PG 206 L 20- PG207 L 9. The fact that I and my aunt testified about past conduct holds no weight compared to the decedent's criminal record being entered and argued. This is well documented evidence that Counsel Chris Brough intentionally failed to argue as this would have taken away from the solicitor's chances of obtaining a conviction in a case of my self-defense renders counsel ineffective.

Issue #6

Public defender Chris Brough should have entered Mignon Williams a state witness written and verbal statement on cross examination. As these statements says she did not see or know who shot Mrs. Williams TR 1 PG 129 L 23-25 she was talking to a friend, defense never questioned whom this mystery friend is, nor did the state present any evidence of a friend that Mignon Williams was alleged to have been outside with the night of 2-25-05. Surely if state witness Misnon Williams was in fact outside with someone the Spartanburg Police department would have found and interviewed this person. This along with Mignon Williams written and verbal statement see exhibits 29-30 that she did not see or know who shot proves she had not witnessed anything. Defense counsel failures to enter and argue the statement were presented at trial. Defense had to ensure my conviction and this renders him greatly ineffective.

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Issue #7

The court received 4 notes from jury see TR 3 PG 308 L 13-14 were received by the court with out my knowledge, as to what were in the four notes from the jury, without offering me the opportunity to be present, or to waive my rights to be present. Citing 520 S.E. 2nd 448 (1999). I had a right to be present. All questions posed by jury are to be done in open court after affording me the opportunity to be present. Counsel Chris Brough was ineffective for not requesting or objecting to me not being present when the court received 4 notes from jury. I have no knowledge as to what were in the 4 notes, that are in the records, minus the fourth note, it is not shown when this note came in, never the less counsel Chris Brough was ineffective for ^{Not} affording me the opportunity to be present, when jury sent these 4 notes to the court.

Issue #8

The trial court abused its discretion when it failed to give the slandered or modified version of the Allen Charge, to an obviously deadlocked jury. See TR 3 PG 310 L 22-PG 311 L 6, its no doubt that the jury needed additional supplement instruction consistent with the language of Allen Charge. Citing Tucker vs. Gatoe, 552 S.E. 2nd 712 (2002). It had been more than six hours of the jury deliberating, with no guidance from the court none what so ever. Show me any case where the trial court did not give some type of Allen/supplemental instruction to a clearly deadlocked jury after more than six hours of deliberation. The only thing asked to jury foreman was, are all twelve jurors actively deliberating. See TR 3 PG 311 L 15-17, this is where the trial judge abused his discretion, and this was due process violation.

Issue #9

Defense lawyer Chris Brough was ineffective where the jury had been out deliberating more than six hours and did not move for a mistrial or that jury be dismissed for further deliberation. See TR 3PG L 22-23, with no instruction from the court, trial lawyer Brough, should have motioned for a mistrial out of manifest necessity to a clearly deadlocked jury. In the alternative defense counsel should have requested that jury stop deliberating for the evening and to reconvene the next day. This resulted in an unlawful conviction and sentence thus renders counsel ineffective.

Issue #10

Juror misconduct was committed by juror # 86, when she did not reveal during voir dire that she was victim of violent crime, as she would have been struck by defense counsel Brough, see exhibit 31 and 32 and citing State vs. Woods, 550 S.E. 2nd 281 (2001).

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Damon Jones, #250332,	)	2010-CP-42-6623
	)	
Applicant,	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
vs.	)	
	)	
State of South Carolina,	)	
	)	
Repondent.	)	

The applicant, Damon Jones, #250332, hereby amends his Application for Post-Conviction Relief to show the following:

1. The Respondent violated the Applicant's fifth (5th) amendment right by withholding "exculpatory" Brady material, and his due process right in the Applicant's case. In the Applicant's case there is exculpatory evidence which is "material" most favorable to the Applicant which was withheld by the prosecution, where the prosecution failed to disclose all the evidence in Applicant's case and there was a concerted effort between prosecution, Barry Barnette, and trial counsel, Chris Brough, to withhold critical evidence in Applicant's case. Had the Applicant's due process rights not been violated, the Applicant's case would have been greatly enhanced to the favorability of the Applicant and the outcome of trial would have been most favorable to the Applicant.
2. Trial counsel, and prosecution, violated the Applicant's due process rights when aiding state's witness, Atiba Long, in construction of a second written statement which is falsified evidence. Had the Applicant's due process rights not been violated, the Applicant's case

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would have been greatly enhanced to the favorability of the Applicant and the outcome of trial would have been most favorable to the Applicant.

