

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

George C. James, Jr., Circuit Court Judge

RECEIVED
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SC SUPREME COURT

TREY LEVAR GARNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001688

A P P E N D I X

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ESSIE M. GARNER - CROSS BY MR. McMAHON

- 1 Q AND THAT'S THE GOLD NOVA?
- 2 A EXCUSE ME?
- 3 Q THE GOLD NOVA?
- 4 A YES. I NEVER SAW DAYON NOR JERMAINE BUT I SAW
- 5 JERMAINE'S CAR.
- 6 Q AND YOU SAW JERMAINE'S CAR, TREY HAD ARRIVED WITH
- 7 WHOEVER WAS IN JERMAINE'S CAR AND PICKED UP VALDIS?
- 8 A NOW, THAT WAS THE SECOND TIME.
- 9 Q THE SECOND TIME?
- 10 A UH-HUH. HE HAD COME HOME AND GOTTEN SOMETHING TO EAT
- 11 AND WAS THERE FOR A LITTLE WHILE. THEN HE LEFT WITH
- 12 JERMAINE IN JERMAINE'S CAR. THEN HE CAME BACK A
- 13 WHILE LATER AND PICKED VALDIS UP.
- 14 Q WHEN HE LEFT THE FIRST TIME WITH JERMAINE IN
- 15 JERMAINE'S CAR, THE "HE" YOU'RE TALKING ABOUT IS
- 16 TREY?
- 17 A YES.
- 18 Q DID VALDIS LEAVE THEN, TOO?
- 19 A NO.
- 20 Q WAS VALDIS HOME ALL DAY?
- 21 A I DON'T KNOW IF VALDIS WAS HOME ALL DAY. AS I SAY,
- 22 I WAS IN CHURCH FOR A WHILE.
- 23 Q NOW, WHEN, IF EVER, DID TREY MOVE BACK TO MEETING
- 24 HOUSE?
- 25 A HE DIDN'T.

ESSIE M. GARNER - CROSS BY MR. McMAHON

- 1 Q HE DID NOT?
- 2 A NO.
- 3 Q DID HE EVER LIVE ON MINERVAVILLE ROAD?
- 4 A I DID ALSO, YES.
- 5 Q DID TREY?
- 6 A WITH ME, YES.
- 7 Q AND WHERE ON MINERVAVILLE DID TREY STAY WITH YOU?
- 8 WHAT ADDRESS?
- 9 A [REDACTED] MINERVAVILLE ROAD.
- 10 Q AT [REDACTED] MINERVAVILLE ROAD --
- 11 A [REDACTED].
- 12 Q I APOLOGIZE.
- 13 A [REDACTED]
- 14 Q [REDACTED] MINERVAVILLE ROAD WOULD BE DOWN MINERVAVILLE
- 15 GOING AWAY FROM MR. BROOKS' STORE, AWAY FROM CABIN
- 16 CREEK GOING TOWARDS DAYON LEMON'S GRANDMOTHER'S
- 17 HOUSE?
- 18 A NO.
- 19 Q WELL, DO YOU KNOW MS. JOSEPHINE NIXON?
- 20 A NO.
- 21 Q THAT LIVES AT [REDACTED] MINERVAVILLE ROAD?
- 22 A NO.
- 23 Q YOU DON'T KNOW DAYON'S GRANDMOTHER?
- 24 A NO.
- 25 MR. McMAHON: THANK YOU, MA'AM. I DON'T HAVE

COLLOQUY

1 ANY FURTHER QUESTIONS.

2 MR. ROGERS: NOTHING FURTHER, YOUR HONOR.

3 THE COURT: YOU MAY STEP DOWN.

4 (WITNESS TO THE SIDE)

5 THE COURT: DO YOU HAVE ANOTHER BRIEF WITNESS
6 BEFORE LUNCH?

7 MR. ROGERS: NO, YOUR HONOR.

8 THE COURT: OKAY. LADIES AND GENTLEMEN, THIS IS
9 A CONVENIENT TIME FOR US TO RECESS FOR LUNCH SO WE'LL
10 DO SO AT THIS TIME. AGAIN, I REMIND YOU OF THE
11 CAUTION. DO NOT DISCUSS THE CASE. ALSO, DO NOT
12 ALLOW YOURSELF TO BE EXPOSED TO ANY TYPE OF MEDIA
13 COVERAGE. HAVE A GOOD LUNCH. PLEASE REPORT DIRECTLY
14 TO YOUR JURY ROOM THIS AFTERNOON AT TWO-THIRTY. AT
15 TWO-THIRTY THIS AFTERNOON, PLEASE REPORT BACK TO YOUR
16 JURY ROOM.

17 (JURY LEAVES THE JURY BOX AT 12:50 P.M.)

18 THE COURT: MR. ROGERS, YOU ARE GOING TO TALK TO
19 YOUR CLIENT ABOUT HIS RIGHT TO TESTIFY AND NOT
20 TESTIFY DURING THE LUNCH RECESS?

21 MR. ROGERS: YES, YOUR HONOR.

22 THE COURT: OKAY. ANY OTHER MATTERS WE NEED TO
23 ADDRESS PRIOR TO LUNCH?

24 MR. McMAHON: NONE FROM THE STATE, YOUR HONOR.

25 MR. ROGERS: NOTHING, YOUR HONOR.

COLLOQUY

1 THE COURT: COURT IS IN RECESS UNTIL TWO-THIRTY.
2 (LUNCHEON RECESS)

3 (COURT RESUMES AT 2:58 P.M.)

4 THE COURT: MR. ROGERS, DURING THE LUNCH RECESS,
5 HAVE YOU HAD SUFFICIENT TIME AND OPPORTUNITY TO
6 DISCUSS WITH YOUR CLIENT HIS RIGHT TO TESTIFY AND NOT
7 TESTIFY?

8 MR. ROGERS: YES, YOUR HONOR, I HAVE. I'VE
9 DISCUSSED IT WITH HIM AT LENGTH AND TOGETHER WITH HIM
10 AND HIS MOTHER. AND IN LIGHT OF OUR DISCUSSIONS WE
11 HAVE DECIDED THAT MR. GARNER WILL NOT TESTIFY.

12 THE COURT: OKAY. MR. GARNER, I NEED TO ASK YOU
13 SOME QUESTIONS REGARDING YOUR DECISION. YOU'VE HEARD
14 ME INQUIRE OF YOUR LAWYER AS TO WHETHER OR NOT HE HAS
15 EXPLAINED TO YOU YOUR RIGHT TO TESTIFY AND TO NOT
16 TESTIFY. DO YOU UNDERSTAND THAT YOU HAVE AN ABSOLUTE
17 RIGHT, A CONSTITUTIONAL RIGHT TO REMAIN SILENT WHEN
18 YOU ARE CHARGED WITH A CRIMINAL OFFENSE?

19 DEPENDANT GARNER: YES, SIR.

20 THE COURT: DO YOU UNDERSTAND THAT YOU CAN NEVER
21 BE REQUIRED TO TESTIFY NOR TO MAKE ANY STATEMENT NOR
22 TO ANSWER ANY QUESTIONS AS THEY RELATE TO CRIMINAL
23 CHARGES WHICH ARE ALLEGED AGAINST YOU BY THE STATE?

24 DEPENDANT GARNER: YES, SIR.

25 THE COURT: DO YOU UNDERSTAND THAT DURING THE

COLLOQUY

1 TRIAL OF A CASE WHERE YOU ARE THE DEFENDANT YOU HAVE
2 TO MAKE THE DECISION AS TO WHETHER OR NOT YOU WILL
3 TESTIFY OR WILL NOT TESTIFY?

4 DEFENDANT GARNER: YES, SIR.

5 THE COURT: DO YOU UNDERSTAND THAT WHILE IT'S
6 PERFECTLY NATURAL THAT YOU WOULD SEEK YOUR LAWYER'S
7 ADVICE AND PERHAPS THE ADVICE OF FAMILY OR FRIENDS IN
8 MAKING YOUR DECISION THAT YOU REALLY CAN'T JUST RELY
9 ON WHAT THEY TELL YOU? YOU HAVE TO DECIDE FOR
10 YOURSELF AND YOU CAN CONSIDER THEIR ADVICE BUT YOU
11 HAVE TO DECIDE FOR YOURSELF WHETHER OR NOT YOU WISH
12 TO TESTIFY OR WISH NOT TO TESTIFY.

13 DEFENDANT GARNER: YES, SIR.

14 THE COURT: NOW, DO YOU UNDERSTAND THAT DURING
15 THE TRIAL OF A CRIMINAL CASE WHEN IT COMES YOUR TURN
16 TO PRESENT EVIDENCE THAT THAT IS THE ONLY TIME AND
17 THAT IS THE ONLY OPPORTUNITY THAT YOU WILL HAVE TO
18 TESTIFY IN THE TRIAL OF THIS CASE IF YOU WISH TO?

19 DEFENDANT GARNER: YES, SIR.

20 THE COURT: HAVE YOU AND YOUR LAWYER DISCUSSED
21 THE ADVANTAGES OF TESTIFYING AND THE ADVANTAGES OR
22 DISADVANTAGES OF NOT TESTIFYING?

23 DEFENDANT GARNER: YES, SIR.

24 THE COURT: DO YOU UNDERSTAND WHAT THE
25 ADVANTAGES AND DISADVANTAGES ARE AS THEY RELATE BOTH

COLLOQUY

1 TO TESTIFYING AND NOT TESTIFYING?

2 DEFENDANT GARNER: YES, SIR.

3 THE COURT: DO YOU UNDERSTAND THAT YOU CANNOT
4 WAIT UNTIL AFTER THE CASE HAS BEEN DECIDED BY THE
5 JURY AND THEN CHANGE YOUR DECISION AS TO WHETHER OR
6 NOT YOU WILL TESTIFY?

7 DEFENDANT GARNER: YES, SIR.

8 THE COURT: WHAT I'M SAYING IS IF YOU MAKE THE
9 DECISION NOT TO TESTIFY, IF THE CASE IS DECIDED
10 DIFFERENTLY THAN YOU WISH THAT IT WERE YOU DON'T GET
11 TO THEN MAKE THE DECISION THAT YOU'D PREFER TO TELL
12 THE JURY YOUR SIDE OF THE STORY OR GIVE THEM ANY
13 TESTIMONY OR EVIDENCE.

14 DEFENDANT GARNER: YES, SIR.

15 THE COURT: HAVE YOU HAD PLENTY OF TIME TO
16 CONSIDER YOUR DECISION AS TO WHETHER OR NOT YOU WILL
17 TESTIFY?

18 DEFENDANT GARNER: YES, SIR.

19 THE COURT: DO YOU UNDERSTAND THAT IF YOU DON'T
20 TESTIFY I WILL INSTRUCT THE JURY THAT THEY CANNOT
21 HOLD THAT AGAINST YOU IN ANY FASHION?

22 DEFENDANT GARNER: YES, SIR.

23 THE COURT: BUT YOU UNDERSTAND THAT IF YOU DO
24 NOT TESTIFY YOU WILL NOT BE ABLE TO PROVIDE THE JURY
25 WITH ANY TESTIMONY OR EVIDENCE THAT YOU WOULD GIVE

COLLOQUY

1 THEM IF YOU CHOSE TO TESTIFY?

2 DEFENDANT GARNER: YES, SIR.

3 THE COURT: HAVE YOU ARRIVED AT A DECISION AS TO
4 WHETHER OR NOT YOU WILL TESTIFY?

5 DEFENDANT GARNER: YES, SIR.

6 THE COURT: NOW, YOUR LAWYER INDICATED THAT YOU
7 DID NOT WISH TO. IS THAT YOUR DECISION?

8 DEFENDANT GARNER: YES, SIR.

9 THE COURT: IS THAT A DECISION THAT YOU HAVE
10 MADE OF YOUR OWN FREE WILL AND ACCORD?

11 DEFENDANT GARNER: YES, SIR.

12 THE COURT: HAS ANYONE PRESSURED YOU INTO
13 ARRIVING AT THAT DECISION?

14 DEFENDANT GARNER: NO, SIR.

15 THE COURT: HAS ANYONE THREATENED YOU OR COERCED
16 YOU IN ANY WAY?

17 DEFENDANT GARNER: NO, SIR.

18 THE COURT: IS THE DECISION THAT YOU REACHED ONE
19 THAT YOU HAVE CAREFULLY THOUGHT ABOUT AND MADE THE
20 DECISION NOT TO TESTIFY?

21 DEFENDANT GARNER: YES, SIR.

22 THE COURT: UNDERSTANDING THAT THIS IS THE ONLY
23 OPPORTUNITY THAT YOU WILL HAVE?

24 DEFENDANT GARNER: YES, SIR.

25 THE COURT: AND YOU STILL WISH NOT TO TESTIFY?

COLLOQUY

1 DEFENDANT GARNER: YES, SIR.

2 THE COURT: OKAY. ANY OTHER WITNESSES?

3 MR. ROGERS: NO, YOUR HONOR.

4 THE COURT: MR. GARNER, DO YOU HAVE OTHER
5 WITNESSES YOU'D LIKE FOR YOUR LAWYER TO CALL ON YOUR
6 BEHALF?

7 DEFENDANT GARNER: NO, SIR.

8 THE COURT: OKAY. WHAT ABOUT REQUESTS TO
9 CHARGE? WE'LL START WITH YOU, MR. ROGERS.

10 MR. ROGERS: OH, ALL RIGHT. JUDGE, I WOULD
11 REQUEST THAT YOU CHARGE THE DEFINITION OF AIDER AND
12 ABETTOR, HAND OF ONE IS THE HAND OF ALL, LIABILITY
13 FOR ACCOMPLICE ACTS. I WOULD REQUEST THAT YOU GIVE
14 AN INSTRUCTION ON THE IMPEACHMENT VALUE OF PRIOR --
15 A WITNESS' PRIOR RECORD. I BELIEVE THAT'S ALL OF THE
16 SPECIFIC REQUESTS THAT I WOULD HAVE.

17 THE COURT: ALL RIGHT.

18 MR. ROGERS: AND, OF COURSE, THE FAILURE OF THE
19 DEFENDANT TO TESTIFY.

20 THE COURT: HIS ELECTION NOT TO TESTIFY?

21 MR. ROGERS: HIS ELECTION NOT TO TESTIFY, YES,
22 SIR.

23 THE COURT: OKAY. SOLICITOR.

24 MR. McMAHON: YOUR HONOR, THE ONLY ONE I HAVE IS
25 THE CHARGE UNDER GILBERT AND IF MY UNDERSTANDING IS

COLLOQUY

1 CORRECT THAT'S YOUR GENERAL CHARGE ANYWAY.

2 THE COURT: AS TO ACCOMPLICE LIABILITY?

3 MR. McMAHON: YES, SIR.

4 THE COURT: YES, SIR.

5 MR. McMAHON: THAT WOULD BE ALL I'D ASK
6 SPECIFICALLY.

7 THE COURT: OKAY.

8 MR. McMAHON: THANK YOU, YOUR HONOR.

9 THE COURT: DOES THE STATE WISH TO OPEN?

10 MR. McMAHON: NO, SIR, WE'LL WAIVE OPENING.

11 THE COURT: DO YOU REQUIRE THE STATE TO OPEN?

12 MR. ROGERS: NO, YOUR HONOR.

13 THE COURT: HOW MUCH TIME DO YOU THINK Y'ALL
14 WILL NEED TO ARGUE?

15 MR. ROGERS: I WILL TAKE ABOUT TWENTY MINUTES.

16 MR. McMAHON: I WILL BE RIGHT AROUND THERE.

17 THE COURT: OKAY.

18 MR. McMAHON: GIVE OR TAKE A FEW.

19 THE COURT: I'M JUST TRYING TO JUDGE THE TIME.
20 THAT'S FINE. ANY OTHER MATTERS WE NEED TO ADDRESS
21 BEFORE WE BRING THE JURY IN?

22 MR. McMAHON: NOTHING FROM THE STATE, YOUR
23 HONOR.

24 THE COURT: THERE'S NO REPLY?

25 MR. McMAHON: NO, SIR, NOTHING IN REPLY.

CLOSING ARGUMENT - MR. ROGERS

1 THE COURT: ALL RIGHT. BRING THE JURY IN,
2 PLEASE, SIR.

3 (JURY RETURNS TO THE JURY BOX AT 3:04 P.M.)

4 BAILIFF: THE JURY IS PRESENT, YOUR HONOR.

5 THE COURT: THANK YOU, SIR. GOOD AFTERNOON,
6 LADIES AND GENTLEMEN. AS YOU KNOW, WHEN WE RECESSED
7 FOR LUNCH THE DEFENDANT HAD BEEN PRESENTING EVIDENCE.
8 DOES THE DEFENDANT WISH TO OFFER ANY FURTHER
9 TESTIMONY OR OTHER EVIDENCE?

10 MR. ROGERS: THE DEFENDANT RESTS AT THIS TIME.

11 THE COURT: DOES THE STATE HAVE ANY REPLY?

12 MR. McMAHON: NO, YOUR HONOR.

13 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN,
14 THAT IS ALL OF THE TESTIMONY OR OTHER EVIDENCE TO BE
15 OFFERED IN THE TRIAL OF THE CASE AND AS I TOLD YOU AT
16 THE BEGINNING THAT MEANS THAT THE BALANCE OF THE
17 TRIAL WILL CONSIST OF THE FINAL ARGUMENTS OR
18 SUMMATIONS OF THE LAWYERS AFTER WHICH I WILL GIVE YOU
19 THE LEGAL INSTRUCTION THAT YOU WILL APPLY TO THE
20 FACTS AS YOU DETERMINE THOSE FACTS TO BE BASED UPON
21 YOUR VIEW OF THE EVIDENCE. SO, I WOULD SIMPLY ASK AT
22 THIS TIME THAT YOU PLEASE GIVE THE LAWYERS YOUR
23 CAREFUL ATTENTION AS THEY GIVE YOU THEIR FINAL
24 ARGUMENTS OR SUMMATIONS. MR. ROGERS.

25 MR. ROGERS: MAY IT PLEASE THE COURT. LADIES

CLOSING ARGUMENT - MR. ROGERS

1 AND GENTLEMEN, THE MURDERER OF JOSEPH BROOKS IS DAYON
2 LEMON. I WANT THAT TO SINK IN A LITTLE BIT BECAUSE
3 I THINK OVER THE LAST COUPLE OF DAYS WE'VE LOST SIGHT
4 OF THAT. THE ONLY QUESTION YOU HAVE TO DECIDE IS
5 WHAT, IF ANYTHING, TREY DID.

6 NOW, I TOLD YOU INITIALLY THAT THE STATE HAD THE
7 BURDEN OF PROVING TREY GUILTY OF THESE CHARGES. TREY
8 DOESN'T HAVE TO PROVE ANYTHING TO YOU. AND HIS HONOR
9 WILL CHARGE YOU THAT THE FACT THAT TREY GARNER DID
10 NOT TESTIFY YOU CANNOT IN ANY WAY HOLD THAT AGAINST
11 HIM. IN FACT, YOU HAVE HEARD FROM TREY THROUGH THE
12 INTRODUCTION OF HIS STATEMENT BY THE STATE IN THIS
13 CASE. SO, YOU CAN'T HOLD THAT AGAINST HIM AND YOU
14 HAVE TO JUDGE THIS CASE BASED ON THE EVIDENCE THAT
15 YOU HEARD.

16 NOW, LET'S TALK A LITTLE BIT ABOUT THAT
17 EVIDENCE. IT IS UNDISPUTED THAT DAYON LEMON
18 COMMITTED THIS MURDER. WHAT YOU HAVE TO DECIDE IS
19 WHETHER TREY WAS INVOLVED AT ALL. NOW, LET'S LOOK AT
20 THE TESTIMONY FOR A MOMENT. WE HAD SEVEN WITNESSES
21 TAKE THE STAND BEFORE YOU HEARD ANY WITNESS THAT
22 IMPLICATED TREY. AND THE TWO WITNESSES THAT DID
23 IMPLICATE TREY WERE THE TWO WITNESSES THAT ADMITTED
24 THEIR INVOLVEMENT -- DAYON AND JERMAINE. SO, YOU
25 DIDN'T HEAR OR SEE ANY OBJECTIVE EVIDENCE. YOU HAVE

CLOSING ARGUMENT - MR. ROGERS

1 NO FINGERPRINTS, THERE WERE NO CAR TIRE TRACKS
2 INTRODUCED, THERE WAS NO SURVEILLANCE, PHOTO OR VIDEO
3 FROM JOE BROOKS' STORE THAT COULD HAVE TOLD YOU WHO
4 CAME IN AND OUT OF THE STORE ON THAT SUNDAY. ALL OF
5 THOSE WERE MISSING. AND THIS INVESTIGATION WENT ON
6 FOR APPROXIMATELY FIVE MONTHS BEFORE AN ARREST WAS
7 MADE. FIVE MONTHS AFTER THE KILLING. AND YOU CAN
8 IMAGINE THE FRUSTRATION THE SHERIFF'S DEPARTMENT WAS
9 GOING THROUGH BECAUSE THEY DIDN'T HAVE ANY LEADS,
10 DIDN'T HAVE ANY CONCRETE LEADS. I BELIEVE THE
11 TESTIMONY WAS THAT THEY DID HAVE SEVERAL SUSPECTS BUT
12 THAT DIDN'T PAN OUT. I BELIEVE THE TESTIMONY FROM
13 AGENT PAAVEL WAS ALSO THAT, YOU KNOW, TWENTY GUNS
14 WERE SUBMITTED TO HIM FOR COMPARISON. SO, THEY
15 REALLY WERE INTERESTED IN SOLVING THIS CRIME. OF
16 COURSE, THEY WERE. WELL, WHAT HAPPENS, WHAT'S THE
17 CHRONOLOGY? WELL, THEY FIRST TALK TO EVERYBODY --
18 DAYON, JERMAINE AND TREY. DAYON AND JERMAINE SAY WE
19 DON'T KNOW ANYTHING ABOUT IT. TREY SAYS THE SAME
20 THING. THEN SOME FIVE MONTHS LATER THEY GO TO
21 JERMAINE. WE DON'T KNOW WHY. WE DON'T KNOW WHY THEY
22 WENT TO DAYON BUT THEY DID. ON MARCH 20TH THEY GO
23 AND TAKE THE INCRIMINATING STATEMENTS FROM THOSE TWO
24 ACCOMPLICES, THOSE TWO CO-CONSPIRATORS BECAUSE,
25 REMEMBER, THEY'VE ALREADY PLED GUILTY. THEY HAVE

CLOSING ARGUMENT - MR. ROGERS

1 ADMITTED THAT THEY AGREED -- DAYON AND JERMAINE. SO,
2 THEY GO AND LOW AND BEHOLD FIVE MONTHS LATER EACH OF
3 THEM SEPARATELY WITHOUT ANY CONTACT WITH THE OTHER
4 PRESUMABLY DECIDES ON THIS DAY THAT THEY ARE BOTH
5 GOING TO FESS UP.

6 NOW, WHEN YOU WERE SELECTED FOR JURY SERVICE,
7 YOU WEREN'T ASKED TO LEAVE YOUR COMMON SENSE AT THE
8 DOOR. SOMETHING HAPPENED. I DON'T KNOW WHAT IT WAS
9 BUT SOMETHING HAPPENED AND YOU DON'T KNOW WHAT IT
10 WAS. THE OFFICERS SAY NOTHING HAPPENED. I MEAN
11 OFFICER HARRIS SAYS, WELL, I CAME IN AND I SAID, YOU
12 KNOW, WITH MY NEW ENERGY I'M GOING TO SOLVE THIS CASE
13 AND GET JUSTICE FOR THE BROOKS. AND THAT CHANGED
14 THAT CRIMINAL'S BEHAVIOR, JERMAINE'S, FOR THE PAST
15 FIVE MONTHS TO THEN SUDDENLY WANT TO CONFESS HIS
16 CRIME AND IMPLICATE TREY. SAME THING WITH DAYON.
17 FIVE MONTHS LATER, MAINTAINED HIS INNOCENCE FOR FIVE
18 MONTHS, AND THEN LOW AND BEHOLD ON THE SAME DAY
19 SOMETHING HAPPENED. AND THE REASON I WENT INTO THE
20 QUESTIONS ABOUT, YOU KNOW, THE CAPABILITY OF TAPING
21 THE INTERROGATION SO WE'D KNOW WHAT HAPPENED. WE
22 DON'T KNOW WHAT HAPPENED. AND YOU DON'T EXPECT THE
23 OFFICERS TO COME IN HERE AND TELL YOU I TOLD 'EM IF
24 THEY DIDN'T TELL US WHAT WE WANTED TO HEAR THEY ARE
25 GOING TO BE ON TRIAL FOR THE DEATH PENALTY, ON TRIAL

CLOSING ARGUMENT - MR. ROGERS

1 FOR THEIR LIVES. THEY WEREN'T GOING TO TELL YOU
2 THAT. BUT THE ABSENCE OF A TAPE AND ABSENCE OF ANY
3 KIND OF CORROBORATIVE, OBJECTIVE EVIDENCE ABOUT WHAT
4 HAPPENED DURING THE CIRCUMSTANCES OF THE TAKING OF
5 THOSE TWO PEOPLE'S STATEMENT I THINK IS IMPORTANT.
6 I THINK IT'S CRUCIAL TO THIS WHOLE CASE BECAUSE HOW
7 SIMPLE, HOW EASY WAS IT FOR THEM TO SAY, OH, YEAH,
8 TREY WAS INVOLVED WHEN ALL TREY MAY HAVE DONE THAT
9 DAY WAS GONE IN THE STORE. AND THE PLAN AS WE KNOW
10 WAS A PLAN BETWEEN JERMAINE AND DAYON. SO, THAT IS
11 A REASON FOR YOU TO DOUBT THAT PIECE OF EVIDENCE.
12 THE CIRCUMSTANCES AROUND THEM GIVING THE STATEMENT.
13 ANOTHER REASON FOR YOU TO DOUBT THEIR TESTIMONY IS
14 THE DEAL AND THE DEALS FOR BOTH OF THEM. AND I WON'T
15 BELABOR THE POINT WITH YOU AGAIN. I THINK I WENT
16 THROUGH THAT IN DEPTH WITH BOTH WITNESSES, BUT
17 SUFFICE IT TO SAY THEY EACH HAD A MOTIVE FOR
18 TESTIFYING THE WAY THEY DID. JERMAINE GOT A TWENTY
19 YEAR SENTENCE, NO MURDER AND NO DEATH PENALTY. DAYON
20 GOT A THIRTY YEAR SENTENCE, NO LIFE WITHOUT PAROLE
21 WHICH IS WHAT HE COULD HAVE GOTTEN OR THE DEATH
22 PENALTY. AND I SUBMIT TO YOU, LADIES AND GENTLEMEN,
23 THAT THOSE ARE SIGNIFICANT FACTS THAT WOULD MOTIVATE
24 SOMEBODY TO NOT TELL THE TRUTH. NOW, IT'S NOT A
25 SITUATION WHERE IN ORDER FOR THEM TO GET A DEAL THEY

CLOSING ARGUMENT - MR. ROGERS

1 WERE GOING TO SAY VALDIS WAS IN IT, WAS AT THE STORE,
2 BECAUSE VALDIS WASN'T AT THE STORE THAT DAY SO THEY
3 COULDN'T PUT VALDIS IN IT. IT WASN'T A SITUATION
4 WHERE THEY SAID SCOOTER BAIT WAS INVOLVED BECAUSE
5 THEY KNEW SCOOTER BAIT WASN'T AT THE STORE THAT DAY.
6 SO, IN ORDER FOR THEM TO GET WHAT THEY NEEDED LOW AND
7 BEHOLD THEY HAD TO PUT TREY IN IT. AND, BY THE WAY,
8 WHERE WERE VALDIS AND SCOOTER BAIT, TASHAN? THE
9 GOVERNMENT COULD HAVE BROUGHT -- THE STATE COULD HAVE
10 BROUGHT THEM IN TO SAY TO YOU, YES, WE ALL AGREED BUT
11 THEN AT SOME POINT THEY BACKED OUT. AGAIN, THE LACK
12 OF EVIDENCE CAN GIVE YOU REASON TO DOUBT. SO, THEY
13 WEREN'T BEFORE YOU. WE ONLY HAD THE TESTIMONY OF THE
14 TWO PEOPLE THAT ADMITTED THEIR INVOLVEMENT WHO HAD A
15 MOTIVE TO PUT TREY IN IT. WE DON'T KNOW WHAT BAD
16 BLOOD MAY HAVE BEEN BETWEEN THEM AND TREY, WHAT HAD
17 GONE ON BEFORE AND THIS WAS A WAY TO GET TREY OUT OF
18 THE WAY. WE DON'T KNOW ANY OF THAT BECAUSE WE DON'T
19 KNOW WHAT WAS SAID AT THAT INTERROGATION. AND SIMPLY
20 IF WE HAD HAD A CASSETTE TAPE RECORDING OF THAT
21 INTERROGATION THOSE QUESTIONS WOULD BE ANSWERED. YOU
22 COULD SAY TO YOURSELVES, WELL, I KNOW THAT DIDN'T
23 HAPPEN BECAUSE I'VE LISTENED TO THE TAPE AND I KNOW
24 THAT THE OFFICERS DIDN'T PUT ANY UNDUE COERCION ON
25 THEM. IT WAS AS THEY SAID, A CHANGE OF CONSCIENCE,

CLOSING ARGUMENT - MR. ROGERS

1 A CHANGE OF HEART TO FINALLY COME CLEAN ABOUT THEIR
2 INVOLVEMENT. THEY COULD HAVE DONE THAT BUT THEY DID
3 SOMETHING ELSE. THEY PUT TREY IN IT. AND WHY?
4 BECAUSE TREY HAD GONE IN THE STORE THAT DAY. SIMPLE
5 ENOUGH.

6 NOW, A SECOND REASON. THAT'S THE SECOND REASON
7 TO DOUBT, THE DEAL THAT THEY GOT. BUT A THIRD REASON
8 TO DOUBT IS WHAT YOU HEARD FROM THEM. YOU HAVE HEARD
9 IN THIS COURTROOM THREE DIFFERENT VERSIONS OF THESE
10 EVENTS. THE FIRST VERSION FROM BOTH DAYON AND
11 JERMAINE BACK IN JANUARY SHORTLY AFTER THIS OCCURRED
12 OR DECEMBER WAS, YOU KNOW, WE WERE AT THE STORE BUT
13 WE DIDN'T HAVE ANYTHING TO DO WITH IT. AND THEN
14 MONTHS PASSED AND THEN THEY COME UP WITH THE WRITTEN
15 STATEMENT THAT TREY WAS IN IT. AND THEN MONTHS PASS
16 AND THEY COME TO COURT HERE YESTERDAY AND TELL YOU A
17 THIRD VERSION. THEY TALK ABOUT VALDIS AND TASHAN
18 BEING INVOLVED IN THE PLANNING. THEY HAD NEVER SAID
19 THAT BEFORE. IN COURT WAS THE FIRST TIME THEY HAD
20 EVER SAID THAT. A THIRD VERSION OF THE STATEMENT.
21 THEY WERE SPECIFICALLY ASKED TO EACH OF THEM DO YOU
22 HAVE ANYTHING ELSE YOU WANT TO ADD TO THE STATEMENT.
23 NO, THAT'S IT. BUT THEN WHEN THEY GOT TO COURT THEY
24 MADE THEIR STATEMENTS BETTER. SO, YOU REALLY HAVE
25 THREE DIFFERENT VERSIONS OF WHAT OCCURRED. THE

CLOSING ARGUMENT - MR. ROGERS

1 FIRST, WE DON'T KNOW ANYTHING. THE SECOND, YEAH, WE
2 DID IT, TREY PUT US UP TO IT, TREY PLANNED IT. AND
3 THEN THE THIRD VERSION IS, WELL, REALLY VALDIS AND
4 SCOOTER BAIT AND ALL PLANNED IT ALONG WITH TREY AND
5 US. ANOTHER REASON FOR YOU TO DOUBT.

6 NOW, BOTH JERMAINE AND DAYON WERE FAMILIAR WITH
7 THE STORE. THEY BOTH TESTIFIED, YOU KNOW, THEY HAD
8 BEEN THERE ON SUNDAYS, KNEW MR. BROOKS COUNTED THE
9 MONEY. THINK OF THE INCONSISTENCIES BETWEEN THEIR
10 STATEMENTS. JERMAINE SAYS, YOU KNOW, DAYON GOT OUT
11 OF THE CAR, I IMMEDIATELY DROVE OFF AND A VERY SHORT
12 TIME LATER DAYON COMES RUNNING UP AND I DIDN'T THINK
13 HE HAD DONE ANYTHING BECAUSE IT HAPPENED SO FAST AND
14 HE JUMPED IN THE CAR AND SAID, YEAH, I SHOT MR.
15 BROOKS. THAT'S WHAT JERMAINE SAID. BUT DAYON SAID,
16 WELL, YOU KNOW, THEY LET ME OUT, I WAS SUPPOSED TO
17 WAIT FOR THEM TO BEEP TO GIVE ME THE SIGNAL, I HEARD
18 THE BEEP BUT IT DIDN'T MEAN ANYTHING BECAUSE THE
19 COAST WASN'T CLEAR SO I WAITED TEN OR FIFTEEN MINUTES
20 UNTIL I SAW THAT THE COAST WAS CLEAR AND THEN I WENT
21 IN. AND AGAIN HE WENT IN AND SAID I WENT IN, I SAW
22 MR. BROOKS, I SHOT, I PANICKED, YOU KNOW, I KNEW I
23 WAS DOING SOMETHING WRONG; I WENT AROUND THE COUNTER,
24 I LOOKED FOR A SECOND AND I RAN OUT BECAUSE I WAS
25 SCARED. NOTHING LIKE I WANT THE MONEY, I'M HERE TO

CLOSING ARGUMENT - MR. ROGERS

1 GET THE MONEY, GIVE UP THE MONEY. HE JUST GOES IN
2 BLASTING. COLD BLOODIED MURDER. AND EVEN HE SAID
3 THE AGREEMENT WAS ONLY TO ROB. AND I'LL TALK TO YOU
4 A LITTLE BIT LATER ABOUT WHY THAT IS SIGNIFICANT.
5 BUT DAYON HAS GIVEN INCONSISTENT STATEMENTS. AND
6 EACH OF THEM, LADIES AND GENTLEMEN, BY THEMSELVES MAY
7 NOT BE SIGNIFICANT BUT THE CUMULATIVE EFFECT OF ALL
8 THESE INCONSISTENCIES I SUBMIT TO YOU RISES TO THE
9 LEVEL OF REASONABLE DOUBT. DAYON SAID -- I BELIEVE
10 HE TESTIFIED THAT -- EXCUSE ME. IN HIS STATEMENT HE
11 SAID THAT WHEN HE WENT BY SCOOTER BAIT'S, SCOOTER
12 BAIT WASN'T HOME. I BELIEVE WHEN HE TESTIFIED HE
13 SAID HE WAS HOME. AND I MAY BE MISTAKEN ON WHICH WAY
14 HE SAID IT BUT SUFFICE IT TO SAY THAT HE HAS TOLD
15 THAT VERSION OF THE STORY AT LEAST DIFFERENT ON TWO
16 DIFFERENT OCCASIONS.

17 NOW, LET ME TALK TO YOU A LITTLE BIT ABOUT THE
18 LAW. HIS HONOR WILL CHARGE YOU ON THE LAW AND I
19 ADMONISH YOU TO TAKE THE LAW AS HIS HONOR TELLS YOU
20 THAT IT IS. BUT IN SOUTH CAROLINA AND IN OUR
21 CRIMINAL JUSTICE SYSTEM MERE PRESENCE TO WHERE A
22 CRIME HAS BEEN COMMITTED IS NOT ENOUGH TO HOLD THAT
23 PERSON ACCOUNTABLE FOR THE CRIME. SO, WE HAVE
24 SEVERAL THINGS THAT WE HAVE TO ANALYZE HERE. FIRST,
25 WE HAVE TO ANALYZE IF TREY WAS WITH THEM AT ALL.

CLOSING ARGUMENT - MR. ROGERS

1 NOW, TREY SAYS WE WENT IN AND I PAID FOR THE GAS AND
2 THEN THEY DROPPED ME OFF OR THEY TOOK ME SOME PLACE
3 AND THEY WENT TO GET REEFER AND THEN THEY CAME BACK
4 TO HIM. JERMAINE SAYS -- WHEN I TALKED TO JERMAINE
5 WHEN HE WAS ON THE STAND, JERMAINE SAYS, WELL, I WAS
6 INVOLVED IN IT AND MY ROLE WAS THE GETAWAY DRIVER, I
7 ASKED HIM SPECIFICALLY WHAT DID HE DO TO AID DURING
8 THE COMMISSION OF THE CRIME AND I DON'T BELIEVE HE
9 GAVE AN ANSWER. HIS ANSWER WAS HE WAS SUPPOSED TO BE
10 THE GETAWAY PERSON. NOW, THE GOVERNMENT IS
11 PROCEEDING ON THE THEORY OF ACCOMPLICE LIABILITY.
12 THAT MEANS THAT IN ORDER TO CONVICT TREY OF THE
13 MURDER YOU HAVE TO FIND THAT HE WAS PRESENT AND
14 AIDING AND ABETTING. NOW, THE CLASSIC EXAMPLE OF
15 THAT IS LET'S SAY ME AND A FRIEND AGREE TO ROB A DRUG
16 STORE. HE GOES IN AND I STAY OUTSIDE IN THE PARKING
17 LOT IN THE CAR. I'M THE LOOKOUT AND I'M THE GETAWAY
18 DRIVER. MY ROLE IS AS AN AIDER AND ABETTOR BECAUSE
19 I AM PRESENT ON THE SCENE, I KNOW WHAT HE'S GOING TO
20 DO AND I AIDED HIM BY BEING THE LOOKOUT. I COULD
21 HAVE WARNED HIM. I ASKED JERMAINE, WELL, WHAT COULD
22 YOU HAVE DONE -- HE WAS CHARGED WITH MURDER REMEMBER
23 -- WHAT COULD YOU HAVE DONE TO HAVE AIDED DAYON AND
24 I BELIEVE HIS RESPONSE WAS NOTHING. HE COULDN'T HAVE
25 DONE ANYTHING FROM THAT LOCATION. AND THAT'S WHY I

CLOSING ARGUMENT - MR. ROGERS

1 PUT THESE PHOTOGRAPHS INTO EVIDENCE BECAUSE HE'S TOO
2 FAR AWAY TO AID. JERMAINE IS TOO FAR AWAY TO AID.
3 AND APPARENTLY THE STATE FELT THE SAME WAY BECAUSE
4 THEY DISMISSED THE MURDER CHARGES AGAINST JERMAINE.
5 TREY SAYS IN HIS STATEMENT AND BY HIS ENTRY OF A PLEA
6 OF NOT GUILTY I DIDN'T DO THIS, I WASN'T THERE AND I
7 DON'T KNOW ANYTHING ABOUT IT. OR I DIDN'T DO THIS
8 BECAUSE I DIDN'T KNOW ANYTHING ABOUT IT. I'LL GIVE
9 YOU ANOTHER EXAMPLE. LET'S ASSUME I'M STANDING IN
10 FRONT OF PEOPLE'S DRUG STORE AND I HEAR SOMEONE SAY
11 I'M GOING IN AND SHOPLIFT AND I BEING THE CAVALIER
12 GUY THAT I AM SAY I'M GOING TO WATCH THIS
13 SHOPLIFTING. I HAVE KNOWLEDGE OF THE CRIME, I GO IN
14 THE STORE, I'M PRESENT BUT I'M NOT GUILTY OF
15 ANYTHING. WHY? BECAUSE I DIDN'T DO ANYTHING TO AID
16 AND ABET. I WAS NOT HIS LOOKOUT, I WAS NOT THE
17 PERSON THAT WAS GOING TO WARN HIM IF ANYTHING WENT
18 WRONG. I WAS JUST THERE. AND THAT'S AN EXAMPLE OF
19 MERE PRESENCE AT THE SCENE OF A CRIME. EVEN IF HE
20 HAD KNOWLEDGE THAT THE CRIME WAS BEING COMMITTED DOES
21 NOT CONVICT YOU OF THAT CRIME. YOU HAVE TO DO
22 SOMETHING. WHAT'S THE TESTIMONY FROM EVERYBODY THAT
23 TREY DID? TREY WENT IN THE STORE AND BOUGHT GAS AND
24 LEFT. NOW, THEY WANT TO CHARACTERIZE THAT AS SCOPING
25 IT OUT. WELL, THAT COULDN'T HAVE AIDED DAYON BECAUSE

CLOSING ARGUMENT - MR. ROGERS

1 ACCORDING TO DAYON HE DIDN'T GO INTO THE STORE UNTIL
2 SOME FIFTEEN OR TWENTY MINUTES LATER OR TEN OR
3 FIFTEEN MINUTES LATER. SO, EVEN IF YOU BELIEVE THAT
4 TREY WENT INTO THE STORE, THAT DIDN'T AID. EVEN IF
5 YOU BELIEVE THAT TREY WAS SITTING IN THE CAR WITH
6 JERMAINE, THAT DIDN'T AID.

7 NOW, THERE'S SOMETHING IN THE LAW CALLED
8 CONSTRUCTIVE PRESENCE AND CONSTRUCTIVE PRESENCE
9 SIMPLY DEFINED IS WHERE THE PERSON IS PHYSICALLY SOME
10 DISTANCE AWAY BUT HE DOES HAVE A ROLE AS EITHER THE
11 LOOKOUT, THE GETAWAY DRIVER OR THE SIGNALER. AND
12 NOBODY TESTIFIED THAT THAT WAS WHAT JERMAINE'S ROLE
13 WAS. AND IF THAT WASN'T JERMAINE'S ROLE, IF YOU
14 BELIEVE THAT TREY WAS IN THE CAR, THEN THAT COULDN'T
15 HAVE BEEN TREY'S ROLE.

16 I'M IN AN AWKWARD POSITION BECAUSE I HAVE TO
17 ARGUE TO YOU INCONSISTENT THEORIES BUT BECAUSE I
18 DON'T KNOW WHAT YOU ARE THINKING AND IN ORDER FOR ME
19 TO DEFEND TREY TO THE BEST OF MY ABILITY I HAVE TO
20 COVER ALL POSSIBILITIES. SO, THE FIRST POSSIBILITY
21 IS TREY SAYS I DIDN'T DO IT AND I WASN'T THERE. IF
22 YOU FIND THAT TO BE THE CASE, THEN YOU HAVE TO RETURN
23 A VERDICT OF NOT GUILTY BECAUSE HE WASN'T THERE.
24 THEY JUST LIED ON HIM TO GET THE DEAL. SECOND
25 POSSIBILITY IS TREY WAS THERE BUT HE DIDN'T KNOW WHAT

CLOSING ARGUMENT - MR. ROGERS

1 WAS GOING ON. AND IF YOU FIND THAT THAT WAS THE
2 RESULT THEN YOU STILL HAVE TO FIND HIM NOT GUILTY
3 BECAUSE THERE HAS TO BE A KNOWING PRESENCE. HE HAS
4 TO HAVE BEEN THERE KNOWINGLY AIDING THE OFFENSE. AND
5 THE THIRD POSSIBILITY IS IF YOU THINK TREY PLANNED
6 IT, THEN HE'S GUILTY OF ACCESSORY BEFORE THE FACT.
7 IF YOU THINK TREY HELPED GET RID OF THE GUN AND THE
8 CLOTHES THEN HE'S GUILTY OF ACCESSORY AFTER THE FACT,
9 BUT THAT'S NOT WHAT HE'S CHARGED WITH. WHAT YOU HAVE
10 TO CONSIDER IS IF HE COMMITTED THE MURDER UNDER THE
11 THEORY OF ACCOMPLICE LIABILITY, UNDER THE THEORY OF
12 HAND OF ONE, HAND OF ALL UNDER THE THEORY THAT HE DID
13 SOMETHING TO AID THIS ENTIRE ENTERPRISE, AND I
14 SUGGEST TO YOU, LADIES AND GENTLEMEN, THAT YOU HEARD
15 NO TESTIMONY FROM EVEN THE ACCOMPLICES OTHER THAN TO
16 SAY TREY PLANNED IT, TREY WAS THERE, IT WAS TREY'S
17 IDEA, I DID IT BECAUSE OF TREY. EVEN WHAT THEY TOLD
18 YOU TREY DID I SUBMIT TO YOU DOESN'T RISE TO THE
19 LEVEL OF ACCOMPLICE LIABILITY.

20 TREY WENT TO THE STORE AFTER MR. BROOKS WAS
21 KILLED. I SUBMIT TO YOU THAT THE PERSON WHO HAD
22 PLANNED, WHO WAS INVOLVED, WHO ASSISTED THE MURDERER
23 WOULD NOT HAVE GONE BACK TO THE STORE THAT NIGHT. IT
24 JUST DOESN'T MAKE SENSE. AND, REMEMBER, THE
25 TESTIMONY FROM JAVORIS BROTHER -- I CAN'T THINK OF

CLOSING ARGUMENT - MR. ROGERS

1 HIS NAME RIGHT NOW -- WAS THAT -- GAUMAL BURKE -- WAS
2 THAT HE, HIS BROTHER, TREY AND VALDIS WENT UP TO THE
3 STORE AFTER THEY HAD GOTTEN TO THEIR HOUSE, JAVORIS'
4 HOUSE, AND LEARNED OF JOE BROOKS SHOOTING. DAYON AND
5 JERMAINE WENT HOME. ACTS OF GUILTY PARTIES? I SUBMIT
6 TO YOU THAT THEY ARE.

