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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Appellate Case Number 2018-000096

Jennifer McSharry,..... Petitioner,

v.

State of South Carolina, ... Respondent.

Appendix, Volume II of III

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SLEEPING IN HIS OWN RESIDENCE WHEN YOU ARRIVED, IS THAT RIGHT?

A YES, MA'AM.

Q HE NEVER THREATENED ANYBODY; IN FACT, HE WAS NICE, HE LET YOU TWO IN BECAUSE HE THOUGHT THAT YOU WERE LOST AND NEEDED TO USE THE PHONE, IS THAT RIGHT?

A YES, MA'AM.

Q AND WHEN YOU ALL GOT IN, WHAT DID THE DEFENDANT DO?

A WE ASKED COULD WE USE THE PHONE.

Q AND THEN WHAT DID YOU ALL DO?

A WE MADE IT OUT LIKE WE WERE USING THE PHONE.

Q WHO WAS ACTING LIKE THEY WERE USING THE PHONE?

A BOTH OF US.

Q AND WHO WAS TALKING TO MR. MILLER?

A JENNIFER.

Q AND DID SHE HAVE ANY TROUBLE CARRYING ON A CONVERSATION?

A NO, MA'AM.

Q WHAT DID SHE TELL HIM TO GAIN ACCESS TO HIS HOUSE?

A THAT WE WERE LOST, THAT WE NEEDED TO USE THE PHONE.

Q DID SHE EVEN CALL HERSELF A DIFFERENT NAME?

A YES, MA'AM.

Q SO SHE KNEW ENOUGH, SHE WAS COHERENT ENOUGH, TO GO UP TO THE DOOR, KNOCK ON THE DOOR, MAKE UP A NAME, MAKE UP A STORY, AND TALK TO MR. MILLER AND GAIN ENTRY INTO

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HIS CAMPER; IS THAT RIGHT?
A I GUESS.
Q DID YOU TALK MUCH TO MR. MILLER?
A NO, MA'AM.
Q ALL RIGHT, AND WHAT HAPPENED AFTER YOU GOT INTO THE TRAILER?
A LIKE I SAID, WE PRETENDED WE WERE CALLING SOMEBODY.
Q AND THEN WHAT HAPPENED?
A AND THEN JENNIFER WENT OUT AND THEN RONNIE CAME IN.
Q ALL RIGHT, AND SHE WAS TO GO OUT AND GIVE THE SIGNAL THAT ALL WAS CLEAR; IS THAT RIGHT?
A I BELIEVE SO.
MR. BYRHOLDT: JUDGE, UNLESS SHE SAW . . .
THE COURT: ALL RIGHT, I'M GOING TO SUSTAIN THE OBJECTION. THE JURY WILL DISREGARD THE TESTIMONY. I WOULD ASK THE ATTORNEY TO LAY A FOUNDATION AND PUT THE WITNESS IN A POSITION TO SEE THIS.
Q DID YOU ALL DISCUSS THE PLAN AS TO WHY YOU ALL WERE GOING IN TO DO THIS? THE REASON WHY YOU ALL WERE GOING IN?
A YES, MA'AM.
Q AND WHAT WAS THE REASON FOR YOU ALL TO GO IN?
A TO DISTRACT THE MAN.
Q NOW, AFTER THE DEFENDANT LEFT, WHAT HAPPENED?
A SHE CAME BACK IN. WE WENT OUT AND THEN RONNIE CAME

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IN.

Q YOU NEED TO SPEAK UP A LITTLE SO THEY CAN HEAR ALL THE WAY BACK, OKAY. LET ME STEP BACK HERE.

THE COURT: LET ME ADJUST THIS FOR YOU. IT MAY HELP A LITTLE BIT.

Q ALL RIGHT, MS. TITMAN, YOU SAID THAT SHE WENT OUT OF THE TRAILER. WHAT HAPPENED WHEN SHE WENT OUT OF THE TRAILER? WHAT WAS THE NEXT THING THAT HAPPENED?

A RONNIE CAME IN.

Q AND WHAT DID HE HAVE IN HIS HAND?

A A GUN.

Q AND WHAT DID HE DO?

A HE PUT IT UP TO MR. MILLER'S HEAD.

Q AND WHAT DID HE SAY?

A GIVE ME MONEY.

Q WHAT DID MR. MILLER DO?

A HE SAID, 'WHY ARE Y'ALL DOING THIS?'

Q HE SAID WHAT?

A HE SAID, 'WHY ARE Y'ALL DOING THIS?'

Q OKAY, AND THEN WHAT HAPPENED?

A AND THEN I WENT OUTSIDE.

Q AND WHO WENT IN AFTER THAT?

A I'M NOT SURE. I MEAN, I DIDN'T SEE ANYBODY.

Q DID YOU HEAR ANY NOISE FROM INSIDE THE TRAILER AFTER THAT?

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A YES, MA'AM.
Q WHAT DID YOU HEAR?
A LIKE SOMEBODY WAS SLINGING THINGS AROUND.
Q AND DID YOU HEAR MR. MILLER YELLING OR HOLLERING OR ANYTHING?
A NO, MA'AM.
Q TO YOUR KNOWLEDGE, WAS MR. MILLER UNARMED?
A YES, MA'AM.
Q AN OLDER GENTLEMAN WHO WAS IN HIS OWN ABODE WHEN THIS OCCURRED?
A YES, MA'AM.
Q DID HE DO ANYTHING, THREATEN ANYBODY, TO CAUSE THIS? PULL ANY GUNS ON ANYBODY, PULL ANY KNIVES ON ANYBODY, ANYTHING LIKE THAT?

MR. BYRHOLDT: OBJECTION, YOUR HONOR, CALLS FOR SPECULATION UNLESS SHE WAS IN THERE DURING THE ALTERCATION.

MS. WHITE: YOUR HONOR, I'M NOT ASKING DURING THE ALTERCATION. ONCE HE BECAME A ROBBERY VICTIM, HE'S ENTITLED TO STRUGGLE.

THE COURT: YOU HAVE TO PUT THIS WITNESS OR ANY WITNESS IN A POSITION TO HAVE OBSERVED.

MS. WHITE: SHE SAID SHE WAS IN THERE, YOUR HONOR.

Q WHILE YOU WERE IN THERE, DID YOU EVER SEE THIS VICTIM,

BEFORE HE BECAME A VICTIM, DID YOU SEE HIM DO ANYTHING TO WARRANT AGGRESSION AGAINST HIM?

A NO, MA'AM.

Q WHO WAS WEARING THE STOCKING HAT?

A MS. KELSO.

Q AFTER THEY WENT IN, YOU SAID THAT YOU WENT TO THE CAR, IS THAT CORRECT?

A YES, MA'AM.

Q AND THE CAR WAS PARKED RIGHT IN FRONT OF HIS FRONT DOOR, WHAT, TWELVE FEET AWAY OR SO?

A I GUESS.

Q HOW MANY SHOTS DID YOU HEAR?

A THREE.

Q AND BEFORE YOU HEARD THE SHOTS, DID ANYBODY COME IN OR OUT OF THAT TRAILER, STEALING ANYTHING FROM THIS VICTIM?

A YES, MA'AM.

Q AND WHO WAS THAT?

A JASON CONLEY.

Q AND WHAT WERE THEY TAKING FROM THIS MAN'S HOME?

A HE HAD BROUGHT OUT THE SHOTGUN AND A POOL STICK.

Q AND DID HE BRING OUT A WALLET TOO?

A I DON'T' REMEMBER SEEING ONE RIGHT THEN.

Q DID YOU SEE ONE LATER?

A YES, MA'AM.

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Q WHAT DID JASON SAY TO YOU WHEN HE CAME OUT, THAT THEY WERE GOING TO DO?
A TAKE HIM TO THE A.T.M. MACHINE.
Q WHY?
A BECAUSE HE DIDN'T HAVE ANY MONEY.
Q SO AT GUNPOINT DID THEY FORCE HIM OUT?
MR. BYRHOLDT: OBJECTION, YOUR HONOR, UNLESS SHE OBSERVED.
MS. WHITE: YOUR HONOR, SHE'S SITTING TWELVE FEET AWAY IN A CAR. I'M ASKING HER THAT.
THE COURT: WELL, ASK THAT FIRST QUESTION TO MAKE SURE SHE WAS THERE.
Q WERE YOU STILL SITTING IN THE VEHICLE?
A YES, MA'AM.
Q AND WHAT HAPPENED?
A I DIDN'T EVER SEE MR. MILLER COME OUT.
Q AFTER THE OTHERS GOT OUT, WHILE THIS CONSPIRACY WAS STILL GOING ON, DID THEY TELL YOU WHAT HAD HAPPENED?
A ON THE WAY BACK, YES, MA'AM, AS WE WERE LEAVING.
Q ALL RIGHT, WE'LL GET TO THAT IN A MINUTE.
OKAY, SO YOU SAID THAT YOU HEARD THREE SHOTS, IS THAT CORRECT?
A YES, MA'AM.
Q AND THEN WHAT HAPPENED AFTER THAT?
A RONNIE, RENEE AND JASON CAME AND GOT IN THE CAR AND WE

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LEFT.

Q AND WAS ANYBODY INJURED?

A YES, MA'AM.

Q WHO WAS INJURED?

A MS. KELSO.

Q WHERE WAS SHE SHOT?

A IN THE HAND.

Q HOW DID SHE GET SHOT, DID SHE SAY?

A RIGHT THEN, NO.

Q WHAT DID SHE SAY LATER?

A THAT THEY WERE STRUGGLING.

Q THEY WERE STRUGGLING FOR WHAT?

A I WOULDN'T - I WOULD ASSUME THE GUN.

Q AND SHE WAS SHOT DURING THE STRUGGLE?

A YES, MA'AM, TO MY KNOWLEDGE.

Q AND THEN WHERE DID YOU ALL GO?

A TO MR. HENDERSON'S HOUSE.

Q AND WHEN YOU ALL GOT TO MR. HENDERSON'S - WHY DIDN'T YOU ALL GO TO THE HOSPITAL?

A WELL, I GUESS BECAUSE -

MR. BYRHOLDT: OBJECT TO WHY SHE DIDN'T GO TO THE HOSPITAL. I DON'T THINK SHE'S QUALIFIED, AND OTHER THAN THAT, IT CALLS FOR SPECULATION.

THE COURT: IF SHE KNOWS WHY. THE QUESTION IS WHY DID YOU NOT GO TO THE HOSPITAL. I'M GOING TO

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ASK THE WITNESS TO ANSWER THE QUESTION.

A I GUESS SO THE POLICE WOULDN'T BE ASKING QUESTIONS.

MR. BYRHOLDT: YOUR HONOR, I'M GOING TO ASK THAT THAT ANSWER BE STRICKEN. SHE SAID SHE GUESSED. THAT WOULD BE SPECULATION.

THE COURT: ALL RIGHT, I WOULD INSTRUCT THE JURY THAT THE WITNESS'S ANSWER IS TO BE STRICKEN IN RESPONSE TO THE SOLICITOR'S QUESTION.

Q ISN'T IT TRUE THAT SOME OF THE OTHER MEMBERS OF THIS CONSPIRACY SAID THAT YOU COULDN'T GO TO THE HOSPITAL BECAUSE IF YOU DID THE POLICE WOULD BE NOTIFIED?

A YES, MA'AM.

Q SO YOU ALL WENT TO MR. HENDERSON'S HOUSE, IS THAT CORRECT?

A YES, MA'AM.

Q AND WHEN YOU ALL GOT THERE, YOU ALL ENDED UP BURNING THE VICTIM'S WALLET, BURNING RENEE'S BLOODY CLOTHES; ANYTHING ELSE YOU CAN THINK OF?

A NO, MA'AM.

Q AS YOU ALL WERE LEAVING THE SCENE, DO YOU REMEMBER GIVING THE INITIAL STATEMENT TO THE POLICE DOWN IN THE HOSPITAL? DO YOU REMEMBER WHEN YOU FIRST WHEN INTO THE HOSPITAL WHEN YOU WERE SUICIDAL OVER THIS, AND YOU GAVE A STATEMENT TO THE POLICE?

A WELL, I DIDN'T REMEMBER IT AT THE TIME.

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Q ALL RIGHT, DO YOU REMEMBER TELLING THEM THAT WHEN EVERYBODY WAS LEAVING THE SCENE, RON WAS SAYING HOW MR. MILLER DESERVED THIS BECAUSE HE STRUGGLED? DO YOU REMEMBER THAT?

A YES, MA'AM.

Q AND DO YOU REMEMBER SAYING THAT THE OTHERS LAUGHED?

A YES, MA'AM.

Q DO YOU REMEMBER THEM LAUGHING?

A YES, MA'AM.

Q DO YOU REMEMBER THIS DEFENDANT LAUGHING?

A YES, MA'AM.

Q AND DO YOU REMEMBER SAYING YOU COULDN'T BELIEVE HOW COLD-HEARTED THEY ALL WERE?

A YES, MA'AM.

Q DID YOU THINK IT WAS FUNNY THAT THIS MAN WHO WAS IN HIS HOME, IN HIS OWN HOME, MINDING HIS OWN BUSINESS, WAS ROBBED AND SHOT?

A NO, MA'AM.

Q ISN'T IT TRUE THAT MS. KELSO WANTED TO GET RID OF THIS GUN? THE GUN THAT WAS TAKEN FROM THE HOME? THIS WAS TAKEN FROM THE HOME AS WELL, WASN'T IT?

A YES, MA'AM.

Q AND ISN'T IT TRUE THAT SHE WANTED TO GET RID OF IT SO YOU ALL WOULDN'T BE CAUGHT?

A YES, MA'AM, SHE WANTED US TO GET RID OF IT.

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Q BUT YOU AND MS. MCSHARRY DECIDED TO KEEP IT, DIDN'T YOU?
A YES, MA'AM.
Q AND YOU DIDN'T TELL HER, DID YOU?
A NO, MA'AM.
Q SO MS. MCSHARRY DIDN'T DO WHAT HER MOTHER SAID, DID SHE?
A NO, MA'AM.
Q BUT MS. MCSHARRY DID THINK IT WAS FUNNY THAT MR. MILLER WAS KILLED?
A WELL, AT THE TIME WE DIDN'T KNOW THAT HE WAS DEAD.
Q THAT HE HAD BEEN SHOT?
A YES, MA'AM.
Q TO YOUR KNOWLEDGE, DID ANYBODY, AFTER THEY GOT TO MR. HENDERSON'S HOUSE, CALL E.M.S. ANONYMOUSLY OR CALL THE POLICE ANONYMOUSLY TO SEEK HELP FOR MR. MILLER?
A NO, MA'AM.
Q DID MS. KELSO TELL YOU WHY SHE LEFT HER SHOES AND HER GLASSES AT THE BACK OF MR. MILLER'S CAR?
A NO, MA'AM.
Q TO YOUR KNOWLEDGE, DID THOSE SHOES SQUEAK WHEN SHE WALKED?
A NO, MA'AM, NOT TO MY KNOWLEDGE.
Q WOULD YOU AGREE IT WAS DARK OUT THERE THAT NIGHT?
A YES, MA'AM.

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Q AND SUNGLASSES CERTAINLY WEREN'T NECESSARY IF YOU HAD A MASK ON OVER YOUR HEAD, WERE THEY?
A NO, MA'AM.
Q DID THIS DEFENDANT, WHEN YOU ALL WENT INTO THE CAMPER, DID THIS DEFENDANT SEATED HERE HAVE ANY TROUBLE TALKING FACE TO FACE WITH THE MAN SHE KNEW WAS GOING TO BE ROBBED AT GUNPOINT IN JUST A FEW SECONDS?
A NO, MA'AM.
Q YOU WOULD AGREE THAT A SEVENTEEN-YEAR-OLD CAN DRIVE, WORK?
A YES, MA'AM.
Q GET MARRIED?
A YES, MA'AM.
Q AND CERTAINLY THERE WAS NO DOUBT THAT WHAT YOU ALL WERE DOING WAS WRONG THAT NIGHT, IS THAT RIGHT?
A YES, MA'AM.
Q AND EVERYONE KNEW THAT ARMED ROBBERY WAS WRONG?
A YES, MA'AM.
Q DID YOU NOTICE ANYBODY FORCING THIS DEFENDANT TO COME ALONG AND BE A PART OF THIS?
A NO, MA'AM.
Q TO YOUR KNOWLEDGE, AFTER MR. MILLER WAS SHOT THERE AT HIS HOME, LYING ON THE GROUND, DID ANYBODY GO HELP HIM?
MR. BYRHOLDT: YOUR HONOR, CALLS FOR

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SPECULATION. SHE WAS NOT INSIDE THE TRAILER WHEN HE WAS SHOT.

THE COURT: WELL, I THINK YOU NEED TO LAY A FOUNDATION FOR THAT BEFORE YOU ASK THIS QUESTION. I'M GOING TO SUSTAIN THE OBJECTION.

Q TO YOUR KNOWLEDGE, DID THIS DEFENDANT LEAVE THE CAR AND GO HELP HIM?

A NO, MA'AM.

Q TO YOUR KNOWLEDGE, DID RONNIE JORDAN HELP MELVIN MILLER?

A NO, MA'AM.

Q TO YOUR KNOWLEDGE, DID ANY OF THE OTHERS IN THAT VEHICLE GO AND HELP THIS VICTIM?

A NO, MA'AM.

Q DO YOU REMEMBER TELLING THE POLICE IN THAT INITIAL STATEMENT, BEFORE YOU'D EVER ENTERED INTO ANY KIND OF AGREEMENT OR ANYTHING ELSE, THAT THEY ALL THOUGHT IT WAS FUNNY?

A YES, MA'AM.

Q WAS IT FUNNY, MS. TITMAN?

MR. BYRHOLDT: YOUR HONOR, THAT'S BEEN ASKED AND ANSWERED TWICE.

THE COURT: ALL RIGHT, I'M GOING TO SUSTAIN THE OBJECTION.

Q TO YOUR KNOWLEDGE, DID ANY OCCUPANT IN THAT VEHICLE

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EVER CALL FOR ASSISTANCE FOR MR. MILLER AFTER THIS OCCURRED?

A NO, MA'AM.

MR. BYRHOLDT: PLEASE THE COURT?

MS. WHITE: WAIT A MINUTE.

MR. BYRHOLDT: I'M SORRY.

MS. WHITE: THAT'S ALL.

REDIRECT EXAMINATION BY

MR. BYRHOLDT:

Q MS. TITMAN, MS. WHITE ASKED YOU ABOUT YOUR INITIAL STATEMENT. IN THE INITIAL STATEMENT YOU GAVE THE POLICE, YOU HAD ATTEMPTED SUICIDE AND WERE UNDER PSYCHO TROPIC DRUGS, CORRECT?

A YES, SIR.

Q DO YOU EVEN REMEMBER GIVING THAT STATEMENT?

A I DO NOW, BUT I DIDN'T FOR A WHILE.

Q YOU DO NOW, OR YOU'VE SEEN THE STATEMENT AND OTHER THAN SEEING THAT STATEMENT, YOU DON'T REALLY KNOW -

MS. WHITE: OBJECTION, LEADING. THIS IS HIS WITNESS.

THE COURT: ALL RIGHT, PLEASE REPHRASE IT. JUST ASK ONE QUESTION AT A TIME.

Q OTHER THAN REVIEWING A STATEMENT THAT THE POLICE CLAIM THAT YOU HAVE GIVEN, DO YOU HAVE ANY INDEPENDENT

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RECOLLECTION O EVER GIVING THAT STATEMENT?
A NO, SIR.
Q CAN YOU TELL THIS JURY, BASED ON YOUR MEMORY, WHAT WAS SAID IN THAT STATEMENT, OR EVEN IF YOU EVER GAVE A STATEMENT?
A BASED ON MY MEMORY OR FROM THE ACTUAL STATEMENT?
Q GIVING AN ACTUAL STATEMENT?
A NO, SIR.
Q NOW, MS. WHITE ASKED IF YOU OR ANYONE IN THE CAR RENDERED HELP. DID YOU KNOW OF YOUR OWN KNOWLEDGE IF MR. MILLER HAD BEEN INJURED FOR SURE OR NOT?
A YES, SIR.
Q DID YOU SEE HIM?
A NO, SIR.
Q WELL, THEN, HOW DID YOU KNOW OF YOUR OWN KNOWLEDGE?
A WELL, I WAS TOLD.
Q I'M NOT SAYING - NOT WHAT YOU WERE TOLD?
A NO, SIR.
Q SHE ASKED YOU, BEFORE LEAVING, WHETHER ANYBODY TRIED TO HELP HIM OR ANYTHING. YOU DIDN'T?
A (WITNESS SHAKES HEAD INDICATING NEGATIVE RESPONSE).
Q DID YOU NOW WHETHER YOU SHOULD?
A NO, SIR.
Q DID YOU KNOW FOR YOURSELF WHETHER HE WAS EVEN HURT?
A NO, SIR, I DIDN'T.

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Q I BELIEVE YOU TESTIFIED THAT YOU WERE TOLD THAT MS. KELSO WAS INJURED DURING THE STRUGGLE, THAT SHE WAS SHOT?
A YES, SIR.
Q FROM WHAT YOU OBSERVED, DO YOU KNOW WHETHER SHE WAS SHOT ON PURPOSE OF ACCIDENTALLY?
A NO, SIR, I DON'T KNOW. I WASN'T THERE.
Q BASED ON YOUR KNOWLEDGE OF WHAT YOU OBSERVED, DO YOU KNOW WHETHER MR. MILLER WAS SHOT DURING A STRUGGLE WITH THE GUN OR ACCIDENTALLY OR ANYTHING ELSE?
A NO, SIR.
Q WHO WAS INSIDE THE TRAILER WHEN THE SHOTS WENT OFF?
A I'M NOT SURE.
Q YOU DON'T KNOW?
A I'M NOT SURE EXACTLY.
Q WELL, WAS JENNIFER MCSHARRY?
A NO, SIR.
Q WERE YOU?
A NO, SIR.
Q AND YOU'RE NOT SURE ABOUT THE OTHER THREE PEOPLE?
A WELL, I MEAN, I DIDN'T - I HEARD THEM IN THERE. I MEAN, I CAN'T SAY THAT I JUST SAW THEM.
Q WHEN THE SHOTS WENT OFF, WHO WAS IN THE CAR?
A ME AND JENNIFER.
Q MS. WHITE ASKED YOU IF ANYONE FORCED YOU TO TAKE, USE

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COCAINE OR MARIJUANA?

A NO, SIR.

Q ON NOVEMBER 17TH OF 1997, WERE YOU ADDICTED TO COCAINE?

A YES, SIR.

Q DID YOUR BODY CRAVE COCAINE?

A YES, SIR.

Q IF COCAINE WAS AVAILABLE AND YOU COULD GET YOUR HANDS ON IT, WHAT WOULD YOU DO WITH IT?

A THEN, I WOULD HAVE SNORTED IT.

Q WAS THAT A VOLUNTARY CHOICE, OR DID YOUR BODY MAKE YOU ASK FOR IT?

MS. WHITE: OBJECTION, YOUR HONOR. THAT IS NOT THE DEFINITION OF VOLUNTARINESS.

MR. BYRHOLDT: I'M JUST ASKING HER -

THE COURT: I'M GOING TO OVERRULE THE OBJECTION AND LET HER ANSWER THE QUESTION.

A I DID IT BECAUSE I WANTED IT. I MEAN, IF THAT ANSWERS YOU.

Q BUT YOU WERE AN ADDICT?

A YES, SIR.

Q YOUR BODY CRAVED IT?

A YES, SIR.

Q YOU CRAVED IT?

MS. WHITE: OBJECTION TO LEADING.

Q DID YOU CRAVE IT?
A YES, SIR.
Q DURING THAT POINT IN YOUR LIFE, WOULD YOU DO ANYTHING TO GET IT?
A NO, SIR, I WOULDN'T SAY ANYTHING.
Q WAS IT ONE OF THE MOST IMPORTANT THINGS IN YOUR LIFE AT THAT POINT IN TIME, THE WEEK OF THE 17TH?
A YES, SIR.
Q MS. WHITE ASKED YOU WHETHER JENNIFER'S BROTHER OR SISTER WENT ON THIS SPREE.
A NO, SIR.
Q DID THEY EVEN KNOW ABOUT IT?
A NO, SIR.
Q WAS IT EVER DISCUSSED IN THEIR PRESENCE?
A NO, SIR.
Q HOW WELL DID YOU KNOW RENEE KELSO?
A PRETTY WELL.
Q AND WHAT WAS HER RELATIONSHIP LIKE WITH JENNIFER MCSHARRY?
A GOOD.
Q DID JENNIFER LOOK UP TO HER MOTHER?
A I GUESS SO.
Q FROM WHAT YOU OBSERVED DID IT APPEAR THAT WAY?
A YES, SIR.
Q WOULD SHE GO ALONG WITH HER MOTHER OR GO AGAINST HER

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MOTHER WHEN HER MOTHER SAID TO DO SOMETHING?
A SHE WOULD GO WITH WHAT HER MOTHER SAID.
Q WHAT WAS YOUR RELATIONSHIP WITH RENEE?
A PRETTY MUCH THE SAME WAY.
Q AND I BELIEVE I ASKED YOU ON DIRECT THAT YOU WERE UNDER THE INFLUENCE, THAT THE STATE YOU WERE IN THAT NIGHT, USING DRUGS, THAT YOU BELIEVED THEY WERE GOING TO COLLECT MONEY? DO YOU RECALL SAYING THAT?
A YES, SIR.
Q WAS THAT YOUR BELIEF IN THE CONDITION YOU WERE IN?
A YES, SIR.
Q IF THAT WAS YOUR BELIEF THEN YOU ANSWERED TO MS. WHITE WAS YOU KNEW THEY WERE GOING TO ROB SOMEBODY?
A YES, SIR.
Q WELL, WHICH ONE'S THE TRUTH?
A WE WERE ROBBING HIM, I MEAN.
Q I KNOW THAT'S WHAT HAPPENED, OR THAT'S WHAT THE STATE CLAIMS HAPPENED. DID YOU GO UP THERE THINKING YOU WERE COLLECTING MONEY, OR WERE YOU GOING UP THERE TO ROB SOMEBODY, YOU?
A ME? WE WERE GOING TO GO TO COLLECT IT BY ROBBERY.
Q OH, NOW, BY ROBBING HIM?
A YES, SIR.
Q NO FURTHER QUESTIONS OF THIS WITNESS.

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RECROSS EXAMINATION BY

MS. WHITE:

Q YOU TALKED ABOUT THE PRIOR STATEMENT, AND YOU SAID YOU DON'T HAVE MUCH OF A RECOLLECTION. THERE IS A TAPE RECORDING OF THAT, RIGHT?

A YES, MA'AM.

Q AND YOU SAID THAT YOU DIDN'T SEE THE VICTIM SHOT, BUT WHEN THE CO-CONSPIRATORS CAME BACK TO THE CAR, THEY TOLD YOU THEY HAD SHOT THE VICTIM, IS THAT RIGHT?

A YES, MA'AM.

Q AND THEY TOLD YOU THAT HE HAD BEEN SHOT WHILE HE WAS -

MR. BYRHOLDT: YOUR HONOR, I OBJECT TO THE PHRASE 'THEY.' YOU NEED TO IDENTIFY WHO SAID WHAT.

Q CO-DEFENDANTS? WHICH CO-DEFENDANTS?

A RENEE AND RONNIE, I BELIEVE.

MR. BYRHOLDT: I DIDN'T HEAR THE ANSWER.

A RENEE AND RONNIE.

Q NOW, MS. TITMAN, NO ONE HELD YOU AT GUNPOINT AND FORCED YOU TO GO ALONG WITH ANY OF THIS, DID THEY?

A NO, MA'AM.

Q AND NO ONE PUT THIS DEFENDANT AT GUNPOINT AND FORCED HER TO GO ALONG WITH IT EITHER, DID THEY?

A NO, MA'AM.

Q ANY OF YOU COULD HAVE STOPPED AT ANY TIME AND WALKED OUT OF THIS, ISN'T THAT RIGHT?

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A YES, MA'AM.
Q AND YOU WOULD AGREE THAT THE DEFENSE ATTORNEY ASKED YOU IF THE DEFENDANT HAD A GOOD RELATIONSHIP WITH HER MOTHER. THERE WAS NO PHYSICAL ABUSE, WAS THERE?
A NO, MA'AM.
MR. BYRHOLDT: OBJECT, YOUR HONOR, WHAT SHE KNOWS. SHE WOULD HAVE TO LAY A FOUNDATION.
THE COURT: YES, SOLICITOR, YOU NEED TO PUT THIS WITNESS IN A POSITION TO ANSWER THESE QUESTIONS.
Q HOW LONG HAVE YOU KNOWN THIS DEFENDANT?
A ALMOST A YEAR NOW, MAYBE A LITTLE BIT LONGER.
Q A YEAR NOW, OR A YEAR BEFORE THE CRIME OCCURRED?
A A YEAR NOW, PROBABLY. MAYBE A LITTLE LONGER.
Q ALL RIGHT, SO ABOUT THREE MONTHS OR SO BEFORE THE CRIME OCCURRED?
A YES, MA'AM.
Q AND DID YOU TALK TO THIS DEFENDANT AND SEE HER AROUND HER MOTHER? I THINK YOU SAID YOU LIVED THERE.
A YES, MA'AM.
Q AND DURING THE TIME THAT YOU SAW THEM TOGETHER, DID THIS DEFENDANT EVER COMPLAIN OF ANY SEXUAL ABUSE, PHYSICAL ABUSE, ANYTHING ELSE THAT HER MOTHER HAD DONE TO SCARE HER?
A NO, MA'AM.
Q DID THEY APPEAR TO HAVE A RELATIONSHIP WHERE THEY WERE

MORE LIKE FRIENDS?

A YES, MA'AM.

Q DID SHE APPEAR TO BE AFRAID OF HER MOTHER AT ALL?

A NO, MA'AM.

Q DID HER MOTHER FORCE HER TO GO ALONG WITH THIS THAT NIGHT, OR DID SHE, JUST LIKE YOU, GO ALONG WITH IT?

A WE JUST WENT ALONG WITH IT.

Q NOTHING FURTHER.

REDIRECT EXAMINATION BY

MR. BYRHOLDT:

Q ONE QUESTION. MS. TITMAN, IF YOU HAD BEEN STRAIGHT THAT NIGHT - DO YOU KNOW WHAT I MEAN BY STRAIGHT?

A ON NO DRUGS.

Q ON NO DRUGS. WOULD YOU HAVE DONE THIS?

MS. WHITE: OBJECTION TO RELEVANCE, YOUR HONOR.

THE COURT: IT'S SPECULATION. I'M GOING TO SUSTAIN THE OBJECTION.

ALL RIGHT, THE WITNESS MAY STEP DOWN.

LET ME SEE THE ATTORNEYS A MINUTE AND WE'LL TALK ABOUT THE LUNCH BREAK.

(WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE JURY AND COURT REPORTER)

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THE COURT: ALL RIGHT, YOU MAY CALL YOUR NEXT WITNESS.

MR. BYRHOLDT: CALL JAMEY MCSHARRY TO THE STAND, PLEASE.

CLERK: COME AROUND, PLEASE, MA'AM. PUT YOUR LEFT HAND ON THE BIBLE AND RAISE YOUR RIGHT.

DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE THE COURT AND JURY IN THE TRIAL OF THIS CASE WILL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

MS. MCSHARRY: I DO.

CLERK: HAVE A SEAT, PLEASE, MA'AM. IF YOU WOULD, STATE YOUR NAME. SPELL YOUR LAST NAME FOR THE RECORD, PLEASE.

MS. MCSHARRY: JAMEY MCSHARRY. M-C-S-A-R-R-Y.

COURT REPORTER: AND YOUR FIRST NAME?

MS. MCSHARRY: JAMEY. J-A-M-E-Y.

DIRECT EXAMINATION BY

MR. BYRHOLDT:

Q JAMEY, I'M GOING TO ASK YOU TO LOOK OVER HERE. HOW OLD ARE YOU?

A NINETEEN.

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Q WHAT'S YOUR DATE OF BIRTH?
A 3/14/78.
Q YOU'VE GOT A SOFT VOICE.
A 3/14 OF '78.
Q AND WHAT IS YOUR RELATIONSHIP WITH JENNIFER MCSHARRY?
A SHE'S MY SISTER.
Q AND YOUR RELATIONSHIP TO RENEE KELSO?
A SHE'S MY MOTHER.
Q AND THE GENTLEMAN SITTING AT THE COUNSEL TABLE WITH US, WHO'S THAT?
A MY FATHER.
Q AND WHERE DOES HE LIVE?
A IN ARIZONA.
Q AND THE GENTLEMAN ON THE FIRST ROW WITH THE BEARD, WHO IS THAT?
A THAT'S MY GRANDFATHER.
Q AND WHERE DOES HE LIVE?
A CALIFORNIA.
Q ON NOVEMBER 17TH OF LAST YEAR, WHERE DID YOU LIVE?
A JONESBORO, GEORGIA.
Q AND WHO ALL LIVED TOGETHER?
A MY MOTHER, RENEE KELSO. MY SISTER, JENNIFER MCSHARRY. MY BROTHER, JEFFREY MCSHARRY. AND MY UNCLE, BRETT HERZOG. AND ME.
Q AND HOW LONG HAD YOU - OR MS. KELSO IS YOUR MOTHER?

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A YES, SIR.
Q AND MR. MCSHARRY IS YOUR FATHER?
A YES, SIR.
Q HOW LONG HAD YOU RESIDED OR LIVED WITH MS. KELSO?
A ABOUT THREE AND A HALF YEARS.
Q ALL RIGHT. PRIOR TO THAT, HAD YOU LIVED WITH YOUR FATHER?
A YES, SIR.
Q AND WHEN YOU QUIT LIVING WITH YOUR FATHER AND WENT WITH YOUR MOTHER, ABOUT HOW OLD WERE YOU?
A WHEN I QUIT LIVING WITH MY FATHER? I BELIEVE I WAS FIFTEEN.
Q AND WHAT'S THE DIFFERENCE IN AGE BETWEEN YOU AND JENNIFER, YOUR SISTER JENNIFER? HOW OLD IS SHE?
A SHE'S SEVENTEEN.
MS. WHITE: YOUR HONOR, I DIDN'T HEAR THAT ANSWER.
MR. BYRHOLDT: SEVENTEEN.
Q IN THE TIME THAT YOU LAST LIVED WITH YOUR FATHER, MOVED IN WITH YOUR MOTHER, CAN YOU DESCRIBE FOR THE JURY WHAT YOU, YOUR SISTER AND YOUR MOTHER'S LIFESTYLE WAS?
MS. WHITE: YOUR HONOR, OBJECTION. THAT HAS NO RELEVANCE IN THIS CASE.
THE COURT: WHAT IS THE QUESTION, NOW? AT

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WHAT TIME ARE WE TALKING ABOUT?

MR. BYRHOLDT: WE'RE TALKING ABOUT THE LAST TWO AND A HALF YEARS, WHEN THEY LIVED WITH THEIR MOTHER, WHAT THEIR LIFESTYLE WAS.

THE COURT: AND RELEVANCE?

MR. BYRHOLDT: YOUR HONOR, IT GOES TO STATE OF MIND AS TO THE DEFENDANT TO SHOW BACKGROUND.

THE COURT: ALL RIGHT, I'M GOING TO SUSTAIN THE OBJECTION ON THE LAST TWO AND A HALF YEARS. I THINK THAT WOULD BE WAY OUTSIDE OF RELEVANCE AS TO THIS CASE.

Q ALL RIGHT, WELL, LET'S START WITH NOVEMBER THE 17TH, THE WEEK PRIOR TO THAT, DID YOU OBSERVE THE LIFESTYLE THAT YOUR MOTHER AND SISTER JENNIFER WERE LEADING AT THAT TIME?

MS. WHITE: YOUR HONOR, I'M GOING TO OBJECT AGAIN. THAT HAS NO RELEVANCE AS TO WHAT HAPPENED THE NIGHT OF THIS ROBBERY.

THE COURT: OKAY, I'M GOING TO OVERRULE THAT OBJECTION. YOU CAN GO INTO THIS.

A COULD YOU REPEAT THE QUESTION

Q ON NOVEMBER THE 17TH AND THE WEEK BEFORE THAT, WHAT WAS YOUR SISTER'S LIFESTYLE LIKE?

A IT WAS BASED ABOUT DRUGS. I WORKED AND SUPPORTED HER. SHE WAS ALWAYS HIGH WHEN I CAME HOME, WITH MY MOM.

Q WAS YOUR MOTHER WORKING?
A NO.
Q WERE YOU THE ONLY ONE IN THE FAMILY WORKING?
A YES, SIR.
Q AND WHEN YOU WOULD COME HOME, WHAT KIND OF CONDITION WOULD YOUR SISTER AND MOTHER BE IN?
A HIGH OFF DRUGS.
Q DID YOU SEE YOUR SISTER AND MOTHER USE DRUGS TOGETHER?
A YES, SIR.
Q WAS THIS SOMETHING THAT HAD JUST RECENTLY STARTED OR HAD BEEN GOING ON FOR A WHILE?
A IT HAD BEEN GOING ON FOR A WHILE.
Q A SHORT WHILE OR A LONG TIME?
A A LONG TIME.
Q AND AT THIS TIME, HOW OLD WERE YOU AT THAT TIME LAST YEAR?
A EIGHTEEN.
Q AND YOU WERE THE FINANCIAL SUPPORT OF THE FAMILY?
A YES, SIR.
Q AND IN THE RELATIONSHIP IN YOUR FAMILY, WHO WAS ACTING AS THE MOTHER OR THE PROVIDER?
A I WAS.
Q AND THAT'S AT AGE EIGHTEEN?
A WELL, SINCE I WAS SIXTEEN, OR WHEN MY MOTHER LEFT US.
Q HOW OLD IS YOUR MOTHER?

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A THIRTY-EIGHT.
Q BUT YOU WERE THE PROVIDER?
A YES, SIR.
Q ON THE NIGHT OF NOVEMBER 17TH, THE EVENING BEFORE, DID YOU SEE YOUR SISTER?
A YES, SIR.
Q WHEN THEY LEFT JONESBORO OR LEFT YOUR HOUSE, DID ANYONE MENTION TO YOU THAT THEY WERE GOING TO SOUTH CAROLINA?
A NO, SIR.
Q WHAT IMPRESSION WERE YOU UNDER? WHERE DID YOU THINK THEY WERE GOING?
A I HAD ASKED MY SISTER AND SHE SAID THAT HER AND JENNIFER TITMAN WERE GOING TO A FRIEND'S HOUSE NAMED JAMAL.
Q WHAT WAS HER CONDITION? DESCRIBE JENNIFER MCSHARRY'S PHYSICAL CONDITION THE LAST TIME YOU SAW HER THE NIGHT OF THE 17TH OR THE NIGHT OF THE 16TH AND THE MORNING OF THE 17TH BEFORE THIS EPISODE IN SOUTH CAROLINA?
A I KNOW JENNIFER AND MY MOTHER HAD BEEN HIGH OFF COCAINE FOR ABOUT A WEEK AND HADN'T SLEPT OR ATE.
Q WAS YOUR SISTER ADDICTED TO COCAINE?
A YES, SIR.
Q WOULD ANYONE IN YOUR FAMILY, THE FAMILY THAT WAS TOGETHER THERE ON NOVEMBER 17TH, 1995, STAND UP TO

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YOUR MOTHER AND TELL HER NO?
A ONLY ME. ME AND MY MOM DIDN'T GET ALONG VERY WELL.
Q WOULD JENNIFER?
A NO. SHE WAS ALWAYS BY MY MOM.
Q DO YOU KNOW WHETHER OR NOT YOUR SISTER LOOKED UP TO HER MOTHER AS A ROLE MODEL?
A YEAH, BECAUSE SHE NEVER HAD A MOTHER, A BIOLOGICAL MOTHER IN HER LIFE, AND WHEN SHE FINALLY DID COME AROUND, SHE GRABBED ONTO IT AND NEVER SEEN ANYTHING ELSE.
Q JAMEY, SINCE THIS HAPPENED BACK IN NOVEMBER, HAS YOUR MOTHER TAKEN ANY RESPONSIBILITY FOR ANY OF THIS?
A NO, SIR.
Q IS YOUR MOTHER ALIVE NOW?
A YES, SIR.
Q DO YOU KNOW WHERE SHE IS?
A SHE'S IN THE WOMEN'S CORRECTIONAL CENTER INSTITUTE IN COLUMBIA FOR THE REST OF HER LIFE.
MS. WHITE: OBJECTION, YOUR HONOR.
THE COURT: ALL RIGHT, I THINK THE QUESTION WAS WHERE DID SHE LIVE.
Q DO YOU SEE HER?
A NO, SIR.
Q ON MARCH 17TH OF LAST YEAR, WAS JENNIFER ADDICTED TO COCAINE AND MARIJUANA?

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THE COURT: ALL RIGHT, I'M GOING TO INTERRUPT. I THINK YOU SAID MARCH THE 17TH.

MR. BYRHOLDT: I APOLOGIZE. NOVEMBER 17TH?

A YES, SIR.

Q WAS YOUR SISTER A DRUG ADDICT?

A YES, SIR.

Q DO YOU KNOW WHAT THE MOST IMPORTANT THING IN HER LIFE WAS AT THAT POINT IN TIME?

A DRUGS.

Q WOULD THAT BE TRUE OF EVERY ASPECT OF HER LIFE?

A YES, SIR.

Q IF YOU WOULD ANSWER ANY QUESTIONS MS. WHITE OR JUDGE HALL WOULD HAVE FOR YOU, PLEASE, JAMEY.

CROSS EXAMINATION BY

MS. WHITE:

Q MS. MCSHARRY, SO WHEN YOU WERE SIXTEEN, YOU WERE WORKING?

A YES, SIR - YES, MA'AM.

Q YOU WERE SAYING NO TO YOUR MOTHER?

A YES, MA'AM.

Q YOU WERE SUPPORTING THE FAMILY?

A YES, MA'AM.

Q AND YOU WERE SIXTEEN YEARS OLD?

A YES, MA'AM.

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Q AND NOW YOU'RE NOT SAYING THAT YOUR SISTER ONLY DID DRUGS BECAUSE OF YOUR MOTHER, ARE YOU?
A WELL, THAT'S HOW SHE WAS INTRODUCED TO DRUGS, BY MY MOTHER.
Q WELL, YOUR MOTHER HAS BEEN IN JAIL FOR QUITE SOME TIME, HASN'T SHE?
A NO.
Q WELL, SHE WAS IN PRISON FOR THREE YEARS PRIOR TO THIS?
A BUT THAT WAS WHEN WE WAS FIVE AND FOUR YEARS OLD.
Q I'M TALKING ABOUT THE LAST YEAR OR SO, SINCE THIS CRIME, SINCE HER ARREST SHE'S BEEN IN JAIL?

MR. BYRHOLDT: YOUR HONOR, WHAT'S HAPPENED AFTER THIS CRIME WAS COMMITTED IS NOT RELEVANT.

MS. WHITE: YOUR HONOR, IT IS IF HE'S SAYING SHE DID DRUGS BECAUSE OF HER MOTHER.

THE COURT: WELL, LET'S JUST CONFINE IT UP UNTIL THE TIME OF THE ARREST AND NOT GO AFTER THE ARREST.

MS. WHITE: YOUR HONOR, I HAVE A MATTER TO TAKE UP OUTSIDE THE PRESENCE OF THE JURY, THEN.

THE COURT: ALL RIGHT, MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, PLEASE GO TO THE JURY ROOM. DO NOT DISCUSS THE CASE. PLEASE LEAVE YOUR PAD IN THE CHAIR.

(WHEREUPON, THE JURY EXITS THE

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COURTROOM: 12:58 P.M.)

THE COURT: LET ME ASK THE SOLICITOR, WHAT IS THE QUESTION YOU WANT TO ASK OF THE WITNESS?

MS. WHITE: YOUR HONOR, THE DEFENSE HAS BROUGHT OUT THAT SHE DID DRUGS BECAUSE OF HER MOTHER, DID THEM WITH HER MOTHER, ET CETERA, PAINTED THIS PICTURE SHE'S UNDER HER MOM'S CONTROL.

SINCE THE MOTHER HAS BEEN IN JAIL, SHE HAS BEEN ARRESTED TWO TIMES AND WE HAD TO GET HER OUT -

THE COURT: JUST A MINUTE, THOUGH. I BELIEVE, BASED ON WHAT I'VE HEARD ABOUT THE CASE, THE MOTHER'S BEEN IN JAIL ON MORE THAN ONE OCCASION -

MS. WHITE: YES, SIR.

THE COURT: SO YOU NEED TO PIN THIS DOWN. WHEN ARE WE TALKING ABOUT?

MS. WHITE: IN THE LAST YEAR, WHILE MAMA HAS BEEN IN JAIL, SINCE THE TIME THIS CRIME OCCURRED, THIS DEFENDANT HAS BEEN ARRESTED TWICE FOR USE OF DRUGS.

AND I THINK THEY'VE OPENED THE DOORS. THEY'RE TRYING TO CHARACTERIZE THIS AS THE CHILD ONLY DOES DRUGS WHEN HER MOTHER IS AROUND, WHEN, IN FACT, HER MOTHER'S BEEN LOCKED UP, HASN'T BEEN ANYWHERE NEAR HER, AND SHE'S USED DRUGS SINCE THEN.

MR. BYRHOLDT: WELL, YOUR HONOR, SHE'S BEEN ARRESTED. SHE'S BEEN CONVICTED OF NOTHING.

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MS. WHITE: WELL, I'M GOING TO ASK THE WITNESS, THEN, HAS SHE USED DRUGS? BECAUSE SHE WAS WITH HER ONE TIME WHEN SHE WAS ARRESTED. SHE'S OPENED THE DOOR TO THAT.

THE COURT: ALL RIGHT, WE'RE GOING TO KEEP OUT OF THE TRIAL OF THIS CASE ANY ARRESTS OR WHATEVER SUBSEQUENT TO NOVEMBER THE 17TH OF 1996.

I WILL ALLOW HER TO ASK THIS WITNESS IF SHE'S BEEN AROUND THE DEFENDANT AND HAS SEEN HER USING ANY DRUGS.

MR. BYRHOLDT: AS LONG AS SHE'S LIMITED TO THAT, YOUR HONOR.

THE COURT: LET'S JUST STAY AWAY FROM ANY ARRESTS OR ANYTHING SINCE NOVEMBER THE 17TH OF 1996. ALL RIGHT, YOU MAY BRING IN THE JURY.

(WHEREUPON, THE JURY ENTERS THE COURTROOM: 1:00 P.M.)

THE COURT: YOU MAY CONTINUE.

CONTINUED CROSS EXAMINATION BY

MS. WHITE:

Q NOW, MS. MCSHARRY, YOU SAID THAT YOUR SISTER USED DRUGS WHEN YOUR MOTHER WAS AROUND, BUT YOUR MOTHER HAS BEEN IN JAIL FOR APPROXIMATELY A YEAR NOW, IS THAT CORRECT?

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MR. BYRHOLDT: YOUR HONOR, I'M GOING TO OBJECT. THAT'S NOT WHAT SHE SAID, SHE USED IT WHEN HER MOTHER WAS AROUND.

MS. WHITE: YOUR HONOR, THAT IS WHAT HE SPECIFICALLY ASKED HER, WOULD THEY USE DRUGS TOGETHER.

THE COURT: WHY DON'T WE DO THIS. LET'S MAKE THIS A TWO-PART QUESTION SO THE WITNESS WILL UNDERSTAND. GIVE A POINT OF REFERENCE SO A WITNESS WILL KNOW WHAT TIME YOU'RE TALKING ABOUT.

Q DURING THE LAST YEAR, YOUR MOTHER HAS BEEN IN JAIL, APPROXIMATELY SINCE SHE WAS ARRESTED FOR THIS CRIME?

A YES, MA'AM.

Q AND AFTER YOUR MOTHER WAS ARRESTED FOR THE CRIME, SHE HAS BEEN IN JAIL SINCE THAT TIME, ISN'T THAT CORRECT?

A YES, MA'AM.

Q SO YOUR SISTER HAS NOT BEEN IN JAIL THAT WHOLE TIME, ISN'T THAT CORRECT? SHE WAS OUT ON BOND?

A AFTER SIX MONTHS IN JAIL.

Q AND SINCE THAT TIME THAT SHE HAS NOT BEEN AROUND YOUR MOTHER, ISN'T IT TRUE THAT SHE HAS USED DRUGS AGAIN?

A YES, MA'AM.

Q SO IN FACT, YOUR MOTHER IS NOT THE ONE WHO GETS HER TO USE DRUGS, IS THAT CORRECT?

A YES, MA'AM. I SAID MY MOTHER INTRODUCED MY SISTER TO DRUGS.

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Q NOW, YOU ALL HAD LIVED WITH YOUR FATHER PRIOR TO COMING OUT TO YOUR MOTHER, IS THAT CORRECT?
A YES, MA'AM.
Q AND THERE WAS NOTHING TO PREVENT ANYBODY FROM PICKING UP THE PHONE AND CALLING YOUR FATHER, WAS THERE?
A NO.
Q AND YOU WOULD AGREE THAT YOUR MOTHER DID NOT PHYSICALLY ABUSE OR MOLEST OR ANYTHING ELSE YOUR SISTER, THE DEFENDANT?
A NO, MA'AM.
Q SO SHE WOULD NOT HAVE BEEN AFRAID OF YOUR MOTHER, WOULD SHE?
A I WOULD GUESS NOT.
Q NOW, YOU WERE PRESENT, YOU HAVE BEEN PRESENT IN THE COURTROOM ON PREVIOUS OCCASIONS IN OTHER TRIALS OF OTHERS, IS THAT CORRECT?
A YES, MA'AM.
Q AND YOUR SISTER WAS PRESENT HERE, TOO, WASN'T SHE?
A YES, MA'AM.
Q SHE WAS DRESSED WITH LONG BLACK FINGERNAILS, BLACK LIPSTICK AND LONG STRAIGHT HAIR AT PREVIOUS OCCASIONS, WASN'T SHE -
MR. BYRHOLDT: YOUR HONOR, I WOULD OBJECT.
A ARE YOU TALKING ABOUT -
THE COURT: WHAT'S THE RELEVANCE OF DRESS?

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MS. WHITE: YOUR HONOR, THEY'RE TALKING ABOUT HER AGE.

THE COURT: SO?

MS. WHITE: AND I'M JUST ESTABLISHING THAT SHE WAS -

THE COURT: ALL RIGHT, I'M GOING TO SUSTAIN THE OBJECTION. WE'RE NOT GOING TO GO INTO THAT. I DON'T THINK IT WOULD BE RELEVANT TO THE TRIAL OF THIS CASE.

Q WELL, WE'VE SEEN TEARS IN THIS CASE. DID WE SEE ANY TEARS IN THE COURTROOM WHEN THEY WERE TALKING ABOUT THE VICTIM AT OTHER TIMES?

A YES, MA'AM.

Q FROM THIS DEFENDANT?

A YES.

Q YOU WOULD AGREE THAT YOUR SISTER VOLUNTARILY CAME WITH YOUR MOTHER TO SOUTH CAROLINA, DIDN'T SHE?

A NO, I WOULD NOT AGREE WITH THAT.

Q WHO HELD A GUN TO HER HEAD?

A DIDN'T NOBODY HOLD A GUN TO HER HEAD. MY MOM HAD THESE WAYS WITH MY SISTER.

Q AND WHEN YOU WERE SIXTEEN, THOUGH, YOU COULD SAY NO AND SUPPORT THE FAMILY, IS THAT RIGHT?

A YES, MA'AM, I COULD.

Q THANK YOU.

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REDIRECT EXAMINATION BY

MR. BYRHOLDT:

Q JAMEY, IS THAT THE DIFFERENCE BETWEEN YOU AND YOUR SISTER?

A YES, SIR.

Q WOULD YOU STAND UP TO YOUR MOTHER?

A YES, SIR. WE USUALLY GOT INTO ARGUMENTS.

Q AND AT ANY TIME DID YOU EVER OBSERVE JENNIFER STAND UP TO HER MOTHER AND TELL HER NO?

A NO, SIR.

MR. BYRHOLDT: THAT'S ALL I WOULD HAVE, YOUR HONOR.

RECROSS EXAMINATION BY

MS. WHITE:

Q SO IT HAD NOTHING TO DO WITH AGE, DID IT? BECAUSE YOU WOULD STAND UP TO HER AND THAT'S WHY YOU ARE NOT HERE TODAY AS A DEFENDANT, IS THAT RIGHT?

A YEAH, PLUS I WAS NOT AWARE THEY WERE GOING TO SOUTH CAROLINA FOR THIS.

Q YOUR SISTER COULD HAVE COME TO YOU TO STAND UP TO YOUR MOTHER ON HER BEHALF, COULDN'T SHE?

A SHE COULD'VE, I SUPPOSE.

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REDIRECT EXAMINATION BY

MR. BYRHOLDT:

Q WAS SHE STRAIGHT OR WAS SHE HIGH ON DRUGS ON THAT NIGHT?

A MY SISTER WAS HIGH ON DRUGS.

Q THANK YOU.

THE COURT: ALL RIGHT, YOU MAY STEP DOWN.

MADAM FOREPERSON AND LADIES AND GENTLEMEN OF THE JURY, WE'LL BREAK FOR LUNCH AT THIS TIME. WHILE YOU ARE AWAY, DO NOT DISCUSS THE CASE AMONG YOURSELVES OR WITH ANYONE ELSE.

SHOULD THERE BE A REPORT IN A NEWSPAPER OR SIMILAR PUBLICATION, A REPORT ON RADIO OR TELEVISION ABOUT THIS CASE OR THE TRIAL OF THIS CASE, DO NOT READ, LISTEN TO, OR VIEW THOSE REPORTS. YOU ARE TO BASE YOUR VERDICT IN THIS CASE SOLELY ON THE EVIDENCE AND THE LAW THAT YOU RECEIVE IN THIS COURTROOM.

WHEN YOU RETURN FROM LUNCH, PLEASE REPORT DIRECTLY TO THE JURY ROOM. PLEASE DO NOT COME IN THE COURTROOM.

PLEASE LEAVE YOUR PADS IN THE CHAIR.

EVERYONE ELSE PLEASE REMAIN IN YOUR SEATS. THE JURY IS EXCUSED UNTIL 2:30 FOR LUNCH.

(WHEREUPON, THE JURY EXITS THE COURTROOM: 1:05 P.M.)

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THE COURT: ALL RIGHT, WE'LL BE IN RECESS UNTIL 2:30 P.M.

(LUNCHEON RECESS)

THE COURT: IS THE STATE READY?

MS. WHITE: YES, SIR.

THE COURT: IS THE DEFENDANT READY?

MR. BYRHOLDT: YES, SIR.

THE COURT: ALL RIGHT, YOU CAN BRING IN THE JURY.

(WHEREUPON, THE JURY ENTERS THE COURTROOM: 2:40 P.M.)

THE COURT: ALL RIGHT, YOU MAY CALL YOUR WITNESS.

MR. BYRHOLDT: AT THIS POINT WE WOULD CALL RENEE KELSO TO THE STAND.

CLERK: COME AROUND, PLEASE. PLACE YOUR LEFT HAND ON THE BIBLE AND RAISE YOUR RIGHT HAND.

DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE THE COURT AND JURY IN THE TRIAL OF THIS CASE WILL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH?

MS. KELSO: I DO.

CLERK: HAVE A SEAT IN THE WITNESS CHAIR, PLEASE. STATE YOUR NAME AND SPELL YOUR LAST NAME FOR

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THE RECORD.

MS. KELSO: MY NAME IS LOU RENEE KELSO, K-E-L-S-O.

DIRECT EXAMINATION BY

MR. BYRHOLDT:

Q MS. KELSO, I'M GOING TO ASK YOU TO SPEAK UP SO THIS LAST GENTLEMAN IN THE JURY BOX CAN HEAR YOU.

MS. WHITE: YOUR HONOR, MAY WE APPROACH THE BENCH?

THE COURT: YES.

(WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE JURY AND THE COURT REPORTER)

Q MS. KELSO, YOU ARE CURRENTLY HOUSED AT THE WOMEN'S CORRECTIONAL INSTITUTE?

A YES, I AM.

Q YOU HAVE BEEN CONVICTED ON CERTAIN CHARGES, IS THAT TRUE?

A YES, SIR.

Q AND YOUR CASE IS CURRENTLY ON APPEAL?

A YES, IT IS.

Q DO YOU UNDERSTAND THAT ANY - THAT YOU HAVE BEEN SWORN TO TELL THE TRUTH AND THAT ANY TESTIMONY YOU GIVE TODAY COULD BE USED AGAINST YOU IF YOUR CONVICTIONS

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WERE OVERTURNED AND YOU WERE GRANTED A NEW TRIAL? DO YOU UNDERSTAND THAT?

A YES, I DO.

Q IS IT YOUR INTENTION TODAY TO INVOKE YOUR FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION?

A NO, IT ISN'T.

Q YOU WERE CONVICTED IN A TRIAL, I BELIEVE IN THIS COURTROOM?

A YES.

Q ON THE CHARGES OF MURDER?

A YES.

Q BURGLARY FIRST DEGREE?

A YES.

Q ARMED ROBBERY?

A YES.

Q CONSPIRACY?

A YES.

Q AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A CRIME?

A CORRECT.

Q THE SAME CHARGES FOR WHICH YOUR DAUGHTER IS ON TRIAL THIS WEEK?

A YES, SIR.

Q THE DAYS PRIOR TO LEAVING GEORGIA ON NOVEMBER 17TH, 1996, LAST YEAR, WHO HAD BEEN LIVING AT YOUR

RESIDENCE?

A MY CHILDREN. I HAVE THREE CHILDREN. AND MY BROTHER. AND JENNIFER TITMAN.

Q COULD YOU SPEAK UP? I'M SORRY.

A OKAY. MY THREE CHILDREN.

Q AND THAT WOULD BE JENNIFER?

A AND JAMEY AND JEFFREY.

Q AND YOU HAVE A SON?

A YES.

Q AND JENNIFER TITMAN?

A AND JENNIFER TITMAN.

Q AND YOUR BROTHER?

A AND MY BROTHER.

Q DURING THE WEEK PRIOR TO NOVEMBER 17TH, OR INCLUDING THAT WEEK, WERE YOU ENGAGED IN THE USE OF ILLEGAL DRUGS, INCLUDING MARIJUANA AND COCAINE?

A YES, I WAS.

Q WAS YOUR DAUGHTER, LIKEWISE, USING ILLEGAL DRUGS?

A YES, SHE WAS.

Q IN YOUR HOME?

A YES, SHE WAS.

Q ON THE NIGHT OF THE INCIDENT OR THE NIGHT PRIOR, STARTING THE NIGHT OF THE 16TH, INTO THE MORNING OF THE 17TH, CAN YOU DESCRIBE TO THE JURY THE CONDITION THAT YOU OBSERVED YOUR DAUGHTER IN?

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A I DON'T THINK THAT HER AND JENNIFER WERE - I DON'T THINK ANY OF US WERE REALLY - I KNOW WE WERE OUT FOR DAYS. WE HAD BEEN GOING THROUGH A WHOLE LOT IN OUR LIVES AT THAT POINT, AND IT SEEMED LIKE DRUGS WERE VERY HEAVY IN OUR LIVES. I WAS DEALING COCAINE AT THE TIME.

Q FOR THE DAYS PRIOR TO THAT, WERE YOU EATING REGULARLY?

A NO.

Q WERE YOU SLEEPING REGULARLY?

A NO.

Q WHAT WAS -

A NOTHING WAS NORMAL. WE DIDN'T HAVE A NORMAL LIFE, NO.

Q WHAT WERE YOU, JENNIFER TITMAN, AND YOUR DAUGHTER JENNIFER MCSHARRY DOING?

A PRETTY MUCH SNORTING COCAINE.

Q LATE THE EVENING OF THE 16TH AND THE MORNING OF THE 17TH, DID YOU TALK TO YOUR DAUGHTER ABOUT GOING TO SOUTH CAROLINA?

A I'D ALREADY THOUGHT ABOUT IT, AND I HAD TOLD HER THAT I WAS GOING TO GO AND GET SOME MONEY THAT WAS OWED TO ME.

Q AND IF YOU WOULD, TELL THE JURY WHAT YOU TOLD YOUR DAUGHTER WAS GOING TO HAPPEN.

A I TOLD HER THAT I WAS GOING TO GO THERE AND WE DIDN'T REALLY TALK A WHOLE LOT UNTIL WE WERE IN THE CAR

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GOING, REALLY, OTHER THAN WE WERE JUST GOING TO GO THERE AND GET SOME MONEY THAT WAS OWED TO ME BY MELVIN MILLER, AND ON THE WAY DOWN THERE IS WHEN I TOLD JENNIFER, MY DAUGHTER AND JENNIFER TITMAN THAT WHEN WE GO THERE, I HAD HAD A WARRANT OUT FOR MY ARREST FOR SOME REASON. I WAS SCARED TO GO DURING THE DAY BECAUSE CALVIN MOORE, THE POLICE OFFICER, HAD KNOWN ME VERY WELL AND COULD SPOT ME JUST LIKE ANYTHING.

AND I WAS AFRAID OF, BELIEVE IT OR NOT, BOUNCED CHECKS. SO WE WENT AT NIGHT. THAT'S WHY WE WENT AT NIGHT.

AND I HAD MADE THE COMMENT THAT WHEN WE GOT DOWN THERE THAT I WOULD WANT THEM TO GO AND KNOCK ON THE DOOR AND WAKE HIM UP AND SEE IF HE WAS ALONE, ASK TO USE THE PHONE, JUST TO MAKE AN EXCUSE TO BE THERE, TO SAY THAT WE WERE LOST OR SOMETHING LIKE THAT.

Q AND THAT WAS WHAT YOU ASKED YOUR DAUGHTER?

MS. WHITE: OBJECTION, LEADING. THIS IS HIS WITNESS.

A YES.

Q IS THAT OR IS THAT NOT WHAT YOU ASKED YOUR DAUGHTER JENNIFER AND JENNIFER TITMAN TO DO?

A THAT'S WHAT I DID ASK THEM TO DO.

Q DID YOU ASK THEM TO DO ANYTHING ELSE?

A NO.

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Q APPARENTLY AT SOME TIME, YOUR DAUGHTER LEFT THE RESIDENCE. DID YOU GO IN?
A I - THINGS WERE KIND OF HAZY AT THAT TIME. AS FAR AS I KNOW THEY WERE NOT IN THERE WHEN I FINALLY DID GET IN THERE, RONNIE AND JASON WERE BOTH IN THERE ALREADY. I WAS THE LAST ONE TO ENTER.
Q WHEN YOU WENT IN THERE, MR. MILLER WAS IN THERE?
A YES.
Q YOU WERE IN THERE?
A YES.
Q BY BEING IN THERE, IN THE TRAILER?
A YES.
Q RONNIE AND JASON?
A THAT'S CORRECT.
Q WERE ANY OF YOU INJURED AT THAT POINT?
A NO.
Q DID AN ALTERCATION TAKE PLACE?
A YES, IT DID.
Q WERE YOU INJURED?
A YES, I WAS.
Q HOW WERE YOU INJURED?
A I WAS SHOT IN THE HAND WHEN I WENT TO GO REACH FOR THE GUN.
Q WAS YOUR SHOOTING, DO YOU THINK YOUR SHOOTING WAS, FROM WHAT YOU SAW, ON PURPOSE OR ACCIDENTAL?

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A I'LL BE HONEST WITH YOU, MR. BYRHOLDT, I'M NOT REALLY SURE. AT THAT TIME, IT WAS FAST. I WENT TO REACH FOR THE GUN. IT HAD GOTTEN OUT OF HAND. IT WAS NOT WHAT I HAD PLANNED TO DO AND EVERYTHING GOT TOO FAST OUT OF HAND AND WHAT I MEAN BY THAT IS WHEN I WENT TO GO GET THE GUN, IT WAS A CLOSE RANGE BETWEEN RONNIE AND MEL AT THE TIME, AND I WAS RIGHT IN BETWEEN THEM.

Q WHY WERE THEY AT CLOSE RANGE?

A THE CAMPER WAS VERY SMALL.

Q WAS THERE A STRUGGLE BETWEEN THE TWO OF THEM?

A NO, NOT AT THAT TIME, THERE WASN'T. WHEN I WENT TO GET THE GUN, IT SEEMED, RIGHT WHEN I WENT TO REACH FOR THE GUN, THE GUN WENT OFF AND IT HIT MY HAND, WENT THROUGH MY HAND.

Q ALL RIGHT.

A THEN I TURNED AROUND. THINGS WERE - I MEAN, I DIDN'T PASS OUT, BUT THINGS WERE KIND OF FOGGY AND I TURNED AROUND AND I HEARD TWO SHOTS. WHEN I TURNED BACK AROUND THERE WAS NOBODY IN THE CAMPER.

Q DID YOU SEE THOSE SHOTS?

A NO, SIR.

Q DID YOU HEAR ANY STRUGGLING GOING ON?

A NO, SIR.

Q BETWEEN MR. MILLER AND THE PERSON WITH THE GUN?

A NO, SIR.

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Q YOU SAW NO STRUGGLE?

A I SAW NOTHING. LIKE I SAID, WHEN I GOT SHOT, I TURNED AROUND JUST OUT OF, I BELIEVE, INSTINCTS OR, I'M NOT SURE. BUT WHEN THE GUN HIT ME, WHEN I GOT SHOT, I JUST TURNED AROUND, AND WHEN I TURNED AROUND, THAT'S WHEN IT SEEMED LIKE, WITHIN SECONDS - I'M SURE IT WAS LONGER THAN THAT NOW - BUT WHEN I DID TURN BACK AROUND THERE WAS NOBODY THERE. I HEARD TWO GUNSHOTS. I DID NOT KNOW WHO WAS GOING TO COME BACK THROUGH THE CAMPER OR IF IT WAS GOING TO BE RONNIE OR IF IT WAS GOING TO BE MELVIN.

Q DID YOU HEAR ANY WORDS OF ANGER PASS BETWEEN RONNIE AND MELVIN, EITHER WAY?

A NO, SIR.

Q WHO PUT THIS GROUP TOGETHER?

A IT WASN'T REALLY PUT TOGETHER. IT WAS ACTUALLY I WANTED JENNIFER TITMAN TO COME BECAUSE I DIDN'T WANT TO BE IN SOUTH CAROLINA WITHOUT - WITH ME DRIVING. I WANTED ANOTHER DRIVER. BECAUSE LIKE I SAY, YOU KNOW, I HAVE WARRANTS HERE. I WAS DEATHLY AFRAID OF BEING LOCKED UP.

Q WAS THERE OR WAS THERE NOT AN AGREEMENT BETWEEN YOU, YOUR DAUGHTER, RONNIE, JASON, AND/OR JENNIFER TO ENGAGE IN ANY ILLEGAL ACTIVITY?

A WAS THERE AN AGREEMENT? NO, SIR.

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Q DID YOU USE YOUR DAUGHTER TO GAIN ENTRANCE INTO MR. MILLER'S HOME TO ROB HIM?

A NO, SIR. I DID USE MY DAUGHTER, I CAN SAY THAT. I DIDN'T MEAN TO USE HER LIKE THAT, BUT I DID USE HER.

Q AND ON THE TRIP UP FROM GEORGIA TO SOUTH CAROLINA, WHAT KIND OF CONDITION WAS SHE IN?

A STONED, LOADED.

Q DID SHE HALLUCINATE?

A YEAH. SHE TOLD ME THE NEXT DAY WHEN I WAS IN THE HOSPITAL, SHE WAS THERE WITH ME. HER AND JENNIFER TITMAN BOTH HAD TOLD ME THAT THEY HAD SEEN MEN JUMPING OUT OF THE FREEWAY IN LITTLE THINGS AND THEY SAID THAT THEY HAD SEEN QUITE A BIT. THAT THEY WERE HALLUCINATING.

MR. BYRHOLDT: BEG THE COURT'S INDULGENCE. (PAUSE).

Q LET ME HAND YOU WHAT'S BEEN MARKED INTO EVIDENCE AS STATE'S EXHIBIT NUMBER 2 AND STATE'S EXHIBIT NUMBER 3 AND ASK YOU IF THOSE ITEMS BELONG TO YOU?

A YES, THEY DO.

Q AND, MS. KELSO, DID YOU ASK YOUR DAUGHTER TO GO TO SOUTH CAROLINA WITH YOU THAT NIGHT?

A YES, I DID.

Q DID YOU ASK HER TO CHECK ON MR. MILLER IN THE HOUSE?

A YES, SIR.

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Q AND WAS THERE EVER AN AGREEMENT TO ROB ANYBODY THAT THIS LADY KNEW ABOUT?

A NO, THERE WASN'T. I WASN'T GOING TO ROB ANYBODY. THE MAN OWED ME MONEY.

Q ON NOVEMBER 17TH OF 1996, MS. KELSO, WHAT KIND OF MOTHER WERE YOU BEING?

A NOT A VERY GOOD ONE, SIR, NOT AT ALL.

Q WILL YOU ANSWER ANY QUESTIONS MS. WHITE OR JUDGE HALL MAY HAVE FOR YOU?

CROSS EXAMINATION BY

MS. WHITE:

Q COCAINE IS NOT AN HALLUCINOGENIC DRUG, IS IT?

A I'M NOT REALLY SURE. I'M NOT A PHARMACIST.

Q WELL, WOULDN'T YOU THINK IT WAS A LITTLE UNUSUAL THAT TWO PEOPLE ON THE SAME DRUG WOULD HAVE THE SAME HALLUCINATION?

A I'M NOT REALLY SURE.

Q YOU SAID THERE WAS NO PLAN TO COMMIT A ROBBERY, IS THAT CORRECT?

A NO, THERE WAS NO PLAN.

Q IF THERE WAS NO PLAN TO COMMIT A ROBBERY, MA'AM, WHY DID YOU AND MR. JORDAN AND JASON GET OUT OF THE CAR AND HAVE THE TWO YOUNG GIRLS DRIVE UP IN THE MIDDLE OF THE NIGHT TO THE VICTIM'S HOUSE?

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A I DON'T REMEMBER IT LIKE THAT.
Q WELL, WHY DID YOU TAKE OFF YOUR SHOES THAT MAKE NOISE?
A THEY WERE HURTING ME. THAT'S WHY I TOOK MY SHOES OFF.
Q SO YOU LEFT THEM BEHIND THE VICTIM'S CAR?
A YEAH.
Q WELL, WHY DIDN'T YOU JUST WALK UP TO YOUR CAR THAT WAS PARKED RIGHT THERE?
A THEY WERE RIGHT NEXT TO EACH OTHER.
Q I'M SORRY?
A THEY WERE RIGHT NEXT TO EACH OTHER.
Q WELL, I KNOW. THAT'S MY POINT.
A I DON'T KNOW.
Q WHY DIDN'T YOU JUST WALK UP? WHY WOULD YOU LEAVE THEM IN THE PITCH DARK BEHIND SOMEONE'S CAR? WAS IT BECAUSE YOU WERE AFRAID THE VICTIM WOULD SEE YOU?
A NO.
Q NO, IT WASN'T BECAUSE OF THAT?
A NO.
Q WELL, WHY DID YOU CUT HOLES IN THE STOCKING MASK ON THE WAY UP THERE?
A I DIDN'T HAVE A SKI MASK.
Q I'M SORRY?
A I SAID I DIDN'T HAVE A SKI MASK.
Q WELL, WHY IS IT THAT RON JORDAN HAD A GUN OUT ON THE WAY UP THERE?

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A I NEVER SAW THE GUN.
Q ARE YOU AWARE THAT DURING THE INVESTIGATION, ALL OTHER FOUR DEFENDANTS GAVE FULL STATEMENTS?
A I GUESS SO.
Q AND YOU DENY -
A I THINK, I'M NOT REALLY SURE.
Q - THAT RON JORDAN AND THE OTHERS -
A EXCUSE ME?
Q WELL, WHY WOULD YOU GO TO COLLECT MONEY AT THREE A.M.?
A LIKE I SAID, IT WAS LATE WHEN WE LEFT OUT ANYWAY, BUT I WAS GOING AT NIGHT BECAUSE I DIDN'T WANT TO BE SEEN DURING THE DAY.
Q WELL, WHY DIDN'T YOU KNOCK ON THE DOOR AND SAY, 'WHERE'S MY MONEY?'
A WELL, BECAUSE I HAD MADE A FEW PEOPLE MAD THERE BY CUTTING THEM OFF FROM COCAINE, AND A LOT OF PEOPLE WERE MAD AND A LOT OF PEOPLE TURN ON YOU, AND I WASN'T REALLY SURE WHETHER HE HAD COMPANY OR IF HE DIDN'T HAVE COMPANY.
Q WELL, A LOT OF PEOPLE WEREN'T OUT AT HIS HOUSE.
A WELL, A LOT OF TIMES THERE ARE.
Q AND SO HE HAD A PHONE. WHY DIDN'T YOU JUST CALL HIM AND TELL HIM?
A I TRIED TO CALL HIM AT ONE TIME.
Q WELL, WHY DID Y'ALL CUT THE LINE?

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A I DIDN'T KNOW THAT THERE WAS A LINE CUT.
Q BUT YOU WERE JUST GOING TO GO GET THIS MONEY?
A YES, MA'AM.
Q WHY DID YOU HAPPEN TO PICK THE TWO PEOPLE OUT OF THE FIVE THAT WERE THE YOUNG FEMALES THAT WOULD BE LEAST SUSPICIOUS?
A I DIDN'T REALLY PICK ANYBODY LIKE THAT. IT WAS NOT LIKE THAT.
Q DO YOU REMEMBER GETTING RONNIE JORDAN AND TELLING MR. JORDAN THAT YOU NEED A CRIME PARTNER?
A NO. I CAN COMMIT A LOT OF CRIMES IN ATLANTA, GEORGIA, IF THAT WAS THE CASE.
Q DO YOU REMEMBER TELLING RONNIE JORDAN THAT YOU NEEDED TO DO THIS BECAUSE A GUY OWED YOU MONEY AND HE DESERVED TO DIE?
A NOT AT ALL. THAT'S A LIE.
Q YOU CHANGED CARS SO THAT THE POLICE WOULDN'T PULL YOU OVER FOR THE TAIL LIGHT, DIDN'T YOU?
A THAT'S NOT TRUE.
Q WHY DID YOU CHANGE CARS?
A IT WAS THE HEADLIGHT WAS OUT.
Q AND YOU CHANGED CARS SO YOU WOULDN'T GET PULLED OVER BY THE POLICE, DIDN'T YOU?
A I CHANGED CARS BECAUSE THE HEADLIGHT WAS BROKE OUT. THE LIGHT BEAMS WAY OUT. YOU CAN'T DRIVE WITHOUT

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HEADLIGHTS.
Q IF YOU WEREN'T PLANNING ON COMING UP HERE AND COMMITTING A CRIME, WHY DIDN'T YOU JUST TELL YOUR FRIEND FROM WHOM YOU BORROWED THE CAR WHERE YOU WERE GOING?
A I DON'T REMEMBER THAT I DIDN'T.
Q WHY DID YOU TELL HER YOU WERE GOING SHOPPING INSTEAD OF SAYING YOU WERE COMING TO BORROW SOME MONEY?
A I DON'T REMEMBER TELLING HER THAT.
Q AND WHILE YOU WERE DRIVING, YOU GOT A SKI MASK OUT AND CUT HOLES, ISN'T THAT RIGHT?
A WHILE I WAS DRIVING, NO, MA'AM.
Q DIDN'T YOU DO THAT IN FRONT OF RONNIE JORDAN?
A NO, MA'AM.
Q NOW, WHEN YOU ALL CAME IN AND YOU SAID YOU WERE THE THIRD IN, ISN'T THAT TRUE?
A WELL, I WAS THE LAST ONE TO COME INTO THE TRAILER.
Q AND AT THAT POINT, RONNIE JORDAN HAD THE GUN TO MR. MILLER'S HEAD, IS THAT CORRECT?
A HE HAD THE GUN TO HIM. I DON'T REMEMBER IT BEING TO HIS HEAD.
Q AND HE AND JASON WERE PILFERING AROUND IN THE TRAILER?
A NO.
Q AND YOU DID, TOO, DIDN'T YOU?
A NO, THAT'S NOT TRUE. IT WAS JASON THAT WAS DOING THE

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PILFERING IN THE TRAILER.
Q AND YOU TOLD HIM TO GO TO THE NEXT TRAILER AS WELL?
A THAT'S NOT TRUE.
Q TO MAKE SURE NO ONE WAS THERE, ISN'T THAT CORRECT?
A THAT'S NOT TRUE.
Q DO YOU DENY THAT?
A I DENY THAT.
Q OH, WELL, OKAY. ONCE YOU REALIZED THAT IT WAS AN ARMED ROBBERY, WHY DO YOU FIGURE THAT THEY DECIDED TO DO AN ARMED ROBBERY WITHOUT TELLING YOU ABOUT THIS?
A I DON'T THINK THAT THERE WAS A DECISION PROCESS BEING MADE AT ALL. I THINK, MS. WHITE, THAT THINGS GOT OUT OF HAND REALLY FAST. I DON'T THINK IT WAS A PLANNED ROBBERY. I DON'T THINK IT'S ANYTHING LIKE YOU'RE SAYING IT WAS LIKE, NO, MA'AM.
Q SO YOU JUST HAPPENED TO PUT A SKI MASK ON BECAUSE -
A AS I SAID, I DIDN'T HAPPEN TO DO ANY OF THAT. IT WASN'T LIKE THAT.
Q WHY DID RONNIE JORDAN, THOUGH HE HAD NEVER MET THIS MAN AND DIDN'T KNOW WHERE HE LIVED, WHY WOULD HE JUST HAPPEN TO PULL OUT A GUN AND RUN IN SCREAMING ABOUT A ROBBERY?
A I'M NOT SURE. I'M NOT REALLY SURE. THAT'S NOT EVEN TRUE. I WAS THERE. AND THAT'S NOT TRUE, WHAT YOU'RE SAYING. I CAN TELL YOU THAT MUCH.

