

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Honorable Maite Murphy, Circuit Court Judge

DEMETRIUS D. SMALLS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000850

APPENDIX

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1 Now, the defendant obviously has pled not guilty to the
2 three indictments, and a plea of not guilty obviously puts
3 the burden on the State of South Carolina to prove each and
4 every element of each and every indictment to you beyond a
5 reasonable doubt. A person charged with committing a
6 criminal offense in South Carolina is never ever required to
7 prove himself innocent. It is an important Constitutional
8 rule of law, under the Constitution of the United States and
9 of our state, that a defendant, in a criminal trial, no
10 matter how serious the crime may be or what he is charged
11 with will always be presumed to be innocent of the crime for
12 which he has been charged and indicted unless guilt has been
13 proven by evidence satisfying you of that guilt beyond a
14 reasonable doubt.

15 The presumption of innocence does not end when you
16 begin your deliberations, but it stays with the defendant
17 throughout the trial and your deliberations until you reach
18 a verdict of guilt based on evidence satisfying you of that
19 guilt beyond a reasonable doubt. The presumption of
20 innocence is not a mere legal theory. It's not just a legal
21 phrase. It is a substantial constitutional right that all
22 defendants are entitled unless you, the jury, are satisfied
23 from the evidence of the defendant's guilt beyond a
24 reasonable doubt.

25 A reasonable doubt has been defined by our Courts very

1 simply as this. A reasonable doubt is the kind of doubt
2 that would cause a reasonable person to hesitate to act. A
3 reasonable doubt is the kind of doubt that would cause a
4 reasonable person to hesitate to act. It is also said that
5 proof beyond a reasonable doubt is proof that leaves you
6 firmly convinced of the defendant's guilt.

7 There are very few things in this world that we know
8 with absolute certainty and, in criminal cases, the law does
9 not require proof that overcomes every possible doubt. If,
10 based on your consideration of the evidence, you're firmly
11 convinced that the defendant is guilty of the crime charged,
12 you must find the defendant guilty. If, on the other hand,
13 you think there's a real possibility that the defendant is
14 not guilty, you must give the defendant the benefit of the
15 doubt and find him not guilty.

16 As I told you at the beginning of the trial that you
17 and I have obviously distinct duties to perform. I told you
18 that you are the finders of the facts, the judges of the
19 facts. I told you that I am the judge of the law in the
20 case. So now you have to accept the law as I give it to
21 you. That is my main role, that, and to rule on the
22 admissibility of evidence. But, more importantly, you are
23 the judges or the finders of the facts.

24 So, at any time during the trial of this case you were
25 looking at me and I rolled my eyes or I yawned or I did

1 something that you thought maybe I had some opinion on the
2 facts, that's not correct. I can't have an opinion on the
3 facts. I can not consider the facts at all. I have to
4 leave that for you.

5 so, if you thought that I was, had some opinion about
6 the facts, set that aside. I can not and I did not. That
7 is solely up to you. You are the judges of the facts in the
8 case. You determine, from this witness stand, from the
9 testimony, and the exhibits, what the true facts are in the
10 case.

11 Necessarily, in doing that, you must determine what we
12 call the credibility of the witnesses who have testified in
13 the case. Credibility simply means believability. It
14 becomes your duty, as jurors, to analyze and evaluate the
15 evidence and determine which evidence convinces you of its
16 truth.

17 In determining the believability or credibility of the
18 witnesses, you have the right to believe several witnesses
19 over one, one witness over several witnesses. You can
20 disbelieve everything a witness says. You can believe
21 everything a witness says. You can believe a part,
22 disbelieve the other part. So, use your every day skills in
23 dealing with people to determine what was the truth in this
24 case.

25 You may consider whether or not a witness has an

1 interest, bias, prejudice, or other motive in the case, and
2 you may also consider the appearance and manner of a witness
3 while on the witness stand. So, you determine what the true
4 facts are, and the way the system works is that, once you
5 determine what the true facts are, you apply those true
6 facts to the charges involved in this case, the three
7 charges, and determine whether or not the State has met its
8 burden of proof, and then you reach your verdict of either
9 guilty or not guilty.

10 In this case, we had a couple of witnesses, Doctor
11 Ross, and perhaps the firearms people who were qualified as
12 experts. As I told you, our rules of evidence ordinarily do
13 not permit a witness to testify about opinions or
14 conclusions. An exception to the rule is what we call the
15 expert witness rule.

16 A witness, who by education, experience, training, has
17 become an expert in some art, science, or profession may
18 state an opinion in the case on any relevant matters. You
19 have the right to give an expert's opinion whatever weight
20 you deem it deserves. You can -- you don't even have to
21 give it any at all, but it's just up to you, like other
22 witnesses, if you believe their expert opinion or their,
23 their opinions as testified in the case.

24 We had some witnesses who had a past criminal record.
25 The law on that is a person who has a past criminal record

1 is competent to testify during the trial. A past record
2 does not affect the ability of that witness to testify, and
3 the past record may only be considered by you if at all in
4 determining his credibility or believability. Please
5 remember you are the sole judges of the facts in the case,
6 and the believability of any and all witnesses.

7 We also heard evidence that the defendant was convicted
8 and had a record of a crime other than the one he is now on
9 trial for, and this evidence may be considered by you, if
10 you conclude it's true, only in deciding whether the
11 defendant's testimony is believable and for no other
12 purpose. You must not consider the defendant's prior record
13 as any evidence of guilt on the charges we're trying here
14 today.

15 There was testimony in the record that a statement was
16 alleged to have been made by the defendant, and it has been
17 admitted into the evidence of this case. While I have
18 determined that the, that the statement is admissible, I
19 instruct you that you make the ultimate decision of whether
20 or not the defendant actually made the statement, and if he
21 did make the statement, you must determine whether the
22 statement was made by the defendant voluntarily and of his
23 own free will. This means that the statement was not caused
24 by pressure, force, fear, threats, coercion, or
25 intimidation, or by any hope or promise of leniency or any

1 rewards.

2 In determining whether the statement was voluntarily,
3 you should consider both the characteristics of the
4 defendant and the details of the questioning. Some of the
5 factors that you may consider are the age of the defendant,
6 education or lack thereof, mental ability or capacity, the
7 defendant's intelligence, the defendant's background and
8 environment, the place and length of detention, the nature
9 of the questioning, and the advice or lack thereof to the
10 defendant of his constitutional rights, including, but not
11 limited to the right to remain silent, that any statement
12 could be used against him in a court of law, and the right
13 to have a lawyer present, and if he or she could not afford
14 a lawyer, a lawyer would be appointed to represent him
15 without any costs and that he can stop making the statement
16 at any time.

17 You must carefully consider all the surrounding
18 circumstances before you give any weight to an alleged
19 statement. The State has the burden of proving, beyond a
20 reasonable doubt, that the alleged statement was voluntary.
21 If you determine it was, then you may give the statement any
22 further consideration that you deem proper. You must decide
23 what weight, if any, it should be given to the alleged
24 statement. If you determine the alleged statement was not
25 the free and voluntary statement of the defendant, then you

1 should not consider it at all. So, that's the general law
2 dealing with statements in a criminal trial.

3 Madam Forelady, and ladies and gentlemen, that's pretty
4 much the, the general propositions of law that deal with all
5 criminal cases.

6 Now let's turn to the three indictments in this case,
7 and I will -- I'll do them -- the first indictment is
8 Indictment 2011-GS-06-65. That's an indictment for murder.
9 The defendant is charged with murder.

10 The State must prove, beyond a reasonable doubt, that
11 the defendant killed another person with malice
12 aforethought. The State must prove, beyond a reasonable
13 doubt, that the defendant killed another person with malice
14 aforethought.

15 Malice is defined in our law as hatred, ill will, or
16 hostility towards another person. It is the intentional
17 doing of a wrongful act without just cause or excuse and
18 with an intent to inflict an injury or under circumstances
19 that the law will infer an evil intent, an evil intent.
20 Malice aforethought does not require that the malice exists
21 for any particular time before the act is committed, but
22 malice must exist in the mind of the defendant just before
23 and at the time the act is committed. Therefore, there must
24 be a combination of the previous evil intent and the act.

25 Malice aforethought may be, may be expressed or

1 inferred. The terms expressed and inferred do not mean
2 different kinds of malice, but merely the manner in which
3 malice may be shown to exist. That is either by direct
4 evidence or by inference from the facts and circumstances
5 which are proved.

6 Express malice is shown when a person speaks words
7 which express hatred or ill will for another or when the
8 person prepared beforehand to do the act which was later
9 accomplished. For example, lying in wait for a person or
10 any other acts of preparation going to show that the deed
11 was within the defendant's mind would be express malice.

12 More commonly we have what is called inferred malice.
13 Malice may be inferred. If you go outside and there is mud
14 puddles everywhere and it is cloudy, you can infer that it
15 has rained even though you hadn't seen it rain. That's what
16 inferred means.

17 Malice may be inferred from conduct showing a total
18 disregard for human life. Inferred malice may also arise
19 when the deed is done with a deadly weapon. Of course, a
20 deadly weapon is any instrument which is likely to cause
21 death or great bodily harm. Whether an instrument has been
22 used as a deadly weapon obviously depends on the facts and
23 circumstances of each case. Obviously, a deadly weapon
24 includes a pistol.

25 So, the State has to prove, beyond a reasonable doubt,

1 that the defendant killed another person with malice
2 aforethought and malice can be either expressed or inferred
3 as I just told you.

4 Under our law, we have, as I told you, earlier degrees
5 of homicide. Obviously the highest degree is murder where
6 you kill someone with malice aforethought. The next degree
7 of homicide -- homicide is the killing of another person by
8 a person -- is what we call voluntary manslaughter. If you
9 find in this case that the State has failed to prove, beyond
10 a reasonable doubt, that the defendant committed murder,
11 then you must consider whether the State has proved, beyond
12 a reasonable doubt, that the defendant committed what we
13 call voluntary manslaughter.

14 To prove voluntary manslaughter, the State must prove,
15 beyond a reasonable doubt, that the defendant took the life
16 of another person in the sudden heat or passion based on
17 sufficient legal provocation. Both heat of passion and
18 sufficient legal provocation must be present at the time of
19 the killing to constitute voluntary manslaughter. Sudden
20 heat of passion may, for a time, effect a person's
21 self-control and temporarily disturb a person's reasoning.
22 Sudden heat of passion must be the type that would make an
23 ordinary person unable to coolly reflect on his actions and
24 would produce an uncontrollable impulse to do violence.

25 Sufficient legal provocation must be the type that

1 would make a person of ordinary reason and caution to become
2 enraged and to lose control temporarily. Provocation needed
3 from voluntary manslaughter must come from some act of or
4 related to the victim.

5 If the heat of passion had cooled or if there was
6 enough time between the provocation, if any, and the killing
7 for the person of a, for the passion of a person, reasonable
8 person to cool, the killing would not be voluntary
9 manslaughter. In deciding whether a reasonable person would
10 have had enough time to cool off, you should consider all
11 the circumstances surrounding the killing. You may consider
12 the nature of the provocation, if any, the defendant's
13 mental and physical state, and the circumstances and
14 relationship between the parties.

15 So, when you go back and you are deliberating on the
16 indictment for murder, the verdict form will be as to the
17 offense of murder, we, the jury, find the defendant, you
18 have two choices, guilty or not guilty. If you find him
19 guilty, that would be the end of it. If you find him not
20 guilty, then you would then deliberate as to whether or not
21 he was guilty of the lesser included homicide of voluntary
22 manslaughter.

23 Does that make sense?

24 (Jurors respond affirmatively.)

25 THE COURT: The next indictment is the Indictment

1 2011-GS-06-66. That's the indictment for assault and
2 battery with intent to kill. The defendant has been charged
3 with assault and battery with intent to kill. In order to
4 prove assault and battery with intent to kill, the State
5 must prove, beyond a reasonable doubt, that the defendant
6 committed an unlawful act of a violent nature to the person
7 of another with malice aforethought. The State must prove,
8 beyond a reasonable doubt, that the defendant committed an
9 unlawful act of a violent nature to the person of another
10 with malice aforethought.

11 Obviously the law defines assault. That occurs when a
12 person unlawfully attempts or offers to commit a violent
13 injury upon another person and has the present ability to
14 complete the attempted injury. A battery is the unlawful
15 touching of another person by a person who has committed the
16 assault. An unlawful touching can be caused by a part of
17 the accused body or by any object the accused puts in
18 motion. In other words, the assault is you sort of draw
19 back your fist to hit somebody, you have the ability to do
20 so, and the battery is when you come around and hit him or
21 pull the gun and fire the gun and shoot somebody.

22 The battery's the completion of the assault by using or
23 applying force to another person, however slight, in a rude
24 angry or resentful manner without legal justification for
25 doing so. Malice and assault and battery with intent to

1 kill is the same as in malice in a murder case. It is the
2 intentional doing of a wrongful act without just cause or
3 excuse and with an intent to inflict an injury or under
4 circumstances that the law will infer an evil intent.

5 Malice aforethought does not require that malice exist
6 for any particular time before the act is committed, but
7 malice must exist in the mind of the defendant just before
8 and at the time of the act. Therefore, there must be a
9 combination of the previous evil intent and the act. And,
10 as in murder, malice may be expressed or inferred. Once
11 again, that does not mean they're two types of malice, but
12 merely the manner which malice may be shown to exist.

13 Express malice is shown when a person speaks words
14 which express hatred or ill will for another or when the
15 person prepared beforehand to do the act which was later
16 accomplished. Malice may also be inferred from conduct
17 showing a total disregard from human life. Inferred malice
18 may also be shown or arise when the deed is done with a
19 deadly weapon and obviously a pistol is an example, under
20 our law, of a deadly weapon.

21 So, that's the law on assault and battery with intent
22 to kill. A specific intent to kill is not required or is
23 not an element of assault and battery with intent to kill,
24 but there must be a general intent to commit serious bodily
25 injury. Intent means intending the result which actually

1 occurs. Not accidentally or involuntarily.

2 Intent may be shown by acts and conducts of the
3 defendant and any other circumstances from which you may
4 naturally and reasonably infer intent. Evidence of the
5 character of the assault, the character of the instrument
6 used, the manner in which it was to be used, the purpose to
7 be accomplished, and the resulting wounds or injuries may be
8 considered in determining the intent with which the assault
9 was committed. Intent may be inferred when it is
10 demonstrated that the defendant voluntarily and willfully
11 commits an act, the natural tendency of which is to destroy
12 another person's life. That's the second indictment.

13 The third indictment is he's charged with pointing --
14 strike that. He's charged with possession of a weapon
15 during the commission of a violent crime. The State must
16 prove, beyond a reasonable doubt, that the defendant was in
17 possession of a firearm during the commission of a violent
18 crime. Firearm means any type of gun including a pistol.

19 In order to find the defendant guilty of possession of
20 a weapon during the commission of a violent crime, you must
21 first find the defendant guilty of committing a violent
22 crime, and obviously murder is a violent crime, and assault
23 and battery with intent to commit, assault and battery with
24 intent to kill is a violent crime.

25 So, Madam Forelady, you would, you would deliberate on

1 the murder charge or the assault and battery with intent to
2 kill charge first. If you find him not guilty on both of
3 those, then obviously he can't be guilty of possession of a
4 weapon during the commission of a violent crime because he
5 hadn't committed a violent crime. If you find that he is
6 guilty of either the murder or voluntary manslaughter or the
7 assault and battery with intent to kill, then you go to the
8 possession of the weapon during the commission of a violent
9 crime.

10 Does that make sense?

11 (Jurors nod affirmatively.)

12 THE COURT: Now, in this case, the defendant has raised
13 the defense of self-defense. Self-defense is what we call a
14 complete defense, and, if established, then obviously you
15 must find the defendant not guilty and you make that
16 analysis on both the murder and the assault and battery with
17 intent to kill.

18 The State has the burden of disproving self-defense by
19 proof beyond a reasonable doubt. If you have a reasonable
20 doubt of the defendant's guilt, after considering all of the
21 evidence including the evidence of self-defense, then you
22 must find the defendant not guilty. On the other hand, if
23 you have no reasonable doubt of the defendant's guilt, after
24 considering all of the evidence, including the evidence of
25 self-defense, then you must find the defendant guilty.

1 There are several elements to the defense of
2 self-defense, and all of the elements have to exist in order
3 for the defense to apply. It can't be one. It has to be
4 all of them.

5 The first one, the first element for self-defense to
6 apply, the defendant must be without fault in bringing on
7 the difficulty. If the defendant's conduct was the type
8 which was reasonably calculated to and did provoke a deadly
9 assault, the defendant would be at fault in bringing on the
10 difficulty and would not be entitled to an acquittal based
11 on self-defense. If the defendant voluntarily participated
12 in mutual combat, a fight, for purposes other than
13 protection, the killing of the victim would not be
14 self-defense. This is true even if, during the combat, the
15 defendant feared death or serious bodily injury. However,
16 before the killing is committed, the defendant withdraws and
17 tried in good faith to try to avoid further conflict and
18 either, by word or act, makes that fact known to the victim,
19 he would be without fault in bringing on difficulty.

20 For mutual combat, there must be a mutual intent and
21 willingness to fight. This intent must be shown by the acts
22 and conduct of the parties and the circumstances surrounding
23 the combat. In addition, it must be shown that both parties
24 were armed with a deadly weapon. So, the first element is
25 that the defendant must be without fault in bringing on the

1 difficulty.

2 The second element that must be met, along with the
3 first, is that the defendant was actually in imminent danger
4 of death or serious bodily injury or that the defendant
5 actually believed he was in imminent danger of death or
6 serious bodily injury. If the defendant was actually in
7 imminent danger, it must be shown that the circumstance
8 would of warranted a person of ordinary firmness and courage
9 to strike the fatal blow to prevent death or serious bodily
10 injury. If the defendant believed he was in imminent danger
11 of death or serious bodily injury, it must be shown that a
12 reasonably prudent person of ordinary firmness and courage
13 would of had the same belief.

14 In deciding whether the defendant actually was or
15 believed he was in imminent danger of death of serious
16 bodily injury, you should consider all of the facts and
17 circumstances surrounding the crime including the physical
18 condition and characteristics of the defendant and the
19 victims.

20 Our law says a defendant does not have to show that he
21 was actually in danger. It is enough that the defendant
22 believes he was in imminent danger and a reasonably prudent
23 person of ordinary firmness and courage would of had the
24 same belief under the same circumstances, and the defendant
25 has the right to act on appearances even though the

1 defendant believes he may have been mistaken. It is for you
2 to decide whether the defendant's fear of immediate danger
3 or death of serious bodily injury was reasonable and would
4 have been felt by an ordinary person in the same situation.

5 So, that's the first two elements of self-defense. The
6 defendant must be without fault. Secondly, which you have
7 to prove as well or disprove, is that he was in, actually in
8 imminent danger of death or serious bodily injury or that he
9 actually believed he was, and then the last element, and you
10 must prove all of them or disprove, the State must disprove,
11 beyond a reasonable doubt, the final element of self-defense
12 is that the defendant had no other probable way to avoid the
13 danger of death or serious bodily injury than to act as he
14 did in this particular instance.

15 So, those are the three elements and all three must be
16 met. The last being that the defendant had no other
17 probable way to avoid the danger of death or serious bodily
18 injury than to act as he did in this particular case.

19 There is one other general proposition I forgot to
20 mention and it deals with voluntary intoxication. A person
21 who voluntarily becomes intoxicated is just as responsible
22 for the acts committed while intoxicated as when the person
23 is not intoxicated.

24 Now, Madam Forelady, ladies and gentlemen of the jury,
25 I have the three verdicts forms that we've discussed. One

1 is dealing with the murder and the lesser included offense
2 of then, of voluntary manslaughter. If you find him guilty
3 of murder, you don't go to the voluntary. If you find him
4 not guilty of murder, then you consider voluntary
5 manslaughter. Decide that independently of the others.

6 The next is assault and battery with intent to kill.
7 If you find him not guilty, that's the end of that one. If
8 you find him guilty, that's the end of that one, and you can
9 only consider possession of a weapon during the commission
10 of a violent crime if you find him guilty of both or at
11 least one. If you find him not guilty on both, then
12 obviously that would be a not guilty.

13 Your verdict must be unanimous. All 12 of you must all
14 agree on the verdict. You have absolutely no friends to
15 reward, no enemies to punish. You are to deliberate based
16 on the evidence that you've heard, apply it to the law as
17 I've given it to you, and when you have completed your
18 deliberations, you let me know by signing the verdict form,
19 whatever verdict it is, knock on the door, and Mr. Eddie
20 will receive the verdict.

21 If, during your deliberations, you have some questions,
22 what I normally like to do is for you to write it on a piece
23 of paper and send it out to me. I will do my best to answer
24 it. Sometimes I can't. Sometimes I can. It just depends
25 on what the question is. So, send it out and I'll do my

1 best to address it for you.

2 I know you, some of you have taken notes. Obviously
3 you can refer to your notes. They'll be back there with
4 you. Some people are better note, note takers than others.
5 So, you know, listen to each one of you and y'all have a
6 good discussion.

7 I think the clerk has ordered some lunch. When it
8 comes, you can continue to deliberate while you eat. You
9 can stop deliberating. If anyone leaves the room for
10 bathroom or, I don't know if anybody smokes, or -- you have
11 to stop deliberating until you have all 12 back in there.

12 Fair enough?

13 (Jurors nod affirmatively.)

14 THE COURT: Okay. I'm gonna ask you to take your notes
15 with you, return to the jury room. Do not start
16 deliberating yet. I have to ask the lawyers if I've left
17 anything out, and then I have to gather the evidence and
18 send it back there with you for you to look at. All three
19 of the guns have been secured by SLED and the solicitor's
20 office. They have those safety clamps on them. They are,
21 they are not dangerous. If you want to handle them, you
22 can.

23 what do you call it, they've been made what?

24 SOLICITOR MILLER: Made safe, Your Honor.

25 THE COURT: Made safe. Pretty good term.

1 Okay. Thank you. You can go back.

2 Mr. Eddie, separate my alternates. Put my alternates
3 in the other room.

4 (WHEREUPON, the following takes place outside the
5 presence of the jury.)

6 THE COURT: All right. Gentlemen, please come on up
7 and let's look at the exhibits and then we'll talk about any
8 exceptions.

9 (Pause.)

10 THE COURT: All right. Mr. Koger, any exceptions,
11 requested additions, deletions, et cetera, to the charge?

12 MR. KOGER: Judge, just one thing I wanted to point out
13 for the record. On the jury instruction, in relation to my
14 self-defense, you stated it was three elements. There are
15 four elements, and I think you combined the second and third
16 element.

17 THE COURT: I did. I'm charging out of my charge book
18 provided to me by the Supreme Court, which lists three
19 elements, imminent danger and appearance of imminent danger
20 combined into one. I covered it. I just -- I said three
21 instead of four, right?

22 MR. KOGER: That's right. I was covered. I just
23 wanted to point that out.

24 THE COURT: All right. Thank you.

25 SOLICITOR MILLER: Your Honor, I think, and I may of

1 misheard, but I think that the Court may have said, during
2 the charge on the self-defense, that the State has to
3 disprove all three elements. I know, at one point, you were
4 specific about saying---

5 THE COURT: All three had to apply.

6 SOLICITOR MILLER: All three had to apply.

7 THE COURT: I'll get them back out. I'll tell them the
8 State has the burden of disproving self-defense.

9 SOLICITOR MILLER: But we only have to disprove any one
10 element.

11 THE COURT: Any one of the three. All three, two, or
12 one.

13 Bring them back out, Mr. Eddie.

14 Are y'all okay with the verdict form?

15 SOLICITOR MILLER: Yes, Your Honor.

16 THE COURT: Same as, same as we looked at yesterday.

17 Okay with all of the exhibits, the State?

18 SOLICITOR MILLER: Your Honor, we haven't looked at all
19 of the boxes yet, but all 15 exhibits are present in the
20 stack. Mr. Koger and I can take a look at them.

21 (WHEREUPON, the following takes place within the
22 presence of the jury.)

23 THE COURT: Just very briefly. Let me make sure I'm
24 making myself clear.

25 The defense of self -- the defense of self-defense has

1 three elements that I've told you about. The defendant must
2 be without fault in bringing on the difficulty. Second is
3 the defendant was actually in imminent danger of death or
4 series bodily injury or that he believed he was in imminent
5 danger of death or serious bodily injury, and, last, he had
6 a means of leaving or avoiding it, and those are the three
7 elements.

8 The State has the burden, the burden of disproving
9 self-defense. They have to disprove it. They have that
10 burden, beyond a reasonable doubt. They don't have to
11 disprove all three elements. If they disprove one, two, or
12 three, then the defense of self-defense is not, is not a
13 defense. If they don't prove -- I mean if they don't
14 disprove at least one -- in other words, if all three exist
15 and they haven't disproven it, then it would be available.
16 So, if they disprove one, two, or three, it's not a defense.

17 Does that satisfy the State?

18 SOLICITOR MILLER: Yes, Your Honor.

19 THE COURT: Mr. Koger?

20 MR. KOGER: Yes, Your Honor.

21 THE COURT: Thank you.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury.)

24 THE COURT: All right. Let the record reflect that
25 both the defense and State have reviewed the exhibits.

1 They're all in order. They've reviewed the verdict forms.

2 They are in agreement with the verdict forms.

3 And Mr. Eddie, I am going to ask you to take the
4 evidence and verdict forms back to the jury room and they
5 may start their deliberations. Make sure that the two
6 alternates are not in there, but I'm still -- we still got
7 them in another room.

8 (WHEREUPON, the following takes place outside the
9 presence of the jury.)

10 THE COURT: All right. We'll stand at ease.

11 (WHEREUPON, the jury began to deliberate at 12:14 and a
12 returned to the courtroom at 12:33.)

13 THE COURT: Madam Forelady, let me see you right here
14 please.

15 (WHEREUPON, an off-the-record discussion was held with
16 the forelady at this time.)

17 THE COURT: All right. Let the record reflect that
18 I've got the jury back in. They have just been out just for
19 a few minutes, and we had ordered pizza, and they had
20 started eating their pizza, but, Madam Forelady, y'all have
21 not started deliberating the case, had you not?

22 THE FOREPERSON: No, sir.

23 THE COURT: Hadn't talked about anything as far as
24 deciding the case?

25 THE FOREPERSON: No, sir.

1 THE COURT: Just talking about your pizza.

2 When I instructed you dealing with the murder charge
3 and the assault and battery with intent to kill charge, we
4 were talking about malice aforethought, and you could either
5 have express malice or inferred malice.

6 Do you remember that charge?

7 (Jurors nod affirmatively.)

8 THE COURT: And I charged you that malice may be
9 inferred when someone uses a deadly weapon.

10 Remember that?

11 (Jurors nod affirmatively.)

12 THE COURT: That's been the law in this state for a
13 long long time, but the Supreme Court, in 2009, has issued
14 an opinion that I did not have in my charge book. That's my
15 fault. The law is that there is no longer an inference from
16 the use of a deadly weapon regarding inferred malice. That
17 goes to the murder charge as well as the assault and
18 battery, assault and battery with intent to kill and perhaps
19 voluntary manslaughter.

20 So, when I charged you that you could infer malice from
21 the use of a deadly weapon, pistol, I was incorrect. That
22 is not the law.

23 okay?

24 THE FOREPERSON: Okay.

25 THE COURT: Does that satisfy the State?

1 SOLICITOR MILLER: Yes, Your Honor.

2 THE COURT: Does that satisfy, Mr. Koger?

3 MR. KOGER: Yes, Your Honor.

4 THE COURT: And both, gentlemen, y'all have had an
5 opportunity to look at State versus Belton, is that correct?

6 SOLICITOR MILLER: Yes, Your Honor.

7 MR. KOGER: Yes, Your Honor.

8 THE COURT: And y'all had not started deliberating and
9 you understand my new instructions, is that correct, Madam
10 Forelady?

11 THE FOREPERSON: Yes, sir.

12 THE COURT: Thank you.

13 Enjoy your lunch and you may start deliberating at your
14 convenience.

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

17 THE COURT: We'll stand at ease.

18 (WHEREUPON, the jury began deliberations again at 12:37
19 and returned with a verdict at 2:10.)

20 THE COURT: Ladies and gentlemen, let me, once again,
21 commend each and every one of you on your behavior so far.
22 It's been wonderful. As expected, everyone's acted with
23 respect to the court system.

24 The jury has reached a verdict on all three counts. I
25 do not know what it is. Obviously the victim's side of the

1 family and the defendant's side here, I will not allow any
2 emotions, outbursts, crying, clapping, cheering, whatever.
3 If you can not conduct yourself accordingly, I'm gonna ask
4 you to leave now. If anyone does not follow my instruction,
5 I have officers all over the courtroom, as we do in all
6 murder cases, and you will be held in contempt of court for
7 violating my order not to show emotions.

8 So, if you can not control your emotions, I'm gonna ask
9 you now to please leave as nicely as I know how.

10 Thank you.

11 All right. Bring me my two alternates, let them have a
12 seat, and as soon as they come in, then bring the jury in.

13 (WHEREUPON, the alternates enter the courtroom at this
14 time.)

15 THE COURT: All right. Mr. Eddie, bring the jury in
16 please, sir.

17 (WHEREUPON, the following takes place within the
18 presence of the jury.)