7 NOW, I THINK MR. McMAHON WILL GET UP HERE AND
8 ARGUE TO YOU THAT, YOU KNOW, TREY IS THE RINGLEADER,
9 DAYON IS A YOUNG GUY, JERMAINE WAS OLDER BUT NOT AS
10 INTELLIGENT AND WOULD DO ANYTHING ANYBODY TOLD HIM TO
11 DO BUT YOU SAW THE TESTIMONY, YOU SAW THE WAY THEY
12 TESTIFIED, YOU SAW THEIR DEMEANOR. AND YOU CAN JUDGE
13 THEIR CREDIBILITY. I THOUGHT IT WAS SIGNIFICANT MS.
14 GARNER, YOU KNOW, SHE TOOK THE STAND. SHE CAN'T
15 PROVIDE AN ALIBI FOR TREY BECAUSE SHE WASN'T LOOKING
16 AT TIMES. NOBODY WAS LOOKING AT THEIR WATCH. AND
17 AGAIN WE'RE NOT EVEN SURE EXACTLY WHEN THE SHOOTING
18 OCCURRED. WE KNOW IT WAS SOMEWHERE BETWEEN SIX AND
19 SIX-THIRTY. BUT REGARDLESS OF THE TIMES, MS. GARNER
20 TELLS YOU THAT WHEN MS. RUTHIE SCOTT CALLED HER TO
21 SAY THAT SOMETHING WAS WRONG AT THE STORE THAT TREY
22 HAD JUST LEFT A FEW MINUTES BEFORE. AND I SUBMIT TO
23 YOU THAT THERE WAS NO WAY FOR TREY TO HAVE GOTTEN
24 FROM HIS HOUSE TO THE STORE IN TIME TO HAVE BEEN
25 INVOLVED IN THE MURDER AND THEN HAVE RUTHIE SCOTT

CLOSING ARGUMENT - MR. ROGERS

1 CALL MS. ESSIE GARNER AND SAY SOMETHING WENT WRONG.
2 SO, ALTHOUGH IT IS NOT AN ALIBI PER SE IT DOES
3 ESTABLISH THROUGH MS. GARNER THAT SHE RECEIVED THE
4 PHONE CALL ABOUT FIVE MINUTES AFTER THEY HAD LEFT
5 WITH VALDIS TO GO OUT TO PLAY BALL. AT THAT POINT
6 THEY WENT TO THE UNCLE'S HOUSE, CHARLES. HE WASN'T
7 HOME AND THEN THEY WENT TO JAVORIS' HOUSE. AND WHEN
8 THEY GOT TO JAVORIS' HOUSE WAS WHEN JAVORIS THEN TOLD
9 THEM ALL ABOUT THE SHOOTING.

10 YOU HAVE A DIFFICULT DECISION I THINK OR A
11 DIFFICULT TASK TO ANALYZE WHAT YOU'VE HEARD FROM THE
12 WITNESS STAND, TO JUDGE THE MOTIVES OF DAYON AND
13 JERMAINE, TO ASSESS THEIR CREDIBILITY, TO ASSESS
14 THEIR MOTIVES, THEIR REASON TO NOT TELL THE TRUTH TO
15 HELP THEMSELVES. AND THAT'S ALL YOU HAVE. THAT'S
16 ALL YOU HAVE. DAYON AND JERMAINE. AND I SUBMIT TO
17 YOU YOU COULDN'T BELIEVE THEM IF THEY TOLD YOU TODAY
18 WAS WEDNESDAY. THEY ARE JUST INCREDIBLE. NO
19 OBJECTIVE EVIDENCE, NO OTHER EVIDENCE TO CORROBORATE,
20 ONLY THEIR TESTIMONY.

21 YOU KNOW, OUR SYSTEM IS BASED ON THE OLD ENGLISH
22 LEGAL SYSTEM FOR CRIMINAL CASES THAT HAD THREE
23 VERDICTS. ONE WAS NOT GUILTY, ONE WAS GUILTY AND THE
24 OTHER WAS NOT PROVEN BECAUSE IT WAS RECOGNIZED THAT
25 IN CERTAIN CIRCUMSTANCES BASED ON THE FACTS YOU CAN'T

CLOSING ARGUMENT - MR. McMAHON

1 SUFFICIENTLY PROVE BEYOND A REASONABLE DOUBT THAT A
2 PERSON COMMITTED A SPECIFIC ACT. WE HAVE ROLLED THE
3 NOT GUILTY AND THE NOT PROVEN INTO ONE VERDICT WHICH
4 IS NOT GUILTY. IF YOU HAVE A DOUBT ABOUT WHAT
5 HAPPENED, IF YOU'RE NOT SURE IF JERMAINE AND DAYON
6 ARE TELLING THE TRUTH, IF YOU'RE NOT SURE THAT TREY
7 KNEW WHAT WAS GOING AND JUST GOT PUT IN IT, IF YOU'RE
8 NOT SURE THAT TREY HAD SOME PRIOR INVOLVEMENT OR SOME
9 POST INVOLVEMENT, IF YOU'RE NOT SURE IF HE HAD ANY
10 INVOLVEMENT, THEN THAT IS A REASON TO DOUBT.

11 YOU KNOW, IT'S A TRAGEDY THAT MR. BROOKS WAS
12 KILLED. THERE'S NO QUESTION ABOUT THAT. DAYON HAS
13 ADMITTED HE DID IT. DON'T COMPOUND THIS TRAGEDY BY
14 CONVICTING A PERSON THAT WASN'T INVOLVED. THAT
15 WASN'T INVOLVED. THAT WASN'T INVOLVED.

16 MR. McMAHON: MAY IT PLEASE THE COURT.

17 THE COURT: MR. McMAHON.

18 MR. McMAHON: MR. FOREMAN AND LADIES AND
19 GENTLEMEN OF THE JURY, FOR THE NUMBER OF YEARS THAT
20 I'VE BEEN AN ASSISTANT SOLICITOR WHICH HAS BEEN QUITE
21 A FEW NOW, AS I GO TO CLASSES AND SEMINARS ABOUT HOW
22 TO BE AN ASSISTANT SOLICITOR THEY ALWAYS SAY WHEN YOU
23 GET UP IN FRONT OF A JURY YOU OUGHT TO START BY
24 TELLING SOME STORY THAT HAS SOME MORAL, THAT HAS SOME
25 LESSON. AND THE EXPERTS SO TO SPEAK SAY YOU DON'T

CLOSING ARGUMENT - MR. McMAHON

1 GET UP THERE AND YOU DON'T THANK A JURY NECESSARILY.
2 THAT'S NOT THE WAY TO DO IT. BUT I'VE SEEN JURORS
3 COME AND GO OVER THE YEARS AND I DON'T TELL YOU THIS
4 TO ASK FOR ANY PARTICULAR FAVOR ON BEHALF OF THE
5 STATE BECAUSE I'M SURE IT GOES FOR MR. ROGERS AND
6 ASSISTANT SOLICITOR CHAPLIN, TOO. I DO THANK YOU.
7 WE ALL THANK YOU FOR THE TIME AND ATTENTION WHICH
8 YOU'VE SHOWN DURING THE TRIAL OF THIS CASE FOR EACH
9 AND EVERY WITNESS THAT TESTIFIED BEFORE YOU UNDER
10 OATH. AND I REALIZE THAT THERE ARE SACRIFICES THAT
11 YOU MAKE. WE'RE HERE EVERY DAY, I'M HERE EVERY DAY,
12 DAY IN AND DAY OUT, AT LEAST EVERY WEEK DAY,
13 SOMETIMES EVERY WEEKEND AND THIS IS WHERE MY
14 COLLEAGUES ARE AT AND MY FRIENDS, YOU KNOW, FELLOW
15 EMPLOYEES. I GO HOME AND I HAVE MY SAME ROUTINE AND
16 I REALIZE IT TAKES YOU FROM YOUR ROUTINE, FROM YOUR
17 HOMES, YOUR FAMILIES, YOUR JOBS. I APPRECIATE IT.
18 WE ALL APPRECIATE IT. IT'S IMPORTANT THAT ATTENTION
19 YOU SHOW BECAUSE SHORTLY IT WILL BECOME YOUR DUTY TO
20 DECIDE THE FACTS OF THE CASE. I MAY SPEAK OF THE LAW
21 A LITTLE BIT IN MY CLOSING AS MR. ROGERS DID. HIS
22 HONOR IS THE ONE AND ONLY JUDGE OF THE LAW. HE WILL
23 TELL YOU THE LAW OF CRIMINAL CONSPIRACY IN SOUTH
24 CAROLINA, THE LAW OF ATTEMPTED ARMED ROBBERY AND THE
25 LAW OF MURDER IN SOUTH CAROLINA. HE WILL TELL YOU

CLOSING ARGUMENT - MR. McMAHON

1 THE RULES BY WHICH EACH AND EVERY ONE OF US IN
2 SOCIETY MUST ABIDE. HE WILL TELL YOU THAT THE STATE
3 HAS THE BURDEN OF PROVING THE CASE BEYOND A
4 REASONABLE DOUBT AND THAT IS HOW IT SHOULD BE IN A
5 FREE SOCIETY. AND I WELCOME THAT BURDEN PARTICULARLY
6 IN THIS TYPE OF CASE. IN THIS TYPE OF CASE WITH THE
7 EVIDENCE THAT IS AVAILABLE IN THIS TYPE OF CASE. AND
8 YOUR DUTY IS TO DECIDE THE FACTS, TO TAKE THOSE FACTS
9 APPLIED TO THE STANDARD THAT HIS HONOR TELLS YOU THE
10 LAW IS AND REACH A VERDICT THAT SPEAKS THE TRUTH,
11 THAT DOES JUSTICE. NOTHING MORE AND NOTHING LESS.

12 THEY SWEAR YOU IN AT THE BEGINNING AND TALK
13 ABOUT JURY DUTY AND ALL. I THINK LIKE TO THINK OF IT
14 ALMOST AS JURY PRIVILEGE BECAUSE IT'S ONE OF THE FEW
15 TYPES OF PARTICIPATION THAT EACH AND EVERY ONE OF US
16 AS CITIZENS ARE DIRECTLY INVOLVED IN OUR SOCIETY, IN
17 OUR COMMUNITY. OUR VOTE, WE SEE IT COUNT IMMEDIATELY
18 IN DOING JUSTICE WHICH IS PROBABLY THE GREATEST
19 PRINCIPLE UPON WHICH OUR SOCIETY SHOULD BE FOUNDED.

20 NOW, IN THIS PARTICULAR CASE AS IN ALL CASES TO
21 DECIDE CREDIBILITY, BELIEVABILITY, WHO YOU ARE GOING
22 TO BELIEVE -- AND THERE'S A NUMBER OF WITNESSES.
23 THERE'S A NUMBER OF WITNESS, FOUR, FIVE, SIX, SEVEN
24 HE SAYS BEFORE ANYONE POINTS THE FINGER AT MR. GARNER
25 BECAUSE TO BEGIN WITH THE STATE HAS TO PROVE WHAT IS

CLOSING ARGUMENT - MR. McMAHON

1 KNOWN AS THE CORPUS DELICTI OF THE CRIME, THAT A
2 CRIME OCCURRED. THAT'S WHY THERE ARE OFFICERS COMING
3 IN HERE ANSWERING THE CALL. THAT'S WHY RUTHIE
4 SCOTT'S COME IN HERE -- OH, BY THE WAY IT'S
5 INTERESTING, THEY DIDN'T ASK RUTHIE SCOTT ANYTHING
6 ABOUT THE CONVERSATION THAT SHE HAD WITH TREY
7 GARNER'S MOTHER. I FOUND THAT SOMEWHAT INTERESTING.
8 BUT YOU HAVE TO PROVE THE ACTUAL CRIME ITSELF. AND
9 YOU DECIDE THE BELIEVABILITY OF EACH AND EVERY
10 WITNESS. AND HOW DO WE DETERMINE PEOPLE'S
11 BELIEVABILITY? WELL, WE USE THOSE SKILLS AND VALUES
12 THAT WE USE IN EVERYDAY LIFE TO MAKE IMPORTANT
13 DECISIONS. NOW, ONE VALUE WE USE IS IF WE KNOW
14 PEOPLE IN EVERYDAY LIFE. AND IF YOU REMEMBER JUDGE
15 COLE IN THIS PARTICULAR CASE QUALIFIED Y'ALL. DID
16 YOU KNOW SO AND SO, DID YOU KNOW SO AND SO AND WOULD
17 THAT EFFECT. SO, YOU HAVE TO SET THAT ASIDE AND MAKE
18 YOUR DECISION BASED ON THOSE OTHER CHARACTERISTICS
19 AND VALUES WE EACH HAVE AND FOCUS THEM ON THE
20 WITNESSES. WE DECIDE WITH OUR COMMON SENSE, WITH
21 WHAT MAKES GOOD SENSE, WITH OUR GOOD JUDGMENT USING
22 OUR EDUCATIONAL LEVELS, OUR WORK HISTORIES, OUR
23 BACKGROUNDS. IF SOMETHING IS CORROBORATED OR
24 UNCORROBORATED, WE DECIDE THAT. AND WE DECIDE WHO IS
25 OR IS NOT TELLING THE TRUTH AND WHAT MOTIVE THEY MAY

CLOSING ARGUMENT - MR. McMAHON

1 OR MAY NOT HAVE FOR TELLING THE TRUTH. FOR TELLING
2 THE TRUTH AND WHO WE ARE GOING TO BELIEVE. NOW, IT'S
3 ALMOST LIKE THE CASE OF THE DISAPPEARING DEFENDANT.
4 MAYBE HE'S THERE, MAYBE HE ISN'T. IF HE IS, MAYBE HE
5 KNOWS, MAYBE HE DOESN'T. WELL, YOU CAN'T BELIEVE
6 JERMAINE McLEMORE AND YOU CAN'T BELIEVE DAYON LEMON.
7 DAYON LEMON WHO SOMEHOW IN HIS SIXTEEN YEAR OLD
8 SOPHISTICATION ON MARCH 20TH, 1997, DECIDED I'M GOING
9 TO GET A GOOD DEAL FOR MYSELF BY TELLING THEM I DID
10 IT. NOT BY SAYING TREY DID IT BUT THAT I DID IT, WHO
11 COMMITTED ONE OF THE MOST DESPICABLE ACTS I HAVE EVER
12 HEARD TESTIFIED TO IN A COURTROOM. I TOLD YOU IN MY
13 OPENING DAYON PULLED THE TRIGGER. DAYON LEMON PULLED
14 THE TRIGGER ON THAT YOUNG LADY'S DADDY THAT
15 TESTIFIED. MS. DAVIS. THERE'S NO QUESTION ABOUT
16 THAT. THERE'S NO DISPUTE ABOUT THAT. NOW, DO YOU
17 BELIEVE DAYON WHEN HE SAYS THAT? IF YOU DON'T, WELL,
18 I'VE CUT THE DEAL OF THE CENTURY BECAUSE I GOT HIM TO
19 PLEAD GUILTY TO MURDER AND HE DIDN'T EVEN DO IT. BUT
20 HE SAYS ON MARCH 20TH, 1997, HERE'S HOW I'M GOING TO
21 HELP MYSELF, HERE'S HOW I'M GOING TO MAKE MY DEAL,
22 HERE'S HOW I'M GOING TO FOOL SERGEANT ED GARDNER AND
23 DETECTIVE WENDALL HARRIS. I'M GOING TO TELL THEM I
24 DID IT. I'M GOING TO TELL THEM I DID IT. IF HE'S
25 LYING, WOULDN'T HE BE IN HERE SAYING TREY DID IT,

CLOSING ARGUMENT - MR. McMAHON

1 TREY PULLED THE TRIGGER, TREY SHOT MR. BROOKS.
2 THAT'S NOT WHAT HE SAYS. WHERE IS THE DEAL? WHERE
3 IS THE DEAL WHEN HE GETS THE SECOND MOST SERIOUS NON-
4 DEATH PENALTY SENTENCE UNDER THE LAW IN SOUTH
5 CAROLINA? AND HE HASN'T BEEN SENTENCED YET. I
6 DISAGREE WITH THAT. THE SENTENCE WILL BE UP TO THIS
7 JUDGE AND I HAVEN'T HIDDEN THAT. I BROUGHT IT OUT
8 WITH MR. LEMON THE THIRTY YEAR DAY FOR DAY SENTENCE.
9 BUT HE GOT A DEAL AND HE WAS SOPHISTICATED ENOUGH TO
10 FIGURE OUT THAT DEAL ON MARCH 20TH, 1997. IF THAT
11 APPEALS TO YOUR COMMON SENSE AND IF THAT APPEALS TO
12 YOUR GOOD JUDGMENT, FIND TREY GARNER NOT GUILTY.
13 FIND HIM NOT GUILTY. BUT IF YOU LOOK USING YOUR
14 COMMON SENSE AND YOU SAY, WELL, SOMEHOW THIS
15 DEVELOPED. SURELY THOSE OFFICERS AREN'T GOING TO
16 COME IN HERE AND TELL YOU THEY THREATENED THEM WITH
17 THE DEATH PENALTY BUT SURELY THEY DID. SURELY THEY
18 SAID SOMETHING. WELL, LET'S JUST SEE HOW IT DID
19 DEVELOP.

20 WHO WAS THE FIRST PERSON THEY TALKED WITH ON
21 MARCH 20TH? BY THE WAY, THE FIRST TIME THEY WERE
22 ABLE TO TALK TO HIM, ALSO. UNCONTROVERTED TESTIMONY
23 THE FIRST DEFENDANT THEY TALKED WITH ON MARCH 20TH --
24 WHOOPS, WASN'T DAYON, WASN'T JERMAINE. YOU KNOW WHO
25 IT WAS? TREY GARNER. THE FIRST PERSON THEY TALKED

CLOSING ARGUMENT - MR. McMAHON

1 WITH -- TREY GARNER. AND THEY ADVISE HIM OF HIS
2 RIGHTS. THEY ADVISE HIM OF HIS RIGHTS AND HE GIVES,
3 THEY TAKE, A THREE PAGE STATEMENT. NOW, YOU REMEMBER
4 THEY HAD TALKED WITH JERMAINE AND THEY HAD TALKED
5 WITH DAYON BACK IN DECEMBER. DECEMBER 11TH OF '96.
6 AND THEY DIDN'T ADMIT THEY DID IT BUT THEY TOLD THEM
7 ON DECEMBER 11TH OF '96 WHO ALL WAS TOGETHER. DAYON,
8 JERMAINE, TREY. THEY TALKED ABOUT WHERE THEY HAD
9 BEEN. SLANK'S, SCOOTER BAIT'S, VALDIS WENT HOME,
10 BUT, NO, THEY DIDN'T COME FORWARD AND CONFESS
11 DECEMBER 11TH. THEY DIDN'T SAY ANYTHING ABOUT BEING
12 AT MR. BROOKS' STORE ON DECEMBER 11TH. BUT LOOK
13 HERE. ON MARCH 20TH IF YOU'LL LOOK AT TREY'S
14 STATEMENT -- AND YOU'LL HAVE THE ORIGINAL OF THIS
15 STATEMENT IN YOUR JURY ROOM -- IF YOU LOOK AT PAGE
16 TWO RIGHT HERE HE'S TALKING ABOUT BEFORE YOU WENT TO
17 CHARLES' HOUSE WHAT DID YOU DO THAT DAY. CHARLES'
18 HOUSE IS THE COUSIN, CHARLES LLOYD, OFF OF HIGHWAY
19 48, OFF OF BLUFF ROAD. NOW, THE TESTIMONY -- TAKING
20 ALL OF THE TESTIMONY OF MR. McLEMORE AND DAYON AND
21 THIS STATEMENT IS GOING TO CHARLES LLOYD'S HOUSE IS
22 AFTER THE HOMICIDE OF MR. BROOKS. SO, HE SAYS WHAT
23 DID YOU DO BEFORE, WHAT DID YOU DO THAT DAY BEFORE
24 YOU WENT TO CHARLES'? I DON'T KNOW WHAT TIME IT WAS
25 BUT ME AND MY BROTHER WERE WALKING ON THE ROAD AND

CLOSING ARGUMENT - MR. McMAHON

1 JERMAINE WAS COMING DOWN THE ROAD. I'M NOT SURE HOW
2 IT ALL WORKED OUT BUT AROUND TWO OR THREE ALL OF US
3 WERE AT -- THIS HAS GOT SLINK'S; I SUBMIT TO YOU
4 THAT'S SLANK'S HOUSE -- AND THEN WE ALL WENT TO
5 SCOOTER BAIT'S HOUSE. VALDIS WENT HOME. NOW, WHO IS
6 ALL OF US? I DON'T KNOW WHAT TIME JOE GOT KILLED.
7 I DO KNOW THAT ME, JERMAINE McLEMORE AND DAYON NIXON
8 WERE RIDING IN JERMAINE'S CAR. THAT'S IT RIGHT
9 THERE. THEY COME DOWN THE ROAD. THAT'S WHAT DAYON
10 TESTIFIED TO. VALDIS AND TREY CAME THROUGH THE CUT.
11 THEY HOOKED UP, THEY WALKED DOWN TO SCOOTER BAIT'S.
12 YOU'VE GOT VALDIS, YOU'VE GOT TREY, YOU'VE GOT DAYON.
13 JERMAINE IS IN THE CAR. HE'S THE ONE WITH THE CAR
14 AND THE FOUR OF THEM LEAVE AND THEY GO TO SCOOTER
15 BAIT'S. TASHAN'S. AND THEY SAY FROM THERE THE TWO
16 TESTIFIED VALDIS WENT HOME. VALDIS WENT HOME. HIS
17 OWN MOTHER SAYS THERE'S A TIME WHEN VALDIS IS HOME
18 AND TREY ISN'T. SHE SAID SHE LOOKS OUT LATER ON AND
19 TREY IS OUT THERE IN WHAT SHE DESCRIBES AS JERMAINE'S
20 CAR. HIS OWN MOTHER. VALDIS WENT HOME. EVERYBODY
21 IS CONSISTENT WITH THAT, EVEN THIS DEFENDANT. WHERE
22 IS THERE INCONSISTENCIES FROM THIS TESTIMONY IN
23 THERE? BUT HE ONLY GOT THIRTY YEARS DAY FOR DAY.
24 ALSO, MR. ROGERS SAID THAT MR. McLEMORE GOT TWENTY
25 YEARS. THAT'S NOT CORRECT EITHER. THE SENTENCING IS

CLOSING ARGUMENT - MR. McMAHON

1 UP TO HIS HONOR. HIS HONOR CAN GIVE HIM UP TO TWENTY
2 YEARS ON ATTEMPTED ARMED ROBBERY AND UP TO FIVE YEARS
3 ON CRIMINAL CONSPIRACY. TWENTY-FIVE YEARS. THAT I
4 DON'T THINK HE IS GUILTY OF MURDER? I THINK WHAT HE
5 GETS IS SUFFICIENT IF HE GETS UP TO TWENTY-FIVE YEARS
6 BUT I DON'T THINK HE WAS THE KINGPIN THAT SPAWNED THE
7 PLAN. THAT'S THE DIFFERENCE BETWEEN HIM AND HE'S NOT
8 THE TRIGGER MAN, DAYON, AND HE'S NOT THE MASTER
9 SCHEMER, TREY. THAT'S THE DIFFERENCE. BUT TREY
10 GOES ON. THEN THE THREE OF US -- NOW WHO IS THE
11 THREE HE'S TALKING ABOUT? TWO OF THEM TESTIFIED.
12 THE THREE OF US -- JERMAINE AND DAYON -- DROVE DOWN
13 TO JOE BROOKS' TO GET SOME GAS. NOW, WE KNOW WHAT
14 CAR IT IS UNLESS YOU TOTALLY DO NOT BELIEVE ANYTHING
15 JERMAINE SAYS. IF YOU CAN'T BELIEVE IT'S WEDNESDAY
16 IF THEY TELL YOU THEN YOU CAN'T BELIEVE HE'S GOT A
17 GOLD NOVA, YOU CAN'T EVEN BELIEVE HIS MAMA. SHE
18 KNOWS WHAT KIND OF CAR HE'S GOT. SHE KNOWS THEY ARE
19 FRIENDS, THEY ARE ASSOCIATES. SHE KNOWS HE WAS WITH
20 THEM THAT DAY. SHE KNOWS THAT. SO, THEY DRIVE DOWN
21 TO JOE BROOKS' STORE TO GET SOME GAS. NOW, LET ME
22 ASK YOU SOMETHING. MS. MICHELLE DAVIS -- WHO IS THE
23 ONLY PERSON OF THIS GANG, THIS GROUP, THESE THREE
24 THAT SHE'S SEEN IN THAT STORE THE SUNDAY BEFORE, THE
25 LAST TIME SHE'S COUNTING THE MONEY WITH HER DADDY?

CLOSING ARGUMENT - MR. McMAHON

1 TREY GARNER. AND SHE LOOKS OUT, REMEMBER, AND WHO
2 DOES SHE SEE? JERMAINE. AND SHE'S THERE COUNTING
3 THE MONEY AND HE'S IN THERE PAYING FOR THE GAS AND
4 JERMAINE IS OUT THERE AGAIN IN THE GOLD NOVA. NOW,
5 DOES THAT APPEAL TO YOUR COMMON SENSE ABOUT THE PLAN
6 A WEEK BEFORE WHEN DAYON SAYS I HID OUT THE WEEK
7 BEFORE OVER THERE. I DIDN'T DO IT THEN. BY THE WAY,
8 WHY DID HE DO IT? HE OWED HIM MONEY FOR COCAINE.
9 UNCONTROVERTED TESTIMONY. NO DISPUTE. NO DISPUTE.
10 NOBODY HAS DISPUTED THAT DAYON OWED TREY MONEY FOR
11 COCAINE. AND HE SAID, WAIT A MINUTE, THE PLAN WAS
12 JUST TO ROB. WELL, WHO TOLD DAYON SHOOT HIM IN THE
13 SHOULDER, HE'LL GO FOR HIS GUN, SHOOT HIM IN THE
14 SHOULDER? YOU'RE RESPONSIBLE FOR THE NATURAL AND
15 PROBABLE CONSEQUENCES OF YOUR ACTS AND IF ARE PART OF
16 A CRIMINAL CONSPIRACY -- AND IN A CRIMINAL
17 CONSPIRACY, LADIES AND GENTLEMEN, THERE'S NOT A
18 CONTRACT, A DOCUMENT THAT THESE CO-CONSPIRATORS FILL
19 OUT AND SAY WE AGREE TO DO THIS, THAT AND THE OTHER.
20 THEY AGREED TO ROB JOE BROOKS BECAUSE THEY KNEW HE
21 HAD SEVERAL THOUSAND DOLLARS AND IT WAS THEY THOUGHT
22 EASY PICKINGS AND THEY KNEW DAYON WENT IN THERE
23 KNOWING, WITH MALICE IN HIS HEART THAT HE'D HAVE TO
24 SHOOT, THAT HE'D HAVE TO SHOOT JOE BROOKS. NOW, HOW
25 BROAD DO WE CAST THE NET TO GET THE RESPONSIBLE

CLOSING ARGUMENT - MR. McMAHON

1 PARTY? THE ONE THAT PLANS AND SCHEMES? THE ONE THAT
2 GOES IN AND SCOPES IT OUT? AND SAY, WELL, HE SCOPED
3 IT OUT BUT HE DIDN'T HELP DAYON. WHERE DID THE GUN
4 COME FROM? UNCONTROVERTED TESTIMONY. WHERE DID THE
5 GUN COME FROM? WHO PUT THE GUN IN THE KILLER'S HAND?
6 TREY GARNER. I GO TO GET SOME GAS. I DON'T KNOW HOW
7 MUCH WE GOT, A COUPLE OF DOLLARS. ENOUGH TO GO TO
8 GADSDEN AND BACK. WHO LIVES IN GADSDEN? CHARLES
9 LLOYD. SO, GO TO PAGE ONE. WE WERE RIDING IN
10 JERMAINE'S CAR. I DON'T KNOW THE EXACT TIME WE WENT
11 TO MY COUSIN, CHARLES LLOYD'S, HOUSE IN GADSDEN OFF
12 48. HE WASN'T THERE BUT HIS SISTER, CAN'T REMEMBER
13 HER NAME, SHE WAS THERE. WE LEFT. WE WENT BY MY
14 HOUSE AND PICKED UP MY BROTHER, VALDIS.

15 THE SOLICITOR UP IN THE EIGHTH CIRCUIT, FORMER
16 SOLICITOR, HIS SON IS SOLICITOR NOW, SOLICITOR BILL
17 JONES. HIS WRITTEN WORD WAS BETTER THAN MY SPOKEN
18 I'VE ALWAYS THOUGHT. KIND OF AN OLD HERO OF MINE.
19 IN SOME OF HIS CLOSINGS HE USED TO SAY, YOU KNOW, THE
20 BEST LIE IS ONE THAT'S NINETY-FIVE PERCENT THE TRUTH.
21 IT'S THAT FIVE PERCENT, THAT OMISSION THAT YOU LEAVE
22 OUT. THAT'S WHAT IT IS. WHAT FIVE PERCENT, FIVE
23 MINUTES IS LEFT OUT? AND IF LOOK AND YOU ANALYZE HIS
24 STATEMENT HE'LL TELL YOU IN HERE. HOW LONG WERE YOU
25 IN THE STORE? A COUPLE OF MINUTES. THERE WAS A

CLOSING ARGUMENT - MR. McMAHON

1 BLACK MAN AND A BLACK WOMAN AT THE QUARTER MACHINE
2 STANDING BY CHILLING. MS. LENAHAH WHO TESTIFIED, THE
3 NEWSPAPER LADY, AND RICARDO CUNNINGHAM. I SEEN THAT
4 OLD MAN THAT WORKS FOR JOE, SOME SKINNY DUDE. THEO
5 MARSHALL. I SEEN THE OLD MAN WITH THAT TRUCK. HE
6 LIVES AROUND THERE AND HE WAS GETTING AIR FOR HIS
7 TIRE. THIS IS TREY GARNER'S STATEMENT THAT HE GAVE,
8 THE FIRST OF THREE DEFENDANTS THAT GAVE A STATEMENT
9 ON MARCH 20TH OF '97. AFTER GETTING GAS, WHERE DID
10 YOU GO? MY COUSIN'S HOUSE.

11 NOW, YOU HAVE TO BELIEVE BECAUSE JERMAINE
12 TESTIFIED TO THAT BUT HE TOLD YOU THAT OTHER FIVE
13 PERCENT. SURE, THERE'S INCONSISTENCIES AND, YES, HE
14 ADMITTED HE DIDN'T TELL THE TRUTH DECEMBER 11TH OF
15 '96 BUT HE TOLD YOU THAT OTHER FIVE PERCENT. DAYON
16 TESTIFIED TO IT AND HE TOLD YOU THAT OTHER FIVE
17 PERCENT. SO, SEPARATE FROM EACH OTHER THEY TELL THE
18 SAME SEQUENCE AND TREY'S NOT GUILTY? AND THAT
19 APPEALS TO YOUR COMMON SENSE BECAUSE HE GOT A DEAL
20 FOR THIRTY YEARS. I DON'T WANT NO DEALS LIKE THAT.
21 I DON'T WANT NO DEALS LIKE THAT. IF YOU DON'T LIKE
22 THE DEAL, THAT'S ME. PUNISH ME, DON'T PUNISH JUSTICE
23 FOR THE DEALS I MADE IN EVALUATION OF THE CASE.
24 DON'T DO THAT. SO, IT'S ALL CONSISTENT ONE WITH THE
25 OTHER BUT HE LEAVES OUT THE FIVE PERCENT. THAT'S THE

CLOSING ARGUMENT - MR. McMAHON

1 CREDIBILITY. SO, YOU CAN BELIEVE DAYON AND JERMAINE
2 WHEN THEY SAY SOMETHING BAD ABOUT THEMSELVES, BUT YOU
3 CAN'T BELIEVE THEM WHEN THEY SAY SOMETHING BAD ABOUT
4 TREY BECAUSE THE POLICE -- I DON'T KNOW. THE
5 DISAPPEARING DEFENDANT. THAT'S WHAT I SUBMIT TO YOU
6 IT IS.

7 SO, LADIES AND GENTLEMEN, WHEN YOU ANALYZE IT
8 USING YOUR COMMON SENSE, WHERE ELSE DO YOU GO? WHERE
9 ELSE DO YOU LOOK? WHEN THE OFFICERS GET THIS
10 STATEMENT THEN THEY GO TO JERMAINE AND HE TELLS THEM.
11 WHEN THEY GET THAT STATEMENT THEY GO TO DAYON
12 SEPARATELY AND HE TELLS IT. AND THEY BOTH SEPARATELY
13 TALK ABOUT THE SAME BRIDGE ABOUT THE GUN. AND THEN
14 THEY GO BACK TO MR. GARNER AND GIVE HIM AN
15 OPPORTUNITY. NO, SIR. NO, MA'AM. BUT YOU DON'T
16 HAVE FINGERPRINTS AND YOU DON'T HAVE VIDEO AND YOU
17 DON'T HAVE AUDIO, YOU DON'T HAVE A TAPE. IT'S ALWAYS
18 WHAT YOU DON'T HAVE AS OPPOSED TO WHAT YOU DO HAVE.
19 YOU HAVE TO LOOK AND SEE WHERE THE NET GOES. UNDER
20 THE LAW THE HAND OF ONE IS THE HAND OF ALL. IF TWO
21 OR MORE PEOPLE AGREE, CONSPIRE, COMBINE TO GO OUT AND
22 COMMIT AN UNLAWFUL ACT, SOME OF THEM ARE THE LOOKOUT,
23 SOME OF THEM ARE SCOPING, SOME OF THEM MAY BE
24 ASSISTING IN THE ESCAPE, GETTING RID OF EVIDENCE,
25 GETTING RID OF GUNS, BURNING CLOTHES, SHARING IN THE

CLOSING ARGUMENT - MR. McMAHON

1 PROCEEDS, IF ANY. EACH AND EVERY ONE IS RESPONSIBLE
2 AS IF THERE WERE THREE HANDS, THREE FINGERS THAT
3 PULLED THE TRIGGER. EACH AND EVERY ONE UNDER OUR
4 LAW. THAT'S THE ONLY WAY IT CAN BE. WE CANNOT ALLOW
5 THOSE RESPONSIBLE FOR THE PLANNING, THE SCHEMING,
6 THOSE THAT ARE USING THE DAYON LEMONS AS THE DEADLY
7 WEAPON TO GET BY. THERE ARE HUNDREDS, THOUSANDS
8 UNFORTUNATELY, OF DAYON LEMONS AT HIS DISPOSAL, AT
9 TREY GARNER'S. YES, SIR. YES, MA'AM. I THINK HE IS
10 AS MR. ROGERS SAID THE MASTERMIND, THE KINGPIN. AND
11 YOU HAVE A CHOICE TO MAKE BASED ON WHAT YOU HEAR FROM
12 THESE WITNESSES AS TO WHETHER OR NOT THE DEFENDANT'S
13 GUILTY OR NOT GUILTY. HE SAYS THEY, THEY, THEY. I
14 SAY TREY, TREY. HE BROUGHT -- IN MY MIND A WORD JUST
15 JUMPED OUT IN MY MIND IN THINKING ABOUT THIS AND
16 THINKING ABOUT JOE BROOKS AND HIM GOING IN THERE THE
17 WEEK BEFORE AND TALKING WITH DAYON AND TALKING WITH
18 JERMAINE. HE'S THE DEMISE OF JOE BROOKS. I CALL IT
19 TREYPOCOLIPS. IT'S FROM HIM.

20 MR. ROGERS: YOUR HONOR, I'M GOING TO OBJECT TO
21 THAT INFLAMMATORY COMMENT.

22 THE COURT: OVERRULED. GO AHEAD.

23 MR. McMAHON: AND I THINK IT GOES TO THE ISSUE
24 FULLY AND CLEARLY OF MALICE. THEY WANT YOU TO TRY
25 EVERYBODY BUT TREY. THEY WANT YOU TO SAY, YEAH, IT'S

CLOSING ARGUMENT - MR. MCMAHON

1 INCONSISTENT BECAUSE IT'S A LIE, IT'S UNTRUTHFUL.
2 WELL, HE WASN'T THERE AND IF HE WAS HE DIDN'T KNOW
3 BUT HE MIGHT HAVE NOT BEEN. AND YOU CAN ONLY RELY ON
4 THE EVIDENCE OF THE WITNESSES THAT TESTIFIED BEFORE
5 YOU. A GOOD JURY USING GOOD JUDGMENT AND COMMON
6 SENSE EVALUATING EVIDENCE WILL FIND THE TRUTH, WILL
7 CAST THAT NET APPROPRIATELY. YOU'VE HEARD THE
8 EVIDENCE. YOU HAVE A RIGHT TO VIEW IT, TO LOOK AT
9 IT, TO EVALUATE TO DETERMINE WHEREIN THE TRUTH LIES
10 AND WHAT THE EVIDENCE PROVES. DON'T LET HIM GET AWAY
11 WITH MURDER JUST BECAUSE THE TRIGGER HE PULLED WAS
12 NINE MILLIMETER DAYON, NOT THE NINE MILLIMETER THAT
13 HE GAVE DAYON. THANK YOU. THANK YOU, YOUR HONOR.

14 THE COURT: LADIES AND GENTLEMEN, I'M NOW GOING
15 TO INSTRUCT YOU AS TO THE LAW THAT IS APPLICABLE. IS
16 THERE ANY JUROR THAT NEEDS TO TAKE A SHORT BREAK
17 BEFORE WE PROCEED WITH THAT INSTRUCTION? OKAY, LET'S
18 TAKE ABOUT FIVE MINUTES TO GIVE THE JURY AN
19 OPPORTUNITY TO STRETCH AND THEN WE'LL COME BACK WITH
20 THAT INSTRUCTION. DO NOT DISCUSS THE CASE AS OF YET
21 BUT YOU ARE EXCUSED FOR A FEW MINUTES.

22 (JURY LEAVES THE JURY BOX AT 4:00 P.M.)

23 THE COURT: LET ME EXPLAIN SOMETHING TO THE
24 AUDIENCE. WHEN I BEGIN TO GIVE MY INSTRUCTION TO THE
25 JURY NO ONE IS PERMITTED TO COME IN OR TO LEAVE. SO,

CHARGE TO JURY

1 IF YOU DON'T WANT TO SIT THROUGH THE INSTRUCTION YOU
2 NEED TO LEAVE NOW BECAUSE YOU WILL NOT BE PERMITTED
3 TO MOVE ABOUT THE COURTROOM DURING THE INSTRUCTION.

4 (RECESS)

5 THE COURT: (AT CONCLUSION OF RECESS) ARE ALL
6 THE JURORS READY NOW?

7 BAILIFF: I BELIEVE THEY ARE, YOUR HONOR.

8 THE COURT: BRING THEM BACK, PLEASE

9 (JURY RETURNS TO THE JURY BOX AT 4:09 P.M.)

10 BAILIFF: THE JURY IS PRESENT, YOUR HONOR.

11 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, AS
12 YOU KNOW, YOU'VE SEEN OR HEARD ALL OF THE TESTIMONY
13 AND OTHER EVIDENCE TO BE RECEIVED IN THE TRIAL OF
14 THIS CASE. YOU HAVE NOW PATIENTLY LISTENED TO THE
15 FINAL ARGUMENTS OR SUMMATIONS WHICH HAVE BEEN
16 ACCOMPLISHED BY THE LAWYERS AND IT NOW BECOMES MY
17 DUTY TO CHARGE YOU OR TO INSTRUCT YOU AS TO THE LAW
18 THAT IS APPLICABLE IN A CASE OF THIS NATURE. YOU WILL
19 THEN BE ASKED TO GO BACK INTO YOUR JURY ROOM AND
20 BEGIN YOUR DELIBERATIONS AND THROUGH THAT PROCESS YOU
21 WILL EXAMINE ALL OF THE EVIDENCE, YOU WILL DECIDE THE
22 FACTS, YOU WILL APPLY THE LAW AND YOU WILL ARRIVE AT
23 A DECISION THAT IS FAIR AND JUST TO BOTH THE STATE
24 AND TO THE DEFENDANT BASED SOLELY UPON THE EVIDENCE
25 IN THE CASE AND THE LAW THAT IS APPLICABLE TO THAT

CHARGE TO JURY

1 EVIDENCE AS I WILL HAVE PROVIDED IT FOR YOU.

2 NOW, IT IS YOUR EXCLUSIVE DUTY TO DETERMINE WHAT
3 THE FACTS ARE AND YOU DO THAT THROUGH YOUR OWN
4 EXAMINATION AND YOUR OWN EVALUATION OF ALL OF THE
5 TESTIMONY AND OTHER EVIDENCE RECEIVED DURING THE
6 COURSE OF THE TRIAL. YOU WILL DECIDE WHAT WEIGHT,
7 VALUE AND EFFECT TO GO TO ANY PARTICULAR WITNESS'
8 TESTIMONY OR PORTION OF A WITNESS' TESTIMONY AND YOU
9 WILL ALSO DECIDE THE WEIGHT, VALUE AND EFFECT TO GIVE
10 TO ANY OTHER EVIDENCE THAT HAS BEEN RECEIVED DURING
11 THE COURSE OF THE TRIAL. IN DOING SO, YOU WILL
12 DECIDE WHAT EVIDENCE TO ACCEPT, WHAT EVIDENCE TO
13 REJECT. YOU WILL DETERMINE WHAT YOU BELIEVE THE TRUE
14 FACTS TO BE BASED UPON YOUR EVALUATION OF THAT
15 EVIDENCE. ONCE YOU DECIDE WHAT YOU BELIEVE THE TRUE
16 FACTS TO BE, YOU WILL THEN APPLY THE LAW AS I WILL
17 HAVE GIVEN IT TO YOU IN ORDER TO ARRIVE AT YOUR
18 DECISION IN THIS CASE.

19 NOW, YOU WILL ACTUALLY HAVE THREE DECISIONS TO
20 MAKE BECAUSE THERE ARE THREE SEPARATE AND DISTINCT
21 OFFENSES EVEN THOUGH THEY ARE ALLEGED TO HAVE ARISEN
22 OUT OF ONE PARTICULAR EVENT OCCURRING ON A SPECIFIC
23 DATE. THERE ARE THREE INDICTMENTS THAT WILL BE IN
24 THE JURY ROOM WITH YOU AND IT'S THOSE THREE
25 INDICTMENTS ON WHICH YOU WILL WRITE THE VERDICT, MR.

CHARGE TO JURY

1 FOREMAN, AND, OF COURSE, YOU WILL WRITE A SEPARATE
2 VERDICT AS TO EACH OF THE SEPARATE INDICTMENTS.

3 NOW, AS I TOLD YOU AT THE BEGINNING OF THE
4 TRIAL, ALL CHARGES THAT ARE BROUGHT INTO THIS
5 COURTROOM ARE BASED UPON DOCUMENTS CALLED
6 INDICTMENTS. THE INDICTMENTS THEMSELVES ARE NOT
7 EVIDENCE IN THE CASE. YOU WILL NOT CONSIDER THESE
8 INDICTMENTS IN ANY WAY AS BEING ANY EVIDENCE AGAINST
9 THE DEFENDANT IN THIS CASE. YOU WILL HAVE THE
10 INDICTMENTS IN THE JURY ROOM WITH YOU BECAUSE
11 OBVIOUSLY YOU MUST RENDER A DECISION OR A VERDICT AS
12 TO EACH SEPARATE CHARGE. MR. FOREMAN, THE
13 INDICTMENTS WILL SIMPLY SERVE AS THE VERDICT FORM.
14 IT'S ON THE BACK OF EACH INDICTMENT THAT YOU WILL
15 WRITE THE UNANIMOUS DECISION OF THE JURY.

16 NOW, AS YOU ARE AWARE, BY THESE THREE
17 INDICTMENTS THE STATE OF SOUTH CAROLINA THROUGH THE
18 SOLICITOR HAS CHARGED THE DEFENDANT WITH THREE
19 SEPARATE AND DISTINCT OFFENSES. THE DEFENDANT IS
20 CHARGED WITH THE CRIME OF MURDER. THE DEFENDANT IS
21 CHARGED WITH THE CRIME OF ATTEMPTED ARMED ROBBERY AND
22 THE DEFENDANT IS CHARGED WITH THE CRIME OF CRIMINAL
23 CONSPIRACY. AND THE ALLEGATIONS ALLEGING THOSE
24 OFFENSES ARE SET FORTH IN THE INDICTMENTS.

25 NOW, AS TO THE CHARGES CONTAINED IN EACH

CHARGE TO JURY

1 INDICTMENT, THE DEFENDANT HAS ENTERED A PLEA OF NOT
2 GUILTY. THAT PLEA OF NOT GUILTY HAS PLACED UPON THE
3 STATE THE BURDEN OF PROVING ALL OF THE ALLEGATIONS
4 SET FORTH IN EACH INDICTMENT, THE BURDEN OF PROVING
5 EACH OF THE ESSENTIAL ELEMENTS THAT CONSTITUTE EACH
6 OF THOSE OFFENSES THAT ARE SET FORTH IN THE
7 INDICTMENT AND, THEREFORE, THE BURDEN HAS BEEN UPON
8 THE STATE TO ESTABLISH THE GUILT OF THE DEFENDANT TO
9 YOUR SATISFACTION BY EVIDENCE WHICH CONVINCES YOU OF
10 HIS GUILT BEYOND A REASONABLE DOUBT. THE BURDEN IS
11 NEVER UPON A DEFENDANT OR A PERSON ACCUSED OF HAVING
12 COMMITTED SOME CRIME TO PROVE THAT THEY ARE NOT
13 GUILTY OR TO PROVE THAT THEY ARE INNOCENT BECAUSE IN
14 MANY INSTANCES THAT WOULD NOT BE POSSIBLE. I CHARGE
15 YOU THAT IT IS A VITAL, IMPORTANT AND CARDINAL RULE
16 OF LAW THAT EVERY DEFENDANT IN A CRIMINAL TRIAL NO
17 MATTER HOW GREAT OR HOW SERIOUS MIGHT BE THE OFFENSE
18 FOR WHICH THAT PERSON STANDS CHARGED, THAT PERSON
19 SHALL ALWAYS BE PRESUMED INNOCENT OF THAT CHARGE.
20 THAT PRESUMPTION OF INNOCENCE REMAINS WITH ANY PERSON
21 ACCUSED. IT REMAINS WITH THIS DEFENDANT FROM THE
22 MOMENT OF HIS ARREST THROUGHOUT THE COURSE OF THE
23 CRIMINAL PROCESS AND EVEN THROUGHOUT THE COURSE OF
24 THE TRIAL. AS I ALSO TOLD YOU AT THE BEGINNING OF
25 THIS TRIAL, THAT PRESUMPTION OF INNOCENCE WILL REMAIN

CHARGE TO JURY

1 WITH THIS DEFENDANT EVEN WHEN YOU GO BACK INTO THE
2 JURY ROOM TO BEGIN YOUR DELIBERATIONS AND IT WILL
3 REMAIN WITH HIM THERE AND ALWAYS UNLESS YOU TWELVE
4 JURORS DETERMINE THAT HE IS NO LONGER ENTITLED THAT
5 PRESUMPTION OF INNOCENCE; THAT IS, BASED UPON YOUR
6 OWN VIEW OF THE EVIDENCE, YOUR DETERMINATION OF FACT,
7 YOUR APPLICATION OF LAW YOU DETERMINE THAT HIS GUILT
8 HAS BEEN PROVEN BEYOND A REASONABLE DOUBT.