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Q OH, IT'S NOT TRUE?
A IT'S NOT TRUE THAT HE WAS YELLING ROBBERY. I BELIEVE THE BOY THOUGHT AT THAT TIME HE WAS DOING ME A FAVOR. I'M NOT REALLY SURE, TO BE HONEST WITH YOU.
Q WHY DO YOU THINK HE WOULD BE DOING YOU A FAVOR BY ROBBING SOMEONE?
A I'M NOT SURE. I DON'T SEE THE ROBBERY PART IN THERE, BUT I THINK THAT DEMANDING THE MONEY PART WAS.
Q AND NOW, AS YOU ALL WERE TRYING TO GET HIM TO GO TO AN A.T.M. MACHINE, THAT'S WHEN THE VICTIM BEGAN STRUGGLING, DIDN'T HE, WHEN HE SAW THE CAR OUT THERE AND SAW THESE PEOPLE?
A NO, MA'AM.
Q AS HE STEPPED OUT THE DOOR, THAT'S WHEN IT BEGAN, DIDN'T IT?
A NO, MA'AM.
Q AND AT THAT POINT, YOU WERE THE ONE HOLDING HIS ARM BACK?
A NO, MA'AM, I NEVER TOUCHED MELVIN MILLER AT ALL. NEVER.
Q WHEN HE WAS STRUGGLING FOR THE GUN?
A NO, MA'AM.
Q YOU NEVER FORCED HIS OWN ARM BEHIND HIS BACK?
A NO, MA'AM. IT WAS ME THAT WAS GOING FOR THE GUN, NOT HIM.

Q AND IN FACT, AFTER THE SHOOTING, YOU RAN INTO THE CAR, DIDN'T YOU, AND SAID THAT YOU WERE GLAD HE HAD BEEN SHOT, HE DESERVED IT?

A THAT'S NOT TRUE. THAT IS NOT TRUE.

Q BECAUSE HE WOULDN'T GIVE YOU THE MONEY?

A THAT IS NOT TRUE. ABSOLUTELY NOT. I HAVE NO REASON TO LIE HERE TODAY. I'VE GOT TWO HUNDRED AND FORTY-FIVE YEARS, MS. WHITE, AND I'M NOT GOING TO BURN IN HELL, SO I'M NOT GOING TO SIT UP HERE AND LIE TO YOU OR THIS JURY OR ANYONE ELSE.

Q YOU HAVE -

A I'M ALREADY SOMEWHERE I'D REALLY RATHER NOT BE.

Q NOW, AFTER THAT, YOU WENT TO WHAT, THE EMERGENCY ROOM TO HELP THE VICTIM, OR DID YOU CALL THE POLICE, OR WHO DID YOU CALL?

A NO, I DID NOT. NO, I DID NOT.

Q WHO DID YOU CALL, EXACTLY?

A I CALLED THE WOMAN THAT I BORROWED THE CAR FROM.

Q WELL, NOW, THAT WAS THE NEXT DAY. I'M TALKING ABOUT THAT NIGHT AFTER YOU HAD SEEN THE VICTIM SHOT AND LYING THERE.

A NO, I NEVER SAW HIM. I NEVER SAW HIM. I NEVER SAW HIM.

Q YOU KNEW HE WAS SHOT, OBVIOUSLY. YOU HAD TO WALK OUT OVER HIS BODY, DIDN'T YOU?

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A NO, I DID NOT WALK OUT OVER HIS BODY, NO, MA'AM, IT WAS NOT LIKE THAT.
Q WELL, LET'S PUT IT THIS WAY, LET'S SKIP OVER THAT.
WHICH AGENCY DID YOU CALL -
A I CALLED NONE.
Q - TO COME HELP YOUR FRIEND?
A I CALLED NONE, ABSOLUTELY, I DIDN'T CALL ANY. I PANICKED.
Q NOW, LET'S GO TO JASON CONLEY.
JASON WASN'T ORIGINALLY GOING TO COME, WAS HE? HE JUST HAPPENED TO COME BY THAT NIGHT?
A YES, HE DID.
Q AND THE PLAN THAT YOU PLANNED WITH HIM AND THE OTHERS WAS THAT THE GIRLS WOULD LET YOU KNOW THAT THE VICTIM WAS THE ONLY ONE THERE, THEY WOULD GIVE SOME KIND OF SIGNAL AND THEN YOU THREE WOULD GO IN, BUST THROUGH THE DOOR, AND POKE THE GUN AT HIM? WASN'T THAT THE PLAN?
A I DON'T REMEMBER ANYTHING LIKE THAT. NO, I DO REMEMBER THE GIRLS WERE GOING TO GO IN AND COME BACK OUT AND TELL US, BUT I DON'T REMEMBER SIGNALING US TO BUST THE DOOR IN. WE'RE TALKING ABOUT A TEENY, TINY MOBILE HOME YOU CAN PULL BEHIND A CAR.
Q SO YOU THOUGHT THIS CAMPER THAT WAS PITCH DARK WOULD BE FULL OF PEOPLE, EVEN THOUGH -

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A USUALLY HE HAD COMPANY. YES, USUALLY HE DID HAVE COMPANY AND IT USUALLY WAS PEOPLE THAT I KNEW.

Q AND I GUESS MOST OF THOSE PEOPLE PROBABLY WALKED, CONSIDERING HE LIVED WAY OUT IN THE COUNTRY. THEY DIDN'T HAVE CARS THAT THEY WOULD PARK AROUND HIS CAMPER?

A I'M NOT REALLY SURE. A LOT OF PEOPLE DON'T HAVE VEHICLES. A LOT OF THEM DO GO ON THEIR OWN.

Q AND THEN THE JENNIFERS WERE SUPPOSED TO GO IN. ONE WAS GOING TO BUST THROUGH THE DOOR AFTER THEY CAME OUT. RON WAS GOING TO BUST IN THE DOOR AND POINT THE GUN AT HIM?

A NO.

Q ISN'T THAT CORRECT?

A NO, MA'AM.

Q NOW, AFTER THE SHOOTING OCCURRED, DO YOU REMEMBER LAUGHING ABOUT IT WITH YOUR DAUGHTER AND JASON CONLEY AND RON JORDAN?

A I DON'T THINK SO. MY HAND WAS BLOWN WIDE OPEN. I DON'T REMEMBER LAUGHING AT ALL. I'VE NOT LAUGHED SINCE THEN.

Q AND YOU ALL TOOK THE SHOTGUN, IS THAT RIGHT?

A NO, WE ALL DIDN'T. JASON DID.

Q YOU WERE ALL TOGETHER WHEN THAT WAS TAKEN, IS THAT CORRECT?

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A NO, I DIDN'T EVEN KNOW THE SHOTGUN WAS THERE UNTIL WE GOT TO RAY HENDERSON'S HOUSE. THAT'S WHEN I KNEW A SHOTGUN WAS THERE, ALONG WITH HIS WALLET. I DIDN'T KNOW ANYTHING ABOUT THAT UNTIL WE GOT TO RAY HENDERSON'S HOUSE.

Q YOU TOOK THE MONEY FROM THE WALLET, DIDN'T YOU?

A NO, MA'AM, THAT WAS JASON CONLEY.

Q ALL RIGHT, LET'S GO TO JENNIFER TITMAN. DO YOU RECALL ON THE WAY UP THERE ASSIGNING HER THE ROLE OF GOING IN WITH YOUR DAUGHTER?

A YES, I DO.

Q DO YOU AGREE THAT ANY OF THE FIVE OF YOU COULD HAVE JUST SAID, 'WE DON'T WANT ANY PART OF THIS,' AT ANY TIME, ISN'T THAT RIGHT?

A IT WASN'T LIKE THAT. IT JUST WAS NOT LIKE THAT.

Q WELL, YOU WOULD AGREE THERE WAS A NEIGHBOR SIXTY FEET AWAY, THAT IF SOMEBODY HAD WANTED TO GO STOP SOMETHING THEY COULD HAVE GONE FOR HELP NEXT-DOOR, MADE A PHONE CALL AND STOPPED IT AT ANY TIME, IS THAT RIGHT?

A I DON'T THINK THEY REALLY KNEW THERE WAS ANYBODY THERE.

Q WELL, THEY COULD HAVE CHECKED. THAT'S AN IDEA, ISN'T IT?

A THAT'S ONE OF MANY.

Q ANY OF YOU COULD HAVE NOT PARTICIPATED IN THIS IF YOU

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HAD WANTED TO, ISN'T THAT TRUE?

A I DON'T THINK THAT IT WAS LIKE THAT. LIKE I SAY, IT WASN'T A PLANNED THING TO WHERE YOU COULD SAY WELL, LET'S NOT GO THROUGH THIS PLANS. IT WASN'T PLANNED LIKE THAT.

Q WELL, A CLUE MIGHT HAVE BEEN WHEN RONNIE JORDAN CAME IN THE DOOR, PUT THE GUN TO THE MAN'S HEAD AND STARTED SCREAMING AT HIM -

A AS I TELL YOU, I WAS NOT IN THERE AT THE TIME. THE TWO GIRLS WERE NOT IN THERE AT THE TIME. I WAS NOT IN THERE AT THE TIME. I CAME IN AFTERWARDS.

Q WHEN DID THEY USE MR. HENDERSON'S PHONE? HE HAS A PHONE, DOESN'T HE?

A THEY DIDN'T USE IT, I DID.

Q WHY DIDN'T YOU USE THE PHONE TO CALL EMERGENCY SERVICES?

A THEY DIDN'T USE IT, I DID. I DON'T THINK THEY WERE IN A STATE OF MIND. THEY HAD BEEN FOR DAYS ON COCAINE, THE TWO YOUNG CHILDREN.

Q THAT WAS VOLUNTARY CHOICE, TO USE COCAINE, WASN'T IT?

A I DON'T KNOW THE ANSWER. I'M NOT REAL PROUD OF IT, MS. WHITE.

Q THEY VOLUNTARILY CHOSE TO DO THAT, DIDN'T THEY?

A I DON'T KNOW, SHE JUST TURNED SEVENTEEN. THAT'S KIND OF HARD TO SAY, AND I AM HER MOTHER. IT'S NOT A VERY

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GOOD INFLUENCE, IF YOU ASK ME.
Q DID YOU SAY THAT YOU CALLED MELVIN MILLER ABOUT THIS LOAN?
A IT'S BEEN A WHILE, YES.
Q IS IT A LONG DISTANCE TELEPHONE CALL?
A YES, IT'S BEEN QUITE SOME TIME.
Q HOW FAR AHEAD OF THIS WAS IT?
A OH, IT'S BEEN A LONG TIME. I CAN'T EVEN TELL YOU. IT'S BEEN A LONG TIME.
Q IT WOULDN'T HAVE SHOWN UP ON HIS PHONE RECORDS, WOULD IT, A FEW MONTHS AROUND THIS, THEN?
A NO, NO.
Q SO YOU WEREN'T THE ONE IN CHARGE HERE, IS WHAT YOU ARE SAYING?
A OH, I DIDN'T SAY THAT. I DON'T THINK ANYONE WAS IN CHARGE. YOU'RE MAKING IT SOUND LIKE I WAS A MA BARKER DEAL. IT'S NOT ANYTHING LIKE THAT.
Q SO IT'S JUST NOBODY'S FAULT, REALLY?
A I'M NOT SAYING I HAVE NO RESPONSIBILITY. I'M DOING TWO HUNDRED AND FORTY-FIVE YEARS, MS. WHITE. I THINK I'M DOING MY SHARE, I REALLY DO.
Q MY QUESTION, THEN, IF YOU'RE NOT RESPONSIBLE -
A I'M RESPONSIBLE.
Q - AND RONNIE JORDAN'S NOT RESPONSIBLE, WHO KILLED MELVIN MILLER?

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MR. BYRHOLDT: OBJECT, YOUR HONOR, ARGUMENTATIVE. THERE'S NO REASON FOR THAT.

A RONNIE JORDAN DID.

THE COURT: JUST A MINUTE. I'M GOING TO OVERRULE THE OBJECTION AND INSTRUCT THE WITNESS TO ANSWER THE QUESTION.

A RONNIE JORDAN KILLED HIM.

Q AND COULD RONNIE JORDAN HAVE KILLED HIM, MA'AM, IF YOU DID NOT GIVE HIM DIRECTIONS TO HIS HOUSE AND IF SHE DID NOT GO IN AND FIND OUT THAT HE WAS ALONE TO -

A I'M NOT RESPONSIBLE FOR RONNIE JORDAN. I'M NOT RESPONSIBLE FOR HIM. FROM WHAT I UNDERSTAND, HE HAS A LONG RAP SHEET, TOO.

Q NO FURTHER QUESTIONS.

THE COURT: REDIRECT?

REDIRECT EXAMINATION BY

MR. BYRHOLDT:

Q WHEN JENNIFER MCSHARRY, YOUR DAUGHTER, AND WHEN JENNIFER TITMAN LEFT THE HOUSE, NONE OF THIS HAD STARTED YET, IS THAT TRUE?

A THAT'S CORRECT.

Q NOTHING FURTHER.

THE COURT: DOES ANYONE OBJECT TO THE WITNESS BEING EXCUSED?

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MS. WHITE: NO.

THE COURT: ALL RIGHT, THE WITNESS IS EXCUSED.

MR. BYRHOLDT: CALL MR. MCSHARRY TO THE STAND.

CLERK: COME AROUND, PLEASE, SIR. PUT YOUR LEFT HAND ON THE BIBLE AND RAISE YOUR RIGHT.

DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE THE COURT AND JURY IN THE TRIAL OF THIS CASE TO BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

MR. MCSHARRY: I DO.

CLERK: HAVE A SEAT, PLEASE, SIR. IF YOU WOULD, STATE YOUR NAME AND SPELL YOUR LAST.

MR. MCSHARRY: MY NAME IS JEFFREY ALAN MCSHARRY. M-C-S-H-A-R-R-Y.

DIRECT EXAMINATION BY

MR. BYRHOLDT:

Q MR. MCSHARRY, WHERE DO YOU LIVE?

A I LIVE IN TUCSON, ARIZONA.

Q ALL RIGHT, AND HOW LONG HAVE YOU LIVED THERE?

A ABOUT SEVEN YEARS NOW.

Q AND YOU ARE THE FATHER OF JENNIFER AND JAMEY MCSHARRY?

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A THAT'S CORRECT.
Q AND WHEN DID THEY LAST RESIDE WITH YOU? DO YOU RECALL JENNIFER'S AGE?
A IT WAS THREE YEARS AGO, SO IT WOULD BE ABOUT SIXTEEN, FIFTEEN.
Q AND WHEN SHE LIVED WITH YOU - ARE YOU MARRIED NOW?
A I AM MARRIED, YES.
Q WHEN SHE WAS LIVING WITH YOU, WERE YOU ALSO MARRIED OR WERE YOU A SINGLE PARENT?
A LAST LIVING WITH ME, I WAS MARRIED.
Q AND YOU WERE FORMERLY MARRIED TO MS. KELSO, THE LADY WHO JUST TESTIFIED?
A THAT'S CORRECT.
Q WHEN YOU WERE LIVING IN ARIZONA, DID YOU HAVE LEGAL CUSTODY OR DID MS. KELSO HAVE LEGAL CUSTODY?
A I HAD LEGAL CUSTODY OF ALL THREE CHILDREN.
Q AND I TAKE IT AT SOME POINT IN TIME THERE WAS A DECISION MADE WITH THE CHILDREN TO GO WITH THEIR MOTHER?
A THAT'S CORRECT.
Q DURING THE TIME YOU WERE MARRIED TO MS. KELSO, WAS SHE IN TROUBLE?

MS. WHITE: YOUR HONOR, I'M GOING TO OBJECT.

MR. BYRHOLDT: I'LL WITHDRAW IT.

THE COURT: ALL RIGHT, THE QUESTION IS

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WITHDRAWN.

Q CAN YOU TELL ME THE TYPE OF RELATIONSHIP JENNIFER MCSHARRY HAD WITH HER MOTHER, RENEE KELSO?

MS. WHITE: OBJECTION, YOUR HONOR, HE HADN'T SEEN HER FOR TWO AND A HALF YEARS, APPARENTLY. I'D ASK FOR A TIME FRAME.

THE COURT: I'M GOING TO SUSTAIN THE OBJECTION ON RELEVANCE.

MR. BYRHOLDT: ALL RIGHT, YOUR HONOR, I HAVE A PROFFER TO MAKE OUTSIDE THE PRESENCE OF THE JURY.

THE COURT: ALL RIGHT. MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, PLEASE GO TO THE JURY ROOM. DO NOT DISCUSS THE CASE. LEAVE YOUR PADS IN YOUR CHAIRS.

(WHEREUPON, THE JURY EXITS THE COURTROOM: 3:11 P.M.)

MR. BYRHOLDT: THE ONLY REASON I'M MAKING THE PROFFER FOR THE RECORD, YOUR HONOR, I THINK IT'S IMPORTANT TO ESTABLISH THE BACKGROUND AND THE UPBRINGING THIS CHILD HAD, AND I KNOW THE COURT'S ESSENTIALLY LIMITING ME TO WHAT HAPPENED A WEEK OR SO BEFORE THIS INCIDENT.

THE COURT: NO, THAT HAD TO DO WITH DRUG USE. I LIMITED YOU ON DRUG USE A WEEK BEFORE.

MR. BYRHOLDT: WELL, I'M TRYING TO ESTABLISH

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THE RELATIONSHIP, AND I THINK IT GOES TO, YOU KNOW, WHAT THEY HAD THERE. JAMEY TESTIFIED WHAT THE RELATIONSHIP WAS WITH HER FATHER DURING THE TIME THEY WERE LIVING HERE. I WANT TO SHOW WHAT IT WAS LIKE BEFORE THAT. I THINK IT'S RELEVANT TO SHOW THE CHANGES IN HER. THAT'S WHY I WAS ASKING HER ABOUT WHEN THEY LIVED IN ARIZONA.

MS. WHITE: CHANGES IN THE RELATIONSHIP ARE NOT RELEVANT BECAUSE THE RELATIONSHIP IS NOT RELEVANT, THEN, YOUR HONOR.

THE COURT: WHAT WOULD BE THE RELEVANCE? MAYBE I MISUNDERSTOOD, BUT THIS WITNESS, I BELIEVE, TESTIFIED THAT THE DEFENDANT HAD NOT LIVED WITH HIM FOR THE LAST TWO AND A HALF YEARS.

MR. BYRHOLDT: THAT'S TRUE, BUT HE KNOWS THE CONDITION SHE WAS IN WHEN SHE LEFT AND THE CONDITION HE FOUND HER IN FOR ABOUT THE LAST YEAR.

MS. WHITE: WHAT RELEVANCE -

THE COURT: HOW IS THAT RELEVANT TO THESE CRIMES?

MR. BYRHOLDT: TO SHOW THE CHANGES MADE IN THIS CHILD'S LIFE WHEN SHE WENT TO LIVE WITH HER MOTHER.

MS. WHITE: YOUR HONOR, THE WHY SHE DID IT IS NOT IMPORTANT. THE QUESTION IS DID SHE DO IT OR NOT,

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AT THIS POINT. NOW, MAYBE IN SENTENCING, YES. BUT THIS IS DID SHE DO IT, NOT WHY.

THE COURT: AND WHAT IS THE QUESTION YOU WANT TO POSE TO THIS WITNESS?

MR. BYRHOLDT: WHETHER HIS CHILD HAD ANY PROBLEMS WITH SCHOOL, DRUGS, OR ANYTHING ELSE WHILE LIVING WITH HIM IN ARIZONA. I JUST WANT TO DO IT FOR THE RECORD.

THE COURT: THAT'S THE QUESTION YOU WANT TO ASK, I'LL LET YOU ASK THAT ONE QUESTION. AND THEN WE'RE GOING TO MOVE ON TO SOMETHING ELSE BECAUSE I BELIEVE YOU SAID HE HAD NOT LIVED WITH THE CHILD, OR SHE HAD NOT LIVED WITH HIM FOR APPROXIMATELY TWO AND A HALF YEARS PRIOR TO THIS CRIME OR THESE CRIMES.

MR. BYRHOLDT: I UNDERSTAND.

DIRECT IN-CAMERA EXAMINATION BY MR. BYRHOLDT:

Q DURING THE TIME YOUR DAUGHTERS, JENNIFER AND JAMEY LIVED WITH YOU, DID YOUR DAUGHTER JENNIFER HAVE ANY PROBLEM WITH DRUG USAGE, PROBLEMS AT SCHOOL, OR BEHAVIORAL PROBLEMS WHILE LIVING WITH YOU?

A NONE WHATSOEVER. SHE WAS AN A AND B STUDENT.

THE COURT: I'LL LET YOU ASK THAT AND THEN WE'LL MOVE ON TO SOMETHING ELSE.

MR. BYRHOLDT: THAT'S IT.

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THE COURT: ALL RIGHT, THEN YOU CAN BRING IN THE JURY.

(WHEREUPON, THE JURY ENTERS THE COURTROOM: 3:14 P.M.)

THE COURT: ALL RIGHT, YOU MAY CONTINUE.

CONTINUED DIRECT EXAMINATION BY

MR. BYRHOLDT:

Q MR. MCSHARRY, I'M GOING TO ASK YOU TO SPEAK UP.

BACK WHEN JENNIFER AND HER SISTER WERE LIVING WITH YOU, TWO AND A HALF OR THREE YEARS AGO, DID YOU HAVE ANY BEHAVIORAL PROBLEMS WITH JENNIFER, EITHER WITH DRUG USAGE, POOR SCHOOL WORK OR ANYTHING LIKE THAT?

A NO, SIR, WE DID NOT. SHE WAS AN A AND B STUDENT AT SCHOOL AND DRUGS WERE NOT ALLOWED IN THE HOUSE.

Q DID YOU AS A FATHER ATTEMPT TO PROVIDE A GOOD, STABLE HOME FOR HER?

A YES.

Q AND EVEN NOW, OR IN THE FUTURE, ARE YOU WILLING TO DO THAT AGAIN?

A I WOULD LOVE THAT OPPORTUNITY.

Q IF YOU WOULD, ANSWER ANY QUESTIONS MS. WHITE OR JUDGE HALL WOULD HAVE.

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CROSS EXAMINATION BY

MS. WHITE:

Q AND THEY KNEW YOUR PHONE NUMBER, DIDN'T THEY?

A YES, THEY DID.

Q AND ALL THEY HAD TO DO WAS PICK UP THE PHONE AND TEL YOU WHAT WAS HAPPENING AND YOU WOULD HAVE GOTTEN THEM OUT OF THAT LIKE ANY GOOD FATHER WOULD, ISN'T THAT RIGHT?

A YES, I WOULD.

Q THANK YOU.

THE COURT: ANYTHING ELSE?

MR. BYRHOLDT: THAT'S ALL.

THE COURT: YOU MAY STEP DOWN.

MR. BYRHOLDT: IF WE MAY APPROACH THE BENCH?

(WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE JURY AND THE COURT REPORTER)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY, THERE IS A MATTER I NEED TO TAKE UP OUTSIDE OF YOUR PRESENCE, AND WE WILL USE THIS FOR A BREAK. SO IF YOU WANT SOME REFRESHMENTS, LET THE BAILIFF KNOW.

ONCE AGAIN, DO NOT DISCUSS THIS CASE. PLEASE LEAVE YOUR PAD IN THE CHAIR.

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(WHEREUPON, THE JURY EXITS THE COURTROOM: 3:17 P.M.)

THE COURT: MR. BYRHOLDT?

MR. BYRHOLDT: MAY IT PLEASE THE COURT, IT'S MY INTENTION THE DEFENSE WILL REST. I WANT TO CALL MS. MCSHARRY BACK TO THE STAND AND QUESTION HER ON HER RIGHT TO TESTIFY OR NOT TESTIFY.

THE COURT: ALL RIGHT, IF SHE WOULD COME AROUND AND ASK THE CLERK TO PLEASE ADMINISTER THE OATH TO THE WITNESS.

CLERK: PUT YOUR LEFT HAND ON THE BIBLE AND RAISE YOUR RIGHT HAND.

DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE THE COURT TO BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

MS. MCSHARRY: YES.

CLERK: HAVE A SEAT IN THE WITNESS CHAIR.

THE COURT: MR. BYRHOLDT, I'LL QUESTION HER FIRST, IF YOU DON'T MIND, AND THEN I'LL BE GLAD TO GIVE YOU AN OPPORTUNITY TO QUESTION HER ON THIS POINT.

MR. BYRHOLDT: NO PROBLEM.

THE COURT: ALL RIGHT, WOULD YOU STATE YOUR FULL NAME FOR THE RECORD, PLEASE?

A JENNIFER LEE MCSHARRY.

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THE COURT: WOULD YOU TELL US YOUR AGE?

A SEVENTEEN.

THE COURT: AND TELL US ABOUT YOUR EDUCATIONAL BACKGROUND?

A I WENT TO THE TENTH GRADE AND I DROPPED OUT.

THE COURT: OKAY. ARE YOU IN GOOD HEALTH?

A YES, SIR.

THE COURT: ARE YOU TAKING ANY KIND OF MEDICATION?

A NO, SIR.

THE COURT: AND ARE YOU TODAY UNDER THE INFLUENCE OF ANY ALCOHOLIC BEVERAGE, ANY DRUGS OR OTHER SUBSTANCES?

A NO, SIR.

THE COURT: I WANT TO GO OVER WITH YOU YOUR RIGHTS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

I NOW ADVISE YOU THAT YOU HAVE THE RIGHT TO INVOKE THE PROTECTIONS GIVEN YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND A SIMILAR COUNTERPART PROVISION TO THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROVIDES IN PART THAT NO PERSON SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST

HIMSELF.

THIS PROVISION OF CONSTITUTIONAL LAW MEANS THAT YOU CANNOT BE COMPELLED, WHICH MEANS FORCED, OR REQUIRED TO TESTIFY IN THIS CASE. THIS IS A RIGHT AND A PRIVILEGE THAT THE LAW EXTENDS TO YOU. THIS IS A PERSONAL PRIVILEGE AND NO ONE CAN WAIVE THIS RIGHT, AND MS. MCSHARRY, WHEN WE SAY WAIVE, THAT MEANS GIVE UP THIS RIGHT, EXCEPT YOU.

YOU HAVE THE RIGHT NOT TO TESTIFY IN THIS CASE, BUT YOU ALSO HAVE THE RIGHT TO TESTIFY.

I AM GOING TO GRANT YOU A TIME, WHATEVER TIME YOU FEEL NECESSARY, TO CONSULT WITH YOUR ATTORNEY BEFORE YOU MAKE A DECISION ON THIS.

I WANT TO FURTHER INSTRUCT YOU, THOUGH, THAT IF YOU ELECT NOT TO TESTIFY, YOUR FAILURE TO TESTIFY CANNOT BE USED BY THE STATE AS AN INFERENCE OF GUILT AND YOUR FAILURE TO TESTIFY CANNOT BE CONSIDERED BY THE JURY DURING ITS DELIBERATIONS.

IF YOU ELECT TO TESTIFY AND WAIVE THE PRIVILEGE EXTENDED YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, I ADVISE YOU NOW THAT YOU WOULD THEN ASSUME THE ROLE OF A WITNESS IN THIS CASE AND YOU THEN WAIVE OR GIVE UP YOUR CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION.

MS. MCSHARRY, THIS MEANS THAT IF YOU VOLUNTARILY

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TAKE THE WITNESS STAND AND TESTIFY, YOU WILL THEN SUBJECT YOURSELF TO THE SAME RULES THAT GOVERN OTHER WITNESSES, AND YOU MAY BE EXAMINED AND CROSS EXAMINED ON ANY RELEVANT ISSUE IN THIS CASE, AND YOU MAY BE IMPEACHED TO THE SAME EXTENT AS ANY OTHER WITNESS, ALL OF WHICH IS SUBJECT, HOWEVER, TO THE RULES OF THIS COURT AND THE LAWS OF THIS STATE.

I FURTHER ADVISE YOU THAT IF YOU ELECT TO TAKE THE WITNESS STAND AND TESTIFY, THAT THIS DECISION ON YOUR PART MUST BE MADE FREELY, VOLUNTARILY, INTELLIGENTLY, AND WITH KNOWLEDGE OF THE PROTECTIONS GIVEN YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND WITH KNOWLEDGE OF THE CONSEQUENCES OF YOUR ELECTION TO TESTIFY.

AT THIS TIME, MS. MCSHARRY, I AM GOING TO ASK THAT YOU STEP DOWN AND TALK TO MR. BYRHOLDT ABOUT THIS, AND IN A FEW MINUTES, WHEN YOU ARE READY, I WILL HAVE A FEW MORE QUESTIONS TO ASK YOU.

SO IF YOU WOULD STEP DOWN AND CONSULT WITH YOUR ATTORNEY, PLEASE.

(WHEREUPON, DEFENDANT CONSULTS WITH DEFENSE COUNSEL)

MR. BYRHOLDT: YOUR HONOR, SHE MAY RESUME THE STAND.

THE COURT: ALL RIGHT.

THIS WILL BE KIND OF BRIEF UNLESS MR. BYRHOLDT IS GOING TO HAVE SOME QUESTIONS. YOU CAN JUST STAND RIGHT HERE IF IT SUITS YOU, MS. MCSHARRY.

MR. BYRHOLDT, YOU MAY STAND WITH HER.

MR. BYRHOLDT: THANK YOU, YOUR HONOR.

THE COURT: MS. MCSHARRY, HAVE YOU HAD AN OPPORTUNITY TO CONSULT WITH MR. BYRHOLDT ABOUT WHETHER YOU WILL OR WILL NOT TESTIFY IN THIS CASE?

MS. MCSHARRY: YES, SIR.

THE COURT: DID YOU HAVE SUFFICIENT TIME TO GO OVER THIS WITH HIM?

MS. MCSHARRY: YES, SIR.

THE COURT: DO YOU NEED ANY ADDITIONAL TIME TO TALK TO MR. BYRHOLDT?

MS. MCSHARRY: NO, SIR.

THE COURT: ALL RIGHT. SO YOU HAVE CONSULTED WITH YOUR LAWYER ABOUT THIS MATTER?

MS. MCSHARRY: YES, SIR.

THE COURT: AND HAVE YOU DISCUSSED WITH MR. BYRHOLDT WHETHER YOU SHOULD OR SHOULD NOT TESTIFY IN THIS CASE?

MS. MCSHARRY: YES, SIR.

THE COURT: ALL RIGHT, SO YOU HAVE DISCUSSED BOTH, WHETHER YOU SHOULD OR SHOULD NOT TESTIFY?

MS. MCSHARRY: YES, SIR.

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THE COURT: ALL RIGHT, NOW, DO YOU UNDERSTAND WHAT I EXPLAINED TO YOU A FEW MINUTES AGO ABOUT YOUR RIGHTS UNDER THE FIFTH AMENDMENT?

MS. MCSHARRY: YES, SIR.

THE COURT: DO YOU HAVE ANY QUESTIONS THAT YOU WOULD LIKE TO ASK ME ABOUT YOUR RIGHTS UNDER THE FIFTH AMENDMENT?

MS. MCSHARRY: NO, SIR.

THE COURT: AND DO YOU WISH TO TESTIFY IN THIS CASE?

MS. MCSHARRY: NO, SIR.

THE COURT: ANY QUESTIONS, MR. BYRHOLDT?

MR. BYRHOLDT: NONE WHATSOEVER.

THE COURT: ALL RIGHT, YOU MAY RETURN TO YOUR SEAT.

MR. BYRHOLDT: YOUR HONOR, I INTEND TO OFFER SUBSTANTIAL ASSISTANCE AGREEMENT ON THE OTHER CO-DEFENDANT, THE STATEMENT THAT JASON CONLEY, WHO MS. WHITE REFERRED TO, THE SUBSTANTIAL ASSISTANCE AGREEMENT BY MR. CONLEY ALSO, I WOULD SEEK TO OFFER THAT. AND I WANTED TO DO IT NOW BECAUSE I THINK MS. WHITE MAY HAVE AN OBJECTION TO IT.

MS. WHITE: YOUR HONOR, I NEVER MENTIONED A SUBSTANTIAL AGREEMENT, ASSISTANCE AGREEMENT. THE ONLY RELEVANCE A SUBSTANTIAL ASSISTANCE AGREEMENT HAS IS IF

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SOMEONE TESTIFIES, THAT CAN GO TO BIAS OR WHATEVER, TO IMPEACH. THAT WAS NO RELEVANCE WITH MR. CONLEY NOT TESTIFYING. HOW COULD THAT HAVE RELEVANCE, IF HE DIDN'T TESTIFY?

MR. BYRHOLDT: IT'S WHETHER GAVE - AND THE STATEMENT THAT YOU WERE REFERRING TO, WAS THAT GIVEN BEFORE OR AFTER? YOU REFERRED TO A STATEMENT THAT HE GAVE IN CROSS EXAMINING THE WITNESSES.

MS. WHITE: HE GAVE STATEMENTS THROUGHOUT THE INVESTIGATION. THAT WOULD HAVE NO RELEVANCE.

THE COURT: ALL RIGHT, MR. BYRHOLDT, I'M GOING TO DENY YOUR REQUEST TO ADMIT THIS. WE CAN MARK IT SO THAT IT'S - THE RECORD WOULD SHOW THAT IT WAS OFFERED AS A DEFENDANT'S EXHIBIT FOR I.D. ONLY AND THAT THE COURT DECLINED OR REFUSED YOUR MOTION.

MR. BYRHOLDT: I WANTED TO DO THAT OUTSIDE THE PRESENCE OF THE JURY SO YOU WOULDN'T HAVE TO SEND THEM OUT AGAIN, YOUR HONOR.

(WHEREUPON: DEFENDANT'S EXHIBIT NUMBER 2 IS MARKED FOR IDENTIFICATION IN THE TRIAL OF THIS CASE - CONLEY SUBSTANTIAL ASSISTANCE AGREEMENT)

THE COURT: ANY OTHER MATTERS?

MR. BYRHOLDT: WELL, WITH THAT, WHEN THE JURY COMES BACK, WE'LL REST.

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THE COURT: OKAY.

MR. BYRHOLDT: WE PROBABLY NEED TO DISCUSS, BECAUSE WE'RE GOING TO GO INTO CHARGE AND ARGUMENT.

THE COURT: WE'VE GOT TO DO MOTIONS FIRST. WE'RE GOING TO DO THE CHARGE AND ALL.

I TOLD THE JURY TO GO AHEAD AND TAKE A BREAK. ARE THEY ASKING FOR REFRESHMENTS?

BAILIFF: YES, SIR.

THE COURT: ALL RIGHT, SINCE THE DEFENSE RESTS, IF YOU ARE READY, I CAN HEAR YOUR MOTIONS, OR IF YOU NEED A FEW MINUTES WE CAN TAKE A SHORT BREAK.

MR. BYRHOLDT: NO, YOUR HONOR, I WOULD RENEW THE MOTIONS I MADE AT THE CONCLUSION OF THE STATE'S CASE, SAME GROUNDS.

AGAIN, BASED ON ALL THE EVIDENCE, I DON'T - ESPECIALLY THE EVIDENCE PUT UP BY THE DEFENSE, THERE IS NOT SUFFICIENT EVIDENCE UPON REASONABLE JURORS COULD RETURN A VERDICT OF GUILTY ON REASONABLE DOUBT AS TO ALL THE CRIMES CHARGED OTHER THAN POSSIBLY CONSPIRACY. AND I HAVE SET FORTH MY REASONS AT THE END OF THE STATE'S CASE, AND I DON'T WANT TO BURDEN THE RECORD BY GOING THROUGH THEM ALL AGAIN, BUT I WOULD AS THE COURT TO TAKE NOTICE OF THOSE AND THE REASONS I SET FORTH AND THE CASES I CITED IN THOSE.

THE COURT: ALL RIGHT, MR. BYRHOLDT RENEWED

ALL OF THE MOTIONS THAT HAVE BEEN MADE THROUGHOUT THE TRIAL OF THE CASE, AND THE COURT WOULD REAFFIRM ALL OF ITS RULINGS ON THOSE MOTIONS AND DENY SAME.

ANY OTHER MATTERS BEFORE WE GO INTO SOMETHING -

MR. BYRHOLDT: YOUR HONOR, I WOULD MAKE A REQUEST ON WHETHER OR NOT THE COURT INTENDS TO CHARGE THE LESSER INCLUDED CHARGE OF MANSLAUGHTER.

THE COURT: LET ME FINISH AND MAKE SURE THERE ARE NO MORE MOTIONS.

MR. BYRHOLDT: I HAVE NO MORE FROM MY STANDPOINT.

THE COURT: OKAY, ANYTHING ELSE FROM THE STATE BEFORE WE -

MS. WHITE: NO, SIR.

THE COURT: ALL RIGHT, ARE THE ATTORNEYS READY TO HAVE A CONFERENCE ON THE PROPOSED CHARGE TO THE JURY OR DO YOU NEED A FEW MINUTES?

MR. BYRHOLDT: I'M READY.

MS. WHITE: YOUR HONOR, I JUST WANT TO INFORM THE COURT, I DO PLAN ON CALLING ONE REBUTTAL WITNESS. I WANTED TO ASK ONE QUESTION OF MR. LAUDERMILCH, AND THAT IS, DID THIS - DID THE VICTIM - YOU KNOW HOW KELSO TESTIFIED HE HAD PEOPLE IN AND OUT DURING ALL HOURS OF THE NIGHT. I JUST WANTED TO ASK HIM IF THAT IS TRUE, THAT HE HAD COMPANY IN AND OUT ALL THROUGHOUT

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THE NIGHT AND THAT'S IT.

THE COURT: WELL, WE'D BETTER DO THAT BEFORE WE GO INTO THE CHARGE.

MS. WHITE: WELL, JUDGE IT'S NOT GOING TO CHANGE THE CHARGE AT ALL.

MR. BYRHOLDT: MY CLIENT NEEDS TO USE THE RESTROOM.

THE COURT: OKAY, WHY DON'T WE JUST TAKE ABOUT FIVE MINUTES AND WE CAN COME BACK IN AND DO THE WITNESS AND WE'LL HAVE OUR CONFERENCE.

MS. WHITE: YOUR HONOR, I HAVE NO OBJECTION, IF THE DEFENSE ATTORNEY DOESN'T, NOT TO TAKE THE JURY IN AND OUT.

MR. BYRHOLDT: BUT I'M GOING TO RENEW MY MOTIONS AFTER HE TESTIFIES IF YOU'RE GOING TO CALL HIM. WE'RE GOING TO HAVE TO GO THROUGH IT AGAIN.

THE COURT: WELL, WE'RE GOING TO TAKE ABOUT FIVE MINUTES NOW, AND WE'LL COME BACK IN. SOLICITOR, JUST LET US KNOW WHAT YOU WANT TO DO ABOUT RECALLING A WITNESS.

MS. WHITE: ALL RIGHT, SIR.

(BRIEF RECESS)

THE COURT: ALL RIGHT, LET THE RECORD SHOW THAT THE STATE IS PRESENT REPRESENTED BY MS. WHITE. THE DEFENDANT IS PRESENT WITH HER ATTORNEY, MR.

BYRHOLDT.

SOLICITOR, BEFORE WE - I NEED TO KNOW IF YOU'RE GOING TO PUT UP SOMEBODY IN REPLY?

MS. WHITE: YES, SIR, ONE WITNESS, YOUR HONOR.

THE COURT: ALL RIGHT, YOU MAY BRING IN THE JURY.

(WHEREUPON, THE JURY ENTERS THE COURTROOM: 3:36 P.M.)

THE COURT: YOU MAY CALL YOUR WITNESS.

MS. WHITE: THE STATE CALLS MR. LAUDERMILCH.

THE COURT: WHILE HE'S COMING AROUND, LADIES AND GENTLEMEN, LET ME EXPLAIN TO YOU, THE DEFENSE HAS RESTED AND THE STATE IS CALLING A WITNESS IN REPLY.

CLERK: PUT YOUR LEFT HAND ON THE BIBLE AND RAISE YOUR RIGHT HAND.

DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE THE COURT AND THE JURY IN THE TRIAL OF THIS CASE WILL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

MR. LAUDERMILCH: I DO.

CLERK: STATE YOUR NAME, PLEASE, SIR.

MR. LAUDERMILCH: WILLIAM ADAM LAUDERMILCH. L-A-U-D-E-R-M-I-L-C-H.

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DIRECT EXAMINATION BY

MS. WHITE:

Q MR. LAUDERMILCH, YOU TESTIFIED EARLIER, I BELIEVE, THAT YOU WERE THE NEIGHBOR OF THE VICTIM IN THIS CASE, MR. MILLER?

A YES, WE SHARED COWS AND GOATS TOGETHER.

Q AND I BELIEVE THAT YOU WERE PRESENT WHEN MS. KELSO TESTIFIED THAT HE FREQUENTLY HAD VISITORS WHO SPENT THE NIGHT, FORMER, APPARENTLY COCAINE PEOPLE WHO OWED HER MONEY FOR COCAINE.

TO YOUR KNOWLEDGE, WHEN LIVING NEXT-DOOR AND BEING BEST FRIENDS WITH THIS VICTIM, IS THIS TRUE OR NOT?

A NO, INDEED NOT.

Q AND DID MR. MILLER HAVE FREQUENT OVERNIGHT GUESTS?

A THAT WAS RARE.

Q AND DID HE IN FACT HAVE PEOPLE OVER ALL THE TIME WHO PARTIED AND DID COCAINE?

A NO, MA'AM. WE HAD AN OCCASIONAL BARBECUE WITH MUTUAL FRIENDS AND IT WOULD SOMETIMES GO INTO EARLY HOURS AFTER DARK, BUT NOT VERY LATE, AND THAT'S ABOUT THE ONLY TIME WE WOULD HAVE GROUPS TOGETHER.

Q ALL RIGHT, THANK YOU, NO FURTHER QUESTIONS.

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CROSS EXAMINATION BY

MR. BYRHOLDT:

Q MR. LAUDERMILCH, WHAT TIME DO YOU GO TO BED, USUALLY?

A VARIOUS TIMES, DEPENDING ON WHAT'S ON T.V. BUT SELDOM LATER THAN - WELL, VARIOUS TIMES. I'VE GONE TO BED WITH A LATE MOVIE AROUND THREE O'CLOCK, AND THEN I'VE GONE TO BED SHORTLY AFTER DARK.

Q WELL, YOU'RE NOT TELLING THIS JURY THAT, SAY FROM TEN O'CLOCK ON, YOU WOULD HEAR EVERYTHING THAT WENT ON AT MR. MILLER'S HOUSE, ARE YOU?

A NOT EVERY NIGHT, BUT I WOULD BE AWARE IF VEHICLES CAME IN THERE.

Q OKAY, YOU KNOW THE NIGHT THIS HAPPENED, THIS STICKS OUT IN YOUR MIND AS A VERY TRAUMATIC EVENT, RIGHT?

A OF COURSE.

Q CAN YOU TELL THIS JURY HOW MANY VISITORS HE HAD THE NIGHT BEFORE THAT?

A THE NIGHT - THE VERY NIGHT BEFORE THAT?

Q UH-HUH.

A NONE THAT I REMEMBER.

Q WELL, DO YOU REMEMBER FOR SURE?

A I TESTIFIED EARLIER THAT WE WERE TOGETHER UNTIL LIKE MAYBE AN HOUR AFTER DARK. HE WANTED TO WATCH SOMETHING ON T.V. I WANTED TO WATCH SOMETHING.

Q I UNDERSTAND THAT. HOW ABOUT THE NIGHT OF THE 14TH OF

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NOVEMBER OF 1996? THAT WOULD BE THREE NIGHTS PRIOR TO THE 17TH.

A I CAN'T SAY FOR SURE ABOUT ANY VISITORS ON THAT DATE.

Q ISN'T IT TRUE THAT EVERYTHING THAT YOU'RE TESTIFYING TO RIGHT NOW IS KIND OF BASED ON WHAT YOU REMEMBER WHAT MIGHT HAVE HAPPENED, NOT WHAT YOU KNOW FOR SURE HAPPENED?

A THAT'S NOT SO.

Q OKAY, THE LAST TIME THERE WAS A VISITOR THERE OTHER THAN YOURSELF?

A I WASN'T A VISITOR.

Q YOU WEREN'T A VISITOR IN MR. MILLER'S HOME?

A I OWN THE FARM.

Q YOU WERE NOT -

A YES, YOU COULD CALL ME A VISITOR IF YOU WILL.

Q NO FURTHER QUESTIONS. THANK YOU, SIR.

REDIRECT EXAMINATION BY

MS. WHITE:

Q DID YOU ALL LEAD A QUIET LIFE OUT ON THE FARM, SIR?

A SURELY.

Q THANK YOU. NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT, YOU MAY STEP DOWN.

MS. WHITE: YOUR HONOR, THAT'S ALL THE STATE HAS.

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THE COURT: ANYTHING ELSE?

ALL RIGHT, LADIES AND GENTLEMEN, I'LL HAVE TO SEND YOU TO THE JURY ROOM ONCE AGAIN WHILE WE PREPARE TO GO INTO THE NEXT PHASE OF THE TRIAL, WHICH WILL BE THE CLOSING ARGUMENTS.

THAT WILL BE FOLLOWED BY MY INSTRUCTIONS TO YOU, AND THEN AFTER MY INSTRUCTIONS YOU WILL BE ASKED TO RETIRE TO BEGIN YOUR DELIBERATIONS TO REACH A VERDICT IN THIS CASE.

WE MAY BE FIFTEEN MINUTES OR SO, SO IF YOU NEED SOME REFRESHMENTS OR WHATEVER, LET THE BAILIFF KNOW.

ONCE AGAIN, WHILE YOU ARE OUT, DO NOT DISCUSS THIS CASE. PLEASE LEAVE YOUR NOTEPADS IN THE CHAIR.

(WHEREUPON, THE JURY EXITS THE COURTROOM: 3:40 P.M.)

THE COURT: ANYTHING FROM THE STATE OR DEFENDANT?

MR. BYRHOLDT: YOUR HONOR, I WOULD RENEW AGAIN MY MOTIONS FOR A DIRECTED VERDICT NOW AT THE CONCLUSION OF THE STATE'S REPLY TESTIMONY, ENUMERATING THE SAME REASONS SET FORTH IN MY PRIOR MOTIONS, YOUR HONOR.

THE COURT: ALL RIGHT, ANY COMMENT ON HIS MOTIONS?

MS. WHITE: NO, SIR.

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THE COURT: ALL RIGHT, THE MOTIONS FOR DIRECTED VERDICT HAS BEEN MADE AS IT WAS PREVIOUSLY, AND THE COURT IS GOING TO DENY THE MOTION.

ANY OTHER MATTERS?

MR. BYRHOLDT: YOUR HONOR, I WANT TO GO OVER THE CHARGE.

MS. WHITE AND I ARE BOTH FAMILIAR WITH YOUR STANDARD CHARGE, AND WE'D HAVE NO PROBLEM WITH THAT. I THINK MS. WHITE HAD A QUESTION WHETHER - SHE HAD SOME REQUESTS TO CHARGE THAT SHE HANDED UP.

MS. WHITE: YOUR HONOR, I WOULD REQUEST CHARGES 1, 2, 3, AND 4, IN PARTICULAR 4. AND THEN THE LANGUAGE IN THAT IS IF IT IS A PROBABLE OR NATURAL CONSEQUENCE. THAT'S THE MAIN ONE, BUT I WOULD, OF COURSE, ASK FOR ALL FOUR. I THINK ALL FOUR APPLY IN THIS CASE.

MR. BYRHOLDT: YOUR HONOR, JUST RECENTLY, AND I APOLOGIZE, I WOULD ASK THE COURT - AND I DON'T KNOW, I'M NOT FAMILIAR WITH THE CONSPIRACY CHARGE, BUT IN STATE V. ADAMS, WHICH IS 462 S.E. 2D 308, THE COURT OF APPEALS HELD THAT WHILE CONSPIRATORS ARE RESPONSIBLE FOR ALL INCIDENTAL AND CONSEQUENTIAL ACTS GROWING OUT OF A GENERAL DESIGN, CONSPIRATORS ARE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANY ONE CONSPIRATOR. I DON'T KNOW IF THAT'S INCLUDED ANYWHERE, BUT I WOULD

HAND THAT CASE UP. IT'S A RECENT CASE THAT JUST CAME OUT.

AND THE ONLY OTHER REQUEST I WOULD HAVE IS I WOULD REQUEST A CHARGE ON MANSLAUGHTER. MY UNDERSTANDING IS IF THERE WAS ANY EVIDENCE THAT WOULD SHOW A CHARGE OF THE MURDER NOT GUILTY, THE COURT SHOULD CHARGE IT.

IN THE TESTIMONY OF STATEMENTS THAT CAME IN THROUGH JENNIFER TITMAN, FROM MS. MCSHARRY'S OWN STATEMENT, AND I BELIEVE ALSO THE STATEMENT OF MR. CONLEY WAS REFERRED TO, SAID THAT THE SHOTS WERE FIRED DURING A STRUGGLE. IF THERE WAS A STRUGGLE GOING ON WITH THE GUN, THAT COULD BE CONSTRUED AS EVIDENCE OF EITHER PROVOCATION OR HEAT OF PASSION.

I WOULD ASK THE COURT TO MAKE THAT LESSER INCLUDED CHARGE. THAT WOULD BE MY ONLY ADDITIONAL REQUEST.

MS. WHITE: YOUR HONOR, THE DEFENSE IS SAYING THAT A VICTIM OF AN ARMED ROBBERY CANNOT STRUGGLE WITH A GUN WHEN IT'S POINTED AT HIM. I THINK THERE ARE NUMEROUS CASES ON THAT POINT.

IF YOU NEED ME TO DIG THEM OUT, I'LL DIG THEM OUT. I'VE GOT THEM UP HERE SOMEWHERE. BUT THAT'S UNBELIEVABLE. SELF DEFENSE, YOU HAVE TO BE WITHOUT FAULT IN CAUSING THE DIFFICULTY. OF COURSE THE VICTIM

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OF A CRIME IS -

MR. BYRHOLDT: YOUR HONOR, I'M NOT ARGUING SELF DEFENSE.

MS. WHITE: OF COURSE, A VICTIM IS ALLOWED TO STRUGGLE WITH A PERPETRATOR DURING AN ARMED ROBBERY.

YOUR HONOR, AS TO THE MANSLAUGHTER, THERE IS NO EVIDENCE WHATSOEVER OF THAT. RIGHT OFF THE TOP OF MY HEAD, STATE V. MCCALL IS ONE THAT TALKS ABOUT HOW, DURING A FELONY YOU'RE NOT ENTITLED TO INVOLUNTARY AND THE LANGUAGE OUT OF THAT WOULD APPLY. YOUR HONOR -

MR. BYRHOLDT: IT'S NOT INVOLUNTARY I'M ASKING FOR. IT'S VOLUNTARY.

MS. WHITE: OR VOLUNTARY.

THE COURT: ANY PROVOCATION, TO REDUCE THIS FROM MURDER TO MANSLAUGHTER, ANY PROVOCATION WOULD HAVE TO HAVE BEEN ON THE PART OF MR. MILLER, THE VICTIM.

MR. BYRHOLDT: THAT'S RIGHT, AND THEY WERE STRUGGLING FOR THE GUN. THAT COULD BE EVIDENCE.

THE COURT: BUT THE EVIDENCE IS THAT HE DIDN'T HAVE THE GUN, THAT SOMEONE WENT IN AND POINTED THE RIFLE AT HIM. THAT'S THE EVIDENCE THAT I HEARD. AND I WAS LOOKING THROUGH MY NOTES THAT MS. TITMAN, I THINK, TESTIFIED THAT -

MR. BYRHOLDT: MS. TITMAN TESTIFIED THAT THEY

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WERE STRUGGLING FOR THE GUN. THAT WAS HER QUOTE. I QUOTED IT.

MS. WHITE: I'LL STIPULATE THE VICTIM STRUGGLED WITH THE GUN, YOUR HONOR.

THE COURT: THAT'S NOT A PROBLEM. THERE IS NO PROBLEM THAT THEY WERE STRUGGLING. WHAT I'M SAYING IS, THERE WOULD HAVE TO BE SOME PROVOCATION ON THE PART OF THE VICTIM. IT WOULD HAVE TO BE MORE THAN WORDS. IT WOULD HAVE TO BE, AS THE DEFINITION IN ALL THE CASES IS, IS OF COURSE MERE WORDS, WITHOUT MORE, CAN NEVER BE SUFFICIENT PROVOCATION.

I DON'T REMEMBER ANY EVIDENCE WHERE HE WAS THE AGGRESSOR.

MS. WHITE: AND EVEN IF HE HAD BEEN, YOUR HONOR, DURING A ROBBERY, YOU'RE ENTITLED TO BE AN AGGRESSOR. THAT DOESN'T REDUCE A FELON FROM MURDER TO MANSLAUGHTER, BECAUSE THE VICTIM STRUGGLED.

THE COURT: ALL RIGHT, MR. BYRHOLDT, I'M GOING TO NOTE YOUR REQUEST. I'M GOING TO DECLINE TO CHARGE VOLUNTARY MANSLAUGHTER. I DON'T THINK THERE HAS BEEN ANY EVIDENCE THAT THERE WAS ANY PROVOCATION BY THE VICTIM, MR. MILLER.

MR. BYRHOLDT: YOUR HONOR, I WOULD ASK ALSO THEN THAT I HAVE A CHARGE ON ACCIDENTAL SHOOTING. MS. KELSO TESTIER THAT SHE WAS SHOT ACCIDENTALLY. SHE HAD

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REACHED FOR THE GUN. THE GUN WENT OFF AND SHE WAS SHOT FIRST AND THERE WERE TWO ADDITIONAL SHOTS. I THINK THAT WOULD BE CIRCUMSTANTIAL EVIDENCE THERE WAS ONE ACCIDENTAL SHOT. THE OTHER TWO SHOTS COULD HAVE BEEN ACCIDENTAL ALSO.

THE COURT: ACCIDENTAL SHOOTING?

MS. WHITE: YOUR HONOR, WE'RE NOT TRYING HIM FOR SHOOTING MS. KELSO OR FOR MS. KELSO'S INJURIES. WE'RE TRYING HIM FOR THE VICTIM OF THE FELONY MURDER.

THE LANGUAGE IN THE ACCIDENT, I BELIEVE, SAYS THAT THEY ARE ACTING LEGALLY AND LAWFULLY AND SO FORTH.

THE COURT: YES. WE'LL TAKE A LOOK AT THAT.

I BELIEVE, GOING BACK TO THE STATE'S REQUEST, STATE'S NUMBER 1, THAT LANGUAGE IS COVERED. IT MAY NOT BE IDENTICAL TO WHAT YOU PASSED UP, SOLICITOR, BUT I THIN IT'S COVERED.

NUMBER 2 IS COVERED.

NUMBER 3 - LET ME CHECK, I THINK THAT'S COVERED ALSO.

MS. WHITE: AS LONG AS THOSE WERE COVERED YOUR HONOR, I'D HAVE NO PROBLEM.

BUT 4, I WOULD SPECIFICALLY REQUEST, BECAUSE I DON'T THINK THAT'S IN THE USUAL JURY CHARGE.

THE COURT: OKAY, I BELIEVE THAT NUMBER 3 IS

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COVERED AND NOW YOU'RE CONCERNED ABOUT YOUR NUMBER 4.

I'LL TAKE A LOOK AT THAT.

SOLICITOR, YOUR NUMBER 4, I'M LOOKING AT YOUR CASE. I'M NOT SURE THAT'S THE RIGHT, STATE V. MCCALL. I THINK THERE'S ANOTHER STATE V. MCCALL THAT THAT COMES FROM. BUT IF YOU WANT TO APPROACH THE BENCH, MAYBE YOU CAN SHOW ME IN THE CASE THAT'S ATTACHED TO YOUR REQUEST WHERE THAT IS INCLUDED IN THERE. I DO REMEMBER THE CASE LAW ON THIS.

(WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE COURT REPORTER)

THE COURT: ALL RIGHT, MR. BYRHOLDT, LET ME HEAR FROM YOU ON STATE'S NUMBER 4. SHE HAS ATTACHED THE STATE V. MCCALL CASE TO THAT.

MR. BYRHOLDT: YOUR HONOR, I WOULD HAVE NO PROBLEM. I THINK THAT'S A PROPER ASPECT OF THE LAW, AS LONG AS YOU ALSO CHARGE THE CASE I HANDED UP THAT HAS THAT LANGUAGE IN IT, THAT YOU'RE NOT RESPONSIBLE FOR INDEPENDENT ACTS OF A CO-CONSPIRATOR.

MS. WHITE: JUDGE, I HAVEN'T SEEN THAT, SO I'D LIKE TO SEE WHAT WE'RE TALKING ABOUT.

THE COURT: YOU ALL TALK ONE AT A TIME. IT'S HARD, Y'ALL GET TO TALKING AND YOU DON'T STAY FOCUSED ON ONE THING AT A TIME. I'M OLD-FASHIONED. I LIKE TO

DO ONE THING AT A TIME, PUT THAT BEHIND ME, AND MOVE ON TO SOMETHING ELSE.

ALL RIGHT, ON THIS, THEN I'M GOING TO CHARGE OUT OF THE STATE V. MCCALL, THE LANGUAGE THAT'S BEEN PASSED UP. IT'S THE STATE'S NUMBER 4.

NOW, LET ME LOOK AT - WHAT IS THE NEXT CHARGE? I'VE COVERED ALL OF THE STATE'S REQUESTS.

MS. WHITE: SO THE OTHER THREE ARE IN YOUR GENERAL CHARGE ANYWAY, JUDGE?

THE COURT: I THINK THEY ARE COVERED BY THE CHARGE. I DON'T KNOW THAT THEY FOLLOW THE EXACT LANGUAGE.

MS. WHITE: ALL RIGHT.

THE COURT: THE AIDING AND ABETTING OR THE HAND OF ONE, HAND OF ALL IS - YOU'VE HEARD THAT CHARGE BEFORE. SO I THINK IT COVERS ALL ASPECTS OF WHAT YOU HAVE REQUESTED.

NOW, DID YOU GIVE HER A COPY OF THIS?

MR. BYRHOLDT: THAT'S MY ONLY COPY, YOUR HONOR. I JUST GOT IT OVER THE LAST BREAK.

MS. WHITE: YOUR HONOR, MAY I GET A COPY OF THIS BEFORE WE ARGUE?

THE COURT: CERTAINLY. THE CLERK CAN MAKE THAT FOR YOU.

MS. WHITE: JUST THIS PAGE.

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THE COURT: WHILE THE CLERK'S DOING THAT, LET ME CHANGE OVER TO THIS ACCIDENT OR MISADVENTURE.

I THINK, MR. BYRHOLDT, ON THAT, THE LAW ON THAT IS THAT THE PERPETRATOR ACTED WITH NO WRONGFUL PURPOSE IN DOING THE HOMICIDAL ACT THAT WAS DONE WHILE HE WAS ENGAGED IN A LAWFUL ENTERPRISE.

AND I'M NOT SURE, IN THIS SITUATION, THAT IF SOMEBODY GOES INTO SOMEONE ELSE'S HOME WITH A RIFLE AND POINTS IT AT THEM, YOU CAN SAY THEY WERE ENGAGED IN A LAWFUL ENTERPRISE.

MR. BYRHOLDT: I'M NOT GOING TO ARGUE WITH YOU. NOTE MY OBJECTION.

THE COURT: ANY COMMENT ON HIS REQUEST FOR ACCIDENT?

MS. WHITE: YOUR HONOR, I MEAN, YOU CAN'T EXPLAIN AN ACCIDENT DURING A FELONY MURDER.

THE COURT: ALL RIGHT, I'M GOING TO NOTE YOUR REQUEST. I'M GOING TO DECLINE TO CHARGE ACCIDENT OR MISADVENTURE OR MISFORTUNE, AS IT'S SOMETIMES CALLED.

MR. BYRHOLDT: THANK YOU, YOUR HONOR.

THE COURT: OKAY. AND MR. BYRHOLDT, YOU'VE GIVEN ME STATE V. ADAMS. WHERE ARE WE?

MR. BYRHOLDT: YES, SIR, ON PAGE 309, UNDER HEAD NOTE 1 AND 2, THE LAST PARAGRAPHS, BEGINNING WITH THE WORD 'ADDITIONALLY.' WHILE CONSPIRATORS ARE

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RESPONSIBLE FOR ALL INCIDENTAL AND CONSEQUENTIAL ACTS GROWING OUT OF A GENERAL DESIGN, CONSPIRATORS ARE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANY ONE CONSPIRATOR. CITING STATE V. WOODS, YOUR HONOR.

THE COURT: I WILL BE GLAD TO HEAR FROM THE STATE.

MS. WHITE: YOUR HONOR, I DON'T OBJECT TO THAT AS TO CONSPIRACY. CERTAINLY, THAT'S TRUE. IF I STAY AT HOME, BUT I'VE CONSPIRED WITH SOMEONE TO DO SOMETHING AND THEY GO OFF AND DO THAT AND THEN DO SOMETHING TOTALLY DIFFERENT AS WELL, I'M NOT RESPONSIBLE. BUT I REQUEST IF IT IS, IT DOES NOT APPLY TO FELONY MURDER. IT'S TALKING ABOUT CONSPIRACY, BEING RESPONSIBLE FOR THE CONSPIRACY, SO I WOULD ASK IT BE CHARGED UNDER CONSPIRACY.

THE COURT: THIS CASE, MR. BYRHOLDT, ADAMS WAS CONVICTED OF CONSPIRACY TO TRAFFIC CRACK COCAINE. AND I THINK THIS WOULD GO TOWARD THE CONSPIRACY. I DON'T MIND CHARGING IT WHEN I CHARGE CONSPIRACY.

MR. BYRHOLDT: THANK YOU, YOUR HONOR.

THE COURT: WHILE I THINK ABOUT IT, LET ME GO BACK ON THE ARMED ROBBERY CHARGE. BOTH OF YOU ARE AWARE THAT THE STATUTE WAS REVISED EFFECTIVE AUGUST THE 16TH OF '96. THEY ADDED SOME LANGUAGE. THE STATUTE SAYS ANY PERSON WHO COMMITS ROBBERY WHILE

ARMED WITH A PISTOL, DIRT, SLINGSHOT, METAL KNUCKLES, RAZOR, OR OTHER DEADLY WEAPON, AND THEN THEY ADDED, OR WHILE ALLEGING EITHER BY ACTION OR WORDS HE WAS ARMED WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY OBJECTION, ET CETERA.

I WASN'T GOING TO CHARGE THAT PARAGRAPH, SINCE I DON'T THINK IT APPLIES TO THE FACTS OF THIS CASE, EVEN THOUGHT IT IS PART OF THE ARMED ROBBERY STATUTE.

MR. BYRHOLDT: I WOULD AGREE.

THE COURT: AND WE WILL, OF COURSE, HAVE THE CHARGE ON ALL THE SUBSTANTIVE CRIMES, AND I THINK YOU HAVE HEARD THEM ON THE BURGLARY CHARGE. THERE IS A SECTION IN THERE THAT HAS TO DO WITH HAVING BEEN CONVICTED OF - I WAS GOING TO OMIT THAT. I DON'T THINK THAT WOULD APPLY.

MR. BYRHOLDT: IT WOULD NOT APPLY, YOUR HONOR.

THE COURT: OKAY, DOES THE STATE AGREE WITH THAT?

MS. WHITE: WHAT, YOUR HONOR?

THE COURT: ON THE BURGLARY -

MS. WHITE: OH, THE BREAKING AND ENTERING, THE OTHER PART?

THE COURT: THE PART ABOUT HAVING BEEN PREVIOUSLY CONVICTED OF BURGLARY.

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MS. WHITE: NO, THAT WOULDN'T APPLY, I AGREE.

THE COURT: I'M JUST GOING TO LEAVE THAT OUT. I DON'T THINK IT WOULD. THERE IS NO EVIDENCE OF ANY PRIOR CONVICTION, AND I'M JUST GOING TO CHARGE THE BASIC STATUTE.

I'VE GOT THE CHARGE ON THE HAND OF ONE IS HAND OF ALL.

WE HAVE AN EXPERT WITNESS CHARGE.

THERE WERE - WHAT ABOUT A CHARGE ON VOLUNTARY STATEMENTS? WE'VE HEARD ALL OF THAT AND WE HAD A JACKSON V. DENO ON THE ORAL AND VERBAL ON THAT.

CIRCUMSTANTIAL EVIDENCE. I'LL BE GLAD TO HEAR YOU ON CIRCUMSTANTIAL.

MR. BYRHOLDT: I WOULD ASK THAT IT BE CHARGED. I THINK WE HAVE TO.

MS. WHITE: I'M THINKING, YOUR HONOR, BELIEVE IT OR NOT.

THE COURT: I'M LEANING ON THE SIDE OF CHARGING IT. I THINK MOST OF THE EVIDENCE, WE HAVE SOME EYE WITNESSES, BUT I THINK THERE IS ALSO SOME CIRCUMSTANTIAL EVIDENCE OF THINGS THAT HAPPENED OR THEY ALLEGED HAPPENED THAT WOULD TEND TO PROVE SOME OTHER POINT.

MS. WHITE: I THOUGHT, THOUGH, YOUR HONOR, THAT THE CIRCUMSTANTIAL EVIDENCE CHARGE IS TO THE

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EXTENT YOU RELY EXCLUSIVELY ON CIRCUMSTANTIAL EVIDENCE.

MR. BYRHOLDT: THAT'S TRUE, THAT'S TRUE.

MS. WHITE: AND I'M JUST TRYING TO THINK. I MEAN . . .

THE COURT: YOU'RE RIGHT ABOUT THAT. IF THE STATE IS RELYING ON CIRCUMSTANTIAL EVIDENCE TO PROVE SOME POINT, IT DOESN'T HAVE TO BE THE WHOLE CASE. IT JUST COULD BE SOME.

MR. BYRHOLDT: I THINK OUT OF AN ABUNDANCE OF CAUTION, I WOULD ASK FOR IT.

THE COURT: I THINK I'M GOING TO CHARGE IT OUT OF AN ABUNDANCE.

MS. WHITE: I THINK THAT'S A GOOD IDEA.

THE COURT: OKAY, AND THEN WE HAVE ALL OF THE TESTIMONY ABOUT INTOXICATION. I PLAN ON CHARGING VOLUNTARY INTOXICATION.

MR. BYRHOLDT: YOUR HONOR, YOU ALSO ASKED ME TO REMIND YOU, WE NEED A LIMITING INSTRUCTION ON THE HANDWRITING EXEMPLARS. THAT THEY CAN ONLY BE USED FOR THAT PURPOSE, NOT FOR THE TRUTH OF THE -

THE COURT: I ALSO AM GOING TO CHARGE THAT AND JUST TELL THEM THAT THOSE EXHIBITS WERE GIVEN FOR PURPOSES OF BEING EXAMINED BY THE EXPERT AND THAT NOTHING, THE WRITING, THE CONTENT OF THE EXEMPLAR IS

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NOT EVIDENCE IN THIS CASE.

ALSO, I'M GOING TO CHARGE THAT ALL OF THE FOLLOWING, AND Y'ALL LISTEN CAREFULLY, OR IF YOU WANT TO COME UP, I'LL LET YOU READ IT:

ALL OF THE EXHIBITS THAT HAVE BEEN ADMITTED IN EVIDENCE BY THE COURT WILL BE AVAILABLE TO YOU IN THE JURY ROOM DURING YOUR DELIBERATION. YOU WILL NOTICE THAT LABELS HAVE BEEN AFFIXED TO EACH EXHIBIT. THESE LABELS ARE USED IN COURT TO IDENTIFY THE PARTY OFFERING THE EXHIBIT AND THE NUMBER OF THAT PARTICULAR EXHIBIT. THE EXHIBITS THAT HAVE BEEN OFFERED IN THE TRIAL OF THIS CASE HAVE LABELS ATTACHED INDICATING THE PARTY THAT OFFERED THE EXHIBIT AND THE DATE THE EXHIBIT WAS OFFERED. IF AN EXHIBIT HAS MORE THAN ONE LABEL, IT ONLY MEANS THAT THE EXHIBIT HAS BEEN USED IN ANOTHER PROCEEDING. IT DOES NOT ADD TO OR DETRACT FROM THAT EXHIBIT.

MR. BYRHOLDT: NO PROBLEM.

THE COURT: DO Y'ALL WANT TO LOOK AT THIS OR THINK ABOUT THAT A MINUTE?

MR. BYRHOLDT: NO, SIR, I'VE GOT NO PROBLEM.

THE COURT: OKAY. CAN YOU THINK OF ANYTHING

ELSE?

MR. BYRHOLDT: NOTHING ON BEHALF OF THE DEFENDANT.

THE COURT: ALL RIGHT, IF YOU WOULD COME FORWARD, WE HAVE PREPARED SOME VERDICT FORMS. AND OF COURSE, IN THE CHARGE, I WILL HAVE TO CHARGE THEM THAT IF THEY FIND THE DEFENDANT NOT GUILTY OF MURDER, NOT GUILTY OF ARMED ROBBERY OR BURGLARY, THAT THEY CANNOT FIND HER GUILTY OF POSSESSION OF A FIREARM. SO THAT WILL BE PART OF THE CHARGE.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OUT OF THE HEARING OF THE COURT REPORTER)

MR. BYRHOLDT: YOUR HONOR, FOR PURPOSES OF THE RECORD, DEFENSE HAS REVIEWED THE VERDICT FORMS AND THEY ARE PROPER.

THE COURT: ALL RIGHT, WHAT ABOUT, CAN YOU THINK OF ANYTHING ELSE THAT YOU WANT TO REQUEST? OF COURSE YOU WILL HAVE AN OPPORTUNITY, ONCE I GIVE THE CHARGE, TO MAKE ADDITIONAL REQUESTS.

MR. BYRHOLDT: I DON'T THINK SO, YOUR HONOR.

MS. WHITE: EVERYTHING'S COVERED, JUDGE.

THE COURT: THE STATE'S GOING TO OPEN FIRST ON THE LAW, AND THEN YOU'LL BE IN THE MIDDLE.

DO Y'ALL NEED A FEW MINUTES, OR ARE YOU READY?

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MR. BYRHOLDT: WE'RE READY.

THE COURT: ARE YOU READY?

MS. WHITE: YOUR HONOR, LET ME JUST PULL THIS AROUND. BY THE TIME THEY GET HERE, IT WILL BE UP.

MR. BYRHOLDT: JUDGE, I SPOKE WITH MS. WHITE, AND WE DO NOT THINK THESE ARE GOING TO BE LENGTHY ARGUMENTS.

MS. WHITE: THE LAW WILL BE MY LONGEST PART, JUDGE. I'VE GOT A SHORT CLOSING AND MR. BYRHOLDT SAYS HE DOES, TOO.

THE COURT: LET'S GIVE THE COURT REPORTER A CHANCE TO GO THROUGH THESE EXHIBITS AND REMOVE ANY THAT ARE MARKED JUST FOR IDENTIFICATION SO Y'ALL WON'T ACCIDENTALLY PICK ONE UP AND WAVE IT IN FRONT OF THE JURY. WE'LL TAKE A MINUTE TO DO THAT.

(BRIEF RECESS)

THE COURT: IS THE STATE READY?

MS. WHITE: YES, SIR.

THE COURT: IS THE DEFENDANT READY?

MR. BYRHOLDT: YES, SIR.

THE COURT: IS THE JURY READY? YOU CAN BRING THEM IN.

(WHEREUPON, THE JURY ENTERS THE COURTROOM: 4:10 P.M.)

THE COURT: MADAM FOREPERSON, LADIES AND

GENTLEMEN OF THE JURY, WE HAVE REACHED THE STAGE OF THE TRIAL WHERE WE WILL NOW HAVING THE CLOSING ARGUMENTS.

OUR RULES PROVIDE THAT THE ATTORNEYS FOR EACH SIDE HAVE AN OPPORTUNITY TO ADDRESS YOU.

YOU WILL NOTICE THAT THE STATE WILL ARGUE FIRST. THE DEFENDANT WILL ARGUE SECOND, AND THEN THE STATE ARGUES LAST.

THIS IS PART OF OUR RULES IN A CASE OF THIS TYPE, SINCE THE REASONS FOR THE ORDER THAT THEY ARGUE IS SINCE THE BURDEN OF PROOF IS UPON THE STATE TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF EACH ONE OF THESE CRIMES, THE STATE GETS FIRST ARGUMENT AND THEN THEY WILL ALSO ARGUE LAST.

THE STATE HAS TO OPEN ON THE LAW, WHICH MEANS THEY HAVE TO OPEN, MAKING AN ARGUMENT TO YOU ON THE LAW IN THESE CASES.

ALSO, LET ME - I'M GOING TO ALLOW YOU TO CONTINUE TAKING NOTES. BUT LET ME REMIND YOU THAT DURING THESE CLOSING ARGUMENTS THAT WHAT THE ATTORNEYS TELL YOU IS NOT EVIDENCE. IT IS SIMPLY THEIR WAY OF REMEMBERING WHAT THE EVIDENCE IS OR THEIR IMPRESSION OF THE EVIDENCE IN THIS CASE.

THE PART OF THE TRIAL WHERE EVIDENCE IS PRESENTED HAS ALREADY CLOSED, SO AT THIS TIME, THE ATTORNEYS,

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UNDER THE RULES, CAN REFER TO THE EVIDENCE AS THEY DEEM IT TO BE AND ARGUE IT TO YOU.

BUT JUST KEEP IN MIND THAT THE STATEMENTS YOU ARE ABOUT TO HEAR ARE NOT EVIDENCE.

AT THIS TIME WE WILL CONTINUE WITH THE TRIAL WITH THE CLOSING ARGUMENTS. SOLICITOR, YOU MAY PROCEED.

MS. WHITE: LADIES AND GENTLEMEN, AT THIS TIME, WE'D LIKE TO THANK YOU FOR BEING HERE FOR THE LAST SEVERAL DAYS. IT'S BEEN A ROCKY ROAD, BUT WE FINALLY MADE IT, I THINK.