19 THE COURT: Madam Forelady, y'all have reached a
20 verdict on all three indictments?

21 THE FOREPERSON: Yes, sir.

22 THE COURT: And you've passed those up to the clerk as
23 I understand?

24 THE FOREPERSON: Yes, sir.

25 THE COURT: All right. Madam Clerk, if you will

1 publish them, publish the verdict please.

2 THE CLERK: In the Court of General Sessions for the
3 Second Judicial Circuit, Indictment Number 2011-GS-06-00065,
4 the State of South Carolina, County of Barnwell, State of
5 South Carolina versus Demetrius Smalls, as to the offense of
6 murder, we, the jury, find the defendant not guilty.

7 If your verdict is not guilty of murder as to the
8 lesser included offense of voluntary manslaughter, we, the
9 jury, the defendant, guilty. Unanimously agree.

10 In the State of South Carolina versus Demetrius Smalls,
11 Indictment Number 2011-GS-06-00067, as to the offense of
12 possession of a weapon during a violent---

13 THE COURT: Do the other one first.

14 THE CLERK: I'm sorry.

15 THE COURT: My mistake. My mistake.

16 THE CLERK: Indictment Number 2011-GS-06-00066, the
17 State of South Carolina versus Demetrius Smalls, as to the
18 offense of assault and battery with intent to kill, we, the
19 jury, find the defendant guilty. Unanimously agree.

20 And in Indictment Number 2011-GS-06-00067, State of
21 South Carolina versus Demetrius Smalls, as to the offense of
22 possession of a weapon during a violent crime, we, the jury,
23 find the defendant guilty.

24 They unanimously agree.

25 THE COURT: Thank you.

1 Anything for the jury before I release them, Mr. Koger?

2 MR. KOGER: I'd like to poll the jury, Your Honor.

3 THE COURT: All right. Very well.

4 Madam Forelady, ladies and gentlemen of the jury, the
5 clerk is gonna ask you this question, when she calls out
6 your name, please respond.

7 Mrs. Hughes, is this your verdict and is it still your
8 verdict?

9 THE FOREPERSON: Yes, sir.

10 THE CLERK: Mr. Williams, is this your verdict and is
11 it still your verdict?

12 THE JUROR: Yes.

13 THE CLERK: Mr. Frasier, is this your verdict and still
14 your verdict?

15 THE JUROR: Yes.

16 THE CLERK: Mr. Bell, is this your verdict and still
17 your verdict?

18 THE JUROR: Yes.

19 THE CLERK: Mr. Felton, is this your verdict and still
20 your verdict?

21 THE JUROR: Yes.

22 THE CLERK: Mrs. Roundtree, is this your verdict and
23 still your verdict?

24 THE JUROR: Yeah.

25 THE CLERK: Mr. Woods, is this your verdict and still

1 your verdict?

2 THE JUROR: Yes, ma'am.

3 THE CLERK: Mr. Stillinger, is this your verdict and
4 still your verdict?

5 THE JUROR: Yes, ma'am.

6 THE CLERK: Mrs. Carter, is this your verdict and still
7 your verdict?

8 THE JUROR: Yes.

9 THE CLERK: Mr. Holliway, is this your verdict and
10 still your verdict?

11 THE JUROR: Yes, ma'am.

12 THE CLERK: Mrs. Robinson, is this your verdict and
13 still your verdict?

14 THE JUROR: Yes, ma'am.

15 THE CLERK: Mrs. Palm, is this your verdict and still
16 your verdict?

17 THE JUROR: Yes, ma'am.

18 THE COURT: Thank you.

19 THE CLERK: That's everybody.

20 THE COURT: All right. Madam Forelady, and ladies and
21 gentlemen of the jury, as well as my two alternates, once
22 again, I commend you for how well you paid attention,
23 accepted the responsibilities. It's not an easy task, but I
24 know of no better way than when someone is accused of a
25 crime to let 12 citizens from the community to decide what

1 the true facts are, and I commend you for your service.
2 This will conclude your service for the balance of the week.
3 It'll get you one day off anyway and Monday. You will be
4 exempt for three years if you don't want to serve.

5 You are welcome to leave. I have to -- the lawyers
6 will fill out some sentencing sheets and I will sentence the
7 defendant here in the next five or ten minutes. You're
8 welcome to sit through that or you're welcome to leave now,
9 whatever is your choice.

10 So, everybody else remain seated.

11 Y'all are welcome to do what you'd like to do.

12 All right. Mr. Miller, give him the sentencing sheets.

13 SOLICITOR MILLER: I have them, Your Honor.

14 (Pause.)

15 THE COURT: All right. Mr. Koger, come forward with
16 your client.

17 All right. Mr. Koger, it's -- as to the offense of
18 voluntary manslaughter, the range of sentence on that is a
19 minimum of two years, a maximum of thirty. On assault and
20 battery with intent to kill, it is zero to twenty.
21 Possession of a weapon during the commission of a violent
22 crime, zero to five.

23 Do you agree with that?

24 MR. KOGER: Yes, Your Honor.

25 THE COURT: I'll be glad to hear from you.

1 MR. KOGER: Your Honor, may it please the Court.

2 of course, the jury has spoken in this particular case
3 in relation to Mr. Smalls. I came on this case August of
4 last year. I had had contact and had known Mr. Smalls
5 before, before then. He's 23 years of age. As he testified
6 on the stand, he, he obtained his GED from Denmark Tech, and
7 actually, at one time, was working on his barbering license.

8 As you can see here in the courtroom here, he has
9 community support, church support, and most importantly, his
10 parents. His mother, Mrs. Cassandra Mays, she's right here
11 in the black on the front, has been here everyday this week.

12 As far as my representation of them throughout this
13 representation, I had almost daily contact with her. He
14 also have a stepfather that is very involved in his life. I
15 think he mentioned that during the incident that he was
16 speaking with his stepfather on that particular day. We
17 went, we went with self-defense because Mr. Smalls, from the
18 very first time I spoke with him, felt that his life was in
19 danger at that particular moment, and as I stated in
20 closing, he made a split second decision, but, of course, we
21 understand, we understand that the jury rejected that
22 theory. He is before you for sentencing.

23 He's 23 years of age. This is a young man that, as you
24 probably can tell from on stand, is articulate and is
25 intelligent, but did not make a intelligent decision on that

1 particular day, but can be a productive member of society.
2 He realizes that he must pay for what happened on that
3 particular day. He still maintain, and based upon our
4 defense, that it was self-defense, but we would ask that
5 whatever leniency you can grant Mr. Smalls in this
6 particular case. I understand that not only you, Your
7 Honor, but any judge must balance the interest of the State,
8 must balance the interest of the victims in the case, along
9 with the interest of the defendant.

10 We just ask that whatever you can do to, to allow
11 Mr. Smalls to have semblance of a life, to come back out, to
12 come back out of the Department of Corrections to his loved
13 ones. He has a mother that loves him very much, and then,
14 again, I know the victims' parents loved and loves their son
15 and relative very much. But we just ask that -- this is
16 someone that, that I think -- I'm, I'm reasonably sure that
17 after he pays his debt to society that he still can
18 contribute to society, and the one thing that he has
19 support, and I'm sure they're gonna stick with him, they're
20 gonna stick by him, and they're gonna always be behind him,
21 and, and hopefully, after a period of time he's
22 incarcerated, that the mama still be here for him, the
23 stepfather will still be for him, and the people that's here
24 today will still be there for him.

25 THE COURT: Mr. Smalls, anything you'd like to say?

1 THE DEFENDANT: I'd like to say I made a mistake. I
2 guess -- I like to say you don't get a chance to take it
3 back. I just want to apologize to the hurt I brought both
4 sides of the family and hopefully I get another chance at
5 society and I just ask for the Court to be lenient and
6 accept my apology to the family.

7 THE COURT: Thank you.

8 Anyone from the victims, anybody want to say anything?

9 (A party responds.)

10 THE COURT: Come right up here to the mic.

11 SOLICITOR MILLER: Your Honor, this is Mr. Mayes'
12 mother.

13 THE MOTHER: I thank and I praise God today that I was
14 able to see this here. It was a hard pill to swallow, but
15 the Lord says whatever man reaps he got to sew. My child
16 can't come back. I could of had Zantrell gone, too.

17 But the only thing I can say to the family, and the one
18 that did it to my son, that I pray the Lord, when you go to
19 incarceration, that you will find Jesus because sometime you
20 make mistakes. We all make mistakes in life, but you got to
21 learn from your mistakes.

22 The only thing I say, while you're in there, ask the
23 Lord to save you and to set you free, nad I have forgiven
24 you cause I got to forgive you cause God have forgive me. I
25 can't go in this world without forgiveness in my heart

1 because that's not the Lord, that's not the Lord, that's not
2 his will. And I say to the family, I love y'all, but, like
3 I say, whatever a man reap, that's what he got to sew, and
4 that's coming from the Bible. Not me. And I love all of
5 y'all.

6 THE COURT: Anything else from anybody?

7 MR. KOGER: No, Your Honor.

8 THE COURT: Well, to the family of Mr. Smalls, and to
9 the family of the Mays, it is a, and to the jury, and
10 everybody involved, where is my Mr. Eddie, who always
11 confides in me, I don't know what's going on with the young
12 people, but if you've been in here all week, you saw a
13 horrible situation on Monday. We had two young men killed.
14 That was a combination of drugs and money. And then we get
15 young people here. That was a combination of alcohol and
16 guns.

17 I don't know why guns have, all of a sudden, become so
18 pravelent in our, in our society and the use of guns without
19 anybody thinking as to the ramifications. I mean this boy's
20 life was gone in a second, the young man, the other man shot
21 in the chest, and you're looking at going to jail for 52
22 years.

23 I just hope, as the mama said, that y'all all learn
24 from your mistake, and I hope society around here learns
25 from your mistake to let's put these guns up. You got a

1 problem with somebody, do it like we use to do it when I was
2 in high school. Sometimes you fight and get it over with.
3 Pulling these guns and shooting people without thinking
4 about it, you could have killed three people out there that
5 day.

6 I agree with the jury's decision. I don't think it was
7 a case of self-defense. I don't think any of the elements
8 were met. I think it was a case of voluntary manslaughter.
9 So, they've shown you some mercy, and as a result, I'll show
10 you some mercy, but you've got to be punished and we can not
11 allow this type of behavior, and I have to send a message to
12 the community, if you want to keep shooting, keep killing,
13 I'm gonna keep sending you to Columbia. That's not fair to
14 any of you. All you got to do is conduct yourselves like
15 your mama taught you.

16 But, unfortunately, we have a young man who's dead.
17 You'll get out and come home one day. That young man will
18 never come home.

19 I do want to put on the record I commend the efforts of
20 the lawyers. You were excellent advocates for each side,
21 but you conducted yourself with civility and with respect to
22 each other and to the Court and you were prepared and I
23 appreciate it. I appreciate that.

24 And to the police officers, you-all conducted a very
25 objective investigation.

1 Mr. Smalls, as to Indictment 2010-GS-06-65, that's the
2 indictment where you were indicted for murder and the jury
3 found you guilty of the lesser included offense of voluntary
4 manslaughter, the sentence of this Court is that you be
5 committed to the State Department of Corrections for a
6 period of 25 years.

7 As to the crime of assault and battery with intent to
8 kill, the sentence of this Court is that you be committed to
9 the State Department of Corrections for a period of 20
10 years.

11 As to Indictment 11-GS-67, for possession of a weapon
12 during the commission of a violent crime, the sentence of
13 this Court is that you be committed to the South Carolina
14 Department of Corrections for a period of five years.

15 The weapons charge and the assault and battery with
16 intent to kill will all run concurrent.

17 Good luck to you.

18 MR. KOGER: Thank you.

19 THE COURT: Everybody remain seated.

20 Thank y'all very very much. The clerk will be sending
21 you a check. Don't spend it all in one shot spot. Thank
22 you. Thank you. I enjoyed working with you, and I hope
23 you, not enjoyed it, but it was eye opening for some of you.

24 Thank you. You did a wonderful job.

25 Everyone else remain seated. You're free to go.

1 (Pause.)

2 THE COURT: Mr. Koger.

3 MR. KOGER: Your Honor, before the pronouncement of
4 sentence I didn't move for a new trial on this case right
5 here just to protect the record, and I would like to move
6 for a new trial based upon the grounds I reiterated earlier
7 in the motion for directed verdict and I reiterated it
8 again.

9 THE COURT: Very well. For the same reasons, I
10 respectfully deny it.

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13 (WHEREUPON, this case was in recess.).

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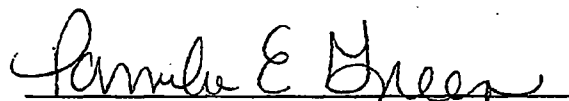
25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Barnwell County, South Carolina, on the 24th, 25th, 26th, and 27th day of January, 2011, as reported by Lisa Davenport and transcribed by myself.

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

December 28th, 2011



PAMELA E. GREEN, Court Reporter

WITNESSES

State Law Enforcement Division

Shaun E. Harley

Law Enforcement Case #: 31090371

LM

ARREST WARRANT NUMBER

H861982

ACTION OF GRAND JURY

True Bill

Mark Dillman

Foreperson of Grand Jury
Date: JANUARY 25, 2011

VERDICT

*Guilty of Vol.
Manslaughter*

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS0600065

The State of South Carolina

County of Barnwell

COURT OF GENERAL SESSIONS

JANUARY TERM 2011

**THE STATE
vs.**

DEMETRIS D. SMALLS

CDR #: 0116

Indictment for

MURDER

§ 16-03-0010

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)

INDICTMENT FOR
MURDER

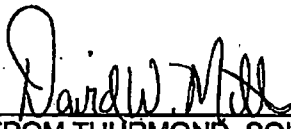
COUNTY OF BARNWELL)

§ 16-03-0010

At a Court of General Sessions, convened on January 25, 2011, the Grand Jurors of Barnwell County present upon their oath:

That **DEMETRIS D. SMALLS** did in Barnwell County on or about August 20, 2009, with malice aforethought, kill one Terrance Mayes by means of shooting the victim and said victim died as a result thereof, all in violation of Section 16-3-10, *South Carolina Code of Laws*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

 FOR
J. STROM THURMOND, SOLICITOR

WITNESSES

State Law Enforcement Division

Shaun E. Harley

Law Enforcement Case #: 31090371

LM

ARREST WARRANT NUMBER

H861983

ACTION OF GRAND JURY

True Bill

Mark D. Miller

Foreperson of Grand Jury
Date: JANUARY 25, 2011

VERDICT

Guilty

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS0600066

The State of South Carolina

County of Barnwell

COURT OF GENERAL SESSIONS

JANUARY TERM 2011

**THE STATE
vs.**

DEMETRIS D. SMALLS

CDR #: 0014

Indictment for

**ASSAULT AND BATTERY WITH INTENT
TO KILL**

§ 16-03-0620

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

**INDICTMENT FOR
ASSAULT AND BATTERY WITH INTENT TO
KILL**

§ 16-03-0620

At a Court of General Sessions, convened on January 25, 2011, the Grand Jurors of Barnwell County present upon their oath:

That **DEMETRIS D. SMALLS** did in Barnwell County on or about August 20, 2009, with malice aforethought commit an assault and battery upon one Zantrell May with intent to kill the said victim, to wit: the Defendant did shoot the victim with a .380 caliber Hi-Point Pistol. All in violation of §16-03-620 of the *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.

 FOR
J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Barnwell

VS.

DEMETRIS D. SMALLS

AKA:

Race: 2 Sex: M Age: 23

DOB: 1987 SS#: [REDACTED]

Address: Falcon Street

City, State, Zip: BLACKVILLE, SC 29817

DL#: [REDACTED] (ID) SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Manslaughter / Voluntary manslaughter

IN THE COURT OF GENERAL SESSIONS

543

INDICTMENT/CASE#: 2011GS0600065

A/W#: H861982

Date of Offense: 8/20/2009

S.C. Code §: 16-03-0010

CDR Code #: 0116

SENTENCE SHEET

2-30

☒ CONVICTED OF or ☐ PLEADS

In violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 78213 Demetris Smalls 267 7111
McAlister, Allen (Kip) SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 0736

Sentence Date: Jan 27, 2011

544

STATE OF SOUTH CAROLINA

COUNTY OF Barnwell
 STATE VS.
DEMETRIS D. SMALLS

AKA:

Race: 2 Sex: M Age: 23DOB: 1987 SS#: [REDACTED]Address: Falcon StreetCity, State, Zip: BLACKVILLE, SC 29817DL#: [REDACTED] (ID) SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Assault / Assault and battery with Intent to Kill (ABWIK)

in violation of § 16-03-0620of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

McAlister, Allen (Kip)78213
SC Bar#Demetris Smalls
Defendant[Signature]
Attorney for Defendant7111
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 11-25-06-65
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0600066A/W#: H861983Date of Offense: 8/20/2009S.C. Code § : 16-03-0620CDR Code #: 0014

SENTENCE SHEET

O-20

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0620of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

McAlister, Allen (Kip)78213
SC Bar#Demetris Smalls
Defendant[Signature]
Attorney for Defendant7111
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

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Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
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§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

Presiding Judge

Judge Code:

Sentence Date:

☐ Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition
☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)
THE STATE OF SOUTH CAROLINA)

Plaintiff)

vs.)

DEMETRIS SMALLS)

Defendant)

IN THE COURT OF GENERAL SESSIONS
FOR THE SECOND JUDICIAL CIRCUIT
Indictment Number(s): 2011-GS-06-00065

VERDICT FORM

2011 JAN 27 PM 4:20
RHONDA D. McELVEEN
CLERK OF COURT S.C.
BARNWELL

As to the offense of MURDER, we the Jury find the Defendant

☒ Not Guilty

☐ Guilty

If your verdict is Not Guilty of Murder, as to the lesser included offense of
VOLUNTARY MANSLAUGHTER, we the Jury the Defendant

☐ Not Guilty

☒ Guilty

WE UNANIMOUSLY AGREE.

January 27, 2011

Cynthia D. Hughes
Foreperson

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BARNWELL)
)
 THE STATE OF SOUTH CAROLINA)
)
 Plaintiff)
 vs.)
 DEMETRIS D. SMALLS)
)
 Defendant)

IN THE COURT OF GENERAL SESSIONS
 FOR THE SECOND JUDICIAL CIRCUIT
 Indictment Number(s): 2011-GS-06-00066

VERDICT FORM

As to the offense of ASSAULT AND BATTERY WITH INTENT TO KILL, we the jury find the Defendant,

_____ Not Guilty

_____ ☒ Guilty

FILED FOR RECORD
 11 JAN 27 PM 4:20
 RHONDA D. HIGGINS
 CLERK OF COURT
 BARNWELL COUNTY, S.C.

WE UNANIMOUSLY AGREE.

January 27, 2011

Cynthia D. Hughes
 Foreperson

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF BARNWELL)
)SECOND JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA) 2011-GS-06-065
) 2011-GS-06-066
) 2011-GS-06-067

Vs.

Demetrius D. Smalls,

Defendant.

**MOTION FOR NEW TRIAL BASED
UPON ADDITIONAL GROUNDS:**

RICHARD D. HELFERTH
CLERK OF COURT
RAVEN, COUNTY, S.D.

2011 FEB -4 PM 1:13

FILED FOR RECORD

The Defendant, through his undersigned attorney, moves before this

Honorable Court for a new trial based upon the following additional grounds that were brought to the attention of the undersigned attorney approximately several days after the rendering of the verdict:

1.) Juror #95, April Robinson, expressed concern in her attached, notarized statement that facial reactions of the trial judge to the testimony of defense witnesses during the trial may have impacted the jury in rendering a verdict in this case and therefore, affected the right of the Defendant to have a fair trial; additionally, juror #95 desired to change her vote during the polling of the jury, but felt that her vote change would have not made a difference, did not know her options or fear reprisals or repercussions from the trial

judge if she changed her vote;

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL. **ind**
I, Rhonda D. McElvern, Clerk of Court for Barnwell County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

Several other affidavits, admittedly, by family and supporters of

FEB 04 2011

the Defendant, observed similar behaviors by the trial judge as

By: Paul D. McEwen
Clerk of Court, Barnwell County, SC

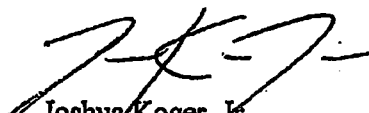
summarily stated by juror #95 in her affidavit, and, subsequently, outlined their concerns in their attached, notarized statements.

Counsel for the Defendant was approached by the family of the Defendant to conduct a meeting with the family on February 1, 2011. The family and other observers of the trial proceedings from January 25, 2011 to January 27, 2011 expressed their concerns at this meeting. Subsequently, family, other observers of the trial and juror #95 produced notarized statements to defense counsel on February 3, 2011. Defense counsel is aware that the trial judge made a curative instruction to the jury about his facial gestures during his jury instructions; however, it is the position of defense counsel, which is based on the contents of the affidavit of juror #95 and her belief that the curative instruction at that time was not enough to correct any type of prejudice that the Defendant may suffered to his right to a fair trial. Therefore, this motion is made in conjunction with earlier trial motions for dismissing the jury pool and subsequent jury for the Defendant after a potential juror made a comment about an incarceration period with Defendant, earlier directed verdict motions and initial new trial motion of the evidence not warranting the case being submitted to the jury and after verdict, the evidence not warranting or supporting the verdict and this motion for new trial based upon additional grounds which were brought to the attention of defense counsel on February 1, 2011 and, subsequently, filed on February 4, 2011. Thus, the Defendant is requesting a new trial in this matter based upon the right of the Defendant to have a fair trial under the Sixth Amendment of the United States Constitution and its applicable South Carolina counterpart, the right of the Defendant to have due process of the law under the Fifth and Fourteenth Amendments of the United States Constitution and its applicable South

188m
2

Carolina counterpart, any other constitutional provision by either the United States, and/or the State of South Carolina and any other Federal and/or State law and applicable case law, Federal and/or State. Additionally, the Defendant is requesting a hearing in this matter as soon as practical and reserves the right to supplement this motion with additional affidavits and memoranda of law.

Respectfully submitted,



Joshua Koger, Jr.

Orangeburg, SC

February 4, 2011

February 3, 2011

April Robinson
[REDACTED] Yenome road
Barnwell, SC 29812

To whom it may concern:

This letter is in regards to the sentencing of Demetrius Smalls. As a juror on that case, I feel the sentencing was very harsh, considering there were so many unanswered questions. I didn't feel I had a choice in the way I voted, with what was charged by the presiding judge.

In the jury room, many jurors including myself all noticed and talked about the presiding judge many facial reactions, particularly with the defense witnesses. This was discussed the day before closing arguments, and coincidentally the judge address those facial remarks the day after we discussed among ourselves in the jury room, asking us not take anything by his facial gestures, at that point, I honestly believe it was too late. I would have felt better had that been address before the trial began, for warning us, if this is something he normally does.

I do agree Mr. Smalls should do some time, I just don't understand or agree as to why so harsh of a sentence was issued.

Admittedly, I wanted to change my vote, as other jurors were being polled, but thought what would I change it to? What were the other options? What would the judge do to me? I just feel Mr. Smalls was not in a position to come out with a fair sentencing with the indictments that were before us.

Thank you,

April Robinson

April Robinson

Notary: Ella Mae Rivers O'Berry
Date: February 3, 2011
Commission expires: July 26, 2012

March 23, 2011

April Robinson
 [REDACTED] Yenome road
 Barnwell, SC 29812

To Whom it may concern:

This letter is in regards to the appeal coming before you for Demetrius Smalls. As a juror on that case, I indicated in a previous letter how Judge Early's facial gestures were addressed by jurors in the deliberating room and in my opinion played some part in the way they voted. Mr. Early made numerous, noticeable facial gestures throughout the trial. Mr. Early gestures were as if he didn't believe witnesses, particularly the defense witnesses, or that their testimony was bizarre. Personally I wasn't so much intimidated by the gestures when it was time to deliberate, I was more intimidated by two other jurors statements, I felt as if I had no other choice to vote as I did, believing that Demetrius did not have a self-defense case on the assault and battery with intent to kill indictment. As I sat in that jury box, I knew we made the wrong choice on the assault and battery with intent to kill indictment, I wanted to change my vote when we were being polled, during the polling, that very moment was the one time due to Judge Early's facial gestures, I was afraid of what he would do to me, I was afraid of what would happen to me, and to know that the families would clearly know I was the one who changed her mind. I take great responsibility for what was decided by the jurors. There are still so many unanswered questions for me, so much doubt, I've been struggling with those verdicts since this trial, and then to hear the harsh sentencing added so much more guilt on my heart.

I can't say if Judge Early had any personal intentions toward Mr. Smalls, only because those words didn't come out of his mouth, but I did clearly see he wanted to get this case over with, due to the comment he made about the budget, then in the same sentence stated for us to take our time, I felt he took the defense attorney as a joke, and had little respect for him. There were several jurors that did not want to render a guilty verdict on the second indictment, but when our forelady made the comment "anytime you pull out a gun and shoot someone, that's an intent to kill them", a lot of us didn't really say much after that, because we believed that statement to make sense, and another juror stated he had some criminal justice education, and there was no way for self-defense to apply. It dawned on me when the verdict was being read that we were making the wrong decision based on those two comments. According to what little evidence, and lack of creditable witnesses that testified, we had no business rendering the verdict we did, the state did not prove to us without a doubt that Mr. Smalls had a way out, and to this day I failed, we failed the defendant not giving him a fair trial, resulting in Judge Early being able to give such a harsh sentencing. I really hope that Mr. Smalls wins this appeal, and get a lesser sentencing. Of all the testimony that I heard during the trial, his testimony was believable, the only one that made any sense. I don't know what is to happen from here, but I do pray everything works out for him and his family.

Thank you

April Robinson

April Robinson

*Notary: Illa MacKew O'Berry
 My Commission expire: July 26, 2012
 Date: March 23, 2011*

To whom it may Concern:

I, Sherita Walker, am writing this letter in regards to the case, State of South Carolina vs. Demetrius Smalls. This case was held the week of January 24, 2011 through January 27, 2011. I have concerns in regards to the professionalism of a judge. During this week of trial I observed behavior from a superior that I felt was very inappropriate. I will stand corrected if you find my complaints petty. I have never seen a judge that sat on a stand and behaved in a manner that he wouldn't allow in his courtroom from any other citizen, with that being said he corrected the behavior of the victim's family when they began giving bad gestures in the courtroom. In return he, the Honorable Judge Early, acted the same during the entire trial. Not only was this observed the first day of trial, but the second, third, and fourth day as

well. He was seen rolling his eyes, falling back in his seat, shaking his head, and covering his face with both hands all while the defendant's lawyer gave his opening statement, during his argument, and his closing statement. Every word that came from the defendant's lawyer seemed to be disruptive with the Honorable Judge Jack Early. Was Mr. Kroger not supposed to give his opening statement and argue the facts and evidence in the case? One would think not because he was being told not to ask certain questions again. Was he not supposed to give his closing argument? I don't know all of the law but I do know that a Judge should act and treat every victim, defendant, etc. in a professional and respectable way. Not only did Honorable Judge Jack Early present his self in an inappropriate manner in front of other citizens, but to act in such a manner in front of a jury panel, and

then ask them to disregard his actions. Those actions should have never took place in that courtroom. My question is, did he catch himself acting disrespectful or did someone else bring it to his attention? It was very noticeable to everyone. Even a blind man could have saw all of the actions of Judge Jack Early. I am writing this letter because I feel Judge Jack Early treated the defendant and his lawyer in a very disrespectful way. I feel the Judge's actions could have made the jury panel feel that the defendant and his lawyer should have never walked in his courtroom. The attitude he had as a Judge would have made me feel, if I was a juror, that this defendant is guilty no matter what the charges are. I am asking that this behavior be investigated so no other victim, defendant, or family have to experience this unprofessional behavior or attitude from Judge Early or any other judge. When

you held a position whether it's
in the law, management, etc we
have special responsibilities and one
is to treat others in a respectable
and professional manner.

Akento Walker
February 3, 2011

Notary: Ella Mae Rivers O'Berry
Date: February 3, 2011
Commission expires: July 26, 2012

2-2-11

To whom it may concern,
My name is Cassandra W. Mays.
I'm a native of Blackville S.C.
On 1-24-11 my son Demetrius D.
Smalls was in Court from
1-24-11 through 1-27-11.

The Presiding Judge was
Jack Early, at the Barnwell
County Court Room in Barnwell
S.C. My son Demetrius D. Smalls
has been charged with voluntary
manslaughter, assault and
battery with intent to kill,
and Possession of a weapon
during a violent crime.

Now on that same day of
1-24-11 Both families were
in the courtroom. On the
next day 1-25-11 the victims
family as well as Demetri's
family were there to. So
Judge Jack Early made a
comment about there will be
no facial movements, no
clapping of hands because
we were not in church or
no body movement if any
Kord (or something of that
nature) and if he saw it
he would find you in
contempt and have 2 officers

to escort you out of the Court house. Now I notice everytime Joshua Rogers Jr (Defensive Lawyer) would speak he made negative facial movements leaning back and forth in the chair, frowning up and just a look of all negative.

So on ~~the~~^{CHD} 1-26-11 when the State was speaking Judge Jack Early had a pleasant look on his face, but when the Defensive Lawyer began to speak he made facial motions

They returned he stood up
and said disregarding
my facial movements or
anything of that nature.