9 THE STATE IS REQUIRED TO PROVE THE GUILT OF THE
10 DEFENDANT BEYOND A REASONABLE DOUBT. THIS DOES NOT
11 MEAN THAT THE STATE IS REQUIRED TO PROVE THE GUILT OF
12 THE DEFENDANT BEYOND ALL DOUBT OR BEYOND ALL POSSIBLE
13 DOUBT. THE STATE DOES HAVE, HOWEVER, THE BURDEN OF
14 PROVING THE DEFENDANT TO BE GUILTY BEYOND A
15 REASONABLE DOUBT. THE TERM REASONABLE DOUBT SHOULD
16 BE GIVEN IT'S PLAIN AND ORDINARY MEANING. A
17 REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD
18 CAUSE A REASONABLE PERSON TO HESITATE TO ACT. THE
19 DEFENDANT IN A CRIMINAL TRIAL IS ENTITLED TO EVERY
20 REASONABLE DOUBT THAT ARISES FROM THE EVIDENCE OR
21 LACK OF EVIDENCE IN A CASE AND IF UPON ANY FACTUAL
22 ISSUE ESSENTIAL TO A FINDING OF A VERDICT OF GUILTY
23 YOU HAVE SOME REASONABLE DOUBT AS TO HOW THAT ISSUE
24 SHOULD BE RESOLVED IT WOULD BE YOUR DUTY TO RESOLVE
25 THAT REASONABLE DOUBT IN FAVOR OF THE DEFENDANT.

CHARGE TO JURY

1 THEREFORE, IF UPON YOUR CONSIDERATION OF THE WHOLE
2 CASE YOU HAVE A REASONABLE DOUBT AS TO THE
3 DEFENDANT'S GUILT, IT WOULD BE YOUR DUTY TO RESOLVE
4 THAT REASONABLE DOUBT IN FAVOR OF THE DEFENDANT AND
5 TO RETURN A VERDICT OF NOT GUILTY. IF ON THE OTHER
6 HAND, AFTER YOU HAVE CONSIDERED ALL OF THE EVIDENCE
7 IN THE CASE AND YOU'VE APPLIED THE LAW AS I HAVE
8 GIVEN IT TO YOU, IF YOU HAVE NO REASONABLE DOUBT AS
9 TO THE DEFENDANT'S GUILT, THEN OF COURSE IT WOULD BE
10 YOUR CORRESPONDING DUTY TO CONVICT THE DEFENDANT;
11 THAT IS, TO FIND HIM GUILTY.

12 NOW, AS I HAVE STATED, YOU ARE THE SOLE JUDGES
13 OF THE FACTS IN THIS CASE AND, THEREFORE, NECESSARILY
14 YOU ARE ALSO THE SOLE JUDGES OF THE CREDIBILITY; THAT
15 IS, THE BELIEVABILITY OF EACH OF THE WITNESSES THAT
16 HAVE TESTIFIED DURING THE COURSE OF THIS TRIAL. YOU
17 WILL DECIDE WHAT WEIGHT, VALUE AND EFFECT TO GIVE TO
18 ANY PARTICULAR WITNESS' TESTIMONY OR TO ANY PORTION
19 OF ANY PARTICULAR WITNESS' TESTIMONY. THERE ARE A
20 NUMBER OF FACTORS WHICH YOU SHOULD CONSIDER IN
21 ARRIVING AT YOUR DETERMINATION AS TO A PARTICULAR
22 WITNESS' CREDIBILITY OR BELIEVABILITY. I'M GOING TO
23 LIST SOME OF THOSE FACTORS FOR YOU BUT IN THE EVENT
24 YOU THINK OF OTHER FACTORS THAT YOU BELIEVE ALSO BEAR
25 UPON THAT WITNESS'S CREDIBILITY OR BELIEVABILITY THEN

CHARGE TO JURY

1 YOU MAY CONSIDER THOSE ADDITIONAL FACTORS AS WELL.
2 BUT YOU SHOULD CONSIDER THE Demeanor OF THE WITNESS
3 AS THE WITNESS TESTIFIED FROM THE WITNESS STAND.
4 WHAT WAS THAT PARTICULAR WITNESS' MANNER AND
5 APPEARANCE? DID THE WITNESS APPEAR TO BE
6 STRAIGHTFORWARD IN RESPONDING TO QUESTIONS OR WAS THE
7 WITNESS HESITANT OR EVASIVE IN RESPONDING TO
8 QUESTIONS? DID THE WITNESS APPEAR TO YOU TO KNOW OF
9 WHAT THAT WITNESS WAS TESTIFYING? SIMPLY PUT, DID
10 THE WITNESS APPEAR TO YOU TO BE TELLING THE TRUTH,
11 WAS THE WITNESS BELIEVABLE. YOU MAY ALSO CONSIDER
12 WHETHER OR NOT THE TESTIMONY OF A WITNESS WAS
13 CONSISTENT OR WAS IT INCONSISTENT WITH THAT WITNESS'
14 OWN TESTIMONY OR WITH OTHER TESTIMONY OR OTHER
15 EVIDENCE RECEIVED DURING THE COURSE OF THE TRIAL, AND
16 THAT WOULD INCLUDE ANY OTHER STATEMENTS THAT HAD BEEN
17 MADE BY THAT WITNESS WHETHER IT BE IN COURT OR OUT OF
18 COURT. YOU MAY ALSO CONSIDER HOW THE WITNESS CAME TO
19 KNOW THE FACTS TO WHICH THAT WITNESS TESTIFIED. WHAT
20 WAS THAT PARTICULAR WITNESS' ABILITY TO PERCEIVE THE
21 EXISTENCE OF THOSE FACTS BY MEANS OF THEIR SENSES AND
22 THEN TO COME INTO COURT AND TESTIFY AS TO WHAT
23 THEY'VE SEEN OR HEARD? YOU MAY ALSO CONSIDER THE
24 OPPORTUNITY THAT A WITNESS HAD TO PERCEIVE THE
25 EXISTENCE OF SOME FACT BY MEANS OF THEIR SENSES AND

CHARGE TO JURY

1 THEN WHAT ABILITY THEY HAVE TO COME INTO COURT AND TO
2 RECOLLECT AS TO WHAT THEY'VE SEEN OR HEARD. YOU MAY
3 ALSO CONSIDER WHETHER OR NOT THE TESTIMONY OF A
4 WITNESS IS STRENGTHENED OR WEAKENED BY OTHER
5 TESTIMONY OR OTHER EVIDENCE RECEIVED DURING THE TRIAL
6 OF THE CASE AND YOU MAY ALSO CONSIDER ANY BIAS OR
7 PREJUDICE THAT A WITNESS MIGHT HAVE. SIMPLY PUT, DO
8 YOU FIND SOME REASON THAT A PARTICULAR WITNESS WOULD
9 COME INTO COURT AND TESTIFY ONE WAY OR ANOTHER TO
10 HELP OR HURT ONE SIDE OR THE OTHER AND YOU MAY
11 CONSIDER ANY INTEREST THAT THE WITNESS MIGHT HAVE IN
12 THE OUTCOME OF THE CASE AS IT BEARS UPON THAT
13 WITNESS' CREDIBILITY OR BELIEVABILITY SHOULD YOU FIND
14 THAT TO BE APPROPRIATE.

15 NOW, DURING THE COURSE OF THIS TRIAL YOU HAVE
16 HEARD CERTAIN EVIDENCE THAT WAS ELICITED REGARDING A
17 PARTICULAR WITNESS' PRIOR CONVICTION OF A CRIMINAL
18 OFFENSE. AND I CHARGE YOU THAT WHILE ORDINARILY
19 PRIOR CONVICTIONS OF CRIMINAL OFFENSES THAT RELATE TO
20 CERTAIN WITNESSES IS NOT A MATTER WHICH IS ORDINARILY
21 PERMITTED TO BE BROUGHT OUT DURING THE TRIAL OF A
22 CASE AND ORDINARILY IT IS NOT PERMITTED FOR A JURY TO
23 CONSIDER ANY PRIOR CONVICTIONS OF A WITNESS. WHERE
24 A WITNESS HAS BEEN CONVICTED OF CERTAIN TYPES OF
25 OFFENSES THOSE PRIOR CONVICTIONS MAY BE ADMITTED INTO

CHARGE TO JURY

1 EVIDENCE AND THE JURY MAY CONSIDER THAT EVIDENCE IF
2 YOU FIND IT TO BE TRUE BUT YOU MAY CONSIDER IT FOR
3 ONLY ONE PARTICULAR PURPOSE AND THAT PURPOSE BEING AS
4 IT MIGHT RELATE TO THE CREDIBILITY OR BELIEVABILITY
5 OF THAT WITNESS. SHOULD YOU FIND A PRIOR CONVICTION
6 TO BE TRUTHFUL EVIDENCE AND SHOULD YOU FIND THAT THE
7 CONVICTION FOR THAT PARTICULAR OFFENSE DOES BEAR UPON
8 THE CREDIBILITY OR BELIEVABILITY OF THAT PARTICULAR
9 WITNESS, THEN YOU MAY CONSIDER THAT EVIDENCE ON THAT
10 PARTICULAR POINT BUT YOU MAY NOT CONSIDER IT FOR ANY
11 OTHER REASON.

12 NOW, AS YOU ARE THE SOLE JUDGES OF THE FACTS AND
13 AS YOU ARE THE SOLE JUDGES OF THE CREDIBILITY OF EACH
14 WITNESS THAT HAS TESTIFIED, YOU ARE PERMITTED TO
15 BELIEVE AS MUCH OR AS LITTLE OF WHAT A WITNESS HAS
16 TESTIFIED TO AS YOU DEEM IS APPROPRIATE. YOU MAY
17 BELIEVE EVERYTHING THAT A WITNESS HAS TESTIFIED TO.
18 YOU MAY CHOOSE TO BELIEVE NONE OF WHAT A WITNESS HAS
19 TESTIFIED TO. YOU MAY BELIEVE SOME PORTION OF A
20 WITNESS' TESTIMONY AND REJECT SOME OTHER PORTION OF
21 THAT SAME WITNESS' TESTIMONY. YOU MAY BELIEVE ONE
22 WITNESS AS OPPOSED TO SEVERAL OR SEVERAL AS OPPOSED
23 THE ONE. WHATEVER YOUR GOOD JUDGMENT AND COMMON
24 SENSE TELLS YOU IS THE MOST BELIEVABLE TESTIMONY IS
25 THAT WHICH YOU SHOULD ACCEPT AND REJECT THAT

CHARGE TO JURY

1 TESTIMONY AND EVIDENCE WHICH YOU FIND NOT TO BE
2 CREDIBLE OR BELIEVABLE. YOUR SOLE OBJECTIVE AS I
3 HAVE STATED IS TO REACH THE TRUTH IN THE MATTER AND
4 BY DOING THAT YOU WILL HAVE FULFILLED YOUR
5 OBLIGATIONS AS JURORS AND THAT IS TO SIMPLY GIVE BOTH
6 THE STATE AND THE DEFENDANT A FAIR AND IMPARTIAL
7 TRIAL.

8 NOW, THE SAME LAW THAT PROVIDES THAT YOU ARE THE
9 JUDGES OF THE FACTS ALSO PROVIDES THAT I AM THE JUDGE
10 OF THE LAW AND THAT SIMPLY MEANS THAT NO ONE IS GOING
11 TO TELL YOU HOW TO ARRIVE AT YOUR DETERMINATION OF
12 FACT IN THIS CASE. YOU DO THAT EXERCISING YOUR OWN
13 GOOD JUDGMENT AND COMMON SENSE IN DETERMINING THE
14 CREDIBILITY OF EVIDENCE AND BELIEVABILITY OF
15 WITNESSES. YOU MUST, HOWEVER, ACCEPT THE LAW AS I
16 GIVE IT TO YOU AS BEING THE LAW THAT IS APPLICABLE IN
17 A CASE OF THIS NATURE. YOU ARE NOT TO CONCERN
18 YOURSELF WITH WHAT YOU THOUGHT THE LAW WAS OR WHAT
19 YOU THINK IT OUGHT TO BE OR WHAT YOU WISH IT WERE.
20 YOU MUST ACCEPT THE LAW AS I GIVE IT TO YOU AS BEING
21 THE LAW THAT IS APPLICABLE IN A CASE OF THIS NATURE.
22 THEN YOU SIMPLY TAKE THAT LAW AND YOU APPLY IT TO THE
23 FACTS AS YOU TWELVE JURORS DETERMINE THOSE FACTS TO
24 BE IN ORDER TO ARRIVE AT YOUR DECISION IN THIS CASE.

25 NOW, WHILE THERE ARE VARIOUS FORMS OF EVIDENCE,

CHARGE TO JURY

1 SUCH AS TESTIMONY, SUCH AS PHOTOGRAPHS, SUCH AS
2 DOCUMENTS AND OTHER TYPES OF PHYSICAL EXHIBITS, THERE
3 ARE REALLY ONLY TWO TYPES OF EVIDENCE AND EITHER OR
4 BOTH OF THOSE TYPES OF EVIDENCE MAY BE USED TO PROVE
5 A FACT IN ISSUE AND MAY BE USED TO PROVE THE
6 COMMISSION OF A CRIMINAL OFFENSE. THE TWO TYPES OF
7 EVIDENCE ARE DIRECT EVIDENCE AND CIRCUMSTANTIAL
8 EVIDENCE. DIRECT EVIDENCE IS THE TESTIMONY OF A
9 PERSON OR PERSONS WHO HAVE PERCEIVED THE EXISTENCE OF
10 A FACT BY MEANS OF THEIR SENSES AS WHERE A PERSON
11 VIEWS THE COMMISSION OF AN ACT AND THEN THEY COME
12 INTO COURT AND THEY TESTIFY AS TO WHAT THEY'VE SEEN.
13 CIRCUMSTANTIAL EVIDENCE ON THE OTHER HAND IS PROOF OF
14 SOME OTHER FACT OR FACTS WHICH TAKEN EITHER SINGLY OR
15 COLLECTIVELY MAY PROVE THE EXISTENCE OF A FACT IN
16 QUESTION AS A NECESSARY CONSEQUENCE; THAT IS, BY AN
17 INFERENCE. THE COMMISSION OF A CRIMINAL OFFENSE MAY
18 BE PROVEN BY EITHER CIRCUMSTANTIAL EVIDENCE OR DIRECT
19 EVIDENCE OR A COMBINATION OF BOTH OF THOSE TWO TYPES
20 OF EVIDENCE. TO THE EXTENT THAT THE STATE RELIES
21 UPON EVIDENCE WHICH IS CIRCUMSTANTIAL IN NATURE, THE
22 STATE HAS THE BURDEN OF PROVING ALL OF THE
23 CIRCUMSTANCES RELIED UPON BEYOND A REASONABLE DOUBT.
24 YOU MAY NOT CONVICT A DEFENDANT BASED UPON
25 CIRCUMSTANTIAL EVIDENCE ALONE UNLESS EVERY

CHARGE TO JURY

1 CIRCUMSTANCE RELIED UPON BY THE STATE IS PROVEN
2 BEYOND A REASONABLE DOUBT AND ALL OF THE
3 CIRCUMSTANCES SO PROVEN ARE CONSISTENT WITH EACH
4 OTHER AND TAKEN TOGETHER POINT CONCLUSIVELY TO THE
5 GUILT OF THE ACCUSED TO THE EXCLUSION OF ANY OTHER
6 REASONABLE EXPLANATION.

7 NOW, IN THIS CASE AS YOU AWARE THE DEFENDANT IS
8 CHARGED WITH THREE AND SEPARATE OFFENSES. THOSE
9 THREE OFFENSES AS YOU ARE AWARE ARE MURDER, ATTEMPTED
10 ARMED ROBBERY AND CONSPIRACY TO COMMIT ARMED ROBBERY.
11 EACH OF THOSE OFFENSES ARE SET FORTH IN A SEPARATE
12 INDICTMENT AND I'M GOING TO EXPLAIN TO YOU THE LAW AS
13 IT RELATES TO EACH OF THOSE SEPARATE OFFENSES. YOU
14 ARE NOT TO ATTACH ANY SIGNIFICANCE TO THE ORDER IN
15 WHICH I GIVE YOU THE LEGAL EXPLANATION AS TO THE LAW.
16 I AM SIMPLY GOING TO GIVE YOU THE LEGAL EXPLANATION
17 IN THE ORDER THAT THESE INDICTMENTS APPEAR; THAT IS,
18 IN THEIR NUMERICAL ORDER. THE FIRST INDICTMENT IN
19 NUMERICAL ORDER IS THE INDICTMENT ALLEGING THE
20 OFFENSE OF MURDER.

21 MURDER IS DEFINED IN A CODE SECTION IN THE SOUTH
22 CAROLINA CODE OF LAWS, SPECIFICALLY IN 16-3-10 OF THE
23 CODE OF LAWS OF SOUTH CAROLINA, AND IT IS DEFINED AS
24 THE KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT
25 EITHER EXPRESSED OR IMPLIED. IN ORDER FOR YOU TO

CHARGE TO JURY

1 FIND THE DEFENDANT GUILTY OF THE CRIME OF MURDER, IT
2 IS NECESSARY THAT THE EVIDENCE HAS ESTABLISHED BEYOND
3 A REASONABLE DOUBT THAT THE DEFENDANT OR AN
4 ACCOMPLICE DID KILL THE DECEASED AND THAT THE KILLING
5 WAS DONE WITH MALICE AFORETHOUGHT. MALICE
6 AFORETHOUGHT IS AN ESSENTIAL ELEMENT OF THE CRIME OF
7 MURDER. I WILL EXPLAIN TO YOU ACCOMPLICE AND THE
8 LEGAL DOCTRINE OF ACCOMPLICE LIABILITY LATER ON IN
9 THIS INSTRUCTION. MALICE IS DEFINED AS A TERM
10 CONNOTING AN ILL WILL AND AN INTENT TO DO HARM. IT
11 IS A TECHNICAL TERM IMPORTING WICKEDNESS AND
12 EXCLUDING JUST CAUSE OR EXCUSE. IT IS SOMETHING
13 WHICH SPRINGS FROM WICKEDNESS OR DEPRAVITY, FROM A
14 HEART DEVOID OF SOCIAL DUTY AND FATALLY BENT ON
15 MISCHIEF. MALICE MAY BE EITHER EXPRESSED OR IMPLIED
16 UNDER THE STATUTE. THE WORDS EXPRESSED OR IMPLIED
17 MALICE DO NOT MEAN DIFFERENT KINDS OF MALICE BUT
18 MERELY THE MANNER IN WHICH MALICE MAY BE SHOWN TO
19 HAVE EXISTED; THAT IS TO SAY BY EITHER DIRECT
20 EVIDENCE OR CIRCUMSTANTIAL EVIDENCE INFERRING THE
21 EXISTENCE OF MALICE. MALICE MAY BE EXPRESSED AS
22 WHERE THERE IS AN EXPRESSED THREAT TO KILL OR A LYING
23 IN WAIT OR WHERE THE CIRCUMSTANCES SHOW DIRECTLY THAT
24 AN INTENT TO KILL WAS ENTERTAINED BY THE SLAYER.
25 MALICE MAY BE INFERRED THOUGH NO EXPRESSED INTENT TO

CHARGE TO JURY

1 KILL IS PROVED BY DIRECT EVIDENCE WHERE THE FACTS AND
2 THE CIRCUMSTANCES WHICH HAVE BEEN PROVEN BY THE
3 EVIDENCE IN THE CASE SATISFY YOU BEYOND A REASONABLE
4 DOUBT THAT MALICE WAS PRESENT IN THE MIND OF THE
5 SLAYER AT THE TIME OF THE KILLING. AS I HAVE STATED,
6 MALICE MAY BE EITHER EXPRESSED OR IMPLIED AND MALICE
7 MAY BE INFERRED FROM THE CIRCUMSTANCES SHOWN TO HAVE
8 EXISTED AT THE TIME OF THE EVENT. AND YOU MAY INFER
9 MALICE FROM THE UNLAWFUL, INTENTIONAL KILLING OF
10 ANOTHER WITHOUT JUSTIFICATION OR LEGAL EXCUSE. YOU
11 MAY INFER MALICE FROM A WRONGFUL INTENT TO INJURE
12 ANOTHER THROUGH THE INFLECTION OF SERIOUS BODILY HARM
13 INDICATING A WICKED OR DEPRAVED SPIRIT. YOU MAY
14 INFER MALICE FROM THE INTENTIONAL USE OF A DEADLY
15 WEAPON. YOU MAY INFER MALICE FROM THE INTENTIONAL
16 COMMISSION OF AN ACT WHICH IS INHERENTLY DANGEROUS TO
17 HUMAN LIFE AND YOU MAY INFER MALICE FROM THE
18 INTENTIONAL KILLING OF ANOTHER DURING THE COMMISSION
19 OF A FELONY WHICH IS DANGEROUS TO HUMAN LIFE OR WHERE
20 THE CIRCUMSTANCES OF THE CRIME CREATE A SUBSTANTIAL
21 FORESEEABLE RISK TO HUMAN LIFE. NOW, EVEN IF THE
22 FACTS THAT ARE PROVEN IN THE CASE ARE SUFFICIENT TO
23 RAISE AN INFERENCE OF MALICE, THIS INFERENCE WOULD
24 SIMPLY BE AN EVIDENTIARY FACT TO BE TAKEN INTO
25 CONSIDERATION BY YOU TWELVE JURORS ALONG WITH ALL THE

CHARGE TO JURY

1 OTHER EVIDENCE IN THE CASE AND YOU MAY GIVE IT SUCH
2 WEIGHT, IF ANY, AS YOU DETERMINE THAT IT SHOULD
3 RECEIVE. SIMPLY STATED, YOU ARE PERMITTED TO INFER
4 MALICE FROM THE PROOF OF ANY ONE OR MORE OF THOSE
5 CIRCUMSTANCES THAT I HAVE SET FORTH ABOVE BUT YOU ARE
6 IN NO WAY REQUIRED TO DO SO. YOU MUST DETERMINE
7 WHETHER OR NOT MALICE EXISTED BASED UPON YOUR
8 CONSIDERATION OF THE EVIDENCE IN THE CASE AND ANY
9 REASONABLE INFERENCES WHICH MAY BE DRAWN THEREFROM.
10 THE STATE IS REQUIRED TO PROVE THE EXISTENCE OF
11 MALICE JUST AS IT MUST PROVE ANY OTHER ELEMENT OF THE
12 OFFENSE. IT IS FOR YOU, THE JURY, TO DETERMINE
13 WHETHER OR NOT THE EVIDENCE IN THE CASE ESTABLISHES
14 MALICE BEYOND A REASONABLE DOUBT. IT IS ALSO
15 ESSENTIAL THAT THERE BE MALICE AFORETHOUGHT. THE LAW
16 DOES NOT REQUIRE THAT MALICE MUST EXIST FOR ANY
17 APPRECIABLE LENGTH OF TIME BEFORE THE COMMISSION OF
18 THE ACT PRODUCING A FATAL RESULT. INDEED, IT MAY BE
19 CONCEIVED AT THE VERY MOMENT THAT THE FATAL ACT IS
20 COMMITTED. IT IS SUFFICIENT IN THE LAW IF THERE IS
21 A COMBINATION OF MALICE AND THE ACT WHICH PROXIMATELY
22 CAUSES THE FATAL RESULT. WHILE THE STATE IS REQUIRED
23 TO PROVE BEYOND A REASONABLE DOUBT THAT A KILLING
24 OCCURRED ACCOMPANIED BY MALICE AFORETHOUGHT IT IS NOT
25 REQUIRED THAT THE STATE PROVE A MOTIVE FOR ANY SUCH

CHARGE TO JURY

1 KILLING ALTHOUGH THERE MAY BE EVIDENCE OF MOTIVE IN
2 THE TRIAL OF THE CASE.

3 THE SECOND INDICTMENT WHICH I WILL EXPLAIN TO
4 YOU RELATES TO THE INDICTMENT ALLEGING ATTEMPTED
5 ARMED ROBBERY. SO THAT YOU'LL UNDERSTAND WHAT
6 ATTEMPTED ARMED ROBBERY IS, I SIMPLY WILL DEFINE FOR
7 YOU THE CRIMINAL OFFENSE KNOWN AS ARMED ROBBERY AND
8 THEN I WILL ALSO DEFINE FOR YOU WHAT IS MEANT BY AN
9 ATTEMPT. THE CRIMINAL OFFENSE KNOWN AS ARMED ROBBERY
10 INCLUDES NECESSARILY THE LESSER OFFENSES OF ROBBERY
11 AND OF LARCENY AND, THEREFORE, I'M GOING TO DEFINE
12 FOR YOU THE TERM LARCENY AND OF ROBBERY, EACH OF
13 THOSE BEING INCLUDED IN THE CRIME OF ARMED ROBBERY.
14 LARCENY IS COMMONLY REFERRED TO AND KNOWN AS
15 STEALING. LARCENY IS DEFINED IN THE LAW AS THE
16 TAKING, THE STEALING AND THE CARRYING AWAY OF THE
17 PERSONAL PROPERTY OF ANOTHER WITH THE INTENTION OF
18 PERMANENTLY DEPRIVING THE TRUE OWNER OF THAT PROPERTY
19 AND CONVERTING THE PROPERTY TO THE TAKER'S OWN USE.
20 ROBBERY IS DEFINED IN THE LAW AS THE TAKING, STEALING
21 AND CARRYING AWAY OF THE PERSONAL PROPERTY OF ANOTHER
22 HAVING ANY VALUE FROM THE PERSON OR FROM THE PRESENCE
23 OF ANOTHER PERSON THROUGH THE USE OF FORCE OR
24 VIOLENCE OR BY THE THREAT OF THE USE OF FORCE OR
25 VIOLENCE; THAT IS, BY INTIMIDATION. IN OTHER WORDS,

CHARGE TO JURY

1 ROBBERY IS THE TAKING OF THE PROPERTY OF ANOTHER
2 AGAINST THE OWNER'S WILL AND WITHOUT HIS OR HER
3 CONSENT BY THE USE OF FORCE, VIOLENCE OR INTIMIDATION
4 IN ORDER TO ACCOMPLISH THE ROBBERY. AND AN ARMED
5 ROBBERY IS SIMPLY A ROBBERY THAT IS ACCOMPLISHED BY
6 THE USE OF A DEADLY WEAPON IN ORDER TO ACCOMPLISH THE
7 ROBBERY. AN ATTEMPT IS AN ACT DONE IN PART EXECUTION
8 OF A DESIGN TO COMMIT A CRIME. THERE MUST BE AN
9 INTENT THAT THE ACT SHALL BE COMMITTED AND AN ACT
10 DONE IN FURTHERANCE OF THAT INTENT. AN ATTEMPT IS
11 DISTINGUISHED FROM THE MERE PREPARATION TO COMMIT A
12 CRIME AND AN INTENT TO COMMIT A CRIME. IN ORDER TO
13 BE GUILTY OF AN ATTEMPT, IT IS NECESSARY THAT SOME
14 ACT SHOULD BE DONE IN FURTHERANCE OF THE INTENT TO
15 COMMIT THAT PARTICULAR OFFENSE, AN ACT WHICH SHOULD
16 THE CRIME BE COMPLETED WOULD CONSTITUTE PART AND
17 PARCEL OF THE OFFENSE ITSELF BUT WHICH DOES NOT REACH
18 TO THE ACCOMPLISHMENT OF THE ORIGINAL INTENT BECAUSE
19 IT IS PREVENTED OR ABANDONED.

20 NOW, AS I HAVE STATED, THE STATE IS ALLEGING THE
21 DEFENDANT TO BE GUILTY OF THE CRIME OF MURDER AND OF
22 ATTEMPTED ARMED ROBBERY UNDER THE THEORY, THE LEGAL
23 THEORY, OF ACCOMPLICE LIABILITY. ONE MAY BE
24 CONVICTED AS A PRINCIPAL OR AS AN ACCOMPLICE UNDER
25 THE THEORY OF ACCOMPLICE LIABILITY. AN ACCOMPLICE IS

CHARGE TO JURY

1 ONE WHO KNOWINGLY, VOLUNTARILY AND WITH COMMON INTENT
2 WITH THE PRINCIPAL OFFENDER UNITES IN THE COMMISSION
3 OF A CRIME. WHEN TWO OR MORE PERSONS COMBINE,
4 CONSPIRE OR AGREE TO THE COMMISSION OF A FELONY, SUCH
5 AS A BURGLARY OR SUCH AS A ROBBERY, AND IN THE
6 COMMISSION OF THE CRIMINAL ACT A HOMICIDE IS
7 COMMITTED BY ONE OF THE PARTICIPANTS AS A PROBABLE OR
8 NATURAL CONSEQUENCE OF THOSE ACTS DONE IN FURTHERANCE
9 OF THE COMMON PLAN, ALL PERSONS WHO ARE PRESENT AND
10 PARTICIPATING IN THE CRIMINAL ACT ARE EQUALLY AS
11 GUILTY AS THE ONE WHO ACTUALLY COMMITS THE FATAL ACT.
12 UNDER THOSE CIRCUMSTANCES THE LAW DECLARES THAT THE
13 ACT OF ONE IS THE ACT OF ALL OR THE HAND OF ONE IS
14 THE HAND OF ALL. IF SEVERAL PERSONS IN FURTHERANCE
15 OF A COMMON DESIGN TO COMMIT AN UNLAWFUL ACT SET OUT
16 TOGETHER AND EACH TAKES THE PART AGREED UPON OR
17 ASSIGNED TO HIM, SOME TO COMMIT THE ACT OR SOME OTHER
18 TO WATCH AT A PROPER DISTANCE TO PREVENT INTERFERENCE
19 OR SURPRISE OR TO ENCOURAGE THE COMMISSION OF THE
20 UNLAWFUL ACT OR TO FAVOR, IF NECESSARY, THE ESCAPE OF
21 THOSE IMMEDIATELY ENGAGED IN THE COMMISSION OF THE
22 UNLAWFUL ACT, UNDER THESE CIRCUMSTANCES IF THE
23 UNLAWFUL ACT IS COMMITTED THE LAW SAYS THE ACT OF ONE
24 IS THE ACT OF ALL OR THE HAND OF ONE IS THE HAND OF
25 ALL. THE COMMON PURPOSE MAY NOT HAVE BEEN TO KILL

CHARGE TO JURY

1 ANYONE BUT IF IN THE COMMISSION OF THE CRIMINAL ACT
2 OR COMMON PURPOSE, SUCH AS A BURGLARY OR SUCH AS A
3 ROBBERY, IF A HOMICIDE IS COMMITTED BY ONE OF THE
4 PARTICIPANTS AS A NATURAL OR PROBABLE CONSEQUENCE OF
5 THE ACTS DONE IN FURTHERANCE OF THE COMMON PLAN, THEN
6 ALL WHO ARE PRESENT AIDING, ABETTING, ASSISTING AND
7 PARTICIPATING IN THE COMMON DESIGN ARE AS EQUALLY
8 GUILTY AS THE ACTUAL SLAYER. ONE MAY BE CONSIDERED
9 CONSTRUCTIVELY PRESENT AT THE COMMISSION OF AN
10 OFFENSE EVEN THOUGH HE MAY BE PHYSICALLY SOME
11 DISTANCE AWAY SO LONG AS HE IS CARRYING OUT THE ROLE
12 ASSIGNED TO HIM IN FURTHERANCE OF THE COMMON DESIGN
13 AND IN FURTHERANCE OF THE CRIMINAL ACT.

14 MERE PRESENCE AT THE SCENE OF THE CRIME IS NOT
15 SUFFICIENT IN AND OF ITSELF TO PROVE SOMEONE GUILTY
16 OF A CRIME UNDER THE THEORY OF ACCOMPLICE LIABILITY.
17 IT MUST BE PROVEN BEYOND A REASONABLE DOUBT THAT THE
18 PERSON WAS PRESENT WITH THE INTENTION OF AIDING,
19 ABETTING, ASSISTING OR PARTICIPATING IN THE
20 COMMISSION OF THE CRIMINAL ACT OR COMMON DESIGN.
21 SHOULD YOU CONCLUDE FROM YOUR REVIEW OF THE EVIDENCE
22 IN THE CASE THAT THE DEFENDANT WAS NOT PRESENT OR
23 THAT THE DEFENDANT WAS ONLY PRESENT WHERE THE
24 CRIMINAL ACT OCCURRED BUT DID NOT AID, ABET, ASSIST
25 OR PARTICIPATE IN THE COMMISSION OF THE CRIME THEN

CHARGE TO JURY

1 YOUR VERDICT MUST BE NOT GUILTY. SHOULD YOU
2 DETERMINE THAT THE STATE HAS PROVEN BEYOND A
3 REASONABLE DOUBT THAT THE DEFENDANT DID AID, ABET,
4 ASSIST OR PARTICIPATE IN THE COMMISSION OF ANY CRIME
5 PROVEN TO HAVE BEEN COMMITTED BY THE EVIDENCE IN THE
6 CASE THEN YOU MUST DETERMINE IF THE STATE HAS PROVEN
7 BEYOND A REASONABLE DOUBT THE ACTUAL CRIME CHARGED
8 BASED UPON THE ESTABLISHMENT OF THE ELEMENTS OF THAT
9 PARTICULAR CRIME AS I HAVE DEFINED THEM FOR YOU AS
10 THEY RELATE TO MURDER AND AS THEY RELATE TO ATTEMPTED
11 ARMED ROBBERY.

12 THE LAST INDICTMENT OR THE THIRD INDICTMENT IS
13 THE INDICTMENT FOR CRIMINAL CONSPIRACY OR CONSPIRACY
14 TO COMMIT ARMED ROBBERY. AND BY THAT INDICTMENT THE
15 STATE IS ALLEGING THAT ON OR ABOUT OCTOBER 27TH OF
16 1996 THE DEFENDANT WILFULLY AND UNLAWFULLY CONSPIRED
17 WITH OTHERS IN THE COMMISSION OF A CRIMINAL OFFENSE,
18 SPECIFICALLY THE OFFENSE OF ARMED ROBBERY. WILFULLY
19 SIMPLY MEANS VOLUNTARILY AND INTENTIONALLY. AND THE
20 WORD CONSPIRE SIMPLY MEANS TO AGREE. IT MEANS TO
21 AGREE TO COMMIT A CRIMINAL ACT. A CONSPIRACY IS A
22 COMBINATION BETWEEN TWO OR MORE PERSONS TO COMMIT AN
23 UNLAWFUL ACT. THERE CAN BE NO CONSPIRACY WHEN ONE
24 INDIVIDUAL ACTS BY AND FOR HIMSELF AND NOT IN CONCERT
25 WITH OTHERS. IN ORDER TO BECOME A PARTY TO A

CHARGE TO JURY

1 CONSPIRACY A PERSON MUST COMBINE WITH SOMEONE ELSE,
2 ONE OR MORE PERSONS, TO EFFECT THE OBJECT OF THE
3 CONSPIRACY BY THE MEANS THAT HAVE BEEN AGREED UPON
4 PURSUANT TO THE AGREEMENT IN THE CONSPIRACY. IN
5 ORDER TO ESTABLISH A CONSPIRACY IT IS NECESSARY THAT
6 THE CONSPIRACY OR THE AGREEMENT TO COMMIT THE OFFENSE
7 ALLEGED IN THE INDICTMENT BE ESTABLISHED. AND,
8 SECONDLY, THAT ONE OR MORE OF THE PARTIES ENGAGED IN
9 THE CONSPIRACY HAVE COMMITTED SOME ACT TO EFFECT ITS
10 OBJECT. WHEN AN UNLAWFUL END IS SOUGHT TO BE
11 EFFECTED AND TWO OR MORE PERSONS ACTUATED BY THE
12 COMMON PURPOSE OF ACCOMPLISHING THAT END WORK
13 TOGETHER IN ANY WAY IN FURTHERANCE OF THE UNLAWFUL
14 SCHEME, EACH OF THOSE PERSONS BECOMES A MEMBER OF THE
15 CONSPIRACY. BUT BEFORE ANY PERSON MAY BE FOUND
16 GUILTY OF THE CRIME KNOWN AS CONSPIRACY IT MUST
17 APPEAR BEYOND A REASONABLE DOUBT THAT A CONSPIRACY
18 WAS FORMED AND THAT THAT PARTICULAR PERSON WAS AN
19 ACTIVE PARTY TO IT.

20 CRIMINAL INTENT IS ALSO AN ESSENTIAL ELEMENT OF
21 EVERY CRIMINAL OFFENSE WHICH MUST BE PROVEN BEYOND A
22 REASONABLE DOUBT BY THE STATE. CRIMINAL INTENT IS
23 DEFINED AS A STATE OF MIND WHICH OPERATES JOINTLY
24 WITH AN ACT IN THE COMMISSION OF A CRIME. CRIMINAL
25 INTENT IS FURTHER DEFINED AS A MENTAL STATE OF

CHARGE TO JURY

1 CONSCIOUS WRONGDOING. CRIMINAL INTENT JUST AS ANY
2 OTHER ELEMENT IN A CRIME MAY BE PROVEN BY EITHER
3 DIRECT EVIDENCE OR CIRCUMSTANTIAL EVIDENCE OR A
4 COMBINATION OF EACH OF THOSE TYPES OF EVIDENCE.

5 NOW, I INSTRUCT YOU FURTHER AND I EMPHASIZE TO
6 YOU THAT THE FACT THAT A DEFENDANT DURING THE TRIAL
7 OF A CRIMINAL CASE DOES NOT TESTIFY DURING THE TRIAL
8 OF THAT CASE IS NOT A FACTOR TO BE CONSIDERED BY YOU
9 IN ANY WAY DURING YOUR DELIBERATIONS NOR IN YOUR
10 CONSIDERATION AS TO WHETHER OR NOT HIS GUILT HAS BEEN
11 PROVEN BEYOND A REASONABLE DOUBT. IT MAY NOT BE
12 CONSIDERED IN ANY FASHION BY YOU NOR MAY IT WEIGH
13 EVEN IN THE SLIGHTEST DEGREE AGAINST THE DEFENDANT.
14 YOU ARE TO REACH NO INFERENCE NOR DRAW ANY CONCLUSION
15 FROM THE FACT THAT THE DEFENDANT DOES NOT TESTIFY
16 DURING THE TRIAL OF THE CASE AND YOU MAY NOT EVEN
17 DISCUSS THAT FACT WHILE YOU ARE DELIBERATING THE CASE
18 IN THE JURY ROOM. AS I HAVE STATED, THE BURDEN IS
19 ALWAYS UPON THE STATE TO PROVE ALL OF THE ESSENTIAL
20 ELEMENTS OF EVERY CRIME THEY ALLEGE AGAINST THE
21 DEFENDANT BEYOND A REASONABLE DOUBT. THE BURDEN IS
22 NEVER UPON A DEFENDANT TO PROVE ANYTHING.

23 NOW, MR. FOREMAN AND LADIES AND GENTLEMEN OF THE
24 JURY, I AM NOT IN ANY WAY CONCERNED WITH WHAT YOUR
25 VERDICT IS BUT I DO TELL YOU THAT THE VERDICT OF THE

CHARGE TO JURY

1 JURY MUST BE UNANIMOUS. ALL TWELVE JURORS MUST AGREE
2 AS TO WHAT YOUR VERDICTS ARE. NOW, AS I INDICATED TO
3 YOU EARLIER, THERE ARE THREE INDICTMENTS. YOU WILL
4 BE CALLED UPON TO RENDER SEPARATE VERDICTS AS TO EACH
5 OF THOSE SEPARATE INDICTMENTS. YOU WILL CONSIDER
6 THE EVIDENCE AS IT RELATES TO EACH OF THE SEPARATE
7 INDICTMENTS. YOU WILL CONSIDER THE LAW AS IT RELATES
8 TO EACH OF THOSE SEPARATE AND DISTINCT CRIMINAL
9 OFFENSES. AS TO EACH OF THE SEPARATE INDICTMENTS
10 THERE ARE TWO POSSIBLE VERDICT FORMS. THOSE TWO
11 POSSIBLE VERDICT FORMS ARE GUILTY AND NOT GUILTY. SO
12 FAR AS THE THREE SEPARATE INDICTMENTS ARE CONCERNED,
13 YOUR VERDICTS MAY BE THE SAME AS TO EACH OR THEY MAY
14 BE DIFFERENT AS TO THE THREE SEPARATE INDICTMENTS
15 DEPENDING UPON YOUR DETERMINATION OF FACT, YOUR
16 APPLICATION OF LAW AND YOUR ARRIVING AT A UNANIMOUS
17 VERDICT. SO, MR. FOREMAN, AS I SAY, YOU WILL HAVE
18 THESE INDICTMENTS IN THE JURY ROOM. THEY ARE TO
19 SERVE NO PURPOSE OTHER THAN TO SERVE AS THE VERDICT
20 FORM BUT IT IS ON THE BACK OF THESE INDICTMENTS YOU
21 WILL SEE NEAR THE BOTTOM THE WORD "VERDICT" AND IT'S
22 UNDERNEATH THAT WORD THAT YOU WILL SIMPLY WRITE THE
23 DECISION OF YOU AND YOUR FELLOW JURORS. AS I SAY,
24 THE DECISION MUST BE UNANIMOUS, ALL TWELVE MUST
25 AGREE. MR. FOREMAN, ONCE YOU AND YOUR FELLOW JURORS

CHARGE TO JURY

1 HAVE ARRIVED AT A UNANIMOUS VERDICT AS TO THE
2 INDICTMENT I WOULD SIMPLY ASK THAT YOU INDICATE THAT
3 VERDICT IN THE SPACE PROVIDED AND SIGN YOUR NAME AS
4 THE FOREPERSON AND PLACE TODAY'S DATE ON IT.

5 NOW, AT THIS TIME I'M GOING TO ASK YOU TO PLEASE
6 RETIRE TO YOUR JURY ROOM BUT I'M GOING TO ASK THAT
7 YOU STILL NOT BEGIN YOUR DELIBERATIONS UNTIL I SEND
8 YOU WORD TO DO SO. I'VE GOT SOME MATTERS THAT I'LL
9 NEED TO ADDRESS WITH THE LAWYERS AND IN THE EVENT I
10 DO NOT NEED TO BRING YOU BACK I'LL SIMPLY SEND WORD
11 BY WAY OF THE BAILIFF THAT YOU MAY BEGIN YOUR
12 DELIBERATIONS. IN THAT EVENT, THE BAILIFF WILL BRING
13 TO THE JURY ROOM ALL OF THE EXHIBITS WHICH HAVE BEEN
14 ADMITTED AND ALSO, MR. FOREMAN, TO YOU WILL BRING THE
15 VERDICT FORMS. SO, PLEASE RETIRE TO YOUR JURY ROOM
16 BUT AWAIT MY INSTRUCTION AS TO WHEN TO BEGIN YOUR
17 DELIBERATIONS. MR. EICHELBERGER AND MS. HOPKINS, IF
18 YOU'LL JUST STAY HERE WITH US, PLEASE.

19 (JURY LEAVES THE JURY BOX AT 4:43 P.M.)

20 (ALTERNATE JURORS ARE DISMISSED)

21 THE COURT: ARE THERE ANY EXCEPTIONS OR
22 ADDITIONS TO MY INSTRUCTION BY THE STATE?

23 MR. McMAHON: NO, YOUR HONOR.

24 THE COURT: BY THE DEFENDANT?

25 MR. ROGERS: JUDGE, I HESITATE TO MENTION THIS

COLLOQUY

1 BUT WHEN YOU WERE GOING THROUGH YOUR CHARGES AND YOU
2 LISTED THE MURDER, ATTEMPTED ARMED ROBBERY AND
3 CONSPIRACY YOU TOLD THE JURY THAT THERE WAS NO
4 SIGNIFICANCE TO THE FACT THAT YOU WERE LISTING THEM
5 IN THAT ORDER. I THOUGHT YOU WERE GOING TO ALSO SAY
6 THE SAME THING WITH RESPECT TO THE FORMS OF VERDICT,
7 GUILTY OR NOT GUILTY. I USUALLY HEAR JUDGES SAY I'M
8 NOT SAYING THIS IN ANY ORDER TO INTIMATE WHAT YOUR
9 VERDICT SHOULD BE AND YOU DIDN'T DO THAT WHEN YOU HAD
10 DONE THAT WITH THE CRIMES AND I'M CONCERNED THAT SOME
11 INTIMATION ALTHOUGH NOT INTENTIONAL MAY HAVE GONE TO
12 THE JURY.

13 THE COURT: YOU MEAN THAT WHEN I GAVE THEM THE
14 TWO VERDICT FORMS BY GIVING ONE FIRST THEY MIGHT TEND
15 TO CHOOSE THAT OPTION OVER THE OTHER?

16 MR. ROGERS: WELL, JUDGE, I'VE JUST HEARD JUDGES
17 WHEN THEY DO THAT SAY BY GIVING THEM IN THIS ORDER
18 I'M NOT SUGGESTING WHAT YOUR VERDICT SHOULD BE. AND
19 I THOUGHT THAT'S WHAT YOU WERE GOING TO SAY IN LIGHT
20 OF THE FACT THAT YOU HAD SAID SOMETHING SIMILAR TO
21 THAT EFFECT ABOUT THE CHARGES. AND I'M JUST
22 CONCERNED. I DON'T THINK THERE WAS ANY INTENTION ON
23 YOUR PART. I'M SURE THERE WAS NOT, BUT I'M JUST
24 CONCERNED WHAT MESSAGE THE JURY MIGHT HAVE PICKED UP
25 FROM THAT.

CHARGE TO JURY

1 THE COURT: WELL, I DON'T BELIEVE THEY PICK UP
2 ANY MESSAGE FROM THIS. I'M GOING TO DECLINE ANY
3 FURTHER INSTRUCTION.

4 MR. ROGERS: VERY WELL, YOUR HONOR. I MADE IT
5 FOR THE RECORD. THANK YOU.

6 THE COURT: ANY OTHERS?

7 MR. ROGERS: NO, SIR.

8 THE COURT: OKAY. LET ME ASK Y'ALL TO CHECK ALL
9 OF THE EXHIBITS AND LET'S BE CERTAIN THAT WE'VE GOT
10 THEM ALL.

11 (EXHIBITS ARE ALL ACCOUNTED FOR)

12 (JURY DELIBERATING)

13 THE COURT: I HAVE A REQUEST FROM THE FOREMAN.
14 HE'S INDICATED THE JURY WOULD LIKE TO RECEIVE A MORE
15 DETAILED INSTRUCTION ON THE DOCTRINE OF THE HAND OF
16 ONE, HAND OF ALL. I INTERPRET THAT TO MEAN THEY NEED
17 TO BE REINSTRUCTED IN THE DOCTRINE OF ACCOMPLICE
18 LIABILITY. SO, THAT'S WHAT I INTEND TO REINSTRUCT
19 THEM AS TO. ALL RIGHT. BRING THE JURY IN, PLEASE,
20 SIR.

21 (JURY RETURNS TO THE JURY BOX AT 6:03 P.M.)