AND I'D LIKE TO TALK TO YOU NOW ABOUT THE LAW IN THIS CASE. YOU'VE HEARD THE FACTS. YOU'VE HEARD THE TESTIMONY. YOU'RE GOING TO BE LOOKING AT THE EVIDENCE. IT WILL GO BACK WITH YOU. THAT'S ONE THING I WANT TO EMPHASIZE TO YOU, THAT WE HAVE HAD SOME GAPS HERE AND MEMORIES DO DIM. FOR INSTANCE, WITH THE FIRST STATEMENT THAT THE DEFENDANT GAVE THAT WAS ORALLY READ INTO THE RECORD, YOU WILL NOT HAVE THAT. YOU CAN ASK, WHILE YOU ARE DELIBERATING, TO HEAR ADDITIONAL TESTIMONY IF IT HAS SORT OF RECEDED BACK INTO THE DEPTHS OF THE MEMORY.

I AM GOING TO GO THROUGH THE CHARGES AT THIS TIME.

THE DEFENDANT HAS FIVE CHARGES, OR INDICTMENTS, AND I'M JUST GOING TO TELL YOU WHAT THE ELEMENTS OF

EACH CRIME ARE.

EACH CRIME IN THIS STATE HAS CERTAIN ELEMENTS WHICH THE STATE MUST PROVE BEYOND A REASONABLE DOUBT. THAT IS THE STATE'S BURDEN.

AND I'D LIKE TO EMPHASIZE ONE THING, THAT THE KEY WORD HERE - AND THIS SEEMS TO BE VERY MISUNDERSTOOD - IS REASONABLE.

THE STATE'S BURDEN IS BEYOND A REASONABLE DOUBT, NOT ALL DOUBT, AND THAT'S WHY WE HAVE TWELVE JURORS. AND YOU KNOW, IT PUZZLES ME THAT SOMETIMES JURORS SEEM TO LOSE ALL THEIR COMMON SENSE. THEY LEAVE IT RIGHT AT THE FRONT OF THE COURTHOUSE. AND WE HAVE YOU HERE BECAUSE YOU'RE TWELVE PEOPLE FROM ALL DIFFERENT WALKS OF LIFE, ALL DIFFERENT. USE YOUR EXPERIENCE. WHAT IS REASONABLE?

IS IT REASONABLE TO BELIEVE THIS DEFENDANT WAS PARTICIPATING IN THESE CRIMES AND THEREFORE, HAND OF ONE, HAND OF ALL WOULD APPLY? OR IS IT UNREASONABLE? THAT IS YOUR BURDEN. IT'S REALLY VERY SIMPLE. IT IS COMMON SENSE. SO PLEASE DON'T CHECK YOUR COMMON SENSE AT THE DOOR AND THEN COME INTO THE JURY DELIBERATION. USE YOUR EXPERIENCE. USE YOUR KNOWLEDGE OF HUMAN NATURE. USE YOUR - ALL THE THINGS YOU'VE GONE THROUGH IN THIS WORLD, BECAUSE THAT IS THE BURDEN, BEYOND A REASONABLE DOUBT.

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THERE HAVE ACTUALLY BEEN CASES WHERE TWELVE JURORS HAVE COME OUT AND SAID, 'WE ALL BELIEVE IT HAPPENED, BUT WE DIDN'T THINK THEY WERE GUILTY. IT WASN'T BEYOND A REASONABLE DOUBT.' TWELVE PEOPLE BELIEVE, ALL DIFFERENT WALKS OF LIFE, THEN IT'S REASONABLE. REASONABLE.

SO THAT'S THE BURDEN OF PROOF.

THE JUDGE IS GOING TO TALK TO YOU ABOUT CIRCUMSTANTIAL EVIDENCE, AND YOU KNOW, IN A CASE, THIS IS A RATHER SIMPLE CASE FACTUALLY BUT A DIFFICULT CASE LEGALLY, BECAUSE YOU'VE GOT HAND OF ONE, HAND OF ALL. YOU'VE GOT FIVE CHARGES INSTEAD OF ONE LIKE WE SOMETIMES HAVE. SO I'M GOING TO TRY TO EXPLAIN THIS. AND IT'S SORT OF DIFFICULT TO DO.

CIRCUMSTANTIAL EVIDENCE, YOU WILL GET A CHARGE ON CIRCUMSTANTIAL EVIDENCE.

CIRCUMSTANTIAL EVIDENCE, WE HAVE TWO KINDS, DIRECT AND CIRCUMSTANTIAL. DIRECT EVIDENCE IS, I SEE IT, I HEAR IT, I TOUCH IT. MY SENSES, IN OTHER WORDS.

CIRCUMSTANTIAL EVIDENCE IS HE WALKS THROUGH THE DOOR. HE'S DRIPPING WET. HE HAS A RAINCOAT ON. THERE'S THUNDER AND LIGHTENING OUT THERE. I DON'T SEE THE RAIN. I DON'T HEAR THE RAIN. I DON'T FEEL THE RAIN, BUT I CAN GATHER THAT IT'S RAINING. I DIDN'T SEE IT, NONE OF MY SENSES. SO IT'S SOMETHING YOU

GATHER.

THE JUDGE WILL SAY TO THE EXTENT YOU RELY ON CIRCUMSTANTIAL EVIDENCE, THERE MUST BE NO OTHER REASONABLE HYPOTHESIS TO WHICH YOU MAY RELY. IN OTHER WORDS, IT ALL POINTS TO THIS REASONABLE CONCLUSION, AND YOU WILL HEAR THE WHOLE CHARGE ON THAT.

BUT THERE IS A DIFFERENCE BETWEEN THOSE TWO. BUT JUST REMEMBER, THE BURDEN OF PROOF ON ANY KIND OF EVIDENCE IS BEYOND A REASONABLE DOUBT.

SO LET'S GET INTO OUR CHARGES. I'M GOING TO START WITH THE FIRST ONE, WHICH IS MURDER.

THERE ARE FOUR ELEMENTS OF MURDER: THE KILLING OF ANOTHER PERSON WITH MALICE AFORETHOUGHT.

THAT'S WHAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT, THAT THIS DEFENDANT KILLED ANOTHER PERSON, NAMELY HERE MELVIN MILLER, WITH MALICE AFORETHOUGHT.

I'M NOT GOING TO TALK ABOUT KILLING ANOTHER PERSON, BECAUSE THIS IS SELF EXPLANATORY.

BUT MALICE, LET'S LOOK AT THAT. WHAT DOES THAT MEAN? WELL, OF COURSE, IN EVERYDAY TERMS, IT'S HATRED, ILL WILL. BUT IN FACT, IN REAL LIFE, WITH MURDER, YOU DON'T EVEN HAVE TO KNOW YOUR VICTIM. YOU DON'T HAVE TO HAVE EVER MET YOUR VICTIM. YOU DON'T HAVE TO HAVE ANY HATRED OR ILL WILL.

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THERE ARE SEVERAL WAYS THE STATE MAY PROVE MALICE, SO LET'S LOOK AT THOSE.

ONE IS, THE INTENT TO KILL. IF I INTEND TO KILL MELVIN MILLER, I'M GUILTY OF MURDER.

NUMBER TWO, IF I INTEND TO INJURE AND HE DIES, THAT'S ANOTHER WAY OF PROVING MALICE.

THREE IS WHAT WE CALL THE MOUZON, AND THAT'S THE CASE IT CAME FROM. AND IT SAYS: A GENERAL, MALIGNANT RECKLESSNESS OF ANOTHER'S LIFE OR SAFETY, OR A CONDITION OF MIND WHICH SHOWS A HEART WITH TOTAL DISREGARD FOR SOCIAL DUTY AND FATALLY BENT ON MISCHIEF.

SO A GENERAL MALIGNANT RECKLESSNESS. NOW, HOW COULD THAT COME INTO PLAY? IF I GO OUT TO THE INTERSTATE, IT'S PITCH DARK, AND I SAY, YOU KNOW, I THINK IT WOULD BE REALLY FUNNY IF I THROW THIS ENGINE OVER THE OVERPASS. I HAVE NO IDEA WHO I'M THROWING IT ON. I DON'T INTEND TO INJURE, I DON'T INTEND TO KILL. I JUST THINK IT'S GOING TO BE KIND OF FUN TO DROP THIS ON THE NEXT CAR THAT COMES THROUGH.

WELL, THE NEXT CAR COMES THROUGH, I DROP IT. I DIDN'T INTEND TO KILL OR INTEND TO INJURE, BUT IT KILLS SOMEBODY IN THE CAR.

WELL, THAT'S A GENERAL, MALIGNANT RECKLESSNESS OF ANOTHER'S LIFE AND SAFETY. SO THAT'S ANOTHER WAY.

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THE FOURTH WAY IS DEADLY WEAPON. IF A TAKE A GUN AND I FIRE IT INTO A CROWD OF PEOPLE AND I KILL SOMEBODY AND SAY, 'GEE, I DIDN'T MEAN TO KILL ANYBODY, I DIDN'T MEAN TO INJURE ANYBODY.' WELL, NUMBER ONE, IT WOULD BE EXTREME RECKLESSNESS, BUT NUMBER TWO, A DEADLY WEAPON WAS USED. AND THEREFORE, YOU MAY GATHER FROM THE USE OF A DEADLY WEAPON THAT THERE WAS MALICE, BECAUSE IT'S A LITTLE ABSURD TO SAY, 'GEE, I DIDN'T KNOW ANYBODY WAS GOING TO DIE WHEN I USED A WEAPON LIKE A GUN.'

AND THE FIFTH WAY IS THE FELONY MURDER RULE, OTHERWISE KNOWN AS HAND OF ONE, HAND OF ALL. HAND OF ONE IS HAND OF ALL.

HAND OF ONE, HAND OF ALL. IF A CRIME IS COMMITTED BY TWO OR MORE PERSONS WHO ARE ACTING TOGETHER IN THE COMMISSION OF A CRIME OR SOME OFFENSE, THEN THE ACT OF ONE IS THE ACT OF ALL.

THIS IS TRUE IF THERE WERE TWO PEOPLE OR IF THERE ARE MORE THAN TWO PEOPLE INVOLVED IN THE ACT. IF TWO OR MORE PEOPLE ARE TOGETHER - AND YOU WILL HEAR THIS INSTRUCTION - ARE TOGETHER, ASSISTING EACH OTHER IN THE COMMISSION OF AN OFFENSE, THE LAW SAYS THAT UNDER THESE CIRCUMSTANCES, THE ACT OF ONE IS THE ACT OF ALL.

OR ANOTHER WAY: THE HAND OF ONE IS THE HAND OF ALL.

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OTHER CASES HAVE HELD THAT WHEN TWO OR MORE PERSONS COMBINE TO COMMIT AN UNLAWFUL ACT AND IN THE EXECUTION THEREOF, A HOMICIDE IS COMMITTED BY ONE OF THE ACTORS, AND LISTEN TO THIS LANGUAGE, AS A PROBABLE OR A NATURAL CONSEQUENCE OF THOSE ACTS, ALL PRESENT AND PARTICIPATING IN THE UNLAWFUL ACT ARE GUILTY.

SO THE QUESTION TO ASK YOURSELF IS, WHEN ONE COMMITS AN ARMED ROBBERY IN THE MIDDLE OF THE NIGHT IN SOMEONE'S HOME WHEN A GUN IS USED AND IT'S FIVE AGAINST ONE, IS IT A PROBABLE OR NATURAL CONSEQUENCE THAT SOMEONE MAY GET KILLED? AND AGAIN, USE YOUR EVERYDAY EXPERIENCE FROM READING THE PAPER, WATCHING THE NEWS. WHY ELSE WOULD YOU HAVE THE HAND OF THE OTHER?

WHAT DOES AFORETHOUGHT MEAN? AFORETHOUGHT SIMPLY MEANS THAT AT THE TIME OF THE KILLING WHEN THE TRIGGER WAS BEING PULLED OR AT ANY TIME BEFORE THAT, MALICE IS THERE.

SO AT THE TIME OF THE KILLING, WHEN THE TRIGGER WAS BEING PULLED, OR AT ANY TIME BEFORE THAT, MALICE WAS PRESENT.

YOU KNOW HOW YOU READ SOMETIMES ABOUT MURDERS BEING PLANNED FOR A MONTH AND SO FORTH? THERE'S NO REQUIREMENT FOR THAT. AFORETHOUGHT SIMPLY MEANS THAT THIS MALICE, AT LEAST ONE OF THESE THINGS, EXISTED AT

THE TIME THE TRIGGER WAS PULLED OR AT ANY TIME BEFORE THAT.

ONE OTHER THING I WANT TO POINT OUT ABOUT THE HAND OF ONE, HAND OF ALL, AND I EXPECT THE JUDGE WILL INSTRUCT YOU ON THIS AND THE LANGUAGE IS VERY IMPORTANT. A PERSON COMMITTING AN UNLAWFUL ACT IS LEGALLY RESPONSIBLE FOR ALL NATURAL OR NECESSARY CONSEQUENCES THEREOF. I TALKED TO YOU ABOUT THAT LANGUAGE BEFORE. ONE COMBINING AND CONFEDERATING WITH OTHERS TO ACCOMPLISH AN ILLEGAL PURPOSE IS CRIMINALLY LIABLE FOR EVERYTHING DONE BY EITHER HIM OR HIS CONFEDERATES, WHICH FOLLOWS INCIDENTALLY IN THE EXECUTION OF THE COMMON DESIGN AS ONE OF THE PROBABLE OR NATURAL CONSEQUENCES - AND LISTEN TO THIS LANGUAGE BECAUSE THE JUDGE WILL TELL YOU THIS - THOUGH NOT INTENDED AS PART OF THE ORIGINAL DESIGN OR COMMON PLAN.

THOUGH NOT INTENDED AS A PART OF THE ORIGINAL DESIGN OR COMMON PLAN. YOU DO NOT HAVE TO INTEND TO KILL WHEN YOU GO IN TO COMMIT THAT ARMED ROBBERY IF THAT COULD BE A NATURAL CONSEQUENCE OF COMMITTING ARMED ROBBERY.

ALL RIGHT, SO THAT'S MURDER.

NOW, THE NEXT CHARGE THAT I'D LIKE TO TALK TO YOU ABOUT IS BURGLARY IN THE FIRST DEGREE. AND AGAIN, WE

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HAVE ELEMENTS. THOSE ARE THE FOUR ELEMENTS THE STATE MUST PROVE BEYOND A REASONABLE DOUBT FOR MURDER. LET'S LOOK AT THE ELEMENTS NOW OF BURGLARY.

BURGLARY IS DEFINED AS: A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF THE PERSON ENTERS A DWELLING - ENTERS A DWELLING - WITHOUT CONSENT WITH THE INTENT TO COMMIT A CRIME THEREIN AND ONE OF THE FOLLOWING THINGS EXISTS, AND I'M NOT GOING TO LIST THEM ALL ON THE BOARD. IF, WHEN EFFECTING OR WHILE IN THE DWELLING HERE ANOTHER PERSON IS ARMED WITH A DEADLY WEAPON - IN OTHER WORDS IF ONE PERSON IS ARMED WITH A DEADLY WEAPON - OR CAUSES PHYSICAL INJURY TO A VICTIM IN THERE OR USES OR THREATENS TO USE A DANGEROUS INSTRUMENT OR DISPLAYS A PISTOL OR ENTERS IN THE NIGHTTIME. OKAY, ANY OF THOSE THINGS UNDER HERE.

NOW, WHAT DOES THIS MEAN? DWELLING MEANS THE LIVING QUARTERS OF A BUILDING WHICH IS USED OR NORMALLY USED FOR SLEEPING, LIVING OR LODGING BY A PERSON, AND CERTAINLY A CAMPER FITS IN THAT, A TRAILER OR A HOUSE OR ALL SORTS OF THINGS.

WHAT IS ENTERED THE BUILDING WITHOUT CONSENT MEAN? TO ENTER A BUILDING WITHOUT CONSENT MEANS, AND I'M READING FROM THE STATUTE, MEANS TO ENTER A BUILDING WITHOUT CONSENT OF A PERSON IN LAWFUL POSSESSION OR TO ENTER A BUILDING BY USING DECEPTION,

ARTIFICE, TRICK OR MISREPRESENTATION TO GAIN CONSENT TO ENTER FROM THE PERSON.

SO IF YOU TELL SOMEBODY, 'GEE, I'M LOST, I JUST NEED TO USE YOUR PHONE,' YOU HAVE TRICKED THEM INTO LETTING YOU IN. AND THAT IS THE BASIS IN THIS CASE FOR THE BURGLARY.

NOW, ONE THING I WANT TO POINT OUT TO YOU. THE DEFENDANT IS GUILTY OF BURGLARY AND IT'S NOT HAND OF ONE, HAND OF ALL. SHE ACTUALLY WAS INVOLVED IN THE BURGLARY AND DID THE BURGLARY BY USING A TRICK TO GET IN AND BURGLARIZE. BUT IT'S HAND OF ONE, HAND OF ALL ON ALL ELSE.

NEXT WE WILL GO TO ARMED ROBBERY. WHAT ARE THE ELEMENTS OF ARMED ROBBERY? AND BEAR WITH ME. I KNOW THIS IS A LOT TO GO OVER AT ONE TIME.

ALL RIGHT, ARMED ROBBERY, AND I'M NOT GOING TO LIST THESE, BECAUSE ARE FAIRLY SELF EXPLANATORY. THESE ARE THE ELEMENTS OF ARMED ROBBERY: THE USE OF FORCE, THREATS OF FORCE, OR INTIMIDATION. NUMBER TWO, TO TAKE PERSONAL PROPERTY - HERE THE PERSONAL PROPERTY OF COURSE BEING THE GUN AND THERE WERE A FEW OTHER ITEMS TAKEN - FROM THE PERSON OR IMMEDIATE PRESENCE OF ANOTHER WITH THE INTENT TO DEPRIVE HIM OF POSSESSION, CARRYING AWAY THE PROPERTY TAKEN, AND IT'S GOT TO BE, YOU'VE GOT TO BE ARMED WHEN YOU DO IT. A PISTOL WOULD

BE ARMED, OR ONE OF YOUR PEOPLE ARMED.

AND LET'S GO TO CONSPIRACY NEXT. THIS IS VERY SIMPLE. THE COMMON LAW CRIME KNOWN AS CONSPIRACY IS DEFINED AS A COMBINATION BETWEEN TWO OR MORE PERSONS FOR THE PURPOSE OF ACCOMPLISHING AN UNLAWFUL OBJECT. THAT'S WHAT APPLIES IN THIS CASE.

THE INTERESTING THING ABOUT CONSPIRACY IS, IF I AGREE TO ENTER INTO A CRIME WITH SOMEONE, EVEN IF THE CRIME IS NEVER COMMITTED, I'M STILL GUILTY OF CONSPIRACY.

SO CONSPIRACY IS SORT OF A SEPARATE CRIME, BECAUSE THAT'S THE ENTERING INTO AGREEMENT WITH ANOTHER PERSON OR MORE THAN ONE PEOPLE SO THE CONSPIRACY CRIME IS COMPLETED EVEN IF YOU NEVER GO ON TO DO THE CRIME. SO THAT'S A LITTLE DIFFERENT THAN THE OTHERS.

ONE THING I WANT TO TALK TO YOU ABOUT ON THE CONSPIRACY. YOU'RE GOING TO HEAR THE JUDGE TELL YOU - LET'S FIND THE LANGUAGE - YOU'RE GOING TO HEAR THE JUDGE TELL YOU THAT IF SOMEONE WHO IS A CONSPIRATOR GOES OUT ON THEIR OWN AND DOES THEIR OWN THING, THIS IS WHAT YOU WILL HEAR: WHILE CONSPIRATORS ARE RESPONSIBLE FOR ALL INCIDENTAL AND CONSEQUENTIAL ACTS GROWING OUT OF THE GENERAL DESIGN, CONSPIRATORS ARE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANY ONE

CONSPIRATOR.

NOW, YOU WILL NOTICE HE'S GOING TO TELL YOU THIS WHILE HE'S TALKING TO YOU ABOUT CONSPIRACY. THAT DOES NOT APPLY TO HAND OF ONE, HAND OF ALL. AND WHAT THAT LANGUAGE COMES FROM IS YOU'RE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANOTHER CONSPIRATOR. THAT'S, FOR INSTANCE, WHERE I AGREE, SAY, TO SELL DRUGS FOR SOMEONE ELSE. AND THEY GO OUT AND WHILE THEY'RE SELLING DRUGS, THEY DECIDE TO GO DRIVE AND THEY HAVE A FELONY D.U.I. THAT JUST GOES TO CONSPIRACY, IN OTHER WORDS. I'M NOT EVEN THERE AT THE CRIME SCENE, I'M NOT ENGAGED IN THE CRIME, I'VE JUST CONSPIRED. SO I WANT TO REALLY MAKE THAT CLEAR. IT IS KIND OF CONFUSING THAT WHEN YOU HEAR THAT, YOU'RE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF THE CO-CONSPIRATOR. WHAT WE'RE TALKING ABOUT THERE IS NOT WHEN YOU'RE INVOLVED IN THE CRIME AND SOMEBODY DOES SOMETHING THAT'S AN INCIDENTAL AND NATURAL CONSEQUENCE. THAT ONLY APPLIES IN THE CONSPIRACY WHEN I'M NOT EVEN THERE AT THE CRIME SCENE, I'M NOT INVOLVED IN IT. ALL I'VE DONE IS CONSPIRED. I'M NOT AN ACTOR IN THE CRIME.

THAT IS REALLY CONFUSING, AND I KNOW IT IS.

FINALLY, THE LAST CRIME IS THE COMMISSION OF A - OR THE POSSESSION OF A FIREARM DURING THE COMMISSION

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OF A VIOLENT CRIME. IF YOU FIND THE DEFENDANT GUILTY OF MURDER, BURGLARY OR ARMED ROBBERY, ANY ONE OF THOSE THREE THINGS, THOSE ARE VIOLENT CRIMES. CONSPIRACY IS NOT A VIOLENT CRIME.

IF YOU FIND HER GUILTY OF ONE OF THOSE THINGS AND YOU FIND THAT ONE OF THE PARTICIPANTS, UNDER THE HAND OF ONE, HAND OF ALL, HAD A GUN, THEN SHE WOULD BE GUILTY OF THAT.

YOU WILL NOTICE THAT THE INDICTMENTS SAY THAT SHE DID IT. IT WILL SAY THAT SHE MURDERED, THAT SHE BURGLARIZED, THAT SHE ROBBED, AND THAT'S BECAUSE YOU ARE JUST AS GUILTY AS IF YOU HAD DONE IT, SO THE INDICTMENT LANGUAGE, IF YOU GET IT, IS GOING TO BE THAT SHE DID ALL OF THESE THINGS.

AND THAT'S ALL I HAVE ON THE LAW. I'LL BE BACK TO TALK TO YOU ABOUT THE FACTS OF THE CASE LATER.

MR. BYRHOLDT: MAY IT PLEASE THE COURT?

LADIES AND GENTLEMEN OF THE JURY, I APPRECIATE THE CLOSE ATTENTION. THIS CASE HAS LASTED A LITTLE LONGER THAN WE THOUGHT IT WOULD. A LOT OF CIRCUMSTANCES CAME UP. BUT ON BEHALF OF JENNIFER AND HER FAMILY, THE THING WE HAVE NOTICED IS THE CLOSE ATTENTION ALL OF YOU HAVE PAID DURING THIS TRIAL.

AND ON TUESDAY, I TOLD YOU THAT THINGS WERE NOT ALWAYS BLACK AND WHITE. THEY'RE NOT ALWAYS CLEAR.

THAT YOU WERE GOING TO HEAR A STORY ABOUT A SEVENTEEN-YEAR-OLD GIRL, THAT EACH OF US IN THIS COMMUNITY WOULD HOPE WE WOULD NEVER HEAR. AND THAT'S SOMEONE THAT WAS TAUGHT TO USE DRUGS BY THEIR MOTHER, THAT GOT HIGH, GOT STONED, WITH HER MOTHER. THAT FOR THE WEEK BEFORE THIS TERRIBLE INCIDENT, DIDN'T EAT, DIDN'T SLEEP. JUST GOT HIGH.

AND I KNOW MS. WHITE IS GOING TO BE STANDING OVER HERE AGAIN. I WON'T HAVE AN OPPORTUNITY TO GET BACK UP HERE. NOW, THERE WILL PROBABLY BE SOMETHING I'LL WISH I'D HAVE SAID, 'BOY, I WISH I'D HAVE SAID THAT TO THIS JURY.' THIS IS MY ONLY OPPORTUNITY TO SPEAK ON BEHALF OF JENNIFER'S LIFE, BECAUSE THAT'S WHAT WE'RE TALKING ABOUT HERE.

AND YOU SAW HER MOTHER ON THE STAND. HER MOTHER NEVER SAID SHE WAS SORRY. A MOTHER WHO HAS PUT THESE CHILDREN THROUGH THIS, THE LIFE THAT THEY HAD KNOWN.

NOW, UNDER BURGLARY WHAT MS. WHITE SAID, AND ON EACH OF THESE CHARGES, THE STATE HAS TO PROVE EVERY ELEMENT WITH PROOF BEYOND A REASONABLE DOUBT. MS. WHITE SAID, WELL, IF IT'S REASONABLE. THE JUDGE IS GOING TO CHARGE YOU REASONABLE DOUBT MEANS A DOUBT THAT CAUSES AN ORDINARY PERSON TO HESITATE.

THINK ABOUT IT. HAVE THEY PROVEN THEIR CASE?

LET'S GO BACK. BECAUSE IN ANY CRIMINAL ACT, YOU

TALK ABOUT INTENT. MS. WHITE IS GOING TO SAY, 'WELL, IF SOMEONE INTENDS THE CONSEQUENCES OF THEIR ACTIONS.'

I GUESS THAT'S IF YOU'RE SOBER, IF YOU'RE CONSCIOUS. BUT MS. TITMAN, WHO I CALLED AS A WITNESS, WHO HAS ALREADY CUT A DEAL WITH THE STATE FOR FIFTEEN YEARS, SAID THAT HER INVOLVEMENT AND JENNIFER'S INVOLVEMENT WERE IDENTICAL. THEY DID EXACTLY THE SAME THING. THEIR PARTICIPATION WAS IDENTICAL.

WHAT DID THEY DO? THEY WENT TO THE DOOR TO SEE IF SOMEONE WAS ALONE, BECAUSE THEY WERE TOLD THEY WERE GOING TO COLLECT MONEY. TWO PEOPLE THAT DID LINES OF COCAINE FROM THE STATE OF GEORGIA TO SOUTH CAROLINA, SAW SPACE SHIPS AND THINGS, IMAGINED THINGS.

BUT YET MS. TITMAN WAS NOT CHARGED WITH BURGLARY, WAS NOT CHARGED WITH ARMED ROBBERY, WAS NOT CHARGED WITH POSSESSING A HANDGUN, WAS NOT CHARGED WITH CONSPIRACY.

SHE CUT A DEAL.

BUT YET, THE OFFICERS THAT TESTIFIED FROM THAT STAND SAID THAT BUT FOR JENNIFER'S STATEMENT, JENNIFER'S STATEMENT IS THE ONE THAT MADE THEIR CASE, BECAUSE JENNIFER TITMAN'S FIRST STATEMENT, SHE HAD OVERDOSED, TRIED TO COMMIT SUICIDE, DOES NOT EVEN REMEMBER GIVING A STATEMENT.

SO THEY GET HER STATEMENT, GET HER TO COOPERATE,

AND NOW WANT TO DO AWAY WITH HER.

UNDER THAT FINE THEORY THE HAND OF ONE IS THE HAND OF ALL.

BUT YOU'VE GOT TO LOOK AT THE INTENT. USE YOUR COMMON SENSE, AND IT'S GOING TO BE HARD, BECAUSE I DON'T THINK ANYBODY KNOWS WHAT IT WOULD BE LIKE TO BE STONED FOR A WEEK, DOING COCAINE AND MARIJUANA, NOT EATING AND NOT SLEEPING, HOW YOU WOULD REACT, HOW YOUR BRAIN WORKS OR DOESN'T WORK, HOW THINGS APPEAR TO YOU.

BUT JENNIFER TITMAN SAID THEIR INTENT WAS TO CHECK AND SEE IF HE WAS BY HIMSELF, THAT THEY WERE GOING TO COLLECT SOME MONEY, THE SAME THING THAT THIS YOUNG LADY DID.

AND UNDER BURGLARY, THE LAST ELEMENT THAT MS. WHITE PUT UP, THE JUDGE WILL CHARGE YOU, WITH THE INTENT TO COMMIT A CRIME.

MS. TITMAN SAID HER INTENT WAS TO GO COLLECT MONEY. A STONED SEVENTEEN-YEAR-OLD, THE SAME AS JENNIFER.

WELL, IF THERE IS NO INTENT TO COMMIT BURGLARY, WHAT INTENT WAS THERE ON BEHALF OF JENNIFER MCSHARRY OTHER THAN FOLLOWING THE DIRECTION AND DO WHAT HER MOTHER TOLD HER? WHAT JENNIFER TITMAN DID, AND IF YOU WILL GO BACK ON THE DATES THEY'RE TALKING ABOUT, KNEW THESE PEOPLE LESS THAN A MONTH OR TWO, APPARENTLY MS.

KELSO HAD THE GIFT OF DOMINATION, TO TALK HER INTO DOING THESE THINGS, IN COMBINATION WITH THE DRUGS THEY WERE ON, VERSUS A LADY, A YOUNG WOMAN, THAT WANTED A MOTHER THAT DIDN'T HAVE ONE. THAT HER SISTER SAID CLUNG TO THIS WOMAN.

I ANTICIPATE THAT MS. WHITE IS GOING TO SAY IN HER CLOSING THAT YET JAMEY MCSHARRY DIDN'T GET INVOLVED IN THIS. SHE DROPPED OUT OF SCHOOL WHEN SHE WAS SIXTEEN AND GOT A JOB AND TRIED TO KEEP HER SISTER IN SCHOOL AND SUPPORT THE FAMILY.

THANK GOD WE HAD AT LEAST ONE STRONG PERSON OUT OF THESE KIDS. BUT FOR THE GRACE OF GOD, JAMEY WOULD BE UP HERE, TOO. NO EXCUSE. IT'S A FACT OF LIFE. IT'S A FACT OF THESE YOUNG PEOPLE'S LIVES.

I WISH I COULD TURN BACK THE CLOCK AND WISH THEY NEVER CAME HERE, THAT WHEN THEY WERE IN ARIZONA, THEIR MOTHER JUST STAYED OUT OF THEIR LIVES. I CAN'T DO THAT. I DON'T HAVE THAT GIFT.

BUT YOU HEARD JENNIFER TITMAN SAY WHAT HER INVOLVEMENT WAS AND THE DEAL THAT SHE GOT WITH THE STATE. THERE WASN'T ANY CHARGE FOR ALL THESE THINGS THEY'VE NOW CHARGED JENNIFER MCSHARRY WITH.

WHAT WE'RE TALKING ABOUT IS FAIRNESS. I KNOW MS. WHITE IS GOING TO SAY, WELL, ALL IS FAIR. WE WANT JUSTICE, AND THAT JUSTICE DEMANDS JUSTICE FOR THE

VICTIM. IT'S UNFORTUNATE, I AGREE, BUT LET'S TALK ABOUT RESPONSIBILITY AND WHERE DOES THE RESPONSIBILITY LIE?

IT LIES WITH MRS. KELSO, EVEN THOUGH SHE STILL DOESN'T ADMIT IT TODAY. YOU SAW HOW SHE WAS ON THE STAND. IT LIES WITH THE YOUNG MAN THAT PULLED THE TRIGGER, THAT HAD THE GUN AND WALKED IN.

BUT AT THAT TIME, THESE PEOPLE WERE BACK IN THE CAR, STONED OUT OF THEIR MINDS.

AND THE JUDGE IS GOING TO CHARGE YOU, MS. WHITE READ IT AND I'M GOING TO READ IT TO YOU AGAIN: WHILE CONSPIRATORS ARE RESPONSIBLE FOR ALL INCIDENTAL AND CONSEQUENTIAL ACTS GROWING OUT OF THE GENERAL DESIGN, CONSPIRATORS ARE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANY ONE CONSPIRATOR.

AND WHAT YOU'VE GOT TO DECIDE IS WHETHER JENNIFER MCSHARRY IS RESPONSIBLE FOR THE ACTS OF HER MOTHER; RESPONSIBLE FOR THE ACTS OF RONNIE, WHO PULLED THE TRIGGER AND THEY'RE SITTING IN THE CAR; RESPONSIBLE FOR THE ACTS OF JASON CONLEY, WHO'S NOT EVEN HERE, WHO TOOK THE WEAPON, TOOK THE THINGS OUT OF THE HOUSE WHILE THE GIRLS WERE IN THE CAR.

WHERE DOES THE RESPONSIBILITY LIE? THAT'S FOR THE TWELVE OF YOU TO DETERMINE.

THE JUDGE IS GOING TO CHARGE YOU ON THE LAW.

WHAT WE'RE TALKING ABOUT IS PUT YOURSELF IN THE SHOES OF THAT SEVENTEEN-YEAR-OLD GIRL WITH THE UPBRINGING THAT SHE HAD THE LAST COUPLE OF YEARS OF HER LIFE. AND USE YOUR COMMON SENSE. AND USE YOUR HEART AND USE YOUR MIND IN WHAT'S FAIR.

WHAT IS THIS YOUNG WOMAN GUILTY OF?

WHEN JENNIFER PLED NOT GUILTY, SHE SAID, 'I DIDN'T DO THIS. EVERYTHING YOU'VE CHARGED ME OF, STATE, YOU PROVE IT.'

THE FACT THAT SHE DID NOT GET ON THAT STAND SHOULD NOT ENTER INTO YOU DELIBERATIONS AT ALL. THE JUDGE WILL CHARGE YOU THAT BECAUSE IN AMERICA, WE ARE ONE OF THE FEW COUNTRIES THAT SAYS, YOU ARE INNOCENT UNTIL THE STATE PROVES YOU GUILTY. THANK GOODNESS WE HAVE THOSE, BECAUSE THOSE ARE NOT HOLLOW WORDS. THAT'S WHAT MAKES OUR SYSTEM OF JUSTICE THE BEST SYSTEM IN THIS WORLD.

ASK YOURSELVES: WAS THERE AN AGREEMENT? DID THEY PROVE IT? AND WHAT WAS THAT AGREEMENT? WHAT JENNIFER TITMAN SAID WAS THE AGREEMENT WAS TO CHECK AND SEE IF ANYBODY WAS THERE SO RENEE KELSO COULD COLLECT MONEY. THAT IS WHAT MS. TITMAN SAID WHO HAD THE DEAL, MS. WHITE MADE A BIG DEAL OUT OF IT, TO TELL THE TRUTH.

WELL, IF THAT'S HER DEAL, THEN HER INVOLVEMENT COULD BE NO MORE THAN THE INVOLVEMENT OF JENNIFER

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MCSHARRY. NO MORE, NO LESS.

EVERYBODY SHOULD BE TREATED THE SAME.

I ASK YOU TO JUST TAKE A MINUTE. WE'VE BEEN HERE FOR ALMOST A WEEK. CLOSE YOUR EYES AND PUT YOURSELVES IN THE SHOES OF JENNIFER MCSHARRY AND WHAT SHE HAS ACTUALLY GONE THROUGH IN HER SHORT LIFE AND WHAT THE STATE - WHAT IT WOULD BE LIKE. JUST TAKE A MINUTE TO DO THAT AND ASK YOURSELVES WHAT RESPONSIBILITY SHE BEARS IN THIS TRAGIC THING.

BECAUSE JENNIFER MCSHARRY IS THE PERSON WHO IS ON TRIAL FOR HER FUTURE, FOR HER LIFE. AND I KNOW THAT IF SHE COULD RUN BACK THE HANDS OF TIME, SHE WOULD TELL EACH ONE OF YOU HOW SORRY SHE IS FOR ALL THAT HAS TAKEN PLACE.

BUT WHEN YOU GO BACK TO THAT JURY ROOM, USE YOUR MIND AND YOUR HEART AND PUT THE RESPONSIBILITY WHERE IT LIES.

ON BEHALF OF JENNIFER AND HER FAMILY, WE THANK YOU. WE DON'T ENVY THE HARD TASK THAT YOU HAVE TODAY. AND OUR THOUGHTS ARE WITH YOU DURING YOUR DELIBERATION.

MS. WHITE: TAKE A MINUTE AND CLOSE YOUR EYES AND PUT YOURSELF IN SOMEONE'S SHOES WHO HAS CHOSEN TO ROB A MAN, WHO HAS CHOSEN TO GO ALONG WITH PEOPLE TO HOLD HIM AT GUNPOINT AND KILL HIM AND LEAVE AND NOT

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CALL ANYBODY? WHAT IS THIS WORLD COMING TO?

BUT LET'S ALL HAVE A MINUTE OF SILENCE FOR HER, SHALL WE?

THE VICTIM IN THIS CASE IS MELVIN MILLER. THE VICTIM IN THIS CASE WAS LYING IN HIS CAMPER, ASLEEP ON HIS OWN PROPERTY. THE VICTIM IN THIS CASE IS NOT THIS DEFENDANT.

LET'S CLOSE OUR EYES AND THINK ABOUT MELVIN MILLER, SHALL WE? HE DIDN'T CHOOSE TO JOIN A GROUP OF FIVE AND GO TO SOMEONE'S HOUSE.

HE DIDN'T CHOOSE TO BE LYING IN HIS OWN BED IN THE MIDDLE OF THE NIGHT AND HAVE FIVE PEOPLE COME.

HE DIDN'T CHOOSE TO HAVE TWO PEOPLE COME TO HIS HOUSE, WHOM HE THOUGHT WERE INNOCENT YOUNG GIRLS AND LET THEM IN HIS HOUSE TO USE THE PHONE OUT OF THE GOODNESS OF HIS HEART.

HE DIDN'T CHOOSE TO HAVE PEOPLE COME IN THROUGH THE FRONT DOOR AFTER THAT, HOLD A GUN AT HIS HEAD AND START SCREAMING AT HIM AND PILFERING THROUGH HIS THINGS. AND WHEN HE STRUGGLED, HAVE HIS ARM PULLED BACK BEHIND HIS BACK AND SHOT TWO TIMES.

THAT'S THE VICTIM IN THIS CASE. AND THERE IS SOMETHING DREADFULLY WRONG WITH OUR SOCIETY WHEN WE TURN A DEFENDANT INTO A VICTIM.

MR. MILLER ISN'T HERE TODAY TO TELL YOU HIS SOB

STORY. HIS LAST FEW MINUTES OF HIS LIFE WEREN'T TOO GLORIOUS, EITHER.

BUT SHE CHOSE TO ENGAGE IN HER ACTIONS; HE DID NOT.

AND, BY GOLLY, LET'S NOT CONFUSE A VICTIM FOR A DEFENDANT. IT'S SICKENING. I'M SORRY.

THE DEFENSE CAME UP IN OPENING AND SAID, 'WE'RE NOT GOING TO EXPLAIN WHAT HAPPENED, WE'RE GOING TO EXPLAIN WHY IT HAPPENED.'

WELL, THAT'S ALL WELL AND GOOD, BUT WE'RE NOT THERAPISTS, WE'RE NOT SOCIAL WORKERS, AND WE'RE NOT ALCOHOL AND DRUG ABUSE COUNSELORS.

YOU TOOK AN OATH WHEN YOU CAME IN THIS COURTROOM, AND THAT OATH WAS TO RENDER A VERDICT WHICH SPEAKS THE TRUTH. YOUR JOB IS NOT TO DECIDE WHY THIS HAPPENED. IT'S TO DECIDE WHAT HAPPENED. YOU'VE BEEN GIVEN THE LAW. YOU'VE BEEN GIVEN THE FACTS. WHAT HAPPENED, THE VERDICT MUST SPEAK THE TRUTH.

AND THE TRUTH IS, THE HAND OF ONE, HAND OF ALL, SHE'S GUILTY.

THE ONLY WAY FOR HER TO WIGGLE OUT OF THIS IS TO PLAY THE POOR ME, INNOCENT VICTIM, COCAINE HEAD. IT'S HER ONLY WAY. SHE'S GOT TO PLAY THAT ROLE AND SHE KNOWS THAT, BECAUSE THE FACTS SAY SHE'S GUILTY.

WELL, WHAT DO WE KNOW ABOUT POOR ME, LITTLE

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COCAINED-OUT JENNIFER MCSHARRY? WHAT DO WE KNOW ABOUT HER?

WE KNOW HER BEING SO COCAINED-OUT, SHE SURE DID GIVE A DETAILED STATEMENT.

WE KNOW THAT AFTER MR. MILLER WAS KILLED AND LYING THERE BLEEDING TO DEATH, ALONE ON HIS OWN PROPERTY, WHAT DO WE KNOW SHE DID THEN? SHE LAUGHED. HE DESERVED IT. HA, HA, HA, HA. THAT'S FUNNY.

WE KNOW SHE NEVER PICKED UP A PHONE TO CALL AN AMBULANCE.

WE KNOW SHE NEVER RAN TO A NEIGHBOR'S HOUSE SIXTY FEET AWAY TO GET HELP.

WE KNOW SHE DID NONE OF THIS.

THAT'S POOR, INNOCENT LITTLE SEVENTEEN-YEAR-OLD JENNIFER MCSHARRY, THE VICTIM IN THE CASE.

WE KNOW HER OWN BEST FRIEND SAID SHE COULDN'T BELIEVE HOW COLD-HEARTED THEY WERE AFTER THIS. IT DIDN'T FAZE THEM A BIT TO KILL A MAN.

SHE'S NOT A SEVENTEEN-YEAR-OLD CHILD. SEVENTEEN-YEAR-OLDS WORK. THEY MAKE DECISIONS, THEY GO TO SCHOOL. SHE MADE A DECISION TO ENGAGE IN THIS AND NOW SHE MUST PAY THE CONSEQUENCES.

HER SISTER WAS SIXTEEN YEARS OLD IN THE SAME CIRCUMSTANCES AND SHE CHOSE A DIFFERENT PATH FOR HER LIFE.

THIS IS A SAD STORY, ALL RIGHT. HER UPBRINGING ISN'T GREAT. PEOPLE COME THROUGH THIS COURT EVERY DAY FOR CHILD ABUSE, DIPPING THEIR KIDS IN SCALDING WATER AND BURNING THEM, MOLESTING THEM, IN AND OUT OF FOSTER HOMES. THAT IS NO EXCUSE TO VICTIMIZE OTHERS.

SHE DID NOT HAVE THAT BAD A CHILDHOOD. BY MOST STANDARDS, YES. SHE HAD A LOVING PARENT, THOUGH. SHE WASN'T IN AND OUT OF FOSTER HOMES, WASN'T BURNED WITH IRONS, TIED WITH CORDS, BROKEN BONES AND THINGS WE SEE IN HERE EVERY DAY IN ANDERSON COUNTY THAT OCCUR.

NO EXCUSE TO KILL SOMEONE ELSE, PERIOD.

HER SISTER WAS FULLY AVAILABLE TO HELP HER AND SO WAS HER DADDY, IF HER SITUATION WAS SO BAD.

IT'S INTERESTING TO ME THAT HER GREATEST WEAPON THAT NIGHT WAS HER YOUTHFUL, FEMININE BEING. THAT'S THE WHOLE THING THAT MADE THIS WHOLE PLAN WORK. THEY GOT IN THERE TO MAKE SURE HE WAS ALONE, UNARMED, HALF ASLEEP, AND HOW DID THEY DO IT? DO YOU THINK IF ADULTS HAD COME, HE WOULD HAVE LET THEM IN? OH, NO. YOUNG GIRLS.

HER INNOCENCE IS WHAT GOT THESE FIVE PEOPLE INTO THIS HOME.

AND NOW, SHE TURNS BACK TO HER EXCUSE. OH, BUT I WAS YOUNG.

SO THE YOUTH THAT KILLED MR. MILLER IS NOW GOING

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TO EXONERATE HER. ISN'T THAT IRONIC? ISN'T THAT TWISTED?

BUT IT'S NOT HER FAULT, IT'S HER MOM'S FAULT. BUT IT'S NOT HER MOM'S FAULT, IT'S RONNIE JORDAN'S FAULT. BUT IT'S NOT RONNIE JORDAN'S FAULT, IT'S SOMEONE ELSE'S FAULT. IT'S ALL OF THEIR FAULTS.

THEY WERE ALL INDISPENSABLE IN THIS PLAN. THEY ALL HAD THEIR ROLES TO PLAY AND THEY PLAYED THEM AS PLANNED.

THE DEFENDANT WAS A PERPETRATOR.

THERE IS NO WAY TO RECREATE A SCENE OR I DON'T EVEN KNOW WHAT THE WORDS ARE, TO GO BACK AND CREATE A SCENE, TO GO BACK TO THESE FEW MINUTES WHEN THIS WAS HAPPENING. IT MUST HAVE BEEN THE MOST TERRIFYING THING. IT MUST HAVE BEEN TERRIBLE. BLOOD FLYING. PEOPLE YELLING. PEOPLE IN AND OUT.

REMEMBER WHEN HE PUT HIS FOUR FINGERS ON THE GROUND? HIS LAST WORDS. HE THOUGHT THERE WERE ONLY FOUR, BECAUSE ONE HAD GONE OUT AND A FEMALE CAME IN WITH A FACE MASK ON.

SO CHAOTIC DURING THE LAST FEW MINUTES OF MR. MILLER'S LIFE.

THIS DEFENDANT SAT IN A CAR, TEN OR TWELVE FEET AWAY FROM ALL OF THIS. AND NEVER SOUGHT HELP. SHE HAD PLAYED HER ROLE, AND NOW THE OTHERS WERE PLAYING

THEIRS AS WELL.

SHE SAYS, 'BUT I WAS STONED.' DON'T DO DRUGS. THEY'RE ILLEGAL. IF YOU DO THEM, TOO BAD. THAT'S NO EXCUSE. WHAT, NOW WE CAN ALL GO OUT AND SMOKE A JOINT AND SNORT A LITTLE COCAINE AND THEN GO COMMIT A CRIME? IT'S ALL RIGHT? BECAUSE WE WERE STONED?

GEE, THAT WOULD MAKE THE CRIMINAL ENTERPRISES A LITTLE EASIER, WOULDN'T IT? SORRY, JUDGE, I WAS STONED.

VOLUNTARY INTOXICATION IS NO DEFENSE IN THIS STATE, AND THE JUDGE WILL TELL YOU THAT. NO DEFENSE. IF YOU TAKE DRUGS AND YOU COMMIT A CRIME, YOU ARE RESPONSIBLE. TOO BAD. DON'T TAKE DRUGS.

FOR BEING SO DRUGGED, YOU LOOK AT HER STATEMENT. WAS SHE REALLY DRUGGED? HOW DOES SHE REMEMBER COLORS OF THINGS, NUMBERS OF THINGS? WHAT EVERYBODY IS DOING? SHE COULDN'T HAVE BEEN THAT DRUGGED, COULDN'T HAVE.

THE REASON FOR LAWS IS TO PROTECT INNOCENT PEOPLE. THAT'S THE REASON WE HAVE LAWS. IT'S TOO BAD THAT PEOPLE FIND THEMSELVES COMMITTING CRIMES, BUT LAWS ARE HERE TO PROTECT US INNOCENT PEOPLE.

AND THE LAW HERE SAYS HAND OF ONE, HAND OF ALL. YOU STAND IN THE SHOES OF EVERY PERSON THERE. IT'S JUST LIKE SHE STOOD IN RONNIE JORDAN'S SHOES, SHE

STOOD IN KELSO'S SHOES, FOR THE WHOLE THING. IF ANY ONE OF THEM DID ANY OF THESE THINGS, SO DID SHE.

I FIND IT A LITTLE HUMOROUS THAT THE DEFENSE ATTORNEY SAID, 'OH, JENNIFER TITMAN, YOU CAN'T BELIEVE HER, SHE HAS AN AGREEMENT WITH THE STATE.' WE DIDN'T CALL HER. WHAT'S HE DOING CALLING A WITNESS IF SHE'S NOT CREDIBLE? SHE'S HIS WITNESS.

BUT, LADIES AND GENTLEMEN, THINK ABOUT IT. THE STATE HAS GOT TO HAVE SOMEBODY TO TESTIFY IN MS. KELSO'S CASE BECAUSE SHE DIDN'T GIVE A STATEMENT TO TELL WHAT HAD HAPPENED. UNFORTUNATELY, BELIEVE IT OR NOT, PEOPLE WHO COMMIT MURDER AND ACT LIKE THAT DO NOT ASK PREACHERS TO COME ALONG. IT'S REALLY TOO BAD. I WISH THEY WOULD, BECAUSE WE'D HAVE MUCH BETTER EYE WITNESSES, BUT THEY DON'T.

SO YOU'VE TO TAKE WHO WAS THERE.

BUT, LADIES AND GENTLEMEN, IT'S FRUSTRATING. CRIMES CONCEIVED IN HELL DO NOT HAVE ANGELS AS WITNESSES. NEVER HAVE. NEVER WILL. JENNIFER TITMAN CAME IN AND TOLD THE TRUTH. WE DIDN'T EVEN CALL HER.

YOU KNOW, THE DEFENSE SAID YOU THE JURY THINK ABOUT IT FOR A MINUTE. WELL, I WANT YOU TO THINK OF ONE OTHER THING. YOU ARE MR. MILLER'S JURY. HE'S NOT HERE TO TELL YOU HIS STORY. HE'S GOT TO RELY ON A PAIR OF SHOES TO TELL HIS STORY, A PAIR OF SUNGLASSES,

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TO TELL HIS STORY. HE'S GOT TO RELY ON BULLETS TO TELL HIS STORY. BECAUSE HE CAN'T WALK UP HERE TODAY. HE'S NOT HERE.

YOU KNOW, THE DEFENDANT SAID IN HER FIRST STATEMENT: I REALLY THOUGHT WE COULD GET AWAY WITH IT.

HER ONLY WAY OF GETTING AWAY WITH IT IS TO CONVINCE YOU SHE IS A POOR, INNOCENT LITTLE SEVENTEEN-YEAR-OLD. I REALLY THOUGHT I'D GOTTEN AWAY WITH IT.

WILL SHE?

THE COURT: MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, MY INSTRUCTIONS WILL PROBABLY TAKE THIRTY TO FORTY MINUTES. DO ANY OF YOU NEED A BREAK BEFORE WE CONTINUE? (NO RESPONSE).

ALL RIGHT, IF ANYONE WISHES TO LEAVE THE COURTROOM, YOU MAY LEAVE AT THIS TIME. OTHERWISE, YOU'RE GOING TO HAVE TO STAY IN UNTIL I FINISH MY INSTRUCTIONS TO THE JURY.

MADAM FOREPERSON AND MEMBERS OF THE JURY, THE STATE OF SOUTH CAROLINA CHARGES THE DEFENDANT, JENNIFER L. MCSHARRY, WITH THE OFFENSES OF MURDER, ROBBERY WHILE ARMED WITH A DEADLY WEAPON, SOMETIMES CALLED ARMED ROBBERY, BURGLARY FIRST DEGREE, CRIMINAL CONSPIRACY, AND POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME.

THE FIRST PART OF MY INSTRUCTIONS, I WANT TO GIVE

YOU WHAT IS SOMETIMES CALLED A GENERAL CHARGE TO THE JURY. THIS WILL COVER SUCH THINGS AS THE PRESUMPTION OF INNOCENCE, REASONABLE DOUBT, CREDIBILITY OR BELIEVABILITY OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE, AND A DISTINCTION BETWEEN YOUR JOB AS JURORS AND MY JOB AS THE TRIAL JUDGE IN THIS CASE.

FOLLOWING THAT WILL BE DETAILED INSTRUCTIONS OR SPECIFIC INSTRUCTIONS ON EACH OF THE CRIMES INVOLVED IN THIS CASE.

AFTER I FINISH THE DETAILED INSTRUCTIONS ON EACH OF THE FIVE CRIMES INVOLVED, I WILL GIVE YOU SOME MORE GENERAL INSTRUCTIONS ON SUCH THINGS AS VOLUNTARY STATEMENTS, EXPERT WITNESSES, AND MANY OTHERS.

I JUST TOLD YOU THAT THE STATE HAD CHARGED THIS DEFENDANT, JENNIFER L. MCSHARRY, WITH THESE FIVE PARTICULAR CRIMES THAT ARE SET OUT IN THESE INDICTMENTS THAT I HOLD IN MY HAND.

TO EACH OF THESE INDICTMENTS, TO EACH OF THESE CRIMINAL CHARGES, THE DEFENDANT, JENNIFER L. MCSHARRY, HAS ENTERED A PLEA OF NOT GUILTY, WHICH PLACES UPON THE STATE OF SOUTH CAROLINA THE BURDEN OF PROVING THE DEFENDANT GUILTY OF THESE CRIMES.

A PERSON CHARGED WITH COMMITTING A CRIMINAL OFFENSE IN SOUTH CAROLINA IS NEVER REQUIRED TO PROVE HIMSELF OR HERSELF INNOCENT.

I CHARGE YOU THAT IT IS A VITAL, IMPORTANT RULE OF THE LAW OF EVIDENCE THAT THE DEFENDANT IN A CRIMINAL TRIAL, NO MATTER HOW GREAT OR SERIOUS MAY BE THE OFFENSE WITH WHICH HE OR SHE IS CHARGED, MUST ALWAYS BE PRESUMED INNOCENT UNTIL HIS GUILT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT.

NOW, THIS PRESUMPTION OF INNOCENCE REMAINS WITH THE DEFENDANT AT ALL TIMES, FROM THE MOMENT OF THE ARRAIGNMENT THROUGHOUT THE TRIAL AND UNTIL THE JURY HAS, UPON THE TESTIMONY AND EVIDENCE PRESENTED, REACHED A VERDICT OF GUILTY - EXCUSE ME, LET ME REPEAT THAT.

THIS PRESUMPTION OF INNOCENCE REMAINS WITH THE DEFENDANT AT ALL TIMES FROM THE MOMENT OF THE ARRAIGNMENT THROUGHOUT THE TRIAL AND UNTIL THE JURY HAS, UPON THE TESTIMONY AND EVIDENCE PRESENTED, REACHED A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT. IT S THE SOLEMN DUTY OF THE JURY, IF NOT CLEARLY CONVINCED OF THE DEFENDANT'S GUILT BEYOND EVERY REASONABLE DOUBT TO THE CONTRARY, TO ACQUIT THE DEFENDANT.

SO THE BURDEN OF PROOF IS UPON THE STATE TO ESTABLISH TO YOUR SATISFACTION THE GUILT BEYOND A REASONABLE DOUBT OF THIS DEFENDANT HERE ON TRIAL FOR THE CRIMES OF MURDER, ROBBERY WHILE ARMED WITH A

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DEADLY WEAPON, BURGLARY FIRST DEGREE, CRIMINAL CONSPIRACY, AND POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME.

WHAT IS REASONABLE DOUBT? A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

THE GOVERNMENT HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. SOME OF YOU MAY HAVE SERVED AS JURORS IN CIVIL CASES WHERE YOU WERE INSTRUCTED THAT IT IS ONLY NECESSARY TO PROVE THAT A FACT IS MORE LIKELY TRUE THAN NOT TRUE.

IN CRIMINAL CASES, THE GOVERNMENT'S PROOF MUST BE MORE POWERFUL THAN THAT. IT MUST BE BEYOND A REASONABLE DOUBT.

PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT. THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY, AND IN CRIMINAL CASES, THE LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE BATTLE.

IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE YOU ARE FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIMES CHARGED, YOU MUST FIND HER GUILTY.

IF, ON THE OTHER HAND, YOU THINK THERE IS A REAL POSSIBILITY THAT SHE IS NOT GUILTY, YOU MUST GIVE HER

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THE BENEFIT OF THE DOUBT AND FIND HER NOT GUILTY.

UNDER THE CONSTITUTION AND THE LAWS OF SOUTH CAROLINA, YOU THE JURY ARE THE FINDERS OF THE FACTS IN THIS CASE. I DO NOT HAVE THE RIGHT TO PASS UPON THE FACTS OR EVEN TO EXPRESS ANY OPINION I MIGHT HAVE AS TO THEM, NOR MAY I INTIMATE IN ANY WAY WHAT I MAY THINK ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT.

YOU ARE ALSO THE JUDGES, AND THE SOLE JUDGES OF THE CREDIBILITY, THE BELIEVABILITY, OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE. IN PASSING UPON THEIR CREDIBILITY, YOU MAY TAKE INTO CONSIDERATION MANY THINGS, SUCH AS THE FOLLOWING:

THE APPEARANCE AND MANNER OF THE WITNESS ON THE STAND, SOMETIMES REFERRED TO AS THE DEMEANOR OF THE WITNESS;

WAS THE WITNESS FORTHRIGHT OR HESITANT;

WAS THE WITNESS'S TESTIMONY CONSISTENT OR DID IT CONTAIN DISCREPANCIES;

WHAT WAS THE ABILITY OF THE WITNESS TO KNOW THE FACTS ABOUT WHICH HE OR SHE TESTIFIED;

DID THE WITNESS HAVE A CAUSE OR A REASON TO BE BIASED AND PREJUDICED IN FAVOR OF THE TESTIMONY HE OR SHE GAVE;

WAS THE TESTIMONY OF THE WITNESS CORROBORATED OR MADE STRONGER BY OTHER TESTIMONY AND EVIDENCE OR WAS

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IT MADE WEAKER OR IMPEACHED BY SUCH OTHER TESTIMONY AND EVIDENCE?

AS JURORS, YOU HAVE THE RIGHT TO BELIEVE A SMALL PORTION OF A WITNESS'S TESTIMONY AND DISCARD THE LARGER PORTION OR VICE VERSA. YOU MAY BELIEVE ALL OF A WITNESS'S TESTIMONY OR NONE. YOU MAY BELIEVE THE TESTIMONY OF A SINGLE WITNESS AGAINST THAT OF MANY WITNESSES, OR THE OTHER WAY AROUND.

MOST CERTAINLY, YOU DO NOT DETERMINE THE MATTER OF CREDIBILITY OR BELIEVABILITY BY COUNTING UP THE NUMBER OF WITNESSES WHO MAY HAVE TESTIFIED ON BEHALF OF THE PARTIES.

THROUGHOUT THIS ENTIRE PROCESS, YOU HAVE BUT ONE SINGLE OBJECTIVE, AND THAT IS TO SEEK THE TRUTH, REGARDLESS OF FROM WHAT WITNESS THE TESTIMONY MAY HAVE COME.

ALL OF THESE THINGS YOU WILL CONSIDER, BEARING IN MIND THAT YOU SHOULD GIVE THE DEFENDANT THE BENEFIT OF EVERY REASONABLE DOUBT.

THE SAME CONSTITUTION AND LAWS WHICH MAKE YOU THE JURY, THE FINDERS OF THE FACT AS I HAVE ALREADY DISCUSSED WITH YOU, PROVIDE THAT THE JUDGE IS THE SOLE AND THE ONLY INSTRUCTOR IN THE LAW. YOU MUST ACCEPT AS CORRECT THE LAW WHICH I CHARGE AND APPLY IT TO THE EVIDENCE AS YOU FIND IT AND REACH YOUR VERDICT.

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IF I SHOULD MAKE AN ERROR IN THE LAW AS I INSTRUCT IT TO YOU, THERE IS ANOTHER TIME AND PLACE THAT ERROR CAN BE CONSIDERED, AND IF NECESSARY, CORRECTED. BUT FOR PURPOSES OF THIS CASE TODAY, YOU MUST ACCEPT THE LAW AS I CHARGE IT TO YOU TO BE THE CORRECT LAW.

FINALLY, I CHARGE YOU IN THIS REGARD THAT YOU, NOR FOR THAT MATTER, I, SHOULD BE CONCERNED WITH WHAT THE LAW OUGHT TO BE, BUT RATHER WHAT I CHARGE YOU THE LAW TO BE.

I AM NOW GOING TO INSTRUCT YOU ON THE FIVE DIFFERENT CRIMES INVOLVED IN THIS CASE. I AM GOING TO START OUT WITH THE CRIME OF MURDER.

SECTION 16-3-10 OF THE SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED, STATES, IN PART:

> MURDER IS THE KILLING OF ANY PERSON BY ANOTHER WITH MALICE AFORETHOUGHT, EITHER EXPRESSED OR IMPLIED.

I CHARGE YOU THAT IN ORDER TO CONVICT OF MURDER THE STATE MUST NOT ONLY PROVE THAT THE DECEASED WAS KILLED BY THE DEFENDANT, BUT THE STATE MUST ALSO PROVE BEYOND A REASONABLE DOUBT THAT THE KILLING WAS DONE WITH MALICE AFORETHOUGHT.

MALICE, IN THE LAW OF HOMICIDE, IS A TERM OF ART. THAT IS, A TECHNICAL TERM IMPORTING WICKEDNESS AND

EXCLUDING JUST CAUSE OR EXCUSE.

IT IS SOMETHING WHICH SPRINGS FROM DEPRAVITY, FROM A HEART DEVOID OF SOCIAL DUTY AND FATALLY BENT ON WRONGDOING.

MALICE HAS BEEN DEFINED AS THE WRONGFUL INTENT TO INJURE ANOTHER, AND INDICATES A WICKED OR DEPRAVED SPIRIT, INTENT ON DOING WRONG.

THE WORDS EXPRESS OR IMPLIED DO NOT MEAN DIFFERENT KINDS OF MALICE, BUT MERELY THE MANNER IN WHICH THE ONLY KIND KNOWN TO THE LAW MAY BE SHOWN TO EXIST.

MALICE IS EXPRESSED WHEN THERE ARE PRIOR THREATS OF VENGEANCE OR WHEN OTHER CIRCUMSTANCES SHOW DIRECTLY THAT THE CRIMINAL PURPOSE WAS ENTERTAINED.

THE LAW SAYS IF ONE INTENTIONALLY KILLS ANOTHER WITH A DEADLY WEAPON, THE INFERENCE OF MALICE MAY ARISE. IF FACTS ARE PROVED BEYOND A REASONABLE DOUBT SUFFICIENT TO RAISE AN INFERENCE OF MALICE TO YOUR SATISFACTION, THIS INFERENCE WOULD BE SIMPLY AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU THE JURY ALONG WITH THE OTHER EVIDENCE IN THE CASE, AND YOU MAY GIVE IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE.

YOU MAY ACCEPT OR REJECT THIS PERMISSIVE INFERENCE, DEPENDING UPON YOUR VIEW OF THE EVIDENCE.

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WITH RESPECT TO THE USE OF A DANGEROUS INSTRUMENTALITY, SUCH AS A WEAPON, MALICE CANNOT BE INFERRED FROM MERE RECKLESSNESS, WHICH MEANS A CONSCIOUS FAILURE TO EXERCISE DUE CARE OR A CONSCIOUS INDIFFERENCE TO THE RIGHTS AND SAFETY OF OTHERS.

TO INFER MALICE FROM THE USE OF A DANGEROUS INSTRUMENTALITY, SUCH AS A WEAPON, THE CONDUCT MUST EITHER BE INTENTIONAL OR IT MUST BE SO GROSSLY RECKLESS, SO AGGRAVATED, SO ATROCIOUS, SO CULPABLE AND INEXCUSABLE AS TO SHOW AN ACTIVE, INTENTIONAL DISREGARD OF CONSEQUENCES TO HUMAN LIFE, THEREBY DENOTING A HEART DEVOID OF SOCIAL DUTY AND ONE FATALLY BENT ON MISCHIEF.

AS I HAVE SAID, IF THE FACTS ARE PROVED BEYOND A REASONABLE DOUBT SUFFICIENT TO RAISE AN INFERENCE OF MALICE TO YOUR SATISFACTION, THE INFERENCE WOULD BE SIMPLY AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU THE JURY ALONG WITH THE OTHER EVIDENCE IN THE CASE AND YOU MAY GIVE IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE.

I FURTHER INSTRUCT YOU THAT THE LAW SAYS IF ONE INTENTIONALLY KILLS ANOTHER DURING THE COMMISSION OF A FELONY, THE IMPLICATION OF MALICE MAY ARISE. IF FACTS ARE PROVED BEYOND A REASONABLE DOUBT SUFFICIENT TO RAISE AN INFERENCE OF MALICE TO YOUR SATISFACTION,

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THIS INFERENCE WOULD BE SIMPLY AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU THE JURY ALONG WITH OTHER EVIDENCE IN THE CASE, AND YOU MAY GIVE IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE.

WHEN WE DEFINE MURDER AS THE UNLAWFUL KILLING WITH MALICE AFORETHOUGHT, WHAT DO WE MEAN BY THE WORD AFORETHOUGHT?

IT MEANS THAT WHILE THE LAW DOES NOT REQUIRE THAT MALICE SHALL EXIST FOR ANY PARTICULAR LENGTH OF TIME BEFORE THE COMMISSION OF THE ACT IN QUESTION, IT MUST BE AFORETHOUGHT. THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT PRODUCING THE FATAL RESULT.

MALICE NEED NOT BE IN THE MIND OF THE ONE DOING THE WRONGFUL ACT ANY PARTICULAR LENGTH OF TIME BEFORE THE ACT. IF IT IS PRESENT IN THE MIND ANY LENGTH OF TIME BEFORE THE ACT AND AT THE TIME OF THE ACT, ACCOMPANYING AND PROMPTING THE ACT, THEN ITS PRESENCE WOULD BE SUFFICIENT.

LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU CAN FIND THE DEFENDANT, THIS DEFENDANT, GUILTY OF MURDER THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THE CRIME OF MURDER. SHOULD THE STATE FAIL TO PROVE EACH AND EVERY ELEMENT OF THE CRIME OF MURDER BEYOND A REASONABLE DOUBT, YOU MUST

FIND THE DEFENDANT NOT GUILTY AND ACQUIT HER.

I AM NOW GOING TO INSTRUCT YOU ON THE OFFENSE OR THE CRIME KNOWN IN LAW AS ARMED ROBBERY. I AM GOING TO READ TO YOU IN PART SECTION 16-11-330(A) OF THE 1976 CODE OF LAWS OF THIS STATE AS AMENDED:

> A PERSON WHO COMMITS ROBBERY WHILE ARMED WITH A PISTOL, DIRT, SLINGSHOT, METAL KNUCKLES, RAZOR OR OTHER DEADLY WEAPON, IS GUILTY OF A FELONY.

IN ORDER TO DEFINE FOR YOU ARMED ROBBERY, WHICH IS SOMETIMES CALLED ROBBERY WHILE ARMED WITH A DEADLY WEAPON, I AM GOING TO FIRST DEFINE FOR YOU THE CRIME OF LARCENY, AND THEN THE CRIME OF ROBBERY, AND THEN WHAT CONSTITUTES ARMED ROBBERY, BECAUSE LARCENY IS EMBRACED WITHIN ROBBERY. AND THEN ARMED ROBBERY IS THE AGGRAVATION OF THE CRIME OF ROBBERY.

WHAT IS LARCENY? LARCENY IS THE FELONIOUS TAKING AND CARRYING AWAY BY ANY PERSON OF THE GOODS OR PERSONAL PROPERTY OF ANOTHER WITH THE FELONIOUS INTENT TO PERMANENTLY DEPRIVE THE OWNER OF HIS PROPERTY AND CONVERT IT TO THE TAKER'S OWN USE.

THE ESSENTIAL ELEMENTS OF THE CRIME OF LARCENY WHICH ORDINARILY IS CALLED STEALING ARE:

ONE, THE FELONIOUS INTENT, THE INTENT TO STEAL ON THE PART OF THE TAKER, TO PERMANENTLY DEPRIVE THE

OWNER OF THE PERSONAL PROPERTY AND TO CONVERT THE PROPERTY TO THE TAKER'S OWN USE; AND

NUMBER TWO, THE ACT OF TAKING THE PROPERTY.

ROBBERY IS THE FELONIOUS TAKING AND CARRYING AWAY OF THE PERSONAL PROPERTY OF ANY VALUE OF ANOTHER FROM HIS PERSON OR IN HIS PRESENCE BY VIOLENCE OR PUTTING HIM OR HER IN FEAR OF VIOLENCE.

ROBBERY INCLUDES LARCENY AND ALL OF THE ELEMENTS WHICH ARE NECESSARY TO CONSTITUTE LARCENY ARE ALSO NECESSARY TO CONSTITUTE ROBBERY.

THE ELEMENTS OF ROBBERY ARE:

FIRST, THE PROPERTY TAKEN MUST BE THE SUBJECT OF LARCENY, THAT IS, PERSONAL PROPERTY.

I CHARGE YOU THAT IN THIS CASE, THE PROPERTY TAKEN IS DEFINED IN LAW AS PERSONAL PROPERTY.

SECOND, THERE MUST BE A FELONIOUS TAKING AND CARRYING AWAY OF THE PERSONAL PROPERTY. THAT IS, THERE MUST BE A TRESPASS TO, AND AN ASPORTATION OF THE PERSONAL PROPERTY BY THE TAKER. EVEN FOR AN INSTANT IS SUFFICIENT. AND THE CARRYING AWAY OR EVEN THE SLIGHTEST REMOVAL OF THE PERSONAL PROPERTY IS SUFFICIENT IN LAW.

THIRD, THE TAKING AND THE CARRYING AWAY OF THE PERSONAL PROPERTY MUST BE WITH A FELONIOUS INTENT, THAT IS, WITH THE INTENT TO STEAL ON THE PART OF THE

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TAKER, TO PERMANENTLY DEPRIVE THE OWNER OF THE PERSONAL PROPERTY, AND TO CONVERT THE PERSONAL PROPERTY TO THE TAKER'S OWN USE.

FOURTH, THE AGGRAVATED CIRCUMSTANCE OR CIRCUMSTANCES NECESSARY TO CONSTITUTE ROBBERY AS DISTINGUISHED FROM LARCENY ARE THESE: THE PROPERTY MUST BE TAKEN FROM THE PERSON OF ANOTHER, BUT IF IT IS TAKEN IN HIS OR HER PRESENCE IT IS TAKEN CONSTRUCTIVELY FROM HIS OR HER PERSON. THE TAKING MUST NOT ONLY BE WITHOUT HIS OR HER CONSENT, BUT IT MUST BE ACCOMPLISHED BY VIOLENCE OR BY PUTTING HIM OR HER IN FEAR OF VIOLENCE.

IN ORDER FOR ONE TO BE GUILTY OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON OR ARMED ROBBERY, THE LAW REQUIRES THAT ONE MUST HAVE USED A DEADLY WEAPON TO ACCOMPLISH THE PURPOSE OF THE ROBBERY AS I HAVE DEFINED THAT TERM TO YOU.

I NOW CHARGE YOU THAT A GUN OR A RIFLE IS A DEADLY WEAPON AS DEFINED BY THE STATUTE WHICH I HAVE READ TO YOU.

LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU COULD FIND THE DEFENDANT, THIS DEFENDANT, GUILTY OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THE CRIME OF ROBBERY WHILE ARMED WITH A

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DEADLY WEAPON.

SHOULD THE STATE FAIL TO PROVE EACH AND EVERY ELEMENT OF THE CRIME OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY AND ACQUIT HER.

I NOW WANT TO INSTRUCT YOU ON THE CRIME OF BURGLARY.

BURGLARY IS DEFINED AND SET OUT IN SECTION 16-11-311 OF OUR SOUTH CAROLINA CODE OF LAWS:

> A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF THE PERSON ENTERS A DWELLING WITHOUT CONSENT AND WITH INTENT TO COMMIT A CRIME THEREIN AND EITHER (1) WHEN IN EFFECTING ENTRY OR WHILE IN THE DWELLING OR IN IMMEDIATE FLIGHT THEREFROM HE OR ANOTHER PARTICIPANT IN THE CRIME IS ARMED WITH A DEADLY WEAPON OR EXPLOSIVE OR CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME OR USES OR THREATENS THE USE OF A DANGEROUS INSTRUMENT OR DISPLAYS WHAT IS OR APPEARS TO BE A KNIFE, PISTOL, REVOLVER, RIFLE, SHOTGUN, MACHINE GUN, OR OTHER FIREARM; OR (2) THE ENTERING OR REMAINING OCCURS IN THE NIGHTTIME.

NOW, IN CONNECTION WITH THE CRIME OF BURGLARY, I WANT TO GIVE YOU SOME DEFINITIONS.

DWELLING MEANS, ITS DEFINITION FOUND IN 16-11-10 AND ALSO MEANS THE LIVING QUARTERS OF A BUILDING WHICH IS USED OR NORMALLY USED FOR SLEEPING, LIVING OR LODGING BY A PERSON.

THE PHRASE 'ENTERS A DWELLING WITHOUT CONSENT' MEANS TO ENTER A BUILDING WITHOUT THE CONSENT OF THE PERSON IN LAWFUL POSSESSION, OR TO ENTER A BUILDING BY USING DECEPTION, ARTIFICE, TRICK, OR MISREPRESENTATION TO GAIN CONSENT TO ENTER FROM THE PERSON IN LAWFUL POSSESSION.

ENTRY IS AN INDISPENSABLE ELEMENT IN THE CRIME OF BURGLARY. ENTRY IS THE ACT OF GOING INTO THE PLACE AFTER A BREACH HAS BEEN EFFECTED. IT IS NOT NECESSARY, HOWEVER, THAT THE ENTIRE BODY OF A PERSON SHALL GET INTO THE HOUSE. THE LEAST ENTRY IS SUFFICIENT, AND IT MAY BE ACCOMPLISHED BY ANY PART OF THE BODY, AS A HAND OR A FOOT OR EVEN BY AN IMPLEMENT SUCH AS A HOOK OR OTHER INSTRUMENT.

NIGHTTIME IS THAT PERIOD BETWEEN SUNSET AND SUNRISE, DURING WHICH THE FACE OF A PERSON CANNOT BE DISCERNED BY THE LIGHT OF THE SUN.

CONCERNING THE CRIME OF BURGLARY, THERE MUST BE AN INTENT TO COMMIT A CRIME, WHETHER THE CRIME IS

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COMMITTED OR NOT. MERE ENTERING A DWELLING IS NOT A VIOLATION OF THIS LAW. IT IS ONLY WHERE THERE IS AN ENTERING WITH INTENT TO COMMIT A CRIME THEREIN THAT THE CRIME OF BURGLARY IS COMPLETE. THE ENTRY MUST BE CARRIED OUT WITH INTENT TO COMMIT A CRIME, AND A CRIME OF ANY GRADE IS SUFFICIENT.

IT IS ESSENTIAL THAT THE FELONIOUS INTENT EXIST AT THE TIME OF THE ENTERING, AND IT IS NOT SUFFICIENT THAT THE FELONIOUS INTENT IS FORMED AFTER THE ENTRY.

ON THE OTHER HAND, WHERE THE INTENT EXISTS AT THE TIME OF THE ENTERING, IT IS NO DEFENSE THAT THE INTENT WAS ABANDONED AFTER THE ENTRY BECAUSE THE ENTRY WITH FELONIOUS INTENT COMPLETES THE OFFENSE OF BURGLARY.

THE WORD INTENT IS DEFINED: CRIMINAL INTENT IS A STATE OF MIND WHICH OPERATES JOINTLY WITH AN ACT OR AN OMISSION IN THE COMMISSION OF A CRIME.

CRIMINAL INTENT IS A MENTAL STATE OF CONSCIOUS WRONGDOING.

LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU CAN FIND THE DEFENDANT, THIS DEFENDANT, GUILTY OF BURGLARY IN THE FIRST DEGREE, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THE CRIME OF BURGLARY IN THE FIRST DEGREE.

SHOULD THE STATE FAIL TO PROVE EACH AND EVERY ELEMENT OF THE CRIME OF BURGLARY IN THE FIRST DEGREE

BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT JENNIFER L. MCSHARRY NOT GUILTY AND ACQUIT HER OF THIS CRIME.

I NOW WANT TO INSTRUCT YOU ON THE CRIME OF CONSPIRACY.