So it had me feeling some
type of way because his
being in a high place,
with a Professional position
with the Law says one
thing but totally does
his own thing. I also
think by his gestures,
and movements it distracted

or so I see it look
affected or others, so
with that being said
I don't think my son
was given a fair trial.

yours truly

Cassandra D. Mays

Notary: Ella Mae Lewis OBerry

Date: February 2, 2011

Commission expires: July 26, 2012

Feb 2, 2011

On January 25, 2011 until January 27, 2011 I Chandresh W. Harley attended the trial for Demetris Smalls. On January 25, 2011 Judge Early approach the Maup family that were sitting to my left, and he told them that it wasn't church and he didn't want to see any head movements, clapping your hands or facial expressions. On January 26, 2011 as the trial continue while Demetris Smalls lawyer Joshua Huger Jr was speaking I started to notice the Judge was making facial expressions. On January 27, 2011 the lawyer was facing towards the Jurors and explaining to them what happen Judge Early then began to make head movements, facial expressions once again, rare back in the chair, Rubbing his face, putting his glasses in his mouth, and closing his eyes. When the Jurors got ready to do the verdict Judge Early then speaks and told them to disregard the facial expressions and body gestures he was making.

Chandresh

J. Harley

Notary: Ella Mae Rivers O'Berry
Date: February 2, 2011

Commission expires: July 24, 2012

To whom it may concern,

2-2-11

I, Jeanna Montague, am writing this letter in regards to Demetria Small's trial. I feel that the trial was unjustified and unfair to Demetria as well as his loved ones. I feel that the jury was intimidated by the judge's posture and demeanor towards Demetria. As for Joshua Kroger, the lawyer of Demetria Small, I feel that he as well was treated unfairly. Every request made by Kroger was denied and he was told repeatedly to limit his questions and nothing was in his favor. I observed Judge Early's nodding of the head everyday, the facial expressions, the leaning back in his chair, and closing of the eye's and I feel that it all was very unprofessional. That made me realize that he was not interested in the case at all. Because of Judge Early's actions I feel as if he already knew the outcome of the trial and his intentions were to set an example. I feel that the judge was very unprofessional and his actions affected the jury's opinion. This case as well as Judge Early should be fully investigated immediately.

Sincerely,

Jeanna Montague
2-2-11

Notary: Ella Mae Kuehn O'Berry

Date: February 2, 2011

Commission expires: July 26, 2012

ORIGINAL

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)

State of South Carolina,)
)
PLAINTIFF,) HEARING
) 2011-GS-40-065, 066, 067
-VS-)
)
Demetrius Smalls,)
)
DEFENDANT.)
_____)

BEFORE THE HONORABLE Doyet A. Early, III, JUDGE

April 6, 2011

COLUMBIA, SOUTH CAROLINA

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

David Miller, Esq.
Asst. Solicitor
Second Judicial Circuit
For the State

Joshua Koger, Jr., Esq.
For the Defendant

REMA K. GANTT THOMAS
CIRCUIT COURT REPORTER

I N D E X

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Mr. Miller	11, 19
Ruling of the Court	27
Court Reporter's Certification.	30

E X H I B I T S

THERE WERE NO EXHIBITS SUBMITTED AT THIS HEARING.

1 THE COURT: If you all would be seated,
2 please.

3 I was told you have a motion.

4 MR. KOGER: Yes, Your Honor. May it
5 please the Court. We are before Your Honor today to
6 make a motion for a new trial based upon additional
7 grounds in the case of the State of the South
8 Carolina vs. Demetrius Smalls.

9 Mr. Smalls was convicted on voluntary
10 manslaughter assault and battery with intent to kill
11 and possession of a weapon during the commission of
12 a violent crime back on January 27th of this year.

13 After the verdict and as my motion I filed
14 on February the fourth stated, several days after I
15 filed the motion the family got in contact to me to
16 have a meeting with them to discussion further
17 options of Ms. Smalls in this particular matter. we
18 were going to discuss the time frame he had to file
19 an appeal in this particular case.

20 It was brought to my attention at this
21 particular meeting there were concerns by some of
22 the members of the family and one of the jurors
23 about some facial expressions or gestures that Your
24 Honor did during this particular trial and then
25 wanted to see what, you know -- what type of option

1 did they have with that.

2 I told them at that particular time that I
3 would need to have some type of sworn affidavit. I
4 did not talk to any jurors. Basically after I spoke
5 to the family about sworn affidavits they came back
6 with several sworn affidavits.

7 One of them, and one of the more important
8 one we want to address today is Juror 95 who was
9 Able Robinson. And then we have also four other
10 ones by those in attendance of the trial that were
11 friends and family members of the defendant in this
12 particular case.

13 Just to outline their names for the
14 record, there also is one affidavit, he also
15 received one from a Sherea Walker; a Cassandra
16 Mays, the other of the defendant--

17 THE COURT: Mr. Koger, when was the
18 sentence handed down?

19 MR. KOGER: I thought the 27th, it was on
20 that Thursday. So--

21 THE COURT: Could you give me a date,
22 please?.

23 MR. KOGER: Okay. In my -- January 27th,
24 Your Honor.

25 THE COURT: All right, when was the motion

1 filed?

2 MR. KOGER: The motion was filed February
3 4.

4 THE COURT: Two four?

5 MR. KOGER: Yes, sir, February 4.

6 THE COURT: Okay.

7 MR. KOGER: So we want to -- well, as far
8 as the others, there were two other ones that were
9 also filed, affidavits. A Sherese Hardy (PH) and
10 Teresa Montague (PH) so for a total of five
11 affidavits and then--

12 THE COURT: What relationship are those
13 people to the defendant?

14 MR. KOGER: Excuse me?

15 THE COURT: What relationship are those
16 people to the defendant?

17 MR. KOGER: They were either family
18 members or friends of the family. The mother is a
19 family member --

20 Is that--

21 THE COURT: No, I just took my glasses
22 off.

23 MR. KOGER: One other family member and
24 the rest are friends of the family.

25 THE COURT: All right.

7

1 MR. KOGER: So Your Honor I'd like to see
2 and address specifically what I also argued in the
3 motion Juror 95, the first statement that she gave I
4 think on February 3rd and she stated that -- I'd
5 like to go to the second paragraph.

6 And she stated that she felt that the
7 facial action by Your Honor in this particular case
8 may have impacted the jury verdict in this
9 particular case.

10 And she acknowledged and defense also
11 acknowledged that Your Honor did make a curative
12 instruction before the case went back to the jury.
13 But to use the words that she put in her affidavit
14 she thought maybe it was a little too late and she
15 would like to have known about, if that was a normal
16 part of the trial, a normal thing that you usually
17 did, that she would like to have known about it
18 beforehand.

19 She also stated that there was some
20 discussions in the jury room about the facial
21 actions before you made the curative instructions on
22 the 27th and she felt that that may have, that could
23 have impacted the jury verdict in this particular
24 case, Your Honor.

25 Also, and I'm referring to the third

1 paragraph on her initial affidavit, right here --
2 she -- at least in Ms. Simmons' first affidavit here
3 she had felt that she had wanted to change her vote
4 at that particular time but didn't feel that she had
5 any options or other opportunity to vote at that
6 particular time.

7 Now, I submitted a supplemental affidavit
8 on the same juror to Your Honor this morning and I
9 gave a copy over to Attorney Miller and the other
10 attorney once they came in that goes into a little
11 more detail about her affidavit right here.

12 And she stated she did in more detail that
13 she had her concerns about the information in
14 relation to the assault and battery with intent kill
15 indictment. She felt that that could have been
16 clearer and she felt that she may have made, that
17 some may have made the wrong decision on that
18 particular case..

19 She talks about some maybe some undue
20 juror influence in this second affidavit here. And
21 in the second portion of this particular affidavit
22 and also in the first affidavit she felt that maybe
23 some of the facial gestures by Your Honor may have
24 minimized the defense case on this particular
25 matter.

1 And if she felt it minimized this case in
2 this particular matter we will say it could have had
3 an impact on his fifth, sixth and fourteenth -- on
4 his sixth amendment right to have a fair trial and
5 his fifth and fourteenth amendment rights to due
6 process in this particular case.

7 So based upon that we submitted this
8 motion along with an earlier motion that we made for
9 a new trial in this particular case. And even
10 though Your Honor made a curative instruction before
11 the case went to the jury based upon juror number 95
12 saying that she thought that it was a little too
13 little too late as far as a curative instruction not
14 knowing what the other jurors may have felt at that
15 particular time.

16 We only got one affidavit from this
17 particular juror. If she felt that as juror, and
18 again we have the other affidavit submitted just to
19 corroborate the facial reaction and of course Your
20 Honor corroborates the facial action and gave a
21 curative instruction for the jury to ignore the
22 facial gestures or reactions. But we feel--

23 THE COURT: Mr. Koger, I make that in
24 every case, you know that. You have tried a lot of
25 cases before me and I always say that I have no

1 opinion about the facts.

2 If there is a smile, frown, did anything
3 please disregard it. You know I say that every
4 time. You know I say that in every case I try. You
5 know that.

6 MR. KOGER: Yes, I do understand. This
7 was a Juror that came forth and of course I feel
8 it's an obligation to my client to--

9 THE COURT: I tried the whole case. If
10 you seen or heard anything did you come forward?

11 MR. KOGER: Well, Your Honor, when I try I
12 cases I concentrate on the jury. I concentrate
13 entirely on the jury.

14 THE COURT: If I were doing anything
15 improper you would have brought it to my attention.
16 You would have done it very tactfully but you would
17 have said something to me. If I were doing anything
18 on the basis that you thought was jeopardizing your
19 client you would have come forward and said
20 something to me but you did not.

21 Go ahead.

22 MR. KOGER: Judge, based upon the
23 affidavit from one of the jurors in this particular
24 case and that she pointed out in both affidavits
25 that she felt that in this particular trial that the

1 facial expressions or what have you may have
2 minimized the defense case we set forth and we ask
3 for a new trial based upon his sixth amendment
4 rights to a fair trial impacted by the facial
5 expression and we ask that you grant that based
6 primarily upon the affidavit from juror number 95
7 and the cooperation from the other affidavits in
8 this particular case.

9 THE COURT: Anything you want to add to
10 the record? Anything else?

11 MR. MILLER: Your Honor, I'd like to start
12 by handing to the Court the case of State vs.
13 Siegler, it's 364 SC 94 610 S. Eastern 2nd 859,
14 particularly the third portion of that case deals
15 with juror misconduct and opinion that was written by
16 one of the newest -- an opinion that was written
17 2005 and in that opinion the Court discusses a
18 couple of different things related to juror
19 misconduct and in testifying here there is an
20 opinion from Judge Anderson.

21 Your Honor, I'll start off with what we
22 can actually determine from the motion. Mr. Koger
23 has a meeting on February first of 2011 -- in his
24 office, with the family. On February the second
25 there are three statements that are notarized by

1 Eula Mae Rivers O'Verry (PH).

2 One is from the defendant's mother and the
3 other two from -- I really can't read the names --
4 Chandrish L. Harley (PH) and Kara Montague (PH) and
5 those are notarized according to Ms. Eula Mae Rivers
6 O'Verry on February second of 2011.

7 The next day, February third, of 2011, Mr.
8 Koger receives in his office, and he has indicated
9 today he has never spoken to this juror himself, a -
10 - and this is significant, Your Honor, all of these
11 statements are hand-written statements.

12 But on February the third of 2011 he
13 receives a letter that is type-written from a person
14 who says she is juror number 95, April Robinson, and
15 that letter is notarized by Eula Mae River O'Verry
16 on February third, 2011.

17 Now, I want to point out something, Your
18 Honor. In this letter she says that the jurors made
19 some mention about facial reactions, particularly
20 when the defense had witnesses. "This was discussed
21 the day before closing arguments. And
22 coincidentally the judge addresses facial remarks
23 the day after we discussed them by ourselves in the
24 jury room asking us not to take anything by his
25 facial gestures." And she says, "A at that point I

1 honestly believe it's too late."

2 Your Honor, there is absolutely nothing in
3 this affidavit to indicate that the jurors started
4 deliberating the merits of the case before the case
5 was concluded. She does say that there was a
6 comment about facial gestures but she does not say
7 that the jury started deliberating the facts of the
8 case.

9 And Your Honor, we would submit to you
10 that there was no deliberations before the jurors
11 were supposed to begin deliberating. And in fact,
12 Ms. Robinson, who by the only inference I can draw
13 from the way the way the affidavits were obtained,
14 the statements, were obtained, had been approached
15 by the defendant's family to give them something
16 they could take something to Mr. Koger so that he
17 could make this motion.

18 And Your honor, she says in there very
19 clearly, "I agree, do agree Mr. Smalls should do
20 some time. I just don't understand or agree as to
21 why such so harsh a sentence was issued." She is
22 upset with the sentence, but is not a proper
23 consideration for her in the first place.

24 Your Honor, all long we have been
25 referring to these as affidavits. This is not an

1 affidavit. This is a February 3, 2011 letter that
2 was type-written that was signed by Ms. April
3 Robinson, or someone purporting to be her, and was
4 notarized by Eula Mae River O'Verry.

5 It does not say that it was sworn to and
6 subscribed before the notary. It just says I
7 notarize this signature. It is not an affidavit.
8 It is not.

9 Then Your Honor, today, just today, we
10 received the March 23rd 2011 letter. And Your
11 Honor, for the record, I will object to the
12 consideration of this in any respect because of the
13 fact that it was apparently subscribed on March 23rd
14 2011, fourteen days ago, and we got it today.

15 But understanding that the Court is going
16 to look at fundamental fairness and substantial
17 justice in the case, this letter still says,
18 "Personally I wasn't so much intimidated by the
19 gestures when it was time to deliberate." Which
20 clearly indicates that any gestures that she have
21 received or may have seen did not intimidate her
22 when it was time to deliberate.

23 But specifically, Your Honor, that next
24 sentence, "I was more intimidated by two other juror
25 statements." Your Honor, the case handed up to the

1 Court, State vs. Seabrook says very, very clearly,
2 we cannot give into, consider or listen to any
3 testimony about what happened in that jury room
4 during deliberations.

5 Her statement that these are the things
6 that other jurors said and this is the effect that
7 those statements had on me is internal examination
8 of the jury deliberation process. And that is not
9 something that we can look into unless there is an
10 allocation that it affects the fundamental fairness
11 of the trial.

12 And the courts have carved an exception to
13 tell us when that is. And that is when there is
14 testimony from a juror that other jurors started
15 deliberating the case early, then you can get into
16 that and examine what happened in the jury room.

17 Outside of that, Your Honor, we can't talk
18 about what happened in that jury room. Mr. Koger
19 can't illicit any testimony about what went on in
20 that jury room, and it can't be received by
21 affidavit.

22 There's just no reason at all in this
23 case, even assuming that there was some facial
24 gestures that were perceived by the jury, and I
25 don't concede that point, but even assuming it was

1 true, you don't get into what happened during the
2 deliberations inside the jury room.

3 Your Honor, getting away from that, she
4 says, "I felt I had no other choice to vote as I did
5 believing that Demetrius did not have a self-defense
6 on the assault and battery with intent to kill
7 indictment. As I sat in that jury box I knew we
8 made the wrong choice on the assault and battery
9 with intent to kill indictment. I wanted to change
10 my vote."

11 She never once says I wanted to change my
12 vote as to the voluntary manslaughter charge, which
13 is why Mr. Smalls is sentenced to 25 years on. His
14 assault and battery with intent to kill was
15 concurrent time with the assault and battery
16 voluntary manslaughter.

17 She never indicates that she has any
18 hesitation about her verdict on the voluntary
19 manslaughter charge. But she does end up with this
20 sentence. "There are still so many unanswered
21 questions for me, so much doubt, I have been
22 struggling with this verdict since this trial.
23 And then to hear the harsh sentencing adds so much
24 more to my guilt."

25 Again, Your honor, the whole basis of her

17

1 objection is the sentence, which was done after the
2 deliberations, after the verdict was rendered.

3 Your honor, I would like to point out one
4 more other thing and I will make it very clear I am
5 not questioning Mr. Koger's integrity at all and Mr.
6 Koger made it clear he hasn't talked to Ms. Robinson
7 and I absolutely believe him.

8 But Your Honor, in both of these type-
9 written statement that purport to be from Ms. April
10 Robinson, it is interesting that none of the other
11 ones were type written. And if you look at the
12 address for Ms. Robinson, the word road is not
13 capitalized in either one. It's a lower case "r"
14 for the word road.

15 And we know that the defendant's family
16 went to Ms. Robinson and asked her to write a
17 statement. We don't know if she wrote the statement
18 or they wrote it for her.

19 We know that sometime after that, 14 days
20 before this hearing, at least, somebody went back to
21 Ms. Robinson, it wasn't Mr. Koger, somebody went
22 back to Ms. Robinson and all of a sudden there is
23 this much more detailed statement that comes out
24 about what she felt and what she perceived inside
25 the jury room.

1 And Your Honor, even if you take
2 everything that she says at face value, even if you
3 take everything she says at face value, what she is
4 upset with is the sentencing. And that's not a
5 basis for a new trial.

6 She concedes, as does everybody here, that
7 there was a curative instruction given at the close
8 of the testimony in the case. She concedes that she
9 was polled along with the eleven other jurors and
10 confirmed her vote in front of the Court and court
11 reporter on the record.

12 And she concedes that there is no mention
13 of any problem with the verdict or anything else
14 until one of the defendant's family members came to
15 her and asked her to write a statement. And I don't
16 know if the statement was written by her or not.
17 But certainly we do know that Mr. Koger didn't give
18 it himself. We do know that Mr. Koger hasn't talked
19 to her himself.

20 Your Honor, what she says in these
21 statements, both of them, really equally in both of
22 them, particularly the first one and we are
23 objecting to the March 21st statement, is she had a
24 problem with the sentencing. That is what she
25 thought was unfair.

1 I don't have a problem with it, I hate
2 sentencing a young man like this man to 25 years in
3 jail for killing somebody with a gun and a fist
4 fight and he had the perfect opportunity to leave.
5 The jury found him guilty and he was sentenced
6 within the range.

7 Your Honor, I don't like it anymore than
8 anybody else standing up here when you, but when you
9 kill somebody they have to be punished and Your
10 Honor was right in line with what it should be.

11 As this Court is aware, my background with
12 Judge Peeples and I know Your Honor and Mr. Koger
13 all tried cases in front of him before, he was of
14 the belief you got a benefit for admitting
15 responsibility and accepting and admitting
16 responsibility and that you had done something wrong
17 but if you went to trial you pretty well were going
18 to get the max.

19 And quite frankly, I thought in my own
20 view, which is not worth anything, but in my own
21 view I thought it was an exceedingly fair sentence
22 considering the fact that even standing before the
23 Court Mr. Smalls said, It still wasn't my fault. He
24 said that.

25 THE COURT: And the sentences ran

1 concurrent, they weren't consecutive.

2 MR. MILLER: Correct.

3 THE COURT: Because the facts were.

4 MR. MILLER: But again, Your Honor, we get
5 back to the same thing. It's not my position to
6 complain about the sentence. It's not the jury's
7 position to complain about the sentence.

8 And in fact, one of the most hard fought
9 juror misconduct battles I was ever involved in
10 involved a case where one of the jurors took into
11 the jury room the law that said what the punishment
12 for the penalty was.

13 And I mean it's so -- it's such a
14 fundamental part of our law that the jury is not
15 supposed to be considering the sentence. They are
16 supposed to be considering the guilt or innocence of
17 the defendant based upon the evidence presented.

18 And I think that it is clear, Your Honor,
19 that that's what the jury did in this case. They
20 considered the evidence presented, they determined
21 that Mr. Smalls was not acting in self defense.
22 They determined that he was in fact guilty of
23 assault and battery with intent to kill and
24 involuntary manslaughter.

25 And Ms. Robinson, if these statements are

1 to be believed, is upset that the defendant got 25
2 years. And that's just not a proper consideration
3 for the jury.

4 And all of this information about making
5 facial gestures and taking off glasses and leaning
6 back in the chair -- Your honor, from our
7 standpoint, from the State's standpoint, I did not
8 see anything that I thought was untoward or unusual.

9 When you sit up there in the chair, your
10 chair rocks back, you leaned over and talked to your
11 clerk, you take off your glasses, you lean back in
12 the chair. I certainly didn't see -- I didn't see
13 anything that I thought was unusual or improper,
14 number one.

15 And number two, I certainly didn't see
16 anything that would happen when the defendant or his
17 witnesses were up that wouldn't happen when our
18 witnesses were up. And as this Court is aware,
19 based upon the facts and circumstances of this case,
20 there was no conduct -- these are good, honest hard-
21 working people over here --and here's some terribly
22 violent person that came and did some terrible thing
23 to them. This was a party. These people all knew
24 each other. They were all together.

25 There was absolutely no reason -- and I

1 saw nothing from the Court to indicate that there
2 was any preference of one side over the other. And
3 certainly I would have been upset if there had been
4 but I just didn't see any.

5 And we are sitting and we're presenting
6 our case and certainly to the extent that there may
7 have been something inadvertent that was done by the
8 Court it was cured by the curative instruction when
9 you said specifically don't let anything that I have
10 done up here give you some impression that I have an
11 opinion on the facts of this case or the witnesses
12 that testify.

13 And even Ms. Robinson concedes in her
14 statement, we did get the curative instruction, we
15 heard the curative instruction, it was given to us.
16 She concedes that.

17 Your Honor, based on all of that, and
18 based on the fact what is -- what we are attempting
19 to look at is we are attempting to look at the
20 internal deliberative process of the jury, which
21 with the exception of whether or not they
22 deliberated early -- which in South Carolina, to
23 this day -- so we shouldn't have to worry about this
24 at all.

25 There's just nothing there that would lead

1 any reasonable person to believe that it had any
2 impact on the jury even if they disregarded your
3 charge. There's nothing there to determine or to
4 allege that it had some impact on any of the jurors
5 except for Ms. Robinson who says it may have had
6 some impact on me, but it really didn't have any
7 impact on me. What really bothered me was the
8 sentence.

9 Your Honor, finally and obviously there is
10 a abuse of discretion standard when the appellate
11 court sits and reviews the Court's decision on the
12 motion for a new trial. But there is a two-prong
13 inquiry.

14 And the first inquiry is has the proponent
15 of the motion proven that juror misconduct occurred?
16 That's the first step. And Your Honor, we would
17 submit that they have not. Their statements, Ms.
18 Robinson's statement and the other statements which
19 are only, only useful for say, we saw something we
20 said we say it and other people saw it too.

21 Ms. Robinson's statement is the one that
22 matters. She was the only one that was in the jury
23 room.

24 And yes, the Court finds that there was
25 juror misconduct then move to the second step of the

1 inquiry which is, well, what was the effect of that
2 jury misconduct? Was it prejudicial to the
3 defendant?

4 And Your Honor, in this situation nobody
5 is alleging that it was prejudicial to the
6 defendant's right to a fair trial. She is saying it
7 was prejudicial because I was scared and I didn't
8 want him to be found guilty and I want to change my
9 vote on the assault and battery with intent to kill
10 vote.

11 And therefore, Your Honor, it is not
12 prejudicial. Even if that most limited, limited of
13 circumstance where the Court would say, Okay, I
14 think there might be juror misconduct by Ms.
15 Robinson for letting that influence her decision,
16 certainly there is absolutely no evidence that any
17 other jurors let it influence them.

18 You have to then look at well, what
19 difference did it make? How did it prejudice the
20 defendant? By her own admission the only difference
21 it made to her is she might have changed her vote on
22 the assault and battery with intent to kill
23 indictment.

24 Which would not prejudice the defendant
25 one way or the other because he's serving 85

1 percent, he's serving it on the voluntary
2 manslaughter charge and there was no additional time
3 added to his sentence because of the assault and
4 battery with intent to kill indictment.

5 Thank you, Your Honor.

6 THE COURT: Thank you.

7 All right, Mr. Koger, would you like to
8 make a reply?

9 MR. KOGER: Yes, Your Honor.

10 Mr. Miller stated that I met with the
11 family at my office. I met with the family at the
12 mother's home. From our conversation during that
13 particular meeting Ms. Robinson approached them with
14 concern figuring how to approach. Ms. Robinson--

15 THE COURT: How do you know that?

16 MR. KOGER: It's the particular word of
17 Ms. Mays. That is what she indicated to me. I
18 never met Ms. Robinson. I never spoke to Ms.
19 Robinson.

20 THE COURT: All she is concerned about is
21 the sentence. I mean, she says here, "I really hope
22 that Mr. Smalls wins this appeal and gets a lesser
23 sentence." That's what she wanted.

24 MR. KOGER: And Your Honor, as your know,
25 I didn't address the first paragraph of the first

1 affidavit, I didn't address that portion because
2 sentencing is in the province of the judge. So
3 that's not -- I didn't address that because it's not
4 proper consideration for this, to this particular
5 motion.

6 But basically, just in reply and also to
7 the second affidavit dated March 23rd, I had
8 received it April fourth, as far as what I thought
9 was -- excuse me, March 28th, what I thought was the
10 initial hearing date of this motion. I didn't have
11 it since March 23rd. So --

12 THE COURT: When did you get it?

13 MR. KOGER: I got it on March 28th. I
14 came to Barnwell and I though we would have a
15 hearing on that particular day.

16 THE COURT: Well, today is April 6.

17 MR. KOGER: Yes, sir.

18 THE COURT: I don't know what your problem
19 is about time.

20 MR. KOGER: Okay.

21 THE COURT: Whatever it is.

22 MR. KOGER: And as far as I--

23 THE COURT: Other which the notary has
24 signed, I really don't know what that means. I'll
25 accept it as an affidavit.

1 MR. KOGER: Well, I instructed when Ms.
2 Mays came to me--

3 THE COURT: Who is this, O'Verry?

4 MR. KOGER: She is not a notary. She is
5 not connected with me nor is her office.

6 Just basically, Your Honor, we stand on
7 the ground that we set forth in our motion right
8 here. Again, concentrating on Juror 95, April
9 Robinson, the motion, she felt, and again, based on
10 this motion, she felt that because of some
11 inadvertent facial gesture, reaction, things of that
12 nature, that she felt that the defense case was
13 minimized during that particular week.

14 If she felt that case was minimized that
15 goes to that it impacted my client's right to have a
16 fair trial pursuant to the sixth amendment and we
17 ask that you would take that into consideration and
18 in order to -- and to consider granting a new trial
19 in this particular case.

20 THE COURT: Anything else?

21 MR. MILLER: Nothing from the State, Your
22 Honor.

23 MR. KOGER: No, Your Honor.

24 THE COURT: All right, I'll take it under
25 advisement.

1 MR. KOGER: Thank you, Your Honor.

2 THE COURT: Mr. Koger, this letter, this
3 notarized letter, have you filed it with the clerk's
4 office?

5 MR. KOGER: I haven't filed it.

6 THE COURT: All right. I think we need to
7 make that a part of the record. I'm going to ask
8 you to -- obviously I trust you very highly to take
9 it to Barnwell and make sure it's filed so it would
10 be part of the record in this case.

11 MR. KOGER: All right, I'll do it. Thank
12 you, Your Honor.

13 THE COURT: Madam Court Reporter, you are
14 not going to Barnwell, are you?

15 COURT REPORTER: No.

16 THE COURT: What's the best way for us to
17 do it?

18 MR. KOGER: I will take it--

19 THE COURT: Hold on a minute. I'm asking
20 my court reporter.

21 COURT REPORTER: It is a Barnwell County
22 file.

23 THE COURT: Yes, Ma'am, it's a Barnwell
24 case.

25 COURT REPORTER: So it would go back to

1 Barnwell County anyway so I think that would work
2 okay.

3 THE COURT: Mr. Koger is fine. I trust
4 him with this.

5 COURT REPORTER: I need to give him a
6 receipt and have him sign it.

7 THE COURT: That's good. Let's do that
8 then.

9 Thank you all very much.

10 MR. MILLER: Thank you, Your Honor.

11 MR. KOGER: Thank you, Your Honor.

12 --End of Transcript of Record--

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND
NOTARY PUBLIC IN AND FOR 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 EVIDENCE INTRODUCED IN THE
ABOVE-CAPTIONED CASE ON APRIL 6, 2011, IN RICHLAND
COUNTY, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL
NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF
ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS
OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE
TWENTY-THIRD DAY OF FEBRUARY, 2014.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

IN THE COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)

VS)

DEMETRIUS DONNELL SMALLS,)
Defendant.)

ORDER

2011-GS-06-0065,
2011-GS-06-0066, and
2011-GS-06-0067

FILED FOR RECORD
2011 APR 29 PM 4:15
RHONDA D. McIVER
CLERK OF COURT
BARNWELL COUNTY, S.C.
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MAY 13 2011

SC Court of Appeals

This matter came before the Court for a hearing on Wednesday, April 6, 2011 at the Richland County Courthouse. The Defendant was present for the hearing and was represented by Joshua Koger. The State was represented at the hearing by Assistant Solicitor David Miller. At the hearing this Court received arguments on the Defendant's motion for a new trial following his conviction after a jury trial in Barnwell County on the above referenced indictments. After hearing from the Defense and the State, and considering the evidence and arguments presented by each, this Court denies the Defendant's motion for new trial for the reasons listed below.