3. Prosecution committed prosecutorial misconduct when entering and arguing false and altered evidence that, Sigida Long, had been shot at 45 degree angle, and blood was intentionally and digitally removed from the driver's side door of petitioner's car, and argued knowing false evidence of decedent. Had the prosecution not entered false testimony, the Applicant's case would have been greatly enhanced to the favorability of the Applicant and the outcome of trial would have been most favorable to the Applicant.

4. The Applicant submits that he received ineffective assistance of counsel prior to and during the Applicant's trial. The sixth (6th) amendment to the United States Constitution guarantees that every criminal defendant is entitled to effective assistance of counsel in presenting their defense. See also: S.C. Const., Art.1, Section 14.

A. Trial counsel was ineffective for failing to enter and argue Sigida Long's, criminal record.

B. Trial counsel was ineffective when failing to enter and argue state's witness, Mignon Williams's, written statement for impeachment purposes.

C. Trial counsel was ineffective for failing to inform Applicant that the jury sent four notes to the court.

D. Trial counsel was ineffective for not moving for a mistrial or requesting that jury be sent home to reconvene the following day where jury had been deliberating for more than six (6) hours.

Had the trial counsel not failed in his duties to perform to the standards of proper

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effectiveness of counsel, the Applicant's case would have been greatly enhanced to the favorability of the Applicant and the outcome of trial would have been most favorable to the Applicant.

5. Trial Court abused its discretion when it failed to give Allen Charge/ Supplement instruction to a clearly deadlocked jury. Had the court not abused its discretion, the Applicant's case would have been greatly enhanced to the favorability of the Applicant and the outcome of trial would have been most favorable to the Applicant.

6. Juror misconduct was committed where juror # 86 failed to reveal during voir dire that she was a victim of a violent crime. Had this been made known to the trial counsel during jurors' selection, the juror would most likely been excluded from trial. Had this juror been excluded from trial, the Applicant's case would have been greatly enhanced to the favorability of the Applicant and the outcome of trial would have been most favorable to the Applicant.

Issue #1

Trial Counsel and Solicitor conspired and withheld critical evidence in Applicant's case, as will be shown. Applicant never received state witness Atiba Long's first written statement, blood analysis report, the finger prints analysis report, the signed coroners report and all of the Spartanburg Police Department investigative and supplemental reports. See attached exhibits # 1-14 and the Applicant's numerous attempt to obtain his complete Rule 5/ Brady material, but to no avail. See also exhibit # 15 state witness Atiba Long's second written statement page two at the bottom shows and proves that there was a first written statement Emp. (Applicant was allowed to make the needed changes). Applicant does not have this first written statement; trial counsel never questioned state witness

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Atiba Long about making a first written statement, this manifest the concerted effort between solicitor and trial counsel to withhold critical exculpatory evidence from the Applicant, Citing US vs. Taylor 956 F. Supplement 622 (D.S.C 1997) trial counsel letter to the Applicant, see Exhibit #5,

states that trial counsel has only had one written statement, however trial counsel never brought this

to the court attention about the solicitor withholding evidence, because it is clear that there was a

concerted effort between the solicitor and the trial counsel. The DNA Analysis Report would prove

a close proximity shot and that the decedent was in possession of the fire arm when it was discharged

and that there was blood from the decedent on top of the Applicant's left sneaker. This evidence

should have been presented to the jury, as the gun and sneaker was tested for DNA, trial counsel Tr.

3 pg. 264 L 6-8 they are not in evidence, again the defense did not want this in evidence. The

fingerprint analysis reports that were done on the magazine, was not in evidence see tr. 3 pg. 264 L

9-10 as this was very exculpatory in nature. Who knows whom prints that is, also all of the

supplemental and investigative reports were not made available to the Applicant. The signed

coroner's report is very, very important and exculpatory, as it rules on the manner of death. Whether

homicide, suicide, accident or undetermined, there is always this manner of ruling. Applicant does

not have this document and the decedent had a huge amount of GSR on his hand, Applicant can only

assume what the manner of death is. This document could excuse/justify the death of Sigida Long.