SECTION 16-14-410 OF THE SOUTH CAROLINA CODE OF LAWS STATES, IN PART:

> THE CRIME KNOWN TO THE COMMON LAW AS CONSPIRACY IS HEREBY DEFINED AS A COMBINATION BETWEEN TWO OR MORE PERSONS FOR THE PURPOSE OF ACCOMPLISHING A CRIMINAL OR UNLAWFUL OBJECT OR AN OBJECT NEITHER CRIMINAL NOR UNLAWFUL BY CRIMINAL OR UNLAWFUL MEANS.

THIS STATUTE, THEN, MAKES IT UNLAWFUL FOR TWO OR MORE PERSONS TO CONSPIRE OR COMBINE EITHER, (1) TO ACCOMPLISH A CRIMINAL OR UNLAWFUL PURPOSE OR (2) TO ACCOMPLISH A PURPOSE, NOT IN ITSELF CRIMINAL OR UNLAWFUL, BY CRIMINAL OR UNLAWFUL MEANS.

IT IS THE UNLAWFUL COMBINATION OR AGREEMENT BETWEEN TWO OR MORE PEOPLE THAT CONSTITUTES THE OFFENSE, AND NO OVERT ACT IS NECESSARY.

STATED DIFFERENTLY, CONSPIRING IS A DISTINCT OFFENSE AND NOTHING ELSE NEED BE DONE IN EXECUTION OF IT. THAT IS, NO OVERT ACT CARRYING OUT OR COMPLETING

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THE CONSPIRACY IS NECESSARY OR REQUIRED.

FOR EXAMPLE, IF TWO PEOPLE MEET AND AGREE TO COMMIT A CRIME, THEY WOULD BE GUILTY OF A CRIMINAL CONSPIRACY, EVEN THOUGH THEY LATER CHANGED THEIR MINDS AND DETERMINED NOT TO DO SO.

CONCERNING CONSPIRACY, I FURTHER CHARGE YOU THAT WHILE CONSPIRATORS ARE RESPONSIBLE FOR ALL INCIDENTAL AND CONSEQUENTIAL ACTS GROWING OUT OF A GENERAL DESIGN, CONSPIRATORS ARE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANY ONE CONSPIRATOR.

LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU CAN FIND THE DEFENDANT GUILTY OF CONSPIRACY, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THE CRIME OF CONSPIRACY. SHOULD THE STATE FAIL TO PROVE EACH AND EVERY ELEMENT OF THE CRIME OF CONSPIRACY BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY AND ACQUIT HER.

I NOW WANT TO CHARGE YOU OR INSTRUCT YOU ON THE CRIME OF POSSESSION OF A FIREARM DURING THE COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME.

UNDER SECTION 16-23-490 OF THE SOUTH CAROLINA CODE OF LAWS, A PERSON IS GUILTY OF POSSESSION OF A FIREARM DURING THE COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME IF THE PERSON IS IN POSSESSION OF A FIREARM OR VISIBLY DISPLAYS WHAT APPEARS TO BE A

FIREARM DURING THE COMMISSION OF A VIOLENT CRIME.

OUR LAW DEFINES FIREARM AS ANY MACHINE GUN, AUTOMATIC RIFLE, REVOLVER, PISTOL, OR ANY WEAPON WHICH WILL OR IS DESIGNED TO OR MAY BE READILY CONVERTED TO EXPEL A PROJECTILE.

UNDER SOUTH CAROLINA CODE SECTION 16-1-60, A VIOLENT CRIME INCLUDES THE OFFENSES OF MURDER, ARMED ROBBERY, AND BURGLARY IN THE FIRST DEGREE.

THEREFORE, I INSTRUCT YOU AT THIS TIME, SHOULD YOU FIND THE DEFENDANT, THIS DEFENDANT, NOT GUILTY OF THE CRIME OF MURDER, ARMED ROBBERY AND BURGLARY FIRST DEGREE, THEN YOU COULD NOT FIND THE DEFENDANT GUILTY OF THIS CRIME, POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME.

NOW, LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU CAN FIND THE DEFENDANT, THIS DEFENDANT, GUILTY OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THIS CRIME. SHOULD THE STATE FAIL TO PROVE EACH AND EVERY ELEMENT OF A CRIME OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY AND ACQUIT HER.

NOW, THAT CONCLUDES THE CHARGES ON THE FIVE

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CRIMES WITH WHICH THIS DEFENDANT IS CHARGED. I NOW WANT TO GIVE YOU SOME ADDITIONAL INSTRUCTIONS ON SPECIFIC AREAS.

FIRST, ON WHAT IS KNOWN IN SOUTH CAROLINA AS AIDING AND ABETTING OR THE HAND OF ONE IS THE HAND OF ALL.

A PRINCIPAL IN A CRIME IS ONE WHO EITHER IN PERSON PERPETRATES THE CRIME OR WHO, BEING PRESENT, AIDS, ABETS AND ASSISTS IN THE COMMISSION OF THAT CRIME. WHEN ONE DOES AN ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER, THE ACT IS DONE BY BOTH, AND WHERE TWO OR MORE, ACTING WITH A COMMON DESIGN OR COMMON INTENT, ARE PRESENT AT THE COMMISSION OF A CRIME, IT MATTERS NOT BY WHOSE IMMEDIATE AGENCY THE CRIME IS COMMITTED, BECAUSE ALL WOULD BE GUILTY. THE HAND OF ONE IS THE HAND OF ALL.

HOWEVER, THE STATE STILL HAS THE BURDEN OF PROVING THIS BEYOND A REASONABLE DOUBT. PRESENCE AT THE COMMISSION OF A CRIME MEANS TO BE SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN THE COMMISSION THEREOF.

HOWEVER, MERE PRESENCE AT THE SCENE OF A CRIME IS INSUFFICIENT TO CONVICT ONE AS A PRINCIPAL ON THE THEORY OF AIDING AND ABETTING. INTENT IS ALSO A NECESSARY ELEMENT, FOR THERE MUST HAVE BEEN A COMMON

DESIGN OR INTENT TO COMMIT THE CRIME, AND THE CRIME MUST HAVE BEEN COMMITTED PURSUANT THERETO WITH THE PERSON AIDING AND ABETTING BY SOME OVERT ACT.

A PERSON COMMITTING AN UNLAWFUL ACT IS LEGALLY RESPONSIBLE FOR ALL NATURAL OR NECESSARY CONSEQUENCES THEREOF. ONE COMBINING AND CONFEDERATING WITH OTHERS TO ACCOMPLISH AN ILLEGAL PURPOSE IS CRIMINALLY LIABLE FOR EVERYTHING DONE BY EITHER HIM OR HIS CONFEDERATES WHICH FOLLOWS INCIDENTALLY TO THE EXECUTION OF A COMMON DESIGN AS ONE OF THE PROBABLE AND NATURAL CONSEQUENCES, THOUGH NOT INTENDED AS PART OF THE ORIGINAL DESIGN OR COMMON PLAN.

I CHARGE YOU THAT EVIDENCE MAY BE OF TWO KINDS, DIRECT OR CIRCUMSTANTIAL. BY THE TERM DIRECT EVIDENCE, THE LAW MEANS THE TESTIMONY OF PERSONS WHO HAVE PERCEIVED ITS EXISTENCE BY MEANS OF THEIR SENSES.

FOR EXAMPLE, WHERE A PERSON SEES A CRIME COMMITTED AND COMES INTO COURT AND TESTIFIES AS TO WHAT HE OR SHE SAW.

INDIRECT OR CIRCUMSTANTIAL EVIDENCE, ON THE OTHER HAND, MEANS THE PROOF OF SOME OTHER FACT OR FACTS FROM WHICH, TAKEN EITHER SINGLY OR COLLECTIVELY, THE EXISTENCE OF THE PARTICULAR FACT IN QUESTION MAY BE INFERRED AS A NECESSARY CONSEQUENCE.

A CRIME MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE

AS WELL AS BY THE DIRECT TESTIMONY OF EYE WITNESSES.

CIRCUMSTANTIAL EVIDENCE IS PERMISSIBLE, PROVIDED IT MEETS THE LEGAL TEST. TO THE EXTENT THAT THE STATE RELIES ON CIRCUMSTANTIAL EVIDENCE, IT MUST PROVE ALL THE CIRCUMSTANCES RELIED ON BEYOND A REASONABLE DOUBT. THEY MUST BE WHOLLY AND IN EVERY PARTICULAR PERFECTLY CONSISTENT WITH ONE ANOTHER, AND THEY MUST POINT CONCLUSIVELY TO THE GUILT OF THE ACCUSED, TO THE EXCLUSION OF EVERY OTHER REASONABLE HYPOTHESIS.

IN OTHER WORDS, THE CIRCUMSTANCES MUST BE ABSOLUTELY INCONSISTENT WITH ANY OTHER REASONABLE HYPOTHESIS THAN THE GUILT OF THE ACCUSED.

IN THE CONSIDERATION OF CIRCUMSTANTIAL EVIDENCE, YOU MUST SEEK SOME REASONABLE EXPLANATION THEREOF OTHER THAN THE GUILT OF THE ACCUSED, AND IF SUCH REASONABLE EXPLANATION CAN BE FOUND YOU CANNOT CONVICT ON SUCH EVIDENCE.

I NOW WANT TO INSTRUCT YOU ON VOLUNTARY STATEMENTS.

WHILE THE COURT GENERALLY DETERMINES THE ADMISSIBILITY OF EVIDENCE, I INSTRUCT YOU AS REGARDS ANY ALLEGED STATEMENT MADE BY THIS DEFENDANT THAT YOU MEMBERS OF THE JURY MAKE THE ULTIMATE DETERMINATION OF WHETHER OR NOT THE DEFENDANT MADE THE SAID STATEMENT. AND IF THE DEFENDANT DID MAKE THE STATEMENT, WHETHER

THE STATEMENT WAS MADE BY THE DEFENDANT VOLUNTARILY AND OF HER OWN FREE WILL AND ACCORD, AND FINALLY JUST WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO ANY ALLEGED STATEMENT.

I CHARGE YOU THAT YOU MUST DETERMINE IF THE ALLEGED STATEMENT WAS THE PRODUCT OF AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE BY ITS MAKER. IF YOU DETERMINE IT WAS AND THE BURDEN IS UPON THE STATE TO PROVE THIS FACT, AS ALL OTHER FACTS, BEYOND A REASONABLE DOUBT, THEN YOU MAY GIVE THE STATEMENT SUCH FURTHER CONSIDERATION AS YOU DEEM PROPER.

IF YOU DETERMINE THE ALLEGED STATEMENT WAS NOT THE FREE AND VOLUNTARY WILLED EXPRESSION OF THE DEFENDANT, THEN YOU SHOULD NOT CONSIDER THE STATEMENT AT ALL.

IN DETERMINING WHETHER A DEFENDANT'S WILL WAS OVERCOME IN OBTAINING A STATEMENT, YOU SHOULD CONSIDER BOTH THE CHARACTERISTICS OF THE ACCUSED AND THE DETAILS OF THE INTERROGATION, WHICH IS REFERRED TO IN THE LAW AS THE TOTALITY OF THE CIRCUMSTANCES.

SOME OF THE FACTORS THAT YOU MUST CONSIDER ARE: THE AGE OF THE ACCUSED; HER EDUCATION OR LACK THEREOF; HER MENTAL ABILITY OR CAPACITY; HER I.Q. OR INTELLIGENCE; HER BACKGROUND AND ENVIRONMENT; THE ADVICE OR LACK THEREOF TO THE ACCUSED OF HER

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CONSTITUTIONAL RIGHTS, INCLUDING BUT NOT LIMITED TO THE PROCEDURAL SAFEGUARDS KNOWN AS THE MIRANDA WARNINGS CONCERNING THE RIGHT TO REMAIN SILENT, THAT A STATEMENT COULD BE USED AGAINST HER IN A COURT OF LAW, THE RIGHT TO HAVE A LAWYER PRESENT. IF AN INDIGENT, THAT IS, SHE COULD NOT AFFORD A LAWYER, THEN A LAWYER WOULD BE APPOINTED TO REPRESENT HER WITHOUT ANY COST. AND THAT SHE COULD STOP MAKING A STATEMENT AT ANY TIME. OTHER FACTORS TO CONSIDER ARE THE PLACE AND LENGTH OF DETENTION AND THE NATURE OF THE QUESTIONING.

YOU THE JURY MUST CAREFULLY SCRUTINIZE ALL OF THE SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO ANY ALLEGED STATEMENT. YOU MUST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE STATEMENT WAS MADE BY THE ACCUSED, UNINFLUENCED BY PROMISE OF REWARD, THREAT OF INJURY, OR DIMINUTION OF HER RIGHTS.

I CHARGE YOU THAT VOLUNTARY INTOXICATION IS NEVER AN EXCUSE FOR OR A DEFENSE TO CRIME, REGARDLESS OF WHETHER THE CRIME IS ONE INVOLVING GENERAL OR SPECIFIC INTENT.

A PERSON WHO VOLUNTARILY RENDERS HERSELF OR HIMSELF INTOXICATED IS NO LESS RESPONSIBLE FOR HIS OR HER ACTS WHILE IN SUCH CONDITION. IF ONE VOLUNTARILY DRINKS INTOXICATING LIQUORS, WINE OR BEER, OR IS UNDER THE INFLUENCE OF DRUGS AND BECOMES INTOXICATED TO ANY

DEGREE, AND IF WHILE IN THAT CONDITION COMMITS AN ACT WHICH WOULD BE A CRIME IF IT HAD BEEN COMMITTED BY A SOBER PERSON, THE FACT OF DRUNKENNESS WOULD NOT RELIEVE THE INTOXICATED PERSON FROM RESPONSIBILITY WHERE IT HAS NOT PRODUCED PERMANENT INSANITY.

LET ME REPEAT THAT LAST SENTENCE FOR YOU.

IF ONE VOLUNTARILY DRINKS INTOXICATING LIQUORS, WINE OR BEER OR IS UNDER THE INFLUENCE OF DRUGS AND BECOMES INTOXICATED TO ANY DEGREE, AND IF WHILE IN THAT CONDITION COMMITS AN ACT WHICH WOULD BE A CRIME IF IT HAD BEEN COMMITTED BY A SOBER PERSON, THE FACT OF DRUNKENNESS WOULD NOT RELIEVE THE INTOXICATED PERSON FROM RESPONSIBILITY WHERE IT HAS NOT PRODUCED PERMANENT INSANITY.

I INSTRUCT YOU AND EMPHASIZE TO YOU NOW THE FACT THAT THE DEFENDANT IN THE TRIAL OF A CRIMINAL CASE DOES NOT TESTIFY IN HIS OR HER OWN BEHALF IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATION AND IN YOUR CONSIDERATION ON THE QUESTION OF THE GUILT OR THE INNOCENCE OF THE ACCUSED. IT MUST NOT BE CONSIDERED BY YOU IN ANY MANNER WHATSOEVER AGAINST THE DEFENDANT OR MITIGATE AGAINST THE DEFENDANT IN ANY RESPECT WHATSOEVER.

THE DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND THE ASSERTION OF THIS

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CONSTITUTIONAL RIGHT CANNOT AND MUST NOT BE CONSIDERED BY YOU IN YOUR DELIBERATIONS.

UNDER YOUR OATH, THEN, YOU ARE TO REACH NO INFERENCE AND DRAW NO CONCLUSION WHATSOEVER FROM THE FACT THAT THE DEFENDANT IN THIS CASE DID NOT TESTIFY.

THE FACT THAT THE DEFENDANT DID NOT TESTIFY SHOULD NOT EVEN BE DISCUSSED IN THE JURY ROOM.

THE BURDEN OF PROOF, AS I HAVE INSTRUCTED TO YOU, IS UPON THE STATE. IT IS NOT INCUMBENT UPON THE ACCUSED TO PROVE HER INNOCENCE. THE BURDEN OF PROOF REMAINS UPON THE STATE TO PROVE THE GUILT BEYOND AND REASONABLE DOUBT, AND THE FACT THAT THE DEFENDANT DID NOT TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN DETERMINING THE GUILT OR THE INNOCENCE OF THE DEFENDANT.

IN THIS CASE, THERE WERE SEVERAL EXHIBITS ADMITTED IN EVIDENCE AND IDENTIFIED AS HANDWRITING EXEMPLARS.

THE WORD 'EXEMPLAR,' E-X-E-M-P-L-A-R, IS DEFINED IN THE DICTIONARY AS ONE THAT SERVES AS A MODEL OR EXAMPLE. THEREFORE, THESE HANDWRITING EXEMPLARS CONSTITUTE AN EXAMPLE OF THAT PERSON'S HANDWRITING. I INSTRUCT YOU THAT THE CONTENTS OF EACH EXEMPLAR, THAT IS THE WORDS USED IN EACH OF THESE WRITING SAMPLES, HAS NO SIGNIFICANCE.

THESE HANDWRITING SAMPLES WERE OBTAINED FROM THE PERSON FOR THE PURPOSE OF EXAMINATION BY THE HANDWRITING EXPERT WHO TESTIFIED IN THIS CASE.

I CHARGE YOU THAT ALTHOUGH LAY WITNESSES ARE LIMITED TO TESTIFYING ABOUT FACTS WITHIN THEIR KNOWLEDGE AND ARE NOT ALLOWED TO GIVE OPINIONS, CERTAIN WITNESSES WHO BY TRAINING, EDUCATION, OR EXPERIENCE, ARE CONSIDERED AS EXPERTS IN A PARTICULAR FIELD MAY GIVE OPINIONS IN THAT FIELD BASED UPON THE FACTS OF A MATTER AND THEIR CONCLUSIONS, AND THESE OPINIONS CONSTITUTE EVIDENCE TO BE CONSIDERED BY YOU IN CONNECTION WITH ALL OF THE OTHER EVIDENCE AND TESTIMONY IN THE CASE.

THAT IS TO SAY, YOU MAY CONSIDER THE EXPERT'S OPINION JUST AS YOU DO ALL THE OTHER EVIDENCE IN THE CASE AND IT IS FOR YOU THE JURY TO GIVE IT SUCH WEIGHT AS YOU IN YOUR EXPERIENCE AND DISCRETION MAY DETERMINE. BY THIS, I MEAN THAT YOU MUST WEIGH SUCH EVIDENCE AND ACCEPT OR REJECT IT IN THE SAME MANNER AS YOU TREAT ALL OTHER EVIDENCE IN THE CASE.

ALL OF THE EXHIBITS THAT HAVE BEEN ADMITTED IN EVIDENCE BY THE COURT WILL BE AVAILABLE TO YOU THE JURY IN THE JURY ROOM DURING YOUR DELIBERATIONS. YOU WILL NOTICE THAT LABELS HAVE BEEN AFFIXED TO EACH EXHIBIT. THESE LABELS ARE USED IN COURT TO IDENTIFY

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THE PARTY OFFERING THE EXHIBIT AND THE NUMBER OF THAT PARTICULAR EXHIBIT.

THE EXHIBITS THAT HAVE BEEN OFFERED IN THE TRIAL OF THIS CASE HAVE LABELS ATTACHED INDICATING THE PARTY THAT OFFERED THE EXHIBITS AND THE DATE THE EXHIBIT WAS OFFERED.

IF AN EXHIBIT HAS MORE THAN ONE LABEL, IT ONLY MEANS THAT THE EXHIBIT HAS BEEN USED IN ANOTHER PROCEEDING. IT DOES NOT ADD TO OR DETRACT FROM THAT EXHIBIT.

SOME MEMBERS OF THE PANEL HAVE CHOSEN TO TAKE NOTES REGARDING THIS TRIAL, AND I INSTRUCT YOU THAT ANY JUROR'S NOTES SHOULD NOT BE GIVEN ANY GREATER WEIGHT THAN THE RECOLLECTION OR JUDGMENT OF OTHER JURORS.

IT IS ESSENTIAL THAT THE RECOLLECTIONS OF INDIVIDUAL JURORS BE CONSIDERED AS RELIABLE AS NOTES RECORDED BY ANY OTHER JUROR.

MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, YOU HAVE BEEN SELECTED AS FAIR AND IMPARTIAL JURORS SWORN TO IMPARTIALLY TRY AND DETERMINE THE FACTS OF THIS CASE. AND WHEN YOU COMPLY WITH YOUR OATH TO DO SO, NO ONE WILL HAVE A RIGHT TO CRITICIZE YOUR VERDICT, AND YOU WILL HAVE FULLY DISCHARGED YOUR DUTY AS JURORS.

YOU SHOULD NOT BE INFLUENCED BY OPINIONS OR EXPRESSIONS OF OPINIONS, IF ANY, WHICH YOU MAY HAVE HEARD ON THE OUTSIDE, BUT YOU ARE TO DECIDE THIS CASE ACCORDING TO THE TESTIMONY THAT YOU HAVE HEARD FROM THE LIPS OF THE SWORN WITNESSES, ALONG WITH THE OTHER EVIDENCE INTRODUCED.

NOW, MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, ACCOMPANYING YOU TO THE JURY ROOM, ALONG WITH THE EXHIBITS THAT HAVE BEEN ADMITTED IN EVIDENCE BY THE COURT WILL BE THESE VERDICT FORMS THAT I HOLD IN MY HAND AT THIS TIME.

AS I HAVE TOLD YOU, THE DEFENDANT IN THIS CASE, JENNIFER L. MCSHARRY, IS CHARGED WITH FIVE DIFFERENT CRIMINAL OFFENSES. THEREFORE, THERE ARE FIVE DIFFERENT VERDICT FORMS, ONE VERDICT FORM FOR EACH INDICTMENT OR FOR EACH CHARGE.

AS TO EACH CHARGE AGAINST THIS DEFENDANT AND AS TO EACH VERDICT FORM, WHATEVER YOUR VERDICT IS ON THAT PARTICULAR CHARGE, IT MUST BE UNANIMOUS; THAT IS, ALL TWELVE OF YOU MUST AGREE.

MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, THE VERDICT FORMS ALL LOOK VERY SIMILAR. I WANT TO GO OVER THOSE BRIEFLY WITH YOU.

AT THE TOP, LEFT-HAND PORTION OF THE PAGE ON EACH FORM IS THE NAME OR THE CAPTION OF THE CASE. TO THE

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TOP RIGHT-HAND PORTION IS THE NAME OF THIS COURT AND BENEATH THAT IS THE CASE NUMBER.

BENEATH THE CASE NUMBER WE HAVE TYPED THE NAME OF THE CRIME OR THE CRIME CHARGED IN THE INDICTMENT. THE ONE THAT I HAPPEN TO BE HOLDING IS INDICTMENT FOR MURDER.

BENEATH THAT WE HAVE PRINTED ON EACH PAGE THE ONLY FORMS OF VERDICT AVAILABLE ON THAT PARTICULAR CHARGE.

I TELL YOU NOW THAT THE ORDER THAT THESE FORMS OF VERDICT ARE PRINTED ON THE PAGE HAVE NO SIGNIFICANCE WHATSOEVER. IT'S SIMPLY THAT ONE FORM OF VERDICT HAD TO BE PRINTED FIRST AND THEN THE OTHER SECOND.

ONCE AGAIN, WHATEVER YOUR VERDICT IS AS TO THAT PARTICULAR CHARGE, IT MUST BE UNANIMOUS OR ALL TWELVE OF YOU MUST AGREE.

MADAM FOREPERSON, WHEN YOU HAVE REACHED A VERDICT ON A PARTICULAR CHARGE, IF YOU WILL GO TO THAT VERDICT SHEET, YOU WILL NOTICE BENEATH EACH FORM OF VERDICT THERE IS A LINE PRINTED ON THE PAGE, AND BENEATH EACH LINE IS THE WORD 'FOREPERSON.'

IF YOU WOULD THEN SIGN YOUR NAME IN FULL ON THE LINE BENEATH THE FORM OF VERDICT TO WHICH ALL TWELVE OF YOU HAVE AGREED.

AT THIS TIME, I AM GOING TO ASK THAT YOU GO TO

THE JURY ROOM. DO NOT BEGIN YOUR DELIBERATIONS. IN JUST A FEW MINUTES, THE BAILIFFS WILL BRING IN ALL OF THESE EXHIBITS FOR YOU AND THESE VERDICT FORMS.

ONCE THE BAILIFF HAS DELIVERED THOSE TO YOU, HE WILL THEN INSTRUCT YOU TO BEGIN YOUR DELIBERATIONS. THERE WILL ALWAYS BE A BAILIFF OUTSIDE OF YOUR DOOR. IF YOU NEED SOME REFRESHMENTS, PLEASE LET THE BAILIFF KNOW.

ONCE YOU HAVE REACHED YOUR VERDICT IN THESE CASES AND HAVE PROPERLY FILLED OUT ALL OF THE VERDICT FORMS, IF YOU WOULD LET THE BAILIFF KNOW, HE WILL NOTIFY ALL OF US SO THAT WE MAY ASSEMBLE TO RECEIVE YOUR VERDICT IN THIS CASE.

AT THIS TIME, IF YOU WOULD GO TO THE JURY ROOM, DO NOT BEGIN YOUR DELIBERATIONS. YOU MAY TAKE YOUR NOTEPADS WITH YOU.

(WHEREUPON, THE JURY EXITS THE COURTROOM: 5:38 P.M.)

THE COURT: ALL RIGHT, ANY EXCEPTIONS OR REQUESTS FOR ADDITIONAL CHARGING BY THE STATE?

MS. WHITE: NO, YOUR HONOR.

THE COURT: BY THE DEFENDANT?

MR. BYRHOLDT: YES, SIR. NO OBJECTIONS. I WAS TRYING TO FOLLOW CLOSELY. STATE V. ADAMS THAT I HANDED UP, THAT ONE PARAGRAPH, I DIDN'T HEAR THAT

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READ. WHICH IS PAGE 309, THE LAST PARAGRAPH UNDER HEAD NOTE 1 AND 2. ADDITIONALLY, WHILE CONSPIRATORS ARE RESPONSIBLE FOR INCIDENTAL CONSEQUENTIAL ACTS, THEY ARE NOT RESPONSIBLE FOR THE INDEPENDENT ACTS OF ANY ONE CONSPIRATOR.

THE COURT: I WAS PRETTY SURE I READ IT.

MS. WHITE: THAT WAS READ, YOUR HONOR. I SPECIFICALLY LISTENED TO THAT WORDING.

THE COURT: ALL RIGHT, WHAT WE CAN DO IS I CAN LET THE COURT REPORTER CHECK, BUT I'M POSITIVE I READ IT BECAUSE IT'S IN MY STACK AND I MARKED IT.

MS. WHITE: I'M POSITIVE YOU DID, YOUR HONOR.

MR. BYRHOLDT: NO PROBLEM.

THE COURT: ANY OTHER?

MR. BYRHOLDT: THAT'S IT.

THE COURT: I READ IT RIGHT AFTER I READ THE CHARGE ON CONSPIRACY, THE LAST PARAGRAPH UNDER CONSPIRACY CHARGES. AND MY LAST PARAGRAPH ON THE CONSPIRACY CHARGE WAS: FOR EXAMPLE, IF TWO PEOPLE MEET AND AGREE TO COMMIT A CRIME, THEY WOULD BE GUILTY OF CRIMINAL CONSPIRACY, EVEN THOUGH THEY LATER CHANGE THEIR MINDS AND DETERMINE NOT TO DO SO.

THEN I SAID: I FURTHER CHARGE YOU THAT, AND I STARTED READING, WHILE CONSPIRATORS ARE RESPONSIBLE FOR ALL INCIDENTAL AND CONSEQUENTIAL ACTS, SO I'M

PRETTY SURE I COVERED IT.

ANY OTHER?

MS. WHITE: I'M 100 PERCENT SURE YOU COVERED IT. I HEARD IT. I DIDN'T LIKE IT, SO I LISTENED FOR IT.

THE COURT: ANY OTHER EXCEPTIONS OTHER THAN THAT?

MR. BYRHOLDT: NO, SIR.

THE COURT: LET ME ASK THE ATTORNEYS TO COME FORWARD AND CHECK WITH THE COURT RECORDER TO MAKE SURE ALL THE EXHIBITS ARE PRESENT.

(WHEREUPON, THE ATTORNEYS VERIFY EXHIBITS TO BE SENT TO THE JURY)

THE COURT: WE'RE GOING BACK ON THE RECORD. LET THE RECORD SHOW THAT THE DEFENDANT IS STILL PRESENT WITH HER ATTORNEY.

IT APPEARS THAT ALL OF THE EXHIBITS ARE PRESENT, AND I AM GOING TO ASK THE BAILIFF IF HE WOULD TAKE THE VERDICT FORMS, ALONG WITH ALL OF THE EXHIBITS, TO THE JURY ROOM. PLEASE INSTRUCT THEM TO BEGIN THEIR DELIBERATIONS.

MR. BYRHOLDT: YOUR HONOR, FOR PURPOSE OF THE RECORD, ON BEHALF OF THE DEFENDANT, I HAVE REVIEWED THE EXHIBITS THAT HAVE GONE BACK, AND THOSE ARE ONLY THE EXHIBITS THAT HAVE BEEN ADMITTED INTO EVIDENCE BY

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THE COURT. THE OTHER EXHIBITS ARE STILL HERE.

THE COURT: IS THE STATE SATISFIED THOSE ARE THE CORRECT EXHIBITS?

MS. WHITE: YES, SIR.

THE COURT: ANYTHING ELSE?

MR. BYRHOLDT: NOTHING FROM THE DEFENDANT.

THE COURT: ALL RIGHT, WE WILL BE AT EASE UNTIL WE HEAR FROM THE JURY.

(WHEREUPON, THE JURY BEGINS DELIBERATIONS: 5:52 P.M.)

* * *

THE COURT: LET THE RECORD SHOW THAT STATE IS PRESENT.

THE DEFENDANT IS PRESENT WITH HER ATTORNEY, MR. BYRHOLDT.

THE COURT HAS BEEN ADVISED THE JURY HAS REACHED A VERDICT. IS THE STATE READY TO RECEIVE THE VERDICT?

MS. WHITE: THE STATE IS READY.

THE COURT: IS THE DEFENDANT READY?

MR. BYRHOLDT: YES, SIR.

THE COURT: YOU MAY BRING IN THE JURY.

(WHEREUPON, THE JURY ENTERS THE COURTROOM TO REPORT THE VERDICT: 7:57 P.M.)

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THE COURT: ALL RIGHT.

CLERK: ALL RIGHT, MADAM FOREMAN AND LADIES AND GENTLEMEN, HAVE YOU AGREED ON A VERDICT?

FORELADY: YES.

CLERK: PASS THEM UP, PLEASE.

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

CLERK: CASE 97-GS-04-124, STATE VERSUS JENNIFER L. MCSHARRY, INDICTED FOR MURDER. THE VERDICT, THE JURY FINDS THE DEFENDANT JENNIFER L. MCSHARRY GUILTY OF THE CRIME OF MURDER. SIGNED, KAREN A. CAVICCHIA, FOREPERSON.

97-GS-04-1691, THE STATE VERSUS JENNIFER L. MCSHARRY, INDICTED FOR ROBBERY WHILE ARMED WITH A DEADLY WEAPON. THE JURY FINDS THE DEFENDANT, JENNIFER MCSHARRY, GUILTY OF THE CRIME OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON. SIGNED, KAREN A. CAVICCHIA, FOREPERSON.

97-GS-04-1693, THE STATE VERSUS JENNIFER L. MCSHARRY, INDICTED FOR BURGLARY IN THE FIRST DEGREE. THE JURY FINDS THE DEFENDANT, JENNIFER L. MCSHARRY, GUILTY OF THE CRIME OF BURGLARY IN THE FIRST DEGREE. SIGNED, KAREN A. CAVICCHIA, FOREPERSON.

97-GS-04-1692, THE STATE VERSUS JENNIFER L. MCSHARRY, INDICTED FOR CONSPIRACY. THE JURY FINDS THE

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DEFENDANT, JENNIFER L. MCSHARRY, GUILTY OF THE CRIME OF CONSPIRACY. SIGNED, KAREN A. CAVICCHIA, FOREPERSON.

97-GS-04-1694, THE STATE VERSUS JENNIFER L. MCSHARRY, INDICTED FOR POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. THE JURY FINDS THE DEFENDANT, JENNIFER L. MCSHARRY, GUILTY OF THE CRIME OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. SIGNED, KAREN A. CAVICCHIA, FOREPERSON.

NOW, MADAM FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, IF THESE ARE YOUR VERDICTS, WOULD YOU PLEASE ALL RAISE YOUR RIGHT HAND?

(JURORS SO INDICATE UNANIMOUSLY)

CLERK: ALL RIGHT HANDS ARE BEING RAISED, YOUR HONOR, VERDICTS OF THE JURY.

THE COURT: ALL RIGHT, ARE THERE ANY OTHER MATTERS WITH THE JURY? MR. BYRHOLDT, DO YOU WANT THE JURY POLLED?

MR. BYRHOLDT: NO, SIR.

THE COURT: OKAY, ANYTHING ELSE FROM THE JURY?

MS. WHITE: NOTHING FURTHER.

THE COURT: ALL RIGHT. LET ME ASK COUNSEL IF THEY WOULD COME AROUND WITH MS. MCSHARRY.

THE COURT: ANYTHING FURTHER FROM THE STATE, INCLUDING IS THERE ANY PRIOR CONVICTIONS OF MS. MCSHARRY?

MS. WHITE: YOUR HONOR, THE DEFENDANT IS SEVENTEEN, AND WE DID NOT HAVE ACCESS TO ANY JUVENILE RECORDS, IF IN FACT THEY EXISTED IN GEORGIA, SO WE ARE NOT AWARE OF ANY RECORD.

THE COURT: ALL RIGHT. ANYTHING ELSE?

MS. WHITE: YOUR HONOR, THE VICTIM'S FAMILY, I KNOW YOU DID NOT TRY THE PRIOR TWO CASES WITH THE OTHER TWO CO-DEFENDANTS WHO HAVE BEEN TRIED, BUT THE VICTIM'S FAMILY, OF COURSE, DID FLY IN AND LIVE OUT WEST. AND I JUST DIDN'T WANT YOU TO THINK THAT BECAUSE THEY AREN'T HERE FOR THIS ONE THEY DIDN'T CARE. IT'S JUST QUITE A BIG EXPENSE FOR THEM, OF COURSE, AND THEY'RE WAITING FOR US TO CALL.

YOUR HONOR, WE HAVE NOTHING ELSE TO ADD ON SENTENCING. I'M SURE THE FAMILY WOULD LIKE TO THANK THE JURY FOR THE VERDICT.

THE COURT: MR. BYRHOLDT, I WILL BE GLAD TO HEAR FROM YOU AND ANYTHING YOUR CLIENT WOULD WISH TO SAY OR ANY FAMILY MEMBERS.

MR. BYRHOLDT: YOUR HONOR, YOU WERE HERE DURING THE TRIAL OF THE CASE. YOU ARE FAMILIAR WITH THE BACKGROUND IN THIS CASE.

JENNIFER IS SEVENTEEN YEARS OLD. SHE DROPPED OUT OF SCHOOL. GOT HOOKED ON DRUGS WHEN SHE WAS APPROXIMATELY TWELVE OR THIRTEEN YEARS OLD WITH HER MOTHER. HER MOTHER SHOWED HER THE DRUG LIFE, GOT HER INTO THE DRUG LIFE. I KNOW THAT'S NOT AN EXCUSE. DRUG USE IS NOT A DEFENSE. BUT I THINK IF THE COURT - OR I WOULD ASK THE COURT TO TAKE NOTE OF THAT FACT AND THE AGE OF THIS DEFENDANT IN PASSING SENTENCE.

I WOULD ASK HER GRANDFATHER, WHO FLEW IN FROM CALIFORNIA, AND HER FATHER, WHO FLEW IN FROM ARIZONA, TO BRIEFLY ADDRESS THE COURT, YOUR HONOR, AND I WILL CONCLUDE.

THE COURT: ALL RIGHT, IF ANYONE WISHES TO ADDRESS THE COURT, IF THEY WOULD JUST GIVE US THEIR FULL NAME, I WILL BE GLAD TO HEAR FROM YOU.

MR. BYRHOLDT: YOUR HONOR, MR. MCSHARRY.

MR. MCSHARRY: JEFFREY L. MCSHARRY.

I'M ALMOST SPEECHLESS AT THIS POINT. I BEG OF THE COURT, I WOULD LOVE TO HAVE AN OPPORTUNITY TO BE ABLE TO TAKE CARE OF MY DAUGHTER.

HER MOTHER'S NO LONGER IN THE PICTURE AGAIN AND IN HER LIFE.

I'M VERY SORRY FOR WHAT HAS HAPPENED.

MR. BYRHOLDT: AND THIS IS JENNIFER'S GRANDFATHER, YOUR HONOR. STATE YOUR FULL NAME,

PLEASE.

MR. MCSHARRY: MY NAME IS JOHN MCSHARRY. M-C-S-H-A-R-R-Y.

I'M TERRIBLY SORRY FOR ALL THAT'S HAPPENED. I'M TERRIBLY SORRY THAT MR. MILLER WAS KILLED. I WOULD LIKE TO SAY THANK YOU FOR ALL OF YOU FOLKS. IT TOOK UP SO MUCH OF YOUR TIME TO TRY. AND I APPRECIATE IT. THANK YOU.

MR. BYRHOLDT: JENNIFER.

MS. MCSHARRY: MY NAME IS JENNIFER L. MCSHARRY.

I JUST WANT TO SAY I'M SORRY TO THE FAMILY OF MR. MILLER. I'M SORRY IT HAPPENED. BUT I'D SAY IT'S MY RESPONSIBILITY. I'M SORRY.

MR. BYRHOLDT: YOUR HONOR, I WILL JUST GIVE YOU SOME BRIEF BACKGROUND.

MS. KELSO HAD A RECORD, HAD SERVED TIME FOR AN ARMED ROBBERY BEFORE. SHE GOT THESE KIDS HOOKED INTO THIS LIFESTYLE. I KNOW IT DOESN'T EXCUSE THEIR BEHAVIOR, BUT THE FACT THAT WHEN YOU ARE PUT IN THAT ENVIRONMENT AND THAT'S WHAT YOU HAVE TO LOOK AT AND LIVE IN ON A DAY-BY-DAY BASIS, I CAN UNDERSTAND HOW THIS HAPPENED.

IT DOESN'T EXCUSE IT. IT DOESN'T CONDONE IT. BUT I ASK THE COURT TO TAKE THOSE FACTORS INTO

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ACCOUNT, JENNIFER'S AGE, HER EDUCATIONAL BACKGROUND, AND ALL THOSE FACTORS, IN PASSING SENTENCE ON THIS CASE. TO TAKE A SEVENTEEN-YEAR-OLD YOUNG WOMAN AND INCARCERATE HER FOR THE REST OF HER LIFE WOULD SERVE, REALLY, NO USEFUL PURPOSE, AND I WOULD ASK THE COURT JUST TO TAKE ALL OF THOSE FACTORS INTO CONSIDERATION.

I THINK YOU SAW, UNFORTUNATELY, WHAT WE SAW HERE WAS THE GOOD PART OF HER FAMILY. I WISH SHE'D HAVE HAD THAT HER WHOLE LIFE. AND I WOULD ASK THE COURT TO TAKE THOSE FACTORS INTO CONSIDERATION. I APPRECIATE WHAT THE JURY DID. I THINK THEY PAID ATTENTION AND IT WAS A TOUGH CASE. AND YOU KNOW, I WOULD ASK THE COURT TO, IN PASSING SENTENCE, TO HAVE MERCY ON JENNIFER.

THE COURT: ANYONE ELSE?

MR. BYRHOLDT: NO, SIR.

THE COURT: ANYTHING FURTHER FROM THE STATE?

MS. WHITE: NO, SIR, YOUR HONOR.

THE COURT: ALL TOO OFTEN WE SEE THE - I REALLY DON'T KNOW, I'M SORT OF AT A LOSS FOR WORDS AT THIS TIME, BUT WE SEE THE INDIGNITY, HOW HORRIBLE ONE HUMAN BEING CAN TREAT ANOTHER HUMAN BEING.

HERE TONIGHT WE ARE SOME TEN MONTHS AFTER THE FACT, AND I AM SURE MR. BYRHOLDT, THAT YOUR CLIENT, AND I AM VERY MUCH CONVINCED THAT THE FAMILY, REGRETS WHAT HAPPENED NOW.

UNFORTUNATELY, I HAVE TO GO BACK AND FOCUS ON THE EVENTS OF NOVEMBER 16TH AND 17TH, 1996, AND THERE IS JUST NO WAY AROUND THE FACT THAT MELVIN EARL MILLER WAS MURDERED THAT NIGHT IN HIS OWN HOME, MINDING HIS OWN BUSINESS.

AND IF YOU WISH TO - IF A HUMAN BEING WISHES TO FUNCTION IN OUR SOCIETY AND PARTICIPATE IN THE BENEFITS OF OUR SOCIETY, THE BENEFITS THAT THIS COUNTRY OFFERS, YOU HAVE TO BE WILLING TO PARTICIPATE, ABIDING BY THE RULES.

THESE RULES, AS I CALL THEM, THESE STATUTES, ARE NOTHING COMPLICATED. THIS IS JUST COMMON SENSE. IF YOU HAVE ANY CHRISTIAN BRINGING-UP OR HAVE BEEN EXPOSED TO A CHRISTIAN RELIGION, MUSLIM RELIGION, MOST ALL RELIGIONS THAT I AM FAMILIAR WITH, TAKING ANOTHER PERSON'S LIFE, TAKING ANOTHER PERSON'S PROPERTY, ARE THE VERY FOUNDATION OF THOSE BELIEFS, AND PROBABLY HISTORICALLY THAT IS HOW THEY GOT INTO THE LAWS OF THIS STATE.

ANYTHING ELSE?

ALL RIGHT, ON 97-124, THE STATE VERSUS JENNIFER L. MCSHARRY, INDICTMENT FOR MURDER, THE SENTENCE IS THE DEFENDANT BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF LIFE.

97-1691, ARMED ROBBERY: THE SENTENCE IS THE

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DEFENDANT BE COMMITTED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A TERM OF THIRTY (30) YEARS.

97-1693, BURGLARY FIRST DEGREE: THE SENTENCE IS THE DEFENDANT BE COMMITTED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A TERM OF THIRTY (30) YEARS.

1692, CRIMINAL CONSPIRACY: THE SENTENCE IS THE DEFENDANT BE COMMITTED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A TERM OF A FIVE (5) YEARS.

AND 97-1694, POSSESSION OF A FIREARM DURING THE COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME: THE SENTENCE IS THE DEFENDANT BE COMMITTED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A TERM OF FIVE (5) YEARS.

THESE SENTENCES WILL RUN CONCURRENT.

ANYTHING ELSE?

MR. BYRHOLDT: YOUR HONOR, I WOULD ASK THE COURT TO LET ME INFORM MS. MCSHARRY THAT SHE'S GOT A RIGHT TO APPEAL WITHIN TEN DAYS.

SHE WAS PREVIOUSLY DECLARED INDIGENT WHEN I WAS APPOINTED. I WOULD ASK THE COURT TO QUESTION HER. AT THIS TIME, SHE, AS FAR AS I AM CONCERNED, SHE HAS NOT ONE ASSET AND WOULD LIKE TO GET AN ORDER OF INDIGENCY

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SO I CAN NOTIFY APPELLATE DEFENSE, RATHER THAN TRY AND CHASE HER DOWN IN THE WEEKS AND DAYS TO COME AND TRY TO GET THAT DONE. I WOULD ASK THE COURT TO MAKE AN INQUIRY ON WHETHER SHE HAS ANY INCOME OR ASSETS AVAILABLE. I DON'T THINK SHE HAS. I WOULD REPRESENT TO THE COURT, SO FAR AS I KNOW, SHE HAS NONE.

I WOULD ASK THE COURT TO MAKE THAT INQUIRY OF HER.

THE COURT: ALL RIGHT, WELL, SINCE YOUR APPOINTMENT, ARE YOU AWARE THAT SHE HAS COME INTO ANY ASSETS OR -

MR. BYRHOLDT: NONE WHATSOEVER.

THE COURT: - ANY INHERITANCE OR MONEY OR ANYTHING?

MR. BYRHOLDT: NONE WHATSOEVER. AND I'M NOT AWARE OF ANY. I WOULD ASK THE COURT TO ALLOW ME TO PREPARE AN ORDER OF INDIGENCY TO CONTINUE, AND I WOULD GET THAT TO THE COURT NEXT WEEK.

THE COURT: MS. MCSHARRY, YOU OR YOUR ATTORNEY WOULD HAVE THE RIGHT TO APPEAL VERDICTS IN THESE CASES AND THE SENTENCES OF THE COURT, AND YOU OR YOUR ATTORNEY MUST DO SO WITHIN TEN (10) DAYS.

AND, MR. BYRHOLDT, YOU MAY PREPARE AN ORDER OF INDIGENCY. I WILL BE GLAD TO SIGN THAT FOR YOU.

ANY OTHER MATTERS?

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MR. BYRHOLDT: NO, SIR.

THE COURT: CAN YOU ALL GIVE THE FAMILY A FEW MINUTES? I KNOW THEY'VE TRAVELED A LONG WAY. JUST A FEW MINUTES SOMEWHERE WITH THE DEFENDANT BEFORE SHE IS TAKEN TO DETENTION CENTER? I AM GOING TO ASK ONCE AGAIN THAT YOU HOUSE HER AT THE CITY OF ANDERSON.

MR. BYRHOLDT: I'D LIKE TO THANK SECURITY. THIS WEEK HAS BEEN UNBELIEVABLY COOPERATIVE IN ASSISTING THE FAMILY THAT HAVE BEEN HERE FROM OUT OF TOWN. WE REALLY APPRECIATE THAT.

THE COURT: THIS CONCLUDES THIS CASE.

(WHEREUPON, THE FOREGOING CASE IS CONCLUDED: 8:10 P.M.)

FORM 2094 PENGAD • 1-800-631-6989

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED ANN DICKEY CAMPBELL, OFFICIAL COURT REPORTER OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR ANDERSON COUNTY, SOUTH CAROLINA, ON THE 9TH THROUGH 12TH DAYS OF SEPTEMBER, 1997.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

MAY 6, 1998

Ann Dickey Campbell

ANN DICKEY CAMPBELL

CIRCUIT COURT REPORTER

FORM 2094 PENGAD • 1-800-631-6989

ARREST WARRANT

E-712644 E-712644

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of ANDERSON

THE STATE

against

MCSHERRY, JENNIFER L

Address: [redacted]

JONESBORO GA 30236

Phone: _____ SSN: _____

Sex: F Race: W Height: _____ Weight: _____

DL #: [redacted]

DOB: [redacted] Agency ORI #: 0400

Prosecuting Agency: SHERIFF DEPT.

Prosecuting Officer: TATE, EDDIE

Offense: MURDER

Offense Code: 187

Code/Ordinance Sec. C.L.

This warrant is **CERTIFIED FOR SERVICE** in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant MCSHERRY, JENNIFER L on 12-2-96

J. E. Hampton
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

JUDGE DAVID L. CRENSHAW
100 E. QUEEN ST.
P. O. BOX 181
PENDLETON, SC 29670-0181

YB 12-2-96

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of ANDERSON)

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

Personally appeared before me the affiant LT. C.E. TATE, ACSO who being duly sworn deposes and says that defendant MCSHERRY, JENNIFER L did within this county and state on 11/17/96 violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: MURDER

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE AFFIANT HAS OBTAINED A STATEMENT FROM A CO-DEFENDANT STATING THAT THE DEFENDANT DID WITH MALICE AFORETHOUGHT AND WHILE ARMED WITH A DEADLY WEAPON, TO WIT: A HANDGUN, WILLFULLY AND INTENTIONALLY CAUSE THE DEATH OF MELVIN EARL MILLER BY SHOOTING HIM IN THE TORSO. THIS OFFENSE OCCURRED AT [redacted] IN ANDERSON COUNTY, SC.

Sworn to and subscribed before me on 11/21/96

Signature of Issuing Judge (L.S.)

C. E. Tate
Signature of Affiant

Affiant's Address ACSO

Affiant's Telephone 760 4430

FILED-CLERK'S OFFICE ANDERSON SC DEC 4 11 28 PM '96

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of ANDERSON)

** CASE NUMBER 9650877 **

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 11/17/96 defendant MCSHERRY, JENNIFER L did violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE: MURDER

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

_____ (L.S.)
Signature of Issuing Judge

Judge Code: 781

Judge's Address 100 EAST QUEEN ST. PENDLETON SC 29670

Judge's Telephone 803-646-6701

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL

A.672

WITNESSES

LT. C. E. TATE, ACSO

ARREST WARRANT NO. E-712644

TRUE BILL

DATE ACTION OF GRAND JURY

1/14/97

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 97-GS-04-124

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JANUARY TERM 1997

DDW

THE STATE

vs.

JENNIFER L. MCSHARRY

Indictment for Murder

16-3-10/16-3-20[0116]

GEORGE M. DUCWORTH, SOLICITOR

A. 673

comm 9-15-97

FORM 5 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

INDICTMENT FOR MURDER
16-3-10/16-3-20[0116]

At a Court of General Sessions, convened on JANUARY 14, 1997,
the Grand Jurors of ANDERSON County present upon their oath:

COUNT ONE — MURDER

That JENNIFER L. MCSHARRY

did in ANDERSON County on or about NOVEMBER 17, 1996,
feloniously, wilfully and with malice aforethought, kill one MELVIN EARL MILLER

by means of SHOOTING HIM WITH A HANDGUN
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.

George M. Ducworth
SOLICITOR

[redacted]

WITNESSES

. E. TATE, ACSO

- - -

ARREST WARRANT NO. DIRECT

TRUE BILL
DATE ACTION OF GRAND JURY

Elizabeth Gardner

6/25/97

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 97-US04-1641

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JULY TERM 1997

DDW

THE STATE

vs.

JENNIFER MCSHARRY

Indictment for Armed Robbery and Robbery

16-11-0330(A)[0139]

GEORGE M. DUCWORTH, SOLICITOR

Comm. 9-15-97

A. 675

FORM 20 (1/91)

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

INDICTMENT FOR ARMED ROBBERY

~~AND ROBBERY~~

16-11-0330(A)[0139]

At a Court of General Sessions, convened on JULY 29, 1997

the Grand Jurors of ANDERSON County present upon their oath:

COUNT ONE — ARMED ROBBERY

That JENNIFER MCSHARRY did in ANDERSON County on or about NOVEMBER 17, 1996, while armed with a deadly weapon, to wit: A HANDGUN feloniously take from the person or presence of MELVIN E. MILLER by means of force or intimidation goods or monies of MELVIN E. MILLER such goods or monies being described as follows: ONE BROWNING SHOTGUN, $42.00, AND A WALLET

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 and provided.

George M. Ducworth

SOLICITOR

DOCKET NO. 9705-04-1642

WITNESSES

C. E. TATE, ACSO

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JULY **TERM** 1997

DDW

THE STATE

vs.

JENNIFER MCSHARRY

ARREST WARRANT NO. DIRECT

TRUE BILL

DATE **ACTION OF GRAND JURY**

E. Gabriel Gardner

7/29/97

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

Indictment for
Criminal Conspiracy
16-17-410[0049]

GEORGE M. DUCWORTH, SOLICITOR

comm. 9-15-97

A. 677

FORM 24 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

INDICTMENT FOR CRIMINAL CONSPIRACY

16-17-410[0049]

At a Court of General Sessions, convened on JULY 29, 1997,

the Grand Jurors of ANDERSON County present upon their oath:

COUNT ONE — CRIMINAL CONSPIRACY

That JENNIFER MCSHARRY

did in ANDERSON County on or about NOVEMBER 17, 1996,

unlawfully and wilfully unite, combine, conspire, confederate, agree and have tacit understanding with each other and/or with other persons, whose names are unknown to the Grand Jurors, for the purpose of COMMITTING ARMED ROBBERY AND/OR MURDER AND/OR BURGLARY

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

George M. Ducworth

SOLICITOR

WITNESSES

C.E. TATE, ACSO

ARREST WARRANT NO. DIRECT

TRUE BILL
DATE ACTION OF GRAND JURY

7/29/97

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

DOCKET NO. 97-GS-04-1693

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JULY TERM 1997

DDW THE STATE

vs.

JENNIFER MCSHARRY

Indictment for Burglary (Dwelling)

16-11-311[0079]

GEORGE M. DUCWORTH, SOLICITOR

comm: 9-15-97

A. 679

FORM I (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

INDICTMENT FOR BURGLARY
(DWELLING)
16-11-311[0070]

At a Court of General Sessions, convened on JULY 29, 1997,

the Grand Jurors of ANDERSON County present upon their oath:

COUNT ONE — BURGLARY IN THE FIRST DEGREE

(DWELLING)

That JENNIFER MCSHARRY

did in ANDERSON County on or about NOVEMBER 17, 1996,

willfully and unlawfully enter the dwelling of MELVIN EARL MILLER

without consent and with the intent to commit a crime therein and the defendant

DID COMMIT THE BURGLARY IN THE NIGHTTIME AND/OR THE DEFENDANT WAS ARMED WITH A DEADLY WEAPON AND/OR THE DEFENDANT CAUSED PHYSICAL INJURY TO A PERSON WHO WAS NOT A PARTICIPANT IN THE CRIME AND/OR THE DEFENDANT DISPLAYED WHAT APPEARED TO BE A FIREARM AND/OR THE DEFENDANT USED OR THREATENED TO USE A DANGEROUS INSTRUMENT.

COUNT TWO — BURGLARY IN THE SECOND DEGREE

(DWELLING)

That _____

did in _____ County on or about _____,

willfully and unlawfully enter the dwelling of _____

without consent and with the intent to commit a crime therein.

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

George M. Duckworth

SOLICITOR

WITNESSES

C.E. TATE, ACSO

ARREST WARRANT NO. DIRECT

TRUE BILL ACTION OF GRAND JURY

DATE 7/29/97

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

DOCKET NO. 97-GS-04-1694

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JULY TERM 1997

DDW

THE STATE

vs.

JENNIFER MCSHARRY

Indictment for ~~Assault and Battery With Intent To Kill~~ and Possession of Firearm or Knife During Commission of or Attempt to Commit Violent Crime

16-23-490[0549]

GEORGE M. DUCWORTH, SOLICITOR

comm. 9-15-97

A. 681

FORM 8 (12/87)

INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO KILL AND POSSESSION OF FIREARM OR KNIFE DURING COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME
16-23-490[0549]

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

At a Court of General Sessions, convened on JULY 29, 1997,

the Grand Jurors of ANDERSON County present upon their oath:

COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL

That _____

did in _____ County on or about _____, with

malice aforethought commit an assault and battery upon one _____

_____ with intent to kill the said victim.

COUNT TWO — POSSESSION OF FIREARM OR KNIFE DURING COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME

That JENNIFER MCSHARRY

did in ANDERSON County on or about NOVEMBER 17, 1996, possess or visibly display a firearm or visibly display a knife during the commission or attempted commission of a violent crime, to wit: MURDER AND/OR ARMED ROBBERY AND/OR BURGLARY, in violation of Code Section 16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

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

George M. Ducworth

SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT #:97-GS-04-124

STATUTE #:_____ OFFENSE #:_____

Now comes the defendant, Jennifer L. McSherry

who in open Court pleads guilty to the charge in the within warrant(s)/Indictment(s) and consents to the sentence of this Court, This _____ day of _____, 19____.

_____
Defendant Signature

SENTENCE

The defendant, Jennifer L. McSherry is hereby committed to the South Carolina Department of Corrections/~~Anderson County Jail~~ for a term of LIFE ~~months/Years and/or~~ the payment of a **Fine** of $_____ provided upon the service of _____ **months/Years and/or** payment of a **Fine** of $_____ (plus court cost as applicable), the balance suspended with probation for_____ **months/Years.**

Special conditions:_____

Restitution - Yes/No Amount:_____

Pay to Anderson Clerk of Court for:_____
(Victim Name & Address)

(Payment Schedule)

Date: September 12, 1997

H. Dean Hall
Judge of the Tenth Judicial Circuit

Committment: _____

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT #:97-GS-04-1691

STATUTE #:_____ OFFENSE #:_____

Now comes the defendant, Jennifer McSharry

who in open Court pleads guilty to the charge in the within warrant(s)/Indictment(s) and consents to the sentence of this Court, This _____day of _____, 19____.

_____
Defendant Signature

SENTENCE

The defendant, Jennifer McSharry is hereby committed to the South Carolina Department of Corrections/~~Anderson County Jail~~ for a term of 30 ~~months~~/Years and/or the payment of a **Fine** of $_____ provided upon the service of _____ **months/Years and/or** payment of a **Fine** of $_____ (plus court cost as applicable), the balance suspended with probation for_____ **months/Years.**

Special conditions:_____

_____

_____

_____

_____

Restitution - Yes/No Amount:_____

Pay to Anderson Clerk of Court for:_____
(Victim Name & Address)

_____
(Payment Schedule)

Date: September 12, 1997

H. Dean Hall
Judge of the Tenth Judicial Circuit

Committment: _____

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT #:97-GS-04-1692

STATUTE #:_____ OFFENSE #:_____

Now comes the defendant, Jennifer McSharry

who in open Court pleads guilty to the charge in the within warrant(s)/Indictment(s) and consents to the sentence of this Court, This _____day of _____, 19____.

_____
Defendant Signature

SENTENCE

The defendant, Jennifer McSharry is hereby committed to the South Carolina Department of Corrections/~~Anderson County Jail~~ for a term of 5 ~~months~~/Years **and/or** the payment of a **Fine** of $_____ provided upon the service of _____ **months/Years and/or** payment of a **Fine** of $_____ (plus court cost as applicable), the balance suspended with probation for_____ **months/Years.**

Special conditions:_____

Restitution - Yes/No Amount:_____

Pay to Anderson Clerk of Court for:_____
(Victim Name & Address)

(Payment Schedule)

Date: September 12, 1997

_____
Judge of the Tenth Judicial Circuit

Committment: _____

A. 685

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT #:97-GS-04-1693

STATUTE #:_____ OFFENSE #:_____

Now comes the defendant, Jennifer McSharry

who in open Court pleads guilty to the charge in the within warrant(s)/Indictment(s) and

consents to the sentence of this Court, This _____day of _____, 19____.

_____
Defendant Signature

SENTENCE

The defendant, Jennifer McSharry is hereby committed to the South Carolina Department of Corrections/~~Anderson County Jail~~ for a term of 30 ~~months~~/Years and/or the payment of a Fine of $_____ provided upon the service of _____ months/Years and/or payment of a Fine of $_____ (plus court cost as applicable), the balance suspended with probation for_____ months/Years.

Special conditions:_____

_____

_____

_____

_____

Restitution - Yes/No Amount:_____

Pay to Anderson Clerk of Court for:_____
(Victim Name & Address)

_____
(Payment Schedule)

Date: September 12, 1997

H. R. Hall
Judge of the Tenth Judicial Circuit

Committment: _____

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT #:97-GS-04-1694

STATUTE #:_____ OFFENSE #:_____

Now comes the defendant, Jennifer McSharry

who in open Court pleads guilty to the charge in the within warrant(s)/Indictment(s) and consents to the sentence of this Court, This _____day of _____, 19____.

_____
Defendant Signature

SENTENCE

The defendant, Jennifer McSharry is hereby committed to the South Carolina Department of Corrections/~~Anderson County Jail~~ for a term of 5 ~~months~~/Years **and/or** the payment of a **Fine** of $_____ provided upon the service of _____ **months/Years and/or** payment of a **Fine** of $_____ (plus court cost as applicable), the balance suspended with probation for_____ **months/Years.**

Special conditions:_____

_____

_____

_____

_____

Restitution - Yes/No Amount:_____

Pay to Anderson Clerk of Court for:_____
(Victim Name & Address)

_____
(Payment Schedule)

Date: September 12, 1997

_____
Judge of the Tenth Judicial Circuit

Committment: _____

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

H. Dean Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JENNIFER L. MCSHARRY,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Deputy Chief Attorney

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The judge erred by refusing to instruct the jury on voluntary manslaughter, where the jury could have found that the actual killer was guilty of that offense and not murder.

STATEMENT OF FACTS

On July 29, 1997, an Anderson County grand jury indicted Jennifer L. McSharry for murder, first degree burglary, armed robbery, conspiracy and possession of a firearm during the commission of a violent crime. Judge H. Dean Hall presided at her jury trial on September 8 through 12, 1997. The jury found appellant guilty as charged, and the judge imposed concurrent sentences of life plus seventy years.

ARGUMENT

The judge erred by refusing to instruct the jury on voluntary manslaughter, where the jury could have found that the actual killer was guilty of that offense and not murder.

By her own admission, Renee Kelso was not a good mother to appellant, her 17-year-old daughter, but was in fact a bad influence. ROA p. 182, lines 5-7; ROA p. 193, line 23 – p. 194, line 1. Kelso dealt cocaine out of their Georgia residence and, with herself as an example, encouraged appellant and her friend Jennifer Titman, who also lived in the house, to stay constantly wasted on various combinations of drugs. ROA p. 174, line 24 – p. 176, line 15.

At some point, Kelso had been the girlfriend of the victim, Melvin Miller. ROA p. 2, lines 12-16. Miller, who was in his sixties and retired, lived in a small camper in a "[v]ery rural" part of Anderson County. ROA p. 2, lines 1-11. Miller and Kelso had broken up some two years before his death in a dispute over "money that was loaned." ROA p. 3, lines 2-10. Miller sued Kelso and obtained a judgment of almost $5,000. ROA p. 107, lines 18-21. Kelso testified that Miller owed her money. ROA p. 176, lines 16-21. She told Jennifer Titman that he owed her $10,000. ROA p. 131, lines 17-20.

On November 17, 1996, the police were looking for Kelso, who was already somewhat of a police character, because she had written bad checks. ROA p. 176, line 22 – p. 177, line 11. She decided to confront Miller about the money she felt she was owed. Appellant later told the police:

> There were a lot of people on us because of money my mom owes them, and the people told my mom we'd better come up with some serious money. I didn't know who the people were, but heard my mom talk about them. We needed to get like $3,000 or more. My mom said that there is a man in

South Carolina that owed her a lot of money, and we have to go collect it from him.

ROA p. 90, lines 2-24. Kelso, her current boyfriend Ronnie Jordan, appellant, Jennifer Titman and Jason Conley piled into a car and drove across the state line to Miller's camper under cover of darkness. ROA p. 90, line 25 – p. 91, line 13.

Everyone was on drugs. ROA p. 124, lines 6-22. Appellant and Titman were "loaded" to the point of hallucination. ROA p. 122, line 9 – p. 124, line 5; ROA p. 131, line 24 – p. 133, line 9; ROA p. 181, lines 5-9. They saw a UFO buzz the car and "men jumping out of the freeway." ROA p. 125, lines 2-10; ROA p. 133, lines 10-23; ROA p. 181, lines 9-14.

The plan called for appellant and Titman to trick Miller into unlocking his door and letting them into his camper. ROA p. 134, lines 13-19; ROA p. 177, lines 12-25. Then, the others would follow. According to the police, appellant later told them that robbery and possibly murder had also been contemplated. ROA p. 91, lines 16-18; ROA p. 100, lines 23-25. Titman testified that, while robbery had been discussed beforehand, "we didn't know that a murder was going to happen." ROA p. 143, lines 5-10; ROA p. 168, lines 17-21. Kelso testified that neither robbery nor murder had been part of the plan – she just wanted to collect the debt. ROA p. 178, line 24 – p. 179, line 7; ROA p. 182, lines 1-4.

The ruse worked. Miller let appellant and Titman use his telephone after they woke him up and pretended to be lost. ROA p. 101, lines 12-20; ROA p. 150, line 21 – p. 151, line 20. Appellant left the camper and Jordan entered. ROA p. 102, lines 16-20. Titman testified that Jordan put his gun to Miller's head and demanded, "Give me money." ROA p. 153, lines 10-15. Titman ran out and told appellant, "Oh shit, we're going to get caught."

ROA p. 102, lines 21 and 22. Kelso and Conley then entered the camper. ROA p. 102, lines 23 and 24. Kelso and Jordan wore masks. ROA p. 92, lines 11 and 12; ROA p. 143, line 20 – p. 144, line 3.

Kelso testified:

> I went to reach for the gun. It had gotten out of hand. It was not what I had planned to do and everything got too fast out of hand, and what I mean by that is , when I went to go get the gun, it was a close range between Ronnie and Mel at that time, and I was right in between them... right when I went to reach for the gun, the gun went off and it hit my hand, went through my hand.

ROA p. 178, line 17 – p. 179, line 14.

She heard two more shots. ROA p. 179, lines 15-23. Titman testified that she and appellant were in the car when Jordan shot Miller. ROA p 165, lines 23 and 24. Appellant told the police, "I saw Ron hold the gun out, and I saw three orange flashes as three bangs came from the gun." ROA p. 103, lines 9-11. Jordan helped Kelso to the car and they all returned to Georgia, where Kelso was admitted to the hospital for treatment of the gunshot wound to her hand. ROA p. 105, lines 7-11.

The hospital routinely notified Georgia police. ROA p. 16, lines 4-17. Kelso initially told them that she had shot herself "trying to catch a falling gun." ROA p. 18, line 9 – p. 19, line 6. Her story did not add up. ROA p. 19, line 7 – p. 21, line 6. Kelso then claimed that "for unknown, unexplained reasons," a mysterious stranger "just shot her... but that she was sure that he had just accidentally shot her." ROA p. 21, line 7 – p. 23, line 18.

Meanwhile, Jennifer Titman became depressed and suicidal and checked herself into the hospital. ROA p. 36, lines 4-8; ROA p. 138, line 21 – p. 139, line 1. When she explained what had happened to Miller, they called the police. ROA p. 139, lines 2-5.

Titman confessed, and the police arrested everyone involved. ROA p. 36, line 9 – p. 37, line 5; ROA p. 40, line 22 – p. 41, line 8.

Of the five participants, Ronnie Jordan, Renee Kelso and appellant received sentences of life plus. Jason Conley pleaded guilty to voluntary manslaughter and received a sentence of fifteen years. Jennifer Titman also pleaded guilty to manslaughter and received a sentence of seven years.

Defense counsel requested an instruction on manslaughter. ROA p. 196, lines 5-7; ROA p. 197, lines 3-7. The judge refused, stating, "I don't there has been any evidence that there was any provocation by the victim, Mr. Miller." ROA p. 199, lines 18-22. His jury instructions did not include voluntary manslaughter. ROA p. 200, line 10 – p. 232, line 8.

Voluntary manslaughter is defined as an unlawful killing committed during the heat of passion aroused by legally adequate provocation. State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997). In determining whether the evidence requires a charge on voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994).

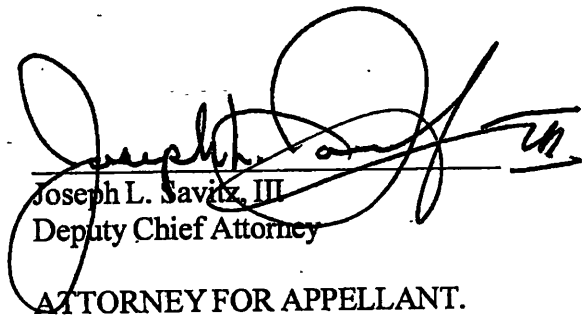
Under one reasonable interpretation of the evidence, Ronnie Jordan and Melvin Miller got into an altercation when Renee Kelso attempted to collect a debt she was owed by Miller. The mere fact that Jordan was armed when he came to Miller's camper would not necessarily preclude voluntary manslaughter. See State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). This view of the evidence supported an instruction on voluntary manslaughter. See State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983).

CONCLUSION

If Ronnie Jordan was guilty of voluntary manslaughter, then so was appellant. Appellant did not kill Miller and had left the camper when Jordan pulled the trigger. Because of Renee Kelso's abysmal parenting skills, her teenaged daughter is now looking at life in prison.

The Court should reverse appellant's convictions and remand for a new trial.

Respectfully submitted,



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This 20th day of April, 1999.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

H. Dean Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JENNIFER L. MCSHARRY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, this 20th day of April, 1999.

Joseph L. Savitz, III
Deputy Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 20th day of April, 1999.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Anderson County

The Honorable H. Dean Hall, Circuit Court Judge

THE STATE,

Respondent,

vs.

JENNIFER L. MCSHARRY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

DID THE TRIAL COURT PROPERLY REFUSE TO CHARGE VOLUNTARY MANSLAUGHTER, WHERE APPELLANT'S CONVICTION FOR MURDER DEPENDED ON ACCOMPLICE LIABILITY, AND THERE WAS NO EVIDENCE THE SHOOTER ACTED IN HEAT OF PASSION UPON SUFFICIENT LEGAL PROVOCATION?

STATEMENT OF THE CASE

In July 1997, the Anderson County Grand Jury indicted Appellant, Jennifer L. McSharry, for murder, armed robbery, first degree burglary, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Specifically, the indictment for murder alleged that, on November 17, 1996, McSharry feloniously and wilfully killed Melvin Earl Miller with malice aforethought by shooting him with a handgun. Jury selection was conducted on September 9th, 1997, before the Honorable H. Dean Hall. Judge Hall held a jury trial from September 9th - 12th, 1997, and a jury found McSharry guilty of all charges. **{R. 233 l. 8 - 234 l. 10}**. On September 12th, 1997, Judge Hall sentenced McSharry to life imprisonment on the murder charge. He further sentenced her to concurrent terms of thirty years for armed robbery, thirty years for burglary, five years for possession of a firearm, and five years for criminal conspiracy. Throughout the trial proceedings, Bruce Byrnholdt, Esquire, represented McSharry. Assistant Solicitor Druanne White prosecuted the case.

A timely notice of appeal was served on September 19, 1997. This appeal follows.

STATEMENT OF FACTS

During the early morning hours of November 17, 1997, Jennifer McSharry and her accomplices gained entry into the home of Melvin Earl Miller to rob him at gunpoint. Miller was shot during the robbery and he died from his wounds. The specific facts of this case are as follows.

On Saturday, November 16, 1996, McSharry, Lu Renee Kelso, McSharry's mother,[1] Jennifer Titman (Titman), a teenage friend of McSharry's, Ron Jordan, and others were partying at Kelso's house in Clayton County, Georgia. Members of the group were smoking pot and snorting cocaine. **{R. 122 I. 17 - 123 I. 21; 172 II. 4-21; 175 I. 14 - 176 I. 15; 193 II. 17-22}**. Kelso told McSharry that she had to come up with over $3000 to repay "some people" she owed, but she also told McSharry and Titman that ex-boyfriend Miller owed her $10,000 that they could go "collect." **{R. 2 II. 12-16; 90 II. 15-24; 99 II. 11-19; 131 II. 12-23; 145 II. 2-5}**. Deciding it would not be wise to use McSharry's car for their "debt collection" journey, Kelso, McSharry, and Titman went to Angelia Chapman's house late Saturday night and asked to borrow Chapman's car to do some shopping. **{R. 32 I. 4 - 33 I. 3; 90 I. 25 - 91 I. 7; 99 I. 20 - 100 I. 3; 145 II. 15-25}**. Chapman agreed, and Kelso and the two girls returned to Kelso's house where they picked up Jason Conley and Ron Jordan. **{R. 91 II. 8-9; 100 II. 4-7; 146 II. 1-18}**. They left for Anderson County between 1:00 and 2:00 a.m. on Sunday morning. **{R. 100 II. 12-13}**.

As Kelso drove the group from Georgia to Anderson County, she outlined the plan

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[1] At the time of the writing of this brief, the mother of Appellant McSharry, Lu Renee Kelso, has an appeal from her convictions for this incident pending before this Court. Kelso's appeal is assigned Supreme Court Docket No. 98-207.

and assigned a role to each member of the group. Kelso told McSharry and Titman to gain entry into Miller's house by pretending they were lost on their way from West Virginia. One of them was then to find an excuse to come back outside and signal the others. Kelso, Jordan, and Conley were to wait for the two teenage girls to gain entry and distract Miller before they came inside to rob him. The group decided that they would force Miller to withdraw money from an ATM, and they agreed that if Miller resisted, they would kill him. **{R. 91 l. 8 - 92 l. 25; 100 ll. 12 - 25; 134 l. 2 - 136 l. 1; 142 l. 23 - 143 l. 17; 147 ll. 7-13; 151 l. 19 - 152 l. 23; 161 ll. 14-18; 168 ll. 12-23; 177 ll. 12-23; 190 ll. 19-23}**.

All of the members of the "debt collection" team were aware that Ron Jordan had a handgun he planned to use during the robbery. Members of the group also used cocaine and marijuana on the way to Anderson. **{R. 91 ll. 10-20; 100 ll. 8-11; 123 l. 22 - 124 l. 16; 131 l. 24 - 134 l. 1; 139 l. 21 - 142 l.9; 143 ll. 3-19; 146 ll. 10-11}**. Kelso and Jordan had ski masks in which they had cut holes for their eyes and mouth. **{R. 101 ll. 8-11; 143 l. 20 - 144 l. 3}**.

At about 5:30 or 6:00 in the morning on November 17th, the group arrived at the property where Miller lived. Titman and McSharry let the others out at the edge of the driveway and drove on to park near Miller's camper. They knocked on the door, and eventually Miller answered in his underwear. As planned, the two girls told Miller that they were lost on their way from West Virginia. Miller invited them inside to use the phone. **{R. 91 ll. 21-22; 92 l. 5 - 93 l. 1; 100 l. 21 - 101 l. 23; 150 l. 21 - 152 l. 7}**.

Inside, the girls pretended to telephone someone who was not home, and they noticed that the phone had no dial tone. McSharry figured the others had cut the phone

line. McSharry then went outside under the pretense of getting an address book, and returned to fake another phone call. McSharry then left the camper again in order to get some cigarettes from the car. **{R. 93 ll. 2-16; 101 l. 17 - 102 l. 17; 152 l. 5 - 153 l.8}**.

As McSharry left the trailer for the second time, Jordan rushed inside the trailer, held the gun to Miller's head, and demanded money. Titman went outside to the car, but Kelso and Conley followed Jordan inside. Titman and McSharry saw Conley bring a shotgun and a pool cue from Miller's camper outside to the car, and Titman later learned Conley took Miller's wallet. Conley told Titman they were going to take Miller to the ATM. **{R. 93 l. 17 - 94 l. 5; 102 l. 18 - 103 l.8; 152 l. 8 - 153 l. 21; 155 l. 14 - 156 l. 5; 178 ll. 1-14; 186 l. 15 - 188 l.8; 191 l. 22 - 192 l. 7}**.

While they were outside, Titman and McSharry heard noises from within Miller's camper. McSharry then saw Kelso, Jordan, and Conley evidently leading Miller out the doorway and onto the deck of Miller's trailer. Titman, who was sitting in the car, suddenly heard a few gunshots, and McSharry saw Jordan "hold the gun out" and shoot Miller. However, in the process Kelso also was shot through her right hand, and once Jordan helped her back to the car, the group sped away from the murder scene. **{R. 94 ll. 3-22; 103 l. 2 - 104 l. 1; 153 l. 24 - 155 l.13; 156 l.1 - 157 l. 7; 178 ll. 3-23}**.

Even though Kelso's hand was bleeding badly, the group drove to a friend's house, Ray Henderson, because they were worried they would get caught if they went to a hospital. On the way, Kelso told the others she was shot during a struggle over Jordan's gun.[2] Titman recalled that the others laughed about shooting Miller, and Jordan said Miller

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[2] Kelso testified she was not really sure whether the shooting was accidental or purposeful. She stated "things had gotten out of hand," but denied there was a struggle

deserved it for resisting. **{R. 94 l. 23 - 95 l. 11; 104 ll. 2 - 15; 157 l. 8 - 159 l.18; 160 ll. 9-13; 162 ll. 15-19}**.

In the meantime, Miller's neighbor and partner William Laudermilch heard the gunshots, thought there had been a hunting accident and ran outside. He saw headlights quickly backing down the driveway, and saw Miller laying face down in front of his trailer. The inside of the trailer was ransacked. Miller told Laudermilch, "I've been shot, Bud," and Laudermilch thought Miller said four people did it. Laudermilch ran to another neighbor's house to call for police and an ambulance. **{R. 1 l. 3 - 2 l. 11; 3 ll. 20-25; 4 l. 22 - 6 l. 5; 7 l. 10 - 10 l. 23}**.