The Defendant was charged with Murder (2011-GS-06-0065), Assault and Battery with Intent to Kill (2011-GS-06-0066) and Possession of a Weapon During the Commission of a Violent Crime (2011-GS-06-0067). The Defendant's trial commenced January 25, 2011 and was concluded on January 27, 2011. The jury in the case found the Defendant guilty of the lesser included offense of Voluntary Manslaughter, Assault and Battery with Intent to Kill (ABWIK), and Possession of a Weapon During the Commission of a Violent Crime. This Court sentenced the Defendant to a term of incarceration of twenty-five years for the Voluntary Manslaughter, a concurrent twenty year sentence for ABWIK, and a concurrent five year sentence for Possession of a Weapon During the Commission of a Violent Crime.

On February 4, 2011, counsel for the Defendant filed a motion for a new trial based upon letters he received from the family of the Defendant. In one of the letters, which was allegedly provided by one of the jurors that heard the case and dated February 3, 2011, it was alleged that some members of the jury

me

panel commented about the facial expressions and gestures made by this Court during the trial of the case. There is no allegation that any premature deliberations on the facts of the case took place. The letter further alleged that the juror felt that the sentence imposed by this Court was too harsh and that she did not believe that the Defendant should have to do so much time.

At the hearing, counsel for the Defendant presented a second, more detailed letter to the Court dated March 23, 2011 wherein the juror alleged that she specifically wanted to change her vote from "guilty" to "not guilty" on the charge of Assault and Battery with Intent to Kill. The letter alleged that she was scared and intimidated by this Court and her fellow jurors, and feared repercussions if she changed her vote when the jury was being polled by the Clerk of Court following pronouncement of the verdict.

Counsel additionally provided several letters written by friends and family members of the Defendant who claimed that they observed this court making facial gestures, leaning back, and removing my glasses during the course of the trial.

At the hearing, counsel for the Defense noted that he was not aware of any unusual or prejudicial conduct by the Court during the trial of the case. Additionally, defense counsel informed this Court that he would have made an appropriate objection and addressed the matter with the Court if he had observed anything during the course of the trial he believed to be prejudicial to his client. Counsel further informed the Court that he had not personally spoken to the juror whose letters he offered to the Court at the hearing and that the subscribing notary Public for the juror's signature was not an employee of his office or connected to his office in any way. If fact, both letters were brought to defense counsel by members of the Defendant's family.

Counsel for the State likewise informed the Court that no one from the Solicitor's office had any contact with the juror whose letters were offered to the Court following the trial. Furthermore, counsel noted that he was also not aware of any unusual or prejudicial conduct by the Court during the trial of the case.

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The record will also reflect that the jurors were individually polled as to their verdicts on the indictments following the publishing of the verdict by the Clerk of Court prior to the Defendant being sentenced. At that time, all jurors affirmed their verdicts on the three indictments.

After considering the arguments raised at the hearing and the letters offered by defense counsel from the friends and relatives of the Defendant who claimed to be in attendance for the trial, I find no basis for a new trial in this matter. Neither the Defense nor the State claims to have observed the conduct complained of in the letters. In fact, the removal of glasses, squinting of eyes or reclining in a chair are all things that this or any other judge will inevitably do during the course of a multi-day trial. To prevent there being any inference drawn by the jury, in every case, civil or criminal, this Court provides a curative instruction to the jury to disregard anything they saw that might have indicated to them that the Court has an opinion on the evidence or witnesses presented by any party. As in all other cases, that instruction was given in this case when the jury was charged on the law prior to the jury beginning its deliberations.

The two letters submitted by the juror discussed her own opinions of the State's case, this Court's sentence and her interactions with other jurors. It is from these letters that the Defense's allegations of juror misconduct arise. The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. *State v. Smith*, 338 S.C. 66, 525 S.E.2d 263 (Ct.App.1999). Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. *State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct.App.2004); see also *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial). Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. *Smith*, 338 S.C. at 71, 525 S.E.2d at 266.

Initially, this Court must make a factual determination as to whether juror misconduct has occurred. See *Smith*, 338 S.C. at 71, 525 S.E.2d at 266; see also *Aldret*, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred).

MAP

As a threshold matter, this Court did consider the letters allegedly written by the juror that were offered by defense counsel. Counsel for the State objected to the timeliness of the disclosure of the March 23, 2011 letter during the hearing. The letter was not presented to counsel for the State or to the Court until the day of the hearing, some fourteen days after it was obtained by defense counsel. Despite the failure to disclose the letter prior to the hearing, this Court has received the letter into evidence and considered the contents of the letter.

Having considered the content of both letters from the juror, I find no credible evidence that any juror misconduct occurred in this case. The first letter clearly indicates that the juror felt that the sentence imposed by this Court was too harsh. Additionally, the letter alleges that some jurors commented *prior to deliberations* about this Court's gestures and facial expressions during the course of the trial. In the letter dated March 23, 2011, the juror discusses wanting to change her verdict on one of the charges and discusses comments made in the jury room during deliberations.

As a general rule, juror testimony is inadmissible to impeach a jury verdict. *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995). Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict. *Id.* Traditionally, a juror's testimony was not admissible to prove either his own misconduct or the misconduct of other jurors. *Galbreath*, 359 S.C. at 405, 597 S.E.2d at 848. However, Rule 606(b), SCRE, altered this common law rule, and now, juror testimony regarding external prejudicial information or improper outside influence is allowed. Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. *See State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (Ct.App.2000); *see also Aldret*, 333 S.C. at 310, 509 S.E.2d at 812 (juror testimony or affidavits are generally admissible in the

case of an extraneous influence); *Hunter*, 320 S.C. at 88, 463 S.E.2d at 316 (juror testimony may normally be used when an extraneous influence is alleged). External influence on a jury involves situations where jurors receive information during deliberations from some outside source. *Galbreath*, 359 S.C. at 405, 597 S.E.2d at 848. I hereby find and rule that no extraneous influence was present in the case at bar. This Court instructed the jurors at the close of this case that the Court had no opinion regarding any of the facts or witnesses presented and that it was the jurors' sole responsibilities to determine the credibility of the evidence and witnesses that had been presented. Furthermore, the jurors were instructed specifically that if they had seen or heard anything from the Court that they believed expressed an opinion about the evidence or witnesses presented they were *not* to consider that in reaching their verdict. In fact, both letters from the juror acknowledged the instructions given to the Court prior to the jury's deliberations. Accordingly, any allegation of alleged juror misconduct in this case would be an allegation of internal misconduct based upon the comments of jurors made during the course of deliberations in the jury room.

Internal influences involve information coming from the jurors themselves. *Galbreath*, 359 S.C. at 406, 597 S.E.2d at 849. Until 1995, the prohibition against juror testimony regarding allegations of internal jury misconduct remained intact. In *State v. Hunter*, our supreme court carved out an exception to this rule, holding that juror testimony is competent in cases involving internal misconduct where necessary to ensure due process, i.e., fundamental fairness. *Id.*; see also *Aldret*, 333 S.C. at 312, 509 S.E.2d at 813 (finding premature jury deliberations may affect fundamental fairness of a trial such that the trial court may inquire into such allegations and may consider juror affidavits in support of such allegations); *Ex Parte Greenville News*, 326 S.C. 1, 482 S.E.2d 556 (1997) (stating juror testimony regarding internal misconduct is generally inadmissible to impeach a verdict except when necessary to ensure fundamental fairness); *Hunter*, 320 S.C. at 88, 463 S.E.2d at 316 (noting juror's testimony was properly considered as basis for impeaching jury verdict, where juror claimed racial prejudice played role in determining defendant's guilt). In *State v. Franklin*, the court of appeals held:

ME
#5

[W]e emphasize that the exception to the general rule against review of internal jury deliberations carved out in *Hunter* is a narrow one, limited by our supreme court to those few situations which implicate due process raising a question of fundamental fairness.... But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.

Franklin, 341 S.C. at 562, 534 S.E.2d at 720.

Because the two letters from the juror raise no allegation of premature deliberations or racial bias, this Court declines to inquire further into the allegations raised at the hearing.

Finally, this Court notes that the specific juror's claim that she wished to change her own verdict from "guilty" to "not guilty" following the publishing of the verdict would not prejudice the Defendant. The juror claimed that she only wanted to change her vote in reference to the Assault and Battery with Intent to Kill indictment. Because the Defendant was sentenced to concurrent time on that indictment, and because he was additionally convicted of the violent, most serious offense of Voluntary Manslaughter, there is no direct or collateral impact on the Defendant because of his conviction on the ABWIK indictment.

Based on the foregoing, this Court denies the Defendant's motion for a new trial on the basis of juror misconduct.

IT IS SO ORDERED!


Doyet A. Early, III
Resident Judge,
Second Judicial Circuit

April 26, 2011
Aiken, South Carolina

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Barnwell)Demetrius Smalls #344584)

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

v.)

State of South Carolina)

2015-CP-06-00380

APPLICATION FOR
POST-CONVICTION RELIEF

2015 NOV -2 PM 1:18

FILED FOR RECORD

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention Broadriver Correctional Institution, 4460
Broadriver Road, Columbia South Carolina 29210
2. Name and location of Court which imposed sentence Court of General Sess.,
Barnwell County, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2011-GS-06-65 (Murder); 2011-GS-06-66 (Assault and Batt.

- (b) With Intent to Kill;
- (c) Possession of a weapon during comm. of violent crime.
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 27, 2011
- (b) Voluntary Manslaughter (20 years) ABWIK (25 con.) and
- (c) Poss. of weapon (5 years concur.)
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XX
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals for South Carolina
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. January 14, 2015
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. No. 2015-UP--28 Unpublished Opinion.
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel "See Attachment".
- (b) Lack of Subject-matter and Personal Jurisdiction. "See Attachments"
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Supporting Memorandum"
- (b) See Supporting Memorandum"
- (c) See Supporting Memorandum"
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

iv. N/A

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No.

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

(a) which grounds have been presented:

i. None.

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ineffective Assistance of Counsel is normally not recognized on direct appeal.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Yes.
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. At trial and Sentencing, Mr. Josh Koger, Att. at law.
 - ii. On Appeal, Mr Benjamin John Tripp, Appellate Defender.
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial and Sentencing and Post-Trial Hearing.
 - ii. On Appeal.
 - iii. _____

19. State clearly the relief you seek in filing this application:
Seeking an order of "Immediate Release", or at minimum,
that this case is reversed for a new trial.

20. Are you now under sentence from any other court that you have not challenged?
No.

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Barnwell)

VERIFICATION

I, Demetrius Smalls #344584, 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.

Demetrius D. Smalls #344584

SWORN to and subscribed before me this 29th
 day of October, 2015.

Susan H. Frye (L.S.)
 Notary Public

My Commission Expires
 March 5, 2018

My Commission Expires: _____

FILED FOR F.0003
 2015 NOV -3 PM 1:13
 BARNWELL COUNTY S.C.

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

I, Demetrius Smalls #344584, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Demetrius Smalls #344584
Applicant

SWORN or affirmed to and subscribed before me this
29th day of October, 2015.

Susan H. Ince
Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

FILED FOR RECORD
2015 NOV -3 PM 1:13

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Demetrius Smalls, #344584,
Petitioner,

2015-CP-06-00380

Vs.

Case No.: _____

State of South Carolina,

Respondent. /

ATTACHED SHEETS AND SUPPORTING
MEMORANDUM FOR RELIEF IN A PCR CASE.

FILED FOR RECORD
2015 NOV -3 PM 1:13
BARNWELL COUNTY, SC

This matter is being brought to the attention of this Honorable Court for the State of South Carolina, by a pro-se Petitioner, for which is without counsel at the time of filing. Claiming an "entitlement to release from confinement", based on a unconstitutional conviction and sentence.

Petitioner also contends that at all times herein, it is requested to treat this application and all supporting attachments supplied in pro-se capacity liberally. Holding such to a less stringent standard than formal pleadings drafted by lawyers. That; "if this court can read the pleadings to state a valid claim upon which relief can be granted, that relief is urged to be extended to the petitioner, pursuant to Supreme Court authority. See Haines v. Kerner, 404 U.S. 519 (1972).

(a). PROCEDURAL HISTORY OF CASE.

On or about August 20th, 2009. The Petitioner was arrested after turning himself into law enforcement soon after a shooting incident had taking place in Barnwell County, South Carolina. The Petitioner gave a statement to law enforcement personnel consistent with a self-defense theory.

The Petitioner remained in County detention (i.e. jail), charged with Murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. From the August 20, 2009 arrest until his case proceeded to trial almost seventeen (17) months thereafter, on January 24, 2011. The bond set in this case was unattainable at \$750,000.00.

On January 24, 2011, the trial officially began with pre-trial matters to be resolved. Petitioner was represented by Mr. Josh Koger, attorney at law. The State was represented by Mr. David Miller of the South Carolina Attorney General's Office. The presiding judge was the Honorable Doyet A. Early, III, and jury.

The Solicitor began by alerting the Court that there was a Jackson v. Denno, hearing prior to selecting the jury. Dealing with the voluntariness of petitioner's statement to police. The Court ruled that petitioner's statement was voluntarily given, and allowed such to be admitted in evidence.

Notably however, (Tr. tr. p. 9 lines 12-15), there was no indictment passed down by the grand jury, to which the court was being made aware, as well as defense counsel. With the allegation

such indictment would be "presented to the grand jury in the morning". On (Tr. tr. p. 27 lines 3-6). The Court left off on January 24, 2011, after the Jackson v. Denno, hearing. Informing all parties "the jury will be here at 9:30 ready for me to qualify in the morning", and we'll draw the jury and try the case thereafter, is that right? The Solicitor Miller, answered "Yes, sir!"

On January 25, 2011, the following takes place. The Solicitor calls his first case as being Indictment number 2011-GS-06-0065, an indictment for murder, 2011-GS-06-0066, an indictment for assault and battery with intent to kill, and indictment 2011-GS-06-0067, an indictment for possession of a weapon during the commission of a violent crime. (Tr. tr. p. 28 lines 7-14)

Whereupon, a bench hearing (conference) was held outside of the hearing of the petitioner and jurors. (Tr. tr. p. 28, lines 15-16). The court (Tr. tr. p. 29 lines 5-12) admonishes defense counsel about matters the court has made counsel aware of, which was outside of petitioner's knowledge pertaining to S.C. Code of Laws, §17-19-80. Which essentially made mandatory "that the indictment shall be given to the defense at least three(3) days prior to trial". Passed down by a grand jury.

The Court further understood the "defense counsel" as opposed to the "defendant" allegedly waived this process of the indictment. (Tr. tr. p. 29, lines 5-8). The Court went on to admonish the prospective jurors that petitioner had indeed been indicted by the Barnwell County Grand Jury, for the offenses charged. And the case proceeded to trial.

The applicant's trial began January 24, 2011 and lasted until the conviction and sentence on January 27th, 2011. The Jury failed to find "malice" on the allegedly indicted murder charge. But instead found all remaining essential elements "except malice", to comply with the essential elements of voluntary manslaughter, for which the applicant was never indicted.

Importantly however, the jury also found the applicant guilty of "assault and battery with intent to kill within the same shooting incident, for which does require 'malice' as an essential element, as a matter of law". [See Court's instruc. Tr. tr. p. 511, lines 1-10].

Thus, at face value, "the assault and battery with intent to kill, requiring the finding of malice", must be reversed as a matter of law. As if such element was present during the jury deliberation. Undoubtedly, the applicant would be convicted of murder as opposed to voluntary manslaughter. And had the assault and battery charge not been assessed, the sentence imposed could have been different.

After trial, within the statutory commands for filing a "Motion for a New Trial". [SCRCP], Rule 29. Defense attorney, Mr Koger, on February 4, 2011, forwarded such a motion. Arguing that the defendant's right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments, had been violated "not solely by jurors, but by the judge, when juror number 95 submitted 'an affidavit' that the actions of Judge Doyet A. Early, III, during defense witnesses testimony in applicant's case in particular, may have impacted the jury's verdict". [See April 6, 2011 hearing in front

of judge Early, III Tr. tr. p. 7, lines 6-9] The affidavit was conveyed in pertinent part on record as expressing the following;

"And she stated that she felt the facial action by Your Honor in this particular case may have impacted the jury's verdict in this particular case".

Lines 19-24

"She also stated that there was some discussions in the jury room about the facial actions before you made the curative instructions on the 27th and she felt that that may have impacted the jury verdict in this particular case, Your Honor". Tr. tr. p. 7.

Tr. tr. p. 8, Lines 19-25

"She talks about some maybe some undue juror influence in this second affidavit here. And in the second portion of this particular affidavit and also in the first affidavit she felt that maybe some of the gestures by Your Honor may have minimized the defense case on this particular matter".

Tr. tr. p. 9, Lines 7-15

"So based upon that we submitted this motion along with an earlier motion that we made for a new trial in this particular case. And even though Your Honor made a curative instruction before the case went to the jury based upon juror number 95 saying that 'she thought that it was a little too little too late as far as a curative instruction not knowing what the other jurors may have felt at that particular time".

Tr. tr. p. 9, Lines 16-22

"We only got one affidavit from this particular juror. If she felt that as juror, and again we have the other affidavit submitted just to corroborate the facial reaction and of course Your Honor corroborates the facial

action and gave a curative instruction for the jury to ignore the facial gestures or reactions".

On April 26, 2011, based upon the April 6, 2011 hearing, in regards to the above facts. Did the trial judge totally misconstrue or misapprehend the veracity of the motion for a new trial, in the following manner.

The court failed to recognize the jury claimed in a detailed affidavit, that any premature deliberations, any undue influence, an any juror misconduct. According to the evidence presented, was caused by none other than the court itself. For which on page 2 of the court's order dismissing the motion for a new trial. Judge Early, III fails to acknowledge.

A appeal was subsequently taken from the denial above which consolidated applicant's other sole "preserved issue" for appeal. The appeal was timely filed however, "the state did not make its responsive pleading until June 3, 2014". See Appellate Case No. 2011-192488.

Importantly enough, in which applicant will at a later time go in depth in regards to the State's response brief. Drafted by Assistant Deputy Attorney General, for the State of South Carolina, Ms. Deborah R.J. Shupe. It begins quite clearly with the "STATEMENT OF FACTS", being:

"On March 8, 2011, the Barnwell County Grand Jury indicted Appellant Demetrius Smalls on one count of murder, one count of assault and battery with intent to kill (ABWIK), and one count of possession of a firearm during the commission of a violent crime".

As noted to pass as a scrivener's error. Nothing in similarity relates with the date this case is said to have been indicted and the date the Attorney General's Office exposes it was indicted. Which directly conflicts with one another.

However, the following facts and evidence will certainly put to rest that question. Where the truth of the matter is logical, legal, and irrefutable. Whereas any rebuttal will be illogical, illegal and arguably inconsistent with the rules, the law and the facts as it pertains to this matter.

In short, this case was tried without any indictment by a properly impaneled grand jury, without any proper waiver thereof, while fraud was committed upon the court, as if such procedures had been followed.

Thus, applicant's conviction and sentence was secured without subject-matter-jurisdiction. And his imprisonment "as of the date this court is being made aware, is unlawful". Based on the record clearly establishing "no indictment was available on the 24th of January, 2011, no signed waiver was obtained". It's inconsistent with due process or logic, that the indictment at 9:30 a.m., in the morning of the 25th, of January 2011, had magically appeared. Neither "was such stamped and filed with the Clerk of Court, as mandated by Chief Justice Toal, to avoid the precise type and kind of confusion". The applicant now moves to present the legal authority for which this application rely upon.

SUPPORTING GROUNDS AND MEMORANDUM FOR RELIEF.

Pursuant to sections 10. and 11., of the Post Conviction application. Petitioner based his initial ground for relief (a) on "Ineffective Assistance of Counsel", which is a Sixth Amendment violation of the United States Constitution. Which if proven to exist, entitles the applicant to relief. As he cannot be held in prison as the result of a unconstitutional conviction and sentence.

(a) As an initial showing to the ground alleged above. The applicant will clearly demonstrate that counsel was ineffective in failing to "contemporaneously object" to the "alleged indictments in this case", for which there was none. And move for a complete dismissal of all charges based on a intended prosecution without the applicant being afforded Due Process of Law, under both the State as well as the United States Constitution..

As beforementioned within the facts of this case. Applicant. turned himself into police soon after the August 20, 2009 shooting incident in which applicant shot two people in fear for his life. The applicant was detained (i.e. arrested) on this date and remained in the county jail on a unattainable bond. The applicant subsequent to his arrest retained the services of Mr. Josh Koger, to represent him. In so doing, the applicant anticipated the services of a professional attorney, representing him zealously, within the bounds of law.

In regards to the applicable law and Constitutional provisions of law. The following outlines the protections which should have been, but was not afforded to the applicant. Specifically, so the circuit court would retain "Subject-Matter-Jurisdiction".

And in the event South Carolina's Constitution remains to be the Supreme Law of this state; and extends "equally" to all persons and not a select few. Then it should be taken at face value to afford the following protections and guarantees:

Article I., Section 3.

"The privileges and immunities of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws".

Article I., Section 11.

"No person may be held to answer for any crime the jurisdiction over which is not within magistrate court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed", [in relevant part].

Taking the above Constitutional Sections of Article I., under advisement. Applicant now turns the attention of this Honorable Court, to the South Carolina Code of Laws, at statutory provision §17-19-10, where it reads as follows:

"No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in the following cases;"

- (1) When a prosecution by information is expressly authorized by statute;
- (2) In proceedings before a police court or magistrate; or
- (3) In proceedings before courts martial.

With the above Constitutional and statutory considerations in mind does the applicant now guide this court's attention to the South Carolina Rules of Criminal Procedure. Which sets the engagement of protecting individual procedural Due Process rights, according to the statutory and constitutional mandates above.

Such is outlined under South Carolina's Rule of Criminal Procedure, Rule 3(a), (b) and (c). Which provides the following;

S.C.R. Crim. Proc. 3.

"Magistrates, municipal judges and other authorized to issue warrants shall, in cases within the jurisdiction of the General Session Court, forward to the Clerk of Court of General Session, all documents pertaining to the case including, but not limited to, the arrest warrant and bond, within (15) days from the date of arrest in the case of an arrest warrant and date of issuance in the case of other documents".

3(b) states: Transmittal to Solicitor.

"The Clerk of the Court of General Sessions shall forward a copy of any arrest warrant received pursuant to paragraph (a) above to the solicitor within two (2) business days from the date of receipt from issuing official".

Most importantly now comes Rule 3(c), a product and protection under "procedural not substantive Due Process". Which is a (procedural protection) guarantee under the United States Constitution.. Rule 3(c) reads as follows:

"Within ninety days (90) after receipt of an arrest warrant from the Clerk of Court, the solicitor 'shall' take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment 'shall' be filed with the Clerk of Court, assigned a criminal number, and presented to the Grand Jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such with the Clerk of Court".

As a matter of law and fact. The only exception given to the above rules governing "procedural guarantees of Due Process". Is accorded at Rule 3(d), which states;

"Extensions of Time".

"The solicitor may petition the circuit court for an order delaying action on the warrant, as set forth, for successive ninety (90) day periods if the circuit court specifically finds good cause for such delay for each successive ninety day period".

And again, the rules either say what is meant, or either means what is conveyed within the governing rules. The gist of Applicant's position here is centered around "Procedural Due Process Protections and Guarantees", along while paying a attorney to make certain the

state abides by those rules in the course of a criminal prosecution against him.

The following is what factually occurred on the record in open court on the day the Applicant's trial began: [January 24, 2011], Tr. tr. pg. 9 lines 7-15:

The Court: What are we going to do?

Solicitor: Your Honor, we have a Jackson v. Denno, in State of South Carolina versus Demetrius Donnel Smalls represented by Mr. Koger. He's on the way in the courtroom.

The Court: All right. This is indictment what?

Solicitor: Your Honor, there's going to be some indictments presented in the morning to the Grand Jury. We have warrant numbers on the cases at this time.

Without any objection from counsel, seeing his client had remained in county jail from August 20, 2009, until January 24, 2011, at the beginning of a two day trial. Going forward with a Jackson v. Denno hearing to determine whether applicant's statement would be introduced to jurors, yet "there is no grand jury indictment".

Yet the constitutional and statutory provisions guarantee "no person will be held to answer for a crime without that true billed indictment" passed upon by Grand Jurors. In which in this case, the solicitor had approximately seventeen months to secure.

Secondly, would it be reasonably effective assistance for counsel not to question "the manner and means in which such a late alleged indictment was passed upon the grand jury". Rather than so doing, counsel and the solicitor worked together in an attempt to

"dupe" the applicant into waiving his right to the indictment pursuant to S.C. Code §17-19-80. Which in relevant part, "required the indictment to be turned over to the defense in such a case as this, at least three (3) days prior to the beginning of trial".

Nevertheless, the alledged waiver fails to meet constitutional safeguards as being "voluntarily and intelligently rendered". As such a waiver of indictment "was not accorded on record", nor explained by the court to the defendant, nor did the clerk of court submit a waiver form to be signed by the defendant, prior to trial.

Third, in order for a indictment to be valid on its face, not only must it be true billed by a "properly impaneled body of a grand jury". But "it must be filed with the Clerk of Court", assigned a criminal number, in accordance with the procedural process.

Taking a close look at the indictment in this case. It is somewhat difficult to determine the "exact date" it was filed with the Clerk of Court. However, what exposes "fraud upon the court", is where the indictment and the sentencing sheet have the identical date, with the letter ["J"] being identified. And the day being identified as ["22"].

In reference to the "J", depicting the month beginning with such letter, "there are only three total on a calendar". January, June and July. Even if the State wants to suggest the "J" without being able to identify the following letters represent January. Then it would equally suggest the indictment was secured at least on the 22nd of January 2011. However, the record of transcript be-

fore this court refutes such a conclusion. Where the solicitor openly admits; "Your Honor, there's going to be some indictments presented in the morning to the grand jury". Tr. tr. p. 9., Lines 7-15. Which was recognized as being the start of trial, on the 24th of January 2011.

Thus, the "J" and following letters depicted on the indictment cannot be for the month of January. But instead, must be subsequent to the month of January, being either June or July 2011. Such is critically flawed and facially invalid when considering Due Process of Law when obtaining an indictment. And Applicant posits the following reasons in support.

On October 23, 2002, Chief Justice Jean H. Toal, of the Supreme Court for South Carolina, sent forth the following directive by "ORDER". Which reads as follows:

RE: Filing Indictments With the Clerk of Court:

Rule 3(c), SCRCrim P, requires solicitors to file indictments with the Clerk of Court. In some counties, solicitors are retaining the original indictments which have been returned by the grand jury until the proceedings are concluded. This local practice leads to problems and confusion in some cases. Accordingly, effective immediately [sic] (the date of this order), all original indictments which have been returned by the grand jury shall immediately be filed with the Clerk of Court.

IT IS SO ORDERED.

Notwithstanding any other provision of law consistent with the October 23, 2002 directive from the South Carolina Supreme Court. Counsel failed to object to a facially invalid indictment where not only was it not passed upon by the grand jurors. The Rules solicitors were expected to follow for obtaining a true billed indictment, was omitted in this case.

Since the State of South Carolina abides by common law rules (i.e. Judge made laws). Once the Supreme Court forwarded such a directive using the word "shall" in reference to the procedure the county solicitors were expected to follow. In such an important matter of supplanting "jurisdiction upon the circuit court". The failure to do so renders the court lacking in subject-matter-jurisdiction.

Fourth, counsel failed the applicant by not moving to dismiss the indictment pursuant to §17-19-80. Where counsel instead attempted to "be a second prosecutor", rather than defense attorney. While attempting to trick the defendant into waiving the procedural requirements of "NOTICE", at least three days prior to trial.

Accordingly, with respect to "waivers" concerning the indictment. S.C. Code Ann. §17-23-130 provides that the Clerk of Court shall have the defendant sign a waiver of the presentment by grand jury. See Odom v. State, 350 S.C. 300, 566 S.E.2d 528 (S.C. 2002), which the notice by §17-19-80, at least three days prior to trial is no less important.

Moreover, "a waiver" must be attended by specific constitutional safeguards in order to be valid. In other words the state must prove by preponderance of the evidence (1) the waiver represented an "uncoerced choice", and (2) the defendant understood both the nature of the right being waived and the consequences of the waiver. See Maranda v. Arizona, 384 U.S. 436, 475 (1966); and Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Here, not only did counsel fail to explain the details of §17-19-80. But also, the court itself failed to properly question the defendant in open court on the record, to make certain the defendant was totally aware (i.e. making an intelligent choice without coercion), of the rights he was waiving and the consequences of such waiver. See also Phillips v. State, 314 S.E.2d 313 (S.C.1984), which does not turn on whether the right being waived is the total waiver of the indictment or, "the requirement that it is presented at least three days before trial", pursuant to §17-19-80. Such failure to obtain "the written waiver", coupled with violating specific safeguards attending such a waiver. Renders the alleged waiver invalid.

Fifth, as a threshold matter to the beforementioned claim the court lacked subject-matter-jurisdiction to try applicant's case. Applicant contends that the Due Process Clause made applicable to the States by way of the Fourteenth Amendment provides that "NO person shall be deprived of life, liberty, or property without due process of law". The Clause protects individuals against two types of government action.

"Substantive due process" prevents the government from engaging in conduct that "shocks the conscience", Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952). As here, "when the Supreme Court of South Carolina clearly gave the solicitors a directive to prevent the state from engaging in acts problematic to obtaining a proper indictment". Or where the government action interferes with rights "implicit in the concept of orderly liberty", Polko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 152 (1937). A comparison would again be where the solicitor of South Carolina engaged in actions which interfered with the Supreme Court's concept of orderly liberty. If the state seeks to take away a individuals liberty. Then the proper function for obtaining the authority to do so (by process of indictment), must be followed to the letter of law. Without which, no conviction can be relied on as producing just results.