22 BAILIFF: THE JURY IS PRESENT, YOUR HONOR.

23 THE COURT: THANK YOU, SIR. MR. FOREMAN, I HAVE
24 YOUR NOTE AND IT INDICATES THAT THE JURY WOULD LIKE
25 TO BE REINSTRUCTED ON THE DOCTRINE OF THE HAND OF ONE

CHARGE TO JURY

1 IS THE HAND OF ALL. WHAT I PROPOSE TO DO IS TO
2 SIMPLY REINSTRUCT YOU ON THE LEGAL DOCTRINE OF
3 ACCOMPLICE LIABILITY AND THEN YOU CAN GO BACK INTO
4 THE JURY ROOM AND IF YOU HAVE ADDITIONAL QUESTIONS OR
5 I FAIL TO ANSWER THE QUESTION THAT YOU AND YOUR
6 FELLOW JURORS ARE LOOKING FOR, JUST SIMPLY AGAIN
7 WRITE DOWN WHATEVER QUESTION YOU HAVE AND I'LL TRY TO
8 RESPOND TO AS BEST I CAN.

9 AN ACCOMPLICE IS ONE WHO KNOWINGLY, VOLUNTARILY
10 AND WITH COMMON INTENT WITH THE PRINCIPAL OFFENDER
11 UNITES IN THE COMMISSION OF A CRIME. WHEN TWO OR
12 MORE PERSONS COMBINE OR CONSPIRE OR AGREE TO THE
13 COMMISSION OF A FELONY, SUCH AS A BURGLARY OR A
14 ROBBERY, AND IN THE COMMISSION OF THE CRIMINAL ACT A
15 HOMICIDE IS COMMITTED BY ONE OF THE PARTICIPANTS
16 WHICH IS A PROBABLE OR NATURAL CONSEQUENCE OF THOSE
17 ACTS DONE IN FURTHERANCE OF THE COMMON PLAN, ALL WHO
18 ARE PRESENT AND PARTICIPATING IN THE CRIMINAL ACT ARE
19 EQUALLY AS GUILTY AS THE ONE WHO ACTUALLY COMMITTED
20 THE FATAL ACT. UNDER THOSE CIRCUMSTANCES THE LAW
21 DECLARES THAT THE ACT OF ONE IS THE ACT OF ALL OR THE
22 HAND OF ONE IS THE HAND OF ALL. IF SEVERAL PERSONS
23 IN FURTHERANCE OF A COMMON DESIGN TO COMMIT AN
24 UNLAWFUL ACT SET OUT TOGETHER AND EACH TAKES THE PART
25 AGREED UPON OR ASSIGNED TO HIM, SOME TO COMMIT OR ONE

CHARGE TO JURY

1 TO COMMIT THE ACT, OTHERS TO WATCH AT PROPER
2 DISTANCES TO PREVENT INTERFERENCE OR SURPRISE OR TO
3 ENCOURAGE THE COMMISSION OF THE UNLAWFUL ACT OR TO
4 FAVOR, IF NECESSARY, THE ESCAPE OF THOSE IMMEDIATELY
5 ENGAGED IN THE COMMISSION OF THE UNLAWFUL ACT, UNDER
6 THESE CIRCUMSTANCES IF THE UNLAWFUL ACT IS COMMITTED
7 THE ACT OF ONE IS THE ACT OF ALL; THAT IS, THE HAND
8 OF ONE IS THE HAND OF ALL. THE COMMON PURPOSE MAY
9 NOT HAVE BEEN TO KILL ANYONE BUT IF IN THE COMMISSION
10 OF THE CRIMINAL ACT OR COMMON PURPOSE, SUCH AS THE
11 COMMISSION OF A BURGLARY OR A ROBBERY, A HOMICIDE IS
12 COMMITTED BY ONE OF THE PARTICIPANTS AS A NATURAL OR
13 PROBABLE CONSEQUENCE OF THE ACTS DONE IN FURTHERANCE
14 OF THE COMMON PLAN THEN ALL WHO ARE PRESENT AIDING,
15 ABETTING, ASSISTING AND PARTICIPATING IN THE COMMON
16 DESIGN ARE AS EQUALLY GUILTY AS THE ACTUAL SLAYER.
17 ONE MAY BE CONSIDERED CONSTRUCTIVELY PRESENT AT THE
18 COMMISSION OF AN OFFENSE EVEN THOUGH HE MAY BE
19 PHYSICALLY SOME DISTANCE AWAY SO LONG AS HE IS
20 CARRYING OUT THE ROLE THAT IS ASSIGNED TO HIM IN
21 FURTHERANCE OF THE COMMON SCHEME, PLAN OR DESIGN.

22 MERE PRESENCE AT THE SCENE OF A CRIME IS NOT
23 SUFFICIENT IN AND OF ITSELF TO PROVE SOMEONE GUILTY
24 OF A CRIME. UNDER A THEORY OF ACCOMPLICE LIABILITY,
25 IT MUST BE PROVEN BEYOND A REASONABLE DOUBT THAT THE

CHARGE TO JURY

1 PERSON WAS PRESENT WITH THE INTENTION OF AIDING,
2 ABETTING, ASSISTING OR PARTICIPATING IN THE
3 COMMISSION OF THE CRIMINAL ACT OR COMMON DESIGN.

4 SO, THAT IS THE DOCTRINE OF ACCOMPLICE LIABILITY
5 WHICH INCLUDES THAT RELATED IN THE QUESTION WHICH IS
6 THE DOCTRINE OF THE HAND OF ONE, THE HAND OF ALL.
7 THAT CONCLUDES MY REINSTRUCTION AS TO THAT PARTICULAR
8 LEGAL DOCTRINE SO I'LL SIMPLY ASK, MR. FOREMAN, THAT
9 YOU AND YOUR FELLOW JURORS GO BACK INTO THE JURY AND
10 CONTINUE WITH YOUR DELIBERATIONS. WHEN YOU GO BACK
11 AND YOU DISCUSS IT, IF THAT STILL DOES NOT CLEARLY
12 DEFINE THAT DOCTRINE FOR YOU, SIMPLY LET ME KNOW AND
13 I'LL TRY TO GIVE YOU A LITTLE MORE DEFINITE OR CLEAR
14 DEFINITION IF I CAN. SO, PLEASE RETIRE TO YOUR JURY
15 ROOM AND CONTINUE YOUR DELIBERATIONS.

16 LET ME SAY ONE THING BEFORE YOU GO. IF THERE'S
17 ANY JUROR THAT NEEDS TO HAVE SOMEONE CONTACTED TO LET
18 THEM KNOW THAT YOU ARE DOWN HERE AND YOU'RE
19 DELIBERATING A CASE IF YOU'LL LET THE BAILIFF KNOW
20 AND IF YOU CAN JUST GIVE THE BAILIFF THE PERSON'S
21 NAME AND PHONE NUMBER AND THEY'LL CALL FOR YOU. IF
22 FOR SOME REASON THAT'S NOT SATISFACTORY AND YOU NEED
23 TO ACTUALLY CALL YOURSELF, LET THE BAILIFF KNOW AND
24 WE'LL TRY TO MAKE THOSE ARRANGEMENTS FOR YOU. BUT IN
25 CONJUNCTION WITH THAT LET ME SAY, HOWEVER, THAT IF AT

CHARGE TO JURY

1 ANY TIME A JUROR IS ABSENT FROM THE JURY ROOM THE
2 DELIBERATIONS MUST STOP. DELIBERATIONS CANNOT TAKE
3 PLACE UNLESS ALL TWELVE JURORS ARE PRESENT SO THAT
4 THEY MAY PARTICIPATE. SO, PLEASE RETIRE AND IF YOU
5 HAVE FURTHER QUESTIONS, LET ME KNOW.

6 (JURY LEAVES THE JURY BOX AT 6:09 P.M.)

7 THE COURT: ANY EXCEPTIONS TO THAT ADDITIONAL
8 INSTRUCTION BY THE STATE?

9 MR. McMAHON: NO, YOUR HONOR.

10 THE COURT: BY THE DEFENDANT?

11 MR. ROGERS: NO, YOUR HONOR.

12 THE COURT: OKAY. WE'LL REMAIN AT EASE WHILE
13 THE JURY IS DELIBERATING.

14 (NOTE FROM THE JURY IS MARKED AS COURT'S EXHIBIT
15 #7)

16 (RECESS)

17 THE COURT: (AT CONCLUSION OF RECESS) THANK
18 YOU. BE SEATED. THEY TELL ME THE JURY HAS REACHED
19 A VERDICT. ARE WE READY TO RECEIVE THE VERDICT?

20 MR. CHAPLIN: MR. McMAHON WILL BE HERE IN JUST
21 A MINUTE.

22 THE COURT: OKAY.

23 (MR. McMAHON RETURNS TO THE COURTROOM)

24 THE COURT: LET ME WARN THOSE PERSONS IN THE
25 AUDIENCE THAT MAY HAVE AN OPINION ONE WAY OR ANOTHER

VERDICTS

1 ABOUT WHAT THE APPROPRIATE VERDICT SHOULD BE WE WILL
2 NOT HAVE ANY TYPE OF OUTBURST OR DISPLAYS OF ANGER,
3 EMOTION OF ANY TYPE. WHATEVER THE VERDICT IS THAT IS
4 THE DECISION OF THE JURY, THAT IS THEIR PREROGATIVE.
5 IF YOU DO NOT FEEL THAT YOU CAN CONTROL YOUR EMOTIONS
6 THEN I WOULD SIMPLY ASK THAT YOU LEAVE THE COURTROOM
7 NOW AS OPPOSED TO LATER. OTHERWISE, I'LL HAVE TO
8 DEAL WITH IT IN A FASHION THAT MIGHT BE UNPLEASANT
9 FOR THOSE THAT CANNOT FOLLOW THAT INSTRUCTION. DOES
10 EVERYONE UNDERSTAND THAT? ALL RIGHT, BRING THE JURY
11 IN, PLEASE, SIR.

12 (JURY RETURNS TO THE JURY BOX AT 6:42 P.M.)

13 BAILIFF: THE JURY IS PRESENT, YOUR HONOR.

14 THE COURT: MR. FOREMAN, HAVE YOU AND YOUR
15 FELLOW JURORS REACHED A UNANIMOUS VERDICT AS TO EACH
16 OF THE SEPARATE INDICTMENTS?

17 MR. FOREMAN: WE HAVE, YOUR HONOR.

18 THE COURT: IF YOU WOULD, PLEASE HAND THOSE
19 VERDICT FORMS UP BY WAY OF THE CLERK.

20 (THE CLERK EXHIBITS THE VERDICTS TO THE COURT)

21 THE COURT: ALL RIGHT, YOU MAY PUBLISH THE
22 VERDICTS.

23 DEPUTY CLERK OF COURT: INDICTMENT NUMBER 97-GS-
24 40-21497, THE STATE VERSUS TREY GARNER, INDICTMENT
25 FOR ATTEMPTED ARMED ROBBERY, WE, THE JURY, FIND THE

MOTIONS

1 DEFENDANT GUILTY. INDICTMENT NUMBER 97-GS-40-21498,
2 INDICTMENT FOR CONSPIRACY TO ARMED ROBBERY, WE, THE
3 JURY, FIND THE DEFENDANT GUILTY. INDICTMENT NUMBER
4 97-GS-40-21496, INDICTMENT FOR MURDER, WE, THE JURY,
5 FIND THE DEFENDANT GUILTY. MR. FOREMAN, IS THIS YOUR
6 VERDICT AND THE VERDICT OF THE ENTIRE JURY?

7 MR. FOREMAN: YES, IT.

8 THE COURT: IF IT IS NOT THE VERDICT OF ANY ONE
9 JUROR OR A NUMBER OF JURORS, I'LL ASK THAT YOU PLEASE
10 INDICATE THAT BY RAISING YOUR HAND. (NO RESPONSE)
11 DOES THE DEFENDANT WISH TO HAVE THE JURY POLLED?

12 MR. ROGERS: YES, YOUR HONOR.

13 THE COURT: ALL RIGHT. POLL THE JURY, PLEASE,
14 MA'AM.

15 (WHEREUPON THE JURY IS POLLED AND ALL ASSENT)

16 DEPUTY CLERK OF COURT: THE JURY HAS BEEN
17 POLLED, YOUR HONOR.

18 THE COURT: ALL RIGHT. ANY OTHER MATTERS THAT
19 NEED TO BE ADDRESSED WITH THE JURY PRESENT?

20 MR. ROGERS: NO, YOUR HONOR.

21 MR. McMAHON: NOTHING FROM THE STATE.

22 (THE JURY IS DISMISSED)

23 THE COURT: MR. ROGERS, ANY OTHER MATTERS WE
24 NEED TO ADDRESS BEFORE WE CONCLUDE?

25 MR. ROGERS: YOUR HONOR, I WOULD RENEW MY

MOTIONS

1 MOTIONS FOR A DIRECTED VERDICT AND NEW TRIAL BASED ON
2 THE EARLIER GROUNDS PREVIOUSLY STATED.

3 THE COURT: AS TO EACH OF THOSE MOTIONS THEY ARE
4 ALSO DENIED ON THE SAME GROUNDS AS PREVIOUSLY
5 INDICATED. I'M GOING TO DEFER SENTENCING UNTIL NINE
6 O'CLOCK IN THE MORNING. ANY OBJECTION TO THAT?

7 MR. McMAHON: NONE, YOUR HONOR.

8 THE COURT: IS THERE ANYONE THAT'S HERE TONIGHT
9 THAT COULD NOT BE BACK IN THE MORNING THAT WISHES TO
10 BE PRESENT?

11 MR. McMAHON: THEY'LL BE HERE IN THE MORNING.

12 THE COURT: OKAY. WE WILL HAVE SENTENCING IN
13 THE MORNING THEN AT NINE A.M. COURT IS IN RECESS
14 UNTIL THEN.

15 (EVENING RECESS)

16 (NOTE: THE DEFENDANT HAD AN OUTBURST WHEN
17 LEAVING THE COURTROOM AFTER THE RECORD WAS CLOSED)

18 THURSDAY, MARCH 12, 1998

19 THE COURT: THANK YOU. BE SEATED. ALL RIGHT,
20 IS THERE ANYTHING FURTHER TO BE PRESENTED ON BEHALF
21 OF THE STATE PRIOR TO SENTENCING?

22 MR. McMAHON: YOUR HONOR, MAY IT PLEASE THE
23 COURT. MYSELF AND ASSISTANT CHAPLIN HAVE TALKED TO
24 SEVERAL MEMBERS OF THE VICTIM'S FAMILY AND STANDING
25 TO MY RIGHT IS HIS SON, RONALD BROOKS, THAT NOW ALONG

COLLOQUY

1 WITH HIS SISTER, MS. DAVIS WHO TESTIFIED BEFORE YOU,
2 NOW RUN BROOKS' STORE. HE WOULD LIKE TO UNDER THE
3 VICTIM IMPACT ADDRESS HIS HONOR.

4 THE COURT: ALL RIGHT.

5 MR. RONALD BROOKS: YES, YOUR HONOR. I'D JUST
6 LIKE TO SAY THAT I APPRECIATE THE JOB THAT WAS DONE
7 HERE, THE EVIDENCE THAT WAS BROUGHT FORTH AND I JUST
8 WANTED TO LET TREY GARNER KNOW AND THE REST OF THE
9 YOUNG MEN THAT ARE INVOLVED THAT WE DON'T HAVE
10 ANYTHING AGAINST YOU. YOU COMMITTED A CRIME AND NOW
11 YOU HAVE TO PAY. I GUESS IT'S DUE TO THE LACK OF
12 BELIEVING IN GOD THAT YOU HAVE TO TAKE FROM SOMEONE
13 AND NOT EARN AN HONEST LIVING. SO, YOU HAVE TO PAY
14 DEARLY FOR THAT. YOU HAVE ALTERED THE LIFE OF THE
15 WHOLE BROOKS FAMILY, ESPECIALLY MYSELF. I HAVE A
16 RESPONSIBILITY THAT'S GREAT RIGHT NOW BECAUSE OF YOU.
17 I WANT TO ALSO SAY TO HIS MOTHER I DON'T KNOW WHAT
18 TYPE OF RAISING THAT YOU HAVE ISSUED TO YOUR CHILDREN
19 BUT I THINK YOU COULD HAVE DONE A LITTLE BETTER
20 RAISING YOUR CHILDREN. I JUST WISH THAT THIS DOESN'T
21 HAPPEN AGAIN AND THAT THIS THUG LIFE THAT EXISTS IN
22 THE HOPKINS AREA DOESN'T CONTINUE. THANK YOU, YOUR
23 HONOR.

24 THE COURT: THANK YOU. GOOD LUCK TO YOU.

25 MR. McMAHON: YOUR HONOR, THE ONLY OTHER THING

COLLOQUY

1 WE'D HAVE, YOU KNOW, THROUGHOUT THE TRIAL -- WELL,
2 THE PREPARATION OF THE CASE I WAS DOWN, MYSELF AND
3 ASSISTANT SOLICITOR CHAPLIN, IN THAT COMMUNITY ON
4 NUMEROUS OCCASIONS. AND HE'S TALKING ABOUT THE
5 RESPONSIBILITY, HIS FATHER WAS VERY WELL THOUGHT OF.
6 IT WASN'T JUST A CONVENIENCE STORE, IT WAS ALSO A
7 PLACE WHERE SOMEONE COULD GO TO GET A MEAL. THEY
8 COOKED DOWN THERE AND I BELIEVE YOU HEARD DETECTIVE
9 HARRIS REFER TO THE YOUNG LADY THAT COOKS DOWN THERE
10 REGULAR, THAT COOKED DOWN THERE WITH MR. BROOKS.
11 ALSO, MR. BROOKS WAS KNOWN FOR LOANING FOLKS MONEY TO
12 PAY THEIR POWER BILL OR PAY A WATER BILL. YOU KNOW,
13 TO KIND OF TIDE THEM OVER. HOLDING CHECKS, YOU HEARD
14 SOME TESTIMONY LIKE THAT. RONALD HAS HAD QUITE A --
15 IT'S BEEN QUITE AN IMPACT ON HIS LIFE. HE'S RETIRED
16 MILITARY AND HIS FATHER HAD RUN THAT STORE DOWN THERE
17 FOR A NUMBER OF YEARS AND HE WAS KIND OF THRUST INTO
18 THAT RESPONSIBILITY AND AS WE ALL KNOW -- I KNOW
19 MYSELF PERSONALLY AND I KNOW RONALD FROM TALKING TO
20 HIM, WE NEVER THINK WE'LL EVER BE ABLE TO FILL THE
21 SHOES OF OUR FATHERS. I CERTAINLY KNOW I CANNOT FILL
22 MY FATHER'S SHOES. ONE FURTHER THING. MR. BROOKS
23 WAS A VETERAN OF THE FOREIGN WAR. WHEN I WENT DOWN
24 THERE, THERE WERE TWO PICTURES UP THERE AND IT'S
25 EERILY HOW MUCH THEY LOOKED ALIKE -- A PICTURE OF MR.

COLLOQUY

1 BROOKS FROM BACK IN THE 50's IN HIS MILITARY UNIFORM
2 AND THEN A PICTURE OF RONNIE FROM IN THE 70's, I
3 GUESS IN THAT ERA, OF HIM IN HIS UNIFORM AND HIS
4 FATHER WAS A MEMBER OF THE 101ST AIRBORNE DIVISION
5 AND FOUGHT FOR THIS COUNTRY IN KOREA. OF COURSE,
6 THOSE ARE THE TYPE OF INDIVIDUALS THAT ARE ADMIRERD
7 AND RESPECTED AND WE WOULD HOPE TO CONTINUE TO BE
8 PILLARS OF OUR COMMUNITIES. ONE FURTHER THING, YOUR
9 HONOR. ALSO, WHEN I WENT IN THERE SATURDAY OR SUNDAY
10 THEY HAD A SIGN UP AND I THOUGHT IT WAS VERY TELLING.
11 JUST A HANDWRITTEN -- I HAD ASKED THEM TO BRING IT
12 TODAY BUT I APOLOGIZE I WASN'T ABLE TO GET IT, BUT IT
13 WAS VERY TELLING AND HANDWRITTEN. IT WAS STORE WILL
14 BE CLOSED NEXT WEEK FOR THE TRIAL OF JOE BROOKS. AND
15 I THINK THAT SUMS UP A LOT THAT MR. BROOKS WILL BE
16 MISSING FROM THAT COMMUNITY. IT'S ALSO BEEN
17 INDICATED THAT MS. DAVIS WOULD LIKE TO ADDRESS HIS
18 HONOR. I APOLOGIZE. I DID NOT KNOW THAT PREVIOUSLY.

19 THE COURT: ALL RIGHT. MS. DAVIS.

20 MS. DAVIS: YES. I WOULD JUST LIKE TO SAY THAT
21 I APPRECIATE EVERYTHING THAT'S HAPPENED THIS WEEK.
22 I WOULD LIKE TO SAY THAT -- EXPRESS THE DEVASTATION
23 THAT THIS TRAGEDY HAS CAUSED MY FAMILY, NOT JUST MY
24 IMMEDIATE FAMILY, MY SISTERS AND MY BROTHERS AND I,
25 BUT OUR EXTENDED FAMILY. I APPRECIATE THE JUSTICE

COLLOQUY

1 THAT HAS BEEN SERVED THIS WEEK. I KNOW WE CAN'T GO
2 BACK IN TIME AND IT WON'T BRING MY FATHER BACK BUT
3 I'D JUST LIKE TO EXPRESS THE DEVASTATION THAT WE ARE
4 FEELING AND STILL FEEL. YOU KNOW, THIS IS NOT A
5 HAPPY OCCASION BY ANY MEANS. YOU KNOW, WE HATE FOR
6 ANYBODY TO HAVE TO DIE OR ANYBODY TO HAVE TO BE IN
7 PRISON AND WE DO NOT CONSIDER THIS A HAPPY OCCASION.
8 IT'S ALL A TRAGEDY FOR OUR FAMILY AS WELL AS THEIRS
9 AND I'D LIKE TO EXPRESS THAT IT IS A DEVASTATION.
10 IT'S SOMETHING THAT WE HOPE TO FORGET, YOU KNOW, BE
11 ABLE TO FORGET OR GET PASSED BUT IT'S SOMETHING
12 THAT'S THERE EVERY DAY. MY BROTHER AND I ARE IN THE
13 STORE AND MY SISTER LIVES IN MY FATHER'S HOUSE AND WE
14 ARE AROUND HIS MEMORIES EVERY DAY. AND I WANT TO
15 EXPRESS UPON THE COURT THAT WE DEAL WITH THIS EVERY
16 DAY. IT HAPPENED A YEAR AND FIVE MONTHS AGO BUT IT'S
17 JUST LIKE IT HAPPENED YESTERDAY. AND I WANT TO
18 EXPRESS THAT FACT THAT WE ARE STILL DEVASTATED. WE
19 APPRECIATE THE JUSTICE THAT HAS BEEN SERVED AND
20 EVERYTHING THAT HAS GONE ON. WE ARE STILL DEVASTATED
21 AND IT'S STILL A TRAGEDY TO US.

22 THE COURT: ALL RIGHT. THANK YOU, MA'AM. I
23 WISH YOU WELL, ALSO. ANYTHING FURTHER?

24 MR. McMAHON: NO, YOUR HONOR. THANK YOU VERY
25 MUCH, YOUR HONOR.

COLLOQUY

1 THE COURT: WHAT ABOUT THE PRIOR RECORD OF THE
2 DEFENDANT?

3 MR. McMAHON: YOUR HONOR, HE HAD NO PRIOR RECORD
4 OF CONVICTIONS AND YOU HAD HEARD THROUGH MOTIONS AND
5 TESTIMONY CONCERNING SOME PENDING CHARGES IN THE
6 PARTICULAR CASE BUT THERE WAS NO PRIOR RECORD OF
7 CONVICTIONS IN THE PARTICULAR CASE. THANK YOU, YOUR
8 HONOR.

9 THE COURT: OKAY. MR. ROGERS.

10 MR. ROGERS: MAY IT PLEASE THE COURT. BEFORE I
11 BEGIN, YOUR HONOR, I'D LIKE TO TAKE THE OPPORTUNITY
12 TO TELL THE COURT THAT TREY IS EXPRESSING HIS REGRET
13 AND APOLOGY FOR THE OUTBURST YESTERDAY. I'D LIKE FOR
14 HIM TO ADDRESS YOU ON THAT RIGHT NOW IF I COULD.

15 THE COURT: ALL RIGHT. MR. GARNER.

16 DEFENDANT GARNER: YOUR HONOR, I'D LIKE TO
17 APOLOGIZE FOR THE WAY I ACTED WHEN I GOT THE VERDICT
18 YESTERDAY. I HOPE YOU CAN FIND SOMEWHERE IN YOUR
19 HEART TO FORGIVE ME FOR THAT.

20 THE COURT: OKAY.

21 MR. ROGERS: YOUR HONOR, HE CALLED ME AT HOME
22 LAST NIGHT AND TOLD ME THAT OVER THE PHONE. THIS WAS
23 NOT SOMETHING THAT I'VE TOLD HIM TO DO OR PROMPTED
24 HIM TO DO. YOU KNOW, WHEN I WAS THINKING ABOUT IT
25 LAST NIGHT, HERE WE HAVE A TWENTY YEAR OLD, HE'S

COLLOQUY

1 YOUNG, HE'S IMMATURE AND THAT WAS HIS RESPONSE TO
2 WHAT HAPPENED. WHEN I WAS LISTENING TO THE LEAD-IN
3 ON THE NEWS LAST NIGHT ABOUT THAT EVENT IT SOUNDED
4 MUCH WORSE THAN IT WAS. I DON'T WANT TO MINIMIZE IT
5 BUT I DO WANT TO SAY THAT I THINK HE DOES RECOGNIZE
6 THAT THAT WAS A MISTAKE AND HE WANTS TO EXPRESS THAT
7 ERROR TO THE COURT.

8 YOUR HONOR, MR. GARNER IS TWENTY YEARS OLD.
9 HE'S LIVED IN THE COLUMBIA AREA ALL OF HIS LIFE.
10 HE'S ONE OF FOUR BOYS AND A GIRL. THIS IS HIS
11 MOTHER, MS. ESSIE GARNER. YOU'VE HEARD HER TESTIFY.
12 AND STANDING WITH HIM IN COURT TODAY ARE SEVERAL
13 FRIENDS OF THE FAMILY. TREY HAS NO PRIOR RECORD.
14 THIS WAS THE FIRST TIME HE'S BEEN IN ANYTHING SERIOUS
15 LIKE THIS. I TAKE EXCEPTION TO THE STATEMENT THAT
16 MS. GARNER HAS NOT RAISED A DECENT FAMILY. ONE
17 BROTHER IS IN THE MILITARY. THE SISTER IS MARRIED
18 AND WORKING IN ANOTHER STATE. SO, THIS IS THE FIRST
19 TIME -- SHE'S IN THE MILITARY AS WELL. THIS IS THE
20 FIRST TIME ANYTHING OF THIS NATURE HAS HAPPENED TO
21 THIS FAMILY. SO, I DON'T WANT THE COURT TO THINK
22 THAT TREY CAME FROM A DEVOID BACKGROUND.

23 YOUR HONOR, CERTAINLY THIS IS A TRAGEDY. TREY
24 DOES MAINTAIN HIS INNOCENCE STILL. NOTWITHSTANDING
25 THAT WE RESPECT THE JURY VERDICT. IN MY DEALINGS

COLLOQUY

1 WITH TREY OVER THE PAST YEAR THAT I'VE BEEN
2 REPRESENTING HIM I THINK THERE IS SOMETHING
3 SALVAGEABLE IN THIS YOUNG MAN. I DON'T THINK A
4 SENTENCE THAT WOULD PUT HIM IN JAIL FOR THE REST OF
5 HIS NATURAL LIFE WOULD SERVE ANYBODY JUSTICE -- THE
6 BROOKS FAMILY OR THE GARNER FAMILY. TREY CERTAINLY
7 KNOWS THAT HE'S GOING TO DO TIME AND HE'S GOING TO DO
8 CONSIDERABLE TIME. BUT I THINK THAT IF HE CAN SEE A
9 LIGHT AT THE END OF THE TUNNEL, THAT HE KNOWS THAT IF
10 HE BEHAVES HIMSELF IN PRISON AND MAKES AVAILABLE TO
11 HIMSELF THE ADVANTAGES THAT ARE IN PRISON HE WILL
12 HAVE SOMETHING TO LOOK FORWARD TO WHEN HE GETS OUT.
13 OF COURSE, HE WOULD BE FIFTY YEARS OLD BUT THAT'S A
14 HEAVY PRICE TO PAY FOR HIS ROLE IN PLANNING THIS
15 TRAGEDY. AGAIN, I DON'T WANT TO USURP THE JUDGE'S
16 RESPONSIBILITY BUT I DON'T THINK IT WOULD BE FAIR TO
17 GIVE TREY A GREATER SENTENCE THAN DAYON. EVEN THOUGH
18 THEY ARE BOTH IN IT TOGETHER, DAYON WAS ACTUALLY THE
19 SHOOTER. AND I DON'T THINK IT WOULD BE FAIR TO
20 PUNISH TREY FOR EXERCISING HIS CONSTITUTIONAL RIGHT
21 TO GO TO TRIAL. THERE HAD BEEN PLEA NEGOTIATIONS
22 INVOLVED IN THIS CASE. THE STATE THOUGHT I THINK
23 PRESUMABLY THAT A THIRTY YEAR SENTENCE WOULD BE
24 APPROPRIATE BY WAY OF A PLEA. AND I WOULD URGE THE
25 COURT TO CONSIDER GIVING TREY THAT THIRTY YEAR

COLLOQUY

1 SENTENCE AS OPPOSED TO LIFE WITHOUT PAROLE. AT THIS
2 POINT I'D LIKE HIS MOTHER TO ADDRESS YOU.

3 THE COURT: ALL RIGHT.

4 MS. GARNER: GOOD MORNING, YOUR HONOR. I THANK
5 GOD FOR YOU AND THE REASON I DO IS BECAUSE I BELIEVE
6 YOU'VE BEEN FAIR AS I SAT HERE DAY AFTER DAY AND
7 LISTENED TO YOU OVERRULE AND SUSTAIN. I BELIEVE
8 YOU'VE BEEN FAIR IN WHAT YOU'VE DONE. WHEN I FIRST
9 MET MR. JOE BROOKS IN 1985, I HEARD COMMENTS ABOUT
10 HIM. HAD I JUDGED HIM BY WHAT PEOPLE SAID, I
11 WOULDN'T HAVE NEVER STEPPED FOOT IN HIS DOOR. BUT I
12 MET HIM AND I JUDGED HIM FOR MYSELF. I HATE MR.
13 RONALD BROOKS NEVER GOT TO KNOW ME. I KNOW HIS
14 DAUGHTER, MICHELLE. AND EVEN AFTER THIS INCIDENT
15 HAPPENED I STILL CONTINUED TO GO TO THE STORE BECAUSE
16 THIS IS WHERE I USED TO PICK UP THE NEWSPAPER IN THE
17 MORNINGS. I NEVER -- EVEN AFTER MEETING MR. RONALD
18 BROOKS AFTER HIS FATHER HAD PASSED, NEVER HAD ANY
19 HARD FEELINGS TOWARD HIM. I SPOKE TO HIM, HAD
20 CONVERSATIONS WITH HIM. THEY'VE GOT ANOTHER BROTHER
21 I CALL PUNKIN' WHO I'VE KNOWN BEFORE I MET MR. BROOKS
22 I MET BACK IN 1979. WE ARE STILL FRIENDS. AND, MR.
23 RONALD BROOKS, I WANT TO LET YOU KNOW MY STEPS ARE
24 ORDERED BY THE LORD. I BELIEVE IN GOD. HE IS MY
25 FATHER AND I TRULY BELIEVE IN HIM. MY CHILDREN WAS

SENTENCING

1 RAISED BY ME AND IF I COULD HAVE DONE A BETTER JOB
2 THE HOLY GHOST WOULD HAVE TAUGHT ME TO.

3 MR. RONALD BROOKS: YOU WEREN'T AWARE OF WHAT
4 THEY WERE DOING.

5 THE COURT: OKAY. MS. GARNER, YOU'RE GOING TO
6 NEED TO ADDRESS YOUR COMMENTS TO ME. IF YOU DON'T
7 HAVE ANYTHING FURTHER YOU'D LIKE TO ADDRESS TO ME
8 THEN I'LL HEAR FROM YOUR SON.

9 MS. GARNER: YES, SIR. AGAIN, I THANK YOU.

10 THE COURT: MR. GARNER, IS THERE ANYTHING YOU'D
11 LIKE TO TELL ME PRIOR TO MY IMPOSING A SENTENCE?

12 DEFENDANT GARNER: NO, SIR.

13 THE COURT: ANYTHING FURTHER FROM ANYONE ELSE,
14 MR. ROGERS?

15 MR. ROGERS: NO, YOUR HONOR.

16 THE COURT: ALL RIGHT. ON INDICTMENT 97-21496,
17 AN INDICTMENT FOR MURDER WHEREIN YOU HAVE BEEN FOUND
18 GUILTY BY A JURY OF THAT OFFENSE, THE SENTENCE OF THE
19 COURT IS THAT YOU, TREY GARNER, BE CONFINED TO THE
20 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A
21 MANDATORY MINIMUM TERM OF NOT LESS THAN THIRTY (30)
22 YEARS. INDICTMENT 97-21497, AN INDICTMENT FOR
23 ATTEMPTED ARMED ROBBERY WHEREIN YOU HAVE BEEN FOUND
24 GUILTY BY A JURY, THE SENTENCE OF THE COURT IS YOU BE
25 CONFINED TO THE SOUTH CAROLINA DEPARTMENT OF

SENTENCING

1 CORRECTIONS FOR A PERIOD OF FIVE (5) YEARS. THAT
2 SENTENCE IS CONSECUTIVE TO ANY OTHER SENTENCE IMPOSED
3 THIS DATE. INDICTMENT 97-21498, AN INDICTMENT FOR
4 CONSPIRACY TO COMMIT ARMED ROBBERY, THE SENTENCE OF
5 THE COURT IS YOU, TREY GARNER, BE CONFINED TO THE
6 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A PERIOD
7 OF FIVE (5) YEARS.

8 MR. GARNER, YOU HAVE A RIGHT TO APPEAL THE
9 DECISION OF THE JURY AND SENTENCE OF THE COURT. YOU
10 MUST FILE ANY NOTICE OF YOUR INTENT TO APPEAL THOSE
11 JUDGMENTS WITHIN TEN DAYS OF TODAY'S DATE.

12 MR. ROGERS: THANK YOU, YOUR HONOR.

13 (ADJOURNED)

14

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25

STATE OF SOUTH CAROLINA)
)
) C E R T I F I C A T E
COUNTY OF RICHLAND)

I, THE UNDERSIGNED NANCY S. AHRENS, OFFICIAL COURT REPORTER FOR THE 5TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD, RELATIVE TO APPEAL, OF THE CAPTIONED CAUSE IN THE COURT OF GENERAL SESSIONS FOR THE COUNTY OF RICHLAND, STATE OF SOUTH CAROLINA, MARCH 9-12, 1998.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL OR INTEREST TO ANY PARTY HERETO.

Mary A. Miles

NANCY S. AHRENS, CVR
COURT REPORTER
5TH JUDICIAL CIRCUIT

MARCH 29TH, 1999.

01 CP403472

STATE OF SOUTH CAROLINA

County of RichlandTrey LeVar Grewer #248321
Full name and prison number (if any) of Applicant.

vs.

State of South Carolina
Name of Respondent.

In the Court of Common Pleas

AUG 20 AM 11:27
C.C.C. & G.S.
A. SCOTT

FILED

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS — READ CAREFULLY

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

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. 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 applicant was convicted.

1. Place of detention Kershaw Correctional Institution 4848
Goldmine Hwy Kershaw SC 29067
2. Name and location of Court which imposed sentence Richland County Judicial
Center, Columbia, South Carolina
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 97-GS-40-21496 Murder
 - (b) 97-GS-40-21497 Attempted Armed Robbery
 - (c) 97-GS-40-21498 Conspiracy to Armed Robbery
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) March 12, 1998 Murder, mandatory min. term thirty years
 - (b) March 12, 1998 Attempted Armed Robbery, 5 years consecutive
 - (c) March 12, 1998 Conspiracy to Armed Robbery 5 years

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. S.C. Supreme court

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. August 23, 2000

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Memorandum opinion NO. 2000-160-107

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) no

(b) _____

(c) _____

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

(a) ineffective assistant counsel

(b) subject matter jurisdiction

(c) ineffective assistant appellate counsel

10. State concisely and in the same order the facts which support each of the grounds set out in (9): Refused to make timely objections

(a) Did not do a thorough investigation of circumstance surrounding my arrest & conviction

(b) I was arrested illegally without probable cause

(c) My appellate counsel gave me wrong information and the information prejudice my case. my appeal should be reinstated

11. 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 petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO
 - (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO
 - (d) any other petitions, motions or applications in this or any other Court? NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. NO
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. NO
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. NO
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. NO
- ii. _____
- iii. _____
- iv. _____

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

- i. NO
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

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14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. NO
- ii. _____
- iii. _____

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

- i. NO
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) cannot be address own direct appeal
- (b) counsel was ineffective, he didn't do much investigation. Didn't have ^{the} libene ^{excess.}
- (c) cannot be address own direct appeal

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (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? NO

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. James P. Rogers - 1728 Main Street, Suite 106
Columbia, South Carolina 29201
- ii. Robert M. Dudek - 1122 Lady Street, Suite 940
Columbia, SC 29201-3243
- iii. Melody J. Brown - 1122 Lady Street, Suite 940
Columbia, SC 29201-3243

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

- i. Trial
- ii. Appellate De fender - Appeal
- iii. Appellate De fender - Appeal

18. State clearly the relief you seek in filing this application.

I request my sentence be vacated

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

NO

STATE OF SOUTH CAROLINA

County of Richland

VERIFICATION

I, Trey Garner, 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.

Trey Garner

SWORN to and subscribed before me this 1st

day of August, 19 2001

Denny L. West (L.S.)
Notary Public

My Commission Expires: 12-27-10

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Trey Garner, 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 therefor.

Trey Garner
Applicant

SWORN or affirmed to and subscribed before me this

1st day of August, 19 2001.

Denny L. West
Notary Public

My Commission Expires 12-27-10

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
C.A. NO. 01-CP-40-3472

COUNTY OF RICHLAND)

Trey LeVar Garner,
S.C.D.C. No., 248321)

Applicant,)

RETURN

VS.)

State of South Carolina,)

Respondent.)

FILED
2002 MAY 16 AM 8:44
BARBARA A. BROWN
C.C. & G.S.

In response to the post-conviction relief application filed August 20, 2001, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. During the September 1997 term of General Sessions, the Richland County Grand Jury indicted the Applicant for murder, attempted armed robbery and conspiracy to commit armed robbery.

Applicant was tried and convicted by a jury on March 11, 1998. The Honorable Joseph Derham Cole sentenced the Applicant to consecutive sentences of thirty years imprisonment for murder and five years imprisonment for attempted armed robbery. Judge Cole sentenced the Applicant to a concurrent sentence of five years imprisonment for criminal conspiracy. Jimmy Rogers, Esquire, represented the Applicant.

Applicant appealed his conviction and sentence, which was affirmed by the South Carolina Supreme Court on August 23, 2000. Applicant was represented by Melody J. Brown, Esquire, of

the South Carolina Office of Appellate Defense.

For the purpose of this Return, the Respondent attaches and incorporates the Clerk of Court's records by reference. The Respondent will furnish and attach a copy of the trial transcript when it becomes available. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In this current Application, the Applicant alleges being held in custody unlawfully for the following reasons:

1. ineffective assistance of counsel;
2. subject matter jurisdiction;
3. ineffective assistance of appellate counsel.

III.

The State submits that the Applicant's first allegation that he received ineffective assistance of counsel is without merit. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for

employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). The State submits that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, *supra*; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Nevertheless, the allegation probably raises a question of fact which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant's allegation that the trial court lacked subject matter jurisdiction is without merit. A circuit court has subject matter jurisdiction when "(1) there has been an indictment which sufficiently states the offense [and the grand jury issues a true bill]; (2) there has been a waiver of indictment; or (3) the charge is a lesser included charge of the crime charged in the indictment." Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000). In this case, an indictment sufficiently stating the offense was presented to the grand jury, which issued a true bill.

V.

In his third allegation, the Applicant contends his appointed appellate attorney was ineffective for failing to raise certain issues in his direct appeal. The State submits this allegation is without merit. Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983). Indeed, an indigent defendant

has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgement, decides not to present those points.

Id. Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgement not to pursue a particular issue on appeal.

Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Furthermore, under the two part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an Applicant must show not only that counsel's performance was deficient, but that this deficiency prejudiced his defense.

The State submits that the Applicant's appellate attorney's performance was not deficient and that the Applicant was not prejudiced in any way by his appellate attorney's performance.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

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.

VIII.

WHEREFORE, having made Return, the Respondent requests that this Court hold an

evidentiary hearing.

Respectfully submitted,

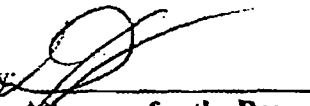
CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

B. ALLEN BULLARD
Assistant Deputy Attorney General

DAVE SPENCER
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

By: 

Attorneys for the Respondents

May 1, 2002

STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

Case No. 2001-CP-40-3472

TREY LEVAR GARNER,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Return of the Respondent been served upon opposing counsel, Robert N. Boorda, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 13th day of May, 2002, to the below address:

Robert N. Boorda, Esquire
2007 Lincoln Street
Columbia, South Carolina 29201



DAVID A. SPENCER
ATTORNEY FOR RESPONDENT

FILED
2002 MAY 16 AM 8:44
BARBARA A. SCOTT
C.C.C. & O.S.

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF RICHLAND)

COURT OF COMMON PLEAS
01-CP-40-3472

3
4 TREY GARNER,)

5 PLAINTIFF,)

6 vs.)

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,)

8 DEFENDANT.)

9
10 January 21, 2004
11 Columbia, South Carolina

12
13 B E F O R E:

14 THE HONORABLE J. ERNEST KINARD, JR., JUDGE.
15

16
17 A P P E A R A N C E S:

18 JOHN S. SIMMONS, ESQ.
19 Attorney for the Plaintiff

20 MOLLY R. CRUM, ASSISTANT ATTORNEY GENERAL
21 Attorney for the Defendant

22
23
24 DEBORAH M. McCURDY
25 Official Court Reporter

INDEX OF WITNESSES**TREY GARNER**

Direct By Mr. Simmons	6
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Redirect By Mr. Simmons	20

JAMES P. ROGERS

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Cross By Mr. Simmons	31
Redirect By Ms. Crum	34
Recross By Mr. Simmons	35

EXHIBITS

(WHEREUPON, no exhibits were introduced
during these proceedings.)

JANUARY 21, 2004

1 THE COURT: All right, what other kind of case are
2 we going to have here? What else is going on?

3 MS. CRUM: Your Honor, the next case we are going
4 to hear is Trey Garner.

5 THE COURT: All right.

6 MS. CRUM: And I have a packet for you.

7 THE COURT: Oh, no, not that large.

8 MS. CRUM: And I believe that is Mr. Garner.

9 MR. SIMMONS: Are you ready?

10 THE COURT: Oh, yes, we're ready.

11 MR. SIMMONS: Thank you, Your Honor.

12 MS. CRUM: Your Honor, for the record I am Molly
13 Crum with the Attorney General's Office.

14 This is a case involving Trey Garner, Case Number
15 2001-CP-40-3472. Mr. Garner was indicted for the
16 charges of murder, attempted armed robbery, and
17 conspiracy.
18

19 On March 2nd, 1998, he was found guilty as charged
20 at trial. He received 30 years for the murder charge,
21 five years consecutive for the armed robbery, and five
22 years for the criminal conspiracy.

23 THE COURT: Okay. And why doesn't he like that?

24 MR. SIMMONS: If the Court please, Your Honor, I'm
25 John Simmons, a court appointed attorney for

1 Mr. Garner.

2 Mr. Garner has raised several issues, Your Honor,
3 primarily relating to alleged ineffective assistance of
4 counsel dealing with testimony of drug activity by he
5 and his two Co-Defendants, both of whom testified at
6 trial against Mr. Garner.

7 THE COURT: Okay.

8 MR. SIMONS: There was also testimony of gang
9 related activities. His counsel did object and moved
10 for a mistrial on that — on part of that evidence that
11 came in, not at closing arguments, and so he also
12 challenges that.

13 Your Honor, Mr. Garner contends that the Assistant
14 Solicitor improperly bolstered the testimony of the two
15 Co-Defendants.

16 Next that there were references in the Solicitor's
17 closing argument to uncontroverted testimony that
18 triggered implications on the Fifth Amendment right.
19 Mr. Garner did not testify at the trial.

20 Next he challenges the fact that he did not
21 testify at trial and state that he went against his own
22 advice and went with the advice of counsel and that he
23 wished to testify at trial, Your Honor.

24 THE COURT: All right, he now represents that he
25 wanted to testify?

1 MR. SIMMONS: That's correct, Your Honor.

2 THE COURT: Okay.

3 MR. SIMMONS: And that he was persuaded not to by
4 his trial counsel.

5 Additionally, Your Honor, he contends that trial
6 counsel failed to properly investigate and present
7 testimony of fact witnesses, specifically some alibi
8 witnesses and others relating to the facts of the
9 crime.

10 And that is in general the gist of the
11 allegations, Your Honor.

12 THE COURT: All right, I mean, I don't know
13 anything about the case, of course, and they just
14 handed me the transcript and I was flipping by to see
15 what sentence was there, and I saw in the charge
16 something about "hand of one, hand of all," so I take
17 it he was not the shooter or the stabber, or whatever?

18 MR. SIMMONS: That's correct, Your Honor. The
19 Co-Defendant was — pled guilty. One of the
20 Co-Defendants who pled guilty and testified at trial
21 was the alleged trigger person.

22 THE COURT: Okay. All right.

23 MR. SIMMONS: That's correct.

24 THE COURT: So we are ready to proceed.

25 MR. SIMMONS: Okay, thank you, Your Honor. The

1 Applicant would call Mr. Garner.

2 THE COURT: All right. Okay, you are Trey Garner?

3 MR. GARNER: Yes, sir.

4 THE COURT: Mr. Garner, I don't have a clerk in
5 here apparently, sometimes they sit down there, but I
6 didn't see anybody. Do you swear or affirm you are
7 about to truthfully testify?