The "debt collectors" eventually made to Henderson's house. There, they cleaned and bandaged Kelso's wound as best they could. The group then set to concealing the evidence of their crime. Kelso told the girls to get rid of the stolen weapon, but instead they kept it. After they took the money out of Miller's wallet, they burned it, as well as Kelso's bloody clothes. **{R. 95 ll. 6-17; 104 l. 12 - 105 l. 6; 157 l. 16 - 158 l. 19; 159 l. 19 - 160 l. 5; 192 ll. 1-7}**.

The group eventually decided to leave Henderson's house and return to Clayton County. Kelso rode with Henderson in his car in order to split up the group and avoid any attention from the police. The group reunited at the South Carolina-Georgia state line, and Henderson returned home after Kelso got into Chapman's car with the others. **{R. 95 ll. 18-25; 105 ll. 7-9}**.

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over the gun. She stated she was standing between Miller and Jordan and "went to go get the gun" when she and Miller were shot. She stated she did not hear any words of anger pass between Miller and Jordan. **{R. 178 l. 24 - 180 l. 14}**.

When they returned to Clayton County, Kelso decided to go to the Southern Regional Medical Center to seek treatment for her wounded hand. The group agreed that they would say Kelso had been shot accidentally, and McSharry "really thought [they] could get away with it." However, Kelso told a number of implausible stories when police at the hospital routinely investigated her gunshot wound. **{R. 15 l. 25 - 30 l. 4; 34 ll. 3-7; 96 ll. 6-16}.**

A few days after Miller's murder, Titman had a nervous breakdown and eventually told the police about the events of November 16th and 17th. When contacted, Conley turned Miller's shotgun over to the police; Kelso had told him to get rid of it but he had kept it at his parents' house. **{R. 35 l. 6 - 39 l. 7; 162 ll. 15-19; 163 l. 11 - 164 l. 8; 169 ll. 3-10}.**

Other physical evidence was introduced. The pathologist testified that Miller died from two gunshot wounds in the left side of his abdomen. The wounds had stippling around them, which indicated the gun was between six and eighteen inches from Miller's abdomen when the shots were fired. Miller also had a defensive gunshot wound to his right hand, and powder debris on the hand indicated it was near the gun's barrel when the shot was fired. While the doctor stated the wound to the hand could have resulted from either a defensive posture or an attempt to grab the gun, he opined that the fatal wounds to the abdomen were NOT consistent with a struggle for the gun, because the victim's arm was in a very unnatural position at the time the fatal shots were fired. **{R. 48 l. 1 - 58 l. 2}.**

A SLED agent testified that a pair of sunglasses found at the scene had Kelso's fingerprint on it. **{R. 61 ll. 9-13; 85 ll. 4-6; 104 ll. 10-11}.** Other SLED agents testified that Kelso and Jordan's blood was consistent with or matched blood on a seat cover, and a

grocery bag found at the scene. **{R. 63 ll. 1-8; 66 ll. 2-5; 68 ll. 18-25; 71 ll. 1-15; 73 ll. 23-24; 76 ll. 13-22; 77 ll. 2-21}**. A pair of Kelso's shoes was found outside near the victim's car. **{R. 10 l. 24 - 11 l. 3; 61 ll. 9-16; 71 ll. 1-6; 104 ll. 10-11; 183 ll. 2-3}**. Evidence was admitted of previous financial transactions between Kelso and Miller, as well as a default judgment Miller obtained against Kelso. **{R. 3 ll. 2-10; 78 l. 16 - 79 l. 6; 80 l. 13 - 81 l. 10; 108 l. 20 - 110 l. 16; 113 l. 15- 114 l. 13; 115 ll. 18-21}**. Finally, a notebook taken from McSharry's purse evidently had some references to Miller. **{R. 40 l. 22 - 43 l. 12; 111 l. 9 - 113 l. 14}**.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO CHARGE VOLUNTARY MANSLAUGHTER, WHERE APPELLANT'S CONVICTION FOR MURDER DEPENDED ON ACCOMPLICE LIABILITY, AND THERE WAS NO EVIDENCE THE SHOOTER ACTED IN HEAT OF PASSION UPON SUFFICIENT LEGAL PROVOCATION.

McSharry contends that the trial court should have charged voluntary manslaughter, because a reasonable interpretation of the evidence is that "Ronnie Jordan and Melvin Miller got into an altercation when Renee Kelso attempted to collect a debt she was owed by Miller." However, McSharry's participation in the late night burglary, armed robbery, and murder of Miller by no means warrants such an instruction.

By way of background, McSharry's guilt of murder in this case depended on the law of parties, since Jordan was the actual shooter. The overwhelming weight of the evidence in this case shows that the group planned a nighttime robbery, planned to kill the victim if he resisted, planned to kidnap the victim and take him to an ATM, used deception to gain entry and make sure the victim was isolated and alone, cut the phone lines, and shot the victim dead when he attempted to resist their attempts to kidnap and rob him.[3]

First, there was evidence to support McSharry's guilt as a principal second to murder.[4] In her statement, McSharry said that the group agreed to kill Miller if he resisted

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[3] **{R. 90 l. 15 - 95 l. 1; 99 l. 11 - 105 l. 17; 131 ll. 12-23; 134 ll. 2-23; 135 l. 21 - 136 l. 1; 142 l. 23 - 145 l. 5; 146 l. 19 - 147 l. 13; 150 l. 21 - 157 l. 17; 159 ll. 1-18; 161 ll. 4-18; 168 ll. 12 - 23; 177 l. 12 - 181 l. 25; 186 l. 15 - 188 l. 8; 188 ll. 19-25; 190 ll. 13-23; 192 ll. 8-11; 193 ll. 6-11}.**

[4] A principal second, who is just as criminally liable as a principal first, is defined as one who is present at the scene of the crime and aids in the commission of the felony. William McAninch & Gaston Fairey, The Criminal Law of South Carolina 363 (3rd ed. 1996) (construing S.C. Code Ann. § 16-1-40 (Supp. 1997)). "Aid" means "to support, help, assist, or strengthen; [to] act in cooperation with; [to] supplement the effort of others." Black's Law Dictionary 68 (6th ed. 1990).

the robbery. Her and Titman's deception, of course, were the means which enabled Jordan to enter the camper and accost Miller. **{R. 91 l. 19 - 93 l. 19; 100 l. 14 - 102 l. 20; 131 ll. 12-23; 134 ll. 2-21; 135 l. 21 - 136 l. 1; 144 ll. 4-10; 146 l. 19 - 147 l. 13; 150 l. 21 - 153 l. 21; 161 ll. 4-18; 177 ll. 12-25; 181 ll. 1-25; 190 ll. 13-23; 192 ll. 8-11}.**

Moreover, the familiar "the hand of one is the hand of all" principle supports McSharry's liability for murder. Under this doctrine, one who combines or confederates with others for an illegal purpose is still criminally responsible for a murder committed by an accomplice, if the murder was a natural and probable consequence of the original plan. State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991) (citing State v. Williams, 189 S.C. 19, 199 S.E. 906 (1938)), cert. denied, (S.C. Oct. 8, 1991). Murder is not only a *per se* natural and probable consequence of a late night burglary and armed robbery of a man in his home, but it was expressly contemplated by McSharry and her confederates. **{R. 100 l. 23 - 101 l. 2}.**[5]

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[5] Cf., e.g. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, cert. denied, 409 U.S. 1077 (1972). While it seems self-evident that murder is a natural and probable consequence of armed robbery and first degree burglary, the Respondent would point to a discussion from Justice O'Connor for further support:

> Household burglaries represent not only the illegal entry into a person's home, but also "pos[e] real risk of serious harm to others." Solem v. Helm, 463 U.S. 277, 315-316 (1983) (Burger, C.J., dissenting). According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985). . . . Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the "harsh potentialities for violence" inherent in the forced entry into a home preclude characterization of the crime as "innocuous, inconsequential, minor, or 'nonviolent.' " Solem v. Helm, supra, at 316 (Burger, C.J., dissenting). See also Restatement of Torts § 131, Comment g (1934) (burglary is among felonies that normally

A defendant's request to charge should be granted if warranted by any evidence taken in the light most favorable to the defendant. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Voluntary manslaughter is defined as the intentional killing of a human being in the sudden heat of passion resulting from sufficient legal provocation. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Both "heat of passion" and "sufficient legal provocation" must be present in order for a voluntary manslaughter charge to be required. See, e.g. State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997). Since McSharry's murder conviction depends on the law of parties, her entitlement (or lack thereof) to a voluntary manslaughter charge depends on the evidence relating to Jordan, the shooter. **{App. Brf. at 9}**. No possible view of the evidence in this case could support the conclusion that any member of the "debt collection" group, and Jordan in particular, acted under heat of passion upon sufficient legal provocation.

A. There was no evidence of heat of passion in this case.

South Carolina caselaw defines "heat of passion" as "an uncontrollable impulse to do violence." State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (quoting

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cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, Criminal Law 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Tennessee v. Garner, 471 U.S. 1, 26-27 (1985) (O'Connor, J., dissenting). Even the majority opinion in Garner, which argued that an unarmed burglar is not always physically dangerous, admitted that "an armed burglar would present a different situation." 471 U.S. at 21. See also State v. Rodriguez, 791 P.2d 633, 637 (Ariz. 1990) (armed robbery reflects "a premeditated readiness for violence and possible injury or death"); W. LaFave & A. Scott, Criminal Law, 406-07 (1972) (including armed robbery and burglary of a dwelling in the list of felonies which pose a substantial risk of death or serious bodily harm). Moreover, the General Assembly defines both first degree burglary and armed robbery as violent crimes and "most serious offenses." S.C. Code Ann. §§ 16-1-60, 17-24-45 (Supp. 1997).

State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)). See also State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1996) ("The provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror.").

In her brief, McSharry relies on the testimony of Kelso to establish an the existence of an "altercation" between the victim and his multiple assailants. **{App. Brf. at 7; R. 178 l. 17- 179 l. 7}**. Moreover, both Titman and McSharry described hearing "things get pushed around" prior to hearing the gunshots. **{R. 94 ll. 10-12; 103 ll. 16-18; 153 l. 24 - 154 l. 3}**. However, Kelso herself testified that there was neither a struggle over the gun nor words of anger between Miller and Jordan prior to the murder. **{R. 179 l. 10 - 180 l. 11}**. She further admitted that the teenage girls were used to gain entry, that Jordan went into Miller's camper, held the gun to him, and demanded money. **{R. 186 ll. 15-21; 186 ll. 2-8; 190 ll. 13-23; 192 ll. 8-11}**. Kelso's vague description of "things getting out of hand," when coupled with her other testimony, cannot establish by any stretch that an objective person in Jordan's situation was at the highest degree of exasperation, rage, anger, sudden resentment, or terror. There is thus no evidence of Jordan's state of mind being in the heat of passion.

B. There was no evidence of sufficient legal provocation in this case.

The even stronger point is that there also is absolutely no evidence of sufficient legal provocation. While McSharry and Titman described hearing things get pushed around in the trailer, as noted in the preceding subsection, Kelso stated that there were no words of anger between Jordan and Miller prior to the murder, and there was no struggle between

Jordan and Miller over the gun. The trial court was thus manifestly correct in ruling that there was no evidence of provocation by Miller. **{R. 199 ll. 18-22}**.

In any event, a voluntary manslaughter charge was properly denied even if Miller attempted to struggle with Jordan for the gun or engaged in harsh words or acts with Jordan. A victim of an armed robbery is entitled to struggle, grab the gun, or otherwise defend himself, and these kinds of acts as a matter of law do not amount to sufficient legal provocation. State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) (citing State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984)). The jury found McSharry guilty of armed robbery, first degree burglary, and conspiracy, and there is no appeal from these verdicts. **{R. 233 ll. 13-23}**. Moreover, Kelso's admissions that the girls were used in a trick to gain entry, and Jordan used a gun to demand money, as much as concede a burglary and armed robbery.[6] **{R. 177 ll. 12-25; 181 ll. 21-25; 186 l. 20 - 187 l. 1; 188 ll. 1-8; 190 ll. 13-23; 102 ll. 8-11}**. And, as noted before, McSharry's statement and Titman's testimony expressly and unequivocally describe the group's commission of those two crimes. There is absolutely no evidence suggesting that Jordan was merely armed when he went to Miller's camper, that he gained entry legally, and that he only produced and used the gun after Miller provoked him.

Finally, McSharry's contention that the group was there merely to collect a debt adds nothing to her issue on appeal. People can NOT lawfully collect a debt, even if it is

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[6] It is interesting to note that these facts are similar to the "burglary by trick" in State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1995). In Nance, the defendant went to the victims' home in the middle of the night, cut the phone lines, made up a story about needing to use the phone, and then used that opportunity to force his way into the home. Id.

assumed the debt is legitimately owed, by using a trick to gain entry into someone's house in the middle of the night, and demanding money while holding a gun to the debtor. See, e.g. State v. Morant, 701 A.2d 1 (Conn. 1997) (citing decisions which have held that creditors cannot use violence, threats, or weapons to collect debts); Thomas v. State, 584 So.2d 1022 (Fla. Dist Ct. App. 1991) (refusing a claim of right defense to robbery, at least where one attempts to collect a debt through the forceful or violent taking of another's money); State v. Russell, 536 P.2d 1392 (Kan. 1975) (rejecting claim of right defense to robbery); Rozika v. State, 520 N.E.2d 1267 (Ind. 1988) (no defense to robbery where creditor uses firearms, force, or violence to collect on a secured loan); People v. Mensah, 604 N.Y.S.2d 49 (N.Y. App. Div. 1993) (while question is open whether it is a defense to robbery when one uses force to recover a specific and stolen chattel, one can NOT collect on a debt by forcibly or violently taking another's property); State v. Willis, 492 S.E.2d 43 (N.C. Ct. App. 1997) (noting that a claim of right defense to robbery is "incompatible with an ordered and civilized society," and questioning the validity of earlier North Carolina precedent); Commonwealth v. Thompson, 648 A.2d 315 (Pa. 1994) (conviction for robbery valid even though defendant was attempting to collect debt); Collins v. State, 800 S.W.2d 267 (Tex. Ct. App. 1990) (creditor cannot use a violent assault to collect on a debt).

There is therefore absolutely no evidence which would suggest that Jordan, or any other member of the group, shot Miller in the heat of passion after being provoked by him. The only reasonable interpretation from this evidence is that Miller was murdered after being awakened in his own home the middle of the night. McSharry's issue should fail.

CONCLUSION

The state would agree with McSharry that it is indeed tragic to see any potential she had as much as wasted in young adulthood. However, such a consideration is wholly irrelevant to the issue she raises on appeal.

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

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S. CREIGHTON WATERS

ATTORNEYS FOR RESPONDENT

April 20, 1999

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Anderson County
The Honorable H. Dean Hall, Circuit Court Judge

THE STATE,

Respondent,

vs.

JENNIFER L. MCSHARRY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 210(b), SCAR.

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April 20, 1999

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Anderson County

The Honorable H. Dean Hall, Circuit Court Judge

THE STATE,

Respondent,

vs.

JENNIFER L. MCSHARRY,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the *Final Brief of Respondent*, dated April 20, 1999, on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to her attorney of record:

Joseph L. Savitz, III, Esquire
Deputy Chief Attorney
South Carolina Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, South Carolina 29201

I further certify that I have served all parties required by Rule to be served.

This 20th day of April, 1999.

S. CREIGHTON WATERS
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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jennifer L. McSharry, Appellant.

Appeal From Anderson County
H. Dean Hall, Circuit Court Judge

Memorandum Opinion No. 99-MO-093
Submitted November 2, 1999 - Filed November 19, 1999

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor George M. Ducworth, of Anderson, for respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Franklin, 310 S.C. 122, 425

S.E.2d 758 (1992); State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984), cert. denied, 471 U.S. 1006, 105 S.Ct. 1873, 85 L.Ed.2d 165 (1985); State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, 459 U.S. 932, 103 S.Ct. 242, 74 L.Ed.2d 191 (1982); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, cert. denied, 409 U.S. 1077, 93 S.Ct. 691, 34 L.Ed.2d 666 (1972); State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969).

C.J.

A.J.

A.J.

A.J.

A.J.

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JAN 6 10 25 AM '00
S.C.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 5, 2000

REMITTITUR

The Honorable Linda J. DeShields
Clerk of Court, Anderson County
Post Office Box 8002
Anderson, SC 29622-8002

Re: The State v. McSharry, Jennifer L.
97-GS-04-0124, 1691, 1692, 1693, 1694

Dear Ms. DeShields:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

DES/djp

Enclosure

cc: Deputy Chief Attorney Joseph L. Savitz, III
Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON	)	THE TENTH JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	Case No. 1997-GS-04-124, 1691-94
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION FOR RESENTENCING**
	)	
Jennifer L. McSharry,	)	
	)	
Defendant.	)	
	)	

The defendant, Jennifer L. McSharry, by and through undersigned counsel,[1] moves for a new sentencing proceeding pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, ___,U.S.___, 135 S.Ct. 2379 (2015).

In *Aiken v. Byars*, the Supreme Court of South Carolina determined that *Miller v. Alabama*, 567 U.S.___, 132 S.Ct. 2455 (2012) (holding that imposing a life without parole sentence on a juvenile offender without considering the hallmark characteristics of juveniles in general and the particular mitigating circumstances in the defendant's individual case in particular violated the Eighth Amendment), applied retroactively in South Carolina. 410 S.C. at 540, 765 S.E. 2d at 575. The Court next opined that applying the constitutional principles articulated in *Miller* to South Carolina's pre-*Miller* sentencing practices, all life without parole sentences imposed on juveniles in this State prior to *Miller* and *Aiken* constituted cruel and unusual punishment. 410 S.C. at 545, 765 S.E. 2d at 577. For that reason, the Court ordered that all juveniles sentenced to life without parole in South Carolina prior to *Aiken* were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and

[1] By separate motion, Ms. McSharry requests this Court appoint the undersigned counsel to represent her.

allow the judge to consider such evidence in the light of its constitutional weight." *Id.* at 544; 765 S.E.2d at 577. Finally, on July 23, 2015, following the United States Supreme Court's denial of the Attorney General's petition for writ of *certiorari*, the South Carolina Supreme Court entered an order permitting any individual "affected by our holding in *Aiken* [to] file a motion for resentencing within one year of the date of this order in the court of general sessions where he or she was originally sentenced." *Aiken v. Byars*, Appellate Case No. 2012-213286 (July 23, 2015) (copy of order attached).

The defendant in this case is eligible for the benefit of *Aiken v. Byars*, because she was sentenced to life without parole for an offense committed when she was seventeen years old, and this motion is timely filed. Therefore, she is entitled to a new sentencing proceeding conducted in conformity with the state and federal constitutional principles set forth in *Miller* and *Aiken v. Byars*.

For the foregoing reasons, Ms. McSharry requests, that after allowing counsel adequate time to conduct an appropriate investigation to gather, marshal and present all evidence relevant to the determination of the appropriate sentence, this Court convene a new sentencing hearing conducted in conformity with *Aiken v. Byars*.

IT IS SO MOVED.

Respectfully Submitted,

By Jennifer L. McSharry

Jennifer L. McSharry
Leath Correctiona Institution
2809 Airport Road
Greenwood, SC 29649

Defendant

And

By

E. Charles Grose, Jr.
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Attorney for the Defendant

March 25, 2016
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON	)	THE TENTH JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	Case No. 1997-GS-04-124, 1691-94
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Jennifer McSharry,	)	
	)	
Defendant.	)	
	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

The Honorable Christina Theos Adams
Solicitor, Tenth Judicial Circuit
P.O. Box 8002
Anderson, SC 29622

By _____

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March 18, 2016
Greenwood, South Carolina

The Supreme Court of South Carolina

Tyrone Aiken, Matthew Clark, Eric Graham, Bradford M. Haigler, Angelo Ham, J'Corey S. Hull-Kilgore, Damian Inman, Roger Legette, Terriel Mack, Jennifer L. McSharry, Wallace Priester, Davon Reed, Dondre M. Scott, Edgar L. Thomas, James Van, et al., Petitioners,

v.

William R. Byars, Jr., Director, South Carolina Department of Corrections, and Alan Wilson, Attorney General of South Carolina, Respondents.

Appellate Case No. 2012-213286

ORDER

Petitioners move this Court to vacate the stay of our opinion issued in this case. Petitioners also request they and others similarly situated be given one year from the date the stay is vacated by order of this Court to file a motion for resentencing. The State opposes the motion on the ground that the stay was effectively lifted when the United States Supreme Court issued its final decision in the matter; therefore, an order vacating the stay is unnecessary. The motion is granted and the stay is hereby lifted. Petitioners and any other individuals affected by our holding in *Aiken* may file a motion for resentencing *within one year of the date of this order* in the court of general sessions where he or she was originally sentenced. There the matters shall proceed pursuant to the guidance provided in *Aiken*.

C.J.

J.

J.

Kaye G. Hearn J.

Kittredge, J., not participating

Columbia, South Carolina

July 23, 2015

cc:
John H. Blume, III, Esquire
Keir M. Weyble, Esquire
Elizabeth Anne Franklin-Best, Esquire
Joshua A. Bailey, Esquire
Diana L. Holt, Esquire
Robert Michael Dudek, Esquire
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Christopher D. Scalzo, Esquire
Joseph M. McCulloch, Jr., Esquire
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John S. Nichols, Esquire

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON	)	THE TENTH JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	Case No. 1997-GS-04-124, 1691-94
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION TO APPOINT COUNSEL**
	)	
Jennifer L. McSharry,	)	
	)	
Defendant.	)	
	)	

The defendant, Jennifer L. McSharry, an indigent inmate currently sentenced to life imprisonment without the possibility of parole for an offense she committed as a juvenile, is entitled to a new sentencing hearing conducted in conformity with the Eighth Amendment and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).[1] She requests that this Court appoint undersigned counsel to represent her in connection with that proceeding.

In 2012, the United States Supreme Court determined in *Miller v. Alabama* that states are precluded from imposing mandatory life without parole sentences on juvenile offenders. 567 U.S. ___, 132 S.Ct. 2455 (2012). In *Aiken v. Byars*, the South Carolina Supreme Court embraced the reasoning of the United States Supreme Court that "youth has constitutional significance" and "must be afforded adequate weight in sentencing." 410 S.C. at 542–43, 765 S.E.2d at 576. After examining the sentencing hearings in cases where juveniles were sentenced to life without parole in this State in light of *Miller*, the South Carolina Supreme Court concluded that the Eighth Amendment required that they be resentenced. The key defect in South Carolina's sentencing practices noted in *Aiken* was the failure to "fully explore the impact

[1] By separate motion, Ms. McSharry moved this Court to convene a re-sentencing hearing.

of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E. 2d at 577. Ms. McSharry, one of the individuals whose sentence was vacated by the South Carolina Supreme Court in *Aiken*, is now before this Court for resentencing.

Miller made clear that because "children are different" for sentencing purposes, life without parole constitutes "[the] ultimate penalty for juveniles. . . akin to the death penalty." *Miller*, 132 S. Ct. at 2466, 2469.[2] As a result, the South Carolina Supreme Court in *Aiken* noted that where life without parole is a sentencing option in a case involving a juvenile offender, the mitigation evidence that must be developed and presented is similar to the types of evidence gathered and considered in capital cases. *Aiken*, 410 S.C. at 544–45, 765 S.E. 2d at 577–78. Particularly, the Supreme Court of the United States mandates that this Court take into account the juvenile's age at the time of the offense, his family background, his history of abuse and neglect, his mental and emotional development, his role and participation in the crime, the influence of family and peer pressures, his inability to deal with law enforcement and prosecutors, and his potential for rehabilitation. *See Miller*, 132 S. Ct. at 2467–68 (noting the constitutional relevance of a juvenile defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences," and emphasizing the need to take "into account the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."). The South Carolina Supreme Court in *Aiken v. Byars,* building on *Miller*, further defined the factors that a court must consider in determining the appropriate sentence:

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[2] Because juvenile life without parole is analogous to the death penalty for adults, the Eighth Amendment demands "individualized sentencing." *See Miller*, 132 S. Ct. at 2468. Thus, a juvenile facing a sentence of life without parole, like an adult facing the death penalty, must be given the opportunity to present evidence in mitigation of punishment regarding "the diverse frailties of humankind." *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence";
>
> (2) the "family and home environment" that surrounded the offender;
>
> (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him;
>
> (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and
>
> (5) the "possibility of rehabilitation."

Aiken v. Byars, 410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller v. Alabama*, 132 S.Ct. at 2468).

Given the new constitutional demands that must be satisfied at her resentencing proceeding, Ms. McSharry requires competent, appropriately qualified counsel as well as investigative and expert assistance to formulate and present a mitigation case in accordance with the complex body of juvenile and capital sentencing law.[3] *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (noting that counsel's investigations into mitigating evidence should "comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.") (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (C), at 93 (1989)). The failure to present all

[3] The National Juvenile Defender Center has promulgated standards for representation of juveniles. National Juvenile Defender Center, *National Juvenile Defense Standards* §1.3 a–c (2012) ("Specialized and comprehensive training, preparation, and education are required to provide effective representation of young people. At a minimum: a. Counsel should be familiar with and utilize state juvenile delinquency statutes, criminal statutes, case law, rules of procedure, rules of evidence, and rules of appellate procedure that impact juvenile practice; b. Counsel should be knowledgeable about the key aspects of developmental science and other research that informs specific legal questions regarding capacities in legal proceedings, amenability to treatment, and culpability; counsel should recognize when to consult experts; c. Counsel must be properly trained in effective adolescent interviewing techniques".)

evidence that a crime reflected a juvenile's "unfortunate yet transient immaturity" rather than her "irreparable corruption" may result in a constitutionally unsound sentence, one that is not valid because it is disproportionate. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 734 (2016) ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.") (internal quotation marks omitted).

South Carolina law requires that defendants who are financially unable to pay for representation be appointed "qualified and experienced counsel," who will be "paid such fee and costs as the court shall deem appropriate." S.C. Code Ann. § 17-3-20. Although, in many cases appointed counsel is limited to $3,500 compensation in felony cases, S.C. Code Ann. § 17-3-50, given the complex and work-intensive mitigation presentation that must be conducted in cases such as the one at issue, that hourly rate and sum is not adequate compensation. Instead, Ms. McSharry would ask that counsel be paid an hourly rate commensurate with his skill and experience.

In sum, Ms. McSharry cannot develop and present the proof supporting his allegations on his own, and only counsel with training and experience in the development and presentation of mitigating evidence will be adequate to represent her. The failure to provide such counsel will impermissibly jeopardize Ms. McSharry's right to an informed and constitutionally adequate sentencing proceeding.

Ms. McSharry respectfully requests this Court appoint Charles Grose to continue to represent her. Since May 2011, Mr. Grose has represented Ms. McSharry, *pro bono,* in a post-conviction relief action to obtain re-sentencing based on *Graham v. Florida*, 560 U.S. 48 (2011),

later amended to include relief under *Miller*. Mr. Grose represented Ms. McSharry as one of the petitioners in *Aiken v. Bayrs*.

Mr. Grose received a B.A. from Furman University (1989) and a J.D. form the University of South Carolina School of Law (1992). He was admitted to practice law in South Carolina on May 17, 1993 and the United States District Court for South Carolina on February 23, 1994. From 1993-1996, he was an Associate Attorney with Grimball & Cabanis P.A. in Charleston South Carolina. In 1996, he became an Assistant Public Defender in Orangeburg County, South Carolina, where he was later promoted to Deputy Public Defender. From 1999-2008, he was the Chief Public Defender for Greenwood and Abbeville Counties, South Carolina. Upon implementation of the Indigent Defense Act of 2007, he was appointed the Circuit Public Defender for the Eighth Judicial Circuit (Abbeville, Greenwood, Laurens, and Newberry Counties), serving a term from August 2008 to August 2012. He is currently a sole practitioner in Greenwood, South Carolina. Throughout his career Mr. Grose has tried numerous felony cases and represented juveniles in Family Court and General Sessions Court.

Mr. Grose has extensive capital experience, is certified by the South Carolina Supreme Court to be lead counsel in capital cases, and is approved as first chair on the CJA Death Penalty Attorney List for the United States District Court for the District of South Carolina. He represented John Kennedy Hughey in his Abbeville County capital post-conviction relief case (Case No. 2000-CP-01-210) and appeal to the South Carolina Supreme Court (Appellate Case Number: 2010-170387). He currently represents Mr. Hughey on the State's petition for writ of *certiorari* in the United States Supreme Court (Case No. 15-880) and any resentencing hearing (Case No. 1996-GS-01-220). His capital trial court experience includes: *State v. Bennie Ray Brown*, Laurens County Warrant Numbers I-556766-67, J-619971-77, currently awaiting a ruling

pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002); *State v. Bixby*, Abbeville County Case Numbers 2004-GS-01-321, 322 and *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010) as trial and appellate counsel; *State v. Steven A. Tinch*, Abbeville County Case Number 2006-GS-01-417, 419, which resulted in a guilty plea and a forty-five year sentence; *State v. Domonique O. Brown*, Laurens County Case Number 2007-GS-30-220, which resulted in a guilty plea and a thirty-year sentence; *State v. Anthony A. Myers*, Greenwood County Case Number 2000-GS-24-1170, which resulted in a guilty plea and sentence of life imprisonment without the possibility of parole; *State v. Barry L. Ervin*, Greenwood County Case Number 1998-GS-24-1770, which resulted in a guilty plea and sentence of life imprisonment without the possibility of parole. In addition to Mr. Hughey's capital post-conviction relief case, Mr. Grose's is currently counsel in the capital post-conviction relief cases of *William O. Dickerson, Jr. v. State*, Charleston County Cases Number 2012-CP-10-3216 and *Jerry Buck Inman v. State*, Pickens County Case Number 2012-CP-39-00918. Most recently, the United States District Court for the District of South Carolina appointed Mr. Grose as counsel in *Stephen Corey Bryant v. Sterling et. al.*, Case No. 9:15-mc-00217-DCN-BM. Mr. Grose has received significant death penalty training, including but not limited to federal habeas training, through the Annual National Federal Habeas Corpus Seminar, (2015, 2014, 2013, and 2011); NAACP Legal Defense & Educational Fund, Inc.'s Annual Capital Punishment Training Conference, Airlie Conference Center, Warrenton, VA (2012, 2010, and 2005); and Capital Case Initiative, sponsored by South Carolina Commission on Indigent Defense (2013, 2012, 2011, and 2010).[4]

[4] Additionally, on December 31, 2015, Mr. Grose's term ended as Chair of the Board of Directors of Justice 360, which was formally the Death Penalty Resource & Defense Center and the Center for Capital Litigation, and was designated by this Court as a Community Defender Organization authorized to provide representation, assistance, information and other matters related to federal death penalty habeas corpus cases. *See In re: Amendments to the Plan on the*

"The Sixth Amendment provides that [i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense. [The Supreme Court of the United States has] previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (internal quotations omitted). "With respect to continued representation...there is no distinction between indigent defendants and non-indigent defendants." *Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim. App. 2010), rehearing denied (Apr. 16, 2010), *cert. quashed,* 80 So. 3d 303 (Ala. 2011) *cert. denied,* 132 S. Ct. 1144 (2012). Therefore, "[a]lthough an indigent defendant does not have the right to force a trial court to appoint counsel of his or her own choosing, once counsel is appointed, the trial judge is obliged to respect the attorney-client relationship created through the appointment.... The attorney-client relationship between appointed counsel and an indigent defendant is no less inviolate than if counsel is retained." *Id.* at 297.[5]

In *Amadeo v. State*, 259 Ga. 469, 470, 384 S.E.2d 181, 182 (1989), the Supreme Court of Georgia considered "the issue of the extent to which a trial court must consider the reappointment of lawyers with whom the defendant has already developed a close relationship." Amadeo's prior lawyers had secured *habeas corpus* relief for him in the Supreme Court of the

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United States District Court for the District of South Carolina for Implementing the Criminal Justice Act, filed May 25, 2010.

[5] *See also Smith v. Superior Court of Los Angeles County*, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74 (1968) ("A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary: it involves not just the causal assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service.").

United States, had developed with him a relationship of trust, confidence, and allegiance, and were thoroughly familiar with his case. "[T]he court's exercise of its discretion is to be reviewed in light of the factors before the court at the time of its decision." *Id.* The Georgia Supreme Court concluded, "[w]hen that statement of preference [to continue with prior counsel], timely made, is supported by objective considerations of the consequence here involved, and where there are no countervailing considerations of comparable weight, it is an abuse of sound judicial discretion to deny the defendant's request to appoint the counsel of his preference." *Id.* 259 Ga. At 470, 384 S.E.2d at 183 (citing *Harris v. People,* 19 Cal.3d 786, 140 Cal.Rptr. 318, 327, 567 P.2d 750, 759 (1977)).

The Supreme Court of Georgia addressed this issue again in *Davis v. State*, 261 Ga. 221, 222, 403 S.E.2d 800, 801 (1991) and concluded the "defendant's choice of counsel is supported by several weighty considerations" including prior counsel were "already familiar with the case, which is both legally and factually complex," and had "a long-standing relationship with the defendant, who they contend is in a fragile state of mental health." *Id.* See also *Grant v. State*, 278 Ga. 817, 817, 607 S.E.2d 586, 587 (2005) (reversing trial court for removing existing counsel base on "the strong interest of the defendant and of the court system in sustaining an existing, close relationship between a death penalty defendant and his counsel").

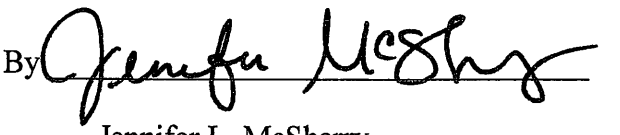
South Carolina Supreme Court precedent is consistent with *Gonzalez-Lopez, Lane, Amadeo, Davis, Grant, and Harris*. "[T]he right to be represented by an attorney of one's choosing could, in effect, determine the action, and it is closely related to the right to a particular mode of trial, which is an established substantial right." *State v. Wilson*, 387 S.C. 597, 602, 693 S.E.2d 923, 925 (2010). The right is so significant that "an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed."

Hagood v. Sommerville, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005). In a criminal prosecution, the right to counsel is not only a substantial right, but also a fundamental right. U.S. Const. Am. VI and XIV; S.C. Const. Art. I, § 14.

WHERFORE, Defendant requests that this Court appoint Charles Grose to represent her in connection with his resentencing.

IT IS SO MOVED.

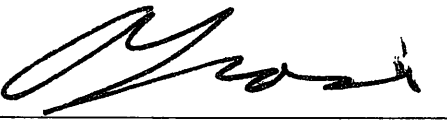
Respectfully Submitted,

By 

Jennifer L. McSharry
Leath Correctiona Institution
2809 Airport Road
Greenwood, SC 29649

Defendant

And

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for the Defendant

March 25, 2016
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON	)	THE TENTH JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	Case No. 1997-GS-04-124, 1691-94
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Jennifer McSharry,	)	
	)	
Defendant.	)	
	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

The Honorable Christina Theos Adams
Solicitor, Tenth Judicial Circuit
P.O. Box 8002
Anderson, SC 29622

By: _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

March 18, 2016
Greenwood, South Carolina

The Supreme Court of South Carolina

Jennifer L. McSharry, Petitioner,

v.

State of South Carolina, Respondent.

Anderson County

Docket No.: 1997-GS-04-00124, 01691-01694

ORDER

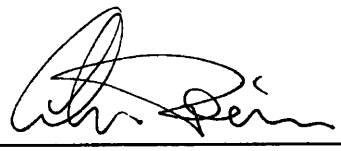
Petitioner filed a motion on March 31, 2016 for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (SC 2014). Now, therefore, pursuant to SC CONST. Art. V, § 4,

IT IS HEREBY ORDERED that the Honorable R. Scott Sprouse be vested with exclusive jurisdiction over the Petitioner's Motion for Resentencing in the above-captioned matter.

Judge Sprouse shall at all times be vested with concurrent jurisdiction in all circuits of the state to dispose of matters relating to this case, and shall decide all matters pertaining to the Petitioner's Motion, and shall retain jurisdiction over this matter regardless of where he may be assigned to hold court, and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled.

If necessary, to resolve issues related to the appointment of counsel, a hearing shall be conducted within thirty (30) days of this order.

Within sixty (60) days of the date of this order, Judge Sprouse shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary.



Costa M. Pleicones
Chief Justice

May 27, 2016
Columbia, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)

ENTERED

State of South Carolina,) Case No.: 1997-GS-04-124, 1691-94
)
Plaintiff,)
vs.)
) ORDER
Jennifer L. McSharry,)
)
Defendant.)

It appears that Jennifer L. McSharry, the Defendant, is entitled to court-appointed counsel.

It also appears that counsel has not yet been appointed by the Court for this matter; therefore, an appointment for counsel is necessary.

Supreme Court Administrative Order 2016-03-16-01 dictates the procedure for appointing counsel. Appointments should first be attempted through the public defender's office. If a public defender is not available, a qualified contract attorney from the South Carolina Commission on Indigent Defense List should be appointed. If no such attorney is available, a qualified attorney pursuant to Rule 608 of the South Carolina Appellate Court Rules should be appointed. If no qualified attorney is available from any of the three prior sources, another qualified attorney may be appointed.

Therefore, it is ordered that counsel be appointed pursuant to Supreme Court Administrative Order 2016-03-16-01. This case shall be referred to the Tenth Circuit Public Defender's Office for screening. In the event that a conflict exists, the procedure as set forth by the above-mentioned Order shall be followed.

A TRUE COPY
JUN 10 2016
Richard M. Kirby
ANDERSON CLERK OF COURT

RSS

The Court notes that a motion has been filed by the Defendant seeking to have her PCR counsel, E. Charles Grose, Jr., appointed counsel for resentencing and that he be paid hourly through public funding in excess of the ordinary fee structure.

In the event that the Tenth Circuit Public Defender's Office consents to this arrangement, a consent order may be submitted. In the event that the Tenth Circuit Public Defender's Office does not consent to the arrangement, a hearing shall be scheduled.

IT IS SO ORDERED.

Honorable R. Scott Sprouse
Tenth Circuit Chief Administrative Judge

Walhalla, South Carolina
June 3, 2016

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COMMON PLEAS AND
GENERAL SESSIONS

A TRUE COPY
JUN 10 2016
Richard X. Kinley
ANDERSON CLERK OF COURT

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ANDERSON SC
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COMMON PLEAS AND
GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)
) Case Number(s): 1997-GS-04-124, 1691-94
THE STATE)
)
vs.) **Order Appointing Counsel**
)
Jennifer L. McSharry)
)

A TRUE COPY
JUL 29 2016
Richard D. Kinley
ANDERSON CLERK OF COURT

This matter is before the Court on the defendant, Jennifer McSharry's, motion for appointment of counsel.

Factual and Procedural Background

The State charged Ms. McSharry with murder, first-degree burglary, armed robbery, criminal conspiracy, and possession of a firearm during the commission of a violent crime. From September 8-12, 1997, the State tried Ms. McSharry before the Honorable Dean Hall and a jury. The jurors convicted on Ms. McSharry of all charges. Judge Hall sentenced Ms. McSharry to life imprisonment without the possibility of parole for murder, thirty years for first-degree burglary, thirty years for armed robbery, five years for criminal conspiracy, and five years for possession of a firearm during the commission of a violent crime. The South Carolina Supreme Court affirmed the convictions and sentences. *State v. McSharry*, S.C.S.St. Unpublished Opinion No. 1999-UP-093 (filed November 19, 1999).

On November 14, 2000, Ms. McSharry filed an application for post-conviction relief. *McSharry v State*, Case Number 2000-CP-04-3030. This application was dismissed by written order dated May 9, 2005. Ms. McSharry's *pro se* appeal was not accepted by the South Carolina Supreme Court.

Ms. McSharry filed a successive application for post-conviction relief alleged her life

sentence without the possibility of parole violates the Eighth Amendment of the United State's constitution. *McSharry v State*, Case Number 2011-CP-04-1581. Ms. McSharry twice amended that application, and it is still pending on other grounds. Charles Grose represents Ms. McSharry *pro bono* in that case.

On March 18, 2016, Ms. McSharry served her motion for a new sentencing proceeding pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, ___,U.S.___, 135 S.Ct. 2379 (2015). The Court notes that Ms. McSharry was one of the petitioners in *Aiken* and that Mr. Grose represented her in that case. Also on March 18, 2016, Ms. McSharry filed a motion for appointment counsel, requesting the Court appoint Grose to represent her.

By written order dated May 27, 2016, the Chief Justice assigned this Court exclusive jurisdiction over Ms. McSharry's re-sentencing hearing. By written order dated June 3, 2016, pursuant to South Carolina Supreme Court Administrative Order 2016-03-16-01, this Court appointed the Tenth Circuit Public Defender's Office and referred this case to that office for screening to confirm Ms. McSharry's status as an indigent person. The order also indicated the Court's willingness to convene a hearing on Ms. McSharry's request to appoint Mr. Grose.

On July 22, 2016, this Court convened a hearing on Ms. McSharry's motion for appointment of counsel. Ms. McSharry, Mr. Grose, Tenth Circuit Public Defender Hervery Young, and Tenth Circuit Assistant Solicitor Catherine Huey were present. Mr. Grose outlined the history of his attorney-client relationship with McSharry. Upon inquiry from the Court, McSharry confirmed her request that this Court appoint Mr. Grose to represent her.

After considering the written motion for appointment of counsel and the matters presented at the hearing, the Court finds it to be in the interest of judicial economy to appoint Mr. Grose to represent Ms. McSharry. Based of Mr. Grose's experience, which is set forth in detail

RSS

in the motion for appointment of counsel, the Court further finds that Mr. Grose is qualified to represent Ms. McSharry in this proceeding.

Conclusions of Law

In addition to South Carolina Supreme Court Administrative Order 2016-03-16-01, this Court considered the authority cited in Ms. McSharry's motion regarding the continuity of appointed counsel. *See e.g. United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); *Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim. App. 2010), rehearing denied (Apr. 16, 2010), *cert. quashed,* 80 So. 3d 303 (Ala. 2011) *cert. denied,* 132 S. Ct. 1144 (2012); *Davis v. State*, 261 Ga. 221, 222, 403 S.E.2d 800, 801 (1991); *Amadeo v. State*, 259 Ga. 469, 470, 384 S.E.2d 181, 182 (1989); *Harris v. People,* 19 Cal.3d 786, 140 Cal.Rptr. 318, 327, 567 P.2d 750, 759 (1977); *Smith v. Superior Court of Los Angeles County*, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74 (1968). *See also State v. Wilson*, 387 S.C. 597, 602, 693 S.E.2d 923, 925 (2010) ("[T]he right to be represented by an attorney of one's choosing could, in effect, determine the action, and it is closely related to the right to a particular mode of trial, which is an established substantial right.").

Therefore, it is ordered that Charles Grose is appointed to represent Ms. McSharry in her motion for a new sentencing proceeding pursuant to *Aiken v. Byars*. It is further ordered that Mr. Grose shall be compensated as provided by S.C. Code Ann. § 17-3-50.

IT IS SO ORDERED.

R. Scott Sprouse
Presiding Judge by Special Assignment of the South Carolina Supreme Court

7-26, 2016
Walhalla, South Carolina

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ANDERSON SC
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COMMON PLEAS AND
GENERAL SESSIONS
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JUL 29 2016
ANDERSON CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	
Jennifer L. McSharry,	)	
	)	SCHEDULING ORDER
	)	
Petitioner,	)	
	)	
vs.	)	
	)	Case No.: 1997-GS-04-124, 1691-94
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court upon Petitioner's motion for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (SC 2014), filed March 31, 2016. Per Chief Justice Pleicones' Order issued on May 27, 2016, the Court issues this scheduling order establishing deadlines for this case.

IT APPEARING THAT a scheduling order will provide for the efficient and organized disposition of this case, it is therefore ORDERED that the parties abide by the following scheduling order:

1. Attorney for Petitioner shall have sixty (60) days from the filing of this Order to share all evaluations, including psychiatric and any other appropriate evaluations conducted. If Petitioner needs additional time, Petitioner must file a written request including the anticipated time needed and reason why extension is requested.
2. Petitioner shall make written evaluations available to Respondent no later than ten (10) days before a hearing on the matter.
3. Within ninety (90) days of the filing of this Order, Attorney for Petitioner shall have all witnesses and evidence prepared for hearing.

4. This matter shall be scheduled for a hearing within one hundred and twenty (120) days of the issuance of this order.

AND IT IS SO ORDERED.

R. Scott Sprouse
Circuit Court Judge
Tenth Judicial Circuit

Walhalla, South Carolina
August _____, 2016

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF GENERAL SESSIONS

STATE VS.

JENNIFER MCSHERRY

AKA: Jennifer L. McSharry

Race: White Sex: F Age: 37

DOB: [redacted] SS#: _____

Address: [redacted]

City, State, Zip: Jonesboro, GA 30236

DL# _____ SID# [redacted]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

INDICTMENT/CASE#: 1997GS0400124
A/W: E712644
Date of Offense: 11/17/1996
S.C. Code §: 16-03-0010, 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS

TO: Murder (30 to Life)

In violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

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

The charge is: ☑ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (def 's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Catherine T. Huey 68416
Catherine T. Huey, Sr. Career Prosecutor SC Bar #

Jennifer McSharry
Defendant

[signature] 66063
Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. Back date sentence to commence on September 12, 1997

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

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: _____		$_____
§14-1-206 (Assessments 107.5%)		$_____
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$_____
§14-1-211 (A)(2)(DUI Surcharge)	$100	$_____
§56-5-2995 (DUI Assessment)	$12	$_____
§56-1-286 (DUI Breath Test)	$25	$_____
Proviso 61.6 (Public Def/Prob)	$500	$_____
§14-1-212 (Law Enforce. Funding)	$25	$_____
§14-1-213 (Drug Court Surcharge)	$150	$_____
§50-21-114 (BUI Breath Test Fee)	$50	$_____
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$_____
3% to County (if paid in installments)	$	$_____
TOTAL		$_____

☐ **Ordered** **PTUP** _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $_____ Beginning _____

$_____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, Proviso 61.6 requires $500 be paid to Clerk during probation and shall be collected before any other fees.

Clerk of Court/Deputy Clerk:

Court Reporter: Steven E. LeBlanc

Presiding Judge: [signature]

Judge Bar ID: _____ Judge Code: 2752

Sentence Date: 2-10-17749

SCCA/217 (07/2016)

FILED-CLE
AND

August 4th, 2003

RE: Du René Kelso vs. The State; 2000-CP-04-2188

ENTERED

Dear Honorable Judge Alexander S. Macaulay,

Respectfully I would ask the Honorable Judge Macaulay, to relieve Attorney Nancy Jo Thomason as my council. I have stated my reasons as follows:

1.) Ms Thomason was appointed to represent my application for Post conviction Relief dated 1-27-03 signed by J. C. Nicholson, Chief administrative Judge Tenth Judicial circuit.

My first and only meeting with Ms Thomason was within minutes before I was to appear in court on 4-24-03.

Ms Thomason informed me that she was going to request a continuance based solely on the fact that the Attorney general had not supplied the necessary material needed to properly prepare my case.

We talked very briefly, at which time I related a situation about

my trial attorney Harold Bowersox Law firm retaining monies from my now ex-husband for a divorce case that was approximately one year prior to my trial. I did not think that Ms Thomason was going to request a continuance based on this, in as that was not what she had told me. I found that to be disturbing and it shook me, I am a lay person and I have no real knowledge of the law, this left me surprised and unprepared to even respond.

2) Before we entered the court room Ms Thomason said "that I did not have good grounds for a PCR but with a life sentence I had nothing to lose." This also surprised me. I asked Ms Thomason "Why then did my previous attorney Mike Morris say that I had a very good case." Ms Thomason said "that Mike Morris is not a Criminal attorney and that she has had years of experience

in this field." Ms Thomason continues to tell me that she grew up watching Harald Rawery in the court room, and that Mike Morris thought Harald Rawery missed alot because he wore a Hearing aid, and said huh.?, what? can you repeat that? Ms Thomason said "H. Rawery used that as a shtick his method (GIG)" and as she read my transcript she once again was in the court room with Harald Rawery". She said "although everybody thought that he was a big buffoon that really he was the smartest one in the courtroom and that he was a good ol" boy from Belton and a family friend and did a great job representing me." Thus Conflict is apparent.

With all due respect your Honor, I dont need an attorney walking down memory lane or recollecting and memories while reading my transcript, especially

Concidering what a Post conviction Relief represents - Ineffective Assistance of Trial Council ie; Harold Bowery.

Due to these reasons I'm asking for Ms Thompson to be relieved as my council. I would also ask that said Admended Application be removed at this time to adequately prepare and file said Admended Post Conviction Application. If you please, I further ask for an Extension of time so that I can research a Pro-bono Attorney, with hopes that I can receive Relief on a life sentence with no parole.

Thank you for your time in this Matter.

Respectfully
Rene' Kelso

Rene' Kelso #239701
MH205 Lath Cor Inst
2809 Airport Rd
Greenwood, S.C.
29649

FILED-CLERK'S OFFICE
ANDERSON SC
2003 NOV 21 A 10:43
COMMON PLEAS AND GENERAL SESSIONS

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF ANDERSON) TENTH JUDICAL CIRCUIT
)
Lu Rene Kelso,) C.A. No: 00-CP-04-02188
)
Plaintiff,)
)
vs.)
)
State of South Carolina)
)
Defendant.)

Plaintiff made a Motion to this Court to proceed pro se. If Plaintiff wishes to proceed pro se she may do so. Nevertheless, Plaintiff's counsel, Nancy Jo Thomason, is Ordered to act as standby counsel and to aid Plaintiff in the preparation of her case.

A TRUE COPY
NOV 21 2003
Cathy M. Phillips
CLERK OF COURT

Plaintiff also made a Motion to Continue this case so that she can properly prepare for trial. Plaintiff's Motion to Continue this case is hereby granted. This case will be continued to the June, 2004 term of Post Conviction Relief Hearings.

IT IS SO ORDERED.

Anderson, South Carolina
11/20, 2003

The Honorable J.C. Nicholson, Jr.
Presiding Judge

TRUE COPY
MAR 14 2005
Cathy M. Phillips
Clerk of Court

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)

2000-CP-04-2188

Lu Rene Kelso, # 239701,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

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ANDERSON SC
2005 MAR 10 P 12:27
COMMON PLEAS AND
GENERAL SESSIONS

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 21, 2000. The Respondent made its Return on January 6, 2003 An evidentiary hearing into the matter was convened on February 9, 2005, at the Anderson County Courthouse. The Applicant was present at the hearing and proceeded *pro se*. Nancy Jo Thomason, Esquire, assisted the Applicant in accordance with this Court's prior order. The Respondent was represented by Christopher L. Newton of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on her own behalf. This Court also had before it the records of the Anderson County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. The Anderson County Grand Jury indicted the Applicant at the January 1997 term of General Sessions for Murder (97-GS-04-94), Burglary in the First Degree (97-GS-04-95), Possession

of a Firearm During the Commission of a Violent Crime (97-GS-04-93), and Criminal Conspiracy (97-GS-04-92). Harold Lowery, Esquire, represented the Applicant. On May 5-8, 1997, the Applicant went to trial and was found guilty as indicted. The Honorable Henry F. Floyd sentenced the Applicant to confinement for two terms of Life without parole for murder and burglary, and two terms of Five (5) years for the firearm and conspiracy convictions. All sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court affirmed the Applicant's conviction and sentence. State v. Kelso, Op. No. 99-MO-059 (S.C. Sup. Ct. filed August 19, 1999).

In her current application for post-conviction relief, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Conflict of interest.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At the hearing, the Applicant testified that Harold Lowery, her trial counsel, had a conflict of interest because Richard Thompson, a member of Lowery's law firm, had represented her husband during their divorce, which was ongoing during the trial. She admitted that her signature appeared

on a conflict waiver form from Lowery's file, but did not recall signing it or discussing it with Lowery. She stated that she would not have waived the conflict had she understood it. The Applicant also claimed that she had told Lowery to call Ronnie Jordan, a codefendant, as a witness and to interview Jennifer Titman, a codefendant and State's witness. She said Lowery had told her that he did not interview Titman. The Applicant did not think Lowery had properly and fully cross-examined Titman because of his failure to interview her prior to trial. She believed also that Jordan would have been a good witness. Finally, the Applicant claimed that Lowery never really explained the application of the "hand of one, hand of all" theory under which the State proceeded.

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, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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, 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court does not find the Applicant's testimony to be credible on the issues in this case. First, the Applicant waived the conflict of interest that she now raises in writing. She admitted that her signature appears on the waiver form. This Court also finds that her trial counsel had no reason to call Ronnie L. Jordan, her codefendant, which would have outweighed the importance of receiving the final argument to the jury. Further, Jordan did not testify, and the Applicant's speculation as to his value to her case does not constitute probative evidence. Regarding the testimony of Jennifer Titman, this Court notes that Lowery's cross-examination filled roughly forty pages of the trial transcript and highlighted Titman's history of mental problems, her drug use, and her multiple statements to the police in the case.

Based on the above findings, the Applicant has failed to carry her burden of proof. Trial counsel's performance did not fall below reasonable professional standards. Further, the Applicant suffered no prejudice as a result of any alleged errors. There is no reasonable probability that the result of the proceeding would have been different but for the any alleged errors.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant her application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that she must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Her attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10 day of March, 2005.

J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

STATE OF SOUTH CAROLINA)
)
County of Anderson)

In the Court of Common Pleas

Jennifer L. McSharry, 244026,)
Full name and prison number, if any, of applicant.)
)
v.)
)
State of South Carolina,)
Name of Respondent)
)
)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make 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 Leath Correctional Institution, 2809 Airport Road, Greenwood, South Carolina 29649

2. Name and location of Court which imposed sentence Court of General Sessions for Anderson County, Tenth Judicial Circuit

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 97-GS-04-124 Murder (b) 97-GS-04-1691 Armed Robbery

(c) 97-GS-04-1692 Criminal Consp. (d) 97-GS-04-1693 Burglary, 1st Degree

(e) 97-GS-04-1694 Poss. Firearm during Commission of Violent Crime

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

(a) 9/12/97 Life (b) 9/12/97 Thirty Years

(c) 9/12/97 Five Years (d) 9/12/97 Thirty Years

(e) 9/12/97 Five Years - All terms to be served concurrently.

5. Check whether a finding of guilty was made

(a) after a plea of guilty No

(b) after a plea of not guilty Yes

(c) after a plea of nolo contendere No

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. South Carolina Supreme Court

ii.

iii.

(b) the result in each such Court to which you appealed:

i. Conviction Affirmed

ii.

iii.

(c) the date of each such result:

i. Filed November 19, 1999

ii.

iii.

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

i. 99-MO--093

ii.

iii.

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

(a) Not Applicable

(b)

(c)

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

(a) Ineffective Assistance of Trial Counsel;

(b) Ineffective Assistance of Appellate Counsel.

(c)

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

(a) See Attachment I "Facts"

(b) See Attachment I "Facts"

(c)

11. Prior to this application have you filed with respect to this conviction

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

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No

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

No

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

(a) the specific nature thereof:

i. None

ii.

iii.

iv.

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

i. Not Applicable

ii.

iii.

iv.

(c) the disposition thereof:

i. Not Applicable

ii.

iii.

iv.

(d) the date of each such disposition:

i. Not Applicable

ii. _____

iii. _____

iv. _____

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

i. Not Applicable

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? None Previously Filed

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

(a) which grounds have been presented:

i. None. Not Applicable

ii. _____

iii. _____

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

i. None. Not Applicable

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) This is first opportunity for collateral challenge to conviction as

(b) provided for in S.C. Code Ann. Section 17-27-20(b).

(c) This is Applicant's sole remedy available.

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? Not Applicable

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. Bruce Byrholdt, Esquire of the Anderson County Bar

ii. Joseph L. Savitz, III, of S.C. Office of Appellate Defense

iii. _____

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

i. Trial and Sentencing

ii. Direct Appeal

iii. _____

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

Reverse Conviction and Sentence; Grant New Trial; and for any other and further relief deemed just and proper.

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

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF Anderson)

I, Jennifer L. McSharry, 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.

Jennifer L. McSharry, Applicant

Sworn to and subscribed before me

This _____ day of November, 2000.

_____ L.S.
Notary Public for South Carolina

My Commission Expires _____

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

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

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Jennifer L. McSharry, Applicant

Sworn to and subscribed before me

This _____ day of November, 2000.

_____ L.S.
Notary Public for South Carolina

My Commission Expires _____

ATTACHMENT I - FACTS

10. The Applicant would allege the following facts in support of her grounds in response to question ten (10) in the Application:

(a) i. Trial counsel was ineffective in failing to take exception to a defective and prejudicial jury instruction on accomplice liability. The instruction did not include a definition of the requisite intent of the non-acting accomplice. Although an accomplice to a crime, present at the scene, may be held liable for the natural consequences of another's acts when acting in concert, the circumstances of this case required the trial court define intent and distinguish criminal intent to aid in the commission of a crime and the mere coincidental facilitation of a crime through presence. Counsel was deficient, to the prejudice of Applicant in failing to request such a jury charge and in not objecting to the trial court's instruction on accomplice liability. In designing instructions to be given a jury, they must be based upon the evidence presented at trial and the applicable law. Counsel's failure to request an additional instruction on intent as to burglary, armed robbery, and murder constitutes substandard performance, to the prejudice of Applicant.

ii. Counsel was ineffective in failing to request an instruction on constructive possession with regard to the charge of possession of a firearm during the commission of a violent crime. Counsel properly argued for a directed verdict of not guilty on the crime as no evidence had been presented which would establish actual possession. The theory of 'hand of one, hand of all' does not apply to this charge as it was not alleged nor evinced that Applicant aided or abetted the first principal in the act of possession of the gun. If the State was proceeding upon a theory of constructive possession, an instruction would be required defining constructive possession for the jury. During the charge conference, the State appeared to be claiming the hand of one, hand of all theory applied, or alternatively, that Applicant had constructive possession of the weapon. More than mere presence was required; the jury was

not instructed on the necessity of dominion and control, which was not evinced by the State with regard to the weapon. Additionally, counsel's failure to request a charge on constructive possession allowed the jury to be misled that Applicant was in possession of the weapon upon entry of the dwelling, enhancing the charge of burglary to first degree through possession of the weapon. The nighttime element was not conclusively proven and it is doubtful the jury found the incident occurred during the nighttime. Other requisite elements that would enhance burglary to first degree were either not present or their factual application was de minimus. Counsel's failure to request an instruction constructive possession as to dominion and control deprived the Applicant due process as the jury was allowed to improperly consider possession of a weapon during the alleged burglary which would enhance an unlawful entry to first degree burglary.

iii. Counsel was ineffective in failing to present available testimony regarding mens rea as affected by involuntary intoxication. Counsel described the Applicant's childhood; Appellate Counsel took note of Applicant's mother's abysmal parenting. Yet, counsel did not present witnesses on state of mind of the Applicant with regard to involuntary intoxication based upon Applicant's tender age at the time of the incident; the coercive influence of Applicant's custodian which resulted in Applicant's intoxicated state; the unlawful nature of the intoxicants and Applicant's intoxication at the urging, if not insistence of her custodian; and the chronic nature and resulting damage caused by such chronic substance abuse fostered by Applicant's custodian/parent. Under the facts of the case, Applicant's intoxication was involuntary. Involuntary intoxication is a complete defense to all criminal charges. The Applicant's mens rea, state of mind, involuntary intoxication, and resultive lack of ability to formulate criminal intent constituted an available, complete defense to the criminal charges. Counsel was ineffective in failing to present testimony and other evidence to support such a defense.

(b) i. Appellate counsel was ineffective in failing to brief and argue the denial of a directed verdict on the charge of possession of a firearm while in the commission of a violent crime. From the charge conference, the State brought the charge on a theory of hand of one, hand of all; however, no evidence was presented that Applicant aided or abetted the first principal in the act of possession of a weapon. Accomplice liability theory fails where the act alleged was possession, and where no allegation, no less evidence of constructive possession was presented.

ii. Counsel was ineffective in failing to brief and argue admission of impermissible hearsay over counsel's objections.

iii. The concurrent sentencing doctrine does not apply rendering harmless counsel's failure to brief and argue for a directed verdict on the charge of possession of a weapon during the commission of a violent crime as several collateral consequences attach to such a conviction which increases the severity of restraints suffered by Applicant on other convictions.

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

JENNIFER L. MCSHARRY,)
APPLICANT,)

VS.)

STATE OF SOUTH CAROLINA)
RESPONDENT.)

IN THE COURT OF COMMON PLEAS
CASE NO: 2000-CP-04-03030

ORDER

IT APPEARING TO THE COURT THAT THE ABOVE-NAMED APPLICANT IS IN NEED OF LEGAL COUNSEL TO REPRESENT HIM IN HIS APPLICATION FOR POST CONVICTION RELIEF AND, IT APPEARING THAT HE IS UNABLE TO PRIVATELY RETAIN SUCH LEGAL COUNSEL NOW THEREFORE,

IT IS HEREBY ORDERED THAT CAROLYN E. GALLOWAY
ATTORNEY AT LAW
PO BOX 13
ANDERSON SC 29622

BE, AND HEREBY IS, APPOINTED TO REPRESENT THE ABOVE-NAMED APPLICIANT IN HIS ACTION FOR POST CONVICTION RELIEF.

IT IS SO ORDERED.

CIRCUIT COURT JUDGE
TENTH JUDICIAL CIRCUIT

ANDERSON, SOUTH CAROLINA
DATED: March 16 2001

COPIES: ATTORNEY
APPLICANT
CLERK OF COURT
ATTORNEY GENERAL'S OFFICE

A TRUE COPY
MAR 16 2001
Carolyn M. Phillips
CLERK OF COURT

RSA

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)	
	TRUE COPY
	2000-CP-04-3030
	MAY 09 2005
Jennifer L. McSharry, # 244026,)	
)	
Applicant,)	Cathy M. Phillips
)	Clerk of Court
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	

FILED-CLERK'S OFFICE
ANDERSON, S.C.
2005 MAY -9 A 8:49
COMMON PLEAS
GENERAL SESSIONS

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 14, 2000. The Respondent made its Return on September 20, 2004. An evidentiary hearing into the matter was convened on April 20, 2005, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by Nancy Jo Thomason, Esquire. The Respondent was represented by Christopher L. Newton of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on her own behalf. Bruce Byrholdt, Esquire, testified on behalf of the State. This Court also had before it the records of the Anderson County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. The Anderson County Grand Jury indicted the Applicant at the July 1997 term of General Sessions for Murder (97-GS-04-124), Armed Robbery (97-GS-04-1691), Burglary in the

1

First Degree (97-GS-04-1693), Criminal Conspiracy (97-GS-04-1692), and Possession of a Firearm During the Commission of a Violent Crime (97-GS-04-1694). The Applicant was represented on the charges by Bruce Byrholdt, Esquire. On September 12, 1997, the Applicant went to trial by jury and was found guilty as indicted. The Honorable H. Dean Hall sentenced the Applicant to confinement for a term of life for murder, two terms of thirty (30) years for armed robbery and burglary, and two terms of five (5) years for on the conspiracy and firearm convictions. The sentences were to run concurrently. A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Joseph L. Savitz, III, Esquire. The South Carolina Supreme Court affirmed the Applicant's conviction and sentence. State v. McSharry, Op. No. 99-MO-093 (S.C. Sup. Ct. App. filed November 19, 1999).

In her current application for post-conviction relief, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and,
2. Ineffective assistance of appellate counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At the evidentiary hearing, the Applicant testified that her trial counsel failed to object to the jury instruction on accomplice liability. She stated that he also failed to request a jury instruction on constructive possession relating to the firearm. The Applicant further testified that her trial counsel

failed to request a mistrial due to a juror becoming ill during part of the trial and did not emphasize during his presentation of the case that her statements were coerced. She stated that her appellate counsel failed to raise the issue of the trial court's failure to grant a directed verdict on the firearm charge and should have raised numerous instances of hearsay. The Applicant admitted that she could not point to any specific instances of hearsay that appellate counsel failed to address, as someone else prepared her application on her behalf.

Trial counsel Bruce Byrholdt, Esquire, testified that he had not legal objection that could be made to the accomplice liability charge. He stated that there were no legal grounds to request a constructive possession charge on the firearm indictment. Byrholdt further testified that he had no grounds to move for a mistrial, because the trial court properly handled the sick juror issue. He stated as well that he could not recall any particularly damaging instances of hearsay. Byrholdt also said that he fought to keep out the statements in the Jackson v. Denno hearing, but could not keep them out.

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, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300

S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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, 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court does not find the Applicant's testimony to be credible on the issues in this case. Trial counsel's testimony is found credible. First, this Court finds no objectionable error in the trial court's instruction on accomplice liability. The "hand of one, hand of all" legal doctrine is the law in South Carolina. There was no legal ground for trial counsel to request a jury instruction on constructive possession. The State proceeded against the Applicant under the "hand of one, hand of all" theory; therefore the State was not required to show that she was in either constructive or actual possession of the firearm. This Court finds no error in trial counsel's presentation of the Applicant's case; her statements were admissible, and the trial court found them so. This Court finds no legal grounds to support any motion for a mistrial in this record.

Given the above findings, the Applicant has failed to carry her burden of proof. Trial counsel's performance did not fall below reasonable professional standards. Furthermore, the Applicant suffered no prejudice. There is no reasonable probability that the result of the trial would have been different but for any alleged errors of trial counsel.

To show ineffective assistance of appellate counsel, an applicant must show that counsel's

performance was deficient and that he was prejudiced as a result. Gilchrist v. State, Op. No. 25973, 2005 WL 949285 (S.C. Sup. Ct. filed April 25, 2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). To show prejudice, an applicant must show that, but for counsel's errors, he would have prevailed on appeal. Anderson. Here, the issues the Applicant alleges that her appellate counsel should have raised are meritless. The Applicant has not shown any instances of hearsay so prejudicial that its admission would constitute reversible error. Further, the Applicant's directed verdict claim relating to her firearms charge is legally deficient. The State charged her under the "hand of one, hand of all" theory. Therefore, the State only had to prove that one of her codefendants possessed a firearm and that she was an active participant in the crime. The State made out a *prima facie* case for the Applicant's direct involvement and for the use of a firearm in the crime. Therefore, the directed verdict issue would not have resulted in a reversal or vacation of her conviction.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ABBEVILLE	)	Case Number: 2011-CP-04-01581
	)	
Jennifer L. McSharry (#244026), Applicant,	)	
	)	APPLICATION FOR
vs.	)	POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649.

2. She was convicted and sentenced in the Anderson County Court of General Sessions.

3. Applicant's co-defendants are:

(i) Lu Renee Kelso, Applicant's mother, who was found guilty on May 8, 1997 following a jury trial and sentenced to life imprisonment without the possibility of parole for murder, life imprisonment for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy.

(ii) Ronnie Jordan, who actually shot and killed the victim, plead guilty to murder on May 19, 1997 and was sentenced to fifty-five (55) years imprisonment for murder, fifty-five (55) years for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy.

FILED IN CLERK'S OFFICE
ABBEVILLE SC
2011 MAY 11 P 4:
CLERK OF COURT
GENERAL SESSIONS

(iii) Jennifer Titman who plead guilty to voluntary manslaughter on October 6, 1997 and was sentenced to fifteen (15) years suspended on the service of seven (7) years to be followed by five (5) years probation.

(iv) Jason Conley who plead guilty to voluntary manslaughter on October 6, 1997 and was sentenced to fifteen (15) years imprisonment.

4. Applicant was indicted for murder (97-GS-04-124), armed robbery (97-GS-04-1691), criminal conspiracy (97-GS-04-1692), burglary in the first degree (97-GS-04-1693), and possession of a firearm during the commission of a violent crime (97-GS-04-1694). She was tried before the Honorable H. Dean Hall and a jury from September 8-12, 1997. She was convicted on all counts on September 12, 1997.

5. On September 12, 1997, Judge Hall sentenced Applicant to life in prison without the possibility of parole for murder, thirty (30) years for armed robbery, five (5) years for conspiracy, thirty (30) years for burglary in the first degree, and five (5) years for possession of a firearm during the commission of a violent crime. All sentences are concurrent.

6. Applicant was found guilty after pleading not guilty.

7. The Applicant appealed the convictions and sentences.

8. (a) Applicant appealed to the South Carolina Supreme Court.

(b) The South Carolina Supreme Court affirmed the conviction and sentences.

(c) Convictions and sentences affirmed on November 19, 1999.

(d) *State v. McSharry*, S.C.S.Ct. Unpublished Op. No. 1999-MO-093 (filed Nov. 19, 1999).

9. Not applicable.

10 & 11. **GROUNDS FOR RELIEF WITH SUPPORTING FACTS**

10(a) The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide.

10(b) Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide.

11(a)&(b) Jennifer McSharry was born on October 20, 1979. Prior to the incident in this case, she was living with her mother, Renee Kelso, in Georgia. Kelso, who dealt cocaine out of her house, introduced McSharry and her friend Jennifer Titman to illegal drugs.

Less than one month after McSharry's seventeenth birthday, McSharry, her mother, and the other co-defendants drove to the victim's residence, a camper, in rural Anderson County. McSharry and Titman were hallucinating because of their drug use. McSharry and Titman knocked on the victim, Melvin Miller's, door. Miller let Titman inside to use the phone. McSharry was outside. Jordan entered the camper and threatened Miller with a gun. Titman ran out of the camper. Kelso and Conley entered the camper. Jordan shot and killed Miller.

McSharry and Titman were in the car when Jordan shot and killed Miller.

12 & 13. Applicant filed an application for post-conviction relief on November 14, 2000. *See McSharry v. State*, Case Number 2000-CP-04-3030. That application was dismissed by written order filed May 9, 2005. Applicant attempted to file a *pro se* appeal to the South Carolina Supreme Court, but the appeal was not accepted.

14 & 15. None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other court, state or federal.

16. The grounds set forth in paragraphs 10 & 11 have not previously been presented to any court, state or federal. Since dismissal of the prior PCR, new developments in the law entitle Applicant to a new sentencing hearing. Applicant relies on *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010), decided on May 17, 2010 as modified on July 6, 2010. *See also* S.C. Code §17-27-45(b) (extending the PCR statute of limitations by one year for binding constitutional decisions) and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (holding S.C. Code §17-27-45(b) is proper procedure for challenging death sentence imposed prior to *Atkins v. Virginia*, 536 U.S. 304 (2002)).

17 & 18. Applicant's was previously represented as follows:

(a) At trial by Bruce Byrholdt, P.O. Box 2506. Anderson, SC 29622.

(b) On direct appeal by Joseph L. Savitz, III, retired from the S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, S.C. 29201.

(c) During the first PCR by Nancy Jo Thomason, P.O. Box 4025, Anderson, SC 29622.

19. Applicant seeks the vacation of her sentence and a new sentencing hearing.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

By _____

E. Charles Grose, Jr.
600 Monument St., Box P-133
Greenwood, SC 29646
(864) 229-9505

COUNSEL FOR APPLICANT

May 7, 2011

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF GREENWOOD)

I, Jennifer L. McSharry, being duly sworn on my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground know 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.

_____
Jennifer L. McSharry

SWORN and subscribed before me this 9th
day of May, 2011

_____ (L.S.)
Notary Public
My Commission Expires: 2/11/15

FILED-CLERK'S OFFICE
GREENWOOD SC
2011 MAY 11 P 4:33

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

CLERK'S OFFICE
ANDERSON SC

2012 JAN 23 P 2:18

COMMON PLEAS AND
GENERAL SESSIONS

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Jennifer L. McSharry, #244026,

Applicant,

v.

State of South Carolina,

Respondent.

2011-CP-04-1581

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application filed on May 12, 2011, the Respondent would show this Court:

I.

The Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. The Applicant was indicted at July 1997 term of the Anderson County Grand Jury for Murder, Armed Robbery, Burglary – First Degree, Criminal Conspiracy and Possession of a Weapon During the Commission of a Violent Crime (1997-GS-04-124, 1691 through 1694). She was represented by Bruce Bryholdt, Esquire, on the charges. On September 12, 1997, Applicant proceeded to jury trial before the Honorable H. Dean Hall at which she was convicted of all charges. Applicant was sentenced to life imprisonment for Murder, thirty (30) years imprisonment each for Armed Robbery and Burglary, and five (5) years each for Conspiracy and the Firearm charge. The sentences were to run concurrently.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Supreme Court affirmed the convictions and sentences. State v. McSharry, Op. No. 1999-MO-093 (S.C. filed November 19, 1999). The Remittitur was sent January 5, 2000.

Applicant filed his first application for Post-Conviction Relief on November 14, 2000 (2000-GS-04-3030). Respondent made its Return on September 20, 2004, and an evidentiary hearing was convened into the matter on April 20, 2005, at the Anderson County Courthouse. Applicant was present and represented by counsel, Nancy Jo Thomason, Esquire. At the hearing, Applicant testified on his own behalf. Also testifying was Bruce Byrholdt, Esquire, Applicant's trial attorney. By order dated May 6, 2005, and filed May 9, 2005, the Honorable Alexander S. Macaulay denied and dismissed the application with prejudice. Applicant never filed a Notice of Appeal with the Supreme Court after the entry of the order denying her PCR.

Attached herewith and incorporated herein are the records of the Anderson County Clerk of Court regarding the subject convictions, Applicant's records from the Department of Corrections and the records from Applicant's previous PCR action. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "The Eight Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."
2. "Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."
3. "Since dismissal of prior PCR, new developments in the law entitle Applicant to a new sentencing hearing. Applicant relies on *Graham v. Florida*, ___ U.S. _____, 130 S.Ct. 2011 (2010), deciding on May 17, 2010."

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

III.

Respondent submits the Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. 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." 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).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

Respondent further submits this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. 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). The Applicant was convicted of the offenses he challenges in this Application on September 12, 1997, and the remittitur was issued after Applicant's unsuccessful appeal on January 5, 2000. This Application was filed on May 12, 2011, well after the statutory filing period had expired.

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."

V.

Regarding Applicant's contention that the United States Supreme Court decision set forth in Graham v. Florida, 130 S.Ct. 2011 (2010), is newly-discovered evidence that allows Applicant to overcome the successive and untimely nature of this application, Respondent submits this is without merit. The Graham decision set forth by Applicant does not qualify as "newly-discovered evidence" as set forth in Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (S.C. 1983). In Hayden, the Court held that a party requesting a new trial based on after/newly discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching. Id. at 611, 855. The Graham case specifically applies to juveniles who are serving a life without parole sentence for "non-homicide crimes". Because Applicant was in fact indicted and later convicted of murder, the ruling set forth in Graham is inapplicable to her situation. She is serving life without parole for a homicide crime, which the Court explicitly stated was a Constitutional sentence, even for a juvenile. Therefore, her allegation of newly-discovered evidence fails to set forth how the Graham decision is one that "would probably change the result if a new trial was had". Accordingly, Respondent submits this Court should grant Applicant's motion to dismiss as no genuine issue of material fact exists and Respondent is entitled to judgment as a matter of law.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

[Signature on Next Page]

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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By: _____
Attorneys for the Respondents

Columbia, South Carolina
January 20, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Case Number: 2011-CP-04-1581
	)	
Jennifer L. McSharry (#244026), Applicant,	)	
	)	Applicant's Reply to State's Motion to Dismiss and Motion to Stay Further Proceedings
vs.	)	
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

To: The Honorable J. Cordell Maddox, Jr., Chief Administrative Judge, Tenth Judicial Circuit

This matter is before this Court on the Applicant, Jennifer McSharry's, second application for post-conviction relief (hereinafter "PCR"). The State filed a return on January 20, 2012 and moved this Court to enter a conditional order of dismissal.[1] McSharry objects to the Court dismissing her application. McSharry further moves this Court to stay additional proceedings in this matter until the Supreme Court of the United States decides three pending cases.

Reply to State's Return and Motion to Dismiss

This PCR is about the legal and factual reasons why South Carolina should not condemn Jennifer McSharry to die in prison.