The trial counsel never asked the pathologist, Dr. Wren, what the manner of death was. Withholding

such critical evidence on the part of the trial counsel and solicitor, resulting in an unlawful

conviction and sentencing is a travesty of justice.

Issue #2

State witness Atiba Long has two written statements. Applicant was in possession of the second

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statement only. What information did solicitor and Spartanburg detective receive that prompted state witness, Atiba Long, to give a second statement. Applicant was first interviewed by trial counsel approximately the first week in March 2005, and trial counsel took the Applicant's account of the events that transpired on February 25, 2005. Applicant told the trial counsel, that he was attacked and being pulled from the car. Then he fell back inside, grabbed the gun cocking jumping back out his car holding the gun waist side, EMP. "Telling both the Long brothers to back up". Applicant never during the interview with Spartanburg Police Department investigators told them that he told both the Long brothers to back up. This information came from defense counsel Chris Brough

conspiring with the solicitor Barry Barnette to build a case against me. Now, all of a sudden state's witness Atiba Long has a second written statement. Which is falsified evidence and it is saying my brother backed up and I shot him." Citing Riddle v. Ozmint OP#26153 (2006). There is no way on earth that Atiba Long could have given this second written statement, unless the solicitor along with public defender Chris Brough worked to ensure it was possible. See TR 1 PG 68 L 21-24 Atiba

Long, I never said anything, I just shot". Again how did Atiba Long know to say this, as this was a concerted effort between solicitor Barry Barnette and public defender Chris Brough? This second written statement is dated 2-25-05, Applicant was interviewed by public defender Chris Brough the first week in March 2005. manifest the most egregious misconduct by Chris Brough and Barry

Barnette to falsify evidence and withhold other evidence. As there is no way Atiba Long made two different statements the night of 2-25-05 and which his second written statement, is saying his

brother Sigida Long backed up and Applicant shot him. It is clear however that sometime after March 05, Atiba Long was allowed to make the needed changes. See exhibit #15.

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Issue #3

At Applicant's Nov. 29, - Dec. 1, 2005 trial for murder, the solicitor argued to the jury that Sigida the decedent was shot at a 45 degree angle while kneeling down behind Applicant's car in mercy or pleading position. The solicitor also argued that Applicant was standing on the 20in wall in his Grandmother's yard when Sigida Long was shot. This was very damaging to Applicant's case of self defense see, Exhibit #17 Robert Talanges Report, it states that, "a large drop of blood is and was located on the driver's side roof of my car". This document makes it impossible for decedent Sigida Long to have been shot at a 45 degree angle while kneeling down behind Applicant's vehicle in a

pleading position and Applicant being on the 20in wall in his grandmother's yard. Pathologist Dr. Wren testified to knowing false evidence and damaging expert testimony see TR 1 PG 136 L 7-9 C, "the bullet actually passed 45 degree downward front-back". This testimony and arguing false evidence was allowed by defense counsel Chris Brough citing, Bruce Tower v. Billy Glover 467 U.S. 914 (1984) to ensure Applicant's conviction. This is also why both lawyers wanted all autopsy photos suppressed see TR 1, PG 33 L 14-16, is because there was major scarring all over the body see exhibit 16 proves that Sigida Long was dragged from the place where he was shot, which was right at the driver's side door of the car. Atiba Long would have had to drag Sigida to the back of Applicant's car. This testimony and argument being presented to the jury is a great injustice and due process violation of Applicant's rights.