In conclusion on the issue of counsel's failure to raise these available defenses. The applicant further contends that not only was no proper grand jury impaneled, and a fraudulent indictment passed to the court. Such was not filed with the court as obviously required by the South Carolina Supreme Court. This rationale come from precedent to Wit; Sharp v. Johnson, 107 F.3d at 290 (No. 30) (1997). In Sharp, supra, the court stated in pertinent part: Jurisdiction is conferred upon the trial court by filing of an indictment not it's reading which invest the trial court with jurisdiction. (Citing Santos v. State, 834 S.W.2d 953 (Tex App. 1992)).

To further amplify this proposition, in United States v. Hill, 210 F3d at 884 (8th Cir. 2000). The court stated that filing of a valid indictment is prerequisite to the court's jurisdiction. In the state of South Carolina; "When the Grand Jury returns a True Bill Indictment it confers upon the trial court subject-matter-jurisdiction. When the Clerk of Court files the indictment certifying the indictment, it confers upon the court Personal Jurisdiction. In order for the trial court to preside, he must have both, subject-matter-jurisdiction, and personal jurisdiction. Jurisdictional defects render the indictment by Grand Jury a nullity. A defective exercise of power". c.f. Lollis v. Manning, 242 S.C. 316, 130 S.E.2d 847 (S.C. 1963).

The above is consistent with the October 23, 2002 Supreme Court directive. Such is consistent with Due Process of Law. And what occurred is a conviction without being afforded rights under the United States Constitution..And counsel is the proximate cause being ineffective, for these inadequacies occurring in his case. And for the above reason, the applicant is entitled as a matter of law, "to be immediately released from custody".

ISSUE (b) AND SUPPORTING ARGUMENT FOR PCR RELIEF.

Here, applicant contends he was deprived of the right to effective assistance of counsel which is a Sixth Amendment violation, by the failure of counsel to (1) question the court's partiality

to preside over this specific criminal matter; (2) counsel's failure to request the court's recusal within the filed Motion for a New Trial pursuant to Rule 29; and (3) failing to object to the court's erroneous self-defense charge.

According to the United States Constitution, as well as the Constitution for South Carolina. The right to trial by an impartial judge is as fundamental as the trial by jury itself. See Duncan v Louisiana, 391 U.S. 145, 155-56 (1968). More importantly, "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities". See Canon 2 of The Judicial Code of Conduct, Rule 501.

For argument sake, defense counsel in the instant case at bar was armed with a "notarized statement from a participating juror in this trial". For which conveyed that; "Judge Early's facial action and gestures were addressed during deliberation by jurors in the deliberating room". And in her opinion (Juror 95, Ms. April Robinson) such had an impact in the way the jury voted; "that judge Early made noticable gestures and facial expressions, as if he didn't believe particularly the defense witnesses".

Here, applicant can see no more damning interference with his right to a fair (something counsel should have also noticed) trial than a judge who is not impartial. That is prejudicially influencing the jurors against him. Yet, counsel went back to that same court without requesting recusal, for a determination whether the misconduct amounted to a reversible error.

Defense counsel did however, argue that the Judge's conduct according to the juror minimized the defense case and impacted defendant's Fifth, Sixth and Fourteenth Amendment rights to a fair trial. Yet forwarded such motion to the judge in which committed the egregious error.

Counsel knew or should have been aware that Judge Early could not be relied upon for issuing a unbiased decision to the Rule 29 motion. Considering the Code of Judicial Conduct, Rule 501, and applying Cannon 3(E)(1). Where it states;

The party seeking to disqualify a judge must must do more than merely allege bias on the judge's behalf, the party must present some evidence of judicial prejudice or bias. Id at 599 S.E.2d at 118 Patel v. Patel.

In State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (19-93), in cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940 (1982). Here however, counsel's incompetence resulted in the applicant's trial being tainted by the judge's conduct. As well as the subsequent motion in attempt to follow through with such a hearing as described above. Which undoubtedly, such accused court could not render a unbiased opinion. For these reasons, the applicant not only was denied a fair trial, but by counsel's failure to protect the rights of his client, and render effective assistance. Such also prejudiced the applicant from receiving a unbiased decision within the Rule 29 motion.

ISSUE (c) AND SUPPORTING ARGUMENT FOR RELIEF.

Applicant contends he was denied the right to effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights, as well as the corresponding provisions under South Carolina Constitution, where trial counsel failed to object to the trial court's jury instruction on mutual combat, as well as the plain, common self-defense charge.

At the close of trial, during the charge to jurors, the trial court on its own volition brought "mutual combat" up during trial. Tr. tr. 443, lines 13-25, 444 line 1-2.

Applicant argues that trial counsel should have objected in order to preserve for appeal, mutual combat being charged to the jury because it was no evidence of any agreement to combat, nor was it applicable in this case but for the self-serving purpose of negating self-defense.

Instead there was testimony during trial that the altercation arose from a conflict between the applicant and the decedent's brother earlier that day at a local convenient store. Once the decedent heard of this altercation, he went in search of the applicant with other family members. The applicant found out that the family members were looking for him once he arrived at a local hangout spot outside a trailer belonging to other family members. The applicant never agreed to have a armed confrontation with the decedent on equal terms nor was the decedent aware that the applicant became armed during the altercation because he (the applicant) feared for his life, once "Zantrell Mays branished a weapon in the

face of the applicant, thus, setting the defense of "self-defense in motion".

The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there "must be mutual intent and willingness to fight" to constitute mutual combat. See State v. Graham, 196 S.E.2d 495. Whether or not mutual combat exist is significant because "the plea of self defense is not available to one who kills another in mutual combat". (citing State v. Jones, 101 S.E. 647)

In order to claim self-defense, the defendant "must be without fault in bringing on the difficulty". State v. Davis, 317 S.E.2d 452. Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved with mutual combat, the "no fault" element of self-defense cannot be established. Mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. As such, it is only logical that the evidence of agreement to fight be plain.

Again, the decedent and his brother came looking for the applicant, after the decedent learned that his brother and the applicant had an earlier altercation. The applicant learned of this only "after he went to a local hangout spot". Never was there any agreement (or testimony at trial of any agreement) between either the decedent or his brother, to meet up and fight. There was irrefutable evidence during trial, that "neither the applicant nor decedent was armed during the fist to fist altercation earlier that day". There was no evidence that the decedent or applicant

agreed to meet later on. In fact, in numerous cases determining "mutual willingness" to fight, several cases emphasized that each party knew the other was armed. See State v. Porter, 239 S.E.2d 641, State v. Graham, 196 S.E.2d at 496, State v. Mathis, 177 S.E.2d 318, and State v. Taylor, 589 S.E.2d 1.

Here there is no indication that Terrance Mays knew the applicant became armed during the altercation, and there was no pre-existing ill will between the parties. Under these circumstances, counsel's failure to object to the erroneous mutual combat instructions, deprived the applicant a fair trial. And is consistent with a Sixth and Fourteenth Amendment violation, which connotes the right to effective assistance of counsel, and the right to a fair trial.

The second position applicant takes in support of his grounds for relief. Is where counsel failed to "object" to the common self-defense charge, and instead require under the circumstances of the case, move for a more specific jury instruction in regards to self-defense.

Applicant contends that his trial counsel was ineffective by not requesting a more specific jury instruction regarding self-defense in light of the evidence that was available to his trial counsel during the jury charge conference. During the jury charge conference, applicant's trial counsel requested that the self-defense charge that the trial judge was going to give be tailored to include the right to act on appearances. Tr. tr. p. 444, lines 9-13. The trial court subsequently charged the jury, "the defendant has the right to act on appearances even though the defendant be-

lieves he may have been mistaken" Tr. tr. p. 516, lines 24-25, 517 line1.

Such charge was insufficient to cover the elements that surrounded the shot which led to the applicant defending himself. The applicant was entitled to a self-defense charge tailored to both shootings perceived. In regards to the Zantrell Mays shooting, applicant had a right to judge more harshly to include size, age difference, and reputation for violence. As noted, Zantrell Mays was born [REDACTED]/1983, and is 6 ft tall and weighed 250 lbs. Whereas, the applicant was born [REDACTED]/1987, was 5'7 and weighed 170 lbs. AND had previously been victimized by the decedent.

More importantly, McKenzie Atterberry was called to testify on the applicant's behalf. But while on the stand, trial counsel neglected to "question the witness about a prior shooting that involved Zantrell Mays discharging a firearm at the witness" See Exhibit.

In charging self-defense, as noted in State v. Fuller, 377 S. E.2d 228, supra, the court must consider the facts and circumstances of the case in order to fashion an appropriate charge. As noted in State v. Rye, 651 S.E.2d 321 (2007), "If defendant is justified in defending himself or others in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended". See charging immunity §16-11-450(A).

Because counsel failed the applicant in this respect, such deprived the applicant of ineffective assistance of counsel and

a fair trial worthy of confidence in the verdict rendered. For these reasons, the applicant is entitled to a new trial. Primarily because the trial attorney and the court failed to request and submit self-defense as to both adversaries.

ISSUE (d) AND SUPPORTING ARGUMENT FOR RELIEF.

Reiterating, the applicant for the most part was charged, not indicted for murder and assault and battery with intent to kill. One person died the other did not. What's important however, is where the applicant "was not charged nor indicted for voluntary manslaughter, but was found guilty of such under the rule of being the lessor-included offense to murder".

Turning to the instructions and the law given by the court, on Tr. tr. p. 507 lines 6-14. The court gives the jury the instructions in order to find the defendant guilty of murder. The essential elements being (a) the defendant killed another person (b) with malice aforethought. The court on Tr. tr. p. 508 lines 17-19 makes a instructional error in violation of the Supreme Court decision in Belcher, that a jury may no longer infer malice by the use of a deadly weapon. And instead, the state must prove malice beyond a reasonable doubt.

In any event, the jury couldn't find the applicant guilty of murder where it is obvious the state failed to prove malice, even under the erroneous instruction by the court, beyond a reasonable doubt. The court then proceeds further in its instruction. Giving

the state another alternative way to convict the applicant without malice as an essential element. The jury finds applicant guilty of voluntary manslaughter. What's argumentative here however, is where the court on Tr. tr. p. 511 lines 1-7, defines assault and battery with intent to kill, and as an essential element to the charge, arising from the same shooting incident. The court instructs that "in order to find the defendant guilty, the state must prove beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought".

The jury returns a verdict on January 27, 2011. Of; "Not guilty of murder because it couldn't find malice in the case of the decedent". Yet within the same shooting incident, convicted the applicant of malice in the assault and battery with intent to kill. Such is not consistent with the fundamental demands of fair play. As the court noted in Rye, 651 S.E.2d 321 (2007), "if the defendant is justified in firing the first shot, then so is he in firing the continuation until the threat is ended".

Not saying self-defense was extended (where it should have been). However, in firing the gun, "the jury could either find malice or not". It wasn't as if somehow one bullet was designed by the applicant to do more harshly, what another bullet could not. Thus, on its face and as a matter of law, the assault and battery with intent to kill, as a matter of law, must be reversed. Whereas, counsel was ineffective for failure to move for

an exoneration with regards to this charge. Which effectively prejudiced the applicant into receiving another conviction on his record.

INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. Yarborough v. Gentry, 540 U.S. 1, 5 (2003) also see McMann v. Richardson, 397 U.S. 759 771 (1970). To obtain reversal of a conviction, the defendant must prove that (1) counsel's performance "fell below an objective standard of reasonableness", Strickland v. Washington, 466 U.S. 668 (1984) and (2) counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the proceeding". See Strickland, supra 466 U.S. at 687, 691-92.

In deciding whether counsel's performance was ineffective, a court must consider the totality of the circumstances. In this case, the "totality of circumstances" centers around the vivid omission as well as misrepresentation of the most important document which should have been available at the onset of this criminal case. Being a authenticated "True Billed Grand Jury Indictment".

Additionally, the assessment of counsel's poor performance is amplified by his many failures to "contemporaneously object" during critical stages of the criminal proceeding as explained

within this memorandum. For which caused the applicant here to be deprive of any effective appellate review. Counsel knew or should have known that the failure to object leaves the issue unpreserved, and in many times, will cause the appeal to fail. See Brightman v. State, 520 S.E.2d 184 (S.C. 1999) (Trial counsel found ineffective in murder/manslaughter case for failing to object to instruction which created a mandatory presumption of malice (rather than allowing a permissive inference) and precluded a finding of manslaughter. See Dandy v. State, 391 S.E.2d 581 (S.C. 1999)(Counsel found ineffective for failing to object to a self-defense charge which erroneously stated that the defendant must prove self-defense by a preponderance of the evidence). See also Holoman v. State, 674 S.E.2d 171 (S.C. 2009)(Trial counsel found ineffective in a case involving multiple charges arising from a shooting incident due to counsel's failure to object to the admission of a handgun).

Wherefore, not only does the applicant clearly demonstrate ineffective assistance within this attached memorandum. The many failures "to object", particularly to the "alleged indictment" caused the applicant to be tried and convicted of a crime in which he was "actually innocent of". When considering the laws of self-defense, when forwarded by a lawyer acting competently. The failure to effectively question and cross-examine witnesses, at critical stages of testimony, coupled with allowing a erron-

jury charge by the court, inter alia, deprived this applicant out of receiving a fair trial. In fact, counsel's behavior once applicant's eyes were opened to applicable laws and procedures, brought on by his incarceration. Exposed the difference between "effective and ineffective attorney representation".

Because "Due Process" protects both "substantive and procedural rights". Rule 3(c) for timely obtaining the indictment does not fall simply because the Rule is non-jurisdictional. See Culbreath v. State. But may be assessed to determine whether the failure of the state to follow such procedure, deprived the defendant of a right guaranteed under "the process entitlement" under the Constitution.

For these reason, the applicant contends respectfully, that as a matter of law. He is entitled to be "immediately released from custody". As no authenticated True Billed Indictment exist in this case". And for other reasons, at minimum, "he is entitled as a matter of law", to have the convictions and sentence vacated and remanded for a new trial. And for any other particularized reason deemed just and proper by this Honorable Court.

Respectfully Submitted,

/s/ Demetrius Smalls #344584
 Demetrius Smalls, #344584
 Broadriver Corr. Institution
 4460 Broadriver Road
 Columbia, S.C. 29210

cc: filed

MIC

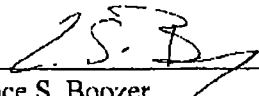
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	C/A NO: 2015-CP-06-380
	)	
Demetrius Smalls, #344584,	)	
	)	
Applicant,	)	
	)	FIRST AMENDMENT TO PRIOR
v.	)	APPLICATION FOR PCR
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

FILED FOR RECORD
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CLERK OF COURT
BARNWELL COUNTY, S.C.

The Applicant, through appointed counsel below, makes the following additional claims and amendments to his prior application for post-conviction relief filed November 3, 2015:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (i) Counsel failed to object, move for mistrial and/or preserve for appellate review the fact that during jury selection, one juror openly stated he had been previously incarcerated with the Applicant. A curative instruction was given, however, counsel failed to contemporaneously object to the instruction.
 - (ii) Counsel failed to properly cross-examine Agent Green.
 - (iii) Counsel failed to object to the jury instruction regarding mutual combat as it applied to both alleged victims.
 - (iv) Counsel failed to object to the jury instruction regarding mutual combat based on the testimony one alleged victim first presented a firearm. *State v. Taylor*, Op. No. 25637 (S.C. Sup. Ct. filed June 12, 2003).
 - (v) Counsel failed to properly explain to Applicant what it meant to waive the three (3) day notice requirement regarding the indictment.

THE BOOZER LAW FIRM, LLC


Lance S. Boozer
Attorney for Applicant
807 Gervais Street, Suite 203
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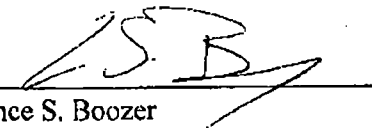
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CLERK OF COURT
DARRELL COUNTY, S.C.

Columbia, South Carolina
August 18, 2016

CERTIFICATE OF SERVICE

I, the undersigned of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing First Amendment to Prior Application for PCR upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Julie Coleman
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Lance S. Boozer

Columbia, South Carolina
August 18, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BARNWELL)
)
 Demetrius Smalls, #344584,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

**SECOND AMENDMENT TO PRIOR
 APPLICATION FOR PCR**

FILED FOR RECORD
 2016 SEP - 1 PM 3:37
 CLERK OF COURT
 BARNWELL COUNTY, S.C.

The Applicant, at his request and through appointed counsel below, makes the following additional claims and amendments to his prior application for post-conviction relief filed

November 3, 2015:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(i) Counsel failed to object, move for mistrial and/or preserve for appellate review a discussion occurring between the trial judge and jury foreperson. See pg. 523.

THE BOOZER LAW FIRM, LLC

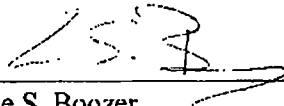

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Columbia, South Carolina
 August 30, 2016

CERTIFICATE OF SERVICE

I, the undersigned of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing Second Amendment to Prior Application for PCR upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Julie Coleman
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211



Lance S. Boozer

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CLERK OF COURT
SARRELL COUNTY, S.C.

Columbia, South Carolina
August 30, 2016

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Demetrius Smalls, #344584,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2015-CP-06-380

RETURN

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The Respondent, making its Return to the application for post conviction relief (PCR) filed November 2, 2015, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. The Applicant was true bill indicted at the January 2011 term of the Barnwell County Grand Jury for murder (2011-GS-06-00065); assault and battery with intent to kill (2011-GS-06-00066). Josh Koger, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty of the lesser included offense of voluntary manslaughter and as indicted for assault and battery with intent to kill. Judge Early sentenced Applicant to twenty five years for voluntary manslaughter and twenty years for assault and battery with intent to kill with the sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Smalls, 2015-UP-028 (Ct. App. filed January 15, 2015). The Remittitur was issued on February 2, 2015.

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

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Failing to contemporaneously object to the alleged indictments in this case.
 - b. Failed to request Judge Early recuse himself from presiding over the trial.
 - c. Failure to object to the trial court's instruction on mutual combat.
 - d. Being found guilty of ABWIK where malice is an element but being found not guilty of murder where malice is an element.
2. Lack of subject matter and personal jurisdiction.

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

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits 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. The Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Applicant also raised subject matter jurisdiction as a claim for PCR. The Respondent submits that the Applicant's allegation that the trial court lacked subject matter jurisdiction is without merit. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). A review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction. Further, the Applicant's indictments are facially valid and proper. An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. State v. Jamcs, 472 S.E.2d 38 (S.C. 1996); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). The indictments in this case are facially valid because they contain all the necessary elements of the offenses intended to be charged, state the date of the offenses, and the name of the accused. The Respondent moves for summary dismissal pursuant to South Carolina Code Ann. 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that this allegation should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well

in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

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

VII.

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

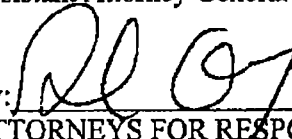
Respectfully submitted,

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By: 
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Office of the Attorney General
P.O. Box 11549
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January 29, 2016.

STATE OF SOUTH CAROLINA)

COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS

2015-CP-06-00380

DEMETRIUS D. SMALLS, #344584,)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

AFFIDAVIT OF SERVICE BY MAIL

FILED
2016 FEB -2 PM 1:48

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire
 The Boozer Law Firm, LLC
 807 Gervais Street, Suite 203
 Columbia, South Carolina 29201

DATED this 29th day of January, 2016.


Caroline Collins, Legal Assistant
 For Respondent

State of South Carolina
County of Bamberg

Court of Common Pleas

Demetrius Smalls)
)
 Applicant,)
 v.)
)
The State)
)
 Respondent.)

Transcript of Record
2015-CP-06-00380

January 26, 2017
Bamberg, South Carolina

B E F O R E:

The Honorable Maite Murphy, Judge.

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

Lance Boozer, Esquire
Attorney for the Applicant

Julie Coleman, Esquire
Attorney for the Respondent

Bethanie K. Creppon
Circuit Court Reporter

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APP. 1 Supreme Court Opinion

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1 P R O C E E D I N G S

2 * * *

3 MS. COLEMAN: Our final case today is Demetrius
4 Smalls. May it please the Court.

5 THE COURT: Yes, ma'am.

6 MS. COLEMAN: This is Demetrius Smalls vs. The
7 State of South Carolina, Docket No. 2015-CP-06-380.
8 Applicant is presently confined in the South
9 Carolina Department of Corrections pursuant to
10 orders of commitment of the Barnwell County Clerk of
11 Court. The applicant was true-bill indicted at the
12 January 2011 term of the Barnwell County Grand Jury
13 for murder and assault and battery with intent to
14 kill. Joshua Koger, Esquire, represented the
15 applicant.

16 Applicant proceeded to a jury trial before the
17 Honorable Doyet A. Early, III. Applicant was found
18 guilty of the lesser included offense of voluntary
19 manslaughter and as indicted for assault and battery
20 with intent to kill. Judge Early sentenced
21 Applicant to 25 years' imprisonment for voluntary
22 manslaughter and 25 years' imprisonment for assault
23 and battery with intent to kill with the sentences
24 running concurrently.

25 A timely notice of appeal was filed on

1 Applicant's behalf. The South Carolina Court of
2 Appeals affirmed the applicant's conviction and
3 sentence. The remittitur was issued on February
4 2nd, 2015.

5 Applicant subsequently filed a timely
6 application for postconviction relief on November
7 2nd, 2015, alleging that he was being held in
8 custody unlawfully based on the following
9 allegations: Ineffective assistance of counsel and
10 lack of subject matter and personal jurisdiction.
11 The State filed its return January 29th, 2016.
12 Applicant filed amendments to his application on
13 August 18th, 2016 and August 30th, 2016. He is
14 present today and represented by Mr. Lance Boozer.

15 THE COURT: Mr. Boozer.

16 MR. BOOZER: Thank you, Your Honor. May it
17 please the Court.

18 THE COURT: Yes, sir.

19 MR. BOOZER: Judge, just by way of
20 housekeeping, I'm going to be referencing a case
21 that I would like to hand up to Your Honor, if I may
22 approach.

23 THE COURT: Thank you.

24 MR. BOOZER: And I've provided a copy to the
25 State as well. Other than that, we'll go ahead and

1 call Mr. Smalls to the stand.

2 THE COURT: All right. Mr. Smalls, come on up.

3 DEMETRIUS SMALLS

4 being first duly sworn, testified as follows:

5 THE WITNESS: Yes, sir.

6 THE COURT: Your witness.

7 DIRECT EXAMINATION

8 BY MR. BOOZER:

9 Q. Mr. Smalls, how are you doing today?

10 A. I'm all right.

11 Q. Okay. Well, tell me this: Do you know what it
12 is that we're doing in court today?

13 A. This is considered my postconviction relief.

14 Q. All right. And you filed an application with
15 some amendments to get in here today?

16 A. Yes, sir.

17 Q. All right. And what is it that you're asking
18 this Court to do for you?

19 A. Grant me the relief that I have requested.

20 Q. You understand that the only thing this Court
21 can do for you, of course, is to grant you a new
22 trial on the charges that you faced?

23 A. Yes, sir.

24 Q. All right. And knowing that, is that what
25 you're asking this Court for. This Court can't

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

7

1 reduce your sentence or modify your time. Is that
2 what you want?

3 A. Yes, sir.

4 Q. All right. Now tell the Court, if you would,
5 what you're currently in prison for.

6 A. I'm currently incarcerated for voluntary
7 manslaughter, assault and battery with intent to
8 kill, and possession of a firearm during the
9 commission of a violent crime.

10 Q. What were your original charges?

11 A. Murder, assault and battery with intent to
12 kill, and possession of a firearm during the
13 commission of a violent crime.

14 Q. Did you have a trial on all those charges?

15 A. Yes, sir, I did.

16 Q. And who was your lawyer?

17 A. Mr. Koger.

18 Q. Okay. And did you retain Mr. Koger or was he
19 appointed to represent you?

20 A. I retained Mr. Koger.

21 Q. Did you have any other lawyers that represented
22 you for purposes of these charges?

23 A. At first I had Mr. J.D. Mosteller which was
24 appointed by the State. And then once I decided to
25 retain Mr. Koger, Mr. Mosteller was no longer my

1 lawyer.

2 Q. Okay. Now before we get into your PCR
3 allegations, if you could, what was it alleged by
4 the State that you had done?

5 A. It was alleged by the State that I murdered
6 Mr. Terence Mayes in the shooting incident that
7 occurred August 20th, 2009. And I was incarcerated
8 at the Barnwell County jail and booked in for those
9 charges -- well, it's two more charges.

10 Q. And talk about those.

11 A. It was assault and battery with intent to kill
12 and possession of a firearm during the commission of
13 a violent crime.

14 Q. Who was it alleged about the other victim --
15 who was the other victim?

16 A. His brother Mr. Zantrell Mayes.

17 Q. Okay. And then tell the Court, if you would, a
18 little bit about what your defense to this case was.

19 A. Self defense.

20 Q. And if you -- and we can certainly ask
21 Mr. Koger some of these questions as well. But what
22 was the basis of your self-defense?

23 A. The fact that the -- I was defending myself and
24 they came in search of me. That's the only reason I
25 pled self-defense because that was my defense,

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

9

1 self-defense, because I was minding my business and
2 they came searching for me, so I had no other choice
3 but to defend myself.

4 Q. Okay. Was there ever a plea offer prior to
5 your trial?

6 A. I think Mr. Mosteller said something about a
7 plea. But I felt as if self-defense, I was just
8 going to go all the way to trial and plead my case
9 in front of the jurors.

10 Q. And my question to you is, did you ever want a
11 plea or was this something you wanted a trial in?

12 A. If the plea would have been reasonable, I could
13 have -- yes, yes, I would have took a plea. But the
14 plea that they came at me with was not reasonable.

15 Q. All right. But, ultimately, you wanted a trial
16 in this case?

17 A. Yes, sir, I did.

18 Q. All right. Now, obviously, you've got a lot of
19 issues in your PCR application and the amendments,
20 so we're going to walk through all of those.

21 A. Yes, sir.

22 Q. Do most of your issues or all of your issues,
23 do they deal with -- do you have any complaints
24 about how much time Mr. Koger spent with you or
25 about what he was discussing with you or are all of

1 your issues basically things that were occurring at
2 and during or immediately before trial?

3 A. Yes, sir.

4 Q. Yes, sir what?

5 A. Everything that I'm in disagreement happened
6 before trial, during trial, and afterwards.

7 Q. Okay. Let me ask you this: How many times did
8 you meet with Mr. Koger?

9 A. I'd say about from August 2010 to January 2011,
10 we probably saw each other probably about five or
11 six times.

12 Q. And did you ever bond out on these charges?

13 A. No, sir. My bond was \$750,000.

14 Q. When you would meet with Mr. Koger, what would
15 you two discuss?

16 A. A possible self-defense -- my self-defense
17 case.

18 Q. What sort of trial strategy did you and
19 Mr. Koger discuss?

20 A. It wasn't really a strategy. He told me to
21 tell what them happened and that's what happened.

22 Q. The strategy was for you to tell your version
23 of the story?

24 A. Yes, sir.

25 Q. Okay. And you actually testified at trial?

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

11

1 A. Yes, sir, I did.

2 Q. All right. Let's get into sort of your
3 allegations and then we can fill in the blanks of
4 when that complaint may be, whether it's before
5 trial or whether it's during trial.

6 A. Yes, sir.

7 Q. You've got an allegation that your lawyer
8 basically failed to properly explain to you what it
9 meant to waive the three-day-notice requirement
10 regarding the indictment. Is that one of your
11 allegations?

12 A. Yes, sir, it is.

13 MR. BOOZER: And, Your Honor, just for the
14 Court's reference, we'll be looking at a few pages
15 of the transcript, one of which is page 28. And the
16 other section we'll be referring to is page 48, so
17 28 through 29 and then also page 48.

18 BY MR. BOOZER:

19 Q. All right. Mr. Smalls, do you recall at the
20 had beginning of the trial -- are you familiar with
21 the transcript, Mr. Smalls?

22 A. Yes, sir, I am.

23 Q. All right. On page 28 when the case was
24 actually called, basically there was a discussion,
25 it appears, between your lawyer and the solicitor

1 and the judge. Do you recall that?

2 A. Yes, sir. But if you back up a little bit on
3 the 24th, it clearly states that this is indictment
4 what, and the solicitor responds there's going to be
5 some indictments presented to the grand jury in the
6 morning.

7 Q. Okay. And walk the Court up to that. So what
8 happened on the 24th?

9 A. On the 24th I was called in that afternoon as
10 if I was proceeding to trial. They had a Jackson
11 vs. Denno hearing.

12 Q. Okay.

13 A. Me, at that point in time, I was unaware of
14 exactly what the Jackson vs. Denno hearing was but
15 it was for, I guess, the statement that I wrote and
16 verifying that my Miranda rights were being read to
17 me and I clearly understood that my statement would
18 be submitted as evidence in the trial.