Prior to the incident in this case,[2] McSharry was living with her mother, Renee Kelso, in Georgia. Kelso, who dealt cocaine out of her house, supplied McSharry and her friend, Jennifer Titman, with marijuana and cocaine.

[1] On January 24, 2012, McSharry's counsel e-mailed Judge Maddox to request until February 8, 2012 to respond.

[2] The incident occurred on November 17, 1996.

Less than one month after McSharry's seventeenth birthday,[3] McSharry, her mother, and the other co-defendants drove to the victim's residence, a camper, in rural Anderson County. McSharry and Titman were hallucinating because of their drug use. McSharry and Titman knocked on the victim, Melvin Miller's, door. Miller let Titman and McSharry inside to use the phone. McSharry went outside. Jordan entered the camper and threatened Miller with a gun. Titman ran out of the camper. Kelso and Conley entered the camper. Jordan shot and killed Miller. ***McSharry and Titman were in the car when Jordan shot and killed Miller.***

After the jury convicted McSharry in September 12, 1997, the Honorable H. Dean Hall sentenced her to life in prison without the possibility of parole for murder, thirty (30) years for armed robbery, five (5) years for conspiracy, thirty (30) years for burglary in the first degree, and five (5) years for possession of a firearm during the commission of a violent crime. All sentences are concurrent.

Life without parole (hereinafter "LWOP"), sometimes referred to as a death in prison sentence, is very unusual in South Carolina for a juvenile. McSharry is the only woman serving such a sentence. The Tenth Judicial Circuit has sentenced only one other juvenile, Joseph Paul Hudgins, to LWOP. Only thirty-eight juveniles have been sentenced to LWOP in South Carolina. Such a sentence is most common in the Seventh Judicial Circuit,[4] with nine juveniles serving LWOP. Twenty-five of these thirty-eight sentences (65.78%) were imposed by judges who are former prosecutors or have a law enforcement background.[5] *See* SC Department of Corrections No Parole Lifers, Offenses Committed before Age 18, Currently Incarcerated,

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[3] McSharry was born on October 20, 1979.

[4] *See* App. p. 2 for a summary of juvenile LWOP sentences by judicial circuit.

[5] *See* App. p. 3 for a summary of Juvenile LWOP sentences by Circuit Court Judges.

current through 6/23/2011, (hereinafter "Juvenile Lifers"), a copy of which is attached,[6] App. p. 1.

The extraordinary capacity of juveniles for rehabilitation is powerfully illustrated in the brief of former juvenile offenders Charles S. Dutton, former Sen. Alan K. Simpson, R. Dwayne Betts, Luis Rodriguez, Terry K. Ray, T.J. Parsell, and Ishmael Beah as *Amici Curiae* in support of petitioners in *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010). A copy is attached, App. pp. 4-40. Because of juveniles' extraordinary capacity for rehabilitation, juvenile LWOP sentences should be abolished.

I. Factual Background

The factual background includes the evidence contained in the trial record, judicial notice of the co-defendants' court records, and the evidence expected to be produced at the PCR hearing.

A. Facts from the Trial Record.

In her opening statement, Deputy Solicitor Druanne White[7] outlined the State's theory of the case. "Renee Kelso has known [Melvin] Miller prior to" November 17, 1996. Miller had "lent" Kelso some money. Miller had "gotten a judgment[8] against" Kelso because she had not repaid him. Kelso "was angry about this, and she felt she should get money from him." Kelso, McSharry, Jennifer Titman, Jason Conley, and Ronnie Jordan met around midnight in south Atlanta, Georgia. ***"Ronnie Jordan had a pistol."*** They drove in the same vehicle to South

[6] The Department of Corrections provided this information pursuant to the Freedom of Information Act.

[7] Ms. White would later serve as Solicitor for the Tenth Judicial Circuit.

[8] *See Miller v. Kelso*, Case No. 1994-CP-04-1254, which can be found at http://www.andersoncountysc.org/web/scjdweb/publicindex/PICaseDetails.aspx?County=04+&Casenum=1994CP0401254&CourtType=G&CaseType=Civil&CourtAgency=04002&LastName=Kelso&FirstName=Rene (last viewed Feb. 5, 2012).

Carolina where Miller, "a man who was in his sixties," lived in a camper on a farm in Anderson County. "On the way to South Carolina they decided the details of the plan" to steal money from Miller. White described a plan where Titman and McSharry would trick their way into Miller's camper and signal the other three it was "clear" for them to enter and "try to get the money." If Miller didn't have adequate money, they planned to take him to an ATM machine to withdraw it. According to White, events proceeded as planned. When Miller claimed, "I don't have any" money, "they got him ready to go to the automatic teller." Miller "balked at the last minute and he was shot two times in the head and killed." White told the jurors, ***"There is no doubt Ronnie Jordan was the trigger person."*** Under the State's theory, "All of these people are guilty under the hand of one, the hand of all." Trial Transcript (hereinafter "Tr."), 62-66 (emphasis added).

McSharry's lawyer, Bruce Byrholt, admitted McSharry's guilt and outlined a theory of jury nullification. He told the jurors Kelso is "the mastermind behind this horrible series of events." McSharry "is a child, a seventeen-year old girl that's been getting high on drugs since she was twelve or thirteen years old with her mother." The case "is not as black and white as the State makes it out to be." He continued:

> People are responsible for their actions. But also, circumstances that you are placed into when you are a child that you may have no control over, that you may not know or really understand, what you are getting yourself in.

He told the jurors they were selected "to pass on what happened, to pass on what caused this to happen." Byrholt intended to present "not so much what happened, but why it happened, and more important[ly], why it shouldn't happen." He intended to explain "who is really responsible for what happened that night in November." Tr. 67-68.

The State relied on McSharry's statement made on November 21, 1996. McSharry was "crying" and "eager to talk to" the investigators. McSharry told them "there are a lot of people

on us because of money my Mom owes them and the people told my Mom [she] better come up with some serious money." McSharry "didn't know who the people were." She understood the people wanted "three thousand dollars or more." McSharry's "Mom said that there is a man in South Carolina that owed her a lot of money and we have to go collect it from him." Driving a borrowed car, Kelso, McSharry, and their co-defendants left for South Carolina. Jordan had a gun. Kelso knew that Miller had guns. The plan was for McSharry and Titman "to pretend we were lost and ask to use the phone." They planned "to force him to go to an ATM and get money and take his guns and what cash was in his pocket." Tr. 335-40, 343-59.

When the group arrived at Miller's House, "Mom, Ron [Jordan], and Jason [Conley] got out of the car and ran behind us toward the camper." Kelso and Jordan were wearing ski masks. Titman and McSharry went to Miller's door. McSharry gave a false name and asked Miller, "Can you help us?" McSharry and Titman pretended to talk on the phone, which did not have a dial tone because the others had cut the phone line. McSharry "walked out the door." She "went to the car and Ron [Jordan] went inside." Titman "ran out and got into the car." "Ron [Jordan] was in the camper for about two minutes before Jason [Conley] and Mom went in." Conley came to the car with a shotgun. Kelso came outside to the car and said, "I'm scared. I'm really scared." Kelso went back inside. McSharry "heard noises coming from the camper like something was getting pushed around." Then she heard "Boom. Boom. Boom. And saw orange flashes coming from the camper." Jordan "was carrying Mom to the car and puts [sic] her in the passenger seat. Kelso "was bleeding bad" because she had been shot in the hand. The five codefendants left South Carolina. Tr. 343-59.

The defense theory was jury nullification. This defense relied on the testimony of Titman and Kelso and confirmed the State's theory of the murder, including McSharry's role. The

defense hoped the jurors would acquit McSharry because of her youth, Kelso causing McSharry to become addicted to drugs, McSharry's drug use at the time of the murder, and Kelso being the mastermind of the plan to get money from Miller.

Jennifer Titman, a nineteen year old mother who dropped out of school in the tenth grade, had entered into a "Substantial Assistance Agreement" where the Solicitor agreed Titman would be sentenced to fifteen years for voluntary manslaughter. Titman testified about the drugs she used with Kelso and McSharry. Because of the drug use, Titman wasn't getting much sleep. On the night of the murder, both teenagers used cocaine and marijuana before they left Georgia for South Carolina. Kelso claimed "that Mr. Miller owed her ten thousand dollars and we were going to get it." During the trip to South Carolina, Titman, McSharry, Kelso, Jordan and Conley all used cocaine and marijuana. Kelso supplied the drugs. Titman used "an eight-ball or more" of cocaine. Titman and McSharry were hallucinating, mistaking "a necklace that was hanging around the rear view mirror for . . . . a flying saucer or a space ship." Tr. 465-74, 481-84, 486-88, 490.

Titman confirmed she and McSharry ***"didn't know that a murder was going to happen."*** Tr. 493 (emphasis added). Both teenagers were ***outside in the car when Jordan shot Miller.*** Tr. 515.

Prior to McSharry's trial, Kelso was convicted of murder, first degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. She told the jurors about Miller's murder. Despite Miller's civil judgment against her, Kelso told McSharry and Titman they were going to South Carolina to "get some money that was owed to me by Melvin Miller." Kelso admitted he was dealing and using drugs at the time. Kelso confirmed McSharry and Titman were hallucinating, "see[ing] men jumping out of the freeway."

Kelso planned to use the two teenage girls to lure Miller to the door, so the others could get inside his camper. Buy the time Kelso entered the camper, McSharry and Titman had already left. Conley and Jordan were already inside. Kelso was shot in the hand when she "went to reach for the gun." The first shot went through Kelso's hand. She turned around and heard two more shots. Tr. 539-48.

In closing arguments, the prosecution continued to rely on "the hand of one, hand of all." Tr. 601, 605-06, 624-26. Trial counsel acknowledged the state's theory and asked the jurors "to look at the intent" in the context of McSharry being "stoned for a week, doing cocaine and marijuana, not eating and not sleeping." Trial counsel then acknowledged McSharry's role in the crimes but argued she was not responsible. Tr. 615-17. The prosecution countered by pointing out "voluntary intoxication is no defense in this state." Tr. 625.

After the jury found McSharry guilty, the trial court immediately imposed sentence. Despite having presented McSharry's drug use as a defense, trial counsel told the court, "I know that's not an excuse. Drug use is not a defense." He asked the court to take McSharry's youth into account but did not present the court with any materials establishing why McSharry's age is mitigating. McSharry's father and paternal grandfather spoke, but trial counsel did not have them provide any information about McSharry. Tr. 662-66.

B. Judicial Notice of Co-Defendant's Court Records.

Lu Renee Kelso, McSharry's mother, who was found guilty on May 8, 1997 following a jury trial and sentenced to life imprisonment without the possibility of parole for murder, life imprisonment for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy. App. pp. 41-50. Kelso also had a prior record for armed robbery. Tr. 665.

Ronnie Jordan, who actually shot and killed the victim, pled guilty to murder on May 19, 1997 and was sentenced to fifty-five (55) years imprisonment for murder, fifty-five (55) years for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy. App. pp. 51-60.

Jennifer Titman, who pled guilty to voluntary manslaughter on October 6, 1997, was sentenced to fifteen (15) years suspended on the service of seven (7) years to be followed by five (5) years probation. App. pp. 61-62.

Jason Conley, who also pled guilty to voluntary manslaughter on October 6, 1997, was sentenced to fifteen (15) years imprisonment. App. pp. 63-64.

C. Evidence that will be presented at the PCR Hearing.

McSharry was born on October 20, 1979 in Greenville, South Carolina. Her parents divorced when McSharry was three years old. She has a full sister, Jamie, and a full brother, Jeffery. She has two stepbrothers, Anthony and Salvador. Salvador committed suicide several months before the incident in this case.

McSharry lived in Greenville for less than a year before moving with her parents to Livermore, California, which is near San Francisco. She lived there for eleven years before bouncing between multiple locations, including Utah, Colorado, Arizona, South Carolina, and Georgia. McSharry lived on-and-off in Tucson, Arizona for four years as she split time between living with her mother in Tucson and her paternal grandparents in Livermore. McSharry lived in Honea Path, South Carolina for a year after her mother took a job there customizing vans. Kelso fled South Carolina because the police were investigating her drug dealing. Kelso moved to Jonesboro, Georgia, which is near Atlanta. McSharry was living in Atlanta with her mother,

brother, sister, and Titman when she was arrested in this case.

Kelso exposed her children to drugs at a young age. At age twelve, McSharry started smoking marijuana that was supplied by Kelso. McSharry smoked it every day, all day. She also smoked cigarettes. McSharry was smoking so much that a doctor in Jonesboro told her, "If you don't stop smoking, then you will be dead in five years." Kelso also kept cocaine in the house, but McSharry would not start using it until her stepbrother Salvador committed suicide in the summer of 1996. McSharry was using an ounce of cocaine a day.

McSharry was attending Mt. Zion High School in Jonesboro, Georgia when she was arrested on these charges. She quit attending school because of the arrest.

At one point prior to trial, the State offered McSharry a fifteen year sentence for voluntary manslaughter. This offer, however, included McSharry testifying against Kelso. At the time of the offer, the prosecution was threatening to seek the death penalty against Kelso. The State made additional plea offers during McSharry's trial, which also included reducing the charges to voluntary manslaughter. McSharry, however, did not understand the legal principles necessary to make an informed decision. Trial counsel not properly educating McSharry about the relevant legal principles influenced her decision not to plead guilty to a lesser offense.

Since she has been in the Department of Corrections, McSharry has broken her drug addiction. McSharry also furthered her education. She completed her GED in 1998. In 2005, she completed a correspondence course on creative writing. McSharry now writes short stories.

McSharry has consistently worked for Prison Industries. For about two years, she was a Senior Teaching Assistant, assigned to a learning disabled class. Through Prison Industries, she worked for the Omega Travel Agency, searching for the lowest airline tickets for the customers. During most of her sentence, McSharry has operated a sewing machine. Her current job is

making t-shirts that are purchased by several companies for sale to the general public.

The State provided McSharry's "Corrections Record Summary Report." A copy is attached, App. pp. 65-66. This report confirms McSahrry does not have a "criminal charge history" or "assaultive disciplinary history."

PCR counsel is in the process of obtaining school records and additional records from the Department of Corrections. PCR counsel intends to move this Court for funds to conduct an evaluation of McSharry. This evaluation is important for two reasons. First, it will show that McSharry has rehabilitated herself, should not spend the rest of her life in prison, and is an appropriate candidate for resentencing. Second, it will show that an evaluation of McSharry for sentencing would have discovered mitigation evidence available at the time of her trial that would have influenced the trial court to impose a sentence of less than life imprisonment. The latter will be significant if the Supreme Court of the United States recognizes a right to effective assistance of post-conviction counsel. *See* Motion to Stay Further Proceedings, Section II, *infra*.

II. Arguments

A. Standard of Review for Summary Dismissal.

> Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c) (2003). When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.

Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).

B. Applicant Properly Plead an Exception to the Statute of Limitations.

The State's proposed order of dismissal relies on the statute of limitation and this

application being successive. S.C. Code Ann. §17-27-45(b), however, extends the PCR statute of limitations by one year for binding constitutional decisions. Under this statute, successive post-conviction applications are the proper procedure to ask the Court to apply binding constitutional decisions. *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (holding S.C. Code §17-27-45(b) is proper procedure for challenging death sentence imposed prior to *Atkins v. Virginia,* 536 U.S. 304 (2002)).

Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011 (2010) is a binding constitutional decision. In *Graham*, the Supreme Court held the Eighth Amendment categorically prohibits a life without parole offense for a juvenile committing a non-homicide offense. The State acknowledges McSharry was a juvenile at the time of her offense, but argues, "Because Applicant was in fact indicted and later convicted of murder, the ruling set forth in *Graham* is inapplicable to her. She is serving a life without parole for a homicide crime, which the Court explicitly stated was a Constitutional sentence, even for a juvenile." State's Return, p. 5.

The State's argument is not a fair characterization of *Graham*. *Graham* is an extension of *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorical prohibition against imposing the death penalty on a person with mental retardation) and *Roper v. Simmons,* 543 U.S. 551 (2005) (categorical prohibition against imposing the death penalty on a defendant who committed the crime before age eighteen). The facts before the Court in *Graham* involved a juvenile sentenced to life without parole for a non-homicide offense.

Contrary to the State's position, the Supreme Court in *Graham* did not sanction life without parole sentences for juveniles in homicide cases. Rather, Graham actually held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Graham*, 130 S.Ct. at 2030. *Graham* reasoned, "[W]hen compared to an

adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Graham*, 130 S.Ct. at 2027. This result is because "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments." *Id.* at 2026. It is also because "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 2027. This part of the reasoning results, in part, from the Supreme Court's holding that the Eighth Amendment prohibits the "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place." *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

"Life without parole is an especially harsh punishment for a juvenile." *Graham*, 130 S.Ct. at 2028. Graham, therefore, reviewed the traditional aims of punishment and concluded that retribution, deterrence, and incapacitation are not justifications for a LWOP sentence for a juvenile who did not commit a homicide. *Graham* then concluded juvenile LWOP "cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal." *Id.* at 2029-30.

McSharry has twice diminished moral culpability. She was juvenile at the time of her offense. *See Roper*. It is undisputed she was not the trigger person. *See Edmund. See also State v. Mercer*, 381 S.C. 149, 169, 672 S.E.2d 556, 566 (2009) (approving instruction jury "could recommend a death sentence only if it found that Mercer was the triggerman"). *Graham*, therefore, establishes that McSharry's LWOP sentence violates the Eighth Amendment.

C. Applicant Presents a Matter of National Interest Currently Pending Before the Supreme Court of the United States.

Further illustrating that *Graham* does not sanction a sentence like the one McSharry is

serving, the Supreme Court recently granted *certiorari* and consolidated two cases seeking to clarify or extend *Graham*. *See Miller v. State*, 63 So.3d 676 (Ala. Crim. App. 2010) *certiorari granted by Miller v. Alabama*, ___ S.Ct. ___, (2011) (2011 WL 1086007);[9] *Jackson v. Norris*, 49, ___S.W.3d ___, (Ark. 2011) (2011 WL 478600) *certiorari granted by Jackson v. Hobbs*, ___ S.Ct. ___ (2011) (2011 WL 1060941).[10]

Miller challenges the imposition of a life sentence on a juvenile who actually committed a homicide offense. This question presented in *Jackson* is summarized as follows:

> Whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense - because, while [Jackson's] offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy shot a shop attendant. [Jackson] himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot.

Supreme Court Docket, Case No. 10-9647 (Questions Presented). McSharry's current PCR issue is identical to the issue in *Jackson*.

The Supreme Court has scheduled oral arguments in *Miller* and *Jackson* for March 20, 2012.

Motion to Stay Further Proceedings

As discussed in more detail below, this Court should stay further proceedings until after the Supreme Court of the United States decides three currently pending cases. Decisions are expected before the end of June 2012.

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[9] *See also* Supreme Court Docket, Case No. 10-9646 located at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-9646.htm (last viewed Feb. 8, 2012), a copy of which is attached, App. p. 67-70.

[10] *See also* Supreme Court Docket, Case No. 10-9647 located at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-9647.htm (last viewed Feb. 8, 2012), a copy of which is attached, App. p. 71-75.

I. This Court should stay further proceedings until the Supreme Court decides *Miller* and *Jackson*.

A. *Miller* and *Jackson* will be decided by this summer.

The Supreme Court has consolidated *Miller* and *Jackson* for oral argument on March 20, 2012. The petitioners filed their briefs on January 9, 2012, and the states' briefs are due on February 14, 2012. The High Court, therefore, is on track to decide *Miller* and *Jackson* during its term that ends in June. If the Supreme Court decides these cases in favor of the petitioners or decides only *Jackson* in favor of the petitioner, then McSharry will be entitled to summary judgment in her favor and remand to General Sessions Court for a new sentencing hearing. Therefore, it is reasonable and prudent for this Court to wait on the decisions in these cases.

B. Adequate and Independent State Ground.

Even if the Supreme Court decides Miller and Jackson adversely to McSharry, this PCR should continue under state law.

McSharry received a harsher sentence than Jordan, the undisputed shooter. In an unrelated case, our Supreme Court recently noted it was "troubled by the disparate sentences these co-defendants received from the same circuit judge" but observed it has "no power to address that disparity." *Edwards v. State,* 392 S.C. 449, 454, fn. 1, 710 S.E.2d 60, 63, fn. 1 (2011). In McSharry's case, our Court has the power to address this disparity under Art. I, §15 of the South Carolina Constitution.

It is well settled that a state can decide a constitutional issue on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). South Carolina has a tradition of deciding constitutional issues based on adequate and independent state grounds. *E.g. State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable

searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.").

The public policy of this State is derived by implication from the established law of the State, as found in its Constitution, statutes, and judicial decisions." *State v. Brown*, 284 S.C. 407, 410-411, 326 S.E.2d 410, 412 (1985). Art. I, §15 prohibits cruel and unusual punishment. In *Brown*, our Supreme Court held, "Castration, a form of mutilation, is prohibited by Article I, § 15." *Id.* Likewise, our Court has held that banishment violates public policy. *State v. Gilliam*, 274 S.C. 324, 325, 262 S.E.2d 923, 924 (1980) (Banishment "is impliedly prohibited by public policy.").

"Actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 130 S.Ct. at 2023. At the time of McSharry's trial, life without parole was a relatively new sentence for murder, effective on January 1, 1996. As previously noted, LWOP remains a very unusual sentence in this state for a juvenile. With only thirty-eight such sentences, there is already a consensus among the Circuit Court Judges that LWOP is inappropriate for juvenile offenders. When judges that are former prosecutors or law enforcement agents are excluded, LWOP is even rarer for juveniles, with only thirteen people under such a sentence. Twenty of thirty-four (55.8%) of juvenile life sentences imposed since the change in the law were imposed in the first six years of the new law. *See* Juvenile Lifers, App. p. 1. The last decade has seen a significant decrease in juvenile life sentences. This reduction in juvenile LWOP sentences is evidence of the evolving standards of decency in this state. The sentence is so rare that our Supreme Court should take the next step and abolish it altogether.

II. This Court should stay further proceedings until the Supreme Court decides *Martinez v. Ryan*, Supreme Court of the United States Case No. 10-1001.

Since McSharry filed this PCR application, the Supreme Court of the United States

granted *certiorari* in *Martinez v. Ryan,* Supreme Court Case No. 10-1001.[11] The Court heard oral arguments on October 4, 2011 on the following question:

> Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

For a discussion of the oral argument, please see Steve Vladeck, *Argument recap: An Arizona-specific right to collateral post-conviction counsel?*, SCOTUSblog (Oct. 5, 2011, 2:13 PM), http://www.scotusblog.com/?p=129072 (last viewed Feb. 7, 2012), a copy of which is attached, App. pp. 80-81.

Because South Carolina does not allow an appellant to present ineffective assistance of trial counsel during the direct appeal of a conviction, a holding in *Martinez* recognizing the right to effective post-conviction counsel would apply in this state. If the Supreme Court recognizes a federal constitutional right to affective assistance of "first tier" post-conviction counsel, then McSharry will move to amend her current application to allege ineffective assistance of her post-conviction counsel.

Although the investigation into trail counsel's ineffectiveness is ongoing, McSharry was deprived of her Sixth Amendment right to effective assistance of counsel in the following manners:

- Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the "hand of one, hand of all."

[11] Found at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1001.htm (last viewed (Feb 8, 2012), a copy of which is attached, App. pp. 76-79.

- Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

- Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence.

McSharry did not receive effective assistance of post-conviction counsel at her original PCR hearing. Although the investigation into PCR counsel's ineffectiveness is ongoing, McSharry was deprived effective assistance of PCR counsel in the following manners:

- Her PCR counsel, Nancy Jo Thomason, had an actual conflict of interest. In addition to representing McSharry, Thomason previously represented Kelso during her PCR.[12] *See Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Thomason's loyalty to Kelso prevented her from investigating and recognizing trial counsel's failure to investigate, prepare, and present meaningful mitigation evidence during McSharry's sentencing hearing.

- PCR counsel did not conduct any investigation at all and, therefore, failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

- PCR counsel failed to retain an expert witness to perform a psychiatric examination of McSharry to discover the evidence that trial counsel should have presented at the sentencing hearing, and provide relevant and available mitigation evidence.

- PCR counsel failed to advise McSharry and assist her in preparing an amended PCR application. *See* order of dismissal, Case No. 200-CP-04-3030, p. 3.

- McSharry wanted to appeal the denial of her PCR, but PCR counsel failed to file a Rule 59(e), SCRCP motion or file the required notice of appeal. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

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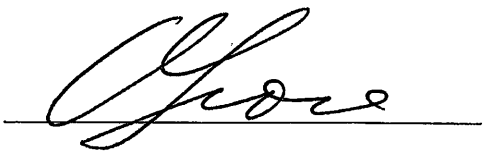
[12] *See Kelso v. State*, Case No. 2000-CP-04-2188 located at http://www.andersoncountysc.org/web/scjdweb/publicindex/PICaseDetails.aspx?County=04+&Casenum=2000CP0402188&CourtType=G&CaseType=Civil&CourtAgency=04002&LastName=Kelso&FirstName=Lu (last viewed Feb. 8, 2012), a copy of which is attached, App. p 82.

Conclusion

This Court should deny the State's motion to dismiss. Rather, this Court should stay further proceedings in this case until the Supreme Court of the United States decides *Miller, Jackson,* and *Martinez.*

IT IS SO MOVED.

Respectfully Submitted,

By 

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Pro Bono Counsel for Applicant

February 7, 2012
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Case Number: 2011-CP-04-1581
	)	
Jennifer L. McSharry (#244026), Applicant,	)	
	)	Applicant's Reply to State's Return and
vs.	)	Motion to Stay Further Proceedings
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

The undersigned hereby certifies that a copy of this pleading was served on opposing counsel on the date reflected below by depositing a copy in the U. S. Mail, postage paid, addressed as follows:

Kaelon E. May, Esquire
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211.

At the same time, a copy was also mailed the Clerk of Court for Anderson County and the Honorable J. Cordell Maddox, Jr, Chief Administrative Judge, Tenth Judicial Circuit.

Respectfully Submitted,

By _____

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Pro Bono Counsel for Applicant

February 7, 2012
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Case Number: 2011-CP-04-1581
	)	
Jennifer L. McSharry (#244026), Applicant,	)	
	)	Appendix
vs.	)	
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

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SC DEPARTMENT OF CORRECTIONS NO PAROLE LIFERS
OFFENSES COMMITTED BEFORE AGE 18 CURRENTLY INCARCERATED (n=38)
6/23/2011

NAME	INMATE NUMBER	DOB	OFFENSE DATE	SENTENCE DATE	SENTENCING COUNTY	MOST SERIOUS OFFENSE	SENTENCING JUDGE	RACE	SEX	OFFENSE AGE	SENTENCE AGE
IKEN, TYRONE	244428	[redacted]	5/7/1997	9/25/1997	CALHOUN	MURDER	WHETSTONE, JR.,	B	M	17	18
ONNER, JOHN BENDARIAN	338030		4/2/2008	11/18/2009	CHEROKEE	KIDNAPPING	COLE, C	B	M	17	18
UN, SOK	324006		10/12/2006	9/10/2007	SPARTANBURG	MURDER	WILLIAMS, J	C	M	17	18
LARK, MATTHEW	277574		7/18/1999	8/14/2001	HORRY	HOMICIDE BY CHILD ABUSE	BURCH, P	W	M	17	19
ARBY, CHRISTOPHE G	263162		12/14/1998	12/13/1999	ORANGEBURG	MURDER	WILLIAMS, JR, J	B	M	16	17
ARRETT, DAVID VIRON	333334		5/30/2007	2/24/2009	SPARTANBURG	MURDER	COLE, D	B	M	17	19
RAHAM, ERIC	251687		12/7/1996	8/27/1998	DARLINGTON	MURDER	BURCH, P	B	M	17	19
AIGLER, BRADFORD	239913		1/12/1997	5/22/1997	ORANGEBURG	MURDER	COTTINGHAM, E	B	M	17	17
AM, ANGELO	315014		9/9/2004	4/17/2006	DARLINGTON	MURDER	MILLING, J	B	M	15	17
ARRISON, THEODORE	155651		2/8/1988	11/12/1990	CHESTER	MURDER	RUSHING, D	B	M	16	19
OLLIS, BRETT BLAIR	250418		11/16/1997	3/4/2000	LEXINGTON	MURDER	JOHNSON,	W	M	17	20
UDGINS, JOSEPH PAUL	276817		12/7/1992	7/18/2001	ANDERSON	MURDER	WATSON, J	W	M	17	25
ULL KILGORE, JCOREY SUAVE	340853		5/24/2008	5/20/2010	SPARTANBURG	MURDER	COLE, J	B	M	17	19
UTTO, STEPHEN	276637		8/12/1999	8/9/2001	CLARENDON	MURDER	COOPER, JR., T	W	M	17	19
MAN, DAMIAN	344143		8/18/2009	12/16/2010	DILLON	MURDER	RUSSO, T	B	M	17	18
ENNINGS, TERRANCE	329264		11/4/2006	6/27/2008	RICHLAND	MURDER	NEWMAN, C	B	M	17	18
ETER, JOSHUA	314407		12/8/2004	3/17/2006	SPARTANBURG	MURDER	COLE, D	B	M	16	18
ELLY, WILLIAM ARTHUR	250459		1/8/1996	9/19/1998	LEXINGTON	MURDER	CLARY, G	W	M	17	20
INGRATSAIPHON, AE	259854		6/23/1997	7/20/1999	AIKEN	MURDER	PEEPLES, R	O	M	16	18
EGETTE, ROGER SYNDELL	243366		5/24/1996	8/5/1997	HORRY	MURDER	MARTIN,SR., D	B	M	15	16
OVE, ONTAVIOUS J	271569		12/16/1999	12/14/2000	LANCASTER	MURDER	GOODE, K	B	M	17	18
YLES, LANCE	314408		12/8/2004	3/17/2006	SPARTANBURG	MURDER	COLE, D	B	M	16	17
ACK, TERRIEL L.	312070		12/17/2003	10/26/2005	FLORENCE	MURDER	COTTINGHAM, E	B	M	17	18
CSHARRY, JENNIFER L.	244026		11/17/1996	9/12/1997	ANDERSON	MURDER	HALL, H	W	F	17	17
OORE, ROBERT	155652		2/8/1988	11/12/1990	CHESTER	MURDER	RUSHING, D	B	M	16	19
ORGAN, ERIC DALE	314503		5/4/2000	3/17/2006	SPARTANBURG	MURDER	COLE, J	W	M	17	23
ARKER, RODNEY	315646		12/13/2003	7/19/2006	COLLETON	MURDER	JAMES, G	B	M	16	19
RIESTER, WALLACE	279604		10/18/2000	11/2/2001	BARNWELL	MURDER	WILLIAMS, JR, J	B	M	15	16
EED, DAVON WILLIAM	316090		6/1/2007	9/3/2008	FLORENCE	MURDER	NEWMAN, C	B	M	17	18
COTT, DONDRE MICHAEL	342246		6/8/2009	8/13/2010	FLORENCE	MURDER	RUSSO, T	B	M	17	18
CRUGGS, TIMOTHY	260711		5/7/1997	8/27/1999	SPARTANBURG	MURDER	CLARY,	B	M	17	19
LOCUMB, CONRAD L.	197165		3/6/1996	2/18/2004	RICHLAND	KIDNAPPING	JOHNSON, J	B	M	16	24
MART, JON PAUL	277378		8/12/1999	8/9/2001	CLARENDON	MURDER	COOPER, T	W	M	16	18
MITH, JAMES BRANDON	275590		11/9/2000	6/4/2001	UNION	MURDER	SHORT, JR, P	W	M	17	18
HOMAS, EDGAR LERON	254554		8/1/1997	11/24/1998	FLORENCE	MURDER	MANNING, L	B	M	17	18
ANG, JAMES	269142		6/23/1997	9/8/2000	AIKEN	MURDER	KEESLEY, W	C	M	15	18
IGFALL, ERIC DEANGELO	299508		12/18/2001	2/2/2004	CHARLESTON	MURDER	JEFFERSON, D	B	M	16	18
ILLIAMS, MELVIN DOUGLAS	123206		6/18/1984	9/27/1984	SPARTANBURG	MURDER	RUSHING, D	B	M	17	18

A. 806

Summary of Juvenile LWOP Sentences by Judicial Circuit

Circuit	Counties	# of Sentences
1st	Calhoun, Orangeburg, Dorchester	3
2nd	Aiken, Bamberg, Barnwell	3
3rd	Clarendon, Lee, Sumter, Williamsburg	2
4th	Chesterfield, Darlington, Dillon, Marlboro	3
5th	Kershaw, Richland	2
6th	Chester, Fairfield, Lancaster	3
7th	Cherokee, Spartanburg	9
8th	Abbeville, Greenwood, Laurens, Newberry	0
9th	Berkley, Charleston	1
10th	Anderson, Oconee	2
11th	Edgefield, Lexington, McCormick, Saluda	2
12th	Florence, Marion	4
13th	Greenville, Pickens	0
14th	Allendale, Beaufort, Colleton, Hampton, Jasper	1
15th	Georgetown, Horry	2
16th	Union, York	1

Summary of South Carolina Judges Imposing Juvenile LWOP Sentences

Judge	Prosecutor or Police Background	# of Sentence
Paul M. Burch	Pageland Police Department, 6 years	2
Gary E. Clary	No	2
J. Durham Cole	ASOL 7th Circuit Ran for 7th Circuit Solicitor	6
Thomas W. Cooper, Jr.	No	2
Edward B. Cottingham	No	2
Kenneth B. Goode	No	1
H. Dean Hall	No	1
George C. James, Jr	No	1
Deadra L. Jefferson	No	1
James W. Johnson, Jr.	Asst. Attorney General, 1976-1982	2
William P. Keesley	ASOL 11th Circuit, 1987-1988	1
L. Casey Manning	Constable and SLED Agent, 1973-1974 Asst. Attorney General, 1988-1989	1
Daniel E. Martin, Jr.	ASOL 9th Circuit, 1974-1984	1
John M. Milling	ASOL for Darlington County	1
Clifton Newman	ASOL Williamsburg County, 17 years	2
Rodney A. Peoples	No	1
Don S. Rushing	ASOL for 6th Judicial Circuit, 1974-1976	3
Thomas A. Russo	Deputy Solicitor 12 Circuit, 1999-2005	2
Paul E. Short, Jr.	No	1
Joseph J. Watson	Solicitor 13th Circuit, 1985-1997	1
Charles W. Whetstone, Jr.	No	1
James C. Williams, Jr	Chief Deputy Solicitor 1st Circuit, 1993-1998	3

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Nos. 08-7412 and 08-7621

IN THE
Supreme Court of the United States

TERRANCE JAMAR GRAHAM
Petitioner,
v.
FLORIDA
Respondent.

JOE HARRIS SULLIVAN
Petitioner,
v.
FLORIDA
Respondent.

On Writs of Certiorari from the District Court of Appeal of Florida, First District

BRIEF OF FORMER JUVENILE OFFENDERS CHARLES S. DUTTON, FORMER SEN. ALAN K. SIMPSON, R. DWAYNE BETTS, LUIS RODRIGUEZ, TERRY K. RAY, T.J. PARSELL, AND ISHMAEL BEAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 23, 2009

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Lonnae O'Neal Parker, *From Inmate to Mentor, Through Power of Books*, Wash. Post, Oct. 2, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100101160.html 8

T.J. Parsell, *FISH: A Memoir of a Boy in a Man's Prison* (2006) 8

Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., 1999), *available at* http://www.cjcj.org/files/secondchances.pdf 8, 31

Mike Sonksen, *The Redeemer Speaks*, O.C. Weekly, Dec. 1, 2005, *available at* http://www.ocweekly.com/2005-12-01/culture/the-redeemer-speaks// 8

INTEREST OF *AMICI CURIAE* [1]

The *Amici* who submit this brief are former juvenile offenders who were able to become productive, law-abiding adults and make meaningful contributions to society. *Amici* believe that their experiences may assist the Court in resolving the difficult issues presented by these cases by providing insight into the unique capacity of children to rehabilitate themselves.

As juveniles, *Amici* in many ways resembled Joe Harris Sullivan and Terrance Jamar Graham, the petitioners in this case. Each of them engaged in serious criminal conduct. Some of them were convicted of crimes that, in Florida and elsewhere, are punishable today by life sentences. Others committed acts that quite easily could have led to such a conviction had circumstances been different or had a prosecutor taken a harder line.

Yet because *Amici* were not sentenced to life imprisonment – because they ultimately were given another chance, in part because of the young age at which they had committed criminal offenses – they were able to make significant contributions to their communities and even, in some cases, the nation and the world. The life stories of the *Amici* show how much could have been lost by concluding too quickly

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

that they were beyond hope. *Amici* seek to share their individual stories with the Court.

Charles S. Dutton attended Yale University's School of Drama. He made his Broadway debut in 1984 and has received two Tony nominations. He also has starred in several major motion pictures and a television series, and won an Emmy for directing the HBO mini-series "The Corner."

Alan K. Simpson served in the United States Senate from 1979 to 1997, serving, among other positions, as Republican Whip and Chairman of the Veterans Affairs Committee. He has also served several terms in the Wyoming legislature, directed Harvard University's Institute of Politics, and participated in the Iraq Study Group.

R. Dwayne Betts is a published author and poet. He recently graduated from the University of Maryland, College Park, where he was selected for the honor of delivering a commencement address.

Luis Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books, including his memoir, *Always Running: La Vida Loca, Gang Days in L.A.*, which has won numerous awards. He has also published articles in leading newspapers, and he founded Youth Struggling for Survival, a community organization for troubled youths in Chicago.

Terry K. Ray attended Luther College and the Northwestern University School of Law. He has served as a trial attorney for the Department of Justice Tax Division and as an Assistant United States Attorney, prosecuting tax crimes. Today he is a white-collar defense attorney in Dallas. He has participated in and initiated mock trials at inner city

schools and received a grant from the State of Illinois to teach youngsters in the Venice School District how to resolve conflicts without resorting to violence.

T.J. Parsell is a successful software executive and one of the country's leading advocates against prison rape. He authored a book about his experiences in prison, *FISH: A Memoir of a Boy in a Man's Prison*, which was published in 2006. This fall he will enter the graduate film school at New York University.

Ishmael Beah is a United Nations Children's Fund (UNICEF) Advocate for Children Affected by War. He speaks at conferences on children's welfare around the world. A graduate of Oberlin College, he has written a memoir, *A Long Way Gone*, which has become an international best-seller.

Although they are now successful adults, *Amici* made terrible mistakes as teenagers. They are living, breathing testaments to the resiliency, adaptability, and rehabilitative potential of juvenile offenders.

SUMMARY OF ARGUMENT

As the experiences of *Amici* show, it is fundamentally inhumane to give up on a youthful offender. The same distinctive characteristics of youth that render capital punishment unconstitutional for juvenile offenders make it equally improper to sentence them to life in prison without the possibility of parole. As this Court recognized in *Roper v. Simmons*, 543 U.S. 551 (2005), children are less susceptible to deterrence, less deserving of retribution, and, crucially, much more capable of rehabilitation. Like a death sentence, a

sentence of life in prison without the possibility of parole ignores these important differences between adults and children.

As individuals who committed serious criminal offenses as juveniles but who subsequently have realized their mistakes, atoned for them, and rehabilitated themselves, *Amici* are uniquely situated to provide insight into the difficult issues presented in these cases. One of the *Amici* has helped to enforce the laws of the United States; another helped to write them. Others have made important national and even international contributions to social justice, culture and the arts, and business. Their stories, and the stories of others like them, prove that no matter how broken their spirit, nor how violent their actions, juveniles can be redeemed and can make contributions to society that would be tragic to lose. It is impossible to know what any juvenile offender will grow up to become. But it is also impossible to conclude that any juvenile offender has no redeeming potential, and therefore should be locked away for life with no possibility of parole. Although *Amici* come from a variety of backgrounds, each of them understands firsthand and proves the limitless potential of young people to change. They speak today with one voice and urge this Court to rule in Petitioners' favor in these cases.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT.

This Court has repeatedly endorsed the view that juveniles are "categorically less culpable than

the average criminal." *Roper*, 543 U.S. at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). In *Roper*, the Court pointed to three "general differences" between juveniles and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569-70. First, juveniles' immaturity and susceptibility to irresponsible behavior makes their irresponsible conduct less morally reprehensible than that of adults. *Id.* Second, juveniles are more vulnerable to negative environmental influences and pressures, including peer pressure. *Id.* at 569. This vulnerability, combined with a relative lack of control over their immediate surroundings, allows greater forgiveness to juveniles for bad behavior. *Id.* at 570. Finally, juvenile personalities are not fully developed. The signature qualities of youth are transient, leaving open the possibility of maturity and personal growth. *Id.* at 569-70.

This Court has also explained that punishments are justified under one or more of three principal rationales: retribution, deterrence, and rehabilitation. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008). In *Roper*, this Court recognized that the first two of these justifications apply to juveniles "with lesser force" than to adults. 543 U.S. at 571. The case for retribution is less strong for a minor because the culpability and blameworthiness of juveniles is significantly diminished by their youth and immaturity. *Id.* These same characteristics also

suggest that juveniles will be "less susceptible to deterrence." *Id.*

The third justification for punishment – rehabilitation – is of course not applicable to a sentence of life imprisonment without parole, just as it does not apply to the death penalty. Yet the same characteristics that decrease the culpability of juveniles and make them less susceptible to deterrence increase their prospects for rehabilitation. As the Court noted in *Roper*, the reality that juveniles are still in the process of defining their identity diminishes the presumption that a heinous crime is evidence of irretrievably depraved character. *Id.* at 570. It would be misguided to equate the failings of a minor with those of an adult, "for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* The incredible potential for such reformation is the focus of this brief.

When a juvenile offender commits a serious criminal offense, the State retains authority to take basic liberties away from that offender. *Id.* at 573-74. What the State cannot do, however, is to "extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* This brief provides examples of the important contributions that can be made by youth when they are given a second chance – the chance to attain a mature understanding of their own humanity, and to share it.

These examples are necessarily anecdotal. Undoubtedly there are many more former juvenile offenders with stories like those of the *Amici*, just as there are others who do *not* go on to become

Senators, authors, and human rights activists. However, the examples set forth in this Brief do dramatically illustrate that the goals of rehabilitation, deterrence, and retribution are *not* served by sentencing juveniles to life in prison without parole. Had the *Amici* received such sentences, they never would have had the opportunity to discover and cultivate their impressive talents, and society never would have benefited from their undeniable contributions.[2]

II. THE LIFE STORIES OF THE *AMICI* SHOW THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT AND THAT INCARCERATING A YOUTHFUL OFFENDER FOR LIFE WITHOUT PAROLE CAN BE A TREMENDOUS LOSS TO SOCIETY.

A. Charles S. Dutton

Charles S. Dutton is one of the nation's most respected actors and directors. He has received two Tony Award nominations for his performances on the Broadway stage and has been honored with Emmy Awards for his acting and directing on television.

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[2] *Amici* do not condone in any way the crimes committed by the petitioners in the cases before the Court. Nor are *Amici* in a position to evaluate the appropriate criminal sanctions that these particular defendants, or any other defendants convicted of serious offenses, should receive for their crimes. Strong criminal sanctions, including lengthy periods of incarceration, often are appropriate for individuals who have committed serious criminal offenses. However, *Amici* also strongly believe that when a juvenile commits a crime, even a serious offense, a constitutional system of justice cannot conclude that no possibility of rehabilitation exists and that the only recourse is a term of life imprisonment without the possibility of parole.

Yet his path to success did not begin at the Yale School of Drama, from which he earned his Masters of Fine Arts degree, but years earlier, during his third and final stint in Maryland State Prison.

Dutton grew up in the Latrobe Homes housing projects in Baltimore. His childhood bedroom overlooked the Maryland Penitentiary, an imposing and dark gothic structure built in the early 1800s. Dutton saw that prison every day and night from birth. "We all expected to end up there," he says, "because all the older guys we knew were there. It was as if I was born for it."[3]

Dutton was first sent to a juvenile reform school when he was thirteen, and he bounced around the juvenile system for several years. "I thought there

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[3] *Amici* speak directly to the Court in this Brief, and each adopts the statements attributed to him herein as his own. However, the stories of the *Amici* have been told before in a wide spectrum of public media. *See, e.g.,* Ishmael Beah, *A Long Way Gone* (2007) (Ishmael Beah); Ernest Hooper, *After Jail, Arts Pave Way Back Into Life*, St. Petersburg Times, Sept. 14, 2007, *available at* http://www.sptimes.com/2007/09/14/Columns/After_jail__arts_pave.shtml (Charles Dutton); *Second Chances: 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice* at 35, 41 (Justice Policy Institute & Children and Family Justice Center, 1999), *available at* http://www.cjcj.org/files/secondchances.pdf (Alan Simpson and Terry Ray); T.J. Parsell, *FISH: A Memoir of a Boy in a Man's Prison* (2006) (T.J. Parsell); Lonnae O'Neal Parker, *From Inmate to Mentor, Through Power of Books*, Wash. Post, Oct. 2, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100101160.html (Dwayne Betts); Mike Sonksen, *The Redeemer Speaks,* O.C. Weekly, Dec. 1, 2005, *available at* http://www.ocweekly.com/2005-12-01/culture/the-redeemer-speaks/ (Luis Rodriguez).

was more going on in the street corner than in the classroom." In order to look "tough" to his cohorts, Dutton felt the need to be imprisoned in more and more severe establishments, in what he describes as a "morbid rite of passage." "You gained 'rep' by being tough. If you were in City Jail, people would say, 'you ain't tough. You need to go to the Farm, or the Cut," slang for other Maryland detention facilities. "You ain't done nothin'."

When he was seventeen, Dutton was involved in a street fight that escalated into a knife fight. He and his assailant stabbed each other. Only Dutton survived. He was convicted of manslaughter and sentenced to five years of imprisonment. Dutton was out on parole for only a few months when he returned to prison for possession of a deadly weapon (a handgun). When a prison riot broke out, Dutton participated and punched a guard. He was sentenced to an additional eight years of imprisonment. "I knew what I was doing," he says. "For a long time I didn't want to hear anything positive. I just wanted to know when we were going to burn down the prison."

In 1974, during his last prison stint, Dutton was put in the "hole" – solitary confinement – for refusing to clean toilets. He was fed only every seventy-two hours. "The only thing you were allowed to bring with you into the hole was one book. I brought in an anthology of plays that my girlfriend sent me from the outside. I had meant to grab a different book, actually, but took the plays by mistake," he says. "For the first three days, I couldn't read it. The hunger hurt too badly. But after that, by the light that shone through the two inches between the door

and the floor, I lay flat on my stomach and read for days." One play in the anthology was *A Day of Absence* by the famous African-American playwright Douglas Turner Ward. "Reading that play sparked me in a way that allowed me to rediscover my own humanity," Dutton recalls.

When Dutton left "the hole," he convinced the warden and a prison teacher, who was also a local actress, to start a prison drama program. Preparing for the group's weekly meetings and rehearsals gave him purpose. While in prison, he received his G.E.D. and then an Associate's Degree in theater. After his release, he earned a Bachelor's Degree in theater from Towson State University and acted for two years in Baltimore. He applied and was accepted to Yale University's School of Drama – one of the top drama schools in the country. "When I used to wander the campus at night, looking at the buildings and statues, I used to think, 'wow, I don't believe this.' I have that same feeling today when I shoot a film or perform on a Broadway stage."

Dutton made his Broadway debut in 1984 in August Wilson's "Ma Rainey's Black Bottom," a performance that earned him a Theater World award and the first of his two Tony nominations. In 1991, Towson State University bestowed him with an honorary doctorate degree. Dutton has co-starred in several major motion pictures, and from 1991-1994 starred in the television series "Roc." In 2000, Dutton earned an Emmy Award for directing the acclaimed HBO mini-series "The Corner."

Dutton emphasizes that his redemption is not unusual. "I have buddies who are plumbers and brick masons and carpenters who've been out as long

as I've been out and been as productive with their lives," he says. He firmly believes the chance for a productive life is at its height with juvenile offenders. "I just can't fathom sentencing juveniles to life without parole," Dutton says. "I just talked in Florida to some kids with that sentence. It was just dawning on them after ten or twelve years that their lives were over. They were kids and now they're finished. There's a heart-wrenching sadness on their faces, and you can see the fight is out of them. If they were given a second chance, they'd be changed human beings."

"As long as it's a young mind," he says, "they're salvageable. At those tender ages, the mind is still pliable and can be shaped. It's not too late."

B. Senator Alan K. Simpson

Alan K. Simpson is an accomplished former Member of the United States Senate and a leader of the Republican Party. He served in the Senate for eighteen years, from 1979 to 1997, rising to become the Republican Whip. When Simpson announced his candidacy for the Senate in 1977, one man stood out in the crowd: J.B. Mosley, Simpson's probation officer. When Simpson was a juvenile – long before he finished college, law school, and eventually became a candidate for the Senate – Simpson was convicted of a serious federal offense and engaged in other conduct that could have led to other serious criminal offenses and, under certain regimes, a potential life sentence. In Simpson's words to this Court, "I was a monster."

One day in Cody, Wyoming, when Simpson was in high school, he and some friends "went out to do

damage." They went to an abandoned war relocation structure and decided to "torch" it. They committed arson on federal property, a crime now punishable by up to twenty years in prison if no one is hurt, *see* 18 U.S.C. § 844(f)(1), and punishable by up to life in prison if the arson causes a person's death, *see id.* § 844(f)(3). Luckily for Simpson, no one was injured in the blaze.

Simpson not only played with fire, but also with guns. He played a game with his friends in which they shot at rocks close to one another, at times using bullets they stole from the local hardware store. The goal of the game was to come as close as possible to striking someone without actually doing so. Again, Simpson was lucky: no one was killed or seriously injured.

Simpson and his friends went shooting throughout their community. They fired their rifles at mailboxes, blowing holes in several and killing a cow. They fired their weapons at a road grader. "We just raised hell," Simpson says. Federal authorities charged Simpson with destroying government property and Simpson pleaded guilty. He received two years of probation and was required to make restitution from his own funds – funds that he was supposed to obtain by holding down a job.

J.B. Mosley became Simpson's probation officer. Simpson resisted Mosley's efforts, earning money at the local pool hall and reporting to Mosley (sarcastically) that he was going to "choir practice." One late night in Laramie, Simpson arrived at a bar popular with African-Americans. He saw a man leaving the bar who had just been in a knife fight inside. Simpson asked what happened. The man

uttered racial slurs, and Simpson responded that, with that attitude, the man was at the wrong bar. The man attacked Simpson and Simpson shoved the man down – just as the police arrived.

The police separated the men and, believing Simpson was responsible for the man's knife wounds, attempted to arrest Simpson. In his words, Simpson then "belted the cop" who was holding him. The officer responded by striking Simpson in the head with a billy club. As Simpson reports, "I still carry a lovely little crescent above my eyebrow as a reminder of how stupid one can get." The officers arrested Simpson and locked him up. His girlfriend (and now wife of fifty-five years) refused to bail him out. Simpson spent the night in a "sea of puke and urine."

For Simpson, that night triggered what he describes as "creeping maturity" – a resolve that he would avoid further trouble with the law and become a productive member of society. As he has described it, "The older you get, the more you realize . . . your own attitude is stupefying, and arrogant, and cocky, and a miserable way to live." With the help of Probation Officer Mosley, Simpson began to redeem himself.

Simpson went on to graduate from the University of Wyoming with a Bachelor of Science degree in 1954 and a law degree in 1958. He served in the United States Army from 1954 to 1956, in various state-level attorney positions from 1958 to 1959, as a United States Commissioner from 1959 to 1969, as a private attorney for many years, and as a member of the Wyoming House of Representatives from 1965 to 1977. He and his wife Ann also raised three children.

Simpson was elected to the United States Senate in 1978. During his tenure, he served as Republican Whip from 1984 to 1994, and he was considered as a potential candidate for Vice President in 1988. He served principally as Chairman of the Senate Veterans Affairs Committee, and also held many other posts in the Senate.

Simpson declined to run for reelection in 1996 and went on to teach at and later to direct the Institute of Politics at Harvard University's John F. Kennedy School of Government. In 2006, he was a member of the Iraq Study Group. He has been an outspoken advocate for equality for all persons regardless of race, color, creed, gender, or sexual orientation. Among many other honors, Simpson has received Honorary Doctor of Laws degrees from the University of Wyoming, Notre Dame, and American University, as well as the Thomas Jefferson Award in Law at the University of Virginia.

Alan Simpson was involved in activities as a youth that could have led to a lengthy prison term. He engaged in felonious and violent conduct that posed a serious risk to life and property. Had circumstances been different – had he not been fortunate regarding where his stolen bullets struck or what was damaged by his arson – he might have been jailed for the rest of his life. But the system did not treat him so harshly. It gave him a second chance, including the help of a probation officer who, in Simpson's view, had a great influence on his life and helped him make it to the moment where he stood before a crowd in Wyoming, asking to be elected to the United States Senate.

C. R. Dwayne Betts

On May 21, 2009, Reginald Dwayne Betts became his family's first college graduate when he received his bachelor's degree in English from the University of Maryland. He had the honor of being chosen to give a commencement address at graduation. Standing before thousands of spectators and his fellow graduates, Betts recalled a day twelve years earlier when he stood as a teenager in a Virginia courtroom and was sentenced to prison. "My journey," Betts said, "began the moment my life became a derailed train headed toward the state penitentiary."

In 1997, sixteen-year-old Betts and a friend took a joyride in a stolen car. They came across a man asleep in his car near a Northern Virginia shopping mall and decided to carjack the man. Betts had a gun. He pointed it at the car window, stole the man's wallet, and drove off with the car. Betts was arrested the next day. Asked later about his motivations, Betts said, "I did it for all kinds of reasons I can't clearly reason out. At that moment I wanted to do it, and I had no idea that it would define me for the rest of my life."

Betts was convicted of carjacking, use of a firearm during a felony, and attempted robbery. Although he had never before been arrested, he was certified as an adult. He faced a possible life sentence, but was sentenced to fifteen years for carjacking, five years for attempted robbery and three years for the use of a firearm in the commission of a felony. After the judge suspended all but six years of the fifteen-year sentence, and ran

it concurrently with the five-year robbery sentence, Betts was left facing a nine-year prison sentence. He recalls the judge saying, "I'm under no illusions that sending you to prison will help you."

Prior to his arrest, Betts had drifted between his school life and his social life. An avid reader, he qualified for his school's gifted program, made the honor roll, and was elected class treasurer. But Betts was restless and, as his mother noted, thought he could talk his way out of anything. His group of friends consisted of boys who were mainly failing, so Betts hid his college potential and aspirations. Although he remained on the honor roll and excelled in his honors classes, Betts began to get into trouble. He started getting high with the boys in his neighborhood after school. Over time, his drug use increased and he began cutting classes. Nevertheless, his mother and teachers did not notice his downward spiral, because he continued to excel in class. Looking back, Betts says, "I guess I didn't set off any alarms in anybody's head."

After his arrest, Betts "closed my eyes hoping it would go away." But of course it did not, and he soon realized he would remain locked up for a long time. He spent the rest of his adolescent years trying to maintain his sanity and sense of self, living in a prison environment ruled by violence. In that world, Betts learned, "you are either predator or prey." During his first two years in prison, Betts spent almost a full year in solitary confinement for what he calls "incidental contact with correctional officers." Although solitary protected Betts from the danger of always being the youngest person in the room, his constant fears of violence gave way to a worry that

prison would harden him, would turn him into someone he knew he was not.

As he had done as a child, Betts escaped into books. He began writing as well to pass the time. He wrote to his mother every week, and he started writing essays and poetry. Betts knew that one day he would be released back into society, and he did not want to have wasted the years he was incarcerated. He knew he needed a skill once he was released from prison, and he focused on writing. "I took everything seriously because I knew I had a release date," he says. "I wrote my way out of that world."

Betts says that "if I had gotten life without parole, I would never have written those poems and essays." There is an "absolute loss of hope" for juveniles sentenced to life in prison, and "no push to do anything at all." Betts met several such inmates while in jail, and none of them tried to develop skills or improve themselves. Instead they became "part of that world, predator or prey," uninterested in doing anything constructive with their lives.

Betts now has been out of prison for four years. He is making the most of his second chance. "Prison gave me a skill to market, and a story to tell," he says. "I had seventeen hours a day for nine years just to read, study, and exercise – all to prepare for my release." Since his release, Betts has proved he can be a productive member of society. He is, indeed, "not the person I was when I was locked up."

After his release, Betts enrolled at Prince George's Community College. He served in the student government, was the Phi Theta Kappa honor society president, and edited the college's literary

journal. His grades earned him a spot in the school's Honors Academy and a full tuition scholarship to attend the University of Maryland. "The reason why I'm here today is because there were a number of people willing to give me a chance, who were willing to say 'no' to the voices that said I wasn't good enough," Betts has said. "To say 'no' to the voices that said I didn't deserve a chance."

His poetry has been published in several national magazines and journals, and he has won a number of writing contests and scholarships, including the Breadloaf Writer's Conference scholarship and a Holden Fellowship to attend the graduate program at Warren Wilson College. Later this year, Betts will publish a memoir, "A Question of Freedom," as well as a book of poetry. He is married and has a child.

Betts also has worked to give back to his community. At Karibu Books in Bowie, Maryland, Betts started a book club for young boys, to provide a space where the boys could read and share their thoughts about literature and life. Betts wanted to provide the boys with the kind of role model that he never had, so that they could avoid the mistakes he made. Betts also teaches poetry workshops for middle school students in Washington, D.C., as part of the D.C. Creative Writing Workshop.

Betts is remorseful for his actions and grateful for the opportunity to prove that he is not a criminal at heart, not a menace to society. "I made one mistake," he says. "It was not the sum total of who I was." He knows how fortunate he is to have this second chance. "It's difficult to see, right after trouble, that someone is deserving of an

opportunity," he says. "People are dying from the lack of opportunity every day. I'm very blessed."

Knowing that he would have another chance – that he had a release date – is what motivated Betts to work hard to prepare for life after prison. "I always knew I'd have this day, standing on a porch, looking outside," he muses. "Without that, there would just be no reason to think about life beyond a jail cell."

D. Luis Rodriguez

Luis Rodriguez was stealing things by the time he was seven years old, and at the age of eleven, he joined Las Lomas, a Los Angeles gang. As a teenager, Rodriguez says, "I was destructive and self-destructive. I was willing to shoot, stab and even kill for the gang – and I was willing to die for the gang as well. My world was extremely limited and I ended up becoming small to fit in this world."

Beginning when he was thirteen years old, Rodriguez repeatedly was arrested for stealing, fighting and disturbing the peace. He also became addicted to drugs. By age fifteen, Rodriguez had been expelled from school and thrown out of his house by his mother.

When Rodriguez was seventeen, a member of his gang was assaulted by a neighborhood club of white bikers. Rodriguez, deeply ensconced in gang culture, addicted to heroin, and seeking retaliation, shot one of the bikers. He was arrested as he fled the scene and was charged with assault with the intent to commit murder. Although those charges were dropped, a year later Rodriguez faced a six-year prison sentence for assaulting a police officer and

resisting arrest. Instead of giving up on him, the criminal justice system – based partly on letters of support from community members – gave him another chance, directing him to a county jail based on a lesser conviction.

Rodriguez has spent his life paying back the second chance he was given and doing so in spades. At nineteen, Rodriguez broke free of his drug addiction and took a series of low-skill jobs. Over the next four years he worked at Bethlehem Steel, with various periods spent as a carpenter, mechanic, foundry smelter, paper mill worker, and truck and school bus driver. He went back to complete high school, and after taking night classes at East L.A. Community College worked as a reporter and photographer for local weekly newspapers. He subsequently was accepted into a summer program for minority journalists at Berkeley, and at the age of twenty-six was hired as a daily reporter for the *San Bernardino Sun.*

Today, Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books of fiction, nonfiction, literature, and poetry. In 1993, Rodriguez wrote his memoir and signature work *Always Running: La Vida Loca, Gang Days in L.A.*, which he dedicated to twenty-five close friends who died during his gang days. The book, intended to steer Rodriguez's son away from gang life, has sold more than 300,000 copies, and received numerous accolades, including being named a *New York Times* Notable Book, and receiving the Carl Sandburg Literary Award and a *Chicago Sun-Times* Book Award. His freelance journalism has appeared in *U.S. News & World Report, The Chicago Tribune,*

The L.A. Times, and *The New York Times*. Rodriguez also has appeared on National Public Radio, the Oprah Winfrey Show, Good Morning America, CNN, BBC, Fox TV News, and Jim Lehrer's NewsHour.

Returning full circle, in 1994 Rodriguez helped found Youth Struggling for Survival, a community organization that works with gang and non-gang youth in Chicago. He believes that "if properly seen, mentored, assisted, guided, and initiated, young people have immense capacities for change and transcendence. I have seen this in the work I do with gang and other troubled youth, as well as in my own teen years when I left the gang and drugs, including heroin." Today, he testifies as a gang expert and has filed affidavits and appeared in over fifty cases. Rodriguez also spends time speaking in juvenile facilities, prisons, homeless shelters, and detention centers. He says, "Adults today give up on youth when the going gets rough. Youth is youth for a good reason. Youth are very malleable and it is society's obligation to try to change them. I am living proof of the capacity for change."

E. Terry K. Ray

In 1961, eleven-year-old Terry Ray entered Chicago's primary juvenile detention center, the Audy Home, after injuring a friend during a neighborhood rock fight. Ray had regularly been abused at home. Over the years that followed, Ray's anger swelled and he committed a series of increasingly violent offenses.

As a youth, Ray bore all the hallmarks of an incorrigible, recidivist violent criminal. He

repeatedly fought with other students, at times responding with extreme violence to the slightest provocation. At age eleven, he stabbed a classmate in the leg with scissors, and then stabbed the teacher who tried to break up the fight. He attached a combination lock to a metal chain and then pummeled another student with it. One day when he was sixteen, he marched toward his school with a gun, intending to attack a teacher. An alert police officer intercepted Ray, beating him severely. "I was a very violent young man," Ray says. "I was a very angry young man."

Ray spent his teen years drifting in and out of the juvenile justice system. For Ray, incarceration meant stability and safety. It meant protection from the abuse he faced at home. He explains, "I felt much, much better locked up than on the streets. The food was better. The living conditions were better. I had friends."

After his final release from juvenile detention, Ray enrolled in a junior college and took a job as an orderly at a local hospital. One counselor at the college recognized that he had significant academic potential and encouraged him to avoid further trouble by leaving Chicago to complete his education. Ray listened, transferring to and eventually graduating with honors from Iowa's Luther College. He then attended Northwestern University School of Law. After graduating, Ray earned a Master of Legal Letters degree in taxation from Washington University School of Law.

Despite these degrees, Ray initially had trouble finding a job. After he had worked for fourteen months for an insurance company, two law school

professors helped him arrange for an interview with the Department of Justice Tax Division in Washington, D.C. Ray – who at one point had seemed destined to spend his adult life in and out of prison – became a trial attorney for the United States. He later became an Assistant United States Attorney, prosecuting street crime cases in Washington, D.C., and eventually was hired to lead the Tax Fraud Prosecution Unit in the U.S. Attorney's Office in Dallas, Texas. When he left that post in 1987, the Internal Revenue Service thanked him for his service by making him an honorary special agent.

Ray is now an attorney in private practice in Dallas. Throughout his career, he has reached out to juvenile offenders and at-risk youths, teaching them to resolve conflicts without resorting to violence. "Sometimes we don't take the time to look at someone as an individual," Ray says. "We look at something a person did in one second, five seconds, or ten minutes and say that the person has no possibility of ever overcoming that moment. But those people who make it out – they have an extra gear, and they can do remarkable things."

F. T.J. Parsell

T.J. Parsell is a successful software executive, author, and human rights activist. But after convictions for larceny and armed robbery as a juvenile, his life might have been quite different.

Parsell grew up in Michigan, raised by a family with a "long history of trouble." As he relates, "my grandfather, father, uncle, brother, and stepbrother all served time in a juvenile reform school or went to

prison." Parsell describes a family with "twisted ethics" – where it was almost expected that he would end up behind bars.

In 1978, Parsell was seventeen and worked at a hotel, and so he had keys to all of the guest rooms. He often invited friends to drink alcohol, party, and stay the night in the empty rooms. He even stole items from occupied rooms. He was caught and agreed to plead guilty in exchange for probation. The larceny charge could have carried a ten-year prison sentence. *See* Mich. Comp. Laws § 750.356. While out on bail for that offense, Parsell held up a Photo Mat with an imitation gun and stole money from the proprietor. Parsell was arrested the following day and charged with armed robbery, a crime for which he could have spent the rest of his life in prison. *See* Mich. Comp. Laws § 750.529.

The state courts sentenced Parsell as an adult to two-and-a-half to four years of imprisonment on the larceny charge (because Parsell already had violated any probation he might have been granted) and delayed sentencing on the armed robbery for several months. While in the county jail, awaiting assignment to a state prison, Parsell met with the prison psychologist who informed him that because he had not yet been sentenced for armed robbery, and because armed robbery could subject him to a life sentence, Parsell would be "going inside" – meaning "inside the walls of maximum security." After the psychologist noted that Parsell was "dangerous," Parsell was transferred to the Riverside Correctional Facility – "a close-custody prison for inmates serving long sentences, usually ten or more years."

Parsell was terrified. When he arrived at Riverside, he "felt a sudden urge to scream," but kept it hidden. "I could not let the other inmates see how the sight of the prison's massive walls hit me like I was entering a slaughterhouse." On his first day in the general population, an inmate spiked Parsell's drink with Thorazine, a powerful sedative. Parsell was dragged to a cell, where four inmates gang-raped him. They flipped a coin to see who would "own" him for the rest of his prison time. Only a few weeks earlier, Parsell was reading comic books at home. Now, after stealing property from a Photo Mat, Parsell was the property of another person: an inmate nicknamed Slide Step, who won the coin toss.

Parsell was then transferred back to county jail for sentencing on his armed-robbery charge. Here, outside of Slide Step's "protection," Parsell was gang-raped even more brutally than he had been at Riverside. When the probation officer preparing his presentence report made a sexual advance, Parsell rebuffed it. He then received a harsh sentencing recommendation, and the judge sentenced him to four-and-a-half to fifteen years in prison.

Parsell was transferred to a medium-security facility called the Michigan Training Unit, which stressed rehabilitation. It helped Parsell turn his life around. "The school and the library became my sanctuaries," he reports. A woman named Miss Burt, the classification director, was starting a prison newspaper. "She brought her passion for making a difference to the position, and so she stood out," he recounts. "She was like an angel." Simply by calling Parsell by his first name (Tim), she made him "believe that I was human again." As he recalls,

"what a difference it made to be treated with dignity in a place that didn't seem to value it much."

Parsell wrote for the prison newspaper – called the *Oracle*, because the inmates on the paper analogized Miss Burt to a priestess "through whom a deity is believed to speak." Recounting Miss Burt's impact, Parsell says: "Here was this woman, a black woman in a man's world, who was better educated than anyone I'd ever known. She stuck up for me as my mother never had. Now that I was getting an education I was starting to understand what it meant not to have one." Finally, Parsell says, "I could see that through education there was possibility." Parsell completed his G.E.D. and twenty months of his college education in prison.

Parsell left prison in 1982. He took a typing job – "it was my only marketable skill" – and put himself through night school to complete his undergraduate degree. He graduated with honors from St. Francis College and went on to work in the software industry. "I got therapy, I got sober, and I started to do well." He went on to become a top executive at several technology firms, ultimately rising to become vice president of sales at a major publicly traded software company.

Following his brother's death and the September 11, 2001 terrorist attacks, Parsell made a decision to confront issues he long had repressed. "I felt extremely fortunate to have been able to transcend the mistakes of my earlier life." He decided to write and talk about his experiences in prison. His memoir, *FISH: A Memoir of a Boy in a Man's Prison* (Carrol & Graf), was published in 2006 and won the Pass Award for Literature by The National Council

on Crime and Delinquency. Since then, Parsell has become one of the nation's leading advocates against prison rape. He is president of the human rights group Stop Prisoner Rape. He worked with the Justice Department to set up the National Prison Rape Elimination Commission and with the Bureau of Justice Statistics and the National Institute of Corrections on various ways of quantifying and preventing prison rape. He helped produce an inmate orientation video, which is shown to all new incoming prisoners in the United States, outlining ways in which inmates can avoid prisoner rape.

This fall, Parsell will enter the graduate film school at New York University. He plans to turn his memoir into a feature film. Unsurprisingly, "being a poster child for prisoner rape was not high on my list of ambitions," Parsell says. "I'm taking back the voice that was stolen from me when I was seventeen years old. And I know that others, no matter how far down a wrong path they may have gone, or how far they've fallen, can do the same."

G. Ishmael Beah

Like the other *Amici*, Ishmael Beah is today a highly accomplished individual who is making the world a better place. His background is very different from the others, however, and far more extreme. In a foreign country, as a literal child-soldier in a militia army, Beah engaged in the atrocities of murder and torture. But his story equally illustrates the potential of youth to grow and change.

Today Beah is a best-selling author, a United Nations Children's Fund (UNICEF) Advocate for

Children Affected by War, and a member of the Human Rights Watch Children's Rights Division. He has devoted his adult life to advocating rehabilitation for children who have committed brutal acts, focusing on the amazing capacity of young people to transform their lives.

Beah grew up in Sierra Leone, and his home region was engulfed in warfare in his early teenage years. After the death of his family, he tried to flee to safety until he was forced to join the government army, as this became the only way to ensure his survival. He was initially reluctant to be a soldier, but rapidly became accustomed to the extreme violence that surrounded him. At age thirteen, he learned to fire a gun, to handle a bayonet, and to find motivation by focusing on his hatred for the rebel army, which had killed his family.

In the years after he enlisted, Beah aspired to be a fierce and deadly soldier, modeling himself after the Rambo movies. He practiced beheading rebels with a bayonet; he shot prisoners in their feet and kept them living for hours in excruciating pain before finally killing them; he led small bands of soldiers in massacring entire villages. When Beah was fifteen, UNICEF workers managed to get him out of the army – entirely against his will – and into a refugee camp. On his first night in the camp, as the UNICEF workers looked on in horror, Beah and other former child soldiers started a pitched battle of fists, grenades, and bayonets that eventually left six boys dead. As the UNICEF workers struggled to bring the boys back to some semblance of normalcy, the boys ripped apart furniture, walls, windows, and

anything else they could find, so inured had they become to a lifestyle of violence and ruin.

Looking back on that time now, Beah recognizes that the violence was a way to keep himself from thinking about what he and his family had suffered. But it was only the opportunity given to him by the UNICEF workers that allowed him to "discover himself" and realize that he could be more than a mindless agent of destruction. At the camp, UNICEF workers constantly told Beah that he had been just a boy when he committed his crimes, and that it wasn't his fault. After being given "time and space" to heal, Beah began to come to terms with what he had done as a teenager. He moved to the United States in 1998 and finished his last two years of high school at the United Nations International School in New York. In 2004, he graduated from Oberlin College with a Bachelor of Arts degree in political science. Within a few years, he was speaking at conferences on children's welfare all around the world. In 2007, he published the memoir *A Long Way Gone*, which has become an international best-seller.

Beah's time spent immersed in fighting and acts of criminality gives him a deep sympathy for other children trapped in a similar cycle of violence. Although the circumstances in America are very different from those in Africa, he believes that the forces that push people to criminal activity are fundamentally the same in both places. "Not every child who fights wants to be a child soldier," he explains. "Many have bad home lives and can fall victim to those who would pull them into a life of violence as a solution from their abuse or suffering."

Whether in Florida or Sierra Leone, violence or theft "becomes normalized because it becomes the only way to live." What children see, he believes, is what they will do.

Beah knows that there is no easy solution for juvenile crime, and that different methods are effective for different people. Still, he is certain that a lifetime in prison is not the answer: "There's more trauma in prison than what I'd been put through. Punitive measures for kids just don't help." If Beah had been in an American-style prison, he believes, he would have been left to "push myself into despair, wallowing in the trauma of what happened" instead of getting a chance to discover his own potential and eventually educating the world about African wars and the rehabilitation of child soldiers.

Beah has seen some of the worst things that teenagers can do, if pushed far enough, and he grasps the fundamental similarity between his own life and some of the excruciating histories of juveniles serving life sentences in America. His goal now is to prevent such sentences from being imposed, so that young people like him "can tell others, instead of being locked away."

"Children who commit crimes lack the moral and psychological underpinnings of adults," he says, "but they're also more resilient, so it is very possible to change. And it is only through rehabilitating such children and youth that we are able to learn how to prevent a similar situation from happening to others." Beah's own story illustrates that a youth who has committed even the most horrific crimes can, given another chance, build a joyful and meaningful life. Because he was not judged solely on

who he was as a fifteen-year-old, he says, "I discovered my own potential and have become a productive member of society."

* * * * * * * * *

The stories of the *Amici* are only a handful of countless more that exist, many of which properly are confidential under existing juvenile court rules. Not every juvenile offender goes on to become an acclaimed actor, a United States Senator, a poet, or a software executive. Indeed, not every juvenile offender will be rehabilitated. But because no child is a finished product, every child has the potential to be redeemed, and if given the opportunity many will accomplish great things.

A sentence of life in prison without the possibility of parole, like a death sentence, extinguishes all hope that a juvenile offender might one day contribute to his or her community as have Charles Dutton, Senator Alan Simpson, Dwayne Betts, Luis Rodriguez, Terry Ray, T.J. Parsell, Ishmael Beah, and others like them.[4] "When you get a life sentence, you have no reason to think about the future. You only think about the day to day," says Betts. "If I know I can never get out of prison, that's as good as dead to me," says Dutton. "I would prefer the death penalty to a life sentence without the possibility of parole."

This Court found in *Roper* that juveniles are less culpable than adults, that their minds are not fully developed, and that they are more subject to peer pressure and other environmental factors. *Amici*

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[4] *See Second Chances, supra.*

know from their experiences that, upon attaining adulthood, juvenile offenders often can overcome their troubled pasts.

The Eighth Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). *Amici* submit that evolving standards of decency compel the conclusion that a juvenile offender may not be sentenced to life in prison without parole as punishment for a non-homicide offense. The personality of such an offender is still too unformed, and the potential for productive contributions to society simply too great, to allow such a result. In Senator Simpson's characteristically blunt and common-sense words, "Anybody in our society – unless they are totally out to lunch – can understand that a guy of twenty-five or thirty-five is not the same guy of seventeen. You can't just throw a kid in the clink forever."