Issue #4

Solicitor Barry Barnette's entire argument was Sigida Long was shot at a 45 degree angle behind Applicant's car while in a pleading position and Applicant was on the twenty inch wall in his grandmother's yard. As Applicant has already proven that the 45 degree angle argument was

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prosectorial and defense counsel misconduct. The solicitor during his closing argument tr. 3 pg. 274 L 22-23 "There is no blood beside the driver's side door of the car" besides, meaning next to but apart from the car the sidewalk. See also tr. 3 pg 278 L 2-10 Emp. On L 6 "It's not up at the driver's side door of the car there is no blood?" at meaning in or on as defined by the dictionary and published a picture of Applicant's car with no blood on the driver's side door. The jury took those exhibits to the jury room with them. See exhibit #19 proves that there was in fact blood smears on the driver's door of Applicant's car and this is where the struggle over the gun had taken place, and where, Sigida Long was shot at. Note, the photos that were taken at the scene 2-25-05, evidence tech Robert Pennington took them with digital camera and can be downloaded on computer and altered and manipulated at will. Citing Tower vs. Glover, 104 S. CT 2820 (1984) again, both lawyers strategically worked in concert to ensure Applicant's conviction.

Issue #5

Defense counsel did not introduce and argue Sigida Long's lengthy criminal record. Chris Brough never had plans on entering and arguing the decedent's criminal background see TR 1 PG 36 L 22-23 made it clear that he wasn't. As Applicant understands the admittance or exclusion of a decedent's criminal background in trial Judge's discretion. See exhibits 21-28, particularly exhibit #27 where a one Mr. Arnold was attached by Atiba and Sigida Long July 27, 1999 with what was believed to be a pocket knife at the same Lil Cricket, where 2 1/2 yrs later I would be threatened with death while with my son. Applicant thinks this falls squarely in line with State vs. Day, 535 SE 2d 421-422 and Sigida Long was in fact the night of 2-25-05 armed with a deadly weapon. The solicitor argued that Applicant nor his late Aunt Mrs. Mae Cole had never called the police TR 2 PG 218 L 21-24 and TR 2 PG 206 L 20-PG 207 L 9. The fact that Applicant and his aunt testified about past conduct

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holds no weight compared to the decedent's criminal record being entered and argued. This is well documented evidence that Counsel Chris Brough intentionally failed to argue as this would have taken away from the solicitor's chances of obtaining a conviction in a case of Applicant's self-defense renders counsel ineffective.

Issue #6

Public defender Chris Brough should have entered Mignon Williams a state witness written and verbal statement on cross examination. As these statements says she did not see or know who shot

Mrs. Williams TR 1 PG 129 L 23-25 she was talking to a friend, defense never questioned whom

this mystery friend is, nor did the state present any evidence of a friend that Mignon Williams was

alleged to have been outside with the night of 2-25-05. Surely if state's witness Mignon Williams

was in fact outside with someone the Spartanburg Police Department would have found and

interviewed this person. This along with Mignon Williams written and verbal statement see exhibits

29-30 that she did not see or know who shot proves she had not witnessed anything. Defendant

counsel failures to enter and argue the statement were presented at trial. Defense had to ensure

Applicant's conviction and this renders him greatly ineffective.

Issue #7

The court received 4 notes from jury see TR 3 PG 308 L 13-14 were received by the court without

Applicant's knowledge, as to what were in the four notes from the jury, without offering Applicant

the opportunity to be present, or to waive his rights to be present. Citing 520 S.E. 2nd 488 (1996).

Applicant had a right to be present. All questions posed by jury are to be done in open court after

affording Applicant the opportunity to be present. Counsel Chris Brough was ineffective for not

requesting or objecting to me not being present when the court received 4 notes from jury. Applicant

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has no knowledge as to what were in the 4 notes, that are in the records, minus the fourth note, it is not shown when this note came in, never the less counsel Chris Brough was ineffective for not affording Applicant the opportunity to be present, when jury sent these 4 notes to the court.

Issue #8

The trial court abused its discretion when it failed to give the slandered or modified version of the Allen Charge to an obviously deadlocked jury. See TR 3 PG 310 L 22-PG 311 L 6, its no doubt that the jury needed additional supplement instruction consistent with the language of Allen Charge. Citing Tucker vs. Catoe, 552 S.E 2nd 712 (2002). It had been more than six hours of the jury deliberating, with no guidance from the court none what so ever. Show Applicant any case where the trial court did not give some type of Allen/supplemental instruction to a clearly deadlocked jury after more than six hours of deliberation. The only thing asked to jury foreman was, are all twelve jurors actively deliberating. See TR 3 PG 311 L 15-17, this is where the trial judge abused his discretion and this was due process violation.