19 Q. Okay. Well, keep going about the indictment
20 and your understanding of what happened.

21 A. Okay. Honestly, the next day, we got to court.
22 I was under the impression the trial had already
23 started. So when we get there, they had an
24 off-the-record discussion about I don't know. But
25 when Mr. Koger got back to the table, he asked do I

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

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1 want to proceed with trial, and I said yes, I did.

2 Q. And let me stop you there so we can sort of
3 fill in some blanks. On page 9 of the transcript,
4 that's where you're talking about where the Court
5 says, all right, this is indictment what --

6 A. Yes, sir.

7 Q. -- solicitor says, Your Honor, there's going to
8 be some indictments presented in the morning to the
9 grand jury --

10 A. Yes, sir.

11 Q. -- and we have warrant numbers on the cases at
12 this time. So your understanding is they were
13 actually going to present -- you weren't indicted.

14 A. Right.

15 Q. Okay. And then the next day on the 25th,
16 beginning on page 28, is when the case is then
17 called with your indictments.

18 A. Right.

19 Q. And then do you recall that the Court indicated
20 at line 5: "Mr. Koger, the Court has made us all
21 aware -- or made you aware of Sections 17-19-80
22 concerning the time span between indictment and
23 trial. As I understand, your client wishes to waive
24 that." Mr Koger says, "Yes, Your Honor." The Court
25 says, "We've selected the jury. When we -- before

1 we start the case, I'll go over it with you in
2 fuller detail." And he says -- and your attorney
3 says, "Yes, sir." Then they go on to present or
4 read these indictments. Do you recall that?

5 A. Yes, sir, I do.

6 Q. All right. If we skip forward to page 48 of
7 the transcript, do you recall that the Court
8 indicates -- where they ask you to stand up?

9 A. Yes, sir.

10 Q. He's addressing you.

11 A. Yes, sir.

12 Q. The Court says, "Before we get started this
13 morning, there was some -- I don't want to use the
14 word confusion, but, anyway, we've all had -- we're
15 working on the assumption that the indictments had
16 been presented to the grand jury, and yesterday we
17 realized it had not. And the grand jury came in
18 this morning and met and they returned a true bill
19 on the indictments on the three charges we're moving
20 forward with.

21 "As I've explained to Mr. Koger, there's a
22 particular section, 17-19-80, which allows a person
23 who is charged with a capital offense such as murder
24 to have a true copy of the indictment for three days
25 before he's tried for the offense, basically so he

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

15

1 can talk to his lawyer, et cetera, et cetera."

2 And the judge goes on to say, "Mr. Koger
3 discussed that with you before we started this
4 morning and informed me you were fully aware of that
5 and that you wished to waive that and go ahead and
6 move along with the trial of the case this morning.
7 Is that correct?" To which you said, "Yes, sir."

8 A. Yes, sir.

9 Q. "Do you have any questions you need to ask me
10 about that?" You said, "No, sir."

11 A. No, sir.

12 Q. Tell me what was going on and what you were
13 talking about with Mr. Koger as far as the three-day
14 notice?

15 A. He never said nothing about no three-day notice
16 that I had to have an indictment presented to a
17 grand jury three days prior to me being called to
18 answer for anything. I was unaware of that fact at
19 that moment. I did not know exactly what Section
20 17-19-80 was, that's why I hired Mr. Koger.

21 Q. Well, how did he explain it to you?

22 A. He just explained it to me like, well, do you
23 want to go to trial now? And I said, yes, sir, I'm
24 ready to go to trial. I was under the impression
25 that we was ready to go to trial.

1 Q. Okay. Had you -- what is it that you know now
2 that you've learned since then?

3 A. You cannot waive presentment to the grand jury.

4 Q. All right. And have you reviewed the
5 indictments in this case?

6 A. Yes, sir, I have.

7 Q. Since you've been incarcerated?

8 A. Yes, sir, I have.

9 Q. Okay. And is it your understanding that the
10 action of the grand jury was true billed on January
11 25th, 2011?

12 A. That's -- that's what I'm under the impression.

13 MR. BOOZER: And, Your Honor, I know that
14 they're already part of the had record, I believe,
15 the indictments. I would just direct Your Honor's
16 attention that they are January 25th, 2011.

17 THE COURT: All right, sir.

18 BY MR. BOOZER:

19 Q. So knowing what you know now, would you have
20 waived that three-day notice requirement?

21 A. No, I wouldn't.

22 Q. Why not?

23 A. Because in order for me to plead a
24 self-defense, it has to be presented to the jury.
25 If I waive an indictment, that means that I'm about

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

17

1 to take a plea or I don't want this charge heard by
2 the grand jury. And if I'm pleading self-defense,
3 why wouldn't I want to plead my case to the grand
4 jury?

5 If I say I waive -- if I say I waive
6 presentment of murder to the grand jury, that's
7 basically saying that I did it; I'm giving the Court
8 jurisdiction over my life and my livelihood and my
9 freedom.

10 Q. But you didn't have any discussion other than
11 your lawyer saying we can either go to trial now or
12 wait?

13 A. Yes.

14 Q. That was the only discussion you had?

15 A. That's it.

16 Q. Okay. Is there anything else with regard to
17 the indictment before we move into other allegations
18 where you feel like your lawyer was ineffective?

19 A. I feel like my lawyer was ineffective because,
20 first of all, I never seen an indictment --

21 Q. Okay.

22 A. -- until after I was already incarcerated.
23 Then when I see the indictment, the ink stamp by the
24 clerk of court is July 22nd, 2011, which is six
25 months after my incarceration.

1 Q. And when you're referring to that, are you
2 talking about a copy of the indictment that you've
3 got in what is your record on appeal?

4 A. Yes, sir. Compared -- and I --

5 MR. BOOZER: Court's indulgence, Your Honor?
6 Does Your Honor have a copy of the record on appeal?

7 THE COURT: I do.

8 MR. BOOZER: Okay.

9 BY MR. BOOZER:

10 Q. And you're referring to the indictment and you
11 believe there's a problem with it being stamped July
12 22nd, 2011?

13 A. Yes, sir, I do.

14 Q. Okay. What's your issue with that?

15 A. My issue is it's the same exact ink stamp that
16 is on my sentencing sheet, which is January 27,
17 2011.

18 Q. Explain that again.

19 A. I have copies of it.

20 Q. Well, explain what you -- I understand what
21 your sentencing sheet is. But explain what you mean
22 about the differences in the dates?

23 A. The differences in the date and through the
24 trial transcript it clearly shows that they didn't
25 have a true-billed indictment on the 24th of

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

19

1 January.

2 Q. Okay. All right. What else with regard to the
3 indictment?

4 A. That's -- that's pretty much it.

5 Q. Okay. One other question about the indictment
6 though: Obviously, as we've read from the
7 transcript, some questions were asked by the judge
8 of you --

9 A. Yes, sir.

10 Q. -- which we've already reviewed. Right?

11 A. Yes, sir.

12 Q. Why did you indicate to the Court that you
13 didn't have any questions about it and that you were
14 basically telling the Court, yes, sir, Mr. Koger has
15 discussed that with me. Why did you make those
16 statements?

17 A. Because I put -- I was under my lawyer's
18 advisement. That's what I hired him for.

19 Q. Okay. Let's move forward a little bit. You've
20 also got an allegation that your lawyer failed to
21 object, move for mistrial, and/or preserve for
22 appellate review the fact that during jury selection
23 one juror openly stated that he had previously been
24 incarcerated with you --

25 A. Yes, sir.

1 Q. -- and that a curative instruction was given,
2 but your lawyer failed to actually to object to the
3 curative.

4 A. Yes, sir.

5 Q. All right. Let's look in the transcript to
6 page 34. And do you recall a juror by the name of
7 Antoine Berry?

8 A. Yes, sir.

9 Q. All right. And on page 34 when his number is
10 called at page 34, line 21, the juror states:
11 "Antoine Berry, Juror No. 3. Real close to them,
12 personal friend, known the family a long time. Me
13 and him had a couple -- had an incident a couple
14 years ago where we had been locked up together and I
15 feel -- I feel I would -- I feel that I would --"

16 And then the Court on 35: "All right. I'll
17 let you be excused. Your name and number again?

18 "Antoine Berry, Juror No. 3."

19 At that point, is it your understanding that
20 the juror was stating that you and he had been in
21 jail together?

22 A. Yes, sir.

23 Q. All right. Did your lawyer make any sort of
24 objection at that point?

25 A. At that point, no, sir.

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

21

1 Q. Okay. Did he make any sort of motion at that
2 particular point?

3 A. No, sir, he didn't.

4 Q. All right. Now directly after that, beginning
5 on line 4, the Court goes ahead and says, "Thank
6 you. Ladies and gentlemen, the fact that -- be
7 seated. The fact that this young man mentioned that
8 they were locked up in the past, that ain't got
9 anything to do with this trial. Disregard --
10 disregard that statement. I mean, we all grow up
11 sometimes and we may get in it a little. That ain't
12 got nothing to do with this case. Just disregard
13 that. Last but not least, at least -- last but
14 least, in the maroon shirt," and then he goes on to
15 pull another juror.

16 At this point when the judge makes that
17 statement, does your lawyer take any action to
18 object?

19 A. No, sir, he doesn't.

20 Q. All right. Does your lawyer make any motion
21 for mistrial?

22 A. No, not at that point.

23 Q. All right. And he's actually not -- that juror
24 is excused; correct?

25 A. Yes, sir, he was.

1 Q. All right. So at this point, this is in front
2 of the entire jury panel --

3 A. Yes, sir, it is.

4 Q. -- and everyone has now heard this, that you've
5 been in jail with him?

6 A. Yes, sir.

7 Q. All right. Now, this issue, do you recall it
8 coming back up a little bit down the road?

9 A. Yes, sir.

10 Q. All right.

11 MR. BOOZER: And, Your Honor, I'm referring to
12 page 49 of the transcript.

13 THE COURT: Thank you.

14 BY MR. BOOZER:

15 Q. And, Mr. Smalls, on 49, and this is basically
16 after the issue with the indictment, the judge is
17 addressing you.

18 A. Yes, sir.

19 Q. Or, excuse me, the judge is addressing
20 Mr. Koger, and says, "Mr. Koger, during the jury
21 qualification, a juror stood up and said something
22 to the effect that he and the defendant had, I
23 think, been in jail together or something to that
24 effect."

25 Your lawyer says, "Yes, Your Honor." And the

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

23

1 Court says, "Do you have a motion in regards to
2 that?" To which Mr. Koger says, "Yes, Your Honor."
3 And Mr. Koger goes on to argue his motion and say,
4 "May it please the Court. I do not have the juror
5 number, but -- but the comment summarily that
6 they're -- they were locked up together for a period
7 of time, it is our position that with the whole --
8 with the entire panel and the subsequent jury that
9 we selected, that those comments brings about the
10 strong possibility that the jury and the jury pool
11 was tainted; that it would be prejudicial to my
12 client and, subsequently, the jury that was selected
13 is tainted, so we ask that this jury panel and the
14 jury be dismissed."

15 And the Court then states in part, "Okay.
16 Well, when that happened, I obviously saw the look
17 on your face and, of course, it concerned me and I
18 gave a very -- I thought and I still think a very
19 explicit curative instruction." And, of course, the
20 Court goes to talk a little bit more about it.

21 Let me ask you this: Did you have an appeal
22 from your trial?

23 A. Yes, sir, I did.

24 Q. And who represented you on appeal?

25 A. At first it was Mr. Breen Richard Stevens. And

1 after that, it was -- Mr. Stevens ended up going to
2 the Orangeburg County Solicitor's Office, so I was
3 appointed Mr. Benjamin John Tripp.

4 Q. Okay. And as part of the appeal, did you ever
5 talk to your appellate lawyer?

6 A. Yes, sir, I did.

7 Q. What were the issues that were raised on
8 appeal?

9 A. The tainted jury pool issue.

10 Q. From the juror stating that you two --

11 A. From the juror stating that we were locked up
12 together.

13 Q. And just for the court reporter, we can't talk
14 at the same time.

15 A. Oh, okay. I'm sorry.

16 Q. So wait on me and I'll wait on you. Okay?

17 A. All right.

18 Q. So tell me again, one of the issues was about
19 the juror stating that y'all were in jail together?

20 A. Yes, sir.

21 Q. And then you had another issue?

22 A. The other issue was --

23 Q. Was it facial expressions from the judge?

24 A. Facial expressions from the judge, yes, sir.

25 Q. All right. And, obviously, did the court of

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

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1 appeals or supreme court -- the court of appeals

2 actually issued an opinion --

3 A. Yes, sir.

4 Q. -- or ruled on your case?

5 A. Yes, sir.

6 Q. And have you seen a copy of that opinion?

7 A. Yes, sir.

8 Q. All right.

9 MR. BOOZER: And, Your Honor, I'm looking at
10 the opinion, of course, which is a part of the
11 package that Your Honor has as well. And if not,
12 I'm certainly happy to hand a copy up.

13 THE COURT: Do you have an extra copy?

14 MR. BOOZER: I have one copy, but, Judge, I'm
15 happy to hand this up. I do have a highlight on it.

16 THE COURT: Okay. I was just thinking it would
17 be in here.

18 MS. COLEMAN: There's a chance that it's
19 missing and I'd apologize.

20 THE COURT: Okay.

21 MR. BOOZER: Your Honor, if I may, may we make
22 this part of the record by marking it as Applicant's
23 Exhibit 1?

24 THE COURT: Sure.

25 Ms. Coleman, any objection?

1 MS. COLEMAN: No, Your Honor.

2 MR. BOOZER: And, Your Honor, I do have a
3 highlight and a star on it, but that's the only
4 alteration.

5 THE COURT: That's okay. I'll ignore that.

6 MR. BOOZER: Thank you.

7 (Applicant's Exhibit No. 1 marked for
8 identification.)

9 BY MR. BOOZER:

10 Q. Now, Mr. Smalls --

11 A. Yes, sir.

12 Q. -- in that opinion, what is your understanding
13 of what the Court of Appeals did with regard to the
14 issue of whether the trial court erred in not
15 declaring a mistrial or dismissing the entire jury
16 panel because of the statement that that juror made?

17 A. Due to counsel failing to contemporaneously
18 object, that didn't preserve my sole issue for
19 appellate review on the tainted-jury-pool issue.

20 Q. Okay. Did you have a discussion with your
21 appellate lawyer about that issue?

22 A. Yes, sir, I did.

23 Q. Okay. And based on your conversations with
24 your appellate lawyer, what was your understanding
25 of all that?

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1 A. He basically told me that I couldn't raise it
2 on appeal due to the fact that it wasn't objected
3 to. If it would have been objected to and
4 overruled, then I might have some relief on appeal.

5 Q. Okay. And to your knowledge -- you testified;
6 right?

7 A. Yes.

8 Q. All right. To your knowledge, was there
9 anything that could come up or be admitted into
10 evidence or you be impeached on where you had been
11 previously incarcerated?

12 A. Just a -- I think it was a 2005 drug
13 conviction, probation. That's it.

14 Q. Okay. Do you think that this issue of the
15 juror being -- telling all the other jurors that you
16 had been in jail together, do you think that
17 prejudiced your case?

18 A. Of course it did. As soon as he said it, the
19 court broke out into a frenzy as if whispers and all
20 conversations started.

21 Q. Okay. Let's move on to some of your other
22 allegations. You have an allegation that your
23 lawyer failed to properly cross-examine a witness by
24 the name of Agent Greene. Do you -- is that one of
25 your allegations?

1 A. Yes, sir, it is.

2 Q. All right. If you would, explain to the Court
3 a little bit about Agent Greene. And we're looking
4 at the examinations. The direct begins on 145, and
5 then the cross begins at 155. If you would, tell
6 the Court why you believe your lawyer was
7 ineffective for failing to properly cross-examine
8 this particular witness.

9 A. Because my lawyer had knowledge of the --
10 Mr. Mayes having possession of two firearms. He
11 said one firearm he pulled from his waist --

12 Q. And Mr. Mayes is who?

13 A. Zantrell.

14 Q. Okay. Is that a surviving victim?

15 A. Yes, sir.

16 Q. Okay. Keep going.

17 A. He said one firearm he pulled from his waist
18 and the other one was in his back pocket -- well,
19 no. He said that he pulled one from his right back
20 pocket and another one from his left back pocket.
21 My -- what I told Mr. Koger is Mr. Agent Greene
22 testified as a ballistics -- as a professional
23 ballistics expert and said that one of the firearms
24 had three misfired bullets in it, so that's a
25 possibility that somebody could have shot that

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1 firearm.

2 So if he testified in court saying that he
3 pulled a gun out and it's numerous testimony saying
4 that the gun was not a revolver, it was an automatic
5 which had to be cocked back, it's impossible for him
6 to have one gun in his right back pocket and the
7 other gun in his left back pocket being misfired.
8 If he pulled one out and pulled it on me, how is the
9 other gun being fired? Where did the misfired
10 bullets come from?

11 Q. And your lawyer didn't address that with that
12 witness?

13 A. Period.

14 Q. And is that something you believe that your
15 lawyer should have addressed?

16 A. Yes, he should have.

17 Q. Did you have a discussion with your lawyer
18 about attacking that particular witness prior to
19 trial?

20 A. Yes, I did.

21 Q. All right. Did you tell him exactly what you
22 have discussed today in court?

23 A. At that point in time, I didn't explain it like
24 that, but I brought it to his attention that we
25 could possibly take this avenue as a defense.

1 Q. What was his response?

2 A. I can't even remember.

3 Q. Okay. Is there anything else as far as that
4 particular allegation that you want to explain or
5 discuss?

6 A. That's it.

7 Q. All right. Now, you got a couple other issues
8 that you and I have discussed, obviously, that
9 really involve some legal theories and case law and
10 whatnot regarding certain aspects.

11 A. Yes, sir.

12 Q. And some of that, you understand, we'll get
13 into more in depth with your lawyer?

14 A. Yes, sir.

15 Q. All right. You got some allegations regarding
16 a mutual-combat charge that was given?

17 A. Yes, sir.

18 MR. BOOZER: And, Your Honor, in the mutual
19 combat instructions in particular, I'll be referring
20 to page 515 of the transcript which would be volume
21 2.

22 Q. Did your entire case rest on self-defense?

23 A. Yes, sir, it did.

24 Q. And to your recollection, the jury was actually
25 charged with self-defense?

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1 A. Yes, it was.

2 Q. Now, additionally, do you recall that this
3 charge was also given? And this is on page 515 page
4 11: If the defendant voluntarily participated in
5 mutual combat, a fight, for purposes other than
6 protection, the killing of the victim would not be
7 self-defense. This is true even if during the
8 combat the defendant feared death or serious bodily
9 injury. Do you understand that to be what's called
10 an instruction for mutual combat?

11 A. Yes, sir.

12 Q. All right. And do you understand that legally,
13 that based on that instruction as it's given, that
14 if there's mutual combat, that self-defense is not a
15 defense?

16 A. Self-defense is not available to one who
17 engages in mutual combat.

18 Q. Okay. Did your lawyer make any objection to
19 that instruction?

20 A. No, sir.

21 Q. Did your lawyer make any request that that
22 instruction not be given?

23 A. No, sir.

24 Q. All right. Did you have a discussion with your
25 lawyer about the jury instructions or about mutual

1 combat or self-defense? Did y'all discuss the jury
2 charges?

3 A. He said something about mutual combat. But I
4 was under the impression that it would be a good
5 thing for me, me not knowing it totally negated my
6 self-defense claim.

7 Q. Okay. And as I stated, we'll be talking more
8 about that with your lawyer. But that's one of your
9 allegations; correct?

10 A. Yes, sir, it is.

11 Q. You also have an allegation that your lawyer
12 failed to object, move for mistrial, or preserve for
13 appellate review a discussion occurring between the
14 trial judge and the jury foreperson. Is that an
15 allegation?

16 A. Yes, it is.

17 MR. BOOZER: And, Your Honor, again, I'm
18 referring to page 523.

19 BY MR. BOOZER:

20 Q. Let's talk a little bit, Mr. Smalls, about that
21 allegation.

22 A. Yes, sir.

23 Q. In that allegation -- and specifically on 523
24 it says, beginning at line 11, there's a note the
25 jury -- not a note. But there's a caption the jury

DIRECT EXAMINATION OF DEMETRIUS SMALLS BY MR. BOOZER

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1 began to deliberate at 12:14 and returned to the
2 courtroom at 12:33. "The Court: Madam Forelady,
3 let me see you right here, please." And then it
4 says: "Whereupon, an off-the-record discussion was
5 held with the forelady at this time."

6 On the record, the Court: "All right. Let the
7 record reflect that I've got the jury back in.
8 They've just been out just for a few minutes and we
9 had ordered pizza and they had started eating their
10 pizza. But, Madam Forelady, y'all had not started
11 deliberating the case, had you not?" And she says,
12 "No, sir." And the Court says, "Hadn't talked about
13 anything as far as deciding the case?"

14 "No, sir, just pizza."

15 What is your position as far as what your
16 lawyer should have done?

17 A. At that point in time, my lawyer should have
18 been up there with that discussion that the judge
19 was having with the forewoman.

20 Q. And why?

21 A. Because I've never heard of a judge during a
22 trial conversating with a jury.

23 Q. All right. And did you have any discussion
24 with your lawyer as this was occurring or after it
25 occurred?

1 A. No, sir, because I didn't -- it really
2 wasn't -- I really didn't pay it any attention at
3 that moment.

4 Q. All right. And now, obviously, this is your
5 day for your PCR hearing.

6 A. Yes, sir.

7 Q. And I want to make sure that we've got your
8 allegations as they've been alleged in your PCR
9 application and amendments. Okay?

10 A. Yes, sir.

11 Q. So is there anything that we've not covered as
12 far as allegations against either Mr. Koger or
13 allegations you had against the process that you've
14 been through that are a part of your PCR application
15 or have we covered everything?

16 A. Everything that I presented and filed within
17 PCR application has been presented today for the
18 courts.

19 Q. All right. At this time I do not have any
20 further questions for you, but please answer any
21 that the State may have.

22 A. Yes, sir.

23 THE COURT: Cross-examination?

24 MS. COLEMAN: Thank you, Your Honor.

25

CROSS-EXAMINATION OF DEMETRIUS SMALLS BY MS. COLEMAN

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1 CROSS-EXAMINATION

2 BY MS. COLEMAN:

3 Q. You testified that on the day of trial you were
4 ready to go forward with the trial; correct?

5 A. Yes, sir.

6 Q. Wanted to get it over with?

7 A. Yes. Yes. Yes, ma'am. I'm sorry.

8 Q. That's fine. Did you know about this trial
9 before it happened?

10 A. Yes.

11 Q. Okay. You knew that you were ready to go to
12 trial that day?

13 A. Mr. Koger said I was supposed to go to trial
14 that week. Yes.

15 Q. Had it been scheduled for another trial date
16 before that and was continued for some reason?

17 A. It was scheduled a couple times before that.

18 Q. Okay. So you knew that the State was going to
19 take you to trial on these allegations; right?

20 A. Yes, sir -- I mean, yes, ma'am, I did. I'm
21 sorry.

22 Q. That's okay. Now you've alleged that had you
23 known what it meant to waive that three-day notice
24 for the indictments, you would not have waived it?

25 A. No, ma'am, I wouldn't have.

1 Q. Okay. And if you did not waive that notice, if
2 that meant that you would have had to wait longer
3 for a trial, would you have wanted to do that?

4 A. I would have asked my lawyer to have the entire
5 case thrown out --

6 Q. Okay.

7 A. -- dismissed.

8 Q. Okay. You just wanted to get it over with?

9 A. Yes, ma'am.

10 Q. All right. Now you testified that you have a
11 prior conviction from 2005 for cocaine; is that
12 correct?

13 A. Possession, yes, ma'am.

14 Q. Possession of cocaine?

15 A. Yes, ma'am.

16 Q. And you told the jury that at trial, didn't
17 you?

18 A. No, I didn't tell them that at trial.

19 Q. Will you please flip to page 421 of the
20 transcript on line 21 there. This is on
21 cross-examination by Solicitor Miller.

22 A. Yes, ma'am.

23 Q. He asked you, "Isn't it true in 2005 you were
24 convicted of possession of cocaine?" And you said,
25 "Yes, sir, it is." Do you remember that?

CROSS-EXAMINATION OF DEMETRIUS SMALLS BY MS. COLEMAN

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- 1 A. You said what page, ma'am?
- 2 Q. 421 --
- 3 A. Yes, ma'am.
- 4 Q. -- on line 21.
- 5 A. Yes, ma'am.
- 6 Q. Do you remember that?
- 7 A. Yes, ma'am.
- 8 Q. Okay. And then he goes on to ask you on the
- 9 next page, page 422, if you were incarcerated with
- 10 one of the witnesses Mr. Julius Tilly; is that
- 11 correct?
- 12 A. Yes, ma'am.
- 13 Q. And you went on to tell him about how you were
- 14 incarcerated together?
- 15 A. Yes, ma'am.
- 16 Q. Okay. Thanks.
- 17 You had to take the stand in order to tell your
- 18 story for self-defense; right?
- 19 A. Yes, ma'am.
- 20 Q. Okay. Mr. Smalls, you've testified about Agent
- 21 Greene and how your attorney should have
- 22 cross-examined Agent Greene. Is Agent Greene here
- 23 today to testify?
- 24 A. No, ma'am, he's not.
- 25 Q. Okay. The judge's discussion with the jury

1 foreperson, do you remember exactly what they talked
2 about?

3 A. I wasn't part of the conversation, ma'am.

4 Q. You couldn't hear it across the room?

5 A. No, ma'am.

6 Q. But, to your knowledge, did they talk about the
7 trial at all?

8 A. (Nonverbal response.)

9 Q. You wouldn't know? Okay. I have no further
10 questions. Thank you.

11 THE COURT: Anything further?

12 MR. BOOZER: Briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. BOOZER:

15 Q. You were asked about during your testimony that
16 you had basically admit that you had been
17 incarcerated before?

18 A. Yes, sir.

19 Q. Okay. But when the juror stated it, would you
20 agree with me that that's -- that could have been a
21 different time than that time?

22 A. Yes, sir, it could have.

23 Q. Okay. And you would agree with me that they
24 had heard that before even the first witness had
25 testified?

DIRECT EXAMINATION OF JOSHUA KOGER BY MR. BOOZER

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1 A. Yes, sir.

2 Q. So already the jury has heard, before they even
3 start hearing anything, that you've been in jail
4 before?

5 A. Yes, sir.

6 Q. All right. No further questions. Thank you.

7 THE COURT: You may step down, sir. Thank you.
8 You can call your next witness.

9 MR. BOOZER: We'll go ahead and call Mr. Koger
10 to the stand.

11 JOSHUA KOGER

12 being first duly sworn, testified as follows:

13 THE WITNESS: I do.

14 DIRECT EXAMINATION

15 BY MR. BOOZER:

16 Q. Mr. Koger, how are you?

17 A. I'm doing well. How about you?

18 Q. Doing well. Thank you. Now, Mr. Koger, do you
19 recall representing Mr. Smalls?

20 A. Yes.

21 Q. And tell us how you two came together. Were
22 you retained?

23 A. I was retained.

24 Q. All right. Do you know about how many times
25 you may have met with Mr. Smalls prior to the trial?

1 A. Mr. Smalls testified about five or six. I'd
2 say a little more than that, maybe seven or eight.

3 Q. Okay. What was sort of y'all's discussions as
4 far as getting ready for trial?

5 A. We, of course, discussed the case. We
6 discussed -- from day one when I started
7 representing Mr. Smalls, he told me he acted in
8 self-defense, he felt that he was fearful for his
9 life. Basically we knew from the very first visit
10 that he would have to take the stand to testify to
11 what happened, according to him, on that particular
12 afternoon.

13 We went over the facts over and over again. I
14 wanted him to be able to be prepared on the stand
15 and testify to what happened -- to his version of
16 what happened like clockwork. So we basically
17 discussed the facts and also discussed theories
18 also, how we was going to hopefully convince the
19 jury that he was not guilty of the charges against
20 him.

21 Q. Based on your recollection of this case and
22 whatnot, what was the State's allegations against
23 Mr. Smalls?

24 A. Well, as Mr. Smalls stated, our main defense
-25 was self-defense. So, of course, the State was

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1 trying to disprove and say it was not self-defense,
2 that on that particular day that Mr. Smalls did not
3 act in self-defense when he shot Mr. Zantrell Mayes
4 and Mr. Terence Mayes.

5 Q. Talk a little bit about -- sort of fill in some
6 of those gaps as far as what the State alleged and
7 kind of what happened at trial as far as there at
8 the scene sort of what was going on, as far as you
9 understood it.

10 A. Okay. Well, as far as I understood it, it was
11 an earlier incident with Mr. Demetrius Smalls and, I
12 think, the youngest brother named DeeDee or
13 Demetrius Mayes. And that -- I don't want to call
14 it -- it wasn't an altercation, but they had some
15 type of run-in. Well, that was settled at that
16 particular time. Blackville Police Department was
17 called and, from my recollection, they told both of
18 them to go home. And that's happened. That
19 happened earlier in the day, maybe 4:00 or 4:30.

20 Q. Okay.

21 A. Maybe about an hour, hour and a half later,
22 maybe around 5:30 to 6:00, Mr. Smalls ended up in
23 this location. He was out there playing cards and
24 just, you know, socializing at this particular
25 place. From my recollection, this was located near

1 one of the family members of the deceased.

2 Basically what happened, in the interim when
3 Blackville Police Department told Mr. Smalls to go
4 his way and told Mr. Mayes, the youngest brother, to
5 go this way, he contacted -- he contacted family
6 members; he contacted Zantrell Mayes, he contacted
7 Terence Mayes. I think one was working at
8 McDonald's in -- I can't recall whether it was
9 McDonald's in Aiken or something. But, anyway, they
10 ended up at that point, around about 6:00 or 6:30,
11 at their cousin's house in which Mr. Smalls was
12 located near. He was initially, I think it was,
13 under a tree or something or ended up in that
14 location.

15 Q. Okay. And so -- and we'll get into a little
16 bit more detail on that as we kind of go through
17 some my questions.

18 A. Right.

19 Q. Going to some of what Mr. Smalls' testimony has
20 been -- and you've been in the courtroom the whole
21 time for his testimony?

22 A. Yes.

23 Q. All right. Talk a little bit about your
24 understanding -- obviously from the transcript it
25 appears that on the morning of January 25th, which

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1 was, I guess, technically the second day of trial --

2 A. Right.

3 Q. -- I guess you could say, a grand jury met and
4 it's alleged that they actually true-billed an
5 indictment against Mr. Smalls.

6 A. Yes.

7 Q. What was your understanding of what was going
8 on?

9 A. Well, basically, there was some type of glitch
10 that his case was not going to the grand jury. But
11 up until that point, I mean, Mr. Smalls knew we were
12 going to trial this week. I was noticed through
13 e-mails back in October that we would be a trial
14 certain for January.

15 So basically, and from meeting with Mr.
16 Smalls -- again, I was not the first attorney in the
17 case, I was the second attorney. I came on board, I
18 think, August of 2010. So I had maybe about eight
19 months with Mr. Smalls and the prior attorney had
20 maybe nine -- seven, eight, or nine months with him.

21 So Mr. Smalls, he was eager to have his day in
22 court. So at that particular time, you know, we
23 were ready to go to trial. Mr. Smalls wanted to go
24 through with it and we were prepared and ready to
25 go.

1 Q. Well, at that point when you're doing all this
2 preparation with Mr. Smalls, do you know or do you
3 not know that there's an indictment out there or do
4 you just assume --

5 A. I assumed.

6 Q. Okay. So you never reviewed any indictments
7 with -- well, there wouldn't have been one to
8 review --

9 A. Right.

10 Q. -- so you never reviewed any with him prior to
11 the trial?

12 A. Right. That's correct.

13 Q. Okay. So --

14 A. We just based our preparation off of the
15 warrants.

16 Q. All right. And so when y'all --

17 A. And discovery that was, of course, sent to us.

18 Q. Sure. So when y'all get in there and this
19 issue sort of comes up or it's discovered that he's
20 not yet indicted, then there was some discussion in
21 the transcript, as I've gone through with
22 Mr. Smalls, about the three-day notice requirement
23 that the Court addresses. Do you recall that?

24 A. It's in the transcript, so yeah.

25 Q. Do you recall what specific discussion you

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1 would have had with Mr. Smalls about sort of the
2 three-day notice requirement and whether he wants to
3 waive that or not?

4 A. The discussion I had with Mr. Smalls is that he
5 wanted to go forward with trial on that week.

6 Q. Do you know if you had any discussion with him,
7 hey, they do have this three-day notice requirement,
8 we don't have to go now? Do you know if you would
9 have had that specific of a discussion or would it
10 have been either we can go to trial now or we can do
11 it later?

12 A. I think the latter is more it. Basically, you
13 know, do you want to go to trial -- and I think he
14 testified to it -- do you want to go to trial this
15 week? And he indicated that he wanted to go to
16 trial this week.

17 Q. Do you know if you had any specific discussion
18 with him that he didn't have to, that, you know, you
19 hadn't been indicted until this morning, that you
20 can do it later?

21 A. I don't recall any specific discussion other
22 than do you want to go to trial this week. If he
23 had indicated that he didn't want to go to trial,
24 then I would have used that as a basis to try to
25 get -- well, actually, it would have ended up in a

1 continuance because they're not going to start a
2 trial on a Thursday or Friday of a trial week.

3 Q. Right. And do you think at that time sort of
4 his -- do you think his understanding of the law
5 would have allowed him to know sort of the nuances
6 and details of that particular section and the
7 waiver -- the three-day waiver?

8 A. Well, we had been preparing since August for
9 this trial. And, basically, based upon my
10 communication with him, he wanted to go to trial, he
11 wanted to go to trial. So, basically, we were ready
12 to go and he wanted to go during the week of January
13 because he knew that he was going because it was a
14 trial certain.

15 Q. All right. On page 34 of the transcript --
16 you've obviously heard this allegation in
17 testimony -- do you recall a juror by the name of
18 Antoine Berry standing up and stating that he knew
19 him, that they had had an incident a couple years
20 ago where they had been locked up together? Do you
21 recall that?

22 A. I recall that.

23 Q. Okay. And you'd agree with me that when all
24 this happens, you don't make any sort of an
25 objection or motion for a mistrial?

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1 A. Well, I didn't want to draw additional
2 attention to it. I mean, basically, it's the type
3 of thing that, you know, he stated it, okay, you
4 don't want to reinforce it in the jurors' mind by
5 making an objection right then before the other
6 jurors in the pool.

7 Q. Okay.

8 A. So, therefore, that's why it was made later
9 because I would have drawn an additional attention
10 to it by making an objection in front of the jury
11 pool at that time.

12 Q. And then the Court went on to give what it felt
13 was a curative instruction?

14 A. That's correct.

15 Q. All right. And immediately after the curative,
16 did you make any sort of objection or a motion for
17 mistrial?

18 A. No, I didn't.

19 Q. All right. And would you agree with me though,
20 for preservation purposes, that would have been an
21 appropriate time to have made the objection?

22 A. I didn't make the objection.

23 Q. Okay. And then flipping on over to page 48,
24 the issue comes up, and I think this is what you
25 were talking about, where the jury has now gone back

1 into the jury room and there are a couple issues
2 that come up, one of which is, obviously, you had
3 indicated to the Court that you had a motion with
4 regard to the juror.

5 A. That's correct.

6 Q. How did that come about where you told the
7 Judge I need to make a motion? Is that something
8 y'all approached on or do you remember?

9 A. No. The courtroom was cleared at that
10 particular time, so there would have been no need to
11 have approached. And that was -- I felt it was an
12 appropriate time to make the motion because then
13 there was not any jurors or jury pool in the
14 courtroom to draw additional attention to this
15 person that stated that he was incarcerated or
16 detained with Mr. Smalls.

17 Q. Okay. So at this point is when you make, I
18 guess, an objection or a motion with regard to that
19 juror?

20 A. That's correct.

21 Q. And you indicate, "I don't have the juror
22 number, but the comment, summarily, that they were
23 locked up together for a period of time is our
24 position that with the whole -- with the entire jury
25 panel and subsequent jury that we selected that

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1 those comments bring about the strong possibility
2 that the jury -- the jury pool was tainted, that it
3 would be prejudicial against my client and,
4 subsequently, the jury that we selected is tainted,
5 so we would ask that this jury panel and jury be
6 dismissed." That was your argument in support of
7 the motion?

8 A. That's correct.

9 Q. Okay. And you -- so you were requesting that
10 they are tainted, they've heard he's been in jail,
11 we want a whole new jury?

12 A. Whole new jury, that's correct.

13 Q. Okay. And did you make that motion because you
14 felt that there was a possibility that this jury
15 had, in fact, been tainted by hearing that?

16 A. Well, I thought I was properly preserving it
17 for appellate review when I made it at that
18 particular junction of the trial.

19 Q. Okay. And also that, partly, not only was the
20 jury tainted, that would prejudice Mr. Smalls.
21 That's part of your argument as well?

22 A. Well, I was -- at that time I thought I was
23 properly preserving that issue for appellate review
24 when I made it at that time. Now, what would have
25 happened, I guess if we would have gone, I guess,

1 the next term of court -- because they weren't going
2 to put another panel together for that week.

3 But when I made it at that particular time, I
4 thought I was properly preserving it for appellate
5 review when I made it outside the presence of the
6 pool and the jury.

7 Q. And that jury, obviously, was not selected?

8 A. That's correct.

9 Q. All right. But as I was stating with
10 Mr. Smalls, even before this jury hears an opening
11 statement or one word about Mr. Smalls, they're
12 under the impression that he's been in some trouble
13 before and had been to jail?

14 A. As Mr. Smalls stated and as we discussed, a
15 self-defense case, he must take the stand. And of
16 course I wasn't going to -- you know, he didn't have
17 a real bad prior record. You know, if I -- now I've
18 been doing this over 20 years. If I have a client
19 that I have to put on the stand -- and I try not to.

20 But if they have a long prior record, then I
21 would have taken -- tried to have taken the sting
22 out and, on direct, brought out their prior record.
23 But Mr. Smalls just had that one possession of crack
24 cocaine, I think, in 2005. So I felt the facts of
25 the case -- the self-defense facts much outweighed

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1 that.

2 But, of course, I knew Solicitor Miller was
3 going to do that as a -- was going to bring that out
4 as a part of impeachment, at least the possession of
5 crack cocaine. So he was going to take the stand
6 and that was going to come out.

7 Q. Sure. And I guess when it comes out that he's,
8 obviously, been in the county jail before for that
9 particular incident, that's when Solicitor Miller is
10 questioning him about that?

11 A. Well, no. Basically, of course, if you put a
12 person on the stand that's got a prior record, then
13 the solicitor or the prosecutor is going to ask --
14 you know, not even go into detail, but is going to
15 ask admit or deny you -- admit or deny, just admit
16 or deny. And then, of course, if the person denied,
17 then you bring out the rap sheet and try to impeach
18 the witness in which Mr. Smalls did not do. He
19 admitted that he had that particular charge or that
20 conviction in 2005 or 2006.

21 Q. But then the solicitor went on to make some
22 statements about or some questions about being in
23 Barnwell County with maybe another person or a
24 witness or something like that.

25 A. Well, Judas Tilly was our witness.

1 Q. Okay.

2 A. Mr. Smalls instructed me to subpoena him. And,
3 of course, he was on the witness list and Tilly did
4 testify. But, yes, because -- yeah, he went into a
5 line of questioning about being in there with
6 Mr. Tilly.

7 Q. But apart from that, it could be interpreted by
8 the jury that not only has he been there because of
9 this, we got a juror that was just sitting here that
10 said he was also in jail, that could have been
11 something completely different; right?

12 A. Well, we're trying to go into the jurors' mind.
13 I guess any juror, with someone charged with murder,
14 they're going to -- anyone, not just Mr. Smalls,
15 they're going to assume that they at least have
16 spent some time in jail before they made bond.

17 Q. Did you have any discussion with either
18 Mr. Smalls himself or Mr. Smalls' appellate lawyer
19 after the trial was over and the appeal began?

20 A. No discussions with Mr. Smalls' appellate
21 lawyer. I think Mr. Smalls requested his file. I
22 think I may have had discussions with him and we
23 was -- I think, during the motion for new trial.
24 But as far as his appellate case, no, other than
25 just sending the file to him.

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1 Q. Okay. Have you reviewed the appellate opinion
2 in the case?

3 A. Yes, I have.

4 Q. Okay. And you're familiar that the issue of
5 the juror stating that he had been in jail with
6 Mr. Smalls was actually raised on appeal?

7 A. Yes.

8 Q. And you're aware that the Court of Appeals
9 stated that because it was not contemporaneously
10 objected to at the time of the Court's curative
11 instruction that it wasn't preserved for appellate
12 review and so they couldn't take any action?

13 A. That's what the opinion says, yes.

14 Q. Okay. So you would agree with me that they
15 couldn't review it because it was not timely
16 objected to at the time of the curative instruction?

17 A. And my testimony to that is that when I made
18 it, I thought I was properly preserving it for
19 appellate appeal. And the reason why I did not
20 object when it happened, I want to bring unwarranted
21 attention. Again, it was already stated, you know,
22 it slipped through.

23 If I had objection in front of the jury pool,
24 then that would have brought attention to it again,
25 so that's the reason why I didn't do it at the time.

1 And I thought that I had waited until the
2 appropriate time to make the objection, but
3 obviously the Court of Appeals felt otherwise.

4 Q. Did you hear Mr. Smalls' allegation regarding a
5 witness by the name of Agent Greene?

6 A. Yes.

7 Q. All right. Tell us a little bit about sort of
8 your discussion with Mr. Smalls about examining that
9 particular witness and anything that Mr. Smalls told
10 you in regard to suggestions he may have had about
11 that witness, if any.

12 A. Well, actually, Mr. Smalls today had additional
13 explanation. We did discuss that. Mr. Zantrell
14 Mayes turned in an additional gun. Okay? Part of
15 the self-defense argument against the deceased is
16 that, of course, with Zantrell Mayes, he pulled a
17 gun out and placed it in Mr. Smalls' face.

18 However, with Terence Mayes, it was part of our
19 theory that Mr. Smalls acted the way he did because
20 he either reached in his back pocket or reached in
21 his pocket or back or something and that's why we
22 had Judas Tilly to testify to corroborate that he
23 saw that he went behind him with something and,
24 therefore, that's why Mr. Smalls, according to our
25 theory, felt that his life was in danger.

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1 So basically our theory was that the gun
2 possibly belonged to Terence Mayes and it was
3 brought to SLED after the fact because Mr. Zantrell
4 felt somewhat responsible, by the way he acted with
5 pulling the gun out, for the death of his brother.

6 My testimony was brief with Agent Greene, but I
7 got out what I wanted to get out so I could use it
8 in closing. What I got out of Agent Greene, if you
9 read the transcript, is that the three -- we went --
10 we had a discussion between unfired versus misfired.
11 And we came up -- or Agent Greene came up with the
12 definition or explanation that if something is
13 misfired, that means someone attempted to fire the
14 gun.

15 If you go to my closing, basically that was the
16 theory that, you know, even though a gun was not
17 found on the scene that belonged to Terence Mayes,
18 it tended to corroborate with what Mr. Smalls saw
19 and what Mr. Tilly saw that that gun, that misfired
20 gun that someone attempted to shoot three times,
21 could have been the gun that belonged to Terence
22 Mayes and was eventually turned in by Zantrell Mayes
23 a year later.

24 So today hearing about the two guns and
25 Zantrell, that was not evidence. I don't recall

1 that being discussed. Once I informed Mr. Smalls
2 about that additional gun, it's my recollection that
3 those conversations went to that was the gun that --
4 or the motion that Mr. Smalls thought he saw and
5 what Mr. Tilly testified to.

6 Q. Okay. Now, obviously, as you've indicated and
7 Mr. Smalls has, this entire case was about
8 self-defense.

9 A. Yes.

10 Q. So, certainly, one of the big things you want
11 and have to have is a self-defense charge.

12 A. That's correct.

13 Q. All right. And in this case, of course, the
14 judge gave that instruction; right?

15 A. He gave that instruction. And I know your next
16 question will be about mutual combat.

17 Q. Correct.

18 A. But he gave that instruction. It wasn't a
19 separate mutual combat instruction, you know. From
20 looking at the transcript -- and, of course, this
21 case happened seven years ago -- he gave the mutual
22 combat instruction as a part of the first element of
23 self-defense of the difficulty in bringing about the
24 fault.

25 It was my thinking at that time that that --

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1 because that was kind of odd. But it was like it
2 was kind of a clarification of the difficulty of --
3 that he didn't bring about the fault as the first
4 element of self-defense.

5 Q. Would you agree with me though that by giving
6 the mutual combat instruction, as specifically given
7 in this case, that if there is mutual combat, even
8 if the defendant is in fear for his life, that that
9 negates the self-defense?

10 A. Well, this case, and I'm -- I'm going to answer
11 your question. But this case was kind of
12 convoluted. And I discussed this with Mr. Smalls.
13 See, you had the earlier incident with Mr. Demetrius
14 Smalls and younger brother Demetrius Mayes. Okay.

15 All right. And I discussed this: There was a
16 danger that the jury may have determined that to be
17 a part of the entire -- of the entire thing where if
18 we tried to separate the two -- because, basically,
19 I think, in my opening and closing, you know, I'll
20 say, well, that's settled, that's done with, that is
21 not part of the nexus of what happened during the
22 day.

23 So, basically, that one -- you know, jurors
24 could have thought that Mr. Smalls brought about the
25 difficulty in that, in which our position was that

1 wasn't a part of what happened two hours later on
2 the scene.

3 Now, what happened on the scene was that
4 initially there was an altercation with Mr. Smalls
5 and Mr. Demetrius Mayes and then other family
6 members getting involved, and at that time
7 Mr. Smalls felt it was unfair. So Mr. Smalls say,
8 come on, let's do it again, you know, let's have a
9 fair fight because, you know, all of the family
10 members and, you know, hit the hand of Zantrell and
11 then things transpired and Zantrell showed the gun.

12 So it's not -- you know, you had the issue of
13 the earlier incident, you had the issue of -- and,
14 again, the Court -- I don't recall the prosecution
15 making that request. I think the Court added that
16 on his own volition as far as the mutual combat.
17 But, you know, that's just to give you some idea of
18 what we were working with when it was several things
19 going on there.

20 Q. And so let me just -- obviously I read the
21 transcript and just kind of make my own opinion
22 about things.

23 A. Right.

24 Q. But let me if this kind of jives with what your
25 sort of theory or y'all's theory in the case was

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1 that initially this was just a fight, this was a
2 fistfight between --

3 A. That was in my opening.

4 Q. All right. So your theory is that this is just
5 a fistfight and Mr. Smalls and the victim who is
6 deceased were going to fight each other?

7 A. Well --

8 Q. Or not necessarily going to fight each other,
9 but --

10 A. Well, defended them.

11 Q. Correct.

12 A. Right.

13 Q. Okay. And so everybody shows up and initially
14 it's a fight, it's a fistfight?

15 A. Right. But Mr. Smalls felt that it was not
16 fair because other family members got involved and
17 he was double-teamed, triple-teamed, what have you.

18 Q. And there's some testimony out there and it may
19 have been conflicting or it may not have been --

20 A. Right.

21 Q. -- that maybe someone was stepping on his head
22 or --

23 A. Kicking him.

24 Q. Right.

25 A. Right. Things of that nature.

1 Q. So then at this point is when some of the
2 testimony and allegations and facts are is that the
3 second brother, that's when he produced the weapon?

4 A. The oldest brother.

5 Q. The oldest brother produces the weapon.

6 A. Right.

7 Q. So now sort of your theory of the case and what
8 you're trying to present to the jury are the -- we
9 got two separate things; one that was supposed to be
10 this, the fistfight, and now it's taken to a whole
11 other level.

12 A. It's been escalated.

13 Q. To a -- something that he wasn't in agreement
14 to come and do which was -- now, he didn't come out
15 there to get a gun pointed in his face; right?

16 A. No. No.

17 Q. Okay. He was there for a fistfight?

18 A. Well, basically -- and then when the gun was
19 produced, this cause Mr. Smalls to act in the way he
20 did. He got a gun and he -- that's what brought
21 about the fear that he acted in self-defense.

22 Q. So now just progressing on, was it sort of your
23 theory and sort of what was going on was that the
24 second victim produces the gun, and the testimony
25 from Mr. Smalls is that he cocks it and points it

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1 towards his face; is that right?

2 A. Yeah. Right.

3 Q. Okay. And then at this point --

4 A. It was cocked numerous times, I think.

5 Q. Okay. And so then at this point, somehow
6 throughout this process, Mr. Smalls then has a gun
7 or retrieves a gun or is given a gun?

8 A. From the crowd, from the crowd.

9 Q. Okay.

10 A. I forget the person that gave it to him, but he
11 got possession of a gun.

12 Q. So after he's had a gun pointed at him, he gets
13 a gun and then that's when the shooting ensues?

14 A. That's correct.

15 Q. All right. And sort of your whole theory
16 behind was kind of like I was stating, there are two
17 separate things going on; initially there's a
18 fistfight, victim produces a gun, that's when he's
19 in fear for his life of getting shot, he thinks the
20 other victim is going to somehow get a gun or has
21 one on him?

22 A. Because according to -- from the vantage point
23 of Mr. Smalls, he saw -- I think he testified out of
24 the corner of his eyes, he saw him running or
25 something and might was reaching for something or at

1 least running in that manner.

2 Q. Okay. Did you do any type of legal research
3 prior to the trial about claiming self-defense and
4 how it intertwined with mutual combat and a weapon
5 being involved?

6 A. Well -- and on the self-defense, of course we
7 did some research and of course we was -- you know,
8 there are several self-defense instructions. We
9 wanted to use the one to -- that had the language
10 for the defendant to be able to act upon appearances
11 because the appearance from Terence of having the
12 gun.

13 I did some research on mutual combat, just
14 briefly, just based upon that. And, again, this was
15 convoluted because then this person, Mr. Zantrell
16 Mayes, had a gun and, then Mr. Smalls got a gun, and
17 they both had a gun. But we decided -- I decided
18 that our best bet, based upon the testimony of Judas
19 Tilly along with Mr. Smalls, that we would do the
20 act upon appearance as being one of the elements and
21 use that type of self-defense instruction.

22 And, again, Judge Early, upon his own volition,
23 inserted that he was going to use the standard
24 instruction that, I guess, comes from the judges
25 book, but then he inserted that mutual-combat

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1 language. And I think he inserted that to further

2 clarify that first element again on self-defense.

3 Q. And, Mr. Koger, I'm certainly not trying to
4 ambush you with case law or anything like that. If
5 you wouldn't mind just taking a moment, I'm handing
6 you --

7 A. State v. Taylor.

8 Q. Correct. I've also handed up a copy to the
9 Court and to Madam Attorney General. Are you
10 familiar with that case? I certainly wasn't before
11 I started doing the research on the case.

12 A. Right.

13 Q. Are you familiar with that case?

14 A. I glimpsed it when you had it in your
15 allegations.

16 Q. Okay. Would this have something that you would
17 have reviewed in preparing for the trial for
18 Mr. Smalls?

19 A. I reviewed case law in reference to
20 self-defense.

21 Q. Okay. And I certainly do not mind. Do you
22 want to take a moment to review it or do you want me
23 just start asking questions?

24 A. Just go ahead. If I need to, I'll review it.

25 Q. Would you agree with me that basically in

1 the -- this is a direct appeal on whether the trial
2 court erred in charging mutual combat. And
3 basically, as part of the law and analysis, the
4 Court says: The doctrine of mutual combat has
5 existed in South Carolina since 1843, but has fallen
6 out of common use in recent years."

7 And basically going through the analysis, the
8 Court says -- looks to some other states for some
9 guidance on how to handle the charge of mutual
10 combat. And it says: "Georgia has limited the
11 application of mutual combat in another way by
12 holding mutual combat only arises when the parties
13 are armed with deadly weapons and that mutual combat
14 does not arise from a mere fistfight or scuffle, and
15 they cite Flowers and Grant."

16 The Court goes on to say that in both of those
17 cases, the defendant admitted to killing the
18 decedent, but claimed self-defense. In both cases
19 the disputes that ended in death began as fistfights
20 and so the Court found the mutual combat charge
21 erroneous. And then it goes on to say: "It places
22 on the defendant a heavier burden than required for
23 self-defense when that mutual combat charge is
24 given."

25 The court in Flowers explained: "The charge on

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1 mutual combat where there is no evidence to support
2 it effectively cancels the justification defense."
3 And then the Court goes on to apply -- or excuse me.
4 The Court goes on to say: "We believe these
5 restrictions placed on the applicability of mutual
6 combats by courts in Georgia, Colorado, and Texas
7 are warranted."

8 So they're basically going along and saying,
9 okay, that's what we're going to do, that mutual
10 combat can't arise from a fistfight where it ends up
11 where there's a deadly weapon at some point that's
12 produced.

13 A. Uh-huh.

14 Q. Okay. And then going on they apply the facts
15 of the case that they're reviewing to this law that
16 they're now adopting, and they state: "Evidence of
17 the events leading up to and during a fight between
18 petitioner and defendant were sketchy at best.
19 Witnesses, with the exception of the child witness,
20 were extremely intoxicated and arguably exhibited a
21 bias towards the decedent.

22 "There is no evidence and the State does not
23 contend that there was existing pre-will and dispute
24 between Defendant and Petitioner -- excuse me, Kevin
25 and Petitioner and there is no evidence that Kevin

1 was willing to engage in an arm encounter with the
2 petitioner.

3 "In their determination of mutual willingness
4 to fight, the South Carolina cases as discussed
5 emphasize that each party knew the other was armed.
6 Here there is indicated Kevin knew Petitioner was
7 armed with a knife and there was no preexisting
8 ill-will between the parties. Under these
9 circumstances there is insufficient evidence of
10 mutual willingness to fight to submit the issues of
11 mutual combat to the jury."

12 So looking at this case, wouldn't it be
13 appropriate then to argue just as you -- I mean,
14 sort of your whole theory of the case was actually
15 that; that he wasn't coming -- he was coming for a
16 fistfight, got in a fistfight, it gets escalated by
17 another person who he probably has no idea has a
18 weapon, and when that happens, he fears for his
19 life, he gets a weapon, and then that's when
20 everything snowballs and ends up where it ends up.
21 But wouldn't it be a valid argument to argue that
22 you couldn't charge mutual combat because that's
23 what happened?

24 A. Well, I think the first line you read, and I
25 guess you were reciting it -- citing it off

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1 justices, is that a little-used defense. And this
2 was back in 2003. So we had the trial in 2011, so
3 it was little used at that point in 2003. And
4 looking in the case, it say there was only -- I
5 guess on the last page, the only modern South
6 Carolina case referring to mutual combat was a 1972
7 case.

8 So this was something that was obviously not
9 used a lot in the courts of South Carolina. And,
10 again, it was not separated out as far as, you know,
11 Judge Early stated, well, I'm going to give a mutual
12 combat instruction, it was intertwined in supposedly
13 a standard self-defense instruction. And, again, as
14 was -- of course as you know if you have the three
15 or four elements of self-defense, all the State has
16 to do is disprove one of them and then you have no
17 self-defense.

18 So, basically, this discussion of mutual combat
19 was placed under the element of you cannot be -- you
20 cannot bring about the fault, you cannot have that
21 difficulty. And, of course, if the State disproved
22 and if the jury decides that you brought about the
23 fault, then self-defense is out the window anyway.

24 So it was my position that when that jury
25 instruction was read -- and, again, as borne out by

1 what you read that this was a little-used defense
2 even in 2003 based upon a 1972 case, he was just
3 further clarifying that element number one in
4 self-defense.

5 MR. BOOZER: I beg the Court's indulgence, Your
6 Honor.

7 THE COURT: Yes, sir.

8 BY MR. BOOZER:

9 Q. Mr. Koger, you've heard an allegation that is
10 on page 523 of the transcript where apparently there
11 was some sort of -- whether it was about pizza or
12 whatever it was about, a discussion between the
13 judge and the foreperson. Do you recall anything
14 about that?

15 A. You know, I was trying to recall that. And I
16 told Ms. Coleman and I might have told Ms. Coleman
17 the wrong conversation. I tend to recall that it
18 was some type of discussion about -- but I could
19 have been mistaken -- about Judge Early eating lunch
20 at his mother's house and she made him macaroni.
21 But that may be something -- it could be about the
22 lunch that they were bringing in. I can't recall
23 the text of the conversation.

24 Q. And just summarizing it from the transcript, it
25 was talking about they had started eating pizza,

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1 they hadn't started deliberating; he said, y'all
2 hadn't talked about anything else as far as deciding
3 the case; no, sir, just talking about your pizza.
4 Did you have any discussion with Mr. Smalls about
5 sort of that discussion that was going on?

6 A. I don't recall about having any conversation
7 about that particular discussion, but it is
8 reflected on the record that a conversation took
9 place. But I just don't remember what was actually
10 said.

11 Q. Is that something that looking at it that you
12 feel like you should have been up there a part of or
13 listening to or anything like that?

14 A. Of course if it's during the actual court
15 proceeding, then the State and the Defense go up and
16 see what's going on. I didn't feel so at that
17 particular time. I didn't.

18 Q. Okay. Did you have any discussion with
19 Mr. Smalls about it or did he raise it or bring it
20 to your attention?

21 A. I don't recall.

22 MR. BOOZER: I beg the Court's indulgence, Your
23 Honor.

24 BY MR. BOOZER:

25 Q. Going back to his initial allegation about the

1 indictment, on the 24th, since he technically wasn't
2 indicted, could you have made any motion to dismiss
3 the case at that point as they were calling it for
4 trial that day?

5 A. Well, here's the thing: If I make the motion
6 to dismiss, it had not -- jeopardy would not have
7 attached. So, basically, if the case somehow had
8 been dismissed, they could have rearrested him and
9 started the process over again because jeopardy had
10 not attached at that point.

11 Q. Because the jury hadn't been sworn and all
12 that?

13 A. Right.

14 Q. What was the basis of your motion for a new
15 trial?

16 A. Let me see if I can recall. After the
17 verdict in -- I can't recall how many days. Maybe
18 several days after, it was brought to my attention,
19 I think by Mr. Smalls' mother, that it was some
20 family or friends that had came in for the trial
21 throughout the week -- I think his mother was there
22 every day, I think his step-father came a day or
23 two -- and that Judge Early was making some facial
24 gestures while I was presenting my case.