CONCLUSION

For the foregoing reasons, the decisions of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

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July 23, 2009

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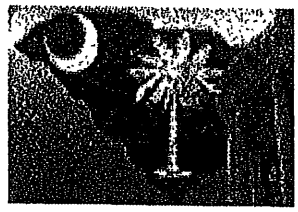

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Case Number:	E712647	**Court Agency:**	General Sessions	**Filed Date:**	12/05/1996
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Disposed	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Floyd, Henry F
Disposition:	Trial Guilty				
Disposition Date:	05/08/1997	**Date Received:**	12/04/1996	**Arrest Date:**	12/02/1996
Law Enf. Case:		**True Bill Date:**	01/14/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400094	**Waiver Date:**	
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Charges

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Kelso, Lu	0116-MURDER/MURDER	0116-MURDER/MURDER	05/08/1997

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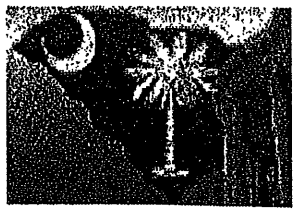

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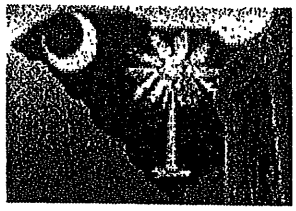

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Kelso, Lu Rene	0049-CONSPIRACY/CRIM CONSP, C/L CONSP DEFIN	0049-CRIMINAL CONSPIRACY	05/08/1997

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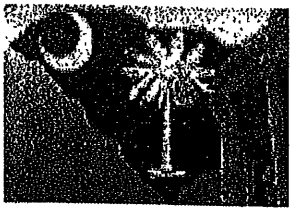

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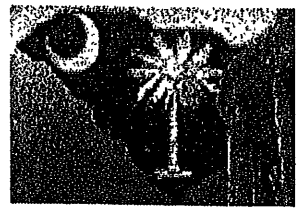

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Kelso, Lu Rene	0549-WEAPONS/POS DUR VLCRM IF NOT SEN 2 LW/	0549-WEAPONS/POS DUR VLCRM IF NOT SEN 2 LW/	05/08/1997

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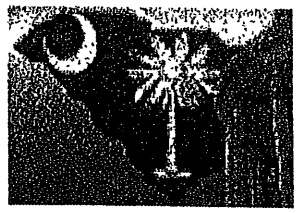

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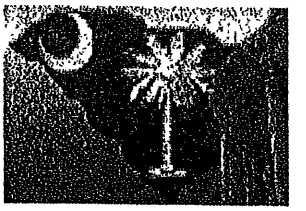

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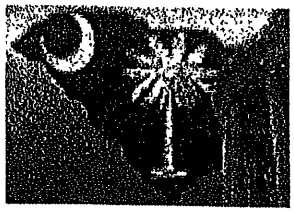

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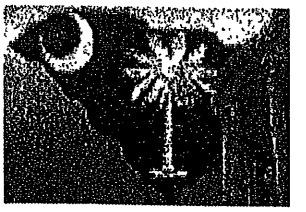

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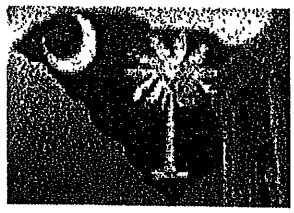

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Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Disposed	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Floyd, Henry F
Disposition:	Trial Guilty				
Disposition Date:	05/08/1997	**Date Received:**	01/14/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	01/14/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400096	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	THIRTY (30) YEARS.					

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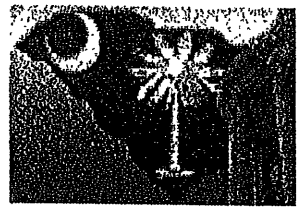

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The State of South Carolina VS Ronnie Jordan

Case Number:	E712646	**Court Agency:**	General Sessions	**Filed Date:**	04/18/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	04/18/1997	**Arrest Date:**	04/16/1997
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400962	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Jordan, Ronnie	0116-MURDER/MURDER	0116-MURDER/MURDER	05/19/1997

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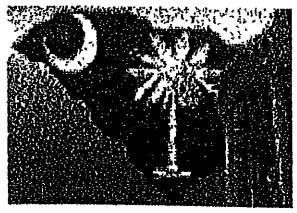

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The State of South Carolina VS Ronnie Jordan

Case Number:	E712646	**Court Agency:**	General Sessions	**Filed Date:**	04/18/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	04/18/1997	**Arrest Date:**	04/16/1997
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400962	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	FIFTY-FIVE (55) YEARS.					

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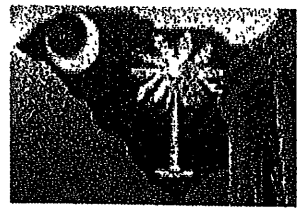

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400958	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400958	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Jordan, Ronnie Lowe	0079-BURGLARY/(AFTER 6/20/85)-1ST DEG	0079-BURGLARY-1ST DEGREE	05/19/1997

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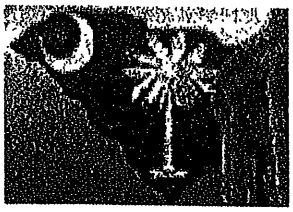

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400958	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400958	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	FIFTY-FIVE (55) YEARS.					

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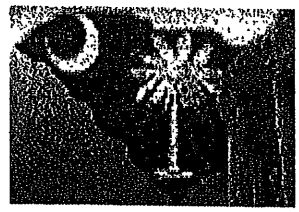

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400959	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400959	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Jordan, Ronnie Lowe	0139-ROBBERY/ARMED OR ALLEGED W/DEADLY WEAP	0139-ROBBERY - WITH A DEADLY WEAPON (ARMED	05/19/1997

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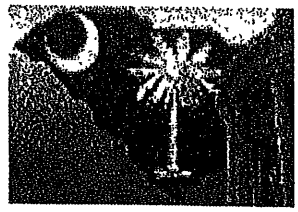

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400959	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400959	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	THIRTY (30) YEARS.					

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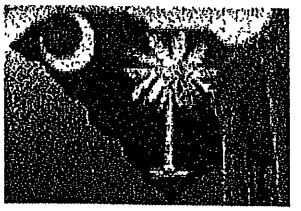

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400960	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400960	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Jordan, Ronnie Lowe	0549-WEAPONS/POS DUR VLCRM IF NOT SEN 2 LW/	0549-WEAPONS/POS DUR VLCRM IF NOT SEN 2 LW/	05/19/1997

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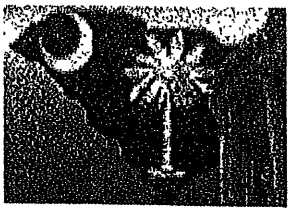

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400960	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400960	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	FIVE (5) YEARS.					

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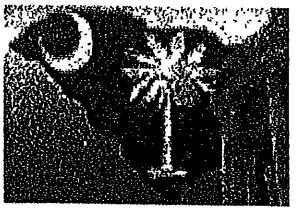

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400961	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400961	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Jordan, Ronnie Lowe	0049-CONSPIRACY/CRIM CONSP, C/L CONSP DEFIN	0049-CRIMINAL CONSPIRACY	05/19/1997

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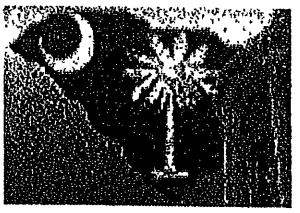

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The State of South Carolina VS Ronnie Lowe Jordan

Case Number:	1997GS0400961	**Court Agency:**	General Sessions	**Filed Date:**	05/14/1997
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**		**Disposition Judge:**	Floyd, Henry F
Disposition:	Pled Guilty				
Disposition Date:	05/19/1997	**Date Received:**	05/13/1997	**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**	05/13/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400961	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	FIVE (5) YEARS.					

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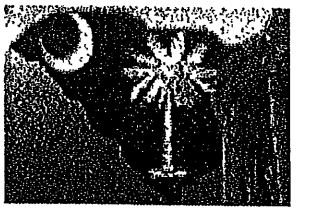

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The State of South Carolina VS Jennifer Titman

Case Number:	E712645	**Court Agency:**	General Sessions	**Filed Date:**	11/27/1996
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Hall, H Dean
Disposition:	Pled Guilty				
Disposition Date:	10/06/1997	**Date Received:**	11/26/1996	**Arrest Date:**	11/23/1996
Law Enf. Case:		**True Bill Date:**	01/14/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400175	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Titman, Jennifer	0217-MANSLAUGHTER/VOLUNTARY MANSLAUGHTER	0116-MURDER/MURDER	10/06/1997

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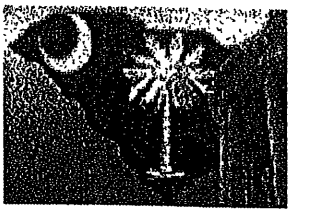

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The State of South Carolina VS Jennifer Titman

Case Number:	E712645	**Court Agency:**	General Sessions	**Filed Date:**	11/27/1996
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Hall, H Dean
Disposition:	Pled Guilty				
Disposition Date:	10/06/1997	**Date Received:**	11/26/1996	**Arrest Date:**	11/23/1996
Law Enf. Case:		**True Bill Date:**	01/14/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400175	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	15 YEARS; SUSP. 7 YEARS AND 5 YEARS PROBATION AND ATU.SENTENCE TO BEGIN 11/22/96. *SURCHARGE=$100* (NO PAYMENT PLAN, DEF. INCARCERATED). ** BOBRUCE 15 YEARS; SUSP 7 YEARS AND 5 YEARS PROBATION AND ATU SENT TO BEG 112296. SURCHARGE $100. (NO PAYMENT PLAN, DEFENDANT INCARCERATED)					

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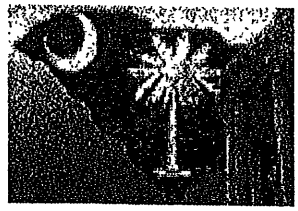

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The State of South Carolina VS Jason Conley

Case Number:	E712648	**Court Agency:**	General Sessions	**Filed Date:**	12/05/1996
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Hall, H Dean
Disposition:	Pled Guilty				
Disposition Date:	10/06/1997	**Date Received:**	12/04/1996	**Arrest Date:**	12/02/1996
Law Enf. Case:		**True Bill Date:**	01/14/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400064	**Waiver Date:**	
Probation Case:					

Parties | **Charges** | Sentencing | Associated Cases

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Conley, Jason	0217-MANSLAUGHTER/VOLUNTARY MANSLAUGHTER	0116-MURDER/MURDER	10/06/1997

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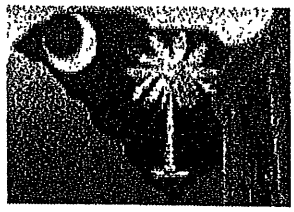

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The State of South Carolina VS Jason Conley

Case Number:	E712648	**Court Agency:**	General Sessions	**Filed Date:**	12/05/1996
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court	**Disposition Judge:**	Hall, H Dean
Disposition:	Pled Guilty				
Disposition Date:	10/06/1997	**Date Received:**	12/04/1996	**Arrest Date:**	12/02/1996
Law Enf. Case:		**True Bill Date:**	01/14/1997	**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	1997GS0400064	**Waiver Date:**	
Probation Case:					

Parties | Charges | **Sentencing** | Associated Cases

Sentencing

And/Or	Description	Amount Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	FIFTEEN (15) YEARS. *SURCHARGE=$100 (NO P/P, DEF. IS INCARCERATED) ** BOBRUCE FIFTEEN (15) YEARS; SURCHARGE $100. (NO P/P. DEF. IS INCARCERATED)					

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 06/07/11

MCSHARRY,JENNIFER L. FBI # [redacted] SID# [redacted] SCDC # [redacted]
OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
INSTITUTION ..: LEATH CORRECTIONAL INST. DORM.....: M20201A
SECURITY/CUST.: 3 MINIMUM IN RACE....:W SEX...:F
CURR INCARC SENT...:999 YRS 0 MOS 0 DYS PROJ MAXOUT DATE: 99/99/9999
CENTRAL MONITORING.: YES PROJ PAROLE DATE: 00/00/0000
SOCIAL SECURITY #...:[redacted] EWC JOB..: IND. GROUP/SECTION
EDUC PGM.: NO CURR EDUC PROGR
CURRENT PROGRAM..: NO CURRENT PROGRAM EWC LEVEL: 3F5 EEC LEVEL:
AGE...: 31 DATE OF BIRTH..:[redacted] ASSIGNMENT..: APPAREL PLANT

PREVIOUS NUMBERS:
** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS	MOS	DYS	COUNTY	SENTENCE START	V/NV	CATE
FIREARMS PROVISION	5	0	0	ANDERSON	9/12/1997	N	
CRIMINAL CONSPIRACY	5	0	0	ANDERSON	9/12/1997	N	
BURGLARY-1ST DEGREE	30	0	0	ANDERSON	9/12/1997	V	
ARMED ROBBERY	30	0	0	ANDERSON	9/12/1997	V	
MURDER	999	99	999	ANDERSON	9/12/1997	V	

PRIOR COMMITMENTS OVER 90 DAYS:
INMATE HAS NO PRIORS
DETAINERS (HOLD,WANTED,NOTIFY):
NO DETAINERS
ESCAPES:
11/22/96 OTHER ESCAPE RELATED CODE NOT IN TABLE
CRIMINAL CHARGES:
NO CRIMINAL CHARGES HISTORY
ASSAULTIVE DISCIPLINARIES:
NO ASSAULTIVE DISCIPLINARY HISTORY
NON-ASSAULTIVE DISCIPLINARIES:

5/25/ 6	FALSE STATEMENT TO HARM	CONVICTED	MAJOR
5/18/ 6	FALSE STATEMENT TO HARM		OTHER
5/12/ 5	VIOLATIONS WRITE/POST IN		OTHER
4/ 7/ 4	REFUSING OR FAILING OBEY	CONVICTED	MINOR
9/20/ 3	TRAFFICKING AND TRADING	CONVICTED	MINOR
2/14/ 3	OUT OF PLACE	CONVICTED	MAJOR
2/20/ 2	OUT OF PLACE		OTHER

HISTORY OF MOVEMENTS:

12/30/ 7	LEATH	INCARCERATED	ADMINISTRATIVE
12/20/ 7	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
4/20/ 5	LEATH	INCARCERATED	RETURN FROM COURT
4/19/ 5	ANDERSON CO	AUTH ABSENCE (AWL)	TO COURT
2/ 9/ 5	LEATH	INCARCERATED	RETURN FROM COURT
2/ 8/ 5	ANDERSON CO	AUTH ABSENCE (AWL)	TO COURT
12/16/ 4	LEATH	INCARCERATED	RETURN FROM COURT
12/15/ 4	ANDERSON CO	AUTH ABSENCE (AWL)	TO COURT
10/25/ 0	LEATH	INCARCERATED	ADMINISTRATIVE
10/25/ 0	GREENWOOD CO	AUTH ABSENCE (AWL)	MEDICAL
12/ 1/98	LEATH	INCARCERATED	ADMINISTRATIVE
10/29/97	GRAHAM CORR INS	INCARCERATED	ADMINISTRATIVE
9/19/97	GRAHAM R&E	INCARCERATED	R&E PROCESSING
9/19/97	PERRY R&E	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON
IND. GROUP/SECTION L	07/17/07	0/ 0/ 0	
WARDKEEPER ASSISTANT	06/06/06	7/14/ 7	INMATE REQUEST

MCSHARRY,JENNIFER L. FBI # [redacted] SID# [redacted] SCDC # [redacted] (CONT

IND. GROUP/SECTION L	05/23/06	5/25/ 6	PLACED IN ST/SP CUSTODY
IND. GROUP/SECTION L	09/16/03	5/18/ 6	PLACED IN ST/SP CUSTODY
WARDKEEPER ASSISTANT	04/30/03	9/15/ 3	INMATE REQUEST
IND. GROUP/SECTION L	05/01/02	2/15/ 3	PLACED IN ST/SP CUSTODY
INDUSTRIES TRAINEE	03/05/02	4/30/ 2	PROMOTION
MACHINE OPERATOR	01/10/00	3/ 4/ 2	INMATE REQUEST
SR DINING ROOM OPERA	09/16/99	1/ 9/ 0	LATERAL TRANSFER
SENIOR TEACHER ASST.	12/04/98	9/15/99	INMATE REQUEST
MACHINE OPERATOR TRA	04/02/98.	12/ 1/98	INSTIT TRANSFER
MACHINE OPERATOR TRA	10/31/97	4/ 1/98	CUSTODY REVIEW

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
NO SCHOOL ASSIGNMENTS			

********* END OF REPORT *********

SUPREME COURT
OF THE UNITED STATES

SUPREME COURT
OF THE UNITED STATES

No. 10-9646
Title: Evan Miller, Petitioner
v.
Alabama
Docketed: March 23, 2011
Linked with 10A697
Lower Ct: Court of Criminal Appeals of Alabama
Case Nos.: (CR-06-0741)
Decision Date: August 27, 2010
Discretionary Court
Decision Date: October 22, 2010
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 7 2011	Application (10A697) to extend the time to file a petition for a writ of certiorari from January 20, 2011 to March 21, 2011, submitted to Justice Thomas.
Jan 13 2011	Application (10A697) granted by Justice Thomas extending the time to file until March 21, 2011.
Mar 21 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 22, 2011)
Apr 15 2011	Waiver of right of respondent Alabama to respond filed.
Apr 27 2011	DISTRIBUTED for Conference of May 12, 2011.
May 2 2011	Response Requested . (Due June 1, 2011)
Jun 1 2011	Brief of respondent Alabama in opposition filed.
Jun 9 2011	Reply of petitioner Evan Miller filed.
Jun 16 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.

Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 24 2011	DISTRIBUTED for Conference of October 28, 2011.
Oct 31 2011	DISTRIBUTED for Conference of November 4, 2011.
Nov 7 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The case is to be argued in tandem with No. 10-9647, Jackson v. Hobbs, Dir., AR DOC.
Dec 7 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 9, 2012.
Dec 7 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, March 20, 2012.
Jan 5 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 9 2012	Joint appendix filed. (Statement of costs filed)
Jan 9 2012	Brief of petitioner Evan Miller filed.
Jan 13 2012	The time to file respondent's brief on the merits is extended to and including February 14, 2012.
Jan 13 2012	Brief amici curiae of American Medical Association, et al. filed. VIDED. (Distributed)
Jan 16 2012	Brief amici curiae of Amnesty International, et al. filed. VIDED.
Jan 17 2012	Brief amici curiae of Former Juvenile Court Judges filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Probation and Parole Association, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Psychological Association, et al. filed (Distributed). VIDED.
Jan 17 2012	Brief amici curiae of Jeffrey Fagan, et al. filed (Distributed). VIDED.
Jan 17 2012	Brief amici curiae of Certain Family Members of Victims Killed by Youths filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Professor of Law and His Students from Moritz College of Law at Ohio State University filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of J. Lawrence Aber, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED. (Distributed)
Jan 23 2012	Record from the Court of Criminal Appeals of Alabama is electronic.
Jan 31 2012	CIRCULATED.

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Party name: Certain Family Members of Victims Killed by Youths

SUPREME COURT
OF THE UNITED STATES

SUPREME COURT
OF THE UNITED STATES

No. 10-9647
Title: Kuntrell Jackson, Petitioner
v.
Ray Hobbs, Director, Arkansas Department of Correction
Docketed: March 23, 2011
Lower Ct: Supreme Court of Arkansas
Case Nos.: (09-145)
Decision Date: February 9, 2011
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 21 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 22, 2011)
Apr 6 2011	Waiver of right of respondent Ray Hobbs, Director, Arkansas Department of Correction to respond filed.
Apr 20 2011	DISTRIBUTED for Conference of May 12, 2011.
May 2 2011	Response Requested . (Due June 1, 2011)
Jun 1 2011	Brief of respondent Ray Hobbs, Director, Arkansas Department of Correction in opposition filed.
Jun 13 2011	Reply of petitioner Kuntrell Jackson filed.
Jun 16 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 24 2011	DISTRIBUTED for Conference of October 28, 2011.
Oct 31 2011	DISTRIBUTED for Conference of November 4, 2011.
Nov 7 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The case is to be argued in tandem with No. 10-9646, Miller v. Alabama.
Dec 7 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 9, 2012.

Dec 9 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, March 20, 2012.
Jan 4 2012	Record from Supreme Court of Arkansas available electronically
Jan 5 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 9 2012	Joint appendix filed. (Statement of costs filed)
Jan 9 2012	Brief of petitioner Kuntrell Jackson filed.
Jan 13 2012	The time to file respondent's brief on the merits is extended to and including February 14, 2012.
Jan 13 2012	Brief amici curiae of American Medical Association, et al. filed. VIDED. (Distributed)
Jan 16 2012	Brief amici curiae of Amnesty International, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Former Juvenile Court Judges filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Probation and Parole Association, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Psychological Association, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Certain Family Members of Victims Killed by Youths filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Jeffrey Fagan, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Professor of Law and His Students from Moritz College of Law at Ohio State University filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of J. Lawrence Aber, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED. (Distributed)
Jan 31 2012	CIRCULATED.

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Party name: Professor of Law and His Students from Moritz College of Law at Ohio State University		
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Party name: Certain Family Members of Victims Killed by Youths

10-9647 JACKSON V. HOBBS

DECISION BELOW: 2011 Ark. 49

LOWER COURT CASE NUMBER: 09-145

QUESTION PRESENTED:

Kuntrell Jackson has been sentenced to life imprisonment without the possibility of parole for an offense committed when he was fourteen years old. He is one of only 73 fourteen-year-olds serving such a sentence throughout the United States. His case presents an ideal vehicle for this Court's consideration of the question left undecided by Graham v. Florida and Sullivan v. Florida - whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense - because, while Kuntrell's offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy shot a shop attendant. Kuntrell himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot. The robbery "plan," such as it was, was spur-of-the-moment, formed just before the robbery, while Kuntrell, his cousin, and another older teen were walking together through a housing project. Because Arkansas law made a life-without-parole sentence mandatory upon Kuntrell's homicide conviction, neither his age nor any of these other mitigating circumstances could be considered by his sentencer. Under these circumstances, the questions presented are:

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally aengage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?

THIS CASE TO BE ARGUED IN TANDEM WITH NO. 10-9646.
CERT. GRANTED 11/7/2011

SUPREME COURT
OF THE UNITED STATES

SUPREME COURT
OF THE UNITED STATES

No. 10-1001
Title: Luis Mariano Martinez, Petitioner
v.
Charles L. Ryan, Director, Arizona Department of Corrections
Docketed: February 7, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-15170)
Decision Date: September 27, 2010
Rehearing Denied: November 5, 2010
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 3 2011	Petition for a writ of certiorari filed. (Response due March 9, 2011)
Feb 11 2011	Waiver of right of respondent Charles L. Ryan, Director, Arizona Department of Corrections to respond filed.
Feb 23 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 7 2011	Response Requested . (Due April 6, 2011)
Apr 6 2011	Brief of respondent Charles L. Ryan, Director, Arizona Department of Corrections in opposition filed.
Apr 18 2011	Reply of petitioner Luis Mariano Martinez filed.
Apr 19 2011	DISTRIBUTED for Conference of May 12, 2011.
May 16 2011	DISTRIBUTED for Conference of May 19, 2011.
May 31 2011	DISTRIBUTED for Conference of June 2, 2011.
Jun 6 2011	Petition GRANTED.
Jun 28 2011	Motion to dispense with printing the joint appendix filed by petitioner Luis Mariano Martinez.
Jul 15 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 4, 2011.
Jul 15 2011	The time to file respondent's brief on the merits is extended to and including September 6, 2011.

Jul 15 2011	Petitioner is to file any reply brief on the merits on or before September 26, 2011.
Jul 15 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 15 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent..
Jul 19 2011	SET FOR ARGUMENT ON Tuesday, October 4, 2011.
Aug 4 2011	Brief of petitioner Luis Mariano Martinez filed.
Aug 10 2011	CIRCULATED
Aug 11 2011	Brief amicus curiae of American Bar Association filed. (Distributed)
Aug 11 2011	Brief amici curiae of Former State Supreme Court Justices filed. (Distributed)
Aug 11 2011	Brief amicus curiae of Innocence Network filed. (Distributed)
Aug 11 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 11 2011	Record from U.S.D.C. for the Distict of Arizona is electronic.
Aug 15 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 6 2011	Brief of respondent Charles L. Ryan, Director, Arizona Department of Corrections filed. (Distributed)
Sep 13 2011	Brief amici curiae of Wisconsin, et al. filed. (Distributed)
Sep 13 2011	Brief amicus curiae of the United States filed. (Distributed)
Sep 13 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 13 2011	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Sep 26 2011	Reply of petitioner Luis Mariano Martinez filed. (Distributed)
Sep 27 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 4 2011	Argued. For petitioner: Robert D. Bartels, Tempe, Ariz. For respondent: Kent E. Cattani, Chief Counsel, Criminal Appeals, Phoenix, Ariz.; and Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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Party name: Luis Mariano Martinez v. Charles L. Ryan, Director, Arizona Department of Corrections		
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10-1001 MARTINEZ V. RYAN

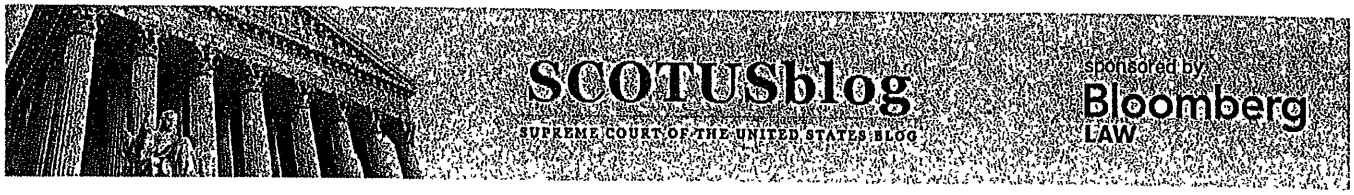
DECISION BELOW: 623 F.3d 731

LOWER COURT CASE NUMBER: 09-15170

QUESTION PRESENTED:

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

CERT. GRANTED 6/6/2011



Prop. 8: Final ruling due – Lyle Denniston

Featured CONTENT **SCOTUS for law students: Honoring war heroes versus protecting false statements (sponsored by Bloomberg Law) – Stephen Wermiel**

U.S. urges more health care argument – Lyle Denniston

Steve Vladeck Guest
Posted Wed, October 5th, 2011 2:13 pm
Email Steve
Bio & Post Archive »

Argument recap: An Arizona-specific right to collateral post-conviction counsel?

Given the implications of the rule for which the petitioner in *Martinez* v. *Ryan* was arguing *i.e.*, that the right to counsel, and to the effective assistance thereof, should extend to *all* collateral post-conviction proceedings in which a defendant has the first opportunity to raise a substantive challenge to his conviction — it is hardly surprising that the bulk of Tuesday's oral argument centered on the Justices' search for a limiting principle. The more intriguing question is whether, with Justice Breyer's help, they might have found one.

Arguing for petitioner Luis Mariano Martinez, Arizona State law professor Robert D. Bartels did his best to ameliorate the concerns raised in the briefs of Arizona and its *amici* about the substantial costs that collateral post-conviction counsel would entail, suggesting at various points that the rule for which he was advocating would apply only to the first round of collateral post-conviction review. The problem, as Chief Justice Roberts quickly pointed out, is that such a rule would necessitate a *second* round of collateral post-conviction proceedings in state court, if for no other reason than to ensure the effectiveness of the now-mandated counsel in the *first* collateral proceeding. Picking up on this theme, Justices Breyer and Alito pushed Bartels to explain whether he thought a right to collateral post-conviction counsel could potentially require multiple rounds of collateral post-conviction proceedings, with each round recursively challenging the effectiveness of counsel during the prior round. Bartels stressed in reply that a line must be drawn somewhere, although such a rejoinder appeared to surprise Justice Breyer, all the more so since it undermines Martinez's argument that the right to counsel must allow for one *meaningful* "first tier" of post-conviction review. After all, if counsel in the first collateral post-conviction proceeding is also ineffective, the defendant presumably still would not have had that opportunity.

Arguing for respondent Charles L. Ryan, Kent Cattani — the chief counsel of the Criminal Appeals/Capital Litigation Section of the Arizona Attorney General's Office — was also on the defensive, with Justices Breyer and Kagan seizing on the fact that Arizona is one of eighteen states requiring the appointment of counsel in the first round of collateral post-conviction proceedings. If Arizona already appoints counsel, the Justices asked, why shouldn't it follow that the post-conviction counsel must provide constitutionally effective assistance? Cattani's reply echoed the Justices' questioning of Bartels: because such a right would necessarily require a second round of collateral post-conviction proceedings in cases in which the defendant claimed that the first post-conviction counsel was ineffective. Nevertheless, the suggestion that the rule might be different in those states that mandate the appointment of counsel in the first collateral post-conviction proceedings surfaced repeatedly during the remainder of the argument. In addition, as Justice Sotomayor pointed out, Arizona – unlike at least some other states – requires ineffective assistance claims to be brought in collateral post-conviction proceedings, and so the vindication of the right to counsel for "first-tier" review that the Court recognized in *Douglas* v. *California* might require counsel in those proceedings as well. Taking these two strands together, one might see in this questioning the conceptual origins of a narrow doctrinal rule that would only apply to the handful of states that *both* mandate the appointment of counsel in the first collateral post-conviction proceeding *and* require ineffective assistance claims to be raised therein. At the very least, Cattani did not do himself any favors when he suggested that there might not be a right to effective assistance even on direct appeal when issues are sent back to the trial court for supplemental proceedings, an argument that Justice Kennedy twice referred to as "very strange."

Perhaps seeing in the Justices' colloquy with Cattani the seeds of a negative result, Assistant to the Solicitor General Jeffrey Wall, arguing for the United States as *amicus curiae* in support of the state, stressed that such a jurisdiction-specific rule would not be particularly narrow, because forty-seven states and the federal government provide for counsel in the first collateral post-conviction proceeding *either* as of right or in the discretion of the trial court and public defender. And although Wall did not make this argument, it might also follow that a constitutional rule that conditions effective assistance in the collateral post-conviction proceeding on whether appointment of counsel is mandated by state law may have the perverse effect of prompting the eighteen states that *do* require the appointment of collateral post-conviction counsel, including Arizona, to revisit that choice if the consequence of such beneficence is the potential for additional rounds of collateral post-conviction proceedings

— and the costs associated therewith.

At bottom, there seemed to be virtually no support among the Justices for any general rule supporting the right of defendants to counsel in collateral post-conviction proceedings for *all* claims that they were unable to raise at trial. Whether there might be five votes for a narrower rule requiring effective assistance of post-conviction counsel because of the fortuities of Arizona state law — which mandates both the appointment of collateral post-conviction counsel and the funneling of ineffective assistance of trial counsel claims into those collateral proceedings — remains to be seen.

Posted in *Martinez v. Ryan*, Featured, Merits Cases

Recommended Citation: Steve Vladeck, *Argument recap: An Arizona-specific right to collateral post-conviction counsel?*, SCOTUSblog (Oct. 5, 2011, 2:13 PM), http://www.scotusblog.com/2011/10/argument-recap-an-arizona-specific-right-to-collateral-post-conviction-counsel/

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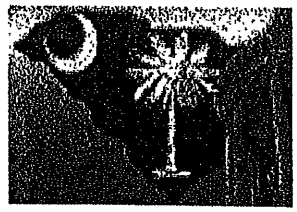
Anderson County
Tenth Judicial Circuit
Public Index



Back New Search County Home Page

Lu Rene #239701 Kelso VS State Of South Carolina

Case Number: 2000CP0402188 **Court Agency:** Common Pleas **Filed Date:** 08/21/2000
Case Type: Common Pleas **Case Sub Type:** Post Convict Rel 500 **File Type:** PCR
Status: Judgment **Assigned Judge:** Clerk Of Court C P, G S, And Family Court
Disposition: Ended by Non Jury **Disposition Date** 03/10/2005 **Disposition Judge:** Maddox, J. Cordell Jr.
Original Source Doc: **Original Case #:**
Judgment Number:

Parties | Judgments | Actions | Associated Cases

Tax Map Information

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State Of South Carolina					Defendant	Active
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
ANDERSON)
COUNTY OF ~~ABBEVILLE~~ 2012 MAY 14 P 12:04) Case Number: 2011-CP-04-1581
)
Jennifer L. McSharry (#244026), COMMON PLEAS AND
Applicant, GENERAL SESSIONS)
) FIRST AMENDED APPLICATION FOR
vs.) POST-CONVICTION RELIEF
)
STATE OF SOUTH CAROLINA,)
Respondent.)

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

Because of recently decided, binding Constitutional decisions, the Applicant, Jennifer McSharry, amends her post-conviction relief application.

1. Applicant is detained at the Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649.

2. She was convicted and sentenced in the Anderson County Court of General Sessions.

3. Applicant's co-defendants are:

(i) Lu Renee Kelso, Applicant's mother, who was found guilty on May 8, 1997 following a jury trial and sentenced to life imprisonment without the possibility of parole for murder, life imprisonment for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy.

(ii) Ronnie Jordan, who actually shot and killed the victim, plead guilty to murder on May 19, 1997 and was sentenced to fifty-five (55) years imprisonment for murder, fifty-five (55) years for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy.

(iii) Jennifer Titman who plead guilty to voluntary manslaughter on October 6, 1997 and was sentenced to fifteen (15) years suspended on the service of seven (7) years to be followed by five (5) years probation.

(iv) Jason Conley who plead guilty to voluntary manslaughter on October 6, 1997 and was sentenced to fifteen (15) years imprisonment.

4. Applicant was indicted for murder (97-GS-04-124), armed robbery (97-GS-04-1691), criminal conspiracy (97-GS-04-1692), burglary in the first degree (97-GS-04-1693), and possession of a firearm during the commission of a violent crime (97-GS-04-1694). She was tried before the Honorable H. Dean Hall and a jury from September 8-12, 1997. She was convicted on all counts on September 12, 1997.

5. On September 12, 1997, Judge Hall sentenced Applicant to life in prison without the possibility of parole for murder, thirty (30) years for armed robbery, five (5) years for conspiracy, thirty (30) years for burglary in the first degree, and five (5) years for possession of a firearm during the commission of a violent crime. All sentences are concurrent.

6. Applicant was found guilty after pleading not guilty.

7. The Applicant appealed the convictions and sentences.

8. (a) Applicant appealed to the South Carolina Supreme Court.

(b) The South Carolina Supreme Court affirmed the conviction and sentences.

(c) Convictions and sentences affirmed on November 19, 1999.

(d) *State v. McSharry*, S.C.S.Ct. Unpublished Op. No. 1999-MO-093 (filed Nov. 19, 1999).

9. Not applicable.

10 & 11. **GROUNDS FOR RELIEF WITH SUPPORTING FACTS**

Ground A – Unconstitutionality of Life without Parole Sentence

10(a)(1) The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide.

10(a)(2) S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide.

11(a)(1)&(2) Jennifer McSharry was born on October 20, 1979. Prior to the incident in this case, she was living with her mother, Renee Kelso, in Georgia. Kelso, who dealt cocaine out of her house, introduced McSharry and her friend Jennifer Titman to illegal drugs.

Less than one month after McSharry's seventeenth birthday, McSharry, her mother, and the other co-defendants drove to the victim's residence, a camper, in rural Anderson County. McSharry and Titman were hallucinating because of their drug use. McSharry and Titman knocked on the victim, Melvin Miller's, door. Miller let Titman inside to use the phone. McSharry was outside. Jordan entered the camper and threatened Miller with a gun. Titman ran out of the camper. Kelso and Conley entered the camper. Jordan shot and killed Miller.

McSharry and Titman were in the car when Jordan shot and killed Miller.

Ground B – Ineffective Assistance of Trial Counsel (Plea Negotiations)

10(b) Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the

"hand of one, hand of all."

"[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012). When trial counsel's deficient performance leads the client to reject the prosecution's plea offer,

> [t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. Presuming [the accused] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence [the person] accordingly, or to leave the convictions and sentence from trial undisturbed.

Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012).

11(b) At one point prior to trial, the State offered McSharry a fifteen year sentence for voluntary manslaughter. This offer, however, included McSharry testifying against Kelso. At the time of the offer, the prosecution was threatening to seek the death penalty against Kelso. The State made additional plea offers during McSharry's trial, which also included reducing the charges to voluntary manslaughter. McSharry, however, did not understand the legal principles necessary to make an informed decision. Trial counsel not properly educating McSharry about the relevant legal principles influenced her decision not to plead guilty to a lesser offense. Had trial counsel properly educated McSharry about the relevant legal principals, then she would have plead guilty.

Ground C – Ineffective Assistance of Post-Conviction Counsel

10(c) McSharry did not receive effective assistance of post-conviction counsel at her original PCR hearing. Although the investigation into PCR counsel's ineffectiveness is ongoing, McSharry was deprived effective assistance of PCR counsel in the following manners:

- Her PCR counsel, Nancy Jo Thomason, had an actual conflict of interest. In addition to representing McSharry, Thomason previously represented Kelso during her PCR. *Kelso v. State*, Case No. 2000-CP-04-2188, located at http://www.andersoncountysc.org/web/scjdweb/publicindex/PICaseDetails.aspx?County=04+&Casenum=2000CP0402188&CourtType=G&CaseType=Civil&CourtAgency=04002&LastName=Kelso&FirstName=Lu (last viewed Feb. 8, 2012). Thomason's loyalty to Kelso prevented her from investigating and recognizing:

  - Trial counsel's failure to investigate, prepare, and present meaningful mitigation evidence during McSharry's sentencing hearing. *See Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008); and

  - Trial Counsel's failure to properly advise McSharry about relevant legal concepts, including "the hands of one, hand of all," that were necessary for McSharry to make an informed decision about whether to plead guilty.

- PCR counsel did not conduct any investigation at all and, therefore, failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

- PCR counsel failed to retain an expert witness to perform a psychiatric examination of McSharry to discover the evidence that trial counsel should have presented at the sentencing hearing, and provide relevant and available mitigation evidence.

- PCR counsel failed to advise McSharry and assist her in preparing an amended PCR application. *See* order of dismissal, Case No. 200-CP-04-3030, p. 3.

- McSharry wanted to appeal the denial of her PCR, but PCR counsel failed to file a Rule 59(e), SCRCP motion or file the required notice of appeal. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Although the investigation into trail counsel's ineffectiveness is ongoing, McSharry was deprived of her Sixth Amendment right to effective assistance of counsel in the following manners:

- Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the "hand of one, hand of all."

- Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to

impose a sentence of less than life imprisonment.

- Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence.

11(c) McSharry was born on October 20, 1979 in Greenville, South Carolina. Her parents divorced when McSharry was three years old. She has a full sister, Jamie, and a full brother, Jeffery. She has two stepbrothers, Anthony and Salvador. Salvador committed suicide several months before the incident in this case.

McSharry lived in Greenville for less than a year before moving with her parents to Livermore, California, which is near San Francisco. She lived there for eleven years before bouncing between multiple locations, including Utah, Colorado, Arizona, South Carolina, and Georgia. McSharry lived on-and-off in Tucson, Arizona for four years as she split time between living with her mother in Tucson and her paternal grandparents in Livermore. McSharry lived in Honea Path, South Carolina for a year after her mother took a job there customizing vans. Kelso fled South Carolina because the police were investigating her drug dealing. Kelso moved to Jonesboro, Georgia, which is near Atlanta. McSharry was living in Atlanta with her mother, brother, sister, and Titman when she was arrested in this case.

Kelso exposed her children to drugs at a young age. At age twelve, McSharry started smoking marijuana that was supplied by Kelso. McSharry smoked it every day, all day. She also smoked cigarettes. McSharry was smoking so much that a doctor in Jonesboro told her, "If you don't stop smoking, then you will be dead in five years." Kelso also kept cocaine in the house, but McSharry would not start using it until her stepbrother Salvador committed suicide in the summer of 1996. McSharry was using an ounce of cocaine a day.

McSharry was attending Mt. Zion High School in Jonesboro, Georgia when she was arrested on these charges. She quit attending school because of the arrest.

Since she has been in the Department of Corrections, McSharry has broken her drug addiction. McSharry also furthered her education. She completed her GED in 1998. In 2005, she completed a correspondence course on creative writing. McSharry now writes short stories.

McSharry has consistently worked for Prison Industries. For about two years, she was a Senior Teaching Assistant, assigned to a learning disabled class. Through Prison Industries, she worked for the Omega Travel Agency, searching for the lowest airline tickets for the customers. During most of her sentence, McSharry has operated a sewing machine. Her current job is making t-shirts that are purchased by several companies for sale to the general public.

The State provided McSharry's "Corrections Record Summary Report." This report confirms McSahrry does not have a "criminal charge history" or "assaultive disciplinary history."

PCR counsel is in the process of obtaining school records and additional records from the Department of Corrections. PCR counsel intends to move this Court for funds to conduct an evaluation of McSharry. This evaluation is important for two reasons. First, it will show that McSharry has rehabilitated herself, should not spend the rest of her life in prison, and is an appropriate candidate for resentencing. Second, it will show that an evaluation of McSharry for sentencing would have discovered mitigation evidence available at the time of her trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

12 & 13. Applicant filed an application for post-conviction relief on November 14, 2000. *See McSharry v. State*, Case Number 2000-CP-04-3030. That application was dismissed by written

order filed May 9, 2005. Applicant attempted to file a *pro se* appeal to the South Carolina Supreme Court, but the appeal was not accepted.

14 & 15. None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other court, state or federal.

16. The grounds set forth in paragraphs 10 & 11 have not previously been presented to any court, state or federal. Since dismissal of the prior PCR, new developments in the law entitle Applicant to a successive post-conviction relief action. *See* S.C. Code §17-27-45(b) (extending the PCR statute of limitations by one year for binding constitutional decisions) and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (holding S.C. Code §17-27-45(b) is proper procedure for challenging death sentence imposed prior to *Atkins v. Virginia*, 536 U.S. 304 (2002)). The relevant, binding constitutional decision are:

a) In Claim A, McSharry relies on *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010), decided on May 17, 2010 as modified on July 6, 2010. Additionally, the Supreme Court recently granted *certiorari* and consolidated two cases seeking to clarify or extend *Graham*. *See Miller v. State*, 63 So.3d 676 (Ala. Crim. App. 2010) *certiorari granted by Miller v. Alabama*, ___ S.Ct. ___, (2011) (2011 WL 1086007); *Jackson v. Norris*, 49, ___S.W.3d ___, (Ark. 2011) (2011 WL 478600) *certiorari granted by Jackson v. Hobbs*, ___ S.Ct. ___ (2011) (2011 WL 1060941). *Miller* challenges the imposition of a life sentence on a juvenile who actually committed a homicide offense. This question presented in *Jackson* is summarized as follows:

> Whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense - because, while [Jackson's] offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery

> in which an older boy shot a shop attendant. [Jackson] himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot.

The Supreme Court consolidated *Miller* and *Jackson* and heard oral arguments on March 20, 2012. The High Court, therefore, is on track to decide *Miller* and *Jackson* during its term that ends in June. If the Supreme Court decides these cases in favor of the petitioners or decides only *Jackson* in favor of the petitioner, then McSharry will be entitled to summary judgment in her favor and remand to General Sessions Court for a new sentencing hearing. Therefore, McSharry reserves the right to amend her PCR application after *Miller* and *Jackson* are decided.

b) In Claim B, McSharry relies on *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012). The Supreme Court of the United States decided both of these cases on March 21, 2012.

c) In Claim C, McSharry relies on *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), decided on March 20, 2012.

17 & 18. Applicant's was previously represented as follows:

(a) At trial by Bruce Byrholdt, P.O. Box 2506. Anderson, SC 29622.

(b) On direct appeal by Joseph L. Savitz, III, retired from the S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, S.C. 29201.

(c) During the first PCR by Nancy Jo Thomason, P.O. Box 4025, Anderson, SC 29622.

19. Applicant seeks the vacation of her convictions and sentences.

20. Applicant is not under sentence from any other court.

(Signature on Next Page)

Respectfully submitted,

By _____

E. Charles Grose, Jr.
600 Monument St., Box P-133
Greenwood, SC 29646
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PRO BONO COUNSEL FOR APPLICANT

May 10, 2012
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ABBEVILLE	)	Case Number: 2011-CP-04-1581
	)	
Jennifer L. McSharry (#244026), Applicant,	)	
	)	SECOND AMENDED APPLICATION
vs.	)	FOR POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

Because of additional recently decided, binding Constitutional decisions, the Applicant, Jennifer McSharry, amends her post-conviction relief application for a second time.

1. Applicant is detained at the Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649.

2. She was convicted and sentenced in the Anderson County Court of General Sessions.

3. Applicant's co-defendants are:

(i) Lu Renee Kelso, Applicant's mother, who was found guilty on May 8, 1997 following a jury trial and sentenced to life imprisonment without the possibility of parole for murder, life imprisonment for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy.

(ii) Ronnie Jordan, who actually shot and killed the victim, plead guilty to murder on May 19, 1997 and was sentenced to fifty-five (55) years imprisonment for murder, fifty-five (55) years for burglary first degree, thirty (30) years for armed robbery, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for criminal conspiracy.

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(iii) Jennifer Titman who plead guilty to voluntary manslaughter on October 6, 1997 and was sentenced to fifteen (15) years suspended on the service of seven (7) years to be followed by five (5) years probation.

(iv) Jason Conley who plead guilty to voluntary manslaughter on October 6, 1997 and was sentenced to fifteen (15) years imprisonment.

4. Applicant was indicted for murder (97-GS-04-124), armed robbery (97-GS-04-1691), criminal conspiracy (97-GS-04-1692), burglary in the first degree (97-GS-04-1693), and possession of a firearm during the commission of a violent crime (97-GS-04-1694). She was tried before the Honorable H. Dean Hall and a jury from September 8-12, 1997. She was convicted on all counts on September 12, 1997.

5. On September 12, 1997, Judge Hall sentenced Applicant to life in prison without the possibility of parole for murder, thirty (30) years for armed robbery, five (5) years for conspiracy, thirty (30) years for burglary in the first degree, and five (5) years for possession of a firearm during the commission of a violent crime. All sentences are concurrent.

6. Applicant was found guilty after pleading not guilty.

7. The Applicant appealed the convictions and sentences.

8. (a) Applicant appealed to the South Carolina Supreme Court.

(b) The South Carolina Supreme Court affirmed the conviction and sentences.

(c) Convictions and sentences affirmed on November 19, 1999.

(d) *State v. McSharry*, S.C.S.Ct. Unpublished Op. No. 1999-MO-093 (filed Nov. 19, 1999).

9. Not applicable.

10 & 11. **GROUNDS FOR RELIEF WITH SUPPORTING FACTS**

Ground A – Unconstitutionality of Juvenile Life without Parole Sentence

10(a)(1)(a) The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole.

10(a)(1)(b) S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole

10(a)(2)(a) The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide.

10(a)(2)(b) S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide.

10(a)(3)(a) The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing hearing during which all available mitigation evidence is considered.

10(a)(3)(b) S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing during which all available mitigation evidence is considered.

11(a)(1)&(2) Jennifer McSharry was born on October 20, 1979. Prior to the incident in this case, she was living with her mother, Renee Kelso, in Georgia. Kelso, who dealt cocaine out of her house, introduced McSharry and her friend Jennifer Titman to illegal drugs.

Less than one month after McSharry's seventeenth birthday, McSharry, her mother, and the other co-defendants drove to the victim's residence, a camper, in rural Anderson County. McSharry and Titman were hallucinating because of their drug use. McSharry and Titman knocked on the victim, Melvin Miller's, door. Miller let Titman inside to use the phone. McSharry was outside. Jordan entered the camper and threatened Miller with a gun. Titman ran out of the camper. Kelso and Conley entered the camper. Jordan shot and killed Miller.

McSharry and Titman were in the car when Jordan shot and killed Miller.

11(a)(3) McSharry was born on October 20, 1979 in Greenville, South Carolina. Her parents divorced when McSharry was three years old. She has a full sister, Jamie, and a full brother, Jeffery. She has two stepbrothers, Anthony and Salvador. Salvador committed suicide several months before the incident in this case.

McSharry lived in Greenville for less than a year before moving with her parents to Livermore, California, which is near San Francisco. She lived there for eleven years before bouncing between multiple locations, including Utah, Colorado, Arizona, South Carolina, and Georgia. McSharry lived on-and-off in Tucson, Arizona for four years as she split time between living with her mother in Tucson and her paternal grandparents in Livermore. McSharry lived in Honea Path, South Carolina for a year after her mother took a job there customizing vans. Kelso fled South Carolina because the police were investigating her drug dealing. Kelso moved to Jonesboro, Georgia, which is near Atlanta. McSharry was living in Atlanta with her mother, brother, sister, and Titman when she was arrested in this case.

Kelso exposed her children to drugs at a young age. At age twelve, McSharry started smoking marijuana that was supplied by Kelso. McSharry smoked it every day, all day. She also smoked cigarettes. McSharry was smoking so much that a doctor in Jonesboro told her, "If you don't stop smoking, then you will be dead in five years." Kelso also kept cocaine in the house, but McSharry would not start using it until her stepbrother Salvador committed suicide in the summer of 1996. McSharry was using an ounce of cocaine a day.

McSharry was attending Mt. Zion High School in Jonesboro, Georgia when she was arrested on these charges. She quit attending school because of the arrest.

Since she has been in the Department of Corrections, McSharry has broken her drug addiction. McSharry also furthered her education. She completed her GED in 1998. In 2005, she completed a correspondence course on creative writing. McSharry now writes short stories.

McSharry has consistently worked for Prison Industries. For about two years, she was a Senior Teaching Assistant, assigned to a learning disabled class. Through Prison Industries, she worked for the Omega Travel Agency, searching for the lowest airline tickets for the customers. During most of her sentence, McSharry has operated a sewing machine. Her current job is making t-shirts that are purchased by several companies for sale to the general public.

The State provided McSharry's "Corrections Record Summary Report." This report confirms McSahrry does not have a "criminal charge history" or "assaultive disciplinary history."

PCR counsel is in the process of investigating McSharry's case. PCR counsel intends to move this Court for funds to conduct an evaluation of McSharry. This evaluation is important for two reasons. First, it will show that McSharry has rehabilitated herself, should not spend the rest of her life in prison, and is an appropriate candidate for resentencing. Second, it will show that an evaluation of McSharry for sentencing would have discovered mitigation evidence available at the

time of her trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

In addition, along with a number of other people serving juvenile life sentences, McSharry has filed a petition for writ of *certiorari* in the original jurisdiction of the South Carolina Supreme Court. *See Aiken et. al. v. Byars*, a copy of which is attached to McSharry's motion to stay these proceedings that is being filed simultaneously with this amended application. This petition asks our Supreme Court to resolve the following issues:

A. Whether the Eighth Amendment preclude life imprisonment without the possibility of parole for juvenile offenders;

B. Whether all juveniles sentenced to life imprisonment without the possibility of parole are entitled to a new sentencing proceeding; and

C. What procedures are required where life imprisonment without the possibility of parole is a sentencing option.

If our Supreme Court accepts this petition, then the resolution of these issues will determine not only the procedures for McSharry's resentencing but also the nature and extent of the required mitigation investigation, including access to resources for investigators and experts.

Ground B – Ineffective Assistance of Trial Counsel (Plea Negotiations)

10(b) Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the "hand of one, hand of all."

"[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012). When trial counsel's deficient performance leads the client to reject the

prosecution's plea offer,

> [t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. Presuming [the accused] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence [the person] accordingly, or to leave the convictions and sentence from trial undisturbed.

Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012).

11(b) At one point prior to trial, the State offered McSharry a fifteen year sentence for voluntary manslaughter. This offer, however, included McSharry testifying against Kelso. At the time of the offer, the prosecution was threatening to seek the death penalty against Kelso. The State made additional plea offers during McSharry's trial, which also included reducing the charges to voluntary manslaughter. McSharry, however, did not understand the legal principles necessary to make an informed decision. Trial counsel not properly educating McSharry about the relevant legal principles influenced her decision not to plead guilty to a lesser offense. Had trial counsel properly educated McSharry about the relevant legal principals, then she would have plead guilty.

Ground C – Ineffective Assistance of Trial Counsel (Sentencing Hearing)

10(c)(1) Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

10(c)(2) Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence.

11(c) *See* 11(a)(3), *supra.*

Ground D – Ineffective Assistance of Post-Conviction Counsel

10(d) McSharry did not receive effective assistance of post-conviction counsel at her original PCR hearing. Although the investigation into PCR counsel's ineffectiveness is ongoing, McSharry was deprived effective assistance of PCR counsel in the following manners:

- Her PCR counsel, Nancy Jo Thomason, had an actual conflict of interest. In addition to representing McSharry, Thomason previously represented Kelso during her PCR. *Kelso v. State*, Case No. 2000-CP-04-2188, located at http://www.andersoncountysc.org/web/scjdweb/publicindex/PICaseDetails.aspx?County=04~&Casenum=2000CP0402188&CourtType=G&CaseType=Civil&CourtAgency=04002&LastName=Kelso&FirstName=Lu (last viewed Feb. 8, 2012). Thomason's loyalty to Kelso prevented her from investigating and recognizing:

  - Trial counsel's failure to investigate, prepare, and present meaningful mitigation evidence during McSharry's sentencing hearing. *See Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008); and

  - Trial Counsel's failure to properly advise McSharry about relevant legal concepts, including "the hands of one, hand of all," that were necessary for McSharry to make an informed decision about whether to plead guilty.

- PCR counsel did not conduct any investigation at all and, therefore, failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

- PCR counsel failed to retain an expert witness to perform a psychiatric examination of McSharry to discover the evidence that trial counsel should have presented at the sentencing hearing, and provide relevant and available mitigation evidence.

- PCR counsel failed to advise McSharry and assist her in preparing an amended PCR application. *See* order of dismissal, Case No. 200-CP-04-3030, p. 3.

- McSharry wanted to appeal the denial of her PCR, but PCR counsel failed to file a Rule 59(e), SCRCP motion or file the required notice of appeal. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Although the investigation into trail counsel's ineffectiveness is ongoing, McSharry was deprived of her Sixth Amendment right to effective assistance of counsel in the following manners:

- Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the "hand of one, hand of all."

- Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment.

- Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence.

11(d) *See* 11(a)(3), *supra.*

12 & 13. Applicant filed an application for post-conviction relief on November 14, 2000. *See McSharry v. State*, Case Number 2000-CP-04-3030. That application was dismissed by written order filed May 9, 2005. Applicant attempted to file a *pro se* appeal to the South Carolina Supreme Court, but the appeal was not accepted.

14 & 15. None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other court, state or federal.

16. The grounds set forth in paragraphs 10 & 11 have not previously been presented to any court, state or federal. Since dismissal of the prior PCR, new developments in the law entitle Applicant to a successive post-conviction relief action. *See* S.C. Code §17-27-45(b) (extending the PCR statute of limitations by one year for binding constitutional decisions) and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (holding S.C. Code §17-27-45(b) is proper procedure for challenging death sentence imposed prior to *Atkins v. Virginia*, 536 U.S. 304 (2002)). The relevant, binding constitutional decision are:

a) In Claim A, McSharry relies on *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010), decided on May 17, 2010 as modified on July 6, 2010, and *Miller v. Alabama*, ___ U.S. ___,

132 S.Ct. 2455 (2012), decided June 25, 2012. In *Miller*, the Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The Court did "not consider [the] argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles." Slip Op. at 12. The Court, therefore, still might hold that the Eighth Amendment categorically bars life without parole sentences for juveniles. *See* 10(a)(1), *supra.*

Likewise, the Court has reserved deciding the issue of whether a life without paroles sentence for a juvenile that does not actually commit a homicide. *See* 10(a)(2), *supra.* In fact, Justice Breyer would hold that for a juvenile, like McSharry, who did not kill or intend to kill "the Eighth Amendment as interpreted in *Graham* forbids" a life without parole sentence "regardless of whether its application is mandatory or discretionary under state law." Slip Op. at 17 (Breyer, J., concurring).

The Court cautioned that because of "*Roper, I Graham*, and this decision about children's diminished culpability and heightened capacity for change, [the] appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Slip Op. at. 12. The Court held the sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Slip Op. at 17. McSharry, therefore, is entitled to an individualized sentencing determination. *See* 10(c), *supra.*

b) In Claim B, McSharry relies on *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012). The Supreme Court of the United States decided both of these cases on March 21, 2012.

c) In Claims C and D, McSharry relies on *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), decided on March 20, 2012.

17 & 18. Applicant's was previously represented as follows:

(a) At trial by Bruce Byrholdt, P.O. Box 2506. Anderson, SC 29622.

(b) On direct appeal by Joseph L. Savitz, III, retired from the S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, S.C. 29201.

(c) During the first PCR by Nancy Jo Thomason, P.O. Box 4025, Anderson, SC 29622.

19. Applicant seeks the vacation of her convictions and sentences.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

By _____

E. Charles Grose, Jr.
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PRO BONO COUNSEL FOR APPLICANT

November 8, 2012
Greenwood, South Carolina

1 *Roper v. Simmons*, 543 U.S. 551 (2005).

FILED-CLERK'S OFFICE
ANDERSON SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ABBEVILLE	2012 NOV 13 P 3:17)	Case Number: 2011-CP-04-1581
	)	
Jennifer L. McSharry (#244026), Applicant,	COMMON PLEAS AND GENERAL SESSIONS)	
	)	Motion to Stay Proceedings until the South Carolina Supreme Court decides *Aiken et. al. v. Byars*
vs.	)	
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

The Applicant, Jennifer L. McSharry, moves this Court to stay these proceedings until the South Carolina Supreme Court decides *Aiken et. al. v. Byars.*

Factual and Procedural Background

McSharry is serving a life without parole sentence for a murder that occurred when she was a juvenile.

On May 11, 2011, McSharry filed a successive application for post-conviction relief (hereinafter "PCR") contending that the Supreme Court of the United State's decision in *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010) precluded her life sentence.

On January 23, 2012, the State moved to dismiss the application contending, among other things, that *Graham* does not apply to McSharry's because she was sentenced to life imprisonment for a homicide offense. On February 8, 2012, McSharry filed a response to the State's motion to dismiss and called this Court's attention to two cases pending before the Supreme Court of the United States that had the potential to extend *Graham* to homicide offenses.

On May 14, 2012, McSharry filed her first amended PCR application and expanded the scope of the relief she is requesting based on new, controlling precedent. McSharry relied on *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012);

and *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). These three cases were decided during the same week in March 2012.

On June 25, 2012, the Supreme Court of the United States decided *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012). *Miller* held that mandatory life imprisonment for juvenile homicide offenses violates the Eighth Amendment. Although the precise issue was not before the Court, *Miller* calls into question all juvenile life without parole sentences. Simultaneously with filing this motion, McSharry is filing a second amended PCR application requesting relief under *Miller*.

On October 29, 2012, McSharry and a group of people serving juvenile life without parole sentences filed a petition for writ of *certiorari* in the original jurisdiction of the South Carolina Supreme Court. This petition asks our Supreme Court to resolve the following issues:

A. Whether the Eighth Amendment preclude life imprisonment without the possibility of parole for juvenile offenders;

B. Whether all juveniles sentenced to life imprisonment without the possibility of parole are entitled to a new sentencing proceeding; and

C. What procedures are required where life imprisonment without the possibility of parole is a sentencing option.

A copy of the petition for writ of certoriari in *Aiken et. al. v. Byars* is attached.

Relief Requested

If our Supreme Court accepts this petition, then the resolution of these issues will determine not only the procedures for McSharry's resentencing but also the nature and extent of the required mitigation investigation, including access to resources for investigators and experts. This Court, therefore, should stay these proceedings until our Supreme Court rules in *Aiken et. al. v. Byars*.

IT IS SO MOVED.

Respectfully submitted,

By _____

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PRO BONO COUNSEL FOR APPLICANT

November 8, 2012
Greenwood, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Tyrone Aiken, Matthew Clark, Eric Graham, Bradford M. Haigler, Angelo Ham, J'Corey S. Hull-Kilgore, Damian Inman, Roger Legette, Terriel Mack, Jennifer L. McSharry, Wallace Priester, Davon Reed, Dondre M. Scott, Edgar L. Thomas, James Vang, et al, *Petitioners*,

v.

William R. Byars, Jr., Director, South Carolina Department of Corrections, and **Alan Wilson,** Attorney General of South Carolina, *Respondents*.

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF JURISDICTION

Petitioners, Tyrone Aiken, Matthew Clark, Eric Graham, et al., pray that this Court grant this petition for a writ of certiorari filed in the Court's original jurisdiction.

In the wake of the United States Supreme Court's recent decision in *Miller v. Alabama*, ___U.S.___, 132 S.Ct. 2455 (2012), petitioners submit that it is incumbent upon this Court to grant certiorari and establish both a constitutionally appropriate remedy for the petitioners and others similarly situated[1] (i.e., a new sentencing hearing), and constitutionally adequate procedures for

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[1]Based on publicly available information from the South Carolina Department of Corrections, it appears that approximately thirty-six (36) individuals, including those named herein, are presently serving sentences of life without parole imposed by South Carolina courts for crimes committed before they reached the age of eighteen.

sentencing hearings in cases where juveniles either have been sentenced to, or face a possible sentence of, life imprisonment without the possibility of parole. As will be explained in more detail later in this petition, *Miller* held that mandatory sentences of life without parole, when imposed upon juveniles, violate the Eighth Amendment to the United States Constitution. 132 S.Ct. at 2464. Additionally, while reserving the question whether juveniles may ever be sentenced to life without parole, *id.* at 2469, the High Court also created a presumption against a sentence of life without parole for juveniles and explicitly imported Eighth Amendment capital sentencing principles into cases where juveniles face the possibility of a sentence of life without parole. Just as "death is different" when imposed upon an adult offender, life imprisonment without the possibility of parole is different when imposed upon a juvenile. 132 S.Ct. at 2470 (just as "'death is different,' children are different").

Given this fundamental change in the relevant legal landscape, juveniles who have been sentenced to life imprisonment without parole in South Carolina are entitled to be resentenced in a manner consistent with *Miller*'s requirement of individualized sentencing and the "distinct set of legal rules" now applicable in juvenile homicide cases, *id.* at 2466. The circuit courts of this state are therefore in need of guidance as to how to proceed in cases where a juvenile offender faces the possibility of a life without parole sentence. Because the questions presented in these cases are not only of grave importance, but also involve issues which must be resolved in these and other cases pending at trial, on direct appeal and in post-conviction proceedings, *certiorari* is especially appropriate.

This petition is not without precedent. A decade ago, following the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that persons with mental retardation

are not eligible for capital punishment, this Court granted a similar petition filed on behalf of death row inmates who alleged they fell within the category of persons for whom the death penalty was no longer a constitutionally permissible punishment in order to address issues concerning the definition of mental retardation, and to establish procedures for cases in various procedural postures. *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Additionally, three decades ago, this Court accepted a case in its original jurisdiction following the United States Supreme Court's ruling in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in order that it might "clarify the law and assure the validity of the sentences imposed, or to be imposed," in the affected cases. *State v. Rodgers*, 270 S.C. 285, 242, S.E.2d 215, 217 (1978). After the statute under which six capital defendants had been convicted and sentenced to death was found unconstitutional, the Attorney General brought the cases before this Court and requested its guidance as to how to proceed. *Id.* This Court intervened.

In light of *Miller v. Alabama*, it is likewise necessary for this Court to grant *certiorari* in this case. Doing so will both provide these petitioners and others similarly situated with a constitutionally adequate remedy, and supply needed guidance to the judiciary, solicitors and defense counsel in pending and future cases. The public interest will also be well served if this Court promptly establishes a remedy and procedures for cases involving juveniles either sentenced to life without parole or facing the possibility of life without parole, thus avoiding the inconsistencies and potential errors inherent in an *ad hoc* approach to the issues raised by *Miller*. *See Westside Quik Shop Inc. v. Steward*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000) (court accepted video gaming case in original jurisdiction due to the "great public interest in finally determining the matter"); *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (citing "significant public interest" as appropriate basis for exercising original jurisdiction).

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Petitioners are all juveniles[2] who have been sentenced to life without the possibility of parole following truncated sentencing proceedings which failed to comport with the Eighth Amendment procedures established in *Miller*. Brief descriptions of their circumstances are set forth below.

> **Tyrone Aiken** was a seventeen-year-old with mental retardation at the time he took part in the armed robbery and murder for which he was sentenced to life without parole. According to official school records, Aiken has a full scale IQ in the low 60s, and spent his entire school career in special education classes.
>
> **Matthew Clark** was seventeen years old at the time of the offense. He was convicted of homicide by child abuse and sentenced to life without parole in connection with the death of his twenty-two-year-old girlfriend's three-year-old daughter.
>
> **Eric Graham** was sentenced to life without parole for a murder committed when he was seventeen years old. The victim was Graham's girlfriend, and she died of a single gunshot wound; according to Graham, the gun went off accidentally while the two of them were watching a movie. There was no evidence of a fight or a disagreement presented at trial, and Graham's cousin, who was present at the shooting, corroborated Graham's account. When the police came into the house they found Graham crying and screaming on the floor. The sentencing proceeding covers seven transcript pages, and the trial judge said nothing concerning Graham's age.
>
> **Bradford Haigler** was a seventeen year old high school junior with no criminal record at the time of the homicide for which he was sentenced to life without parole. The victim, John Bovain, was a member of a group known to police as the "Edisto Boys." On the night of the homicide, Bovain picked up Haigler in his car and, while driving, threatened Haigler. When Bovain appeared to reach under his seat, Haigler, fearing for his own safety, shot him. Haigler has been a model inmate since his conviction in May 1997, and is a longtime resident of the honor dorm at Lee Correctional Institution.
>
> **Angelo Ham** was fifteen years old at the time of his offense; his two codefendants were seventeen and nineteen. Despite a psychologist's recommendation that the case remain in family court in light of his troubled childhood and IQ in the 70s, Ham was transferred to adult court, where he pled guilty. Although he was not the triggerman,

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[2]For purposes of this pleading, juvenile offenders are persons that are convicted of crimes which occurred before the age of eighteen. *See Miller*, 132 S.Ct. at 2460.

was high on drugs at the time of the crime, and was well known to be easily influenced by others, Ham received the same life without parole sentence as the actual killer, who was an adult. His sentencing hearing included four pages of argument by counsel, and no testimony or other evidence was presented on his behalf.

J'Corey Hull-Kilgore was seventeen years old at the time of the shooting for which he was sentenced to life without parole. The victim died from a single gunshot wound. Hull-Kilgore's codefendants, ages twenty-two and twenty-four, each pled guilty and received suspended sentences. After turning down a favorable plea offer, Hull-Kilgore was tried twice: the first jury acquitted him of armed robbery and hung on the murder charge; the second jury convicted him of murder. The trial evidence was in conflict on numerous important facts including the identity of the shooter. The defense presentation at sentencing included two pages of argument by counsel, and no testimony or other evidence was presented on his behalf.

Damian Inman was seventeen years old and had no prior criminal record at the time he took part, along with his older brother and a friend, in the armed robbery and homicide of Mary Alice Stutts. Prior to sentencing Inman to life without parole, the trial judge remarked that he and his codefendants were "no different than those folks that flew planes into the towers in New York," and lamented Inman's failure to plead guilty "to prevent this family from having to go through this trial."

Roger Legette was fifteen years old and had no prior criminal record when he was convicted of murder and sentenced to life without parole. Legette shot a cab driver after a heated argument, and then called the police and told them what he had done. While the State offered him a sentence of no more than thirty years in exchange for a guilty plea, Legette did not learn of that offer until after he had been tried, convicted and sentenced to life without parole.

Terriel Mack was seventeen years old at the time of the homicide for which he was sentenced to life without parole. His two codefendants, Islam Horn and Gregory Johnson, pled guilty and testified against Mack. In exchange for their cooperation with prosecutors, they were each sentenced to less than two years.

Jennifer McSharry was a seventeen-year-old girl with no prior record and a drug habit cultivated by her own mother when she accompanied four people, including her mother, during an attempt to obtain money from the victim. It has never been disputed that McSharry was outside, in a car, at the time the victim was killed inside his camping trailer. After refusing a deal that would have required her to testify against her mother, McSharry was convicted of murder under an accomplice liability theory. After remarking on McSharry's apparent lack of "any Christian bringing-up," the trial court sentenced her to life without parole. The admitted triggerman was

sentenced to fifty-five years in a separate proceeding.

Wallace Priester turned fifteen years old only ten days before the crime for which he was sentenced to life in prison without parole. He had no prior criminal record before becoming involved with his eighteen-year-old codefendant. In addition to his young age and corresponding immaturity, Priester's background made him particularly vulnerable to negative influence. He lacked any kind of father figure, and spent his childhood with a mother and grandmother who abused alcohol, and in foster care made necessary by his mother's abuse and neglect. Although this information had been identified by a state psychologist and was known to Priester's trial counsel, none of it was presented to or considered by the court.

Davon Reed was sentenced to life without parole for a murder committed when he was seventeen years old. As a result of his mother's chronic addiction to crack cocaine, much of Reed's childhood was spent in a series of foster placements. At sentencing, the judge remarked that "age is really no consequence, considering the nature of offense. Society has nothing left to give Reed than to lock him up."

Dondre Scott was seventeen years old at the time of the botched armed robbery and subsequent murder of an elderly man that resulted in his sentence of life without parole. He had no prior criminal record. Scott fired one shot that struck the victim under his arm and killed him. His twenty-five-year-old co-defendant, Sylvester Davis, had an extensive criminal record and was the person who initiated the shooting. Unlike Scott, Davis pled guilty, testified for the prosecution, and was sentenced to thirty years.

Edgar Leron Thomas pled guilty but mentally ill to avoid the death penalty for a murder and armed robbery committed when he was seventeen years old. Thomas has brain damage, and has been diagnosed with multiple mental illnesses, including chronic paranoid schizophrenia.

James Vang was fifteen years old when he accompanied an older codefendant, Ae Kingratsaiphon, during a botched armed robbery of a video poker parlor. Although it was undisputed that Vang was not the triggerperson, he was convicted of murder under an accomplice liability theory. At sentencing, Vang's attorney proceeded under the mistaken impression that he faced a maximum sentence of thirty years. Although a wealth of mitigating evidence was available, none was presented, and the trial court sentenced Vang to life without parole.

REASONS THE WRIT SHOULD BE GRANTED

THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *MILLER V. ALABAMA* CALLS INTO QUESTION THE LEGITIMACY OF A LIFE WITHOUT PAROLE SENTENCE FOR ANY CRIME COMMITTED BY A JUVENILE, MANDATES THAT ALL JUVENILES WHO HAVE SENTENCED TO LIFE WITHOUT PAROLE BE RESENTENCED, AND REQUIRES THIS COURT TO ESTABLISH CONSTITUTIONALLY ADEQUATE PROCEDURES FOR SENTENCING JUVENILE OFFENDERS.

I. Overview of the Supreme Court's decisions involving juvenile offenders.

Over the last decade, the Supreme Court of the United States has dramatically altered the legal framework governing criminal sentences which can be imposed upon juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the Eighth Amendment's ban on cruel and unusual punishment barred states from sentencing juveniles to death. Then, in *Graham v. Florida*, 560 U.S.___, 130 S.Ct. 2011 (2009), the Court went a step further holding that a sentence of life without parole imposed upon a juvenile for a non-homicide offense was cruel and unusual punishment barred by the Constitution. Several months ago, the Court issued its opinion in *Miller v. Alabama*, *supra*, and while it explicitly reserved the question whether the Eighth Amendment permits juveniles to be sentenced to life without parole under any circumstances, the Court held that even in homicide cases there can be no mandatory sentence of life without parole for juvenile offenders. *Miller*, 132 S.Ct. at 2464. All three cases were grounded in one core constitutional fact: "children are constitutionally different from adults for purpose of sentencing." *Id.*

A closer examination of the Court's reasoning in *Miller* is of particular importance to the issues raised in this petition. The Court first observed that the question presented implicated "two strands of precedent reflecting our concern with proportionate punishment." *Miller*, 132 S.Ct. at 2463. The first set of cases are those adopting "categorical bans on sentencing practices based on

mismatches between the culpability of a class of offenders and the severity of the penalty." *Id.* As examples, the Court referred to *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the death penalty is disproportionate for nonhomicide crimes committed by adults), and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty may not be imposed upon persons with mental retardation). *Id.* After reaffirming that *Graham, supra*, "likened life without parole for juveniles to the death penalty itself," *id.* at 2463, the Court turned to the second strand of relevant cases: those holding that mandatory impositions of capital punishment violate the Eighth Amendment. *Id.* at 2463-64 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978)). The Court then concluded that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464.

The Court further explained that all of its recent holdings regarding juveniles hinged on the now established constitutional maxim that juveniles have both "diminished culpability and greater prospects for reform" and are thus "'less deserving of the most severe punishments.'" *Miller*, 132 S.Ct. at 2464 (quoting *Graham*, 130 S.Ct. at 2026). The lessened culpability and possibility of rehabilitation are grounded in three significant differences between juveniles and adults:

- Children are less mature and developed than adults leading to "'recklessness, impulsivity, and needless risk-taking,'" *id.* (quoting *Roper*, 534 U.S. at 569);
- Children are more "'vulnerable ... to negative influences and outside pressures,'" have "'limited control over their own environment and "'lack the ability to extricate themselves from horrific, crime-producing settings;'" *id.*; and,
- A child's character is not as "'well formed' as an adult's, his traits are "'less fixed,'" and thus his actions are "less likely to be 'evidence of irretrievable deprav[ity],'" *id.*

These differences, *Miller* noted, result in part from a consistently growing body of social science and neuroscience research conclusively establishing: a) that only a small percentage of adolescents who commit crimes, even serious crimes, "'develop entrenched patterns of problem behavior,'" *Miller*, 132 S.Ct. at 2464 (quoting *Roper*, 543 U.S. at 570), and, b) there are fundamental differences between the brains of juveniles and adults in areas "'involved in behavior control,'" *id.* at 2464-65 (quoting *Graham*, 130 S.Ct. at 2026). Because the brains of juveniles are not "fully mature in regions and systems related to higher executive functions such as impulse control, planning and risk avoidance," *id.* at 2464 n. 5 (quoting Brief of the American Psychological Association et al), juveniles have a constitutionally different level of moral blameworthiness and, for that reason, the penological justifications for any criminal punishment – deterrence and retribution – are inconsistent with life without parole sentences. The same characteristics that make this category of offenders less culpable necessarily mean that "'an irrevocable judgment about a [juvenile] offender's value and place in society,' [is] at odds with a child's capacity for change." *Id.*

For these reasons, the Court concluded that a sentence of life without parole, when imposed on a teenager as compared to an adult is the same "in name only." *Miller*, 132 S.Ct. at 2466. From a constitutional perspective, it is akin to the death penalty. *Id.* ("[W]e viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."). Thus, the Court held that the same constitutional protections afforded adults in capital cases must be provided in any case where a juvenile faces a possible sentence of life without parole. *Id.* at 2468 ("a similar rule [to capital cases] should apply when a juvenile confronts a sentence of life (and death) in prison"). The Eighth Amendment, in fact, demands "individualized sentencing ... analogous to [that required in] capital punishment [cases].'" *Id.* It was both the fact that the

sentences were mandatory as well as the absence of a process for allowing a juvenile to present the full range of mitigating evidence at a meaningful sentencing hearing similar to the penalty phase of a capital trial which rendered the life without parole sentences imposed upon the petitioners constitutionally infirm. *Id.*[3]

Because the Court was confronted only with cases involving mandatory sentences of life without parole, it did not reach the question whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles ...." 132 S.Ct. at 2469. However, the Court established a presumption against such sentences:

> [G]iven all that we have said in *Roper*, *Graham* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. This is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the "juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. , at ___ (slip op. at 17). Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id.

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[3]*Miller*'s impact on non-mandatory sentences imposed in the absence of informed and individualized sentencing is illustrated by the Supreme Court's recent order summarily vacating the Wyoming Supreme Court's decision in *Bear Cloud v. State*, 275 P.3d 377 (2012). *Bear Cloud v. Wyoming*, ___S.Ct.___, 2012 WL 2002444 (Oct. 1, 2012). As the state court observed, "Bear Cloud did *not* receive a 'life without parole' sentence," *Bear Cloud*, 275 P.3d at 387 n.3, and "[r]ehabilitation and even release are still possible," *id.* at 412. Despite these features, the Supreme Court remanded the case for further consideration in light of *Miller*.

II. Issues to be resolved.

Given both the Supreme Court's explicit holdings and the reasoning it employed in *Miller*, *Graham* and *Roper*, states like South Carolina must now resolve a number of important constitutional issues. Petitioners will address several of the more pressing issues raised by *Miller* below.

A. Whether the Eighth Amendment precludes life imprisonment without the possibility of parole for juvenile offenders?

As will be set forth in detail below, given both the Supreme Court's clear foreshadowing of an absolute categorical prohibition against life without parole sentences for juvenile offenders, and the characteristics shared by all juvenile offenders, regardless of the offense they have been convicted of committing, this Court should declare such sentences unconstitutional.

Miller reaffirmed what the Court had established in *Graham* and *Roper*: "Children are constitutionally different from adults for the purposes of sentencing." *Miller*, 132 S.Ct. at 2464. This immutable constitutional fact led the Court in *Roper* and *Graham* to declare that juveniles may not be sentenced to death regardless of the circumstances of the crime, and to similarly ban life without parole for non-homicide offenses, regardless of the underlying facts of the case. In *Miller*, the Court simply took the next logical step and held that the Eighth Amendment also bars mandatory life without parole sentences for homicides committed by juveniles.