Issue #9

Defense lawyer Chris Brough was ineffective where the jury had been out deliberating more than six hours and did not move for a mistrial or that jury be dismissed for further deliberation. See TR 3 PG L 22-23; with no instruction from the court, trial lawyer Brough, should have motioned for a mistrial out of manifest necessity to a clearly deadlocked jury. In the alternative defense counsel should have requested that jury stop deliberating for the evening and to reconvene the next day. This resulted in an unlawful conviction and sentence this renders counsel ineffective.

Issue #10

Juror misconduct was committed by juror #86, when she did not reveal during voir dire that she

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victim of violent crime, as she would have been struck by defense counsel Brough, see exhibit 31 and 32 and citing State vs. Woods, 550 S.E 2nd 281 (2001).

Issue #11

The prosecution failed miserably to prove its murder case, despite all of the conspiring with the defense counsel to withhold, falsify and alter evidence. See Jackson v. Virginia, 443 U.S. 307, 61 (1979), in that case, the court held that due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of an offense. U.S.C.A.

Amended 14. See S.C. statute §16-3-10, murder, which is the unlawful killing, with malice aforethought, without just cause or excuse or legal provocation. The state's case was doomed from the start, where its key witness, Atiba Long, testified that Applicant was attacked by Long's brother Sigida. See Tr. 1, pg. 66, lines 19-21 and Tr. 1, pg. 70, Lines 6-25, that a scuffle started in Applicant's car. This attack alone mitigates murder. Applicant maintained, as he always has, that he was pulled from his car and attacked, fell back inside the car, retrieved a registered weapon, jumping back out the car, cocking the weapon, making a lawful defensive stand holding the gun waist down. See Tr. 1, pg. 73, lines 10-19. If there was no struggle over the weapon and had Applicant just shot Sigida, why didn't he shoot Atiba, the weapon had seven (7) rounds in it. The gun discharged only once, but the only person shot was Sigida. The prosecution failed also to disprove the struggle over the weapon. Forensic science could not prove who shot. See experts Ila Simmons; Tr. 1, pg. 100, line 23- pg. 101, line 2. No gun shot residue was found on Applicant's hands. But a tremendous amount was found on the decedent's hands. See Tr. 1, pg. 102, line 23- pg. 102, Line 4; emphasis on Tr. P. 1, 109, lines 14-17; See also Jeffery Hollifield, 2, pg. 102, line 10.

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lines 12-15; Tr. 2, pg. 169, lines 4-10; Tr. 2, pg. 172, lines 17-19; Tr. 2, pg. 173, line 2-pg. 174, line 22. Neither expert could disprove the struggle or that Applicant actually shot Sigida. See expert Dan Defreese, Tr. 1, pg. 122, lines 9-23, even with 6-11 lbs. of pressure it takes to pull or fire this weapon, he corroborates the struggle over the weapon. Plus, the fact that two grown men with a total combined weight of more than 300 pounds. The stress, excitement and adrenaline that could be over 800 pounds of pressure of two opposing forces struggling over a 4 pound weapon, that takes 6-11 pounds of pressure to fire. The only truth and a profound thing that the prosecutor said in his closing. See Tr. 3, pg. 278, lines 13-16, was science can't explain this situation. Now a honest and truthful doctor or scientist in their respective field of study will tell you that if science cannot explain something, it is beyond their knowledge, it is from on high, miraculous, in other words, God's divine hand in a matter or situation. Applicant is blameless in this matter, absolutely innocent of murder, manslaughter or involuntary manslaughter. Prosecution failed to prove its case.

Issue # 12

The great inaccuracy, corruption and conspiracy extends to the court reporter Mike Watts who recorded Applicant's November 29- December 1, 2005 trial for murder.

(1) Robert Porter of the Spartanburg Police Department is in Applicant's trial transcript when in fact he did not testify at the trial.

(2) Robert Talanges of the Spartanburg Police Department did testify at Applicant's trial, however he was a part of Jackson v. Denno hearing. Applicant's trial transcript has the jury in, as if they heard

Robert Talanges testimony. This 27 pages of trial transcript testimony is not accurate. At most,

Talanges actually stayed on the witness stand 3-5 minutes. The jury did not get to hear any of

Spartanburg Police testimony.