25 She felt that -- if I can recall from her

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1 affidavit, she felt that my case was being
2 minimized. Now, of course, as I told Judge Early in
3 the hearing, when I try cases, I concentrate on the
4 jury because it is the jury that I will have to
5 convince on behalf of my client, so I was not
6 looking at him.

7 But it was that affidavit and I think it was an
8 additional affidavit, maybe from a family member.
9 And I think we got one from a juror that stated that
10 she felt that it was inappropriate and there was
11 some type of discussion in there about that. So I
12 don't have the actual motion, but those were some of
13 the things that we said that he was -- that those
14 gestures violated his fifth, sixth, and fourteenth
15 amendment right to due process.

16 Q. That was obviously denied?

17 A. Huh?

18 Q. The motion for new trial was obviously denied?

19 A. Yes, it was.

20 Q. Okay. Have you seen -- did you see the
21 sentencing sheet that day? I guess, obviously, you
22 had to sign it.

23 A. Yes.

24 Q. And if I represent to you that it's clocked and
25 filed in the County of Barnwell on January 27th,

1 2011, do you have any dispute as to that date.

2 A. That's the official court stamp. That's -- I
3 have no way to dispute that.

4 Q. Okay. And Mr. Smalls has brought to my
5 attention in our discussions that on one of the
6 indictments -- or the indictments, that it's clocked
7 July 22nd, 2011. Would you have any issue or does
8 anything -- do you take exception to those dates
9 being different or the timing of the dates?

10 A. If it's an official court document I have no
11 way of disputing it.

12 Q. Thank you, Mr. Koger. That's all the questions
13 I have for you.

14 THE COURT: Cross-examination?

15 CROSS-EXAMINATION

16 BY MS. COLEMAN:

17 Q. Hello, Mr. Koger.

18 A. Hello. How are you doing?

19 Q. Fine, thank you. Sorry. Just a moment. I'm
20 trying to figure out where to start. I'll start
21 with the indictments. And we've just discussed
22 those a little bit. Do you recall what the
23 applicant was indicted with before the trial?

24 A. He was indicted with murder, assault and
25 battery intent to kill, and possession of a weapon

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1 during the commission of a violent crime.

2 Q. Okay. Did the trial Court have proper subject
3 matter jurisdiction over these charges?

4 A. Yes.

5 Q. This is a general sessions charge. Is there
6 any reason why they would not have subject matter
7 jurisdiction over these?

8 A. No. The murder was 30 years to life; at that
9 time, assault and battery with intent to kill was
10 zero to 20, and possession of a weapon during the
11 commission of a violent crime was an additional zero
12 to five.

13 Q. Was there any reason why the general session
14 Court wouldn't have personal jurisdiction over the
15 defendant?

16 A. No.

17 Q. Okay.

18 A. It happened in Barnwell County.

19 Q. Okay. It happened in Barnwell County. Was the
20 applicant properly indicted, except for the
21 timeframe which he waived three-day?

22 A. Yes.

23 Q. Okay. He was true-bill indicted by the grand
24 jury; right?

25 A. Right.

1 Q. Okay. Did you see basis for challenging the
2 indictments on the grounds that the facts didn't
3 support the charge of the indicted offense?

4 A. No.

5 Q. Okay. Did the applicant cooperate with you
6 during the course of your representation?

7 A. Yes.

8 Q. And, obviously, you filed Brady and Rule 5
9 motions?

10 A. Most definitely, yes.

11 Q. And you reviewed this discovery material with
12 the applicant?

13 A. Oh, yes, every jail visit.

14 Q. And you discussed with the applicant the
15 elements of the charges and what the State was
16 required to prove?

17 A. Yes.

18 Q. Would you briefly describe the State's evidence
19 against the applicant?

20 A. It's -- I mean, basically, we felt it was
21 self-defense and simply that they felt that he
22 didn't act in self-defense, that they felt that he
23 was guilty of murder. I mean, basically, again,
24 unfortunately, one person was killed, a young
25 person, 19 years of age, and it was -- you know, it

CROSS-EXAMINATION OF JOSHUA KOGER BY MS. COLEMAN

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1 was undisputed that Mr. Zantrell Mayes was shot and,
2 fortunately, did not expire.

3 And basically from the evidence, of course, you
4 had the ballistics and things of that nature and you
5 had the matching of the ammunition and the firearms
6 and things of that nature. And then you had, like,
7 a bunch of witnesses because it was done with a
8 crowd, and you had witnesses that was partial to
9 Mr. Mayes, you had what you call -- I say -- I don't
10 think any witness was partial to Mr. Smalls, maybe
11 other than the one that he called that was
12 advantageous to him, Mr. Tilly.

13 But, basically, it was just a -- you know, it
14 was a fight that resulted into gunfire. You had a
15 bunch of people, I'd say at least eight people.
16 They had their own version of what happened. Some
17 of them were useful, some of them were not. And it
18 was truly a case that the jury had to really take
19 into account what each person said, along with the
20 physical evidence, to come up with a decision.

21 Q. And there's no question that the defendant shot
22 the victims in this case?

23 A. There's no question --

24 Q. And he --

25 A. -- based upon the physical evidence --

1 Q. Right.

2 A. -- and the investigation.

3 Q. Okay. And he admitted this as part of his
4 self-defense story to the jury?

5 A. He shot in self-defense, right.

6 Q. We've already discussed the applicant's prior
7 conviction for possession of cocaine in 2005. And
8 this was something that was going to come out when
9 he took the stand for self-defense; correct?

10 A. Well, I had anticipated that the prosecution
11 would have brought that out; they usually do if a
12 prior record exists.

13 Q. So the jury was going to hear that regardless
14 of whether or not the juror had said that he had
15 been locked up with the applicant?

16 A. Correct.

17 Q. And Mr. Boozer has argued today that it's
18 possible for the jury to think that that could have
19 been another crime that he was incarcerated for. Do
20 you think that it's also reasonable to say that if
21 there was some other crime that he had been locked
22 up for aside from that prior conviction, the
23 solicitor could have brought it up at trial?

24 A. Yes.

25 Q. So it could be reasonable for a juror to think

CROSS-EXAMINATION OF JOSHUA KOGER BY MS. COLEMAN

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1 that this is the only conviction too?

2 A. In this particular case, again, in relation to
3 other defendants that I have represented, Mr. Smalls
4 did not have this terrible prior record that I felt
5 comfortable along with. As you can see, Mr. Smalls
6 is someone who is articulate. I had no problem
7 putting him on the stand to be able to articulate
8 his position.

9 Q. Okay. What was the State's argument in this
10 case?

11 A. The State's argument -- and that of course -- I
12 keep going back -- that he didn't act in
13 self-defense. And I think it was in the solicitor's
14 closing and some of his questioning about the angle
15 in which the deceased was hit. So I think there was
16 some back-and-forth between the two of us.

17 Of course I questioned, I think, the
18 pathologist Janis Ross about the angle in which the
19 bullet entered and exited. I think their thing is
20 that basically Mr. Smalls didn't have to --
21 especially in reference to Terence Mayes, he didn't
22 have to shoot him because he was not, according to
23 them, close enough in proximity for that to happen.

24 So I think it was a heavy concentration on
25 that. I don't think they conceded with Zantrell,

1 but they heavily concentrated on Terence Mayes as
2 far as the angle, how he was turned, how he was
3 found by the investigator, and things of that
4 nature.

5 Q. Okay. Was there any evidence presented that
6 the victim and the defendant both had guns?

7 A. The victim and the defendant?

8 Q. Yes.

9 A. Both had guns?

10 Q. Yes.

11 A. I mean, after Mr. Zantrell pulled a gun, Smalls
12 retrieved a gun from the crowd.

13 Q. Right.

14 A. Yes. Right.

15 Q. And, of course, your theory of self-defense is
16 that he pulled the gun first, and then in
17 self-defense he grabbed a gun.

18 A. Right.

19 Q. But there was evidence presented that both
20 parties had a gun at this fight?

21 A. Yeah. The person testified that gave him the
22 gun. I can't recall his name, but he testified that
23 he gave Mr. Smalls the gun.

24 Q. Okay. In your opinion, if mutual combat -- now
25 you've expressed today that you believe mutual

CROSS-EXAMINATION OF JOSHUA KOGER BY MS. COLEMAN

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1 combat was given to clarify the first prong of the
2 self-defense instruction; is that right?

3 A. That's correct.

4 Q. If it had been presented on its own, do you
5 think there was enough evidence presented in order
6 to justify this instruction on mutual combat?

7 A. (Nonverbal response.)

8 Q. And, essentially, this Taylor case is arguing
9 that it was inappropriate in that situation because
10 there was no evidence presented that it was a
11 gunfight; it was only a fistfight and one of the
12 parties had a gun. In this case is there evidence
13 that both parties had guns at some point in this
14 fight?

15 A. Is there evidence in this case that
16 Mr. Zantrell Mayes had a gun?

17 Q. Yes.

18 A. Mr. Smalls, he didn't bring a gun there, but he
19 retrieved a gun. And then there's testimony that
20 possibly that Terence Mayes had a gun which was not
21 retrieved on that particular day. But the gun that
22 was brought in by Zantrell Mayes later might have
23 belonged to Terence Mayes which would have -- you
24 know, which may have gone to, at least in
25 Mr. Smalls' mind and Mr. Tilly's mind, that when he

1 was reaching, that he was reaching for a gun.

2 Q. Uh-huh.

3 A. Again, it's not really that clean; it's kind of
4 convoluted.

5 Q. Right. Yeah. And this was a strange
6 situation.

7 A. Yes.

8 Q. But in your opinion, is it reasonable if -- for
9 a juror, if a jury did not to believe the
10 self-defense story --

11 A. Right.

12 Q. -- is it reasonable for a juror to think that
13 all of the parties in the fight had a gun and that
14 it was a gunfight?

15 MR. BOOZER: Objection, Your Honor. I'm not
16 sure that he can tell what the jurors were thinking.
17 It's speculative.

18 THE COURT: Sustained.

19 MS. COLEMAN: Nothing further, Your Honor.

20 Thank you:

21 THE COURT: Any redirect?

22 MR. BOOZER: Just briefly, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. BOOZER:

25 Q. Going back to the final verdict, he was found

REDIRECT EXAMINATION OF JOSHUA KOGER BY MR. BOOZER

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1 guilty of voluntary manslaughter and assault and
2 battery with intent to kill?

3 A. Correct.

4 Q. And the voluntary manslaughter, that --
5 basically there has to be no showing of malice for
6 that?

7 A. That's correct.

8 Q. But for ABWIC, there does have to be a showing
9 of malice?

10 A. Correct.

11 Q. Did you find anything inconsistent or odd about
12 those two verdicts?

13 A. Well, we got two different victims. I --
14 actually, we had an uphill climb, and I felt we
15 accomplished it when we had the testimony from Judas
16 Tilly, and Mr. Smalls, I think, was additional, that
17 he acted upon appearances. I thought it was odd not
18 so much by the finding of malice, but just where
19 Mr. Zantrell Mayes located -- he was right there,
20 that maybe we could have looked at a verdict that
21 could have come back voluntary manslaughter against
22 Terence Mayes and a not-guilty on the assault and
23 battery with intent to kill because Zantrell was
24 right there.

25 So I found that odd, but I didn't really think

1 in terms of malice. I didn't think in terms of
2 malice. I thought that it was odd. I knew --
3 again, I knew we had an uphill climb with the
4 deceased, but I thought we stood a good chance on
5 self-defense, a better chace for self-defense, but
6 with Mr. Zantrell.

7 Q. Okay. Thank you, Mr. Koger.

8 THE COURT: You may step down, sir. Thank you.
9 You may call your next witness.

10 MR. BOOZER: No further witnesses on behalf of
11 the applicant, Your Honor.

12 MS. COLEMAN: The State has no witnesses.

13 THE COURT: Parties please provide proposed
14 orders.

15 MR. BOOZER: Thank you, Your Honor.

16 MS. COLEMAN: Thank you, Your Honor.

17 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Bamberg County, South Carolina, on the 26th of January, 2017.

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

June 13, 2017

*s/Bethanie K. Creppon*Bethanie K. Creppon
Circuit Court Reporter

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

The State, Respondent,

v.

Demetrius Smalls, Appellant.

Appellate Case No. 2011-192488

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2015-UP-028
Heard November 12, 2014 – Filed January 14, 2015

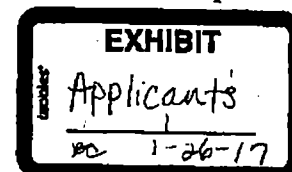
AFFIRMED

Breen Richard Stevens, of Orangeburg, and Appellate
Defender Benjamin John Tripp, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
and Senior Assistant Deputy Attorney General Salley W.
Elliott, all of Columbia, for Respondent.

PER CURIAM: Demetrius Smalls appeals his convictions for voluntary
manslaughter, assault and battery with intent to kill, and possession of a weapon

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during the commission of a violent crime. He argues the circuit court erred by (1) failing to dismiss the entire jury panel when during voir dire a prospective juror stated he and Smalls had been previously incarcerated together; and (2) denying his motion for a new trial because the circuit court's facial expressions during trial amounted to an undue, extraneous influence on the jury during deliberations. We affirm.

① 1. We find the issue of whether the circuit court erred by failing to dismiss the entire jury panel when during voir dire a prospective juror stated he and Smalls had been previously incarcerated together was not preserved for appellate review because Smalls failed to contemporaneously object to the circuit court's curative instruction. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the [circuit court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. No issue is preserved for appellate review if the objecting party accepts the [circuit court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." (citations omitted)).

2. As to whether the circuit court erred in denying Smalls' motion for a new trial because Smalls was prejudiced by facial expressions exhibited by the circuit court during trial, we find the letters from Smalls' family, friends, and a member of the jury did not present clear and convincing evidence that the circuit court's alleged facial expressions amounted to an extraneous influence on the jury that interfered with the conduct of the trial and influenced the verdict. While the juror does state the jury discussed the circuit court's conduct, she gives no indication the alleged actions had any impact on her or the other jurors in reaching a verdict. In fact, the juror stated the comments of two other jurors within the jury room regarding the law of the case impacted her decision to find Smalls guilty. In any event, we see no evidence of misconduct or any prejudice resulting from any alleged misconduct. *See State v. Stewart*, 278 S.C. 296, 303, 295 S.E.2d 627, 631 (1982) ("Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result." (citation omitted)).

AFFIRMED.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Demetrius Smalls, #344584,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2015-CP-06-380

ORDER OF DISMISSAL

RHONDA D. MCILVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

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FILED FOR RECORD

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on November 2, 2015. Respondent submitted its return on January 29, 2016. An evidentiary hearing was convened on January 26, 2017, at the Bamberg County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Applicant was true bill indicted at the January 2011 term of the Barnwell County Grand Jury for murder (2011-GS-06-00065); Assault and Battery With Intent to Kill (2011-GS-06-00066). Josh Koger, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty of the lesser included offense of voluntary manslaughter and as indicted for assault and battery with intent to kill. Judge Early sentenced Applicant to twenty-five years for voluntary manslaughter and twenty-years for assault and battery with intent to kill, with the sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Smalls, 2015-UP-028 (Cr. App. filed January 15, 2015). The Remittitur was issued on February 2, 2015.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel
 - a. Failing to contemporaneously object to the alleged indictments in this case.
 - b. Failed to request Judge Early recuse himself from presiding over the trial.
 - c. Failure to object to the trial court's instruction on mutual combat.
 - d. Being found guilty of ABWIK where malice is an element but being found not guilty of murder where malice is an element.
2. Lack of subject matter and personal jurisdiction.

Applicant filed amended applications on August 18 and August 30, 2016, adding the following allegations:

- (i) Counsel failed to object, move for mistrial and/or preserve for appellate review the fact that during jury selection, one juror openly stated he had been previously incarcerated with the Applicant. A curative instruction was given, however, counsel failed to contemporaneously object to the instruction.
- (ii) Counsel failed to properly cross-examine Agent Green.
- (iii) Counsel failed to object to the jury instruction regarding mutual combat as it applied to both alleged victims.
- (iv) Counsel failed to object to the jury instruction regarding mutual combat based on the testimony one alleged victim first presented a firearm. State v. Taylor, Op. No. 25637 (S.C. Sup. Ct. filed June 12, 2003).
- (v) Counsel failed to properly explain to Applicant what it meant to waive the three (3) day notice requirement regarding the indictment.
- (vi) Counsel failed to object, move for mistrial and/or preserve for appellate review a discussion occurring between the trial judge and jury foreperson. See pg. 523.

III. APPLICABLE LAW

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

IV. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Trial Counsel, Josh Koger, Esquire.

Applicant testified that he retained Trial Counsel to represent him on these charges. He testified that he met with Trial Counsel five or six times prior to his trial. He stated that their theory of the case was self-defense; he explained that the victims came in search of him and he was defending himself. Applicant stated that he wanted to go to trial, but he would have accepted a reasonable plea offer.

Applicant testified that he waived the three-day notice requirement for his indictments because there was a mistake and he was not indicted until the morning of the trial. He stated that his attorney should have explained to him what it meant to waive this requirement, and had he known what it meant, he would not have waived it and the indictments would have been thrown out. Applicant testified that he was ready to proceed to trial after his Jackson v. Denno hearing, and he told his attorney he wanted to have his trial that day. He stated that he was on notice of the trial and he would not have wanted to wait longer to have his trial.

Applicant testified that during jury selection, a potential juror stood up and announced that he could not serve on the jury because he knew Applicant from when they had served time together in prison. Applicant stated that as soon as the potential juror said this, everyone started whispering, and his comment tainted the jury pool and prejudiced him. He stated that, if the potential juror had not announced this, the jury pool would not have known that Applicant had been convicted of a prior crime.

Applicant testified that he had a prior conviction from 2005 for possession of cocaine. He stated that he told this to the jury during trial when he took the stand to tell his side of the story.

He stated that he had to take the stand in order to further his strategy of claiming self-defense. When asked if the potential juror's comment to the jury pool could have changed the outcome of the trial when the jury was going to hear about his prior conviction anyway, Applicant testified that the potential juror could have been talking about a different time that they were incarcerated, leading the jury to believe that he had more than one conviction.

Applicant testified that Trial Counsel improperly cross-examined the State's Witness, Agent Green. He stated that one of the victims, Zantrell Mays, had two firearms at the scene of the shooting—one on his waist, and the other in his right back pocket. He stated that Agent Green testified at trial that one of Zantrell Mays' firearms had three misfired bullets in it. Applicant stated that Trial Counsel did not bring this up at trial on cross-examination, and he should have.

Applicant testified that, during the trial, the trial judge had an off-the-record conversation with the jury foreperson to which Trial Counsel should have objected. He stated that he was not in the room when the conversation took place, so he does not know what they spoke about, but the conversation was noted in the trial transcript at page 523. He stated that he does not know if they spoke about the trial.

At the evidentiary hearing, Trial Counsel testified that his trial strategy in this case was self-defense. He stated that there had been an incident earlier in the day between the victims and Applicant where the police were called. He stated this was settled around 4:30 that afternoon, and around 6, the victims and their friends all met up at a house where Applicant was hanging out, and they came looking for him.

Trial Counsel testified that Applicant knew that they were going to trial that week because it was set for date certain in January. He stated that he assumed Applicant had been

indicted, but they prepared their case based off the warrants and discovery. He testified that Applicant wanted to go forward with the trial, that he knew about the trial that date and he was ready for it.

Trial Counsel stated that he did not object to the potential juror's comment at the time it was made because he did not want to draw more attention to it. He stated that he objected to it later, outside the presence of the juror, and he believed that his objection was properly made. He stated that the trial court gave a curative instruction, but Trial Counsel moved for a whole new jury, and he thought he was preserving the issue for appellate review at the time. Trial Counsel testified that Applicant took the stand at trial and his prior conviction was going to come out to the jury anyway. He stated that if there had been any other convictions on Applicant's record in addition to the 2005 charge, the Solicitor would have brought it out to the jury on cross-examination of Applicant, as well.

Trial Counsel testified that Applicant's view on the victim carrying two guns to the crime scene had changed since the trial. He stated that, at the time of trial, their explanation to the jury was that the victim pulled out a gun and put it in Applicant's face. He stated that the State's witness, Julius Tilley, corroborated that the victim was reaching in his back pocket for a gun. Trial Counsel stated that when cross-examining Agent Green, he got out the testimony that he wanted, and then he stopped.

Trial Counsel testified that there is a difference between an unfired gun and a misfired gun. He stated that his strategy at trial was to suggest to the jury that the misfired gun could have been the gun that belonged to the other victim, Terrance Mays, and that was the gun turned in a year later by Zantrell Mays. He stated that this theory would have allowed the jury to support his self-defense claim.

Trial Counsel testified that the mutual combat charge was given by the trial court not as a separate instruction but as part of the first element of self-defense. He stated that he believed it was a clarification of "bringing about the fault," because the fight between Applicant and the victims earlier in the day could be seen by the jury as "bringing about the fault" two hours later.

Trial Counsel testified that this confrontation initially began as just a fistfight. He stated that one of the victims produced a weapon and escalated the fight to a new level. He stated that someone then handed Applicant a gun, and Applicant shot the victims.

Trial Counsel testified that he believed that the off-the-record discussion between the trial judge and the jury foreperson was about something unrelated to the trial. He stated he thought that the judge was telling the foreperson that he had eaten macaroni at their mother's house recently. He stated that he did not recall if he spoke to Applicant about the conversation. Trial Counsel stated that he did not feel the need at the time to listen to the conversation or to object to it.

Trial Counsel testified that there was no reason why the General Sessions court would not have had personal or subject matter jurisdiction over Applicant, and there was no legal reason to object on this basis. He stated that he could have moved to dismiss the charges based on the lack of three-day notice of the indictments, but it did not make a difference because jeopardy had not attached, so Applicant could have been re-indicted and tried again.

Trial Counsel testified that he made a motion for a new trial based on the trial judge's facial expressions during the trial. He stated that he thought the voluntary manslaughter conviction was strange, but not in terms of the finding of no malice. He stated that he believed the jury could have found that Applicant had malice toward one victim but not the other victim, which could have been the basis of their finding.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. Each allegation presented at the evidentiary hearing is addressed below.

Failure to object to indictments

Applicant alleges that Trial Counsel was ineffective for failing to object to the indictments in this case. At the evidentiary hearing, Trial Counsel credibly testified that there was no legal reason to object to the indictments in this case. He further testified that, even if he had objected to the indictments being issued less than three days before trial and had them thrown out, jeopardy had not yet attached to Applicant, and he could have been re-indicted and re-tried.

The indictments were properly true-billed and signed by the foreman of the grand jury. There was nothing on their face to indicate that the indictments were objectionable for any reason. Furthermore, Applicant and Trial Counsel both testified that they were on notice of the trial. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005)). Since Applicant was on notice of the trial when he received the indictments, he cannot

prove prejudice. As Trial Counsel testified, if the indictments had been objected to and thrown out, Applicant would have been re-indicted and tried at a later date. Therefore, there is no resulting prejudice from the lack of any objection.

This Court finds that there was no legal reason to object to the indictments in this case, and Trial Counsel cannot be ineffective for failing to do so. This Court further finds that Applicant has failed to prove that he was prejudiced in any way by this lack of objection. Because Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to explain waiver of three-day notice requirement for indictments

Applicant alleges that Trial Counsel failed to explain to him what it meant to waive the three-day notice requirement on the morning of his trial, and if he had explained it, he would not have waived the requirement but instead moved to have the indictments thrown out. This allegation is meritless.

Applicant has failed to prove that Trial Counsel did not explain to him what it meant to waive this requirement. Furthermore, Applicant has failed to show any prejudice resulting from this waiver. Trial Counsel credibly testified that both he and Applicant were on notice of the charges well in advance of the trial. He stated that they knew the trial was set for date certain in January, and Applicant came to court that day ready and willing to go to trial. Applicant testified that he wanted to have the trial that week to get it over with, and he was on notice that they would go forward.

Even if Applicant had challenged the indictments, he could have been re-indicted and tried at a later date. Therefore, Applicant cannot prove that the result of the proceeding would

have been any different. This Court finds that Applicant has failed to meet his burden of proving either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to object to potential juror's comments

Applicant alleges that Trial Counsel was ineffective for failing to object to a potential juror's comments about being "locked up" with Applicant during jury selection, which led the jury to hold his prior conviction against him. This allegation is meritless.

Trial Counsel gave a valid strategic reason for choosing not to object at the time the comment was made. He credibly testified that he chose not to draw the jury pool's attention to the comment by objecting. He objected immediately once he was outside the presence of the jury, he requested a new trial, and the trial court denied his motion but gave a curative instruction. Because Trial Counsel strategically chose not to object and made the appropriate objections once outside the presence of the jury, this Court finds that Trial Counsel was not deficient in his actions.

Furthermore, Applicant can show no prejudice in the lack of contemporaneous objection because the jurors heard about Applicant's prior convictions later in the trial. Applicant had a prior cocaine conviction from 2005 which was brought to the jury's attention as admissible impeachment evidence when he took the stand to testify, which he had to do in order to advance his strategy of self-defense. This Court finds that, because the jury knew about the conviction anyway, Applicant has not shown any prejudice from the comment made by the potential juror.

Therefore, since Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to properly cross-examine Agent Green

Applicant alleges that Trial Counsel was ineffective for failing to properly cross-examine the State's witness, Agent Green. This allegation is meritless.

Trial Counsel offered a valid trial strategy for his line of questioning in the cross-examination of Agent Green. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Furthermore, Applicant has failed to meet his burden of proving prejudice because he did not present the proper cross-examination of Agent Green at the evidentiary hearing. The South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what

the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Applicant did not present any testimony from Agent Green to show how Trial Counsel should have properly cross-examined him, thus he has not proven prejudice.

Because Applicant has failed to show deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Failure to object to mutual combat instruction

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial court's mutual combat jury instruction. This allegation is meritless.

According to the trial transcript and the testimony presented at the evidentiary hearing, in the case at hand, Applicant was involved in a fist-fight between himself and the two victims in this case, which followed a confrontation that took place earlier in the day. During the fight, one of the victims, Zantrell Mays, pulled out a gun, cocked it, and waved it in Applicant's face. Applicant then turned away, grabbed a gun from a friend in the group of onlookers, and shot both victims, killing one and injuring the other.

In its jury charge, the trial court gave the following instruction:

If the defendant voluntarily participated in mutual combat, a fight, for purposes other than protection, the killing of the victim would not be self-defense. This is true even if, during the combat, the defendant feared death or serious bodily injury... For mutual combat, there must be a mutual intent and willingness to fight. This intent must be shown by the acts and conduct of the parties and the circumstances surrounding the combat.

Trial tr. pg. 515, ll. 11-15; ll. 20-23. Trial Counsel did not object to this instruction.

Jury charges must be based on the evidence presented. "The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A jury charge is appropriately given if there is any evidence presented that

would support it. To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct.App.1990).

Mutual Combat negates a claim of self-defense. State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919). South Carolina courts have held that there must be "mutual intent and willingness to fight" to constitute mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Id. "Where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder." State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906). The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977).

This Court finds that the jury charge of mutual combat was properly given in this case, and thus Trial Counsel was not ineffective for failing to object to the instruction. There was evidence presented at the trial that there was a dispute between Applicant and the two victims earlier in the day. There was evidence presented that Applicant and the two victims willingly entered into a separate altercation that evening, and they all physically fought each other. More importantly, there was evidence that, at some point during the fight, the victim pulled out a firearm, and Applicant pulled out a firearm in response. Applicant then shot both the victim who pulled the gun and his unarmed younger brother.

Because there was evidence presented that both Applicant and the victim were armed in this fight, the mutual combat instruction was properly given. Any objection to this instruction would have been overruled. Therefore, this Court finds that Trial Counsel was not ineffective for

failing to object to this charge. Because Applicant failed to meet his burden in proving deficiency and prejudice, this allegation is denied and dismissed with prejudice.

Failure to object to judge's conversation with jury foreperson

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to an off-the-record conversation between the trial judge and the jury foreperson meritless. Trial Counsel credibly testified that he saw no reason at the time to object to the conversation or listen to the content. Applicant has failed to prove that the conversation was in any way related to the trial or that it changed the outcome of the trial. See State v. Rowell, 75 S.C. 494, 56 S.E. 23 (1906) (Where a juror spoke privately to the judge while on the bench, but the judge endeavored at once to impart the utmost publicity to what the juror said to him privately by stating what had been asked him, the defendant was not prejudiced.) Because Applicant has failed to meet his burden of proving deficiency and prejudice, this allegation is denied and dismissed with prejudice.

LACK OF SUBJECT MATTER AND PERSONAL JURISDICTION

Applicant alleges that the General Sessions court lacked personal and subject matter jurisdiction. This allegation is meritless and must be dismissed.

A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). In this case, Applicant was indicted by the Barnwell County grand jury. These indictments were true-billed and signed by the foreman of the grand jury. The said indictments contain all the necessary elements of the offense, and further cite to the applicable statute. A

presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. See, e.g., Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Applicant cannot show any irregularity, because the indictments in question are sufficient on their face. Therefore, this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

VI. CONCLUSION

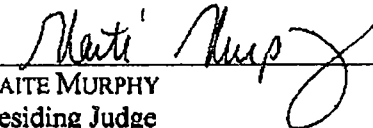
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1 day of March, 2017.



MAITE MURPHY
Presiding Judge
Second Judicial Circuit

St. George, South Carolina