8 MR. GARNER: Yes, sir.

9 THE COURT: Okay. Have a seat.

10 TREY GARNER, after being
11 duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. SIMMONS:

14 Q Now, Mr. Garner, you need to speak up where Judge
15 Kinard can hear you and where the court reporter can take
16 everything down, and you need to speak slowly for her
17 where she can take everything down, okay?

18 A Okay.

19 Q And you need to give yes or no and detailed answers.
20 Don't shake your head or anything like that so everybody
21 can hear you.

22 Now, Mr. Garner, you were convicted in March of 1998,
23 is that correct?

24 A Yes, sir.

25 Q And that was as stated by the Assistant Attorney

1 General here in this courthouse, right?

2 A Yes, sir.

3 Q And Mr. Jimmy Rogers was your trial counsel, is that
4 right?

5 A Yes, sir.

6 Q And where are you currently incarcerated?

7 A Evans Correctional Institution.

8 Q Okay. Now, you have filed a Post Conviction Relief
9 application, is that right?

10 A Yes, sir.

11 Q And you contend that there are some things that
12 Mr. Rogers did not do at trial that he should have, right?

13 A Yes, sir.

14 Q Tell the judge a little bit about the testimony at
15 trial of Mr. Lemmon and Mr. McLamore about alleged drug
16 use or drug sales?

17 A I'm saying that Dayon Lemmon testified that he was
18 selling drugs for me and he had owed me money for cocaine.
19 And Jermaine McLamore, which is my other Co-Defendant, he
20 testified that Dayon also had owed me money for cocaine.

21 Q And your trial counsel did not object to that
22 testimony, is that what you are saying?

23 A Yes, sir.

24 Q And you believe that that prejudiced your case?

25 A Yes, sir.

1 Q Okay. Now, was there also some references in the
2 closing statement from the Assistant Solicitor about drug
3 activity?

4 A Yes, there was.

5 Q And did the trial counsel object to that?

6 A No, sir.

7 Q And you believe that he should have?

8 A Yes, sir.

9 Q And again you believe that prejudiced your trial?

10 A Yes, sir.

11 Q Okay. Was there also testimony — Mr. Garner, tell
12 Judge Kinard about alleged gang activity.

13 A Well, there was mention about — mention about, you
14 know what I'm saying, about there being in a gang that —
15 Well, there was mention about being a gang during the
16 trial. My trial counsel, Mr. Rogers, he object — he
17 object to the mention of the character evidence dealing
18 with the gang, but there was also some more mention about
19 it in closing argument that he didn't object to.

20 Q Okay. And one of the Co-Defendants in the case with
21 you had a tattoo, is that right?

22 A Yes, sir.

23 Q And there was testimony that came out about the
24 tattoo, and it was shown to the jury, is that right?

25 A Yes, sir.

1 Q Now, how did that -- And Mr. Rogers did object to
2 that point, to that, is that correct?

3 A Yes, sir.

4 Q Okay. And he moved for a mistrial, right?

5 A Yes, sir.

6 Q Okay. But do you know whether or not he asked the
7 judge for any kind of instruction to the jury on that
8 testimony?

9 A He didn't.

10 Q Okay. And how did that affect, if at all, your
11 ability to testify and a discussion about whether you
12 would testify in the case?

13 A I think it was unduly prejudicial because my
14 credibility was a central issue in the trial.

15 Q Okay. And was there some discussion or testimony
16 that was attempted to be elicited or attempted to be asked
17 that you had some connection with your Co-Defendant's
18 tattoo?

19 A Yes, sir.

20 Q Okay. Explain that a little bit to the judge.

21 A It was supposed to be testimony that Dayon Lemmon,
22 because he murdered this person, he had supposed -- I was
23 supposed to authorize him to get a tattoo for him
24 murdering this individual. But when he was on the stand
25 testifying, his testimony was that I never authorized him

1 to get the tattoo. I never authorized -- I never
2 authorized him about being in no gang. He never -- His
3 testimony was never anything about us being in a gang or
4 whatever. He just said he got a tattoo. That was it.

5 Q But he didn't say you were the one who authorized him
6 to get one?

7 A No, sir.

8 Q And that is what the Solicitor told the judge he
9 thought the testimony was going to be, is that right?

10 A Yes, sir.

11 Q Okay. Now, how about, you also claim that the
12 Assistant Solicitor bolstered the credibility of the
13 testimony of your two Co-Defendant witnesses, is that
14 right?

15 A Yes, sir.

16 Q And you contend that Mr. Rogers did not object to
17 that either, is that right?

18 A Yes, sir.

19 Q Okay. Mr. Garner, tell the judge a little bit about
20 the statements that were made in the closing argument
21 about uncontroverted testimony that you think prejudiced
22 you because you did not testify?

23 A Well, that was like three or four incidents during
24 closing argument that the Assistant Solicitors commented
25 on about uncontroverted testimony.

1 Q Okay. And Mr. Rogers did not object?

2 A No, sir, he didn't.

3 Q Okay. Did you testify in your defense at trial?

4 A No, sir.

5 Q All right. And did you think that the Solicitor's
6 comments and closings in the closing argument was a
7 statement on your failure to testify?

8 A Yes, sir.

9 Q Okay.

10 MR. SIMMONS: Judge Kinard, I have specific page
11 references. I don't know if the Court would care to
12 hear any of those at this time. If you would like —

13 THE COURT: Yes. I was looking in McMahon's
14 closing argument. I haven't seen them yet.

15 MR. SIMMONS: Yes, sir, I understand. I didn't
16 know if you would like for me to do that at this time
17 or summarize it.

18 THE COURT: Well, you can tell me the page. I'm a
19 speed reader. It doesn't take me long.

20 MR. SIMMONS: Okay. Judge, specifically on the
21 final issue, and if I can back up on the others for the
22 record, but on the closing argument references,
23 Mr. Gardner is relying on the trial transcript at Page
24 535, Lines 7 through 11.

25 THE COURT: Well, that is where I'm down to, but I

1 just turned that page, so I haven't made it quite yet.

2 MR. SIMMONS: And there are a couple of them, Your
3 Honor, as you go through, 536, Lines 1 through 6.

4 THE COURT: Okay.

5 MR. SIMMONS: And then specifically 538, Lines 7
6 through 15.

7 THE COURT: Okay.

8 MR. SIMMONS: There is a reference by the
9 Assistant Solicitor, and then they go back to
10 Mr. Garner and give him an opportunity, and Mr. Garner
11 is suggesting that that discusses his or implicates his
12 Fifth Amendment rights, as he apparently did not say
13 anything.

14 THE COURT: Okay.

15 MR. SIMMONS: Judge, on the evidence of the drug
16 activity, for the record, Mr. Garner is relying upon
17 the trial transcript, Page 200, Lines -- Line 24
18 through Page 201, Line 17.

19 THE COURT: Okay.

20 MR. SIMMONS: Where there was testimony of a
21 Co-Defendant. There was a relationship between one and
22 the other about selling cocaine, trial transcript Page
23 219, Lines 15 through 17, and that was that he was
24 allegedly going to take money and buy cocaine with it
25 from this crime.

1 anything about October the 20th. My trial counsel, he
2 never asked me any questions about that, because if he
3 would have asked me questions about that, that certain
4 weekend, I could have told him -- I could have verified
5 that I had -- I could have had a witness to testify for me
6 in my behalf where I was at October 20th, 1996.

7 Q Okay. And, again, you know, the judge hasn't read
8 the transcript, so you be clear. What you are saying is
9 there was testimony that came out at trial that you had
10 been at Joe's Grocer's -- I'm not sure if that is the
11 correct name of the place?

12 A Yes, that's correct.

13 Q -- For some period of time before the actual event
14 that you were charged, is that right?

15 A Yes, sir.

16 Q Okay. And that is the first time you ever heard
17 anything about that was at trial, is that what you are
18 saying?

19 A Yes, sir.

20 Q And you are saying if you had known about that
21 earlier then you could have told Mr. Rogers some witnesses
22 to refute that testimony?

23 A Yes, sir.

24 Q Okay. Now, what else -- Did you have a complaint
25 about any specific witnesses who were allegedly at the

1 store that you wanted Mr. Rogers to perhaps interview and
2 present?

3 A Yes, sir, the witness that he needed to question was
4 Ms. Lynn Ann because during the trial, she testified in
5 the trial saying she was there approximately between 6 and
6 6:30. That was exactly the approximate time that Joe
7 Brooks been murdered. He could have questioned her and
8 asked her specific questions dealing with identification.
9 She never identified me, now, that she seen me or any more
10 of my Co-Defendants during that time that they allegedly
11 say -- I say she was there at the store.

12 Q Okay. And, Mr. Garner, did you have any other
13 criticisms or other issues on the Post Conviction Relief
14 that you want to present to Judge Kinard here today
15 because now is your opportunity to do so?

16 A I'm saying that is basically everything, it just,
17 like dealing with the bolstering of the State witnesses,
18 you never gave him a transcript page for that.

19 Q Okay.

20 MR. SIMMONS: And that would be, Your Honor, Page
21 191, Lines 18 through 20, Page 246, Lines 2 through 7,
22 Page 250, Lines 24 through 25, Page 251, Lines 1
23 through 9, Page 257, Lines 14 through 16.

24 And, Judge, those arguments primarily relate to
25 the plea agreements that the Co-Defendants received and

1 the alleged bolstering.

2 THE COURT: All right, I missed one page, the one
3 that was right after 250, 24, 25, it was something 1
4 through 9.

5 MR. SIMMONS: Yes, sir, 251.

6 THE COURT: All right.

7 MR. SIMMONS: Yes, sir.

8 Q Okay, anything else, Mr. Garner, that you would like
9 to tell Judge Kinard?

10 A Also, dealing with my trial counsel, my trial counsel
11 ineffectiveness, you know what I'm saying, dealing with,
12 like past history, dealing with my Co-Defendants, I, you
13 know what I'm saying, dealing with my testimony, something
14 else I wanted to testify to.

15 My testimony, I wanted to make it shown that me and
16 my Co-Defendants had animosity towards each other, because
17 me and Dayon Lemmon, that is my Co-Defendant, Dayon
18 Lemmon, me and him had animosity because I had sexual
19 relationship with his mother, and on occasion, on like one
20 or two occasion, he seen me and his mother get in a fight
21 before. And the animosity coming between Jermaine
22 McLamore and me, you know what I'm saying, him and Dayon
23 was saying, they was brothers, you know what I'm saying,
24 they was real tight, whatever, and me and him got in a
25 physical altercation back in January '97, you know what

1 I'm saying, because me and Dayon Lemmon mother was having
2 the sexual relationship.

3 Q And did you give that information to Mr. Rogers?

4 A That's what I'm saying, he never asked me anything.

5 Q Okay.

6 A But that could have been brought out in the
7 courtroom, you know what I'm saying, if I would have got
8 on the stand and testified.

9 Q Okay. On the motive of the Co-Defendant, his
10 testimony?

11 A Yes, sir.

12 Q Okay. And that was the primary evidence at the trial
13 was of the two Co-Defendants, is that correct?

14 A Yes, sir.

15 Q And that is why you believe that was so prejudicial?

16 A Yes, sir.

17 Q Okay. Anything else you want to provide to the Court
18 at this time? Have we covered everything? How about,
19 Mr. Garner, there was evidence of the admission of a
20 photograph of the trial scene, is that right?

21 A Yes, sir.

22 Q Mr. Rogers did indeed object to that, did he not?

23 A Yes, sir.

24 Q And what is your complaint about that issue?

25 A My complaint is that I didn't even see the photograph

1 before it been admitted to the courts, you know what I'm
2 saying, as evidence during the trial.

3 Q Okay. So you didn't have the opportunity to look at
4 it and talk with Mr. Rogers about it?

5 A No, sir.

6 Q Okay. Anything else you would like to tell His
7 Honor?

8 A That's about it. That's it.

9 Q Okay.

10 THE COURT: All right.

11 MR. SIMMONS: Thank you, Judge Kinard.

12 MS. CRUM: Just a minute, Your Honor please?

13 THE COURT: Okay.

14 (Pause.)

15 CROSS-EXAMINATION

16 BY MS. CRUM:

17 Q Mr. Garner, just one question. You never told your
18 lawyer about the animosity with one of your Co-Defendants,
19 did you?

20 A I told him we wasn't friends.

21 Q Did you tell them you had had arguments or fights?

22 A I told him me and Jermaine McLamore we had a physical
23 altercation before.

24 MS. CRUM: Nothing further, Your Honor.

25 THE COURT: Okay.

1 MR. SIMMONS: Your Honor, just one redirect, if I
2 may.

3 REDIRECT EXAMINATION

4 BY MR. SIMMONS:

5 Q Mr. Gardner, did Mr. Rogers ask you if you knew of
6 any motive that your Co-Defendants would have to testify
7 untruthfully against you?

8 A No, sir.

9 MR. SIMMONS: Okay, that's all, Your Honor.

10 THE COURT: Okay, you can step down.

11 (Mr. Garner steps down.)

12 MS. CRUM: Your Honor, at this time the State
13 would like to call Mr. James Rogers to the stand.

14 THE COURT: Okay, Mr. Rogers, come around. Do you
15 swear or affirm you are about to truthfully testify?

16 MR. ROGERS: I do.

17 THE COURT: Take the stand.

18 JAMES P. ROGERS, after being
19 duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. CRUM:

22 Q Mr. Rogers, would you please state your name for the
23 record?

24 A James P. Rogers.

25 Q How long have you been practicing law, Mr. Rogers?

1 A I was admitted to the bar in 1977.

2 Q And what percentage of your practice is criminal law?

3 A Probably 95 percent.

4 Q And were you the attorney for the Applicant, Trey
5 Garner?

6 A Yes, I was.

7 Q And do you recall whether you were appointed or --

8 A I was appointed.

9 Q Were you appointed?

10 A I was appointed.

11 Q Do you recall when you were appointed?

12 A What date? No, I don't.

13 Q Okay. Do you remember how often you met with the
14 Applicant prior to his trial?

15 A No. We met several times, and the number of times
16 that we met I felt comfortable that I was prepared for
17 trial.

18 Q And did the Applicant cooperate with you?

19 A Yes.

20 Q During that representation?

21 A Yes.

22 Q Okay. Do you remember the testimony of one of the
23 Co-Defendants, Jermaine McLamore?

24 A Yes.

25 Q Can you tell me kind of an overview of what

1 Mr. McLamore testified to?

2 A Mr. McLamore was one of Mr. Garner's Co-Defendants,
3 and he along with another Co-Defendant were the only two
4 witnesses that implicated Mr. Garner in these offenses.

5 Q Okay.

6 A And they had also pled guilty as well to charges of
7 their own stemming from this same incident.

8 Q Do you remember during Mr. McLamore's testimony, do
9 you remember when the reference came up to buying cocaine?

10 A Yes.

11 Q Do you remember how it came up?

12 A I believe he was asked by Mr. McMahon what was the
13 plan to do with the money, and he testified that Trey was
14 going to buy cocaine.

15 Q And did you object to that?

16 A I did not.

17 Q Do you remember what your reasoning was for not
18 objecting?

19 A I probably thought it was a minor issue, but in
20 hindsight I think I should have objected.

21 Q Do you know if Mr. McLamore had any prior drug
22 charges against him?

23 A It seemed to me that he did, and in looking through
24 the transcript I didn't see any reference to it. I may
25 have thought that I was going to link it up later with a

1 part of the deal that he got, but I didn't. So, again, I
2 think I probably should have objected to the reference
3 about drugs.

4 Q Did that -- did the reference about drugs, did it say
5 anything about, specifically about Trey's character in
6 that?

7 A I think the reference was that Trey was going to use
8 the money to buy drugs -- buy cocaine.

9 Q Okay. Regarding the testimony of the other
10 Co-Defendant, Mr. Lemmon, do you remember what he
11 testified to? Can you give me an overview of what he
12 testified to?

13 A The same thing, that Trey had planned the robbery,
14 they had scoped out the place the week before, and then
15 they went back on the day in question. Trey was not with
16 them, Trey was in the car, and Dayon went in and shot
17 Mr. Brooks.

18 Q Okay. During Mr. Lemmon's testimony, do you remember
19 when the first -- the term "outlaw", regarding the outlaw
20 tattoo?

21 A Yes.

22 Q Came up?

23 A Yes.

24 Q Did you object to that?

25 A I did.

1 Q Do you remember what happened? What the judge ruled?

2 A Well, the judge -- As Mr. Garner said, Mr. McMahon
3 had proffered to the Court that he was going to be able to
4 link up the tattoo to Mr. Garner being the one that
5 authorized the tattoo.

6 Once that testimony did not develop as Mr. McMahon
7 thought, the judge basically sustained my objection and
8 there was no further reference to the tattoo at that
9 point, but --

10 Q So -- I'm sorry, go ahead.

11 A -- the issue of the tattoo had been brought before
12 the jury, that he, that Trey, that, I'm sorry, that Dayon
13 Lemmon had one.

14 Q But nothing -- did -- was anything brought before the
15 jury that Trey had a similar tattoo?

16 A No, it was not. And it was not linked to Trey at
17 that time, Mr. Garner at that time.

18 Q And did you want to -- did you want to keep that link
19 to Trey out of the testimony?

20 A Well, yes. I mean, I was a little surprised that Mr.
21 McMahon attempted to do that, make that reference, because
22 there was no evidence in the discovery that supported the
23 fact that the three of them were in a gang, so that is why
24 I objected when Mr. McMahon went into the business about
25 the tattoo. And then the judge sustained the objection.

1 Q And then did you move for a mistrial?

2 A I did.

3 Q Okay. And what was --

4 A Overruled.

5 Q Overruled. Regarding the mistrial --

6 A And let me just say, if I may, the reason I moved for
7 a mistrial, because I knew, or I think I argued to Judge
8 Cole that the fact that the tattoo had now been brought
9 out and I knew that Mr. Garner had a similar tattoo, I was
10 then hamstrung in putting Mr. Garner on as a witness
11 because then the link would have been made that I was
12 trying to keep from being made.

13 Q But that -- was that link ever made?

14 A No.

15 Q And did you request a mistrial regarding the drug use
16 coming out?

17 A I don't think I did.

18 Q Okay. But there was -- Did you think that drug use
19 specifically went to Trey's character or was it more the
20 Co-Defendants'?

21 A I guess at the time I was thinking it went to the
22 Co-Defendants, I mean, although it talked about Trey, I
23 knew that there was no other evidence in the record to
24 support that, but, again, I do honestly think I should
25 have objected.

1 MS. CRUM: One moment, Your Honor.

2 (Pause.)

3 Q And I may have already asked this, so I apologize,
4 when you moved for the mistrial and it was denied on the
5 gang issue, do you remember why the -- and you said the
6 judge -- did the judge find no prejudice in the fact that
7 it had been brought up?

8 A I think the judge's conclusion was that since the
9 tattoo had not been linked to Trey at that time then there
10 was no prejudice.

11 Q And you did renew your -- did you -- I'm sorry, did
12 you renew your motion for a new trial on those grounds?

13 A I renewed all my motions and objections at the end of
14 the State's case.

15 Q Okay. Regarding the closing arguments, do you
16 remember any reference in the closing argument to gang
17 activity?

18 A The only one I saw was the one that was referenced
19 earlier and in the context, if I can find it just a
20 moment, I didn't object, by the way, and I think in the
21 context in which it was raised I didn't want to call any
22 more attention to it than it was. I mean, it was not --
23 He said, "Michelle Davis. He was the only person of this
24 gang, this group, these three that she had seen in the
25 store the Sunday before." I didn't perceive that as being

1 an overt reference to a gang, and I guess it
2 surreptitiously was, but I didn't object.

3 Q Okay. Moving on to the — regarding the photograph
4 of the crime scene that was admitted into evidence, do you
5 remember — did you object to photos coming in?

6 A I did.

7 Q Do you remember how many you objected to?

8 A I can't remember how many there were. There were a
9 number that the judge did not let in. I believe he let in
10 three. But I had objected to all of them.

11 Q Okay. Do you remember how many of those — There
12 were three specific photographs I believe on the crime
13 scene. Do you remember how many of those specifically
14 that he let in?

15 A I don't recall.

16 Q Okay. Did the Defendant — Did you show those
17 photographs to the Defendant?

18 A When I saw them. I mean, and typically I would have
19 seen them prior to them being introduced.

20 Q Okay.

21 A And I showed them to him then. And we objected.

22 Q Did you investigate alibi witnesses for Mr. Garner?

23 A Well, what he just testified to were two different
24 things. He is talking about something that occurred a
25 week before the actual incident occurred. So with respect

1 to that, no, I did not investigate anything regarding
2 where he was a week before. I didn't perceive it as
3 necessarily being relevant. An alibi goes to when the
4 offense is committed. And we did try to call his mother
5 who would have testified that Mr. Garner had just left
6 home. Shortly thereafter she received a call saying that
7 Mr. Brooks had been shot. And the argument there was that
8 there wasn't enough time based on what the two other
9 Co-Defendants had said they had done for Trey to have
10 gotten from his home to the store in time to commit the
11 robbery. So we did attempt to put on an imperfect alibi
12 through his mother for the date in question, but I did not
13 investigate where he was a week before, no, I didn't.

14 Q Did Mr. Garner tell you that he wanted you to talk to
15 other witnesses in this?

16 A If he said there were people that could say "I wasn't
17 there," I don't recall. I'm not saying that he didn't,
18 but, again, I didn't perceive that as being relevant to
19 the offense. So I didn't talk with anyone.

20 Q Did you discuss with Mr. Garner the advantages and
21 disadvantages of testifying at trial on his own behalf?

22 A Yes.

23 Q What did you advise him?

24 A Just as he said, I advised him that I didn't think it
25 was in his best interest to testify because the link would

1 have then been made with the tattoo and he would have been
2 questioned about his drug dealings. I mean, I would have
3 tried to keep that out, but I was afraid that that would
4 have come in through him, and that was the reason I
5 advised him not to testify.

6 Q And did the Defendant decide to testify? Did he —

7 A He decided not to.

8 Q Okay. Whose decision was it to not testify?

9 A I always tell the client it is their decision, and I
10 thought it was in this case as well. I didn't know he
11 perceived that I made him not testify.

12 Q Do you remember the judge doing a colloquy asking the
13 Defendant if he had been told of the advantages or
14 disadvantages?

15 A Yes, the judge went through that and asked Mr. Garner
16 if this was his decision, and Mr. Garner indicated yes.

17 Q Do you remember the judge on two different occasions
18 asking the Defendant if he wished to testify?

19 A Yes.

20 Q Okay. And he responded?

21 A He did not.

22 Q Okay.

23 MS. CRUM: One moment, Your Honor.

24 THE COURT: Okay.

25 Q Regarding the testimony on the cocaine purchase, do

1 you remember why it was brought out as far as what was the
2 reason that it was brought up?

3 A I believe it was asked in the context of what
4 Mr. Garner was planning to do with the robbery proceeds,
5 and the answer from Dayon or McLamore, I can't remember
6 which, was that Trey was going to buy cocaine.

7 Q So that testimony provided the context for the crime,
8 is that correct?

9 A According to the Co-Defendant.

10 Q Okay. Did Mr. Garner ever -- Do you remember him
11 ever telling you about any hostilities, animosity that he
12 had with the Co-Defendants?

13 A No. I don't remember anything, and I know had he
14 done so I would have used that to cross examine McLamore
15 with because that would have been the only thing I had.
16 So I don't remember him ever telling me there was this
17 beef between the two.

18 MS. CRUM: One moment, Your Honor.

19 THE COURT: Okay.

20 Q Do you remember any kind of -- Mr. Garner telling you
21 about or any testimony where there was a witness that he
22 wanted you to talk to that said he wasn't at the store on
23 the day that Mr. Brooks was shot?

24 A No.

25 Q Do you remember why -- Did you question a female

1 witness about her identification?

2 A I may have. You'd have to refresh my memory of that.

3 Q Okay.

4 MS. CRUM: The State has no further questions.

5 THE COURT: Okay.

6 MR. SIMMONS: May it please the Court?

7 CROSS-EXAMINATION

8 BY MR. SIMMONS:

9 Q Mr. Rogers, good afternoon -- good morning. It is my
10 understanding that you do believe that you should have
11 objected to the testimony of the drug activity?

12 A Yes.

13 Q And would you agree that that was very prejudicial
14 testimony in this case?

15 A Yes.

16 Q Okay. And specifically, Mr. Rogers, if there was an
17 alleged connection that the State was trying to show
18 between Mr. Garner being owed money here, isn't it fair to
19 say that that could have been demonstrated without any
20 evidence of actual drugs?

21 A Yes.

22 Q Okay. So there could have potentially been a
23 limiting instruction where the testimony would have just
24 been there was some money owed, even if that general
25 theory had been relevant?

1 A Well, see -- Well, that was another -- I mean, I see
2 your point. That was another point that was confusing
3 because there was conflicting testimony. One said that
4 Trey planned the robbery so he could buy cocaine.

5 Q Yes, sir.

6 A Then another said that he owed Trey money. But they
7 both said that they weren't supposed to get money from the
8 robbery. So that -- that was another thing that I thought
9 that made the story incredible, and so I probably didn't
10 hammer on it because it provided an inconsistency in
11 itself. But back to your question about the drugs, right,
12 I should have objected and it was prejudicial.

13 Q Okay. And, Mr. Rogers, talking about the gang
14 activity, and, again, I think we both have demonstrated to
15 the judge you did object and you did move for a mistrial
16 during the testimony, is that right?

17 A That's correct.

18 Q But you did not object to the gang reference in
19 closing argument, right?

20 A I did not.

21 Q And I think you explained that in looking at the
22 transcript. Mr. Rogers, it is a little bit unclear, and
23 let's clarify for the Court, the prior week and the
24 witness testimony we were talking about.

25 A Right.

1 Q As I understand it, there was some testimony at trial
2 that Mr. Garner and others may have been in the store
3 approximately a week before this incident, is that right?

4 A That's correct.

5 Q And that is the time period that Mr. Garner testified
6 here this morning that he had witnesses --

7 A That's right.

8 Q -- related to --

9 A That's correct.

10 Q And Mr. Gardner stated that that was the first time
11 that he ever heard any of that testimony. Do you recall
12 any of that information being in the State's discovery?

13 A It was not. So that was the first time that I heard
14 it as well.

15 Q Okay. So there really would have been no opportunity
16 for Mr. Garner to give you any of those witnesses' names
17 prior to that day, is that right?

18 A That's right.

19 Q Okay. Do you recall whether or not Mr. Garner had
20 any prior convictions?

21 A He did not.

22 Q Okay. And --

23 MR. SIMMONS: Your Honor, Court's indulgence for
24 one moment?

25 THE COURT: Sure.

1 (Pause.)

2 Q Mr. Rogers, that's all I have.

3 MR. SIMMONS: Thank you, Your Honor.

4 THE COURT: All right.

5 MS. CRUM: Beg the Court's indulgence, please.

6 (Pause.)

7 REDIRECT EXAMINATION

8 BY MS. CRUM:

9 Q Did you make a curative instruction regarding the
10 reference to the tattoo coming in?

11 A I don't believe I did.

12 Q Why not?

13 A I don't know. I can't answer that. I don't know if
14 I didn't want to call any more attention to it or I just
15 was going to let it go because there could be no link up
16 of it, I don't remember, but I know I didn't make a
17 curative request — limited instruction.

18 Q I apologize, I missed some of your testimony just a
19 minute ago when you testified to defense counsel. The
20 first time that you heard about something was on the date
21 of the trial. Can you —

22 A That was the testimony that they had been seen at the
23 store the week before.

24 Q Okay.

25 A And that was not in any of the discovery.

1 Q Okay.

2 MS. CRUM: No more questions, Your Honor.

3 MR. SIMMONS: Just very briefly.

4 RECROSS-EXAMINATION

5 BY MR. SIMMONS:

6 Q On that issue again, Mr. Rogers, did you bring that
7 to the Court's attention or ask for a continuance or
8 anything like that on that new information --

9 A No, I didn't.

10 Q -- that you received in discovery?

11 MR. SIMMONS: That's all, Judge.

12 THE COURT: You can step down.

13 (Mr. Rogers steps down.)

14 THE COURT: All right, how can I help anybody?

15 MR. SIMMONS: Judge, just a very brief summary on
16 behalf of Mr. Garner.

17 As regards the testimony of the drug activity, as
18 you heard from Mr. Rogers, there was no objection, and
19 even he concedes he believes he should have objected
20 and that it was very prejudicial in that there were
21 only two primary witnesses in this case, the
22 Co-Defendants, both of whom testified as to drug
23 activity, which was also brought out in closing
24 argument and was not objected to.

25 Judge, regarding the gang activity testimony,

1 although Mr. Rogers did object and move for a mistrial
2 on the testimony, he did not move for any sort of
3 limiting or curative instruction and similarly did not
4 object to the gang reference in the closing arguments.

5 As regards the failure to investigate, I think the
6 testimony established that there may have been some new
7 matter testified to at trial regarding a prior visit to
8 the store a week before the incident in question, and
9 Mr. Garner testified that he had some witnesses who
10 could have refuted that point.

11 And we would submit on Mr. Garner's behalf that
12 there should have been some motion on behalf of
13 Mr. Rogers perhaps for a continuance. None of that
14 information was in the discovery.

15 Judge, Mr. Garner raised the issue regarding
16 several references in the closing argument to
17 uncontroverted testimony which he believes thereby
18 commented on his Fifth Amendment rights. I do not
19 believe that testimony was refuted by the State in this
20 case.

21 And similarly he has challenged testimony
22 regarding the bolstering of the Co-Defendants, which I
23 do not believe was refuted by the State.

24 And, Judge, I believe I have provided the Court
25 and for the record the reference as to each one of the

1 assertions that Mr. Garner has made, but if not I will
2 be happy to provide those.

3 THE COURT: Okay, State, you can prepare an order
4 just denying his claim, and you can, Mr. Simmons,
5 prepare an order any way you'd like for me to consider,
6 but I will just tell you how it looks to me.

7 I have read everything you have -- the pages that
8 you referred to, but, I mean, I haven't read the entire
9 transcript, which I certainly am prepared to do. I see
10 nothing from Mr. McMahon's closing argument that is
11 going to merit a reversal. I mean, even with reference
12 to a gang, that is just a manner of speaking. He is
13 talking about three people going in. He says, "This
14 group, this gang, these three people." He doesn't say
15 "this gang," you know, it is just a manner of talking
16 on that.

17 Uncontroverted testimony, it was only testimony in
18 the case. I mean, you know, jurors don't make those
19 mental leaps that he is saying he should have testified
20 and refuted it on the few little things that they
21 testified to.

22 It looks like the only issue that you might
23 prevail on, and I haven't read the entire transcript,
24 is the crack. But in fairness, I mean, you've got
25 people testifying why they went in. The Solicitor is

1 entitled to ask that question, "Why did you rob the
2 store?"

3 "To get money to buy crack."

4 I mean, that is, you know, Mr. Rogers can object,
5 but I think that the only way he would prevail -- and I
6 recognize that the two Defendants testified differently
7 about the motives and about the crack, and so forth,
8 so, but that seems to be, because it is prejudicial
9 obviously, but whether it merits a new trial, I mean, I
10 don't know at this point.

11 So you can address that in your proposed order.

12 MR. SIMONS: Yes, sir.

13 THE COURT: I would zero in on that, but you can
14 address all the others and I will consider them. It is
15 just, you know, I mean, I haven't thought about it, I
16 just read it.

17 The bottom line, I am second in seniority among
18 the trial judges. That doesn't mean anything other
19 than I have been around. And I kind of operate first
20 impression, like on the "chill bumps" factor. If I
21 read something and it makes me do like that, I think
22 that might have been bad, you know. If I read
23 something and I just, I don't, it doesn't come to my
24 attention that that is an egregious error, people
25 usually don't prevail, but I will consider it and I

1 will read anything else you want me to read, the entire
2 transcript if necessary, because he is serving 30
3 something years. I will give you a fair shot. I'm not
4 saying you are going to win. I don't take it lightly.

5 But, State, you need to address each of those
6 items that he raised.

7 Okay.

8 MS. CRUM: Thank you, Your Honor.

9 MR. SIMMONS: Thank you, Your Honor.

10 THE COURT: Oh, one thing there is no need to
11 address, that is his alibi. He has got the burden of
12 proof on that and he has got to present those witnesses
13 today if they could have helped him. He didn't do
14 that.

15 MR. SIMMONS: Yes, sir.

16 THE COURT: So that is all over with.

17

18 (WHEREUPON, the proceedings were concluded.)

19

20

21

22

(END OF TRANSCRIPT)

23

24

25

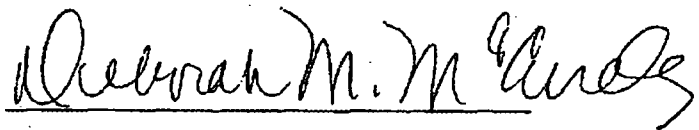
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 21 day of January, 2004.

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

June 2, 2004



Deborah M. McCurdy, Court Reporter

My Commission Expires: 5-24-09

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STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Trey Garner, #248321,)

Applicant,)

vs.)

State of South Carolina.)

Respondent.)

IN THE COURT OF COMMON PLEAS

2001-CP-40-3472

AMENDED
ORDER OF DISMISSAL
WITH PREJUDICE

FILED
04 MAR 24 AM 11:56
BARBARA A. SCOTT
C.C.C. & G.S.

John S. Simmons, Esquire, appearing for the Applicant.

Molly R. Crum, Assistant Attorney General, and Salley W. Elliott, Assistant Deputy Attorney General, appearing for the Respondent.

This is a post-conviction relief (PCR) matter. Applicant originally filed a PCR application on August 20, 2001. The PCR application was amended on January 5, 2004. Applicant alleges he is being held in custody unlawfully due to ineffective assistance of counsel and ineffective assistance of appellate counsel. An evidentiary hearing on the merits of the PCR application was convened at the Richland County Courthouse on January 21, 2004.

I. PROCEDURAL BACKGROUND

Applicant is presently confined at the Kershaw Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Richland County. Applicant was indicted during the September 1997 term of the Richland County Grand Jury for murder (97-GS-40-21496), attempted armed robbery (97-GS-40-21497), and conspiracy to commit armed robbery (97-GS-40-21498). He was represented by James P. Rogers, Esquire. On March 9-12, 1998, Applicant proceeded to trial and was convicted by a jury on all the charges. The Honorable J. Derham Cole sentenced Applicant to consecutive sentences of thirty years

imprisonment for murder and five years imprisonment for attempted armed robbery. Judge Cole also sentenced Applicant to a concurrent sentence of five years imprisonment for criminal conspiracy.

Applicant filed a timely notice of intent to appeal, and an appeal was perfected on his behalf by the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Garner, 2000-MO-107 (S.C.Ct.App. filed August 23, 2000).

II. APPLICABLE LAW

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State.

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. Butler v. State. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient

performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cherry v. State; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

B. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

**III. SUMMARY OF TESTIMONY, EVIDENCE PRESENTED
AT THE PCR EVIDENTIARY HEARING,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW**

At the PCR evidentiary hearing, Applicant raised a number of specific allegations in support of the claims in his application for post-conviction relief. The Court has reviewed the testimony presented at the evidentiary hearing, observed witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all the probative evidence presented.

A. Allegation of ineffective assistance of trial counsel for failure to object to character evidence regarding Applicant's drug and gang activities.

1. Drug activity

The allegation that Counsel was ineffective for failing to object to testimony by co-defendants regarding drug activity is without merit. At the PCR evidentiary hearing, the Applicant testified that Counsel should have objected when Applicant's two co-defendants testified at his trial that they were selling cocaine. This Court finds that Applicant's testimony regarding the deficiencies of his trial counsel's representation for failing to object when the co-defendants testified that they robbed the store to get money to buy cocaine is not credible. This Court finds that Counsel's testimony concerning this matter was credible. Counsel testified that at least one of the co-defendants testified that the purpose of the robbery was to get money to buy drugs. Counsel testified that he did not object because he believed it reasonably offered an

explanation of why the robbery had occurred, may have been useful to attack the co-defendant's credibility, and was a minor issue in comparison to any references regarding gang activity.

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). Therefore, this Court finds that Counsel's decision was based on reasonable trial strategy, and his representation was professionally reasonable in this regard.

Moreover, this Court finds that the evidence was proper. Under the *res gestae* theory, evidence of other crimes is admissible when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) *citing* State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996). Further, this theory recognizes that evidence of other bad acts may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) *citing* State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) and State v. Adams. The co-defendants' testimony that they planned to rob the store to get money to buy cocaine is part of the *res gestae* of the crime. A full presentation of the crime necessarily includes the motive for the robbery, the robbery, and culminating in the shooting of the victim. This Court further finds that the probative value of this testimony outweighs the danger of its undue prejudicial effect as required by State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991). Therefore, this Court finds that Applicant is unable to prove the inadmissibility of the evidence.

Even if the evidence was not admissible under *res gestae* and the prejudicial effect of this evidence had exceeded its probative value, Applicant failed to show prejudice. This Court concludes that the admission of the evidence would be harmless error because Applicant was not

prejudiced by its admission since there was overwhelming evidence of his guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); *See also*, Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). Both co-defendants testified at Applicant's trial that Applicant came up with the plan to rob the store and participated in the crime. Both testified Applicant provided the gun and directed the shooting of the store owner. One co-defendant testified that it was Applicant's idea to get rid of the gun by throwing it off a bridge. The other testified that Applicant made him burn his clothes. A neighbor who lived next to the store testified that he saw Applicant and the co-defendants together shortly after the incident. Therefore, this Court finds that there was overwhelming evidence of Applicant's guilt, and he was not prejudiced by the admission of the evidence. Moreover, this Court also finds that Counsel's failure to move for a mistrial based on the evidence of drug activity did not render his performance deficient or prejudice the Applicant. Accordingly, based on the probative evidence presented, these allegations of ineffective assistance of counsel is denied.

2. Gang activity

The allegation that Counsel was ineffective for failing to object to testimony regarding evidence of gang activity by Applicant is also without merit. Applicant himself admitted that counsel objected when the co-defendant testified that he (the co-defendant) had a tatoo. Counsel testified that he objected to the mention of a tatoo. Counsel also admitted that the co-defendant's testimony did not link the tatoo to Applicant because the co-defendant did not testify as the Assistant Solicitor had believed he would. Counsel further testified that he moved for a mistrial because he knew that Applicant had the same tatoo and, if Applicant chose to testify, it

would come out that Applicant was part of a gang. Counsel testified that the trial court denied his motion for a mistrial because it found there was no prejudice since the tatoo had not been linked to Applicant. Counsel testified he did not move for a curative instruction because the co-defendant's testimony on the tatoo had not linked it to Applicant and to do so would only draw attention to it. Further, the record reflects that Counsel did renew his motion for a mistrial on these grounds. Since both Applicant and Counsel admit that Counsel objected to the admissibility of the co-defendant's tatoo testimony, this Court finds that Counsel was clearly not deficient. Further, both Applicant and Counsel agree that the jury did not hear the link between the tatoo and gang activity, so there was no prejudice. Accordingly, this allegation of ineffective assistance of trial counsel is denied.

B. Allegation of ineffective assistance of counsel for the failure to object to the Assistant Solicitor's comments on drug and gang activity in his closing argument.

The allegation that Counsel was ineffective for failing to object to comments made during the closing argument that related to drug and gang activity is without merit. This Court finds that Applicant's testimony regarding the deficiencies of trial counsel's representation is not credible.

First, Applicant testified that the Assistant Solicitor referenced gang activity during his closing arguments. The record indicates that the Assistant Solicitor merely stated "this gang, this group." Trial Transcript, p 534, lines 22-25. Counsel testified that the Assistant Solicitor did not make an overt reference to gang activity. Further, Counsel explained that he did not want to draw the jury's attention to the comment. There was no logical link between the off-handed comment and the fact that Applicant was involved in gang activity. Further, this Court finds that Counsel's decision not to object was clearly sound trial strategy and, therefore, Counsel was not deficient.

Second, Applicant alleges his attorney was ineffective for failing to object to comments regarding drug activity made by the Assistant Solicitor during his closing argument. This Court disagrees. Counsel testified that he did not object because he did not want to attract the jury's attention to the comment. This Court finds that this was a sound trial strategy and that Counsel was not deficient. Accordingly, based on the probative evidence presented, the allegation of ineffective assistance of trial counsel is denied.

C. Allegation that trial counsel was ineffective for failing to object to the Assistant Solicitor's bolstering the testimony of and vouching for the co-defendants during his closing arguments

The allegation that counsel was ineffective for failing to object to the bolstering of testimony during closing argument is without merit. A solicitor has a right to state his version of the testimony and can comment on how much weight such testimony should be given. Randall v. State, 591 S.E.2d 608, 610 (2004) *citing* State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). This Court finds that Applicant failed to prove that the Assistant Solicitor's comments were inappropriate. Accordingly, this allegation of ineffective assistance of counsel is denied.

D. Allegation that trial counsel was ineffective for failing to object during closing arguments to the Assistant Solicitor's comments that there was "uncontroverted testimony"

The allegation that Counsel was ineffective for failing to object to the Assistant Solicitor's "uncontroverted testimony" comments during his closing argument is without merit. Applicant testified that he believed that the comments referenced his failure to testify, which was against his right against self-incrimination, and that this prejudiced him. This Court finds that Applicant's testimony regarding the deficiencies of trial counsel's representation in this matter is not credible, and Applicant failed to carry his burden of proof.

This Court finds that the Assistant Solicitor's statements were proper and that they did not refer to Applicant's decision to remain silent. Instead, they were comments on the evidence, which had been presented by the prosecution. Moreover, even if the comments did reference Applicant's decision not to testify, this Court finds that it would be harmless error. An improper reference by the State to a defendant's right to remain silent is subject to harmless error analysis. State v. Shuler, 353 S.C.176, 187, 577 S.E.2d 438, 444 (2003) (citing Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000)). Further, a trial court's instruction that the jury may not consider a defendant's failure to testify in any way and may not use it against him is normally sufficient to cure any potential error. State v. Shuler (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). In this case, this Court finds that the trial judge clearly charged the jury that the State had the burden of proof to establish the Applicant's guilt beyond a reasonable doubt and instructed the jury that they could not consider the Applicant's failure to testify in any way during their deliberations or in deciding whether or not he was guilty. Trial Transcript, p 544, p 545, p 546, lines 1-11; p 562, lines 5-22.

Therefore, this Court finds that the comments were not improper, and even if they were, the jury charges negated any potential error, and the Applicant was not prejudiced. Accordingly, this allegation of ineffective assistance of counsel is denied.

E. Allegation that trial counsel was ineffective for persuading Applicant not to testify

The allegation that Counsel was ineffective for persuading Applicant not to testify is without merit. Counsel testified that he told Applicant about his right to testify. Counsel further stated that he explained to Applicant that it was in his best interest not to testify because he could be cross-examined on his tattoo and, therefore, on his involvement in gang activities. Applicant admitted that he decided not to testify because he did not want this information to come out to

the jury. Accordingly, based on the probative evidence presented, this allegation of ineffective assistance of trial counsel is denied.

F. Allegation that trial counsel was ineffective for failing to object to the admission of photographs of the crime scene and for not showing the Applicant a photograph until after it was admitted into evidence.

The allegation that Counsel was ineffective for failing to object to the admission of photographs is without merit. Counsel testified that he objected to the admissibility of several photographs, but the Court admitted one of the crime scene photographs. This Court finds that Counsel's testimony is supported by the record; Counsel did object to the admissibility of the photographs. Trial Transcript, p. 144, lines 2-3.

The allegation that Counsel did not show Applicant the photograph of the crime scene before it was admitted into evidence is also without merit. This Court finds Applicant's testimony regarding this matter is not credible. Counsel testified that he showed Applicant the photographs before they were introduced. Accordingly, based on the probative evidence presented, this allegation of ineffective assistance of trial counsel is denied.

G. Allegation that trial counsel was ineffective for failing to properly investigate and present testimony of the Applicant's alibi.

This Court finds that the allegation that Counsel was ineffective for failing to investigate and present alibi testimony is wholly without merit. Counsel testified that Applicant's purported alibi was not relevant to the defense because it was not for the date of the incident. This Court agrees. This Court finds that Applicant has failed to meet his burden of proof. In order to show prejudice from the alleged failure to call a witness, Applicant must provide competent evidence of the testimony the alleged alibi witness would provide. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). Therefore, failure to present testimony at the PCR

hearing from the alibi witness, or to at least present evidence of that testimony in some other fashion, means that the claim must fail. Accordingly, this allegation of ineffective assistance of counsel is denied.

H. General allegations of ineffective assistance of trial counsel

At the evidentiary hearing, Applicant raised several additional issues related to Counsel's effectiveness. This Court finds they are without merit. First, Applicant testified Counsel did not ask him if he was aware of any motive the co-defendants would have to testify against him. Applicant also stated that he told Counsel he had fought with one co-defendant because Applicant had a sexual relationship with the co-defendant's mother. Counsel testified that Applicant had never told him that he had any animosity with the co-defendant. This Court finds that the Applicant's testimony is not credible and that Counsel's is credible. Second, Counsel testified that he was unable to interview witnesses regarding the claims that Applicant had been at the store the week prior to the incident because he was not aware of it until the trial. This Court finds that Applicant has failed to prove that Counsel's performance was not reasonable or that the Applicant was prejudiced by it. Accordingly, these allegations of ineffective assistance of counsel are denied.

I. Allegations of ineffective assistance of appellate counsel

This Court finds that Applicant did not offer any evidence regarding the allegations against his appellate counsel. Accordingly, his claims for ineffective assistance of appellate counsel are denied.

III. CONCLUSION

Based on the specific findings above, this Court concludes that Applicant failed to carry his burden of proof to show that his trial or appellate counsel's representation fell below

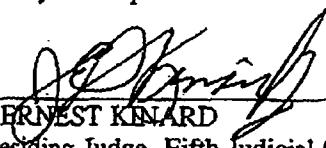


reasonable professional norms or that he was prejudiced by the alleged deficient representation. Applicant's former trial counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of any attorney in a criminal case. Strickland v. Washington; Cherry v. State. Additionally, Applicant did not carry his burden to show a reasonable probability that the result at trial would have been different had trial counsel done what Applicant alleges he should or should not have done. Johnson v. State.

As to any and all allegations which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are denied and dismissed with prejudice.

IT IS THEREFORE ORDERED THAT:

- A. The post-conviction relief application is **DENIED**;
- B. This Court advises Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal; and
- C. Applicant is remanded to the custody of Respondent for the completion of his sentence.


J. ERNEST KINARD
Presiding Judge, Fifth Judicial Circuit

Cand, South Carolina
3/24, 2004.

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA,)

97-GS-40-21496, 21497, 21498

v.)