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(3) Defense counsel never objected to anything. Although Applicant's trial transcript has objections in it, Chris Brough did not object to anything.

(4) The Court did not instruct Applicant on his right not to testify, but the trial transcript has the judge giving Applicant this instruction. This instruction did not take place at Applicant's trial.

(5) The argument about video tapes beings admitted to show Applicant's distraught and emotional state. While Applicant was on the witness stand and what the S.C. Court of Appeals and S.C. Supreme Court viewed for five years most certainly did not take place. This argument has been fabricated it did not happen at Applicant's actual trial.

(6) Defense counsel did not ask for a directed verdict but the trial transcript reflects something different, he did not ask for a directed verdict.

Issue # 13

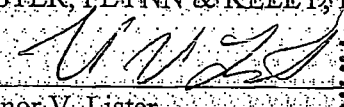
Actual Conflict of Interest

Since the outset of this charge and when defense counsel Chris Brough was appointed to Applicant's case, there was always an atmosphere of deception and confusion wrought by defense lawyer Chris Brough. After counsel received Applicant's Rule 5 Brady material, he stated to Applicant that "this was a clear excusable/justifiable death and that everything looks good unless the prosecutor changes the distance that Sigida was shot at". Applicant immediately asked counsel Brough what was the distance that the decedent was shot at. Counsel stated that he did not know. I knew at that point I was about to be railroaded. There were several occasions, where counsel vehemently tried to get Applicant to plead guilty using that weak reverse psychology. On one particular occasion about 3 days before Applicant's trial, counsel met with him. Counsel Brough stated that "you need to plead guilty because now the prosecutor is going to say that Sigida was shot pointblank range execution on

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style at a 45 degree angle.” Applicant told counsel that he wasn’t pleading to anything. This is precisely why Applicant had wrote in July 2005 to Chief Justice Jean Toal, Spartanburg Administrative law judge, and the disciplinary Board about the way counsel was mishandling his case and that he wanted counsel off his case immediately. See exhibits which show that there was actual conflict and that he wanted counsel off his case. Although counsel stayed on his case, violating Rules of Professional Conduct 1.7 on conflict of interest sub section (4) “if a conflict of interest exist after representation has been undertaken, the lawyer must withdraw from the representation, unless the lawyer obtained the informed consent of client under conditions of paragraph (b).” Applicant did not need or want counsel Chris Brough on his case, because he knew that he was conspiring with prosecutor Barry Barnette to secure Applicant’s conviction. Counsel violated Rule 1.7 Sub Sect 4 when he refused to withdraw himself from representation knowing that actual conflict existed. Obviously counsel was displeased that Applicant had written to his superiors complaining about the way counsel was mishandling his case, and that Applicant wanted him off his case. It is also evident that counsel Chris Brough’s aim and purpose for staying on Applicant’s case, which was to see that he was convicted. See In Matter of Galmore, 530 S.E. 2d 378 (SC 2000).

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Spartanburg, SC
 March 9, 2012

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Submitting Party Signature:

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

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Damon Jones, #250332,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-6623

RETURN

In response to the post-conviction relief application filed on December 15, 2010¹, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Applicant was indicted at the August 2005 term of the Spartanburg County Grand Jury for murder (2005-SS-42-3379). Christopher D. Brough, Esquire, represented the Applicant. On November 30, 2005, the Applicant was convicted of the charge by a jury. The Honorable Paul M. Burch sentenced the Applicant to confinement for life without parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jones, Op. No. 2008-UP-424 (filed July 23, 2008). A Petition for Rehearing was filed by the Applicant and denied by the Court on September 23, 2008. The Applicant then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was granted on December 2, 2009. The

¹ Applicant subsequently filed *pro se* Motions to amend his application, for summary judgment, and a list of witnesses, which are not considered by Respondent to be part of this action because they were all filed while Applicant

South Carolina Supreme Court affirmed the decision of the Court of Appeals. State v. Jones, Memo. Op. No. 2010-MO-020 (filed August 23, 2010). A Petition for Rehearing was filed by the Applicant and denied by the Court on September 22, 2010. The Remittitur was returned on September 22, 2010.