Because the defendants in *Miller* were sentenced pursuant to mandatory schemes, the Court was not required to address the remaining issue: whether the Eighth Amendment bars juveniles from being sentenced to life without parole under any circumstances. Nevertheless, the constitutional reasoning that drove the decisions in *Roper*, *Graham* and *Miller*, leads inexorably to the conclusion that any life without parole sentence imposed on a juvenile offender is cruel and unusual punishment

proscribed by the Eighth Amendment. There can be no genuine doubt that the Supreme Court will eventually so hold. Thus, rather than wait for the High Court to act, this Court should now hold that life without parole sentences are barred for juvenile offenders by the Eighth Amendment of the United States Constitution and Article I §5 of the South Carolina Constitution.

South Carolina would not be the first jurisdiction to make life without parole unavailable for juveniles. In *Graham*, the Supreme Court spoke of national consensus[4] and noted that six jurisdictions[5] did not allow life without parole sentences for any juvenile offenders. As of 2011, twelve jurisdictions in the United States prohibited sentencing juveniles to life without parole,[6] and other states are currently in the process of eliminating life without parole as a sentencing option.[7] At the international level, universal human rights principles, including the American Declaration of the Rights and Duties of Man,[8] preclude the imposition of life without parole sentences for children on

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[4]The Court has repeatedly stated that, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 130 S.Ct. at 2023, *Atkins*, 536 U.S. at 312.

[5]The Court referred to Alaska, Colorado, Montana, Kansas, Kentucky, and Texas. *Graham*, 130 S.Ct. at Appendix III.

[6]These states are: Alaska, Colorado, Kansas, Kentucky, Maine, Montana, New Mexico, New York, Oregon, Texas, West Virginia, and the District of Columbia.

[7]These states include: Arkansas, Florida, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Nebraska, and Washington. *See Graham*, 130 S.Ct. at 2024; *see also* Amnesty International and Human Rights Watch Report, *The Rest of Their Lives: Life Without Parole for Child Offenders in the U.S.*, October 2005.

[8]The International Covenant on Civil and Political Rights, to which the United States is a party, prohibits a life without parole as a sentencing option in cases involving juveniles, International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, Articles 7,14, 24. Such sentences also constitute a violation of numerous human rights treaties. *See* American Declaration of the Rights and Duties of Man, Article VII; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, Article 19; Convention

the basis that the unique characteristics of youth mandate a second opportunity for review.[9] In *Graham*, the Court recognized that the U.N. Convention on the Rights of the Child,[10] ratified by every country except Somalia and the United States, is evidence of international opinion. It explicitly prohibits life without parole sentences on juvenile offender cases. *Graham*, 130 S.Ct. at 2033.[11]

In addition to the unmistakable trend toward rejection of life without parole sentences for juveniles, *Miller* relied heavily upon the fact that a child's character is not yet fully formed; his traits are "more transitory and less fixed" and his actions less likely to be "evidence of irretrievable depravity." *Miller*, 132 S.Ct. at 2464; *see also Roper*, 534 U.S. at 570. The Court also noted that children "have limited control over their own environment," lack maturity and responsibility, and are thus inclined toward "recklessness, impulsivity and needless risk-taking." *Id.* Elaborating on the

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Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc No. 95-20 (1922), 1465 U.N.T.S. 85.

Barbara Hernandez, a sixteen year old girl, together with thirty-one other Michigan residents serving life without parole sentences for crimes committed as children, have filed actions to the Inter-American Commission on Human Rights. Their petition alleges that the U.S. and the State of Michigan are violating the American Declaration of the Rights and Duties of Man and universal human rights principles by sentencing them to a life sentence without the possibility of parole. See American Civil Liberties Union (http://www.aclu.org), Source URL: http://www.aclu.org/blog/criminal-law-reform-human-rights/seeking-second-chance-children-sentenced-life-without-parole.

[9]*See T. v. United Kingdom*, 170 Eur.Ct. H. R. ¶ 121 (1999) (holding that a sentence of detention is illegal under international law where no parole eligibility date is set, and relying upon many of the same reasons contemplated in United States' domestic case law concerning the need for a second chance of review in these cases).

[10]Convention on the Rights of a Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[11]*See Graham*, 132 S.Ct. at 2034 (quoting *Roper*, 543 U.S. at 577) (observing that "'the United States now stands alone in a world that has turned its face against'" life without parole sentences for juvenile non-homicide offenders); *see also id.* at 2036 (Stevens, J., concurring) (reaffirming the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "'evolving standards of decency'").

cruelty of imposing a life without parole sentence on a juvenile, the Court noted "the great difficulty ... of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. ... We believe that incorrigibility is inconsistent with youth." *Miller*, 132 S.Ct. at 2469 (quoting *Roper*, 543 U.S. at 573); *see also Graham*, 130 S.Ct. at 2026-27; *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

Significantly, "[n]othing the Court said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." *Miller*, 132 S.Ct. at 2465. Those characteristics are "evident in the same way, and to the same degree" in juveniles who commit homicide as they are in those who commit armed robbery, kidnaping or any other offense. *Id.* at 2465. In short, the constitutional difference between juvenile and adult offenders does not turn in any respect on the nature of the crime, and any purported distinction on that basis finds no support in the Court's recent decisions.

Finally, the Court also relied upon the difficulty of distinguishing between the "unfortunate" and the truly culpable offender: "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 130 S.Ct. at 2030. Indeed, it is difficult, if not impossible, for even highly trained child psychologists and psychiatrists to differentiate juvenile offenders whose crimes are the product of permanent fixed character traits from those whose crimes are the result of circumstances and the transient qualities of

youth.[12] *Miller*, 132 S.Ct. at 2469 (citing *Roper*, 543 U.S. at 573, and *Graham*, 130 S.Ct. at 2026-27). It is equally impossible for a judge or a jury to make such a determination. The potential for reform that is present in all juvenile offenders thus requires States to maintain the possibility of eventual release as a sentencing option. It would be constitutionally excessive to render a final, permanent judgment that a juvenile offender should never be released; a mechanism for future review must be available, because States cannot ignore the juvenile's "potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 573.

Given the direction of the Supreme Court's juvenile sentencing decisions, the legal principles governing the sentencing of juvenile offenders, and the heightened capacity for change in all juvenile offenders, this Court should take the sensible – and likely inevitable – step of adopting a categorical ban against the imposition of life-without-parole sentences for juvenile offenders.

B. Whether all juveniles sentenced to life imprisonment without the possibility of parole are entitled to a new sentencing proceeding?

Even if this Court is not prepared at this point to declare any life without parole sentence imposed upon a juvenile offender to be cruel and unusual punishment under the United States and/or South Carolina Constitutions, the petitioners in this case and others similarly situated are still entitled to be resentenced because the procedures which produced their sentences did not comply with *Miller*'s mandates. The State may argue that *Miller* is of no avail to some of the South Carolina juveniles sentenced to life without parole because the sentences they received were not mandatory,

[12] *See Miller*, 132 S.Ct. at 2464 (referencing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701–706 (4th ed. text rev.2000); Steinberg & Scott 1015).

i.e., the judge had the power to impose a lesser sentence.[13] Such an argument would be technically true but legally irrelevant.

As this Court is aware, and as a review of the record of the sentencing proceedings in the petitioners' cases establishes, sentencing hearings in South Carolina are very brief and informal. Pre-sentence reports are not utilized and witnesses are rarely, if ever, called to testify. The sentencings ordinarily take place immediately after the verdict is rendered and generally consist of: a) the prosecution advising the trial judge of the defendant's prior record and – in some cases – asking the court to impose the maximum sentence; b) defense counsel making a brief argument regarding any mitigating circumstances (e.g., youth, substance abuse, family circumstances) and suggesting reasons why the judge should consider a lesser sentence; and, c) the defendant (and in some cases one or more family members) telling the court why the maximum punishment is not deserved. The judge then immediately imposes sentence. A typical sentencing hearing in South Carolina takes no more than a few minutes. The sentencing hearings at issue in the petitioners' cases mirror the norm. On average, the proceedings span just a few pages of the trial record, and involve no evidentiary presentations (e.g., mental health experts, social workers, teachers, character witnesses, etc.). Given

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[13]The State may also argue that *Miller* created a new rule which does not apply to life without parole sentences imposed before the Supreme Court's decision, or more specifically, to cases which were "final on direct review" before the Court's decision. *See Teague v. Lane*, 489 U.S. 289 (1989) (holding that new rules of criminal procedure do not apply retroactively to cases final on direct review unless they fall within one of two exceptions). Such an argument, if made, cannot withstand even minimal scrutiny. First, the Supreme Court's other decisions finding punishments imposed upon juveniles to violate the Eighth Amendment, e.g., *Roper* and *Graham*, have universally been recognized to apply retroactively by the state and federal courts because they established limitations on the state's power to impose a particular punishment upon a particular category of offenders. Second, *Miller* itself came to the Supreme Court in a post-conviction setting. Thus, if the Supreme Court did not intend for the principles it announced in *Miller* to apply retroactively, it would not have had the power to declare the life without parole sentences imposed upon the petitioners to violate the Constitution.

the summary nature of the sentencing proceedings that produced the life without parole sentences at issue, resentencing is required in each petitioner's case, and in the cases of all others similarly situated, for two reasons.

First, even assuming that life without parole is still a permissible punishment for some juvenile offenders, *Miller* undeniably created a strong constitutional presumption against it because "children are different" for sentencing purposes. 132 S. Ct. at 2469. Because of their "diminished culpability and heightened capacity for change," the Court made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* The constitutional presumption in favor of providing an opportunity for release at some point in time, flows naturally from the "great difficulty ... of distinguishing ... between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* Given this significant change in the legal framework governing sentencing hearings where life without the possibility of parole is a sentencing option for a juvenile offender, the petitioners are entitled to be resentenced by a judge who is aware of and applies the constitutional presumption against such sentences. That was not the case in any sentencing hearing that resulted in a juvenile being sentenced to life without parole in South Carolina prior to *Miller*.

Second, *Miller* made clear that the kind of individualized sentencing which occurs in capital cases involving adult offenders, and its attendant procedures, are constitutionally required in sentencing proceedings involving juveniles who face life without parole. *Id.* at 2468 ("In meting out the death penalty, [a lack of individualization] would be strictly forbidden. And once again, *Graham* indicates that a similar rule [to capital cases] should apply when a juvenile confronts a sentence of life (and death) in prison."). There can be no serious contention that the sentencing hearings at issue

in these cases provided the type of individualized consideration – with regard to the fundamental differences between all children and adults, the characteristics of the particular defendants, or both – contemplated by the Supreme Court of the United States.

For these reasons, new sentencing hearings are required in all cases where juveniles were sentenced to life without parole before the Supreme Court's decision in *Miller*. The Attorney General may argue that whether resentencing is required should be decided on a case by case basis in the post-conviction context. Such a proposal, if made, should be rejected. As set forth above, given the divergence between pre-*Miller* sentencing practices in South Carolina and the post-*Miller* legal regime now in place for juvenile sentencing proceedings where life without parole is a potential punishment, it is apparent that the deviation from constitutionally required norms was ubiquitous. Requiring petitioners to run the post-conviction gauntlet before receiving the new sentencing hearing to which they are all clearly entitled would do nothing but waste time and scarce judicial, prosecutorial, and defense resources.

C. What procedures are required where life imprisonment without the possibility of parole is a sentencing option?

Should this Court conclude, contrary to petitioner's argument in II.A., *supra*, that juveniles may, in some "uncommon" circumstances, be sentenced to life without parole, *see Miller*, 132 S.Ct. 2469 (reserving question of whether life without parole is ever a permissible sentence for a juvenile), it must establish the procedures under which such uncommon circumstances are to be identified. *Miller* is clear that "similar rules [to capital cases] must apply when a juvenile confronts a sentence of life (and death in prison"). *Id.* at 2468.

1. The sentencing proceeding.

First, because life without parole sentences for juveniles are rarely appropriate, and presumptively disproportionate under the Eighth Amendment, it is necessary to narrow the category of juvenile homicides that are eligible for such sentences. To avoid arbitrariness and caprice, the Eighth Amendment requires a sentencing scheme for the most severe penalty to "genuinely narrow the class of persons eligible for [the most severe punishment] and [to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).[14] This Court can either import the aggravating factors that the legislature has determined distinguish death-eligible homicides by adults from ordinary homicides, or hold that no juvenile can be sentenced to life without parole in South Carolina until the legislature passes a statute enumerating the aggravating factors appropriate to distinguish the few juvenile murderers eligible for life without parole from the many not eligible. Moreover, the State also must show that the homicide itself is one that is eligible for the most severe penalty, either because the defendant himself killed, or because his "participation [wa]s major and [his] mental state was one of reckless indifference to the value of human life." *Tison v. Arizona*, 481 U.S. 137, 152 (1987).

Additionally, because "juvenile life sentences [are] analogous to capital punishment" for adults, *Graham* at 2038-39 (Roberts, C.J., concurring in judgment), the Eighth Amendment also

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[14] *See also* West's Ann. Cal. Penal Code § 190.5 (permitting the impositions of a life sentence upon a juvenile upon jury determination of an aggravating circumstance); West's Ann. Ind. Code § 35-50-2-9 (requiring proof beyond a reasonable doubt of at least one aggravating circumstance before imposition of a sentence of life without parole); *State v. Pierre*, 584 A.2d 618, 620 (Me. 1990) (life sentence permissible only in the presence of enumerated aggravating circumstances); West's Gen. Laws R.I. Ann. § 12-19.2-4 (requiring at least one enumerated aggravating circumstance before the imposition of a sentence of life without parole).

demands "individualized sentencing," *Miller*, 132 S.Ct. at 2468. Thus, a juvenile eligible for a sentence of life without parole, like an adult facing capital charges, must be given the opportunity to show "the the diverse frailties of humankind." *Woodson*, 428 U.S. at 304. When an adult faces a capital sentence, the "sentencer ... may not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a [lesser] sentence ...." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). So too, when a juvenile faces a life without parole sentence,

> *Miller* indicates, at the very least, one must consider a juvenile's age at the offense, his diminished culpability and heightened capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home, and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, ... his mental health history, and his potential for rehabilitation.

Com. v. Knox, 50 A.3d 749, 768 (Pa. Super. 2012); *see also Conley v. State*, 2012 WL 3570390 (Ind.) (Before court imposes a sentence of life without parole, it must find that the State has proven the existence of an alleged aggravator beyond a reasonable doubt and must find that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances"); *State v. Lockheart*, 820 N.W.2d 769, 2012 WL 2814378, at *4 (Iowa App. July 11, 2012) (quoting *Miller*, 132 S.Ct. at 2475) (vacating mandatory life without parole sentence for juvenile and remanding "for individualized resentencing in accordance with the process articulated in *Miller*, whereby the sentencing court shall 'have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'"); *Pierre*, 584 A.2d at 620 ("[E]ven when the presence of aggravating circumstances permit the imposition of a life sentence, the court must consider

whether mitigating factors require a lesser sentence"); Nev. Rev. Stat. 175.552 ("During the [sentencing] hearing [after conviction of murder], evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible."); 21 Okl. St. Ann § 701.10 (upon conviction of first degree murder, defendant may present mitigation evidence to determine whether he should be sentenced to life or life without parole); West's Gen. Laws R.I. Ann.§ 12-19.2-4 (sentencer is required to "consider evidence regarding the nature and circumstances of the offense and the personal history, character, record, and propensities of the defendant" prior to imposing a sentence of life without parole). At least one of those frailties – mental retardation – would doubly diminish a juvenile defendant's culpability, and render him categorically ineligible for a sentence of life without parole, just as it renders an adult ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

2. Preparation for the sentencing hearing.

Because the efforts associated with investigating, preparing and presenting evidence at a sentencing hearing for a juvenile facing life without parole are similar to those necessary for a capital case involving an adult defendant, this Court should require timely notice of the solicitor's intention to seek such a sentence. *See* S.C. Code Ann. § 16-3-26A (requiring notice of intent to seek death at least 30 days prior to the start of trial); *see also* MD Code Ann., Criminal Law, § 2-203 (requiring 30 day notice of intent to seek sentence of life without parole prior to start of trial). For the same reason, this Court should also require the appointment of two appropriately qualified attorneys to assist juvenile defendants in all cases for which life without parole is a possible sentence. *See* S.C. Code Ann. § 16-3-26 B(1) (requiring appointment of two attorneys, and specifying their

qualifications). Additionally, the ordinary caps on funding that apply to noncapital cases should not be applicable in these cases. Rather, the separate provisions for the appointment and compensation of counsel and for the investigative and expert services applicable in capital cases should be imported into juvenile proceedings where a life without parole sentence is or might be sought. *See* S.C. Code Ann. § 16-3-26 B(2)-H (describing procedures for and caps upon obtaining funding for counsel and for expert and investigative services in capital cases).

3. Selection of the sentencer.

With respect to an adult defendant's eligibility for a death sentence, it is clear that the Sixth and Eighth Amendments require a jury determination. *Ring v. Arizona*, 536 U.S. 584 (2002). It follows that to remain consistent with the Supreme Court's mandate that "similar rules [to capital cases] should apply when a juvenile confronts a sentence of life (and death) in prison," *Miller*, 132 S.Ct. at 2468, a juvenile's eligibility for a sentence of life without parole must also be determined by a jury. Although selection of life without parole could constitutionally be performed by a judge, South Carolina law already reflects a legislative preference for jury determination of both eligibility and selection in capital cases. *See* S.C. Code Ann. § 16-3-20. It is thus likely that the legislature would choose to vest juries with responsibility for both the eligibility and selection decisions in juvenile life without parole cases as well. In any event, until the legislature acts, it is up to this Court to determine whether to assign both determinations to juries, or to divide them in a manner consistent with *Ring*.

4. Appellate review of juvenile sentences of life without parole.

This Court should automatically review all juvenile life without parole sentences for

proportionality just as it does with adult death sentences. *See* S.C. Code Ann. § 16-3-25(C)(3) (2003) (providing that Supreme Court shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"); *see also State v. Brown*, 898 A.2d 69, 86 (R.I. 2006) ("In reviewing a sentence of life imprisonment without parole, it is incumbent upon [the Supreme] Court to exercise independent judgment and discretion in deciding the appropriateness of the sentence."). Some of the cases joined in this petition, either because of the facts of the petitioner's participation in the crime, or because of facts already known about the petitioner, seem obviously disproportionate. Full investigation and presentation of mitigating evidence will likely reveal proportionality concerns in additional cases.

Finally, an overwhelming proportion of juvenile recipients of life without parole sentences are members of racial minorities.[15] This Court should therefore review all cases in which such a sentence is imposed on a juvenile to guard against – and to deter – the expression of racial bias. *See* S.C. Code Ann. § 16-3-25C (2) (requiring Supreme Court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor ....").

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[15]There are currently 36 individuals serving life without parole sentences in South Carolina for crimes committed as juveniles. Minorities comprise a disproportionate share of this population: whereas 25% (a total of 9) of the juvenile LWOP population is white, 75% (a total of 27) belong to a racial or ethnic minority group. Such racial disparity is even more pronounced amongst African Americans, who compromise 66% (a total of 24) of South Carolina's juvenile LWOP population. It is important to note that the racial disparities found at the state level in South Carolina are a reflection of the racial disparities found at the national level. For example, in 2009, African Americans compromised 56.1% of the nation's juvenile LWOP population, and more than 60% of the juvenile LWOP population in 17 states. *See* Ashley Nellis & Ryan S. King, *The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America* 23 (2009). These numbers, though striking, are not surprising when one considers the fact that African American youth are more likely to become involved in the juvenile justice system than white youth, and that their overrepresentation in the system increases at each stage of the process – from arrest to disposition. *See* National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 4 (2007).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to consider and resolve the important constitutional questions presented in this petition.

Respectfully submitted,

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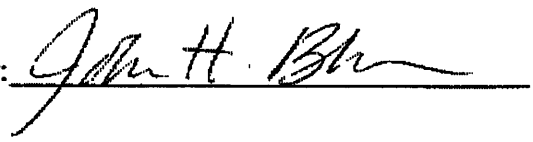
By: 

October 29, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Tyrone Aiken, Matthew Clark, Eric Graham, Bradford M. Haigler, Angelo Ham, J'Corey S. Hull-Kilgore, Damian Inman, Roger Legette, Terriel Mack, Jennifer L. McSharry, Wallace Priester, Davon Reed, Dondre M. Scott, Edgar L. Thomas, James Vang, et al, *Petitioners*,

v.

William R. Byars, Jr., Director, South Carolina Department of Corrections, and **Alan Wilson,** Attorney General of South Carolina, *Respondents*.

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that the Petition for Writ of Certiorari has been served upon counsel for the respondents by placing one (1) copy of same in the United States Mail, first class postage pre-paid, and addressed as follows:

Alan Wilson
Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 29th day of October, 2012 in Columbia, South Carolina.

Jill A. Rider

JILL RIDER

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COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)
)
Jennifer L. McSharry, #244026,) 2011-CP-04-1581
)
Applicant,)
)
v.) **RETURN TO MOTION TO STAY PROCEEDINGS**
)
State of South Carolina,)
)
Respondent.)
)

Respondent, by and through undersigned counsel, making a Return to "Motion to Stay Proceedings until the South Carolina Supreme Court decides *Aiken et. Al. v. Byars*" filed November 13, 2012, would respectfully show unto this Court:

1. The matter is before the Court by way of post-conviction relief (PCR) action filed May 12, 2011;

2. One of the allegations set forth in the PCR application is that the United States Supreme Court opinion in Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012) requires the grant of post-conviction relief because Applicant was a juvenile when she committed the underlying crime for which she was sentenced to life imprisonment without parole;

3. Applicant has filed a "Motion to Stay Proceedings until the South Carolina Supreme Court decides *Aiken et. Al. v. Byars*." Respondent agrees and submits this matter should be held in abeyance until the South Carolina Supreme Court has decided the case of Aiken v. Byars, Appellate Case No. 2012-213286, which is pending in the South Carolina Supreme Court's original jurisdiction. See S.C. Const. Art. V, § 5; Rule 245, SCACR. In Aiken, the issues being raised in the Petition for a Writ of Certiorari concern whether Miller should

extend to all sentences of life imprisonment without parole for juvenile defendants or alternatively whether such defendants are entitled to a new sentencing hearing. As the Court's decision in Aiken will likely be dispositive of the Miller issue raised in the instant case, the instant case should be held in abeyance pending a final decision in Aiken;

4. Respondent submits all motions for either discovery or funding for investigation should also be held in abeyance until the Aiken decision is rendered;

5. Respondent reserves all defenses and the right to file a full Return as necessary;

6. Respondent submits Applicant's "Motion to Stay Proceedings until the South Carolina Supreme Court decides *Aiken et. Al. v. Byars*" should be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: _____

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Nov. 22nd, 2013

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COMMON PLEAS AND
GENERAL SESSIONS

ENTERED

September 1, 2015

The Honorable Richard A. Shirley
Clerk of Court, Anderson County
ATTN: Ms. Jennifer Pruitt, Civil Court Coordinator
P.O. Box 8002
Anderson, SC 29622

Re: Jennifer L. McSharry, SCDC #244062 v. State
Case Number: 2011-CP-04-01581

Dear Mr. Shirley:

Thank you for your letter dated August 26, 2015 requesting a status report on this case. Please allow me to respond.

Ms. McSharry initially filed this application for post-conviction relief based on the United States Supreme Court case of *Graham v. Florida*, 130 S.Ct. 2011 (2010). She subsequently moved to stay these proceedings pending the United States Supreme Court's consideration of the companion cases eventually decided as *Miller v. Alabama*, 132 S.Ct. 2455 (2012). She supplemented her motion to stay these proceedings pending the South Carolina Supreme Court's consideration of *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). Ms. McSharry was one of the petitioners in *Aiken*. The Attorney General moved to stay implementation of *Aiken* in order to petition for writ of *certiorari* to the United States Supreme Court. After the High Court denied that petition, the South Carolina Supreme Court lifted the stay of *Aiken* on July 23, 2015. Ms. McSharry has until July 23, 2016 to move the General Sessions Court for re-sentencing, which she plans to do. This portion of her application for post-conviction relief, accordingly, is moot.

Two additional matters remain relevant. First, after filing the petition, the United States Supreme Court decided *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012). Ms. McSharry amended her application for post-conviction relief to include a request for relief under these cases. Second, Ms. McSharry also cited to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) in her amended application. To the extent that *Martinez* remains relevant to the reaming claims, the Court should probably wait until after the South Carolina Supreme Court decides

Robertson v. State, Appellate Case Number 2012-205909, scheduled for oral argument on October 8, 2015. The Supreme Court's Roster of Cases identifies the issue as

> In this death penalty Post-Conviction Relief (PCR) appeal, the Court granted certiorari to review the circuit court's dismissal of Petitioner's second PCR application. Petitioner contends his second PCR application should not have been dismissed as successive because his case presents unique circumstances warranting review of prior PCR counsel's assistance under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

For the *Frye* and *Lafler* claim, I am in the process of trying to get the relevant files from the Solicitor's Office and trial counsel.

I note the next term of court for post-conviction relief cases in the Tenth Circuit is scheduled for the week of November 9, 2015. I have a capital post-conviction relief case in Charleston County starting on October 19, 2915. Based on this case and the pending decision in *Robertson*, I would respectfully request that Ms. McSharry's case not be scheduled during November.

Given the unique history of this case, a status conference with the Court might be useful.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide more information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: The Honorable J. Cordell Maddox, Jr.
John H. Whitmire, Esquire
Ms. Jennifer McSharry

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
Jennifer L. McSharry, S.C.D.C. No. 244026,	)	Case No.: 2011-CP-04-1581
Applicant,	)	**AMENDED RETURN AND MOTION TO DISMISS**
v.	)	
State of South Carolina	)	
Respondent.	)	

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COMMON PLEAS AND
GENERAL SESSIONS

In response to the application for post-conviction relief filed by Jennifer L. McSharry (Applicant) on May 12, 2011, with Amendments filed on May 14, 2012, and November 13, 2012, Respondent would amend its Return, and show the Court as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the July 1997 term of the Anderson County Grand Jury for murder (1997-GS-04-00124), armed robbery (1997-GS-04-1691), criminal conspiracy (1997-GS-04-1692), burglary in the first degree (1997-GS-04-1693), and possession of a weapon during the commission of a violent crime (1997-GS-04-1694). Bruce Bryholdt, Esquire, represented Applicant. Applicant proceeded to trial before the Honorable H. Dean Hall and a jury. The jury found Applicant guilty of all charges on September 12, 1997. Judge Hall sentenced Applicant to imprisonment for concurrent terms of life for murder, thirty years each for armed robbery and burglary, and five years each for conspiracy and the weapon charge.

Applicant filed a timely notice of appeal, and an appeal was perfected by Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. By opinion decided November 19, 1999, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. State v. McSharry, Op. No. 1999-MO-093 (S.C. 1999). The Remittitur issued on January 5, 2000.

2000-GS-04-3030

Applicant filed her first application for post-conviction relief on November 14, 2000 (2000-GS-04-3030). She alleged the following grounds for relief in her application:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel.

Respondent made its return on September 20, 2004, and an evidentiary hearing into the matter was convened on April 20, 2005, before the Honorable Alexander S. Macaulay. Applicant was present at the hearing and represented by Nancy Jo Thomason, Esquire. Christopher L. Newton, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on her own behalf, and Bruce Byrholdt, Esquire, also testified. By written Order dated May 6, 2005, and filed May 9, 2005, Judge Macaulay denied and dismissed the application. Applicant did not timely file a notice of appeal.

II. CURRENT APPLICATION

In her second and current post-conviction relief application, Applicant alleges she is being held unlawfully for the following reasons:

1. "The Eight Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."
2. "Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."

3. "Since dismissal of prior PCR, new developments in the law entitle Applicant to a new sentencing hearing. Applicant relies on Graham v. Florida, __ U.S. __, 130 S.Ct. 2011 (2010), deciding on May 17, 2010."

Respondent made its return and motion to dismiss on or about January 20, 2012, arguing the application should be dismissed as untimely, successive, and that Graham was inapplicable. Applicant filed a reply to Respondent's motion to dismiss on February 8, 2012.

By and through counsel E. Charles Grose, Jr., Esquire, Applicant amended her application on May 14, 2012, then again on November 13, 2012, alleging she is being held unlawfully for the following reasons:

1. "Unconstitutionality of Juvenile Life without Parole Sentence"
    a. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole[.]"
    b. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of prole when the juvenile did not actually commit the homicide."
    c. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing hearing during which all available mitigation evidence is considered. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing during which all available mitigation evidence is considered."
2. "Ineffective Assistance of Trial Counsel (Plea Negotiations)"
    a. "Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or

proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the 'hand of one, hand of all.'"

b. "'[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.' Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012). When trial counsel's deficient performance leads the client to reject the prosecution's plea offer, '[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. [. . .]' Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012)."

3. "Ineffective Assistance of Trial Counsel (Sentencing Hearing)"
   a. "Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment."
   b. "Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence."
4. "Ineffective Assistance of Post-Conviction Counsel"
   a. "Her PCR counsel, Nancy Jo Thomason, had an actual conflict of interest. In addition to representing McSharry, Thomason previously represented [co-defendant] Kelso during her PCR."
   b. "PCR counsel did not conduct any investigation at all and, therefore, failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment."
   c. "PCR counsel failed to retain an expert witness to perform a psychiatric examination of McSharry to discover the evidence that trial counsel should have presented the sentencing hearing, and provide relevant and available mitigation evidence."
   d. "PCR counsel failed to advise McSharry and assist her in preparing an amended PCR application."
   e. "McSharry wanted to appeal the denial of her PCR, but PCR counsel failed to file a Rule 59(e), SCRCP motion or file the required notice of appeal. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)."

Applicant concurrently filed a "Motion to Stay Proceedings until the South Carolina Supreme Court decides *Aiken et. al. v. Byars*." Respondent filed a Return to the Motion to Stay on November 27, 2013, agreeing the matter should be held in abeyance.

The Supreme Court of South Carolina decided Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) on November 12, 2014, and lifted a stay on its implementation on July 23, 2015. Applicant is proceeding with re-sentencing consistent with the Court's ruling in Aiken and, by letter dated September 1, 2015, and filed September 11, 2015, Applicant, through counsel, informed the Anderson County Clerk of Court that the portions of her application based upon Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, __ U.S. __, 132 S.Ct. 2455 (2012) were moot.

Attached to and incorporated herein are records of the Anderson County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the final order dismissing Applicant's previous PCR action, and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

A. Aiken v. Byars

Applicant's first allegation, that a juvenile "life without parole" sentence is unconstitutional, must be dismissed. On November 12, 2014, the South Carolina Supreme Court held sentences of life without the possibility of parole that were imposed on juveniles violated the Eighth Amendment under Miller and that those individuals are entitled to resentencing pursuant to the United States Constitution. Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The South Carolina Supreme Court specifically ordered "any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion *in the court of general sessions where he or she was originally sentenced.*" Id. at 545, 765 S.E.2d at 578 (emphasis added). Applicant has properly complied with Aiken's procedure in the court of

general sessions. As such, Applicant's first allegation is not properly heard in this PCR action and this allegation should be summarily dismissed.

B. Failure to State a Claim – Ineffective Assistance of PCR Counsel

Applicant's allegations of ineffective assistance of PCR counsel should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. Applicant alleges she is entitled to relief on grounds that her prior PCR counsel was ineffective. Ineffective assistance of PCR counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of her original application, she may not make successive applications based on ineffective assistance of PCR counsel. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

For these reasons and pursuant to Rule 12(b)(6), SCRCP, Applicant's fourth ground for relief should be dismissed for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

Austin v. State

Applicant alleges she did not knowingly and voluntarily waive her right to appellate review of her prior PCR hearing. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order

was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the PCR court determines the applicant did not freely and voluntarily waive her appellate rights, the applicant must still petition the South Carolina Supreme Court to determine "whether he was prejudiced by his failure to obtain review of a meritorious issue." Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

However, Applicant's Austin claim in this case should be dismissed as barred by the equitable doctrine of laches. Although the statute of limitations does not apply to Austin claims, the doctrine of laches may still bar the action. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an Applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). "Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches." Id.

Applicant seeks review of her first PCR hearing more than *eleven* years after its denial, and more than *nineteen* years after she was convicted. Absent some explanation or justification

for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of her conviction, especially where the delay affects the availability of evidence to review Applicant's claims. McElrath at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. *See, e.g.*, Bray, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held). Moreover, because of Applicant's failure to timely challenge her conviction, the tape recordings of Applicant's PCR hearing have likely been destroyed. *See* Rule 607, SCACR ("[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five years . . . and the court reporter may reuse or destroy the tapes after the expiration of that period."); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy "would undoubtedly be futile considering the passage of over ten years' time" when the delay was caused by appellant). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review her claims.

Therefore, Applicant's allegation pursuant to Austin v. State should be summarily dismissed as barred by the equitable doctrine of laches.

C. Statute of Limitations

Applicant's remaining claims of ineffective assistance of trial counsel should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the Act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

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). 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) 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."

Applicant was convicted on September 12, 1997, and the Remittitur from her direct appeal issued on January 5, 2000. The current application was not filed until May 12, 2011 – well after the one-year statutory filing period expired. Therefore, the Application should be summarily dismissed as barred by the statute of limitations.

D. Successive

This Application should also be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code 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 indicate 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." Id. 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. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Respondent submits that Applicant's reliance on the U.S. Supreme Court cases of Missouri v. Frye, 132 S.Ct. 1399 (2012), and Lafler v. Cooper, 132 S.Ct. 1376 (2012), to support her allegation that trial counsel was ineffective with respect to plea negotiations is misplaced. These cases were decided in 2012, more than fifteen years after Applicant was convicted. Applicant has not made any showing that those cases were intended to apply retroactively, and Respondent submits that it would be improper for this Court to do so. Although there are no South Carolina cases that pass on this exact issue, federal courts in the Fourth Circuit and elsewhere have declined to apply Lafler and Frye retroactively, holding that they did not announce a new constitutional rule. *See, e.g.*, In re Graham, 714 F.3d 1181, 1182 (10th Cir. 2013) ("To date, however, every circuit court to consider the question has held that Frye and Lafler do not establish a new rule of constitutional law.... We substantially agree with the reasoning of those decisions." (citations omitted)); Collins v. Cartledge, No. 2:14CV1200-BHH-

WWD, 2014 WL 8396824, at *3 (D.S.C. Nov. 14, 2014), report and recommendation adopted, No. CIV.A. 2:14-1200-BHH, 2015 WL 1518144 (D.S.C. Mar. 30, 2015) ("Neither Lafler nor Frye created a new rule of constitutional law that is retroactive to cases on collateral review.").

Additionally, ineffective assistance of PCR counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of her original application, including an appeal, she may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 395. Aice further held that "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." Id. at 452, 409 S.E.2d at 394. Applicant's contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application.

Thus, Applicant has failed to show that a successive application is appropriate, and this current Application should be summarily dismissed. Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-

conviction relief; the current application is successive and barred under S.C. Code Ann. § 17-27-90. Because, she has failed to meet the burden imposed upon her, this Court should summarily dismiss the Application as successive to Applicant's previous PCR application.

E. Res Judicata

Applicant's second and third allegations are similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; *see also* Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all her allegations of ineffective assistance of trial counsel in her prior action. The finality of the previous Court rulings should be respected.

Therefore, the Application should be summarily dismissed as barred by the doctrine of *res judicata*.

IV.

Respondent denies each and every allegation not expressly admitted, qualified, or explained.

V.

WHEREFORE, Respondent moves to summarily dismiss this Application because it raised claims that are inappropriate for a PCR action, is successive to Applicant's previous application, was filed outside the statute of limitations, and is barred by the doctrine of *res judicata*.

Respectfully submitted,

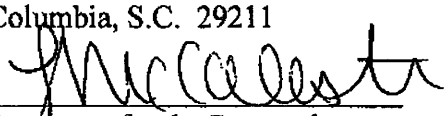
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

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

By: 
Attorneys for the Respondent

Columbia, South Carolina
12/22, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
	)	2011-CP-04-1581
	)	
	)	
JENNIFER L. MCSHARRY, #244026	)	
	)	
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 **Amended Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

DATED this the 22th day of December, 2016.

Deonna Rogers, Legal Assistant
For Respondent

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

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2016 DEC 30 PM 12:09
COMMON PLEAS AND
GENERAL SESSIONS

December 27, 2016

Via email and US Mail

The Honorable R. Scott Sprouse
P.O. Box 1277
Walhalla, SC 29691

Re: *Jennifer L. McSharry v. State of South Carolina*
Case Number: 2011-CP-04-01581

Judge Sprouse:

By letters dated December 22, 2016, the State served its Amended Return and Motion to Dismiss and proposed Conditional Order of Dismissal. Pursuant to *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) ("opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order"), Ms. McSharry objects to the proposed order.

As a threshold matter, Mr. McSharry agrees that her claims under *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) are moot because of our Supreme Court's opinion in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), in which Ms. McSharry was one of the petitioners. Indeed, Ms. McSharry took this position in her status letter dated September 1, 2015, a copy of which is enclosed. Additionally, her re-sentencing is scheduled to occur before Your Honor on February 10, 2017.

In addition to the re-sentencing issue, Ms. McSharry's Second Amended Application for Post-Conviction Relief ("PCR") raises two issues regarding her trial counsel's failure to adequately advise her to accept the State's offer to plead guilty. Please allow me to elaborate.

First, Ms. McSharry asserts that *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012) are constitutionally binding decisions that entitle her to relief. The proposed conditional order of dismissal, relying on *In re Graham*, 714 F.3d 1181 (10th Cir. 2013), concludes that these cases do not apply retroactively because "they do not pronounce a new constitutional rule." Proposed order, p. 10. Other courts have reached a different conclusion. *See e.g. Winward v. Utah*, 792 Utah Adv. Rep. 51, 355 P.3d 1022 (2015) "we cannot conclude that *Lafler* and *Frye*

merely applied the principles of old cases to new facts"). Although *Winward* did not grant relief based on its interpretation of the Utah post-conviction relief statute, our state's statute is worded differently and provides for relief S.C. Code Ann. § 17-27-45(B).

Second, the Second Amended PCR Application alleges deficient performance by Ms. McSharry's initial PCR counsel for not assisting Ms. McSharry amend her PCR application to include trial counsel's failure to adequately advise her about accepting the guilty plea. If the State is correct that *Lafler* and *Frye* did not create a new constitutionally binding decision, then this Court must examine that failure under our state's procedures that allow for a successive application for post-conviction relief. In *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982), our Supreme Court held that a "unique" combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), our Supreme Court allowed a successive PCR where initial PCR counsel was the same as trial counsel, *i.e.* due to the conflict of interest where trial counsel cannot raise ineffective assistance of trial counsel. More recently, in *Robertson v. State*, (S.C. S. Ct. Op. No. 27691) (filed December 14, 2016), our Supreme Court remanded for a determination of whether Robertson could establish prejudice under *Strickland*[1] resulting from initial PCR counsel not meeting the statutory qualifications to serve as counsel in a capital post-conviction relief case. Here, Ms. McSharry's initial PCR counsel operated under an actual, non-waivable conflict of interest. Ms. McSharry's PCR counsel has previously served as PCR counsel for Ms. McSharry's mother and co-defendant, Lu Rene Kelso.[2] Ms. McSharry and Ms. Kelso could not have been more adverse. Ms. Keso introduced Ms. McSharry to street drugs as a child and was the master-mind of the crimes for which both were ultimately convicted. Because of PCR counsel's initial conflict, Ms. McSharry did not receive her "one bite at the apple." *Odem v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (citing *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991)). This Court, therefore, should convene an evidentiary hearing to determine whether Ms. McSharry was prejudiced by initial PCR counsel's conflict of interest.

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] "A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McAbee*, 280 S.C. 490, 313 S.E.2d 325 (1984). *See Kelso v. State*, Anderson County Case No. 2000-CP-04-02188, which can be found on the S.C. Judicial Department's Public Index at http://publicindex.sccourts.org/Anderson/PublicIndex/CaseDetails.aspx?County=04&CourtAgency=04002&Casenum=2000CP0402188&CaseType=V&HKey=525275651071026987701021091077477114112516887105375098868637509889375010280835411053853750102865011910089120103517065, with final disposition date of March 10, 2005. According to the order of dismissal, the evidentiary hearing is Ms. McSharry's initial PCR occurred on April 20, 2015.

Robertson v. State, Appellate Case Number 2012-205909, scheduled for oral argument on October 8, 2015. The Supreme Court's Roster of Cases identifies the issue as

> In this death penalty Post-Conviction Relief (PCR) appeal, the Court granted certiorari to review the circuit court's dismissal of Petitioner's second PCR application. Petitioner contends his second PCR application should not have been dismissed as successive because his case presents unique circumstances warranting review of prior PCR counsel's assistance under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

For the *Frye* and *Lafler* claim, I am in the process of trying to get the relevant files from the Solicitor's Office and trial counsel.

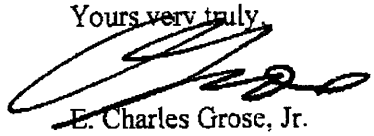
I note the next term of court for post-conviction relief cases in the Tenth Circuit is scheduled for the week of November 9, 2015. I have a capital post-conviction relief case in Charleston County starting on October 19, 2915. Based on this case and the pending decision in *Robertson*, I would respectfully request that Ms. McSharry's case not be scheduled during November.

Given the unique history of this case, a status conference with the Court might be useful.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide more information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: The Honorable J. Cordell Maddox, Jr.
John H. Whitmire, Esquire
Ms. Jennifer McSharry

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ANDERSON SC
2017 JUN -9 AM 10: 28
COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
OF THE TENTH JUDICIAL CIRCUIT

Jennifer McSharry, # 244026)

Case No.: 2011-CP-04-1581

Applicant,)

v.)

ORDER OF CONTINUANCE

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of Applicant's post-conviction relief application. This matter was scheduled to be heard on June 26, 2017, at the Oconee County Courthouse.

Respondent's witness, Applicant's original PCR counsel, is unable to attend the hearing and has been granted an order of protection for court appearances for the week of June 26-30, 2017. Due to the circumstances, Applicant has no objection to the continuance. In an effort to ensure this matter is heard at the next available PCR term, the parties have agreed to a date certain of October 6, 2017. This Court therefore finds this matter should be continued until October 6, 2017, for a date certain during the next scheduled term of court for post-conviction relief matters in the Tenth Judicial Circuit.

IT IS THEREFORE ORDERED:

> That this post-conviction relief matter shall be continued and re-scheduled for the next appropriate term of post-conviction relief hearings.

AND IT IS SO ORDERED.

J. CORDELL MADDOX
Chief Administrative Judge
Tenth Judicial Circuit

June 6, 2017

STATE OF SOUTH CAROLINA	)
	) COURT OF COMMON PLEAS
COUNTY OF ANDERSON	) 2011-CP-04-01518
	)
	) ORIGINAL
	)
JENNIFER MCSHARRY	)
APPLICANT	)
vs.	) TRANSCRIPT OF RECORD
	)
STATE OF SOUTH CAROLINA	)
RESPONDENT	)

October 6, 2017
Anderson, South Carolina

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE, Judge.

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

E. CHARLES GROSE, JR., ESQ.
Attorney for the Applicant

LINDSEY MCCALLISTER, ESQ.
ANTHONY MABRY, ESQ.
Attorneys for the Respondent

APRIL HERRON
Official Court Reporter

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BRUCE BYRHOLDT

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Certificate of Reporter 77

APPLICANT'S EXHIBITS

NO	DESCRIPTION	ID	EV
1	Letter Dated 12-22-16	8	8
2	Letter Dated 12-27-16	8	8
3	Email Dated 1-19-17	8	8

ALL EXHIBITS WERE RETAINED BY THE ANDERSON COUNTY CLERK OF COURT

MR. GROSE: Your Honor, may we have security undo her hands so she can take notes?

THE COURT: That's fine.

Yes, sir.

MR. MABRY: Judge Sprouse, my name is Andy Mabry, I'm an Assistance Attorney General with the South Carolina Attorney General's Office. Ms. McCallister and I will be representing The State. This is Jennifer McSharry, 2011-CP-04-1581. A second successive PCR Application. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to Orders of Commitment from the Anderson County Clerk of Court. She was indicted in 1997 for murder, armed robbery, burglary in the first degree, criminal conspiracy and possession of a weapon during a violent crime. She was represented by Mr. Byrholdt who is here today. She proceeded to trial in September of 1997 and was found guilty as indicted. She was sentenced to life for the murder and two terms for 30 years for burglary and armed robbery. And two terms of five years for conspiracy and for a weapon charge.

She then filed a direct appeal. The case was affirmed on direct appeal by the South Carolina Court of Appeals. She then filed a PCR action in 2000.

And at that time she was represented by Nancy Jo Thomason. And Christopher Newton of our office represented The State in the application. She raised numerous grounds of ineffective assistance of trial counsel and also appellate counsel. And eventually, that PCR was denied in May 9th, 2005. So, no appeal was taken from that Order of Dismissal.

Then, six years later, on May 12th, 2011, the Applicant filed a second PCR application alleging various grounds. She was actually -- The Court probably remembers she was resentenced before you, I believe in Oconee County to 30 years on one of the grounds. I don't know exactly what grounds she's going to proceed on today but my understanding is the main ground she's proceeding on is a claim that counsel did not properly communicate a plea offer to her back in 1997. We assert our motion to dismiss this action because it's bared under the South Carolina Statute of Limitations. And it's also improperly succussive under South Carolina law. She's trying to overcome the procedural bar and time bar through ineffective assistance of PCR counsel. Which our Supreme Court has said in the Lisa Robertson case, that alone is not sufficient to overcome a successiveness for time bars. It's got to

be something more than that.

And besides that, our Supreme Court said Martinez vs. Ryan, which is a case out of U.S. Supreme Court, only allows you to file to raise claims in federal habeas. You don't get to file a second PCR in state court and bring claims that have never been raised before and claim ineffective assistance of PCR counsel, that's for federal habeas.

She was represented at the PCR by Ms. Thomason. I think there's going to be a claim that Ms. Thomason had some type of conflict. However, the record will show -- we believe the record will develop that Ms. Thomason was terminated by the Applicant's, in this case, mother before her PCR. She was only standby counsel. That PCR was over. The mother's PCR, at the time this first PCR took place for the Applicant. But besides that, the trial record in this case will show on Page 406 that trial counsel tried several times to get her to accept plea offers that he worked on for The State, she just absolutely refused to plead guilty to anything. Said she wanted the jury to decide this case.

They are relying on Lafler and Frye. Which is two cases from the U.S. Supreme Court. But as we pointed out in our brief to The Court, and I'll also

hand up to The Court an order that Judge Early issued in a capital case that Mr. Grose and I handled, Mikal Mahdi. And I'll direct you to page -- if I can approach?

THE COURT: Yes, sir. Do you have a packet with the materials in it?

MR. MABRY: Yes, sir, we'll get that for you. I'm sorry. Starting on Page 24 of that Order that I handed up to you, it lists basically every federal circuit that has decided this issue that's held that Lafler and Frye are not now rules to constitutional law. And they're not retroactive to those decisions. Lafler and Frye were both applications of Strickland to the guilty plea process.

And so, you can't use -- they can't use Lafler and Frye to overcome the time bar and the successiveness bar because the claim that they're now raising could have been raised in the first PCR through Strickland and Washington. So, that's our opening. I'll give it to Mr. Grose at this time.

THE COURT: Mr. Grose.

MR. GROSE: Yes, sir, Your Honor, I have three documents that I'd like to mark as exhibits in response to that.

THE COURT: Yes, sir.

MR. GROSE: I don't know if you prefer them as applicant or court. It doesn't matter to me.

THE COURT: Why don't you make them Applicant Exhibits.

MR. GROSE: Okay.

(WHEREUPON, Applicant's Exhibits Nos. 1-3 were marked for identification and received into evidence.)

MR. BRYHOLDT: Your Honor, I'm subpenaed to be here. I've got three hearings downstairs that one is an adoption, two are divorces that can't be continued. I've got to go down, I will get back as soon as I can. I don't know if I'm going to be called as a witness for sure. I've got one at 10, 10:15 and 10:30. They've been set months ago.

MR. GROSE: He's under subpoena by The State, not me. So, I have no objection.

MR. BRYHOLDT: I'll get back as soon as I can.

MR. MABRY: I believe he's going to call -- You have some witnesses?

MR. GROSE: I have two witnesses.

MR. MABRY: We should be fine.

MR. BRYHOLDT: I'll be right back.

THE COURT: All right, just come right back.

MR. BRYHOLDT: Thanks, Judge.

THE COURT: Do we have a copy of the petition in the State's return? What you handed up was a transcript, which obviously I need.

MS. MCCALLISTER: Yes, sir, we do have one for you, I'm sorry.

THE COURT: I need the filing from this case.

MR. MABRY: Yes, sir, may I approach?

THE COURT: Yes, sir. Thank you.

MR. MABRY: Yes, sir.

THE COURT: All right, Mr. Grose, I see a Second Amended Application for Post-Conviction Relief, is that what we're operating under?

MR. GROSE: Yes, sir, we're operating under that with the following caveat. All of this started with the first application which raised the Graham vs. Florida issue. That was prior to Miller vs. Alabama and Aiken v. Byars being decided. The second -- or rather the first amended application is the one that will be raised, you know, the guilty plea issues. The second amended application included those but was amended after Miller was decided to sort of update where we were in the proceedings. So, we make sure that that was in the record.

Then, of course, Aiken v. Byars was decided, Ms. McSharry was one of the named petitioner's in

Byars. In February we had her resentencing in front of Your Honor and she was sentenced to 30 years in prison. Which was the minimum for murder. And that's concurrent with the other charges.

I tell you all of that just to, I guess, make a point that developments, following Miller and Aiken in the resentencing, have muted most of what's in the second amended application. And Mr. Anthony -- I mean, Mr. Mabry is right that the claim that we're proceeding on is this claim regarding the advice concerning the guilty plea. The -- I don't disagree with, you know, Robertson having some effects on how South Carolina views Martinez. But what I wanted to do is just put into the record for The Court was, and one and two are probably already in the file. But with advances in technology, I find sometimes things we circulate don't always make it into the file.

The first one is their letter of December 22, 2016 to Your Honor. It was at the time they filed an amended return. They also asked Your Honor to file or to sign an Amended Conditional Order of Dismissal. They have tried to dismiss this case way back on the first application when we were just dealing with Graham vs. Florida. So, I think that's why that was couched as an Amended Conditional Order of Dismissal.

That's Applicant's Exhibit 1. Applicant's Exhibit 2 is my letter of December 27th, 2016 to Your Honor where in addition to mentioning Robertson, I also mentioned some cases Case vs. State and Carter vs. State and Odom vs. State that, you know, dealt with exceptions to the rule of succussive PCR's.

And two of those cases dealt with situations where the court -- Supreme Court ultimately determined that that PCR Applicant didn't get a fair bite at the apple. Actually, all three did but two of them dealt one when there was no counsel. And two where counsel had a conflict because PCR counsel was the same counsel as trial counsel. And The Court found those reasons as justifications for waiving the procedural bar for successive PCR applications.

I tell you that because we have a disagreement, me and the Attorney General's Office, regarding whether the Frye and Lafler cases are retroactive. I see their argument, I don't concede their argument. But if their argument is correct, then that's something that could have been inquired of during the first PCR. But we believe that the counsel in the first PCR had, what I referred to at times, as a non-waivable conflict. I think the ethics expert sometimes refer to it as a non-consentable conflict

because the same lawyer represented Ms. McSharry and her mother in their PCR's. And I don't think that it makes -- and we can develop the record but I don't think it makes a difference whether they were both pending at the time of Ms. McSharry's PCR or whether prior counsel had been standby counsel because the record is also clear that she had been appointed at one time and relieved. So, the same duties of loyalty and confidentiality and everything would still be applicable.

The third exhibit that I have to hand up is Applicant's Exhibit No. 3, which is an email and I'm pretty sure this is not in the record. This is an email dated January 19th of 2017 from Your Honor's law clerk at the time to counsel indicating that you had reviewed the Conditional Order of Dismissal, that you denied the motion and that you were setting the case for a hearing. And you'll probably recall we had initially planned on doing that in February, after we did Ms. McSharry's resentencing. We had some confusion about which courthouse it was in. So, everybody didn't get to the same place. Jeff McSharry agreed to -- Ms. McSharry's father is going to be one of our witnesses, agreed to make a second trip out from California at his expense and obviously

he's here again today.

And so, our position is that we have no standing to object to them reasserting their motions to dismiss. But our position is it's already been ruled on. And I'd like to hand these up, Your Honor.

THE COURT: Well, it appears that my law clerk did communicate that. That's certainly without prejudice to either party right to assert their claims. So, let's do this, let's proceed. I will, obviously, read these cases and that may be the issue that decides the case. But what I'll allow you to do is go ahead put your -- you have your witnesses here, The State has their witnesses here, I'll allow y'all to put whatever you need to put in the record, then I'm going to, obviously, take this under advisement and read the cases and so.

MR. GROSE: Thank you, Your Honor.

THE COURT: Okay, Mr. Grose.

MR. GROSE: I call Jennifer McSharry.

THE CLERK: Ms. McSharry, I need you right here, please. I just need for you to raise your right hand as best you can.

JENNIFER MCSHARRY, after being duly sworn, testified as follows:

THE CLERK: If you'll take the witness stand,

please. State your name and spell your last name for the record, please.

THE WITNESS: I'm Jennifer McSharry, M-C-S-H-A-R-R-Y.

DIRECT EXAMINATION

BY MR. GROSE:

Q Jennifer, you're The Applicant in this case today?

A Yes, sir.

Q Okay. And just for, I guess, filling out the record, you're serving sentencings for several charges right now?

A Yes, sir.

Q What are those charges?

A Murder, burglary, armed robbery, armed robbery, possession of firearm and conspiracy.

Q Okay. And you initially went to trial; is that correct?

A Yes, sir.

Q And at the trial you were found guilty of the charges that you had been indicted for?

A Yes, sir.

Q Okay. And at that time, who was your trial lawyer?

A Mr. Bruce Byrholdt.

Q Okay. And he was in the courtroom earlier this morning; is that right?

A Yes, sir.

Q All right. And, your Judge at the time, I believe, was Judge Hall?

A Yes.

Q And what did he sentence you to?

A Life without the possibility of parole.

Q Okay. And then sentences for numbers for the other charges that were concurrent with that?

A Yes.

Q Okay. At the time that these crimes were committed, how old were you?

A Seventeen.

Q Okay. Where were you living at the time?

A In Jonesboro, Georgia.

Q Okay. And is that -- where is that in relation to Atlanta, Georgia?

A Right underneath it, not very far at all.

Q Okay. So, just a little bit south of Atlanta?

A Yes.

Q Okay. And who were you living with at the time?

A My mother, Renee Kelso.

Q And were you living with anybody else?

A My sister and my brother, stepfather.

Q All right. And you -- we've already alluded to the fact that your father, Jeff, is here today?

A Yes.

Q Where was he living at the time?

A Tucson, Arizona.

Q And he currently lives in California?

A Yes.

Q Without going through the whole history of your childhood, but you spent time back and forth between your mother and your father?

A Yes.

Q Okay. Now, the crimes that you were convicted for, ultimately took place in Anderson County?

A Yes.

Q Okay. And I think the transcript will reveal the facts in great detail but generally speaking, did a group of you come from Georgia to Anderson?

A Yes.

Q Okay. And do you remember everybody who was in that group?

A Yes.

Q What were their names?

A My mother, Renee Kelso, Jason Connley, Jennifer Titman and Ronnie Jordan.

Q Okay. And the other, not your mother, but the

other lady, the other Jennifer that was there, how old was she at the time?

A Eighteen.

Q Okay. And how old, not necessarily the ages, but were the men over the age of 18?

A Yes.

Q Okay. And obviously your mother was?

A Right.

Q Okay. And when you got to Anderson, the group -- well before we get there, were there drug use that night?

A Yes.

Q And were you using drugs?

A Yes.

Q Okay. And who, in fact, had introduced you to drugs as a child?

A My mother.

Q Okay. When you got to Anderson, did you initially -- this happened at a camper or a trailer, if I remember the record right?

A Yes.

Q All right. When you got to that location, what did you and the other Jennifer do?

A We went inside under false pretenses. And the decision was made I would return to the car if no one was

there and the other Jennifer would return to the car if other people was there. No one was there so I left and I went immediately back to the car.

Q All right. And did, eventually, both people -- both the other Jennifer get back to the car too?

A Yes, shortly after me, she came right behind me.

Q Okay. When was the first time that you became aware that somebody got shot?

A When I heard the gunshot. And everybody came running back. Except my mom. Ronnie ran back in to get her. She had been shot too. And pulled her in -- back into the car.

Q Okay. And I think the record is clear on this but when then shooting happened, it happened inside the camper?

A Yes.

Q And when the shooting happened, you were outside in the car?

A In the car, yes, sir.

Q Okay. But I think the record is also clear that you had a role in setting up what was to be an effort to get some money from the person that was in the camper?

A Yes. Unfortunately, yes.

Q And that ended up being the basis of the armed robbery charge?

A Yes.

Q Okay. Would it be fair to say that really throughout these proceedings, your trial up to today, there's not been a whole lot of dispute in those general facts?

A No, no, sir.

Q All right. Now, were -- prior to trial, did you ever have any meetings with anybody where potential plea offers were discussed?

A Yes.

Q Tell The Court about that, please.

A The prosecutor, Ms. Druanne white, came and offered 15 years to testify against my mother. And at the time they had the death penalty on the table for her. And I just couldn't. I just couldn't do that.

Q Okay. Was anybody with Druanne White at that time?

A An officer.

Q One of the investigators?

A Yes, an investigator.

Q And at the time Druanne White was probably the deputy solicitor in the Tenth Circuit?

A Yes.

Q Now, and again, I don't want to go into a whole lot of emotional details but you had a relationship with

your mother that was that effected by some misinformation, right?

A Yes.

Q Okay.

A Yeah.

Q All right. At one point had you been told that she was not alive?

A Yes.

Q And then later, of course, you found that she was?

A Yeah.

Q And then you all kind of bonded and that was something that added to that bond?

A Yes.

Q Okay. Now, you said at the time that your mother's case, that the death penalty was on the table. It didn't, ultimately, end up being a death penalty, did it?

A Right.

Q But at the time that was what was going through your mind is regarding the offer that the solicitor had presented to you?

A Yes.

Q Okay. And given your relationship with your mother, is it fair to say that you didn't want to

participate in--

A No, I couldn't.

Q -- in a death penalty case?

A Yes.

Q Okay. So, Mr. Byrholdt was your lawyer?

A Uh-huh.

Q Is that right?

A Yes, sir.

Q And you all eventually proceeded to trial, was that correct?

A Yes, sir.

Q Okay. And during the trial, was any offers extended to you at that point?

A He came and offered me 30 years at one point. And I told him, No. And--

Q And when you say he, you're talking about your lawyer?

A My lawyer, yes.

Q And he was communicating that from the prosecutor was your understanding?

A Yes.

Q All right. And at that point you told him no?

A Right.

Q Then was there another offer?

A He's -- 25.

Q Okay. And the 25 that, obviously, would not have been for murder, would it?

A Right.

Q All right. And so, what would they have reduced the charge to?

A Manslaughter.

Q Okay. Voluntary manslaughter?

A Yes.

Q Okay. Now, I don't know if you remember the first letter you wrote to me but one of the first issues that you contacted me about was accomplice liability, what we refer to is the hand of one the hand of all?

A Right.

Q Okay. You were -- let's go back for a second. You were 17 when the crime happened?

A Yes.

Q Or these crimes. And how far -- what is your birthdate?

A October 20th.

Q So, you had just turned 17?

A Yes, sir.

Q All right. And when you went to trial, how old were you?

A Seventeen.

Q Okay. So, your case went to trial pretty fast?

A Yes.

Q Okay. The -- did -- at the time your trial started and really through the end of the trial, did you understand the legal principle about the hands of one hands of all?

A No. Not nearly what I understand it to be today. No, I thought I did but I didn't.

Q All right. And why do you think it is that you didn't understand it?

A I felt like because it was undisputed of my role, that there was no way that they could find me guilty of actual murder, being if I was in the car. I didn't understand that I was considered the trigger person as well.

Q Or that you could be treated the same as the trigger person?

A Yeah.

Q And do you think your age at the time played a role into that?

A Definitely.

Q Okay.

A Do you think the types of communications that you had with your lawyer at the time played a role in that?

MR. MABRY: Objection, leading.

THE COURT: Rephrase your question.

MR. GROSE: All right.

BY MR. GROSE:

Q Did your communications with your lawyer at the time play a role?

A Yes.

Q And can you explain that?

A It was always a gamble. Every time we would speak he would tell me that we would roll the dice. And after we win this thing we'll go out and drink a beer. So, you know, I really didn't think 30 years was a deal if he's expecting to go home and celebrate.

Q Okay. And when he said, Roll the dice. What kind of chances did he tell you that you had?

A There was jury issues going on at the time. And it was relayed that The State wanted to settle this quickly because they felt like the jury would just see it, you know, a different way. And so, I agreed not to take it, take the deal. And so therefore, we would celebrate later.

Q Okay. And so, even though your role in all of this was undisputed, it is fair to say your lawyer was telling you you had a good chance you were going to win this trial--

MR. MABRY: Objection, leading.

MR. GROSE: I'll rephrase.

THE COURT: Rephrase the question.

BY MR. GROSE:

Q Did you understand that your lawyer thought you could win the trial?

A Yes.

Q And why was that?

A As I said earlier, he expected that we would go celebrate later. And if he thought we would celebrate, I felt like we would be winning, you know.

Q All right. Now, over the years, at some point, did you learn more about the principle of the hands of one hands of all?

A Yes.

Q Okay. And what did you come to understand that that means?

A That I'm just as guilty. I'm just as guilty because even though I'm not guilty of the actual crime, I am guilty of a lot. Guilty of a lot.

Q You didn't do the actual act --

A No.

Q But that makes you guilty --

A But I didn't aid in his rescue, you know, and I am, thereby, guilty.

Q All right. And if you had known what you know

now, would you have accepted that plea during the trial?

A Yes.

Q Okay. Now, you had a PCR before?

A Yes.

Q All right. And they put some information on the record, does it sound right that it was filed in about 2005?

A Yes.

Q Decided -- I mean, filed in 2000 and decided in 2005?

A Yes.

Q Okay. Who was the lawyer that, ultimately, represented you at that PCR hearing?

A The morning of that PCR hearing was Nancy Jo Thompson [verbatim].

Q Okay. And prior to that, did you have a lawyer?

A Yes.

Q And you recall who that was?

A Not a clue. I have no idea who she was. I never met her. I met Nancy Jo the morning of my PCR.

Q Okay. And did either one of your lawyers help you with an amended application?

A No.

Q All right. And can you describe sort of what happened at that first PCR hearing, how it proceeded?

A I came into the courtroom and Nancy Jo Thompson told me that she was familiar with the case because she helped mom. But she didn't feel like I had any grounds to stand on. So, she'll try.

Q Okay. Did she review any of your background with you, your family background?

A No.

Q Your educational background?

A No, sir.

Q Get into the relationship that you had with you and your mother?

A No.

Q Did she -- I think I have already asked this. She didn't amend, help you amend the application?

A No, I asked her for an appeal afterwards.

Q But, I guess, I'm jumping ahead. Not so much the appeal but to change the grounds in the application?

A No.

Q Okay. And so, you met her that morning and did the case proceed to a hearing that day?

A Yes.

Q Okay. And did she call any witnesses other than you?

A No.

Q Okay. Backing up to your trial for a second,

and I think the record reflects this, but did you have family members that attended the trial?

A Yes.

Q And who were those family members?

A My father, Jeff McSharry, and my sister, Jamie.

Q All right. And did your grandfather come?

A Yes, my grandfather.

Q Okay. And he's passed away since your trial?

A Yes, sir.

MR. GROSE: Beg the Court's indulgence for a moment.

THE COURT: Yes, sir.

MR. GROSE: I think that's all I have right now. Answer any questions that the Attorney General's Office has.

THE COURT: Mr. Mabry.

MR. MABRY: Yes, sir.

CROSS-EXAMINATION

BY MR. MABRY:

Q I'm sorry, excuse me, just a minute. Ms. McSharry, my name is Anthony Mabry, I work for the Attorney General's Office, I'm going to ask you a few questions this morning, okay?

A Yes, sir.

Q All right. I want to go back to when you were

first charged in this case, okay?

A Okay.

Q You were arrested for murder, armed robbery, burglary, conspiracy and possession of a weapon; is that correct?

A Yes, sir.

Q Okay. And when -- did -- who was your first attorney?

A Bruce Byrholdt.

Q Okay. After you -- now, of course, no one ever claimed or insinuated that you were the person that pulled the trigger in this crime?

A Right.

Q Right. It was a man that pulled the trigger?

A Yes, sir.

Q And when you met with Mr. Rucker, you had been charged with all these crimes. Did you ask him, how can I be charged with murder, armed robbery, burglary, all these crimes and I didn't pull the trigger?

A No.

Q You never asked him that?

A No.

Q Okay. Well, why did you not ask him that?

A He -- he it was never a conversation. I didn't see him until almost trial. I was out on bond.

Q Okay.
A When I met with him the first time.
Q When you went back to Georgia?
A Yes.
Q All right. Now, when you were indicted by the Grand Jury here in Anderson, they also indicted you for murder, armed robbery, burglary first, conspiracy, possession of a weapon?
A Yes.
Q All right. Did you ever ask him, how can they charge me with all these crimes when I didn't pull the trigger?
A I don't remember a distinct question, no, sir.
Q Did he ever explain to you the hand of one is the hand of all?
A No, not in those terms.
Q Well, not in those terms, then explain to me what he did explain to you.
A He didn't explain, necessarily, why I was charged. Because it was never disputed that I was there. He just explained that he was going to try to help me. And that's really all that I remember.
Q Okay. So, he never -- he never -- you're telling this Court he never explained to you accomplice liability? That you could be just as guilty as the person

that pulled the trigger? If you were involved in this whole plan?

A Not that I recall, sir. If you'll forgive me, it was 20 years ago. But I do remember having details about what I would say on the stand or what he needed me to say. But not -- not to my knowledge did we have that kind of conversation.

Q All right. Do you remember in the opening statement in this trial, did the solicitor lay out for the jury that you were just as guilty as everybody else if you participated in the crime?

A Yes.

Q So, you knew that? She talked about the hand of one is the hand of all and accomplice liability; is that correct?

A Yes.

Q So, you understood it then?

A Yes.

Q So, you understood it before the plea offers were made to you during the middle of the trial?

A Yes, in essence, I guess, I just got a little confused by it. I don't know. I really wasn't -- I'd never been in trouble before so I didn't realize for my part that I would, you know -- I don't recall.

Q Do you remember during the trial there was a --

well, let me go back a second, we'll get to that in a minute. But you explained to The Court earlier somewhat of what your role was. And you tell me if I'm wrong. What happened in this case was your mother was in need of some money?

A Yes.

Q A lot of money, about $3,000.

A Right.

Q And she told you and the other people that there was a gentleman in South Carolina, the victim, that owed her $10,000?

A Yes.

Q And you were going to go there and collect the debt?

A Right.

Q All right. And do you remember your statement to the police was read into evidence in the trial of this case?

A Yes.

Q All right.

And, Your Honor, that starts on Page 353 of the record on appeal. I believe. Or the transcript, let me make sure. It's also on 353 of the transcript, depending on which one you have.

THE COURT: Got it.

MR. MABRY: Okay.

BY MR. MABRY:

Q And do you remember in your statement that was read to the jury, that you told the police that you and the other individuals discussed the fact, on the way there, that if the victim, that would be Mel, resisted, that we were going to kill him?

A If you're telling me that that's what's in writing, then yes.

Q Okay. And your role was to go, basically, and pretend, you and another young lady that was involved, you were to go to his trailer at about 6:00 o'clock in the morning, when it's dark, and pretend that you had either broken down or you were lost?

A We were lost, yes, sir.

Q He didn't know you, Mel didn't?

A No.

Q All right. And you were to get your way into his camper or mobile home and then you were to signal the others?

A Right.

Q Okay. And there was also discussion on the way there by the males, that if he resisted he was going to be shot?

A I assume so, yes, sir.

Q According to your statement to the police?
A Yes.
Q All right. And you did exactly what your role was supposed to be in this?
A Yes.
Q And when you told the Judge earlier you were supposed to signal if there was no one in there and she was supposed to signal if there was someone in there. You're talking about other than the victim?
A Right.
Q Right. I mean, there's no question the victim was in there when you went there?
A Yes, yes.
Q And so, you went out and signaled that there was nobody else there?
A Right.
Q Besides Mel?
A Yes, sir.
Q And then, they went in to commit the robbery and he resisted and he ended up getting shot?
A Yes, sir.
Q Okay. And your mother got shot in the hand as well?
A Right.
Q Did -- when you talked about your first plea

offer that came to you was from Deputy Solicitor Druanne White?

A Yes, sir.

Q Okay. Were you represented at that time?

A No, sir.

Q All right. So, you were just -- had just been arrested?

A Yes.

Q Okay. And that offer was to testify against your mother and help them get the death penalty against your mother?

A Yes.

Q That's why you turned that down?

A Right.

Q That was the condition on that plea that you testify against her?

A Yes, sir.

Q And there was no way that you were going to do that?

A No.

Q All right. Do you remember during the middle of the trial Mr. Byrholdt putting on the record that he was trying to work out a plea for you and you also testified?

A Yes.

Q All right.

Your Honor, that's on Page 460 of the transcript.

THE COURT: All right.

MR. MABRY: Have just a moment.

THE COURT: Okay, I got it.

MR. MABRY: Yes, sir. I'm sorry, I'm trying to find -- I was trying to get the witness a copy, I'm sorry. Can I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. MABRY:

Q Ms. McSharry, I'm going to hand you a copy of the transcript from the trial itself, your trial.

And Mr. Byrholdt said, Your Honor, I would have -- I would like to put on the record before I put up any defense that during the last, especially yesterday and the day before, since the trial began, there have been attempts at whether or not to do negotiations toward any type of plea. And I want to put on the record that despite repeated attempts on behalf of my client's family and myself, the Defendant in no way has wished to engage in any kind of plea negotiations. The reason I want to put this on the record is that the fact that if something -- if she is convicted and a PCR is filed a year down the road and this comes back three or four years from now, I don't want any misunderstanding. There is no

indication on the Defendant's part to negotiate any type of plea. She said she wanted to roll the dice, you know, let the jury decide what happens. And I would ask The Court to inquire the Defendant if that is accurate.

You see that?

A Yes.

Q Do you remember that?

A Yes, sir.

Q Okay. Then the Judge says, Mr. Byrholdt I'm going to take by your remarks that your client, Jennifer McSharry, with her plea as to each indictment for which she is on trial in these cases, would be not guilty?

That's correct.

I'll be glad to let you question her.

And then he questions you on Page 462. And you state that you do not want to accept any plea offer from The State.

Is that correct?

A Yes, sir.

Q You wanted a trial, is that correct?

A Yes.

Q All right. Now, what you testified to here today and what's here in this transcript, you had all that information in 2001 to 2005 as well; correct?

A Yes, sir.

Q All right. And who was your first PCR lawyer?

A I don't know her name. Nancy Jo Thomas [verbatim] ended up being my lawyer.

Q Right.

A But I had another first one before.

Q How long was the first one on the case?

A I never met her, I don't know.

Q Do you know how she came to put the allegations in the first -- in your PCR application?

A I have no idea. I wrote--

MR. GROSE: Objection, on that misstates the record. I think the first PCR Application was filed pro se.

THE COURT: Okay, clarify that question.

MR. MABRY: Yes, sir.

THE COURT: Rephrase, clarify, make sure we have a correct question.

MR. MABRY: I didn't mean to misstate the record, I apologize.

THE COURT: Yes, sir.

BY MR. MABRY:

Q The first PCR Application that was filed, was that filed by you?

A Not me personally. It was somebody in --

Q The prison?

A Yes.
Q That helped you?
A Yes, sir.
Q Okay. But at that time you knew all the facts that you're telling us about today?
A Yes, to a limited amount.
Q How would you have not known about them then if you know about them now 20 years later?
A Well, I've learned a lot. I've grown up. But the way things that were presented and the way that we've discussed them were different. I was very meek and scared. But I agreed on all of these things because we had discussed that it would be better to roll the dice. And I said, Yes. And he did offer me the 30 years. And -- but like I said, he wanted to celebrate later that night. And so, we were just putting it on the record but I never thought that it would go any further. Because we were, you know, we were supposed to win.
Q Okay. He guaranteed you that you were going to win?
A No but he did want to celebrate later. And so, that was what I was going on, you know.
Q He -- your testimony he said, If you win?
A Oh, I'm sorry, I'm sorry, I was talking about my trial. At my PCR, she said I had no grounds at all.

Q Okay.

A And that she was already familiar because of my mom's PCR.

Q When you filed your first PCR Application --

A Yes --

Q The one you filed yourself, you did not raise any claim that he did not effectively communicate the plea offers that were made to you, did you?

A He offered pleas to me but he wouldn't -- he made them seem like they weren't the better choice. And so, I didn't take them.

Q That wasn't my question.

A I'm sorry.

Q I'll state it again. When you filed your first application.

A Yes, sir.

Q The one that you filed yourself that somebody helped you in the prison file, you didn't raise a claim that he didn't properly communicate the plea offer to you?

A No.

Q Did you?

A No, I didn't.

Q And no claim was raised by your PCR attorney, the one that represented you after you filed the pro se application or the one that represented you at the

hearing?

A No.

Q Okay. But you knew all the stuff that had occurred at that time?

A Yes.

Q I read you Page 460, do you disagree with Mr. Byrholdt's statement there where he says, I want to put on the record --

I'm on Line 13, Page 460.

That despite repeated attempts on behalf of my client's family and myself, the Defendant in no way has wished to engage in any kind of plea negotiations?

A No, I don't dispute that.

Q So, you agree with that? He and your family had tried to get you to plead guilty to something?

A He offered me the 30 years, yes, sir.

Q Doesn't it say more than that, though, Ms. McSharry? It says both he and your family were trying to persuade you to plead guilty and not roll the dice and go to the jury.

A My grandfather wanted me to take it.

Q He did?

A Uh-huh.

Q But you didn't?

A No.

Q All right. Any other family member besides your grandfather that wanted you to take the plea offer?

A No, sir.

Q So, that says that not only your grandfather but Mr. Byrholdt wanted you to plead as well, doesn't it?

A From what it says, yes, sir.

Q Uh-huh. Also, when you testified on Page 462, can you turn over? Go down to Line 12.

Prior to this trial and then during this trial, myself, as your attorney and members of your family have talked with you about the possibility of engaging in plea negotiations; is that true?

And you said, Yes, sir.

Then the next question, And it is your desire before this trial and has remained so during this trial, that you did not want us to engage in any plea negotiations to try to either reduce the charge or the amount of time, the imprisonment that you could possibly face; is that accurate?

Yes, sir.

Were you telling the truth at that time?

A Yes, sir.

Q Okay. Did I accurately state what's in the record?

A Yes, sir.

Q All right. So, based on this page, would you agree with me, that that states that you didn't want to -- you didn't want to engage in plea negotiations at all?

A No.

Q You wanted to go to trial?

A Right.

Q You also understood that the maximum you could have got was life without parole?

A Right.

Q On both murder and burglary?

A Yes, sir.

Q And then he asked you on Page 462, And you want the jury of 12 people, who we have selected in this case, to decide your innocence or guilt based on the evidence presented in the court?

And your answer was, Yes, sir.

Is that correct?

A Yes, sir.

Q You also said you were satisfied with Mr. Byrholdt's representation; is that correct?

A Yes, sir.

Q And there's no question the statement that you gave to the police that was read into the record to the jury, puts you right in the middle of this whole criminal conspiracy?