TREY LEVAR GARNER,)

MOTION FOR A NEW TRIAL
BASED ON AFTER-DISCOVERED EVIDENCE

Defendant.)

2011 NOV 22 PM 4:37
 FILED
 RICHLAND COUNTY
 CLERK OF COURT
 C.C.P. 2011

NOW COMES the Defendant in the above captioned action, acting by and through his undersigned counsel, moving for a New Trial Based on After-Discovered Evidence pursuant to Rule 29(b), SCRCrimP. In support of this motion he would show unto this Court the following:

A juror serving at his trial has now been discovered to have a close family tie to the victim in this case. Specifically, he will demonstrate that Chandra L. Davis, seated as a juror at his trial, is the niece by marriage of the victim's daughter; Michelle Davis. The jury at the Defendant's trial was asked during *voir dire* whether they were related to various parties in this case including the victim; Mr. Joe Brooks. (Trial Tr. at p. 8, l. 24-p. 9, l. 9) Jurors were further asked to stand if they were related to or had some connection to named witnesses, one of which was a Michelle Davis. (Trial Tr. at p. 13, l. 14-p. 17, l. 13) Chandra Davis did not disclose her relationship to the victim's daughter. The Defendant has now obtained affidavits from various members of the community verifying that Chandra L. Davis is the niece of Coach Willie Lee Davis, who is and has been for many years as of the date of the Defendant's trial, married to Michelle Brooks Davis, who is the daughter of the victim in the Defendant's case. Copies of those affidavits are attached hereto as Defendant's Attachments A- D.¹ The affidavits, confirming the familial relationship, were executed between June and September of 2011.

¹ Originals maintained in Counsel's file and will be provided to the Court on request or introduced as exhibits when a hearing is held on this motion.

"In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999)).

A 2011 amendment to Rule 29(b) mandates that a motion for a new trial based on after-discovered evidence be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when evidence could have been discovered with the exercise of reasonable diligence. Rule 29(b), SCRCrimP.

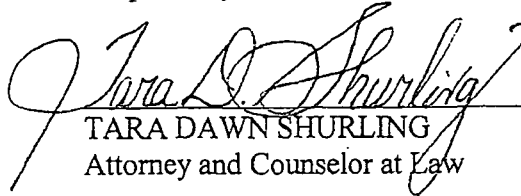
The Defendant has met the standard for after-discovered evidence in South Carolina. There is a substantial likelihood of a different result at a new trial where the jury does not include jurors related to the victim's family. The information regarding Juror Davis was discovered very recently, subsequent to the Defendant's trial. There was no way, through the exercise of due diligence, that the Defendant could have discovered this evidence prior to his trial. It has been through sheer coincidence that information concerning a possible close familial relationship between one of the his jurors and the victim came to his attention in the past year, and he has only recently been able to document this family connection between the victim and this juror through further investigation. The evidence substantiating an undisclosed familial connection between the victim and the juror is material to the outcome of the Defendant's trial. Furthermore, this information is not in any way cumulative or impeaching as it concerns an after-the-fact discovery regarding a juror at trial.

Clearly, any individual on trial in South Carolina is entitled to have a jury free of members with a close familial relationship to the alleged victim. See S.C. Code Ann. 14-7-1020 (providing for the Court to inquire as to whether jury members are related to either party, have an interest in the

action, have expressed or formed an opinion, or are aware of any bias or prejudice therein). "When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges... Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). The juror, Chandra Davis, was specifically asked if she was related to the victim or related or connected to any of the witnesses; one of whom was Michelle Davis. On both occasions, the juror failed to answer in the affirmative, and her failure to disclose reflects that she was not impartial.

For all of the foregoing reasons, the Defendant respectfully requests that this Court grant his motion pursuant to Rule 29(b), SCRCrimP, for a new trial based on after-discovered evidence. Defendant would request a hearing on this request at the Court's earliest convenience.

Respectfully submitted,


TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR DEFENDANT

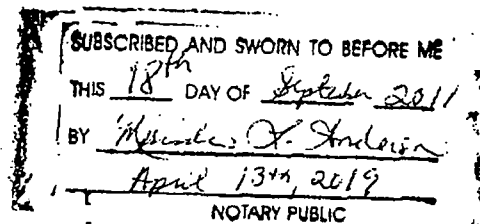
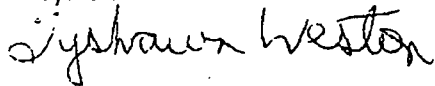
This 22nd day of November, 2011.

September 19, 2011

I am Tyshawn Weston and I am coming forward to state that I attended Middle School & High School with Chandra L. Davis. I can attest to the fact that she is a relative of Coach Willie Lee Davis and Michelle Brook's Davis of Hopkins SC. Chandra and I were peers for over 7 years and on many occasions I heard her refer to Coach Davis as her relative. It has come to my attention now that Chandra served on the jury trial back in 1998 The State Vs Trey Garner in which Mr. Garner was convicted of the murder of Mr. Joe Brook's (Michelle Davis father). It is my statement that Chandra Davis is a relative of the Victim's family and therefore should not have served on this trial.

Yours Truly,

Tyshawn Weston



SUBSCRIBED AND SWORN
TO BEFORE ME
THIS _____ DAY OF _____
BY _____
NOTARY PUBLIC



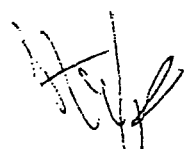
ATTACHMENT B

To Whom It May Concern, my name is Cortez Burgess and I am writing in regards' to the fact that Chandra Davis and I attended school together and I am certain that she referred to Mr. Willie Lee Davis as her uncle. He was a good football player back in the 80's and was very well known. I was unaware that she participated in the trial of Trey Garner which Mr. Davis's father in Law Mr. Joe Brooks was the victim. I am coming forward now to state that I know she is related to Mr. Willie & Mrs. Michelle Davis. Mrs. Davis is the daughter of Mr. Brooks.

Yours Truly,

Cortez Burgess

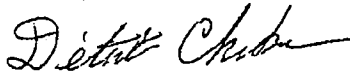
Cortez Burgess
Sept. 3, 2018


Deisha Stafford
Notary Public of SC
My commission expires
March 10, 2020.

June 27, 2011

To whom this may concern: My name is Détente Chambers and I was an associate of Chandra Davis back in Grade School as well as High School for many years. I often heard her refer to Willie L. Davis and Tyrone Davis as her uncle's whenever they came to the school or participated in Football activities at Lower Richland High School. I know for a fact that they are related due to their interactions with each other back in high school as well as her verbally saying so on many occasions.

Détente Chambers



APPEARED BEFORE ME THIS 11TH DAY OF JULY, 2011.



My Commission Expires December 20, 2020

ATTACHMENT D

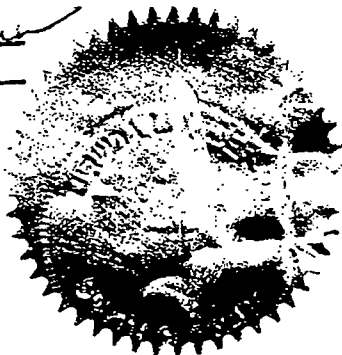
To Whom this may Concern;

I am Rick Anderson and I attended Lower Richland High School along with Chandra L. Davis. Through out our High School years I have always known Coach Willie Lee Davis, and Tyrone Davis to be Chandra's Uncle's. I always remembered this because Coach Davis and his brother were awesome football players for Lower Richland High School back in the 80's and 90's so everyone knew them. On many occasions I have heard and witnessed Chandra refer to them as her uncle's. I wasn't aware until recently that Chandra served on a jury back in 1998 in which Coach Willie Lee Davis wife Michelle Davis father was murdered. Being that Chandra was related to and knew the victims entire family she should not have been able to serve on this jury against also her fellow classmate. Chandra attended school with Trey Garner as well as Jermaine McLemore. The fact that she knew all the parties involved in this trail and is the niece of the victim's son in law, I feel she shouldn't have been on that jury for that particular trial.

Your Truly,

Ricky Anderson

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 21st DAY OF June 2011
BY Michelle L. Davis
exp. 4/13/19
NOTARY PUBLIC



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

STATE OF SOUTH CAROLINA) 97-GS-40-21496, 21497, 21498
)
)
 vs.)
)
)
 TREY LEVAR GARNER,)
)
)
 Defendant.)

CERTIFICATE OF SERVICE

RICHLAND COUNTY
 FILED
 2011 NOV 22 PM 4:30
 JEANETTE W. W. BRIDGE
 C.C.P. & G.S.

The undersigned attorney hereby certifies that one copy of the Motion for a New Trial Based on After-Discovered Evidence in the above-entitled case has been served upon opposing counsel, Paulette Edwards, Deputy Solicitor for the Fifth Judicial Circuit, by hand-delivery on this 22 day, November, 2011.

Christina Dixon Parnall

Christina Dixon Parnall
 Attorney and Counselor at Law

SWORN TO BEFORE me this 22nd day
 of November, 2011.

Denenne Graham (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA,)

v.)

TREY LEVAR GARNER,)

Applicant.)

2014 CP4005098
IN THE COURT OF GENERAL SESSIONS97-GS-40-21496, 21497, 21498
2014 AUG 18 5:10) CONSENT ORDER FOR PREVIOUSLY FILED MOTION
) FOR A NEW TRIAL TO BE REFILED AS A TIMELY
) APPLICATION FOR A NEW TRIAL PURSUANT TO S.C.
) CODE ANN. §§17-27-20(a)(4) and 17-27-45(C)RICHLAND COUNTY
FILED
2014 AUG 18 PM 5:06
JEANETTE W. BRIDE
C.C.P. & G.S.

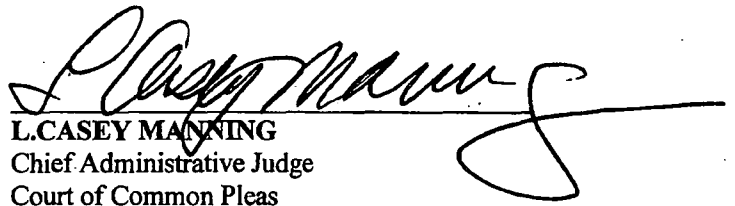
The Applicant in the above captioned action, acting by and through his undersigned counsel, has requested that his Motion for a New Trial previously filed with the Court of General Sessions on November 22, 2011, be treated as a request for a new trial pursuant to S.C. Code Ann. §§17-27-20(A)(4) and 17-27-45(C). In said motion, the Applicant requested a new trial pursuant to Rule 29 (b), SCRCrimP. To date, that motion has never been heard. In the case of *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013) our Supreme Court has indicated that requests for a new trial based on allegations of juror misconduct should be raised under the Uniform Post-Conviction Relief Procedure Act. The Applicant filed his Motion for a New Trial within one year of the discovery of the information which is the basis for his request for a new trial. That motion was, however, filed in the Court of General Sessions, pursuant to Rule 29(b). In light of the *McCoy* decision, the Applicant has asked that his previously filed motion be treated as a timely filed Application for Post-Conviction Relief pursuant to §§17-27-20(A)(4) and 17-27-45(C).

While the State does not in any way concede the merit of the Applicant's prayer for relief, or the timeliness of the original motion, the State has consented to the Applicant's request that his previously filed motion be treated as a request for a new trial pursuant to §17-27-20(A)(4) and §17-27-45 (C). The parties have agreed that the merits of Applicant's allegations, and the timeliness of the original motion, are matters to be decided by the presiding judge on review of this application. The State's consent to having this request considered as an application pursuant to §§17-27-20(A) (4) and 17-27-45(C) is verified by the signature of opposing counsel below.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
JEANETTE W. BRIDE
C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

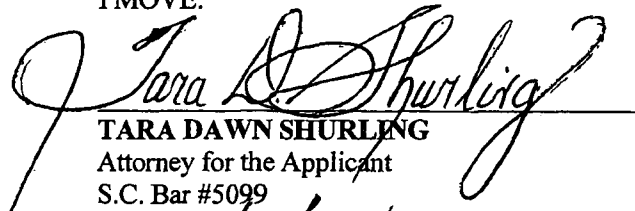
WHEREFORE this Court grants the Applicant's request that his previously filed Motion for a New Trial, a copy of which is attached hereto, be refilled, with the consent of the State, as an Application for Post-Conviction Relief pursuant to S.C. Code Ann. §§17-27-20(A)(4) and 17-27-45 (C). The Applicant shall file with the Court of Common Pleas a Post-Conviction Relief Application with a copy of this Order, and a copy of his original motion, as attachments. The Clerk of Court shall assign this matter a Common Pleas docket number. Inasmuch as this request for a new trial has been pending since November 22, 2011, when the original motion was filed in the circuit court, this Court additionally orders an expedited hearing in this matter and would direct that this case be scheduled for a hearing on the Applicant's request for a new trial as soon as possible.

IT IS SO ORDERED.


L. CASEY MANNING
 Chief Administrative Judge
 Court of Common Pleas
 Fifth Judicial Circuit

This 18 day of Aug, 2014.

I MOVE:


TARA DAWN SHURLING
 Attorney for the Applicant
 S.C. Bar #5099
 Date: 5/12/2014

I CONSENT:


PAULETTE EDWARDS
 Deputy Solicitor
 Fifth Circuit Solicitor's Office
 Date: 5/12/2014

**CERTIFIED TRUE COPY
 OF ORIGINAL FILED,
 Jeannette W. McBride
 C.C.C.P.&G.S.
 RICHLAND COUNTY
 SOUTH CAROLINA**

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

TREY LEVAR GARNER, #248321,)
 Applicant,)

2014-CP-40-05098

v.)

**AMENDED
 APPLICATION FOR
 POST-CONVICTION RELIEF**

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

INSTRUCTIONS – READ CAREFULLY

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

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

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

1. Place of detention: Ridgeland Correctional Institution P. O. Box 2039, Ridgeland, SC 29936
2. Name and location of Court which imposed sentence Richland County Court of General Sessions, 1701 Main Street, Columbia, SC 29202
3. Name(s) of co-defendant(s) (if any) Jermaine McLemore, Dayon Lemon.
4. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 97-GS-40-21496 Murder
 - (b) 97-GS-40-21497 Attempted Armed Robbery
 - (c) 97-GS-40-21498 Conspiracy to Commit Armed Robbery

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 12, 1998; 30 years concurrent
 - (b) March 12, 1998; 5 years consecutive
 - (c) March 12, 1998; 5 years concurrent
6. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? yes
8. If you answered "yes" to (7), list
- (a) the name of each Court to which you appealed:
 - i. Supreme Court of 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. August 23, 2000
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. State v. Trey Garner, Mem. Op. No. 2000-MO-107 (S. Ct. filed August 23, 2000).
 - ii. _____

iii. _____

9. If you answered "no" 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) See Attachment A.

(b) _____

(c) _____

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

(a) See Attachment A.

(b) _____

(c) _____

12. Prior to this application, have you filed with respect to this conviction:

(a) any petitions in a State Court under South Carolina law? Yes

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? Yes

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. PCR Application filed 8/20/2001; 01-CP-40-3472

ii. PCR Application filed 8/20/2001; 01-CP-40-3472

iii. N/A

iv. Motion for New Trial pursuant to Rule 29 (b), SCRCrimP. Filed on November 22, 2011. Attachment A

(b) the name and location of the Court in which each was filed:

- i. Richland County Court of Common Pleas, 1701 Main Street, Columbia SC
- ii. Richland County Court of Common Pleas, 1701 Main Street, Columbia SC
- iii. N/A
- iv. Richland County Court of General Sessions, 1701 Main Street, Columbia SC

(c) the disposition thereof:

- i. Application dismissed with prejudice.
- ii. Application dismissed with prejudice.
- iii. N/A

iv. Rule 29 (b) Motion in General Sessions Court converted to a PCR action in the Court of Common Pleas by Consent Order filed August 18, 2014 and attached hereto as Attachment B. Said Order ordered "an expedited hearing in this matter" and directed "that this case be scheduled for a hearing on the Applicant's request for a new trial as soon as possible." See, Attachment B, pg. 2. Said Order directed Applicant to file an Application for PCR with copies of his Rule 29(b) motion and the Court's Order as attachments whereupon the Clerk of Court was to assign this matter a CP docket number. Subsequently the Court's Order was filed and a CP docket number was assigned to this case at that time despite the fact that the order had a General Sessions case caption. For that reason, this Application has been captioned as an Amended Application and the CP docket number assigned at the filing of the Consent Order has been included in the caption.

(d) the date of each such disposition:

- i. March 24, 2004
- ii. March 24, 2004
- iii. _____
- iv. August 18, 2014

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

- i. Unpublished Order
- ii. Unpublished Order

iii. N/A

iv. Unpublished Order

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

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

(a) which grounds have been presented:

i. Juror issue.

ii. _____

iii. _____

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

i. Previously raised as Rule 29(b) motion and converted to PCR by Consent Order. See, Attachment B.

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) Motion for New Trial was filed as soon as possible after discovery and confirmation of relevant information.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(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? Yes

(f) PCR appeal Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. James R. Rogers, Esquire 1901 Assembly St. Ste. 200, Columbia SC 29201
- ii. Melody J. Brown, Esquire P. O. Box 11549, Columbia, SC 29211
- iii. John S. Simmons, Esquire, 1711 Pickens St., Columbia, SC 29201
- iv. Joseph L. Savitz, III, Esquire, 1825 St. Julian Place, Unit 15-D, Columbia SC 29204

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

- i. Arraignment, trial and sentencing
- ii. Direct Appeal
- iii. PCR docketed at 01-CP-40-3472
- iv. PCR Appeal

19. State clearly the relief you seek in filing this application. A new trial.

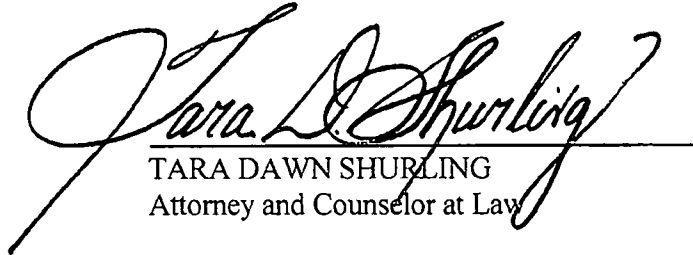
20. Are you now under sentence from any other court that you have not challenged? No.

STATE OF SOUTH CAROLINA

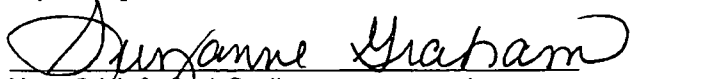
VERIFICATION

COUNTY OF RICHLAND

I, Tara Dawn Shurling, *retained* counsel for the Applicant, 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.


TARA DAWN SHURLING
Attorney and Counselor at Law

SWORN to and subscribed before me this 3rd
day of September, 2014


Notary Public for South Carolina
My Commission Expires: 2/28/24

TREY LEVAR GARNER, #248321,) 2014-CP-40-05098
Applicant,)
)
) CERTIFICATE OF SERVICE
v.)
)
)
THE STATE OF SOUTH CAROLINA,)
Respondent.)
)

Clay Mitchell
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

the Richmond County Clerk of Court for filing.


TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

SWORN TO BEFORE ME this 3rd day of
September, 2014.

Doranne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Trey Levar Garner, #248321,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05098

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application filed August 20, 2014, Respondent would show this Court:

I.

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the September 1997 term of the Richland County Grand Jury for Murder (1997-GS-40-21496), Attempted Armed Robbery and Robbery (1997-GS-40-21497), and Conspiracy to Armed Robbery (1997-GS-40-21498). On March 9-12, 1998, Applicant proceeded to trial before the Honorable J. Derham Cole. At trial, Applicant was represented by James P. Rogers, Esquire. The State was represented by R. Knox McMahon and Joenathan Chaplin, Assistant Solicitors for the Fifth Judicial Circuit. On March 12, 1998, the jury found Applicant guilty as indicted. Judge Cole sentenced Applicant to imprisonment for thirty (30) years for Murder, five (5) years, consecutive, for Attempted Armed Robbery, and five (5) years, concurrent, for Conspiracy.

A timely notice of appeal was filed and an appeal was perfected by Melody J. Brown, Esquire, of the South Carolina Office of Appellate Defense. Applicant, by and through counsel, submitted a Final Brief of Appellant, in which he raised the following issues:

1. The trial judge erred in failing to direct a verdict, or alternatively ordering a new trial, on the murder charge and the attempted armed robbery charge when the testimony from the principal and the other witnesses demonstrated that the act resulting in murder was not an attempt to commit armed robbery, rather the crime acted on was the murder of a storekeeper and not an act of the criminal conspiracy.
2. The trial judge erred in failing to declare a mistrial when the state improperly admitted evidence of a general criminal intent by the inference of gang activity, when gang activity was not an allegation against defendant and only worked to create an inference of guilty from bad character.
3. The trial judge erred in admitting State Exhibit 16, a photograph of the murder site including the victim's blood, when the prejudicial effect of the bloody scene outweighed the possible probative value of the evidence.

The Supreme Court of South Carolina affirmed Applicant's conviction pursuant to Rule 220(b)(1), SCACR, State v. Garner, Mem. Op. No. 107 (filed August 23, 2000).

2001-CP-40-3472

Applicant subsequently filed an application for post-conviction relief on August 20, 2001, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
2. Subject matter jurisdiction
3. Ineffective assistance of appellate counsel.

On January 21, 2004, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Applicant testified on his own behalf. Trial counsel Rogers testified for the State. On March 24, 2004, Judge Kinard issued an Amended Order of Dismissal with Prejudice, denying relief. Applicant served and filed a notice of appeal to the South Carolina Supreme Court.

Applicant was represented by Joseph L. Savitz, III, then Acting Chief Attorney of the S.C. Office of Appellate Defense on the appeal. Counsel Savitz filed a Petition for Writ of

Certiorari pursuant to Johnson¹ on Applicant's behalf on November 3, 2004, where he requested to be relieved as counsel. In an Order dated December 2, 2005, the Supreme Court of South Carolina issued an Order denying certiorari and granting counsel's petition to be relieved as counsel. The remittitur was issued on December 20, 2005.

2006-cv-00021-GRA-BM

Applicant then filed a petition for writ of habeas corpus on January 20, 2006, in federal district court. Applicant raised the following issues:

1. Ineffective assistance of trial counsel deprived Appellant of fair trial in violation of due process. Const. Amends 5, 6.
2. Insufficient evidence adduced to support state court convictions. U.S. Const. Amend. 14.
3. U.S. Const. Amend. 6 and 14.
4. U.S. Const. Amend. 6 and 14.

On March 13, 2006, Respondent filed its return and motion for summary judgment requesting that he case be dismissed. The federal district court granted Respondent's motion for summary judgment and dismissed the case with prejudice by Order filed February 2, 2007. Applicant then filed a notice of appeal on April 4, 2007. The United State Court of Appeals for the Fourth Circuit dismissed the appeal by order dated October 24, 2007, and mandated the judgment on November 15, 2007. This action follows.

II.

Applicant then filed a Motion for a New Trial pursuant to Rule 29(b), SCRCrimP on November 22, 2011, in the Richland County Court of General Sessions. In that motion Applicant alleges that a "juror serving at his trial has now been discovered to have a close family tie to the victim in this case." No action was taken on this case until August 18, 2014, where a document captioned "CONSENT ORDER FOR PREVIOUSLY FILED MOTION FOR A NEW TRIAL

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

TO BE REFILED AS A TIMELY APPLICATION FOR A NEW TRIAL PURSUANT TO S.C. CODE ANN. §§17-27-20(a)(4) and 17-27-45(C),” was filed.² The consent order states that “the State does not in any way concede the merit of the Applicant’s prayer for relief, or the timelines of the original motion, the State has consented to the Applicant’s request that his previously filed motion be treated as a request for a new trial pursuant to §17-27-20(A)(4) and § 17-27-45(C).”

Applicant then filed an application for post-conviction relief (2014-CP-40-05098) in the Richland County Court of Common Pleas where he argues the same allegations as set forth in the Rule 29(b), SCRCrimP motion.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections’ records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Applicant contends that he is entitled to an evidentiary hearing because of newly discovered evidence of juror impartiality and juror misconduct. The South Carolina Supreme Court recently addressed the issue of juror misconduct in McCoy v. State, 401 S.C. 363 (2013). McCoy held an issue of fact exists and a hearing is therefore required where an allegation would establish an exception to either the statute of limitations or the prohibition against successive applications when those allegations are not conclusively refuted by the record. The court also held the traditional five part test governing newly discovered evidence in PCR actions is not applicable to allegations of juror misconduct. The court enunciated a new test for when the grant of a new trial is warranted on the basis of juror misconduct: “if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a

² Respondent notes that the Attorney General was not consulted or apprised of the issues addressed in the consent order. Respondent does not consider the consent order binding.

challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Applicant must file an application for post-conviction relief "within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. §17-27-45(C).

Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Applicant has not shown how this evidence could not have been discovered at the time of trial through reasonable diligence. Respondent was tried in March of 1998 and now claims sixteen (16) years later that his jury was tainted because of an undisclosed relationship. This could have been discovered at the time of trial. Applicant has also failed to support these allegations with any credible evidence to show that the juror intentionally concealed this information. Respondent submits that the Applicant cannot satisfy *any* of these requirements to be granted a new trial.

IV.

Respondent submits any and all other allegations (aside from juror misconduct) should be summarily dismissed because this is a successive application. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were

not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised...in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

V.

Respondent also submits this any allegations other than the juror misconduct issues should be dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the offenses he challenges on August 31, 2000. This application was filed well outside of the statute of limitations.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings...that there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law." Therefore, the Respondent requests that this Court dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent requests a hearing be held on the State's motion to dismiss.

Respectfully submitted,

ALAN WILSON
Attorney General

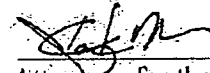
JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for the Respondents

11/14/14

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

2014-CP-40-05098

TREY L. GARNER, #248321

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,
Respondent.

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

**Tara Dawn Shurling, Esquire
Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, SC 29204**

DATED this 14th day of November, 2014.



Sara Moore, Legal Assistant
For Respondent

Document File Copy
Scanned and entered
in WORD File 11/17/14
By de

State of South Carolina)	In the Court of Common Pleas
County of Richland)	Fifth Judicial Circuit
	2014-CP-40-5098

Trey Levar Garner,	)	
	)	
Applicant,	)	
	)	
vs.	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

April 3, 2015
Columbia, South Carolina

B E F O R E:

The Honorable Brooks P. Goldsmith, Judge

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

Tara Dawn Shurling, Esquire
Attorney for Applicant

J. Clayton Mitchell, III, Esquire
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
P-1	Clerk Form		97

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 10:17 a.m.)

MR. MITCHELL: Your Honor, may it please the Court?

THE COURT: Certainly.

MR. MITCHELL: The next matter is *Trey Garner v. the State of South Carolina*. This is Case No. 2014-CP-40-05098. I'm going to run through the procedure quickly on this one. Let's see.

Mr. Garner was indicted in September of 1997 for murder and attempted armed robbery and for conspiracy to commit armed robbery. He proceeded to trial in March of 1998 before the Honorable Judge J. Derham Cole. He was represented on those charges by Mr. James P. Rogers. He was convicted as indicted; sentenced to 30 years for murder, 5 years consecutive for attempted armed robbery, and 5 years concurrent for the conspiracy.

An appeal was filed. The South Carolina Supreme Court -- or the South Carolina Court of -- South Carolina Supreme Court affirmed his conviction. Applicant filed a -- a first postconviction relief application in August of 2001. A hearing was held on that matter. It was denied.

That first PCR was appealed. The denial was affirmed on appeal there. Applicant then proceeded to file a petition for writ of habeas in federal court, challenging those convictions. That -- those -- that action was also

1 denied by an order of February of 2007.

2 He appealed that decision to the United States Court
3 of Appeals for the 4th Circuit, where it was then affirmed.
4 Let's see. So where -- where we're at today, this is --
5 Mr. Garner filed a motion for a new trial, pursuant to
6 29(b) in the Court of General Sessions in Richland County
7 in November -- November 22nd of 2011.

8 And in that motion for a new trial, there was
9 allegations of juror misconduct. Our office had no
10 dealings with this case until August 18th of 2014, where we
11 received a consent order of dismissal -- or consent order
12 of transfer of jurisdiction -- what is it captioned? Let's
13 see.

14 It's a consent order -- it's captioned Consent Order
15 for Previously Filed Motion for a New Trial to be Refiled
16 as a Timely Application for a New Trial Pursuant to -- and
17 then, it cites the PCR statute.

18 So in -- where we are now, the -- this was originally
19 filed as a Rule 29. In the Rule 29 the -- Ms. -- Mr.
20 Garner's attorney had discussions with the solicitor
21 assigned to the case. They entered into a consent order
22 which transferred the case to common pleas, essentially.

23 At this point we filed a motion to dismiss on November
24 14th of 2014. And in that motion, which I think we can
25 argue first today, would be that the consent order entered

1 into by the solicitor's office and by Mr. Garner
2 transferring the case to common pleas is not binding on the
3 attorney general; it's not binding in this action.

4 Our position on that is that we're completely -- you
5 know, it's still the State of South Carolina, but there's
6 many different agencies in the State of South Carolina.
7 The Fifth Circuit Solicitor's Office is confined to the
8 Fifth Judicial Circuit. There's no jurisdiction outside of
9 that. They don't handle cases in common pleas.

10 And what happened here is that the deputy solicitor
11 waived -- consented to the attorney general waiving a
12 defense. So in effect, this thing -- the Rule 29 was filed
13 in 2011. And the timeliness of the discovery of the
14 alleged juror misconduct would have been within a year. So
15 the Rule 29 would've been filed a -- a -- we're not on
16 that. We're -- we're not arguing timeliness of the Rule 29
17 at this point.

18 What we're arguing is that this was filed outside of a
19 year of that discovery. But the -- what the consent order
20 does, it consents that it's timely filed PCR action. So we
21 challenge it on those grounds in that the consent order
22 does not apply to us. I don't -- we did not -- for the
23 reasons that we did not consent to this consent order. We
24 were not brought on board with any of this. We had not
25 been in contact with Mr. Garner's attorneys or the

1 solicitor's office.

2 So what's happened here is we're -- you know, we're
3 alleging -- you know, we're trying to be held bound to
4 something we had no say in. So it's a consent order
5 essentially waiving our defense to these allegations on the
6 timeliness.

7 And, you know, in support of that, I would just say
8 that the -- you know, the attorney general's office is
9 completely separate from the solicitor's office. There's
10 many state agencies. If I sign a consent order on behalf
11 of DHEC, I don't believe that would be binding on them.
12 And on that, that's what I would base motion to dismiss
13 just this PCR action.

14 THE COURT: And you're saying there's a finding in the
15 consent order -- and I haven't read the entire consent
16 order. There's a finding in it, though, that says it was a
17 -- it was timely?

18 MR. MITCHELL: It's not -- it's not that it was
19 timely. It -- it -- we didn't waive the timeliness of the
20 initial filing. It just kind of tolls the filing to where
21 it would be treated as timely as a PCR.

22 MS. SHURLING: Would Your Honor care to hear my
23 response?

24 THE COURT: I -- I'd think so. Certainly.

25 MS. SHURLING: Thank you. . Your Honor, I was

1 enormously grateful for the fortuitous scheduling that
2 resulted in the previous case having a status conference
3 before mine. For the record, by the way, I apologize,
4 madam court reporter. I am Tara Dawn Shurling, and I am
5 retained counsel for Trey Garner.

6 Your Honor, at the time this case was filed as a Rule
7 29(b) motion on after-discovered evidence, the *McCoy*
8 decision -- *McCoy v. State of South Carolina*, 401 S.C. 363,
9 737 S.E.2d 623 -- had not yet been decided. For the
10 convenience of the Court, I am going to pass up a copy.
11 I'm old-fashioned. I like to read things on paper.

12 What had happened, Your Honor, is that I had filed a
13 Rule 29 motion in the Court of General Sessions, addressing
14 question of the nondisclosure of a familial relationship
15 between a juror who served on my client's jury and the
16 victim in this homicide case.

17 That motion languished. I -- I said I was grateful to
18 be following Ms. Blanchette's case's status conference a
19 moment ago. And I meant it. Because I think it
20 illustrates how difficult it is to get a Rule 29 motion
21 scheduled and heard in the Court of General Sessions.

22 I filed it. I followed up on a regular basis as to
23 when I might expect it to be scheduled for a hearing. And
24 it languished.

25 At that point in time, as I was doing routine follow-

1 ups, I discovered the *McCoy* decision had been issued and I
2 -- after reviewing it carefully, I reached the conclusion
3 that it -- at minimum, our Supreme Court had indicated a
4 very strong preference for allegations of this ilk to be
5 heard as components of the postconviction-relief procedure
6 for collateral review. And at its strongest
7 interpretation, one could argue it says they have to be.

8 So at that point I contacted the solicitor's office
9 once again. Only this time, instead of trying to force the
10 issue of it getting scheduled for a Rule 29 hearing, I
11 presented them with copies of the records, of course, and a
12 copy of the *McCoy* decision and essentially said, since it
13 seems to be a problem to get this matter scheduled on my
14 Rule 29(b) motion, I would suggest that you consider
15 consenting to my filing being treated as a postconviction
16 relief application or, alternatively, that you enter into a
17 consent with me for me to file a PCR application and that
18 it be considered timely, based on the filing of the Rule
19 29(b) motion.

20 After many more months' discussion, Mr. Dan --
21 Solicitor Dan Johnson had assigned his chief deputy,
22 Paulette Edwards, to this matter. And after lengthy
23 discussion and debate, she agreed to enter a consent order.
24 I drafted one, which Ms. Edwards very studiously edited and
25 rewrote and edited. And we went back and forth on the

1 language until she finally agreed, at which point we
2 presented that motion -- pardon me -- that consent order to
3 Judge Manning.

4 Now, procedurally, I want to be real clear. My
5 original motion was filed in general-sessions court under
6 29(b). At the time he signed this consent order, Judge
7 Manning was the chief administrative judge for the Court of
8 Common Pleas. We put it before him because the consent
9 order was agreeing between the state and myself on behalf
10 of Mr. Garner for the previously filed Rule 29 to be heard
11 as a PCR application.

12 Now, there's one little procedural glitch that is a
13 difference without substance, as my dad would say. But I
14 need to put it on the record. The way the order was
15 drafted, the way it -- it was intended that things proceed,
16 was that I would file an application for postconviction
17 relief and attach a copy of Judge Manning's general-
18 sessions consent order to the PCR application and then we
19 would move forward.

20 At that point, when Judge Manning's law clerk filed
21 this consent order, whoever filed it in the clerk of
22 court's office -- and, of course, I have no way of knowing
23 who -- went ahead and assigned it a common-pleas docket
24 number: 2014-40-05098. And so since the common-pleas
25 docket number has been assigned to the consent order, I

1 proceeded to then file what was captioned an amended
2 application for postconviction relief, using that CP number
3 and explaining the procedural history and attaching copies
4 of all the documentations up to that point.

5 That is the only reason the PCR application is
6 actually referenced as an amended one: because of the --
7 for whatever reason, the clerk of court's office going
8 ahead and assigning it a CP number at the time the consent
9 order was filed. And we wanted to keep consistency with
10 the same CP number being on all the documentation in this
11 case.

12 While I certainly understand the state's position, I
13 would note, without boring the Court with a great deal of
14 -- of authority, that up until the *McCoy* decision, it was
15 common for allegations of this nature to be handled in the
16 general-sessions court. However, the *McCoy* decision is
17 pretty clear about the Court's wishes with regard to how
18 we're going to do it from here on out.

19 The other issue, Your Honor, is that as you know, from
20 your time on the bench and -- and before, the fact of the
21 matter is the -- the -- when one branch of the state's
22 prosecution -- judicial system agrees to something like
23 this, the state is bound by it -- the state, period, and
24 all of its branches. There's no reason why this was a
25 general-sessions motion. And Ms. Paulette Edwards, the

1 chief deputy solicitor for the Fifth Judicial Circuit,
2 acting on behalf of the state, after much careful
3 deliberation, consented to it being -- she was not
4 consenting to the merits of my position with regard to this
5 juror. And the -- and the order very clearly indicates she
6 wasn't.

7 But she was consenting to it being put in the court
8 that the *McCoy* decision indicates the Supreme Court thinks
9 should hear these matters. And -- and I would submit that
10 the state, in the larger sense of the word, is bound by
11 that ruling. A circuit court judge directed that it be
12 heard as a PCR. And while I certainly understand and
13 appreciate the arguments advanced by respondent, I believe
14 that that order is binding on all of us and particularly
15 binding on the state, since it was consented to by no
16 lesser authority than the chief deputy solicitor in the
17 fifth circuit.

18 THE COURT: All right. Thank you.

19 MR. MITCHELL: Your Honor, in response to that, I'd --
20 I'd point you to *McCoy*. There's nothing in there that says
21 any -- that shows any preference towards these being filed
22 as a PCR. *McCoy* was a PCR throughout. You can file, you
23 know -- as we talked about today, newly discovered evidence
24 in 29 and in PCR. That's just the way that case was filed.

25 There's nothing in there that says that there's a

1 preference that this should be only handled in PCR going
2 forward. You can still file these -- these motions for new
3 trial in general sessions under Rule 29. There's nothing
4 that forbids that. There's nothing in there that shows a
5 preference to that. The Supreme Court is just dealing with
6 what was before them, which was a PCR case that was
7 appealed and went straight to them -- and went to them
8 under argument and a -- under an order.

9 There's -- and that's our position on that: that
10 McCoy does not say these cannot be filed as 29 and shows no
11 preference in that. It's just the Supreme Court -- that's
12 what they had before them at that time.

13 I think, as far as that consent order goes, I think
14 Ms. Paulette Edwards was acting on -- in her position as
15 the deputy solicitor, where she has authority to -- over
16 matters before her. But she -- it's our position that she
17 does not have authority to bind the attorney general's
18 office in anything.

19 MS. SHURLING: And, Your Honor, be that as it may,
20 even if it's true, certainly, Judge Manning does.

21 THE COURT: Let -- let -- let -- let him finish.

22 MS. SHURLING: Yes, sir.

23 THE COURT: You can go ahead.

24 MR. MITCHELL: And, Your Honor, I -- I would just --
25 and I would just finish with this: It's just that this was

1 filed as a 29. The law changed as in PCR cases of how you
2 deal with juror misconduct. Then Mr. Garner tried to get
3 this heard as a PCR, as the law had changed. And, you
4 know, that's why we're here today: because of -- just the
5 -- after the law changed, they were -- they tried to get
6 this case heard in PCR because of that change. And we
7 think that the consent order does not bind us.

8 And I'd also note that, you know, we were never
9 consulted on this in no matter whatsoever -- no manner
10 whatsoever. Excuse me.

11 THE COURT: Still, help -- help me understand better
12 what it is -- your bottom-line objection is that -- what
13 was not timely filed?

14 MR. MITCHELL: Okay. Your Honor, the timely -- the
15 way the order sets it out, it says that applicant asks that
16 this previously filed motion be treated as a timely filed
17 application for PCR. So there's -- there's about a date
18 where Mr. Garner alleges that he became aware of this
19 certain information. But because he -- then he filed the
20 29, and he argues that that's timely.

21 We're not -- we're not there yet to the merits of that
22 timeliness. What we're here on is that this PCR action,
23 which was filed after the consent order, was absolutely
24 outside of the one-year of when he became -- when that
25 knowledge -- when he discovered that knowledge.

1 THE COURT: Oh. That's ---

2 MR. MITCHELL: So ---

3 THE COURT: Oh. You're not -- okay. I see.

4 MR. MITCHELL: So I'm ---

5 THE COURT: You're not ---

6 MR. MITCHELL: --- not challenging ---

7 THE COURT: --- saying ---

8 MR. MITCHELL: --- the overall timeliness of it. I'm
9 just challenging that if this -- my argument is that this
10 consent order does not bind us. And if this consent order
11 does not bind us, this application is untimely filed, you
12 know, admittedly in their own pleadings because, you know,
13 their -- their position is that it was timely filed as a
14 29; the 29 is to be treated as a timely filed PCR case.

15 So we -- we just say that the order does not bind us.
16 And if the order does not bind us to treat it as a timely
17 filed PCR, then it would be barred by the statute of
18 limitations, the one-year on the newly discovered evidence
19 of juror misconduct.

20 THE COURT: Are you saying that the -- the order --
21 the consent order for previously filed -- motion for a new
22 trial -- that it says that the -- that this is timely?

23 I -- what I'm trying to do is figure out where in this
24 order -- is there language in the -- is there language in
25 this order that you're saying affects your ability to argue

1 timeliness?

2 MR. MITCHELL: I think it would affect -- the only
3 thing it would -- it would affect our ability to challenge
4 -- well, it -- the way it would work is he -- he alleges
5 that he found out this information in, I -- I think,
6 sometime in 2010 ---

7 THE COURT: Right.

8 MR. MITCHELL: --- then filed this motion for -- the
9 Rule 29 motion in 2011.

10 THE COURT: Okay.

11 MR. MITCHELL: And they argued that was within the one
12 year of discovery.

13 THE COURT: Okay.

14 MR. MITCHELL: So we argue that if this order does not
15 apply, the one-year rule of -- where you have to file
16 within one year of discovery, this would be outside of
17 that. But I think the order, what it does, it makes the
18 PCR case be treated -- it kind of backs -- backdates the
19 PCR filing date to when the Rule 29 was filed, in effect,
20 because that would consider it -- we would have to -- we
21 would be bound to consider it timely according to the
22 allegations, but just that we would be backdating the date
23 of the PCR filing to be within a year of when he allegedly
24 discovered this information.

25 I'm trying to be as clear as I can. I know this is a

1 bit convoluted.

2 THE COURT: All right. The order says that applicant
3 shall file a -- a postconviction application with a copy of
4 this order.

5 MR. MITCHELL: Well -- well, I think the language is
6 the last sentence on that first page, where it says (as
7 read): "The state consents to having this request
8 considered as an application filed pursuant to the
9 statute."

10 MS. SHURLING: And the last sentence of the previous
11 paragraph.

12 MR. MITCHELL: So I think what -- what, in effect,
13 that Mr. Garner's position is that this order backdates the
14 filing of the PCR to the filing of the Rule 29, for all
15 intents and purposes.

16 THE COURT: Okay.

17 MR. MITCHELL: And that would be ---

18 THE COURT: Yeah. I guess that -- that is ---

19 MS. SHURLING: That's absolutely ---

20 THE COURT: --- correct.

21 MS. SHURLING: --- correct.

22 THE COURT: Okay.

23 MR. MITCHELL: But it's our position that we're not
24 bound by the order because it -- we never consented on it
25 and we would be bound to something in a consent order that

1 we're not consenting to.

2 And -- and there's also language in there about how
3 the -- the Supreme Court indicated a preference of *McCoy* --
4 that *McCoy* indicated a preference to have these filed as a
5 PCR action. And we would absolutely be in opposition to
6 that -- of that language. And that's in the first
7 paragraph (As read): "In the case of *McCoy v. State*, our
8 Supreme Court has indicated" -- so we -- we -- we don't
9 agree with -- we would've had objections to that, and we
10 would've had objections to this being considered -- or
11 essentially backdated a few years.

12 MS. SHURLING: Your Honor ---

13 THE COURT: Well, let ---

14 MS. SHURLING: --- I don't ---

15 THE COURT: --- let ---

16 MS. SHURLING: --- want to ---

17 THE COURT: --- let ---

18 MS. SHURLING: --- unintentionally object, so please
19 let me know when I can respond.

20 THE COURT: Okay. I understand. Let -- let me --
21 let's suppose, for the sake of argument, that the applicant
22 filed a request for a new trial based on after-discovered
23 evidence in a timely manner.

24 MR. MITCHELL: A ---

25 THE COURT: It's ---

1 MR. MITCHELL: --- a PCR or a ---

2 THE COURT: No. The 29.

3 MR. MITCHELL: Yes, sir.

4 THE COURT: Suppose the applicant did do that. Are
5 you saying that -- that now the -- because of the consent
6 order, that the applicant cannot be heard on that by -- in
7 either court?

8 MR. MITCHELL: Well, I think what -- what this -- what
9 the order did was it backdated the filing -- okay. Because
10 this PCR action was filed -- this PCR action was filed, I
11 think, in August of 2014. So he -- if -- if you take his
12 allegations as true, as just assuming that, that he became
13 aware of this supposed juror misconduct in 2010, this
14 application was filed four years later. It's our position
15 that that was -- four years is outside the limitations.

16 But if you accept this consent order, I think, in
17 effect, it treats it as a timely filed PCR action.

18 THE COURT: I understand.

19 MR. MITCHELL: Okay.

20 THE COURT: So ---

21 MR. MITCHELL: Yes, sir.

22 THE COURT: So -- all right. All right. You -- are
23 you saying that the applicant should go back to general-
24 sessions court and having a hearing?

25 MR. MITCHELL: I -- I think that would be -- I think

1 if you ruled that this consent order does not bind us and
2 then it was therefore untimely filed as a PCR, then I think
3 it would go back to general sessions to be heard under
4 their rules and procedures, as -- and I know that's how
5 they filed it initially. This could've been filed as a PCR
6 in 2011 when the 29 was filed. I mean, I think that's --
7 he chose his route in the 29 at that point. So I think
8 that's, in effect, what would have to happen.

9 THE COURT: All right. Ms. Shurling, let me ask you a
10 couple questions before you tell me your position ---

11 MS. SHURLING: Yes, sir.

12 THE COURT: --- on everything that's argued by the
13 state by ---

14 MS. SHURLING: I'm an appellate lawyer ---

15 THE COURT: It ---

16 MS. SHURLING: --- Your Honor. I like questions from
17 the bench.

18 THE COURT: Has the -- the state argues that *McCoy*
19 does not, in fact, show -- or have language in it that
20 indicates the case should be -- these-type cases should be
21 handled as PCRs. And you disagree. And where -- what --
22 point me to the language that ---

23 MS. SHURLING: Yes, sir ---

24 THE COURT: --- that ---

25 MS. SHURLING: --- Your Honor. You have to look at

1 two different sections of the opinion. If you look at
2 Section 2, Subsection (A) ---

3 THE COURT: On it.

4 MS. SHURLING: --- the second paragraph notes that the
5 language of 17-27-45(c) provides for a PCR application
6 where, and I quote, material facts not previously presented
7 and heard that require vacation of his conviction or
8 sentence are discovered. Okay?

9 Now, the difference between that language -- then, the
10 Court notes -- in the second paragraph under Subsection
11 (B), the Court notes that the standard for newly discovered
12 evidence, what it is, and then it cites with approval of
13 Virginia case for the fact that evidence concerning juror
14 misconduct is not properly considered newly discovered
15 evidence because it has no bearing on the issue of
16 innocence or guilt and does not concern the substance of
17 the state's case or an accused's defense. That's Paragraph
18 2 under Subsection (B).