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

II.

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

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to enter and argue Sigida Long's criminal record;
 - b. Counsel failed to enter and argue Mignon Williams' written statement for impeachment purposes;
 - c. Counsel failed to inform Applicant that the jury sent four notes to the court and failed to ensure that Applicant was present or waived his right to be present when the notes were received and read;
 - d. Counsel failed to request a mistrial or request that the jury be sent home to reconvene the following day, where the jury had been deliberating for more than six hours;
2. Prosecutorial misconduct, in that;
 - a. Applicant's 5th amendment rights were violated by the withholding of exculpatory Brady material by a concerted effort between the prosecution and trial counsel;
 - b. Prosecution entered and argued false and altered evidence that Sigida Long had been shot at a 45 degree angle and blood was intentionally and digitally removed from the driver's side door of Applicant's door;
3. Juror misconduct, in that;
 - a. Juror #86 failed to reveal during voir dire that she was a victim of a violent crime;

was represented by Counsel.

4. Due process violations, in that;
 - a. Trial counsel and the prosecution violated Applicant's due process rights when they assisted the state's witness, Atiba Long, in constructing a second written statement, which is falsified evidence,
5. Abuse of discretion, in that;
 - a. Trial court failed to give the Allen/supplemental instruction to a clearly deadlocked jury.

III.

Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney. Although Applicant alleges due process violations in his fourth allegation, Respondent interprets this claim as one that Counsel was ineffective as well.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. 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, 104 S. Ct. 2052. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance

must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

IV.

The Applicant also alleges various incidences of prosecutorial misconduct, including a Brady violation and the entering of false evidence at trial. Although Applicant alleges due process violations in his fourth allegation, Respondent interprets this claim also as one that of prosecutorial misconduct.

First, prosecutorial misconduct is not an issue for post conviction relief. Rather, the allegation is 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 an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

The Applicant could have raised these issues on appeal. The failure to do so has waived this allegation as grounds for relief.

Second, Respondent would submit that these claims lack merit. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the

evidence would have been favorable to the accused, and (3) the suppressed evidence is material.

United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal

if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266

(1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different." Id., 434 S.E.2d at 268. Regardless, it is Applicant's burden to prove actual prosecutorial

misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits that the

Court should summarily dismiss this allegation.

V.

The Applicant also alleged that there was juror misconduct for a juror's failure to reveal information during *voir dire* that he argues would have resulted in her being stricken from the jury.

In order to obtain a new trial based upon allegations of juror misconduct, a defendant must demonstrate prejudice from that alleged misconduct. Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371 (2008) (citing State v. Aldret, 333 S.C. 307, 314, 509 S.E.2d 811, 814 (1999)). Specifically,

as it relates to disclosure of information during *voir dire*, a new trial is required only if the court finds that the juror intentionally concealed the information and the information would have supported a

challenge for cause or would have been material to one of the party's preemptory challenges. Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (citing State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). If the failure to disclose the information is determined to be innocent,

then no inference of impartiality may be drawn. Id.

Respondent submits that this allegation lacks merit and the information alleged to have been concealed by the juror would not have been material to the selection of the jury. Therefore, this

allegation should be dismissed.

VI.

Applicant also alleges that the court abused its discretion when it failed to give a supplemental or Allen charge to the jury. However, this allegation also 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). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

VII.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VIII.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

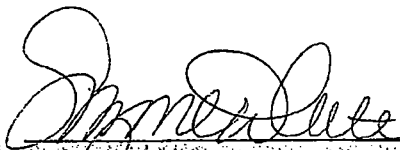
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

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SUZANNE H. WHITE
Assistant Attorney General

By: 

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February, 2012.

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Damon Jones,)
5) TRANSCRIPT OF RECORD
6) 2010-CP-42-06623
7 Applicant,)
8 -vs-)
9 The State,)
10)
11 Respondent.) June 25 and 26, 2013
12) Spartanburg, South Carolina
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B E F O R E:

HONORABLE R. LAWTON MCINTOSH, JUDGE

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

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Attorney for the Applicant

SUZANNE H. WHITE, ESQUIRE
Attorney for the Defendant

Margaret A. Woods
Circuit Court Reporter