19 Rule 29(b), Your Honor, specifically addresses motions
20 for a new trial based on after-discovered evidence. Here
21 in this opinion, in *McCoy*, which came out after I had filed
22 the 29, the Court cites with approval the language from the
23 Virginia *Shepherd* case that evidence of juror misconduct
24 isn't newly discovered evidence.

25 But then, they cite to 17-27-45(c), which provides for

1 the hearing of a PCR application based on material facts
2 not presented and heard, which is a slightly different
3 matter from true after-discovered evidence under the legal
4 standard for what is and isn't after-discovered evidence.
5 So a -- a close reading of the opinion indicates that the
6 Court is now pointing with -- with approval to case law
7 from another jurisdiction that juror misconduct is not
8 after-discovered evidence inasmuch as it doesn't go
9 directly to a question of guilt or innocence but that it
10 can be at -- harkening back to the language of 17-27-45(c),
11 which is, of course, a part of the Uniform Postconviction
12 Relief Procedure Act that it can be -- it can constitute,
13 rather -- to use proper English -- material facts not
14 previously presented and heard.

15 And so in that regard, I would submit that as of the
16 Court's decision in February 2013, the Court has most
17 certainly indicated approval for the notion that discovery
18 of allegations of juror misconduct would not go directly to
19 guilt or innocence and therefore is not a part of any
20 after-discovered-evidence analysis. It also finds that
21 such allegations are properly heard under 17-27-45(c). If
22 you read the language of 29(b), 29(b) addresses after-
23 discovered evidence specifically, as opposed to simply, as
24 the language of *McCoy* relates, to material facts not
25 previously heard. And that would be my basis for that

1 position, Your Honor.

2 And as I've said previously, I -- I initially filed
3 this as a 29(b) because that was what we had done for many
4 years until the *McCoy* decision came out. I think the fact
5 that the Supreme Court was citing to Virginia authority in
6 the *McCoy* case sort of evidences that this was an emerging
7 area of the law.

8 The fact remains that the -- not just the -- the
9 assistant solicitor assigned to the case, but the chief
10 deputy solicitor for the Fifth Judicial Circuit consented
11 to this general-sessions motion being treated as a timely
12 application for postconviction relief. After thorough
13 consideration and, frankly, argument and debate with me,
14 she ultimately agreed that, based on the *McCoy* decision,
15 that it would be necessary and appropriate for the matter
16 -- or at least appropriate -- that it would be appropriate
17 for the matter to be heard in the context of an application
18 for postconviction relief.

19 Now, essentially, what the state is -- is saying is
20 that if Your Honor rules in his favor, I've got to go back
21 to square one and -- and get this heard as a Rule 29. Your
22 Honor, I -- I can tell you, as an officer of the Court,
23 that I filed it; I stayed on top of it; I -- I asked on
24 several occasions that it be scheduled for a hearing. I
25 think the fact that it's difficult to get such motions

1 heard had been borne out by the testimony in the previous
2 proceeding in the *Mitchell* case. And I am -- even if I
3 didn't feel so strongly about the intent of the Court in
4 the *McCoy* decision, I would be extremely reluctant to see
5 this matter returned to the solicitor's office for hearing
6 on a Rule 29(b) motion.

7 Also, Your Honor, I would note that -- that I believe
8 that the solicitor's office did have the authority to bind
9 -- to consent to this conversion but that, as I noted --
10 and I apologize to the respondent if I interrupted; it was
11 not my intent; I thought he was through -- that, certainly,
12 if -- if Chief Deputy Solicitor Paulette Edwards didn't
13 have the authority to bind the state in this matter, Judge
14 Manning certainly did.

15 And he was the chief administrative judge in the Court
16 of Common Pleas. He accepted our consent motion, and --
17 and rule -- and signed off on it. And -- and so I
18 certainly believe that the PCR division of this state is
19 bound by his order, if not by Paulette Edwards' consent.

20 And -- and just a side note, Your Honor, just, I guess
21 -- not to waste the Court's time -- but we have all greatly
22 benefitted from the computer-database system that's been
23 installed for tracking cases in the Court of General
24 Sessions. And I am by no means complaining about it,
25 because I think it has brought about some tremendous

1 changes, positive ones, in terms of how cases are handled.
2 But one flaw in that system that I have experienced as an
3 appellate lawyer is that it was not designed with any means
4 to reintegrate cases, for example, that were won on appeal.
5 I've had a number of matters where I won a new trial on
6 direct on direct appeal or I won a new trial on a PCR and
7 the case has languished, in some cases, for years and years
8 because there's no method in that software to reintegrate
9 those cases in the tracking system for a new trial.

10 I don't know that that's why it was -- it proved so
11 difficult to get this matter scheduled for a hearing. But
12 I would anticipate that it -- it is probably symptomatic of
13 the same problem. The -- the database that they run their
14 schedule by is tracking new charges and timing for those
15 matters to be set up for first, second, and third
16 appearances and that it just isn't designed to reintegrate
17 something like this or a remand following a successful
18 appeal. And it -- it unfortunately, until some glitches
19 are worked out, is resulting in some of these matters, like
20 Ms. Blanchette's case and the *Mitchell* case and this one,
21 where posttrial motions and retrials are significantly
22 delayed.

23 THE COURT: All right. And from the attorney general
24 in response?

25 MR. MITCHELL: Your Honor, very, very briefly: It's

1 just -- this is still a consent order. We -- we had no say
2 -- I mean, I think the *McCoy* -- the stuff we're talking
3 about *McCoy* is a little bit peripheral because, I mean, I
4 understand that it's -- what Ms. Shurling is saying. But
5 that -- we would take the opposite position of that in that
6 they can still properly be filed as 29; 29 still -- you can
7 still file juror-misconduct claims in general sessions.

8 But -- and I think that's peripheral because this is a
9 consent order where we never had a chance to put that on
10 the record. We never had a chance to have our say heard.

11 And, you know, the -- the point about Judge Manning
12 having the ability to bind us, you know, that -- of course
13 he does. But he just didn't have a -- he never heard from
14 us, so he never knew our position on it. So we're bound by
15 things in this order saying that *McCoy* -- that the -- that
16 we're bound by an order saying that *McCoy* indicates that
17 these things should be filed as postconviction relief.

18 And I think that this would set a bad precedent to say
19 that the AG's office consented -- the state consented to
20 these being handled as all PCRs, because we do not do that.
21 In no way we do that.

22 And -- and I -- you know, I would just -- I would ask
23 you to focus on the consent order in that the solicitor's
24 office did not have consent to bind the AG's office.

25 THE COURT: But it's an unappealed order.

1 MR. MITCHELL: It's an order ---

2 THE COURT: That's ---

3 MR. MITCHELL: --- filed ---

4 THE COURT: --- not -- not appealed.

5 MR. MITCHELL: Well, I think this is the first
6 opportunity we've had a chance to do this. This was --
7 what was ---

8 THE COURT: No. No.

9 MR. MITCHELL: --- this ---

10 THE COURT: What I mean is the order is a final order
11 not appealed.

12 MR. MITCHELL: But it's a final order not a -- we're
13 not a party to -- well, that's my whole position, is we're
14 not a party to the order. We can't appeal. The -- it's in
15 general sessions. The solicitor's office would've had to
16 appeal their own consent order. This is our first
17 opportunity to challenge this order. I mean, I don't know
18 how we would've gone about appealing an order that was
19 entered into without our knowledge.

20 I didn't even know about this order until August -- I
21 got that written in my motion to dismiss. I never even
22 became aware of this order until August -- I believe it's
23 August 14th. I don't see the date on here, but -- yeah.
24 August 18th is when I received a copy of this order.

25 So at that point I don't believe I could've filed an

1 appeal from an order of -- in a general-sessions case,
2 transferring the case to here. The case is here now. I'm
3 moving to dismiss it on those grounds. And I think this is
4 my first opportunity to do so.

5 MS. SHURLING: Your Honor, I think they're bound by
6 it, period. But assuming, for the sake of argument, the
7 state's position, when they became aware of this order in
8 August following the filing of the order and the --
9 certainly, they got the amended application. And they
10 admit that in August thereafter, they had become aware of
11 it.

12 At that point, if they had wanted to take the position
13 that they only then received the order, it's a -- it's a
14 general-session ruling -- written ruling from general
15 sessions. They had ten days to appeal it, based on -- ten
16 days from when they had notice of it. And they did not do
17 so. Thank you.

18 THE COURT: Or a motion to reconsider. I don't know.
19 But I'm going to find the order is binding and -- and deny
20 the motion to dismiss, which brings us to what? Where?

21 MR. MITCHELL: Your Honor, now we're here -- since
22 that was more of a preliminary threshold issue. We're now
23 here on Mr. Garner's motion for a new trial, with
24 allegations of juror misconduct in the PCR setting, under
25 the rules set out in *McCoy*. So this would be Ms.

1 Shurling's motion. And I will turn it over to her at this
2 time.

3 THE COURT: Ms. Shurling?

4 MS. SHURLING: Thank you, Your Honor. Your Honor, I
5 have Jim Truitt from the clerk of court's office here. And
6 I promised to get him up and out first. So ---

7 THE COURT: All right.

8 MS. SHURLING: --- Mr. Truitt?

9 (Whereupon, the witness came forward.)

10 JIM TRUITT, having been first duly sworn,
11 testified as follows:

12 MS. SHURLING: And, Your Honor, before we proceed, not
13 to accuse respondent of nitpicking, but this is just a
14 little bit of housekeeping, anticipating arguments that may
15 have been made by the state.

16 DIRECT EXAMINATION

17 BY MS. SHURLING:

18 Q Mr. Truitt, what's your position with the clerk of
19 court's office?

20 A Courtroom administrator.

21 Q And as such, are you familiar with the general
22 policies and procedures of the clerk of court's office with
23 regard to retention of court documents?

24 A Yes.

25 Q Okay. And following a jury trial in Richland County,

1 how long does the clerk of court's office maintain records
2 concerning the jury pool and the jury selected in a case?

3 A We destroy them after three years.

4 Q Okay. After three years they're destroyed?

5 A Yes.

6 Q Now, as a follow-up to that, I also had inquired as to
7 who handles paying jurors, whether it is -- are jurors paid
8 through the comptroller general or are they actually paid
9 through the auspices of the clerk of court's office?

10 A Clerk's office.

11 Q The clerk's office?

12 A (Nodded head up and down.)

13 Q So any record of where Chandra L. Davis would've had a
14 jury-service check mailed to her, how long would that
15 record have been available?

16 A Ten.

17 Q Ten years?

18 A (Nodded head up and down.)

19 Q So ten years after the trial of this case, any record
20 concerning any financial distribution to her for jury
21 service would've likewise been destroyed?

22 A Yes, ma'am.

23 Q So the juror-service-questionnaire sheets that
24 would've reflected how old she was and where she was
25 employed and addresses and so forth would've been destroyed

1 after three years?

2 A Correct.

3 Q And ten years later -- ten years after the trial, any
4 record of where her jury-service check was mailed and the
5 amount of that check and so forth would've likewise been
6 destroyed?

7 A Correct.

8 Q Thank you. No further questions.

9 MR. MITCHELL: No questions for this witness.

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

11 (Whereupon, the witness exited the witness stand.)

12 THE COURT: May the witness be excused?

13 MS. SHURLING: Certainly.

14 MR. MITCHELL: No objection.

15 THE WITNESS: Thank you. Thank you.

16 MS. SHURLING: Your Honor, I would note ---

17 THE COURT: Or he may stay.

18 THE WITNESS: I'll be back, Judge.

19 MS. SHURLING: I would note for the record that back
20 when I was originally hired in this matter, I checked with
21 the clerk of court's office concerning the availability of
22 the juror -- juror-pool surveys and any information I could
23 get my hands on concerning the jury pool and the jury
24 ultimately selected in this case. At that time I was told,
25 sadly, by Anne Kelly -- God rest her soul -- the same

DIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 33

1 information that has now been put on the record by Jim
2 Truitt. And that -- that's why I had to use Jim, as Ms.
3 Kelly is no longer with us.

4 I also made an attempt to get any records I could
5 concerning juror-survey sheets from any other source that I
6 would as able to even think about checking, and no one had
7 it anymore after such a -- a long passage of time.

8 Your Honor, at this time, I would call Coach Willie
9 Lee Davis.

10 (Whereupon, the witness came forward.)

11 MS. SHURLING: Your Honor, I note his wife has left
12 the courtroom. Did you prefer to wait until she returns?

13 THE COURT: Who?

14 MS. SHURLING: His -- Coach Davis's wife is also a
15 witness, and she is with him.

16 THE COURT: I -- I don't -- I don't have a preference.

17 (Off the record briefly.)

18 WILBERT LEROY DAVIS, having been first duly
19 sworn, testified as follows:

20 THE BAILIFF: Watch your step, please.

21 DIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q Could you state your full name for the record, please?

24 A Wilbert Leroy Davis.

25 Q And I called you "Coach Davis." You were and still

DIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 34

1 are, in fact, a football coach, right?

2 A With the recreation, not the high school now.

3 Q Okay. Were you, for some period of time, the football
4 coach at Lower Richland High School?

5 A I was one of the coaches -- assistant coach.

6 Q Okay. Do you remember approximately the time period
7 that you were at Lower Richland?

8 A '95 to about 2 -- about 2000.

9 Q Okay. And I understand you and your brother were both
10 pretty legendary football players at Lower Richland
11 yourself, right?

12 A We did pretty well.

13 Q Thank you. Coach, do you -- do you mind my calling

14 ---

15 A I ---

16 Q --- you that?

17 A I don't mind at all.

18 Q Thank you. Your wife, Michelle Davis, was the
19 daughter of the victim in the murder case we're talking
20 about here today, correct?

21 A Correct.

22 Q And were you and Michelle married at that time?

23 A Yes, we are.

24 Q And that would've been '98. About how long had y'all
25 been married -- what year did you get married is a better

DIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 35

1 way to put that.

2 A '92.

3 Q '92?

4 A (Nodded head up and down.)

5 Q Okay. So you'd been married about six years
6 approximately?

7 A (Nodded head up and down.)

8 Q Okay.

9 A Yeah.

10 Q And how long did you -- as the kids would say, how
11 long you been talking before that -- how long did you see
12 each other before you were married?

13 A It was -- I think I was in tenth grade ---

14 Q Tenth ---

15 A --- in high ---

16 Q --- grade?

17 A --- school. Yes.

18 Q So how many years would that be about?

19 A Now, you're trying to get me in trouble. Nah. It's
20 on -- it's been a long time.

21 Q A long -- so for many, many years before she was
22 formally your wife, y'all went together?

23 A Yes, ma'am.

24 Q Okay. And as such did you attend functions with each
25 other -- with each other's families during ---

DIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 36

1 A Yes.

2 Q --- your courtship and after you're married?

3 A Yes.

4 Q Okay. Coach, do you have a niece named Chandra L.
5 Davis?

6 A No, ma'am.

7 Q Do you have any nieces?

8 A Yes, I do.

9 Q How many do you have?

10 A I have two.

11 Q And how -- how old is the eldest of your nieces?

12 A The oldest is in ninth grade, so that would make her
13 14 or 15.

14 Q Okay. But you've got a family member named Chandra
15 Davis, don't you?

16 A No, ma'am.

17 Q You're not aware of any family member -- second
18 cousin, third cousin, any familiar -- familiar -- my mouth
19 isn't working; I apologize -- anyone familially related to
20 you named Chandra L. Davis?

21 A No.

22 MR. MITCHELL: Objection to leading.

23 THE COURT: Overruled. Go ahead.

24 Q Is there any other who was raised as a part of your
25 family who is not legally or related to you or related to

DIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 37

1 you by blood?

2 A No, ma'am.

3 Q Were your parents foster parents at any point in time?

4 A No, ma'am.

5 Q Was there anyone who was ever taken into either your
6 household or your parents' household, your grandparents'
7 household, that was taken in as part of the family, whether
8 they were lawfully adopted or -- or not?

9 A No, ma'am.

10 Q So you have absolutely no kin people named Chandra L.
11 Davis?

12 A No, ma'am.

13 Q How about Chandra Davis without regard to the middle
14 initial?

15 A No, ma'am.

16 Q Do you, as a coach from that time period, recall a
17 student at Lower Richland named Chandra Davis?

18 A I -- it's -- it's been a lot of students. And they
19 all -- I -- I -- I remember Richard Seymour, who I coached.
20 I -- that's one of the guys that I remember as ---

21 Q Okay. Well, you anticipated my next line of
22 questioning. I know how big L.R. is now. Back in the
23 years when you were a coach, how large a school was Lower
24 Richland?

25 A I -- I -- I believe the population was bigger than it

DIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 38

1 is now.

2 Q Okay.

3 A Because we were considered a AAAA school.

4 Q And I'm not going to hold you to this. But can you
5 give us an approximate estimate as to how many students
6 were there when you were coaching?

7 A I could not tell you. It -- I know it was a lot. And
8 I know at Hopkins Middle it was somewhere in the
9 neighborhood of 12,000 -- well, 1,200. So -- so I'm sure
10 Lower Richland had to be more than that.

11 Q Okay. So you're not -- you're not here to even
12 attempt to say you knew all the students, right?

13 A No. No.

14 Q Coach, did anybody ever make you aware at any point in
15 time that there was a student that was claiming to be
16 related to you?

17 A No, ma'am.

18 Q Your brother that was also a well-known football
19 player, do you share mother and father?

20 A Yes.

21 Q So he wouldn't have any relatives that you don't have?

22 A No, ma'am.

23 Q Not bloodline-wise anyway?

24 A No, ma'am.

25 Q Okay. Thank you. No further questions.

CROSS-EXAMINATION BY MR. MITCHELL - WILBERT LEROY DAVIS 39

1 CROSS-EXAMINATION

2 BY MR. MITCHELL:

3 Q All right. Good morning, Mr. Davis.

4 A Good morning, sir.

5 Q What do you go by -- the name?

6 A I am -- to friends it's Lee. And to -- but the
7 general public, it's Wilbert.

8 Q Okay. Do you go by Willie Lee?

9 A No, I don't.

10 Q Okay. Have you ever gone by Willie Lee?

11 A No, ma'am -- no, sir.

12 Q All right. So you're married to Michelle Davis; is

13 ---

14 A Yes, sir.

15 Q --- that correct?

16 A Yes, sir.

17 Q And Mr. Garner is convicted of murdering your wife's
18 father, correct?

19 A Yes, sir.

20 Q Okay. And the allegation here today is that a juror
21 in that case is related -- was -- is related to you. Do
22 you understand that?

23 A Yes, sir.

24 Q You don't have any nieces?

25 A I have two.

REDIRECT EXAMINATION BY MS. SHURLING - WILBERT LEROY DAVIS 40

1 Q I mean, you don't have a niece named Chandra? Excuse
2 me.

3 A No, I don't. I don't.

4 Q Okay. And the oldest niece is ---

5 A I think she -- she -- she's either 14 or 15.

6 Q Okay. So you're not related to any Chandra Davis?

7 A No, sir.

8 Q Is that correct?

9 A Yeah, I'm not.

10 Q And you're not related to anyone that was on that
11 jury?

12 A As far as I know, I'm not.

13 Q That's what I meant. But you have no knowledge that
14 you were related to anyone on that jury, correct?

15 A No.

16 Q No further questions. Thank you again.

17 A Okay.

18 MS. SHURLING: Very briefly.

19 REDIRECT EXAMINATION

20 BY MS. SHURLING:

21 Q Coach Davis, you were at the jury trial for your
22 wife's father's homicide?

23 A I'm recalling -- I'm -- I'm trying to recall. I'm --
24 I'd like to think I would've been.

25 Q Okay. Do you recall that your wife was a witness at

DIRECT EXAMINATION BY MS. SHURLING - MICHELLE DAVIS 41

1 that trial?

2 A Vaguely. Vaguely remember.

3 Q Okay. No further questions.

4 THE COURT: All right. Thank you, sir. You may step
5 down.

6 THE WITNESS: Thank you.

7 THE COURT: You may call your next witness.

8 (Whereupon, the witness exited the witness stand.)

9 MS. SHURLING: Your Honor, for the purpose of
10 establishing a record, I'd better call Michelle Davis as
11 well, please.

12 (Off the record briefly.)

13 MS. SHURLING: And, Your Honor, I would ask that he be
14 excused. But his misses is here, so I know he can't go
15 anywhere.

16 THE COURT: Okay.

17 (Whereupon, the witness came forward.)

18 MICHELLE DAVIS, having been first duly sworn,
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MS. SHURLING:

22 Q Ms. Davis, was that your husband that just testified?

23 A Yes, it was.

24 Q And -- and you concur with his recollection that y'all
25 have been together since about tenth grade?

1 A Yes. For 30 years.

2 Q And you were married approximately six years at the
3 time of your father's -- the trial involving ---

4 A Close to ---

5 Q --- in your father's ---

6 A --- six years.

7 Q --- killer?

8 A A couple of months -- couple months short of six
9 years.

10 Q Okay. I'm going to try not to talk over you, and if
11 you can let me get my questions out before you start to
12 answer them. Not because I mind you interrupting me, but
13 that nice lady by my -- beside you has got to write
14 everything we say down. And it makes it hard for her when
15 we talk over each other. So -- and I'll make it quick.

16 In all the years that you have been seeing Coach Davis
17 and -- and the years that you've been married, are you
18 aware of any relative of his by the name Chandra Davis?

19 A No.

20 Q Are you aware of anyone who considered themselves to
21 be like family that was named Chandra Davis?

22 A No.

23 Q Were you ever aware of anyone in your community or
24 even outside your community named Chandra Davis that
25 claimed to be kin to or like family with you and your

CROSS-EXAMINATION BY MR. MITCHELL - MICHELLE DAVIS 43

1 husband?

2 A No.

3 Q Were you a witness at the trial involving your
4 father's death?

5 A Yes, I was.

6 Q And as a witness, do you recall looking at the jury in
7 the courtroom?

8 A I'm sure I did. I don't recall seeing everybody, but
9 I'm sure I did.

10 Q Okay. Do you recall recognizing anyone on that jury
11 as being anyone with a family relationship, familial tie
12 whatsoever, to your husband?

13 A I did not.

14 Q No further questions.

15 CROSS-EXAMINATION

16 BY MR. MITCHELL:

17 Q And very briefly, Ms. Davis, do you know a Chandra
18 Davis?

19 A I do not.

20 Q To your knowledge, you or your husband is not related
21 to a Chandra Davis; is that correct?

22 A That is correct.

23 Q Thank you. No further questions.

24 THE COURT: Thank you, ma'am. You may step down.

25 (Whereupon, the witness exited the witness stand.)

DIRECT EXAMINATION BY MS. SHURLING - JERMAINE NIXON 44

1 THE COURT: You may call your next witness.

2 MS. SHURLING: Your Honor, I would call Jermaine
3 Nixon.

4 THE COURT: All right.

5 (Off the record briefly.)

6 (Whereupon, the witness came forward.)

7 JERMAINE NIXON, having been first duly sworn,
8 testified as follows:

9 (Whereupon, Mr. Mitchell and Ms. Shurling conferred.)

10 DIRECT EXAMINATION

11 BY MS. SHURLING:

12 Q Mr. Nixon, thank ---

13 A Yeah.

14 Q --- you.

15 Did you attend Lower Richland High School?

16 A Yes, ma'am.

17 Q And what years would you have been there?

18 A From '92 to '96.

19 Q '92 to '96?

20 A Uh-huh.

21 Q And while you were at Lower Richland High School, did
22 you ever know someone by the name of Chandra Davis?

23 A Yes.

24 Q And was she a close friend or someone you could call
25 an acquaintance?

DIRECT EXAMINATION BY MS. SHURLING - JERMAINE NIXON 45

1 A Just somebody I just knew around school.

2 Q Okay. Now, I had previously spoken with you by
3 telephone concerning your testimony here today, correct?

4 A Uh-huh. Yes.

5 Q Did I ask you to say anything in particular on the
6 stand today?

7 A Oh, no. I don't ---

8 Q Other than to tell the truth?

9 A Yeah, to tell the truth.

10 Q Okay. Other than to tell the truth?

11 A (Nodded head up and down.)

12 Q All right. Now -- and previously, back quite some
13 time ago now, you provided my office with an affidavit?

14 A Yes.

15 Q Is that correct?

16 A Yes.

17 Q Concerning your knowledge of Chandra Davis and her
18 claim to be related to Coach Davis?

19 A Yes.

20 Q Okay. Tell us what you know about that. It -- did
21 you ever personally hear Chandra Davis refer to herself as
22 being the coach's niece or being related to the coach?

23 A Not from her. It just was around school that she's
24 related to him, Coach Davis, like people saying -- or
25 saying she was related to him. Like, I didn't never hear

1 it from her personally, but she was -- everybody around
2 school was, like, she related to him or ---

3 Q Okay. So when you were in school at Lower Richland,
4 Chandra Davis was there at the same time you were?

5 A She -- yes.

6 Q Part of the time, anyway?

7 A Part of the time, not ---

8 Q Okay. And during that time period, you recall it
9 being generally discussed ---

10 A Yes.

11 Q --- among the students that ---

12 A Yes.

13 Q --- she was related to the coach?

14 A Yes.

15 Q And did anyone say how she was related to the coach?

16 A I don't -- probably just a family member, as far ---

17 Q Okay.

18 A --- as I know.

19 Q Are you a very close friend of Trey Garner?

20 A Not -- no.

21 Q Okay. Well, let's get at this way: Have you been to
22 SCDC to visit him in the last 16 years?

23 A No, ma'am.

24 Q Have you exchanged letters with him over the last 16
25 years?

DIRECT EXAMINATION BY MS. SHURLING - JERMAINE NIXON

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1 A No, ma'am.

2 Q You take his collect phone calls?

3 A No, ma'am.

4 Q Okay. Do you have any reason why you would come to
5 court and lie for him?

6 A None.

7 Q Has anybody paid you to present testimony in this
8 case?

9 A Nope.

10 Q Now, I sent you a -- a -- a check, I believe ---

11 A Uh-huh.

12 Q --- for mileage to and from the courthouse, correct?

13 A Yes.

14 Q Other than that, has anybody paid you anything?

15 A Nope.

16 Q Okay. When you executed this affidavit ---

17 MS. SHURLING: --- which was attached, Your Honor, to
18 the -- the original motion filed and the motion and copies
19 of the affidavit were attached to the amended application
20 that was filed as well.

21 Q Who -- who requested that you do an affidavit?

22 A Danita Sumter.

23 Q Danita ---

24 A Yeah. Sumter.

25 Q Okay. And did she ask you to lie for Trey?

1 A No.

2 Q Did she tell you what she wanted you to say?

3 A No.

4 Q Did she simply ask you if you knew Chandra Davis?

5 A Yes.

6 Q Did she ask you if you knew anything about Chandra
7 Davis being related to the coach?

8 A Yes.

9 Q And that's why you agreed to do an affidavit?

10 A Yes.

11 Q Okay. And again, I know I'm being redundant. But you
12 weren't ---

13 A Yes, ma'am.

14 Q --- paid to come here and testify?

15 A No, ma'am.

16 Q Were you paid to do an affidavit?

17 A No, ma'am.

18 Q Thank you. No further questions.

19 THE COURT: Cross-examination?

20 CROSS-EXAMINATION

21 BY MR. MITCHELL:

22 Q All right, Mr. Nixon.

23 A Hey.

24 Q How's it going today?

25 A Pretty good.

1 Q All right. So you have no personal knowledge that
2 this Chandra Davis was related to Mr. Davis; is that
3 correct?

4 A Other than just here -- around school, just ---

5 Q You just heard around school that that was his niece?

6 A Well, family member.

7 Q Or some kind of family member?

8 A Some kind of relation. Yeah.

9 Q Okay. But you never -- did you ever -- did you know
10 that because of their interactions?

11 A Yeah. It was -- interaction with those students.

12 Q Okay. Do you know Mr. Trey Garner?

13 A Yes.

14 Q Did you know him before he was convicted of murder?

15 A Yes.

16 Q What was your relationship with him before he was
17 convicted?

18 A Just a friend.

19 Q Did you ---

20 A I got ---

21 Q --- go to high school together?

22 A Yes.

23 Q Was he there the same years you were there?

24 A Far as -- yes.

25 Q Was he older or younger -- or same age?

1 A About the same age, I guess.

2 Q Okay. So you knew Mr. Garner before in high school?

3 A Yes.

4 Q Okay. Who did you say requested that you write an
5 affidavit?

6 A Danita Sumter.

7 Q Who's that? I'm sorry.

8 A Danita Sumter. Danita.

9 Q Anita Sumter?

10 A Danita.

11 Q Oh. Danita?

12 A (Nodded head up and down.)

13 Q Okay. And who was that?

14 A Actually, she's in the courtroom.

15 Q Okay. Well, I think we'll find out soon enough.

16 A Uh-huh.

17 Q What is her relationship to Mr. Garner?

18 A Far as I know, they -- friends, I guess. I don't
19 know.

20 Q You think they're friends?

21 A I don't know. I ---

22 Q So she reached out to you to see if you would remember
23 this Chandra Davis; is that correct?

24 A Yes.

25 Q So is it fair to say that she is closer to Mr. Garner

REDIRECT EXAMINATION BY MS. SHURLING - JERMAINE NIXON 51

1 than you are?

2 A I would say so.

3 Q Okay. Does she -- do you know if she stays in
4 constant contact with Mr. Garner?

5 A I -- I don't know.

6 Q Do you know if she goes down and visits Mr. Garner?

7 A I couldn't tell you. I don't know. I . . .

8 Q No further questions. Thank you.

9 THE COURT: Any redirect?

10 MS. SHURLING: Briefly.

11 REDIRECT EXAMINATION

12 BY MS. SHURLING:

13 Q When you say that Chandra -- pardon me -- that Trey
14 Garner was at L.R. at the same time you were, he wasn't
15 there the whole time you were there, was he?

16 A I don't know. I think maybe.

17 Q Pardon?

18 A I can't remember.

19 Q Okay.

20 A I just know he was there with me. I don't know if he
21 was there the whole time or -- you know.

22 Q Can you identify this, please? Is that your
23 affidavit?

24 A Yes, ma'am.

25 Q Thank you.

REDIRECT EXAMINATION BY MS. SHURLING - JERMAINE NIXON 52

1 MS. SHURLING: Your Honor, copies of these affidavits
2 were attached with the pleadings that were filed in this
3 matter. I have maintained the originals in my file and
4 would ask that I be allowed to introduce the original at
5 this time.

6 MR. MITCHELL: Your Honor, I don't think his affidavit
7 was attached, at least to the copies that I have here.
8 Jermaine Nixon ---

9 THE COURT: I didn't see it in the file.

10 MR. MITCHELL: It's not a part of my file.

11 MS. SHURLING: Let me check the clocked original that
12 I have, Your Honor. Because it was certainly filed with
13 it.

14 MR. MITCHELL: I don't have it on the amended or in
15 the initial 29 -- or in the consent order.

16 MS. SHURLING: Okay. I -- it -- it appears that it
17 was not. Let me ---

18 Q You've already testified that you gave an affidavit?

19 A (Nodded head up and down.)

20 Q And would that have been back -- the number -- 2011 or
21 so?

22 A Yeah. Something like that.

23 Q Okay. And was the subject matter of that affidavit
24 essentially the same as your testimony here today under
25 oath?

DIRECT EXAMINATION BY MS. SHURLING - TYSHAWN WESTON 53

1 A Yes.

2 Q Thank you. No further questions.

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

4 (Whereupon, the witness exited the witness stand.)

5 MS. SHURLING: Your Honor, I would call Tyshawn
6 Weston.

7 (Whereupon, Ms. Shurling and Mr. Mitchell conferred.)

8 (Whereupon, the witness came forward.)

9 TYSHAWN WESTON, having been first duly sworn,
10 testified as follows:

11 (Whereupon, Ms. Shurling and Mr. Mitchell conferred.)

12 DIRECT EXAMINATION

13 BY MS. SHURLING:

14 Q Mr. Weston, would you state your full name for the
15 record?

16 A Tyshawn Lamont Weston.

17 Q And would you please spell your first name for your --
18 the court reporter and then your last name, slowly, please.

19 A T-y-s-h-a-w-n, W-e-s-t-o-n.

20 Q Thank you. Did you go to school with someone named
21 Chandra L. Davis?

22 A Yes.

23 Q Can you tell us, basically, what part of your public-
24 school education you would've been in school with Chandra
25 Davis?

1 A '92 to '95.

2 Q Okay. Did you also attend middle school with her as

3 ---

4 A Yes.

5 Q --- well?

6 A Yes.

7 Q Okay. Would you consider her someone who was a close
8 friend or an associate? What -- how close ---

9 A Someone ---

10 Q --- were you ---

11 A --- in high school. Just I see her all the time.
12 That's all.

13 Q Okay. You didn't date her or ---

14 A No.

15 Q --- anything?

16 A No, ma'am.

17 Q Okay. Did you ever personally heard -- hear her refer
18 to Coach Davis as her relative?

19 A Yeah. I heard her one time. I heard her say it one
20 time.

21 Q Okay. And when she referred to him as a relative, did
22 she specify what the kinship was?

23 MR. MITCHELL: Objection: calls for hearsay.

24 THE COURT: Sustained.

25 Q Based on your conversations with her, did you have an

DIRECT EXAMINATION BY MS. SHURLING - TYSHAWN WESTON 55

1 opinion as to what their relationship was?

2 A I just heard her say uncle.

3 MR. MITCHELL: Objection ---

4 A That's what ---

5 MR. MITCHELL: --- to hearsay.

6 THE COURT: Sustained.

7 Q Are you close friends with Trey Garner?

8 A No, ma'am.

9 Q Have you visited him at SCDC in the 16 years or so
10 he's been incarcerated?

11 A No, ma'am.

12 Q Have you exchanged letters with him since he's been
13 incarcerated?

14 A No, ma'am.

15 Q Do you take his collect phone calls?

16 A No, ma'am.

17 Q Did anyone pay you to execute an affidavit in this
18 case?

19 A No, ma'am.

20 Q And has anyone paid you anything other than mileage to
21 be in court here today and present testimony?

22 A No, ma'am.

23 Q Okay. I'd like to ask you to identify this, please.
24 Is that your affidavit?

25 A Yes, ma'am.

1 MS. SHURLING: Your Honor, this one was attached to
2 the PCR application that was filed -- well, actually,
3 originally, it was -- a copy was attached to the Rule 29(b)
4 motion, and then it was attached with the 29(b) and the
5 consent order to the amended PCR application. So at this
6 time I'd like to put the original in the record, as much as
7 anything to get the original out of my file, Your Honor, if
8 the state has no problem.

9 MR. MITCHELL: And, Your Honor, I'd -- it's just our
10 position that he's here. I mean, he's testifying. I don't
11 -- the affidavit -- he doesn't need to have the affidavit
12 introduced. I mean, he's here, available for cross-
13 examination. His testimony on -- in person is better
14 suited than the affidavit.

15 THE COURT: That sounds like an objection that I will
16 sustain.

17 MS. SHURLING: Thank you, Your Honor. I -- I will
18 rephrase.

19 Q Mr. Weston, could I ask you to read quickly your short
20 affidavit.

21 A (As read): "I am Tyshawn" ---

22 Q No. Not -- pardon me -- not out loud.

23 A Oh.

24 Q Just read it to yourself.

25 A (Complied.)

DIRECT EXAMINATION BY MS. SHURLING - TYSHAWN WESTON 57

1 Q Thank you. And having read your affidavit, which was
2 admittedly executed several years ago, correct?

3 A True.

4 Q Does that refresh your recollection concerning your
5 knowledge of one Chandra L. Davis?

6 A Yes.

7 Q And having refreshed your recollection, what is your
8 testimony concerning how often you were privy to
9 conversations in which Chandra Davis talked about being
10 related to the coach?

11 A Well, I didn't have conversation with her. But, you
12 know, I heard her just -- as well as Jermaine said ---

13 MR. MITCHELL: Objection ---

14 A --- of ---

15 MR. MITCHELL: --- to hearsay.

16 THE COURT: Sustained.

17 Q Were you present in -- in the context of situations
18 that led you to believe they were related on more than one
19 occasion?

20 A Yes, ma'am.

21 MS. SHURLING: Thank you, Your Honor. No further
22 questions.

23 THE COURT: Any cross-examination?

24 MR. MITCHELL: Yes.

25

1 CROSS-EXAMINATION

2 BY MR. MITCHELL:

3 Q All right. Good morning, Mr. Weston.

4 A Good morning.

5 Q Who asked you to write this affidavit?

6 A No one.

7 Q Well -- okay. How did you come to ---

8 A Oh.

9 Q --- submit this affidavit, then?

10 A It was -- it was a while ago that I wrote it, so ---

11 Q Did -- did someone ask you whether you recalled Ms.
12 Davis?

13 A No.

14 Q So -- well, how did Ms. Shurling get this affidavit?

15 A I don't know.

16 Q Well, you wrote this -- who'd you -- you just wrote an
17 affidavit ---

18 A Yeah. I ---

19 Q --- about this?

20 A --- wrote it. But I -- it's been a while, so I don't
21 ---

22 Q Okay. You -- you don't remember who asked ---

23 A I don't ---

24 Q --- you to ---

25 A --- remember.

1 Q --- write it?

2 A No.

3 Q Was it Ms. Shurling who asked you to write it?

4 A I don't -- I don't remember.

5 Q Was it Ms. Sumter?

6 A I can't remember.

7 Q Do you know Ms. Sumter?

8 A Yes.

9 Q Is she present in the courtroom today?

10 A Yes.

11 Q What's your relationship to her?

12 A That's my cousin.

13 Q Ms. Sumter is your cousin?

14 A Yeah.

15 Q So do you think she asked you to write this affidavit?

16 A I don't know. No. I ---

17 Q What's ---

18 A --- don't think ---

19 Q --- her relationship to Mr. Garner?

20 A They don't have a relationship.

21 Q They don't have any relationship at all?

22 A (Shook head from side to side.)

23 Q So she asked you to write a affidavit about a Ms.

24 Davis in support of a court filing for Mr. Garner and they

25 don't have a relationship?

1 A I mean, no. Not that I know of.

2 Q Okay.

3 A I don't know.

4 Q So she may have a relationship with him, and you just
5 don't know about that?

6 A (Shook head from side to side.)

7 Q Would you conclude that they have a relationship if
8 she asked you to write an affidavit for her ---

9 A Nope.

10 Q --- in support?

11 A (Shook head from side to side.)

12 Q So she ---

13 THE COURT REPORTER: Sir, I need you to answer out
14 loud. I'm sorry.

15 A No, sir.

16 Q So she asked you to write an affidavit, but you don't
17 think they have a relationship, Mr. Garner and Ms. Sumter?

18 A Yes.

19 Q Okay. So you went to high school with Mr. Garner?

20 A Yes.

21 Q And Mr. William Davis was a football coach?

22 A Yes, sir.

23 Q Did you play football?

24 A No, sir.

25 Q Did Mr. Garner play football?

DIRECT EXAMINATION BY MS. SHURLING - TREY GARNER

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1 A No, sir.

2 Q Okay. Were you close with Mr. Davis when you were in
3 school?

4 A No.

5 Q You weren't friends with him -- weren't good friends
6 with him?

7 A No, sir.

8 Q Okay. Did you go to middle school with Mr. Garner?

9 A Yes, sir.

10 Q So you would've gone just through school and would've
11 known him just through that?

12 A Just, you know, see him in school. That's it.

13 Q No further questions. Thank you.

14 MS. SHURLING: Nothing further. Thank you.

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

16 (Whereupon, the witness exited the witness stand.)

17 THE COURT: Call your next witness.

18 MS. SHURLING: Mr. Trey Garner, please.

19 THE COURT: All right.

20 (Whereupon, the witness came forward.)

21 TREY GARNER, having been first duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION

24 BY MS. SHURLING:

25 Q Mr. Garner, can you state your full name for the

1 record and your SCDC number, please?

2 A Yeah. It's Trey Levar Garner, 248321.

3 Q Thank you. And you were tried for murder in
4 connection with the death of Michelle Davis's father back,
5 to be specific, March of 1998, correct?

6 A Yes.

7 Q So how many years have you been locked up?

8 A Eighteen.

9 Q Okay. And how old were you when you were first
10 arrested on this charge?

11 A Nineteen.

12 Q Did you have any prior criminal record?

13 A No.

14 Q Over the years have you maintained contact with some
15 of the folks you went to school with?

16 A Off and on.

17 Q Well, do you occasionally make phone calls to former
18 classmates?

19 A One.

20 Q One former classmate?

21 A Yes.

22 Q Okay. And who would that be?

23 A Danita Sumter.

24 Q And do you have a close, personal relationship with
25 Ms. Sumter?

1 A Yes.

2 Q And since the time of your conviction and
3 incarceration, there have been occasions when -- or have
4 there been occasions when you've called other people you
5 went to school with?

6 A Yeah.

7 Q Okay. And sometimes they take your collect calls, and
8 sometimes they don't, right?

9 A Yes.

10 Q Okay. In the course of one of those conversations --
11 and you and I have talked about the hearsay rule. You know
12 that we can't talk about exactly what somebody said,
13 correct?

14 A Yes.

15 Q Okay. But in the course of one of those conversations
16 with a classmate, were you able to also speak with her
17 brother?

18 A Yes.

19 Q And who was her brother?

20 A Ricky Anderson.

21 Q Can you tell me, in relationship to when I was hired
22 in 2010, was it years before that you talked with Ricky
23 Anderson? Was it fairly close in time to when I was hired?

24 A It was close.

25 Q Okay. And as a result of that conversation, did you

1 become aware of rumors in the Hopkins area that one of your
2 jurors had been related to the decedent?

3 A Yes.

4 Q As a result of that information, did you ask Ms.
5 Sumter to see what she could find out about it?

6 A Yes.

7 Q And when she was unable to obtain any court documents
8 or anything to verify the rumor, did you participate with
9 her in making the decision to hire me?

10 A Yes.

11 Q At some point in time, did you become aware, through
12 my representation, that there were no court documents
13 available to be found concerning this Chandra L. Davis?

14 A Yes.

15 Q Other than the fact that there is a jury sheet on
16 record that verifies that Chandra L. Davis served as a
17 juror on the jury?

18 A Yes.

19 Q Okay. You're incarcerated, right?

20 A Yes.

21 Q So basically, you delegated dealing with investigating
22 this rumor to your close friend, Danita Sumter?

23 A Yes.

24 Q Okay. When did you go to L.R.?

25 A I started in '92.

1 Q '92?

2 A Yes, 1992.

3 Q And how long did you go there?

4 A I stayed -- I stayed -- I did -- I did -- started in
5 19 -- 1992 to 1993. Then I left. And I came back in 1995.

6 Q You came back in '95?

7 A Yes.

8 Q And when you came back in '95, how long were you a
9 student at Lower Richland?

10 A A month.

11 Q A month?

12 A Yes.

13 Q And was that the month immediately before you dropped
14 out of high school?

15 A Yes.

16 Q So in that month that you attended Lower Richland in
17 '95, would you say you attended classes regularly?

18 A No.

19 Q You've heard testimony about how big L.R. was. Did
20 you know everybody you went to high school with?

21 A No, I did not.

22 Q Did you know Chandra L. Davis?

23 A No, I did not.

24 Q At the time of your jury trial, did you recognize
25 anybody on your jury as having been a classmate of yours of

1 L.R.?

2 A No.

3 Q If you had, would you have brought that to the
4 attention of your trial attorney?

5 A Yes.

6 Q And if you had been aware, at least of the allegation,
7 that there was a juror that was related to your coach,
8 would you have brought that to the attention of your
9 defense attorney at the time of your trial?

10 A Yes, I would.

11 Q Would you have wanted anybody to serve on your jury
12 that was related even my marriage to the decedent?

13 A No.

14 Q And I was hired, was I not, to pursue the possibility
15 of requesting a new trial in some context based on a -- a
16 previously undisclosed familial relationship between juror
17 Chandra L. Davis and Coach Davis and his wife?

18 A Yes.

19 Q No further questions.

20 THE COURT: Any cross-examination?

21 CROSS-EXAMINATION

22 BY MR. MITCHELL:

23 Q All right. Good morning, Mr. Garner.

24 A Good morning.

25 Q Let's see. You were 19 at the time of the incident?

1 A I was 19 when I got incarcerated.

2 Q Okay. Nineteen when you were first arrested for this?

3 A Yes.

4 Q Okay. So you would've been out of high school by
5 then?

6 A I was going to adult ed.

7 Q A what?

8 A Adult ed, adult education.

9 Q Oh, I got you. I got you.

10 A Yeah.

11 Q Your case was prosecuted by Mr. Knox McMahon; is that
12 correct?

13 A Yes.

14 Q Okay. So you have a relationship with Ms. Sumter; is
15 that correct?

16 A Yes.

17 Q Are you related to her?

18 A No.

19 Q Were y'all -- did you date before you went into
20 prison?

21 A No.

22 Q You're just friends now?

23 A Yes.

24 Q She keeps in contact with you at the prison?

25 A Yes.

1 Q You write letters to her?

2 A Yes.

3 Q So y'all just communicate as friends; is that correct?

4 A Yes.

5 Q Okay. She wanted to help you in your case?

6 A Yes.

7 Q When did you first become aware that this Chandra
8 Davis that served on your jury may have been related to
9 Coach Davis?

10 A In 2010.

11 Q Do you know exactly when in 2010?

12 A No. I do not know the exact date.

13 Q How did you find that out? Did someone tell you that?

14 A Yes.

15 Q Who was it that told you that?

16 A Ricky Anderson.

17 Q Okay. And Ricky Anderson is Ms. Sumter's brother; is
18 that correct?

19 A No.

20 Q Who is -- who is Ricky Anderson's sister?

21 A Marlene Anderson.

22 Q Who is Mr. Anderson's brother?

23 A I don't -- I don't know if he has any brothers or not.

24 Q I'm sorry. You referred to someone as Ricky
25 Henderson's brother. Who was that?

1 A No, I haven't.

2 Q Okay. So you went to Lower Richland about the same
3 time as the other witnesses that testified?

4 A Yes.

5 Q Do you know them well?

6 A My -- I seen them around.

7 Q So you knew them going up through school?

8 A I'd say like the eighth grade ---

9 Q Okay.

10 A --- going from the eighth.

11 Q What middle school did you go to?

12 A I went to Forest Lake -- no. I went to Dent Middle
13 School; then Hopkins -- I mean, then Hopkins Middle School.

14 Q Okay. I went to Dent Middle School as well.

15 Let's see. So how about Mr. Nixon? Did you go to
16 middle school with him?

17 A Yes.

18 Q Did you go to middle school with Ms. Sumter?

19 A No.

20 Q Okay. Did she go to L.R.?

21 A Yes.

22 Q Okay. Do you -- do you have contact with Mr. Nixon
23 now?

24 A No.

25 Q How about Mr. Weston?

1 A No.

2 Q So this is the first time you've seen or heard from
3 them since you've been incarcerated; is that correct?

4 A Yes.

5 Q Okay. No further questions. Thank you.

6 REDIRECT EXAMINATION

7 BY MS. SHURLING:

8 Q Just to be super careful about the truth here, after
9 both of the witnesses here today gave affidavits, I did
10 supply you copies of their affidavits, did I not?

11 A Yes.

12 Q Now, when you say you didn't -- you -- you have not
13 heard from them since school, the exception to that would
14 be that I had supplied you copies of their affidavits?

15 A Yes.

16 Q Now, you went to school at Lower -- Lower Richland
17 with Danita Sumter, correct?

18 A Yes.

19 Q And I believe at the time of your trial, she wasn't
20 present; is that correct?

21 A Yes.

22 Q She was actually pregnant during your trial?

23 A I don't ---

24 Q Correct?

25 A Yes.

1 Q But that's not your child? I mean, she wasn't your --
2 her daughter is not your child?

3 A No, she's not.

4 Q Okay. Now, you do have a very close, personal
5 relationship now?

6 A Yes.

7 Q What you would characterize as romantic?

8 A Yes.

9 Q But it obviously has very distinct limitations since
10 you're locked up, right?

11 A Yes.

12 Q Okay. No further questions.

13 THE COURT: All right. Thank you, sir. You may step
14 down.

15 (Whereupon, the witness exited the witness stand.)

16 MS. SHURLING: Your Honor, as respondent ---

17 THE COURT: You may call ---

18 MS. SHURLING: --- anticipated, my last witness will
19 be Danita Sumter.

20 THE COURT: Okay.

21 (Whereupon, the witness came forward.)

22 MS. SHURLING: And then, of course, I have a matter
23 I'd need to put on the record with regard to Ricky
24 Anderson.

25 DANITA SUMTER, having been first duly sworn,

1 testified as follows:

2 (Off the record briefly.)

3 (Whereupon, Ms. Shurling and Mr. Mitchell conferred.)

4 DIRECT EXAMINATION

5 BY MS. SHURLING:

6 Q Danita, would you state your full name for the record?

7 A Danita Lashandra Sumter.

8 Q And, Ms. Sumter, are you involved in a relationship of
9 some sort with Trey Garner?

10 A Yes.

11 Q Are -- would you consider yourself to be close,
12 romantic friends?

13 A Yes.

14 Q Now, at the time of Mr. Garner's original trial, you
15 weren't going with him back then, were you?

16 A No.

17 Q And, in fact, you were expecting a child with someone
18 else?

19 A Yes.

20 Q How long have you been close friends with Mr. Garner?

21 A Since we were like 14/15.

22 Q Okay. And do you visit him regularly at the
23 Department of Corrections?

24 A Yes.

25 Q Exchange letters?

DIRECT EXAMINATION BY MS. SHURLING - DANITA SUMTER 73

1 A Yes.

2 Q And do you allow him to call you collect on occasion?

3 A Yes.

4 Q Okay. You, in fact, hired me ---

5 A Yes.

6 Q --- to be his lawyer?

7 A Yes.

8 Q And -- but as you understand it, I required that he
9 give written authorization for me to be his lawyer, since I
10 was being hired by a third party, right?

11 A Yes, ma'am.

12 Q Okay. Now, what prompted you to come and hire me?
13 Why'd you come see me?

14 A Trey contacted me back in, like, April 2010, saying
15 that he had heard something about a juror being related to
16 the victim's family.

17 MR. MITCHELL: Objection: hearsay.

18 THE COURT: Sustained.

19 MS. SHURLING: I'll rephrase.

20 Q Back in approximately April of 2010, did you become
21 aware of rumors in the community that someone who had
22 served on Mr. Garner's jury was related to the decedent?

23 MR. MITCHELL: Objection: calls for hearsay.

24 THE COURT: Sustained. .

25 Q Back in April of 2010, did you launch an effort to

1 determine whether any of the jurors were related to Trey --
2 pardon me -- to the decedent in Trey's trial?

3 A Yes, ma'am.

4 Q And did you actually hire a private investigator at
5 some point?

6 A Yes, ma'am.

7 Q You didn't use him very much, did you?

8 A No, ma'am.

9 Q Okay. At your request did -- did he attempt to get
10 records from the clerk of court's office?

11 A Yes, ma'am.

12 Q And at least told you he attempted to locate Chandra
13 Davis?

14 A Yes, ma'am.

15 Q Did he ever do a written report?

16 A No, ma'am.

17 Q Do you know how much you paid him?

18 A Like 375.

19 Q And do you remember his name?

20 A I can't remember. It was in 2010.

21 Q Okay. So but that was back when you first heard -- or
22 when you first became aware of this issue in 2010?

23 A Yes, ma'am.

24 Q Okay. Did I corroborate with -- when you hired me,
25 did I corroborate for you the fact that those records were

1 no longer available?

2 A Yes. After you looked into it.

3 Q Through my own ---

4 A Yes.

5 Q --- independent effort?

6 A Uh-huh.

7 Q At that point did I ask you to determine whether or
8 not there was anyone who knew Chandra L. Davis and was
9 aware of her alleged familial relationship to the Davis
10 family?

11 A Yes, ma'am.

12 Q Now, this is real important. What did I tell you, in
13 terms of finding people that could attest to that fact?

14 A You told me that you couldn't do anything about it to
15 move forward unless I had one or more people that heard or
16 knew Chandra L. Davis in relation to Coach Davis.

17 Q What parameters did I also give you for those people?

18 A That they had to tell the truth, write affidavit, and
19 be willing ---

20 Q Pardon?

21 A --- to come forward? To ---

22 Q That they ---

23 A --- tell the ---

24 Q --- what?

25 A --- truth, to write affidavit.

1 Q Right. And did I tell you that I did not want to use
2 people that were closely connected to Trey Garner?

3 A Yes, ma'am.

4 Q Did I tell you I didn't want to use relatives of Trey
5 Garner?

6 A Yes, ma'am.

7 Q Did I tell you that I preferred not to even use people
8 that were close friends of Trey Garner's?

9 A Yes, ma'am.

10 Q And why -- what ---

11 MS. SHURLING: I'm sorry, Your Honor. I'm trying to
12 avoid hearsay.

13 Q Did I instruct you to discuss with those individuals
14 that you talked with about this about perjury?

15 A Yes, ma'am.

16 Q And the significance of giving testimony, be it in
17 writing or in a courtroom, under oath if it was not
18 accurate?

19 A Yes, ma'am.

20 Q And after those discussions with me, did you set about
21 attempting to locate people that went to school with y'all
22 that could supply some documentation of the connection
23 between the juror and Trey's case?

24 A Yes, ma'am.

25 Q And you, in fact, provided me the affidavits that have

DIRECT EXAMINATION BY MS. SHURLING - DANITA SUMTER 77

1 been discussed here today, as well as several others from
2 other people?

3 A I think it ---

4 Q Correct?

5 A --- was a total of five.

6 Q Okay. Did you ever pay anybody to write an affidavit
7 or to come to court and testify?

8 A No, ma'am.

9 Q Did you ever tell anybody to lie to me and mislead me
10 concerning their knowledge?

11 A No, ma'am.

12 Q Are any of the people who gave affidavits that have
13 been attached to the pleadings in this case, are any of
14 those people, to your knowledge, close, personal friends of
15 Trey?

16 A No, ma'am.

17 Q Have you had conversations with any of those people
18 promising them anything, doing anything for them as a
19 favor, in exchange for their affidavits, anything like
20 that?

21 A No, ma'am.

22 Q You know the Davis family, don't you?

23 A Yes, ma'am.

24 Q And, in fact, you have referenced with me on occasion
25 having seen them out in the community?

1 A Yes, ma'am.

2 Q And I know that you asked that I make it clear that
3 you're very sympathetic to Michelle Davis's loss and -- and
4 didn't do this with the intent to cause anyone any pain,
5 correct?

6 A Yes, ma'am.

7 MS. SHURLING: I promised I would make that a point,
8 Your Honor. I just wanted to get that on the record.

9 Q Who -- what was your understanding, in terms of who
10 initially brought to Mr. Garner's attention the fact that
11 there was a potential problem with this juror?

12 A A young man by the name of Ricky Anderson.

13 Q And at the time you hired me, was Ricky Anderson
14 incarcerated?

15 A No.

16 Q And has he only fairly recently become incarcerated?

17 A Yes, ma'am.

18 Q To your knowledge, where is he incarcerated?

19 A I think it's Lee -- I mean, well, I'm -- somewhere
20 here that's federal. Edfield -- Edgefield?

21 Q Edgefield?

22 A (Nodded head up and down.)

23 Q Okay. And again, did you pay him anything?

24 A No.

25 Q Coerce him?

CROSS-EXAMINATION BY MR. MITCHELL - DANITA SUMTER

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1 A No.

2 Q Nothing?

3 A No.

4 Q And for at least the first few years after my Rule
5 29(e) motion ---

6 A Uh-huh.

7 Q --- had been filed, was Mr. Anderson still on the
8 street and available to have testified as a witness?

9 A Yes, ma'am.

10 Q That the -- his incarceration at Edgefield is a fairly
11 recent event?

12 A Yes, ma'am.

13 Q Thank you. No further questions.

14 THE COURT: Any cross-examination?

15 MR. MITCHELL: Yes. Quickly.

16 CROSS-EXAMINATION

17 BY MR. MITCHELL:

18 Q All right. Hi, Ms. Sumter.

19 A Hi.

20 Q Good morning.

21 A Good morning.

22 Q Let's see. So you have a close relationship with Mr.
23 Garner; is that correct?

24 A Yes.

25 Q And you're trying to help him essentially get a new

1 trial ---

2 A Yes.

3 Q --- correct?

4 And you've put together -- you've kind of gathered
5 these affidavits pursuant to Ms. Shurling's instructions,
6 correct?

7 A Yes.

8 Q So did you go to Lower Richland High School with Mr.
9 Garner?

10 A Briefly.

11 Q Did you know Mr. Davis at that time?

12 A Coach Davis?

13 Q Mr. -- yeah, Coach Davis.

14 A Yes.

15 Q You did know him back then?

16 A Know of him. Yeah.

17 Q Knew of him? Okay.

18 A Uh-huh.

19 MS. SHURLING: I apologize, Your Honor. I couldn't
20 hear clearly. Was the question whether she knew Coach
21 Davis or Chandra Davis?

22 MR. MITCHELL: Whether she knew Coach Davis.

23 MS. SHURLING: Thank you.

24 Q Now -- and you talked -- when did you have a
25 conversation with Ricky Anderson? Don't tell me what he

CROSS-EXAMINATION BY MR. MITCHELL - DANITA SUMTER 81

1 said, but just when did he have -- when did you have a
2 conversation about this allegation?

3 A It had to be the end of April or May 2010.

4 Q And you told Mr. Garner that as soon as you found out;
5 is that correct?

6 A No. Actually, he told me. I don't know Ricky
7 Anderson like that.

8 Q Okay. Okay. So you're related to Mr. Dixon; is that
9 correct?

10 A Who?

11 Q I mean, Nixon?

12 A No.

13 Q I mean -- I'm sorry. Mr. Weston?

14 A Yes.

15 Q Getting it backwards.

16 Did you attend Mr. Garner's trial?

17 A No.

18 Q So you have -- since he's been incarcerated, you've
19 gotten closer to him; is that correct?

20 A Yes. We were always friends. But when he contacted
21 me back in 2010 and, you know, explained to me what was
22 going on ---

23 Q Okay.

24 A --- that's when I ---

25 Q So y'all ---

1 A --- got involved.

2 Q --- you -- you've -- more -- you haven't been in
3 contact with him the entire time he's been incarcerated?

4 A No.

5 Q Okay. Just the past few years?

6 A Yes.

7 Q Okay. No further questions. Thank you.

8 A All right.

9 THE COURT: Redirect?

10 MS. SHURLING: Nothing further, Your Honor.

11 THE COURT: Thank you, ma'am. You may step down.

12 THE WITNESS: All right.

13 (Whereupon, the witness exited the witness stand.)

14 THE COURT: Did you indicate that was your last
15 witness? I'm sorry.

16 MS. SHURLING: Sir?

17 THE COURT: Did you indicate that was your last
18 witness?

19 MS. SHURLING: Yes, sir, Your Honor. There are
20 several matters I need to put on the record.

21 THE COURT: All right.

22 MS. SHURLING: But -- but -- but I have no additional
23 witnesses.

24 THE COURT: That's fine.

25 MS. SHURLING: Your Honor, I would like the record to

1 very clearly indicate that once I hit a brick wall with
2 regard to locating any documentation that would enable to
3 me to find Chandra Davis through court records, I had my
4 staff at my law firm utilize all of the software and -- and
5 resources available through my firm to try to locate a
6 Chandra L. Davis. And we were unable to locate anyone by
7 that name, the Chandra L. Davis.

8 We found a few Chandra Davises. I actually have a
9 photograph of one in my file. It was a young lady named
10 Chandra J. Davis who had some false -- some fraudulent-
11 check charges. But she did not appear to be -- there's no
12 record of her being referenced in any way as Chandra L.
13 Davis, and her age doesn't appear to be quite right either.

14 With regard to my instructions to Ms. Sumter, it's
15 very -- as Your Honor knows, I'm very careful about my word
16 as an officer of the Court. I'd like the record to reflect
17 that once I was unable to locate Ms. Chandra Davis, whether
18 I was -- I was unable to locate any court records
19 concerning her. I was unable to ascertain any leads as to
20 where she might currently be living in the community,
21 whether she had married, nothing.

22 At that point I advised Ms. Sumter that without some
23 form of documentation as to the fact that one Chandra L.
24 Davis, who had attended L.R., was, in fact, at least known
25 to hold herself out as being related -- closely related to

1 Coach Davis, that I, as an officer of the Court, could not
2 move forward with any sort of motion for a new trial.

3 At that point we discussed the various possible means
4 of -- of documenting that, at which point I advised her
5 that potentially, we could get affidavits from individuals
6 in the community and the circle of -- of L.R. alumni, but
7 that I specifically would not use anyone who was a close,
8 personal friend of Trey Garner's; that if they were someone
9 that the state could demonstrate had stayed in close touch
10 with him over the years -- visiting SCDC, call -- accepting
11 collect phone calls, putting money in his Cooper account,
12 anything like that -- that I would anticipate that their
13 credibility would be immediately discounted and that I
14 would not move forward with affidavits from individuals
15 that could -- whose bias could be demonstrated by such
16 factors.

17 Once Ms. Davis [sic] was able to get me affidavits
18 from, I believe a total of five people, four of which were
19 attached to the pleadings, I went forward with filing the
20 Rule 29(b) motion. I waited until I got the multiple
21 affidavits because of the nature of the allegation and the
22 fact that no one that I'd got affidavits from was able to
23 specifically attest to the fact that -- that the Chandra L.
24 Davis who was on the jury was the one they knew to be an
25 individual who had represented herself to be related to

1 Coach Davis.

2 At this time, Your Honor, I would note that Ricky
3 Anderson is an individual whose affidavit was attached to
4 the pleadings and who indicated that he had known Chandra
5 Davis for some time and was aware that she had held herself
6 out to be related to the coach. And he is the one out of
7 the group who specifically states in his affidavit that he
8 had only recently become aware that she had served as a
9 juror in Mr. Trey Garner's case.

10 Mr. Ricky Davis is now in federal custody. I
11 apologize, Your Honor, I -- for not forcing my paralegal to
12 come to court on Good Friday. But we -- my paralegal, with
13 my direct supervision, literally looking over her shoulder,
14 we verified that he is an inmate at Edgefield. And we also
15 -- at my instruction, she engaged in conversations with
16 Edgefield to determine what hoops I had to jump through to
17 subpoena Mr. Ricky Anderson to come to court today.

18 And we were told, in no uncertain terms, that the
19 federal system will not bring someone to court. They don't
20 care whether I subpoena him or not.

21 I subsequently had a conversation with Judge Casey
22 Manning, fortuitously, in the hall one day when he asked me
23 how I was doing. And I -- I told him I was having a
24 problem getting a federal inmate here as a witness. And he
25 informed me that he'd had that situation come up before and

1 they, in fact, would not transport.

2 I was able to determine that Mr. Ricky Anderson is
3 there on a very minor charge; that he's in a minimum-
4 security portion of the facility; and that he is due to be
5 discharged in February of 2016. Given the fact that it --
6 it would be he his testimony out of the witnesses discussed
7 herein who -- it -- it was Ricky Anderson who indicated
8 that he had become aware of the fact that Chandra Davis
9 had, in fact, been on Trey Garner's jury. And since he is
10 alleged to be the individual that first made Mr. Trey
11 Garner aware of that familial connection, I would ask that
12 the record in this matter be held open until his release
13 from federal custody so that we might obtain his testimony
14 at a subsequent proceeding.

15 Barring that, I would ask for this Court's order
16 permitting us to -- under whatever guidelines the federal
17 authorities -- the Federal Bureau of Prisons insists upon,
18 that the attorney general's representative and I proceed to
19 take his deposition at the federal Edgefield Correction
20 Institution, although I believe that it would certainly be
21 less of a burden on the state's resources, not to mention
22 my own, if we could simply wait until February when he is
23 no longer incarcerated to add his testimony to this record.

24 I would note, Your Honor, that you -- I hope, have
25 before you copies of the records from the trial of this

1 matter. If -- if not, I would note that in my pleadings, I
2 refer very specifically to the portions of the record where
3 the pool is asked questions concerning relationships with
4 the decedent and the decedent's family.

5 I would also note that certainly, Mr. Joe Davis's
6 death was a tragic thing. But the record reflects that my
7 client was convicted almost exclusively based on the
8 testimony of two cooperating codefendants, one of whom was
9 the admitted shooter, and that it was by virtue of their
10 presenting testimony against my client that he and the
11 other codefendant received deals, which enable them to get
12 sentences far less than life and which removed them from
13 the threat of a death penalty proceeding.

14 So while what happened to Mr. Joe Davis is indeed
15 tragic, the record does not reflect a -- a -- a -- a trial
16 with the type of evidence that would make this kind of
17 issue subject to harmless-error analysis. His conviction
18 was based entirely on the testimony of codefendants with a
19 great deal to gain and nothing to lose. Thank you, Your
20 Honor.

21 THE COURT: All right. Thank you, ma'am.

22 MR. MITCHELL: Your Honor, I'll respond first to, I
23 guess, leaving the record open and then maybe save some
24 argument for later. But, you know, we oppose leaving the
25 record open to take testimony of Mr. Anderson.

1 I think, if you look at his affidavit, it's very
2 similar to what -- to Mr. Weston's affidavit. Mr. Weston
3 also says (as read): "It has now come to" -- or -- "It has
4 come to my attention now that Chandra served on the jury."
5 Mr. Anderson's affidavit says (as read): "I wasn't aware
6 until recently that Chandra served on the jury in 1998."

7 I mean, I think, if you -- even if you produce that
8 testimony and even if we can assume that's true, which is
9 just for this argument, you still have to produce the
10 juror's testimony. And until we locate this Chandra Davis
11 and get something tying her to the courthouse, then Mr.
12 Anderson's testimony is just going to be cumulative to
13 what's been presented today.

14 I think we -- I don't want to get in a situation where
15 we hold this case in abeyance until he gets released,
16 which, I mean, is expected to be February, maybe. I don't
17 -- I have not looked into that myself. But, I mean, what's
18 to say they don't have other charges or he may be brought
19 up on something else. I mean, there's -- you know,
20 anything can happen, obviously.

21 But I'd be opposed to holding this case in abeyance
22 for nearly -- for ten/eleven months just to take the live
23 testimony of Mr. Anderson, when I don't think his testimony
24 at this point would be relative. And I think it would be
25 cumulative, at least according to his affidavit. I assume

1 he'd say something similar.

2 And if you'd like to hear argument on the motion as a
3 whole, I can do that as well. But ---

4 THE COURT: Certainly.

5 MR. MITCHELL: Okay. And, Your Honor, since we're now
6 under this *McCoy* standard, I think the way juror misconduct
7 is shown is that the juror -- I'm going to read this
8 straight from *McCoy* -- "The juror intentionally concealed
9 the information. You have to prove the juror intentionally
10 concealed the information and the information concealed
11 would have supported a challenge for cause or would have
12 been material factor in the use of the parties' peremptory
13 challenges."

14 You have to show evidence that the juror intensely --
15 intentionally concealed her relationship with Mr. Davis.
16 We don't even know who this Chandra Davis is. There could
17 be -- this could be any other Chandra Davis. There -- I
18 think even Ms. Shurling has stated that there are three or
19 four Chandra Davises in South Carolina. We don't know ---

20 MS. SHURLING: I didn't say that.

21 MR. MITCHELL: --- if there -- if this is the Chandra
22 Davis that went to L.R. or not. There's no testimony tying
23 her to this trial. So I -- it's our position that they've
24 absolutely failed to meet their burden. It's pure
25 speculation to say that this Chandra Davis was on Mr.

1 Garner's trial and that this case should be granted a new
2 trial on that basis because of speculating of who was on
3 this trial. We have to have this juror here.

4 I -- I don't see how you could grant this without
5 having her live testimony to show, first, that she
6 intentionally concealed this relationship; and then,
7 second, that this is even the right Chandra Davis. No
8 one's been able to do that. The -- the family members who
9 are the alleged relation to her have categorically denied
10 even knowing a Chandra Davis; have absolutely denied being
11 related to any Chandra Davis.

12 I think the testimony of this juror must be produced.
13 And it must be shown that she is, in fact, the juror that
14 testified -- or that heard Mr. Garner's case. Without that
15 it would be pure speculation.

16 THE COURT: All right. Thank you, sir.

17 MS. SHURLING: Your Honor, I would -- would simply
18 follow up by noting that -- that my client has indicated
19 that he became aware of this alleged connection through
20 Ricky Anderson and that Ricky Anderson's affidavit, unlike
21 the other witnesses, indicates that he only recently became
22 aware of the connection.

23 With regard to the coach's testimony here today and
24 Michelle Davis's here -- testimony here today, I think
25 there -- there is a -- a peripheral issue. And that's that

1 even if the Chandra Davis on this jury was not, in fact,
2 related to the coach and his wife, if she was someone who
3 considered herself so close to the family, for whatever
4 reason, that she actually held herself out to classmates as
5 being related to him and him being her uncle, then that, in
6 and of itself, would be a basis for our argument that she,
7 in her mind, had a connection to Coach Davis sufficient
8 that she should've disclosed it and perhaps should've been
9 removed for cause and if not for cause, certainly that
10 defense counsel should've had the opportunity to remove her
11 through the use of a peremptory strike.

12 I am not responsible for the policies and procedures
13 of the clerk of court's office. I -- you know, I don't
14 know why they don't keep juror records. I can represent to
15 Your Honor, as an officer of the Court, I've been doing
16 this for 36 years. I've been a criminal defense lawyer and
17 an appellate lawyer for 36 years.

18 And as a point of rather significant irony, I have two
19 cases involving a juror's failure to disclose going on at
20 this very time. And they are, in fact, the only two I've
21 had in 36 years. But I -- in the other case, I have had
22 the opposite experience. In the other case -- and at the
23 moment -- I apologize. The county is escaping my brain.

24 But in that case the clerk of court's office had all
25 of the records. I was able to get the juror questionnaire

1 sheets that reflected the jurors' employment history,
2 address, date of birth, everything -- even, you know, many
3 years after the trial. So I don't know why Richland County
4 is any different. But it's certainly not something that is
5 -- is the fault of my client.

6 And -- and you've heard testimony from Jim Truitt that
7 as -- as quickly as three years after this trial, that
8 information was destroyed. And I have, of course, given
9 the Court representation from me, as an officer of the
10 Court, that I made every diligent effort through other
11 sources to locate that same information and could not.

12 And even if -- even if it had come up within the time
13 period where that juror's address were still available by
14 virtue of the payment records, what her address was back in
15 1998 may or may not have been useful at all with regard to
16 efforts to locate her here today.

17 I would take issue with the state saying I said I'd
18 found four or five Chandra L. Davises. I -- I -- I
19 certainly -- if I said that, I misspoke. It was not my
20 intention that I say that.

21 What I said was in attempting to locate a Chandra L.
22 Davis, we found none in any of the databases we were
23 checking. We found references to a few Chandra Davises.
24 But we were doing a -- a -- a national search. We were not
25 just limiting to South Carolina, and some of the Chandras

1 that we found were located outside the jurisdiction of
2 South Carolina.

3 And as I've pointed out, the one that we located in
4 South Carolina -- or at least located as having been in
5 South Carolina at one point was a Chandra J. Davis. And
6 the record indicated that she was booked at Alvin S. Glenn
7 on April 1st, 2015. But again, her name was Chandra J.
8 Davis, not Chandra L. That was the only one I -- was able
9 to locate any documentation concerning in South Carolina.

10 THE COURT: All right.

11 MS. SHURLING: Thank you, Your Honor. And -- and I
12 would ---

13 THE COURT: Thank you.

14 MS. SHURLING: --- simply say that given the facts of
15 this case, the seriousness of the charge, the penalty
16 imposed, it's already been a very long time. And it -- it
17 -- in -- in the spirit of fairness, I can say, you know, my
18 Rule 29 motion was -- was filed -- and Your Honor's
19 familiar with my reputation with the Court. I'm a diligent
20 lawyer. I made every reasonable effort to get the Rule
21 29(e) motion heard after it was filed.

22 This matter has gone on for a very long time. Taking
23 that in mind -- taking in mind how long I tried just to get
24 a -- a hearing on the 29 motion, to say for this matter to
25 remain open just a few months longer -- well, ten months

1 longer until Mr. Anderson is available, I do not believe is
2 unreasonable in light of the other delay in this case.

3 And -- and as I've said, it's already old. It's -- it
4 -- it certainly -- his motion was pending with no movement
5 on giving him a hearing on his motion for much longer than
6 ten months. So I -- I would ask the Court to find that it
7 would not be unreasonable to hold the record open until
8 such time as Ricky Anderson is available to either depose
9 or come to court and testify.

10 THE COURT: All right. Thank you, Ms. Shurling.

11 On the issue of leaving the record open to take
12 deposition or to take testimony from Ricky Anderson, I'm
13 going to deny that. And -- and one reason is -- and I -- I
14 reviewed the affidavit of Ricky Anderson. Presumably, he
15 would say something along the same lines of what's in the
16 affidavit. At least there's nothing to indicate he'd say
17 anything more that's contained in that affidavit.

18 But the affidavit is virtually all hearsay and over
19 objection would not be admitted. There's no affirmative
20 statement that he makes to show the Court that he has any
21 evidence that Chandra -- that a Chandra Davis was even on
22 the jury.

23 Taking that further, the only evidence submitted to
24 the Court so far is that a -- excuse me -- concerning
25 Chandra Davis being on the jury is virtually nonexistent.

1 Secondly, the only evidence that indicates Chandra Davis
2 was related to the victim's family is hearsay. It's all
3 hearsay, uncorroborated by any other evidence.

4 In other words, the only evidence that there is a
5 relationship, which, of course, has been specifically
6 denied by those relatives, but the only evidence is, once
7 again, hearsay. And the Court gives little -- little
8 weight to that hearsay, particularly in light of the direct
9 evidence that there was no such relationship.

10 For all those reasons, the Court denies the
11 application.

12 MS. SHURLING: Your Honor ---

13 THE COURT: Is there anything else we need to do?

14 MR. MITCHELL: No, sir. I don't think so.

15 MS. SHURLING: Your Honor, I would ask that the record
16 include from the office of the Richland County Clerk of
17 Court's Office, the only thing we were able to get is a
18 copy of the jury-verdict sheet listing the jurors. And it,
19 in fact, indicates that Juror No. 8, who was No. 82 in the
20 pool, was Chandra L. Davis. And that is a part of the
21 record before the Court as -- as part of the clerk of
22 court's package. But in an abundance of caution, I would
23 ask that I be allowed to introduce that as an exhibit.

24 MR. MITCHELL: Your -- Your Honor, if it's ---

25 THE COURT: I don't -- I didn't see it in the packet

1 that ---

2 MR. MITCHELL: I don't ---

3 THE COURT: --- I had.

4 MR. MITCHELL: --- believe it's included in the packet
5 that I passed up to Your Honor but ---

6 MS. SHURLING: It's a -- it's a part of the court
7 reporter's record from the ---

8 MR. MITCHELL: Uh-huh.

9 MS. SHURLING: --- trial. And it's in the clerk of
10 court's file.

11 THE COURT: Okay.

12 MS. SHURLING: I obtained it from the clerk of court.

13 MR. MITCHELL: Well, if -- if that's the case, then it
14 -- it -- it's already part of the record, and it would be
15 considered with everything else as the Court would do on
16 the application.

17 THE COURT: Okay. All right.

18 MS. SHURLING: All I'm ---

19 THE COURT: Without ---

20 MS. SHURLING: --- trying to ---

21 THE COURT: --- objection.

22 MS. SHURLING: --- do, Your Honor, is make it ---

23 THE COURT: I'm sorry?

24 MS. SHURLING: --- easier for -- all I was trying to
25 do is make it easier for someone who might be handling an

1 appeal in the future to isolate this document without
2 having to go back to the clerk of court's office.

3 THE COURT: All right. And so it'll be admitted
4 without objection?

5 MR. MITCHELL: That's fine, Your Honor.

6 THE COURT: All right.

7 (Whereupon, Plaintiff's Exhibit 1 was marked and
8 entered into evidence.)

9 THE COURT: Anything else we need to do on this case?

10 MS. SHURLING: If I may have a moment's indulgence
11 very quickly, Your Honor.

12 (Off the record briefly.)

13 MS. SHURLING: Nothing further, Your Honor. Thank
14 you.

15 THE COURT: All right.

16 (Whereupon, the proceeding was concluded at 12:14 p.m.)

17 --- END OF TRANSCRIPT OF RECORD ---
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CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 3RD
DAY OF APRIL, 2015.

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



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 17, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Trey Levar Garner, #248321,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05098

ORDER OF DISMISSAL

This matter comes before the Court pursuant to a Motion for a New Trial pursuant to Rule 29(b), SCRCrimP, filed on November 22, 2011, in the Richland County Court of General Sessions. In that motion Applicant alleges that a "juror serving at his trial has now been discovered to have a close family tie to the victim in this case." No action was taken on this case until August 18, 2014, where a document captioned "CONSENT ORDER FOR PREVIOUSLY FILED MOTION FOR A NEW TRIAL TO BE REFILED AS A TIMELY APPLICATION FOR A NEW TRIAL PURSUANT TO S.C. CODE ANN. §§17-27-20(a)(4) and 17-27-45(C)," was filed. The consent order states "the State does not in any way concede the merit of the Applicant's prayer for relief, or the timelines of the original motion, the State has consented to the Applicant's request that his previously filed motion be treated as a request for a new trial pursuant to §17-27-20(A)(4) and § 17-27-45(C)."

Applicant then filed this application for post-conviction relief (PCR) on August 20, 2014, where he argues the same allegations. Respondent filed a Return and Motion to Dismiss on December 2, 2014, requesting the action be dismissed as filed outside the statute of limitations. A hearing was held on April 3, 2015, at the Richland County Courthouse. Applicant was present

and represented by Tara D. Shurling, Esquire. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf. Also testifying was Jim Truitt of the Richland County Clerk's Office, Wilbert Davis, Michelle Davis, Jermaine Nixon, Tyshawn Watson, Applicant, and Denita Sumter. This Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, and the pleadings.

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the September 1997 term of the Richland County Grand Jury for Murder (1997-GS-40-21496), Attempted Armed Robbery and Robbery (1997-GS-40-21497), and Conspiracy to Armed Robbery (1997-GS-40-21498). On March 9-12, 1998, Applicant proceeded to trial before the Honorable J. Derham Cole. At trial, Applicant was represented by James P. Rogers, Esquire. The State was represented by R. Knox McMahon and Joenathan Chaplin, Assistant Solicitors for the Fifth Judicial Circuit. On March 12, 1998, the jury found Applicant guilty as indicted. Judge Cole sentenced Applicant to imprisonment for thirty (30) years for Murder, five (5) years, consecutive, for Attempted Armed Robbery, and five (5) years, concurrent, for Conspiracy.

A timely notice of appeal was filed and an appeal was perfected by Melody J. Brown, Esquire, then of the South Carolina Office of Appellate Defense. Applicant, by and through counsel, submitted a Final Brief of Appellant, in which he raised the following issues:

1. The trial judge erred in failing to direct a verdict, or alternatively ordering a new trial, on the murder charge and the attempted armed robbery charge when the testimony from the principal and the other witnesses demonstrated that the act resulting in murder was not an attempt to

commit armed robbery, rather the crime acted on was the murder of a storekeeper and not an act of the criminal conspiracy.

2. The trial judge erred in failing to declare a mistrial when the state improperly admitted evidence of a general criminal intent by the inference of gang activity, when gang activity was not an allegation against defendant and only worked to create an inference of guilty from bad character.
3. The trial judge erred in admitting State Exhibit 16, a photograph of the murder site including the victim's blood, when the prejudicial effect of the bloody scene outweighed the possible probative value of the evidence.

The Supreme Court of South Carolina affirmed Applicant's conviction pursuant to Rule 220(b)(1), SCACR, State v. Garner, Mem. Op. No. 107 (filed August 23, 2000).

2001-CP-40-3472

Applicant subsequently filed an application for post-conviction relief on August 20, 2001, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
2. Subject matter jurisdiction
3. Ineffective assistance of appellate counsel.

On January 21, 2004, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Applicant testified on his own behalf. Trial counsel Rogers testified for the State. On March 24, 2004, Judge Kinard issued an Amended Order of Dismissal with Prejudice, denying relief. Applicant served and filed a notice of appeal to the South Carolina Supreme Court.

Applicant was represented by Joseph L. Savitz, III, then Acting Chief Attorney of the S.C. Office of Appellate Defense on the appeal. Counsel Savitz filed a Petition for Writ of Certiorari pursuant to Johnson¹ on Applicant's behalf on November 3, 2004, where he requested to be relieved as counsel. In an Order dated December 2, 2005, the Supreme Court of South

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

Carolina issued an Order denying certiorari and granting counsel's petition to be relieved as counsel. The remittitur was issued on December 20, 2005.

2006-cv-00021-GRA-BM

Applicant then filed a petition for writ of habeas corpus on January 20, 2006, in federal district court. Applicant raised the following issues:

1. Ineffective assistance of trial counsel deprived Appellant of fair trial in violation of due process. Const. Amends 5, 6.
2. Insufficient evidence adduced to support state court convictions. U.S. Const. Amend. 14.
3. U.S. Const. Amend. 6 and 14.
4. U.S. Const. Amend. 6 and 14.

On March 13, 2006, Respondent filed its return and motion for summary judgment requesting that the case be dismissed. The federal district court granted Respondent's motion for summary judgment and dismissed the case with prejudice by Order filed February 2, 2007. Applicant then filed a notice of appeal on April 4, 2007. The United States Court of Appeals for the Fourth Circuit dismissed the appeal by order dated October 24, 2007, and mandated the judgment on November 15, 2007. This action follows.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.



As a matter of general impression, this Court finds Wilbert and Michelle Davis's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

State's Motion to Dismiss

At the April 3, 2015, hearing, this Court first heard arguments on the State's Motion to Dismiss. The Court denied this motion at the hearing. The State argued the consent order entered into between the Fifth Circuit Solicitor's Office and Applicant did not bind the Attorney General's Office. The consent order effectively allowed the PCR action to be considered filed on the date the Rule 29(b), SCCrimP, was filed in the court of general sessions. The State argued it was not apprised of or consulted regarding the consent order. The State failed to appeal the consent order, so it is therefore binding. This Court denies Respondent's motion to dismiss.

Newly Discovered Evidence of Juror Misconduct

Applicant alleges that Chandra L. Davis, a juror seated at Applicant's trial was the niece of the victim's daughter, Michelle Davis. Applicant alleges he is entitled to a new trial based upon this newly discovered evidence of juror misconduct. The South Carolina Supreme Court recently addressed the issue of juror misconduct in McCoy v. State, 401 S.C. 363 (2013). McCoy held an issue of fact exists and a hearing is therefore required where an allegation would establish an exception to either the statute of limitations or the prohibition against successive applications when those allegations are not conclusively refuted by the record. The court also held the traditional five part test governing newly discovered evidence in PCR actions is not applicable to allegations of juror misconduct. The court enunciated a test for when the grant of a new trial is warranted on the basis of juror misconduct: "if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a

challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Applicant must file an application for post-conviction relief "within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. §17-27-45(C).

Summary of Testimony

Jim Truit

Jim Truitt, Richland County Clerk of Court Administrator, testified juror records are destroyed after three (3) years. He testified juror checks are destroyed after ten (10) years. Mr. Truitt concluded any records pertaining to juror Chandra Davis have been destroyed as Applicant's trial was held in March 1998.

Wilbert Davis

Mr. Davis testified he is married to Michelle Davis whose father was murdered in October 1996. Applicant was convicted of his murder. Mr. Davis testified he and his brother were standout football players for Lower Richland High School. He testified he thereafter coached football at Lower Richland from around 1995 to 2000.

Mr. Davis testified he did not have a niece named Chandra Davis. He explained that he does have two nieces, but the oldest is in the ninth grade and is fourteen or fifteen years old. Mr. Davis testified no one was raised as part of his family by the name of Chandra. No one by the name of Chandra was taken into his or his family's household. He categorically denied being related to a Chandra Davis. He testified he did not know any students at Lower Richland named Chandra Davis, nor did he know of any student claiming to be related to him. Mr. Davis testified he attended at least some of Applicant's trial and did not recognize any members of the jury.

Michelle Davis



Mrs. Davis testified she is married to Wilbert Davis. She explained they met in the tenth grade and have been together for around thirty (30) years. She unequivocally testified she did not know a woman by the name of Chandra Davis. She testified she did not know anyone named Chandra that is related to her husband or anyone claiming to be related to her husband. She testified she was a witness at Applicant's trial and that she did not recognize anyone seated on the jury panel.

Jermaine Nixon

Mr. Nixon testified he attended Lower Richland High School from 1992 to 1996. He testified he knew Chandra Davis and was acquainted with her. He testified he was asked to tell the truth. He admitted that he had no personal knowledge that Chandra Davis was related to Wilbert Davis and the Davis family. Applicant attempted to elicit certain testimony from Mr. Nixon but this testimony was excluded as inadmissible hearsay. He testified he was not a close friend of Applicant and that he has not had contact with Applicant since he was sentenced to prison. He testified Denita Sumter asked him to provide an affidavit to support this action.

Tyshawn Watson

Mr. Watson testified he went to middle and high school with a Chandra Davis. He testified he is not close friends with Applicant or has he visited him while in prison or had any contact with him since his imprisonment. Applicant attempted to elicit certain testimony from Mr. Watson but this testimony was excluded as inadmissible hearsay. He also testified Denita Sumter asked him to provide an affidavit to support this action.

Trey Garner

Applicant testified he has been in prison for around eighteen (18) years and that he was nineteen (19) years old at the time of the incident. He testified he did not have a prior record at

the time. He testified Ricky Anderson is Denita Sumter's brother. He testified he became aware that a juror seated at his trial was possibly related to the victim. He then asked Ms. Sumter to see if she could talk to people that attended high school with them to see if they could recall a Chandra Davis and her possible relationship to the Davises. He testified he attended Lower Richland High School from 1992 to 1993 and then reenrolled for a month in 1995. He admitted that he did not attend classes regularly and did not know a Chandra Davis himself. He testified he did not recognize any jurors and that he would have brought that to the trial court's attention. Applicant also testified he does have a personal relationship with Denita Sumter. He categorized this relationship as romantic in nature.

Denita Sumter

Ms. Sumter testified she is currently involved in a romantic relationship with Applicant. She testified they have been friends for fourteen (14) to fifteen (15) years. She visits him in prison, writes him letters, and talks to him on the telephone. Ms. Sumter explained that Anderson brought this information to her attention, and she then hired Counsel Shurling to look into this possibility that a juror was related to the victim. She testified Counsel Shurling hired a private investigator to thoroughly inspect the claim. She testified she attempted to find people who would know more about a possible relationship and noted that she tried to bring forward neutral witnesses and not people who are close to Applicant. She testified she provided the affidavits to Counsel Shurling in hopes to have them presented to the Court. Ms. Sumter testified she was very sympathetic with the Davis family.

Analysis

First, this Court denies Applicant's motion to hold the record open to allow for testimony regarding witness Ricky Anderson. Applicant has submitted Anderson's affidavit as an



attachment to the application. This Court finds his testimony would be in conformity with his affidavit and would be additional inadmissible hearsay.

Applicant must show that juror Chandra Davis intentionally concealed her relationship to Mr. Davis and that the concealment would have supported a challenge for cause to her serving on the jury. See McCoy. Applicant has failed to meet his burden of proof. There was no evidence presented from the juror in question who is alleged to have withheld the information. Without her testimony this Court must find Applicant failed to show that she intentionally concealed the alleged relationship. The only evidence Applicant presented to support the existence of the relationship was inadmissible hearsay in the form of affidavits. The Court relies on the credible evidence presented from Wilbert and Michelle Davis in finding that Applicant has failed to meet his burden in proving any familiar or casual connection between juror Chandra Davis and the victim in the underlying case. Applicant failed to present any admissible or credible evidence that juror Chandra Davis was related to the victim. This application is denied and dismissed with prejudice.

III. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

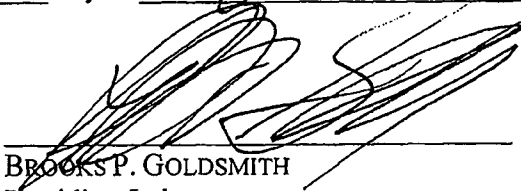
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 18 day of JUNE, 2015.


BROOKS P. GOLDSMITH
Presiding Judge

_____, South Carolina

WITNESSES

Inv. Ed Gardner, RCSD

One D. McDonald

ARREST WARRANT NO. E532510

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

VERDICT

Guilty

Foreman of Petit Jury

March 11, 1998
Date

DOCKET NO. *97-GS-40-21498*

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#100 SEPTEMBER TERM 1997

THE STATE

vs.

TREY GARNER

Indictment for

CONSPIRACY TO ARMED ROBBERY

S. C. Code Section 16-17-410 Class F-Felony
49

CERTIFIED TRUE COPY
OF ORIGINAL FILED.

Janette W. M. Sade
C.C.C.P.&G.S.

RICHLAND COUNTY
SOUTH CAROLINA

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)

INDICTMENT FOR
 CONSPIRACY TO ARMED ROBBERY

At a Court of General Sessions, convened on September 10, 1997
 the Grand Jurors of RICHLAND County present upon their oath:

That TREY GARNER did in Richland County on or about the 27th day of October, 1996, wilfully and unlawfully agree, confederate, conspire, and band together with Jermaine McClemore and Dayon Lemon to violate the laws of the State of South Carolina in that they the said Trey Garner, Jermaine McClemore, and Dayon Lemon did wilfully and unlawfully agree, confederate, conspire, and band together to arm rob a place of business, to wit: Joe's Grocery for unlawful purposes.

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

Warner B. Ghesi
 SOLICITOR

CERTIFIED TRUE COPY
 OF ORIGINAL FILED,
Jeannette W. M. Baskin
 C.C.C.P.&G.S.
 RICHLAND COUNTY
 SOUTH CAROLINA

WITNESSES

Inv. Ed Gardner, RCSD

David L. McDonald

ARREST WARRANT NO. E532509

ACTION OF GRAND JURY

TRUE BILL

Gregory J. Smith
Foreman of Grand Jury

VERDICT

Guilty

John W. White
Foreman of Petit Jury

March 11, 1998

Date:

DOCKET NO.

97-65-40-21477

The State of South Carolina,

County of

RICHLAND

COURT OF GENERAL SESSIONS

#140 SEPTEMBER TERM 1997

THE STATE

VS.

TREY GARNER

ATTEMPTED
Indictment for Armed
Robbery and Robbery

S. C. Code Section 16-11-330(B) Class C-Felony
139

CERTIFIED TRUE COPY
OF ORIGINAL FILED.
Heather W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

FORM 20 (1/91)

STATE OF SOUTH CAROLINA)

ATTEMPTED
INDICTMENT FOR ARMED ROBBERYCOUNTY OF RICHLAND)~~ATTEMPTED~~
AND ROBBERYAt a Court of General Sessions, convened on September 10, 1997The Jurors of RICHLAND County present upon their oath:**COUNT ONE — ARMED ROBBERY**

That TREY GARNER did in
Richland County on or about October 27, 1996, while armed with a deadly
 weapon, to wit: a 9mm handgun,
 attempt to
 feloniously take from the person or presence of Joe Brooks by means of
 force or intimidation goods or monies of Joe's Grocery such goods or monies being
 described as follows: U.S. Currency

with intent to deprive the owner permanently of such property.

COUNT TWO — ROBBERY

That _____ did in _____
 _____ County on or about _____ feloniously take from the
 person or presence of _____ by means of
 force or intimidation goods or monies of _____
 such goods or monies being described as follows: _____

with intent to deprive the owner permanently of such property.

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

**CERTIFIED TRUE COPY
 OF ORIGINAL FILED,**
Wm. B. ...
 SOLICITOR
**RICHLAND COUNTY
 SOUTH CAROLINA**

WITNESSES

Inv. Ed. Gardner, RCSD

Dr. L. McDonald

ARREST WARRANT NO. E532511

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreman of Grand Jury

VERDICT

Guilty

John W. Chapman
Foreman of Petit Jury

Date: *Aug 11 1998*

DOCKET NO. *97 GS-40-21496*

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#100 SEPTEMBER TERM 1997

THE STATE

vs.

TREY GARNER

Indictment for Murder

S. C. Code Section 16-3-10 Felony
116

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OF ORIGINAL FILED.
Janet W. McSwain
C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

FORM 5 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT FOR MURDER

At a Court of General Sessions, convened on September 10, 1997,
the Grand Jurors of RICHLAND County present upon their oath:

COUNT ONE — MURDER

That TREY GARNER
did in Richland County on or about October 27, 1996,
feloniously, wilfully and with malice aforethought, kill one Joe Brooks
by means of a gunshot wound to the chest
and that the said victim died as a proximate result thereof.

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

Warren B. Ghesi
SOLICITOR

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeannette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA