

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

VOLUME II OF II

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Certiorari to Horry County
Honorable William H. Seals, Circuit Court Judge

S.C. SUPREME COURT

BRADLEY GERALD MULLINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000518

APPENDIX

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CLOSING ARGUMENT - MR. HUCKS

1 you had to sit through?

2 Allen, who I contend has nobody to reward or
3 punish, says they pulled right up here in this Blazer,
4 backed it up, started taking guns out. I overheard
5 Brad and Anthony talking about killing somebody and
6 stealing and burglarizing. They walked away, and when
7 they walked away, everything got faint, I couldn't hear
8 what they were saying. When they came back, they asked
9 me to clean these guns.

10 What does Arlie say happens? I went to the back
11 porch to smoke a cigarette because I was freaking out.
12 I saw Brad and Anthony and Moon walk across the yard
13 and get close enough to me where I overheard a
14 conversation about them burglarizing and robbing and
15 killing somebody. Think about it. All we have to do
16 is concentrate on the common thread. What makes sense?

17 The key thing the jury has to ask itself in
18 deciding what is and isn't beyond a reasonable doubt,
19 and the Judge is going to tell you about reasonable
20 doubt, and if I say something that disagrees with him,
21 you go with him, because he's smarter than I am, and
22 he's the judge.

23 Now, there is a common theme here. What makes
24 sense? What makes sense? All four of these boys,
25 except Charlie Junior, depending who you ask, grew up

CLOSING ARGUMENT - MR. HUCKS

1 together. They are raised in an extended family. They
2 work together every day, went to Raleigh, went to
3 Durham, built a shopping center, smoked marijuana
4 together, drank beer together. These are tight folks.
5 What emphasis, whatsoever, would all three of these
6 other people have to put Brad Mullins in that truck or
7 in that house? What? There is not one. There is not
8 one. There is not a reason to put him there.

9 What reason would Anthony Ray have to sit on this
10 witness stand and tell you, I'm in prison for this
11 crime and he did it with me? What other -- what reason
12 would he come to do that? None. There's not one.
13 What makes sense here? When you start weighing through
14 the facts and weigh through the exhibits and weigh
15 through the testimony, come back and ask for something
16 if you want to, but the common thread, common theme
17 here is the story that I told awhile ago. Brad Mullins
18 and Anthony Ray went in Joe Elliott's house. They
19 didn't think he would be home. They went in the
20 nighttime to steal guns. Beat on the door. When he
21 came out, they shot him, not one of them, both of them.
22 They are both culpable for the burglary and murder of
23 Joe Elliott.

24 Court's indulgence. One moment, Your Honor.

25 (A brief pause in the proceedings.)

CLOSING ARGUMENT - MR. HUCKS

1 MR. HUCKS: I thank you for your time. I know it's
2 been way more long and drawn out than you expected, but
3 this is the most important day in Brad Mullins' life,
4 and this is an oath that you took to sit here being the
5 judge of your fellow man. The State has to prove the
6 elements through the witnesses that we presented and
7 the evidence we put in. We have to prove to you that
8 he committed each crime beyond a reasonable doubt.
9 What is a reasonable doubt? There is several
10 definitions, and the Judge will give them to you. A
11 reasonable doubt causes a reasonable person to hesitate
12 to act. Another way of saying it is, Are you firmly
13 convinced? Are you firmly convinced that Brad Mullins
14 played a role in this? If you are, he's guilty. He's
15 guilty. If you are firmly convinced, he's guilty.

16 I'll tell you something else. Last thing I'll
17 leave you with. South Carolina has a rule of law, and
18 the Judge will talk to you about it, it is the hand of
19 one, is the hand of all. Hand of one, is the hand of
20 all. You heard Anthony Ray say it when he was up here.
21 If you believe that Anthony and Brad Mullins were in
22 that house robbing that man together, and that the
23 death of Joe Elliott was a reasonable outcome of
24 robbing a man's house while he is home, committing a
25 burglary first and stealing guns, then it don't matter

CLOSING ARGUMENT - MR. HUCKS

1 who shot him. It don't matter. They are in there
2 together, and that is a reasonable outcome that can
3 happen from robbing a man's house and stealing his
4 guns. It don't matter. He's guilty. Thank you for
5 your time.

6 MR. DIGGS: May we approach for a second?

7 (Whereupon, a bench conference was had.)

8 THE COURT: I'm sure you need a break, and I'm
9 going to give you one before I charge you. Mr. Ropp,
10 if you'll take the jury.

11 (The jury exits at 11:34 a.m., and the following is
12 heard out of the presence of the jury.)

13 THE COURT: Mr. Diggs?

14 MR. DIGGS: Your Honor, the information we have
15 from Dr. Proctor's testimony, I thought, but at least
16 in his autopsy report, Mr. Elliott was 68, not 70 as
17 argued by the State. I would submit when you get into
18 that area, two or three years makes a lot of difference
19 in terms of one's ability to participate in a struggle.
20 It just sounds -- when you say a 70-year-old man, it
21 sounds more important than it should be if one is in
22 their late 60s.

23 THE COURT: I'm going to tell the jury that they
24 will deliberate and base a verdict on the evidence they
25 have heard. If there was any evidence as to his age,

THE COURT AND ATTORNEYS

1 they heard it. If Mr. Hucks misquoted anything, I'm
2 sure they will bring him to bear on it, as they would
3 you, okay.

4 MR. DIGGS: I think I'm supposed to say outside of
5 the record evidence, so that is the way I would phrase
6 the objection.

7 THE COURT: Thank you. We'll take a break.

8 (A recess was taken.)

9 (The jury enters at 11:49 a.m., and the following
10 is heard in the presence of the jury.)

11 THE COURT: Let the record indicate all of the
12 jurors are back in the courtroom.

13 Ladies and gentlemen, at the beginning of the trial
14 I told you it's been my practice to provide the jury
15 with a transcript of my charge, and to that end I'll be
16 reading you my charge from a prepared transcript. I
17 have to give you a verbatim transcript, and that's why
18 I read it. I can certainly appreciate the fact that
19 the charges in these cases are often lengthy and
20 certainly complex, and I don't believe it is fair to
21 expect you, as jurors, to remember everything that I
22 have told you, and that is the reason that I like to
23 give you a copy of the charge that you can refer back
24 to during your deliberations.

25 Let me say this. You should not focus in on any

JURY CHARGE

1 one part of the charge and ignore the other portions of
2 the charge. The charge is a document that should be
3 taken as a whole, and it should be read as a whole, and
4 you should consider all of the parts together --

5 MR. DIGGS: I can't hear you, sorry, Judge.

6 THE COURT: -- in your deliberations. Anyone else
7 have trouble? Can you hear me.

8 JUROR: I can hear you now.

9 THE COURT: Let me remind you that during this
10 trial you and I have certain duties to perform, and as
11 the trial judge, it is my responsibility to preside
12 over the trial of the case, and I also have the duty to
13 rule on the admissibility of the evidence offered
14 during the trial.

15 You are to consider only the competent evidence
16 before you. If there was any testimony or words
17 stricken from the record during this trial, you must
18 disregard that testimony. You are to consider only the
19 testimony that has been presented from this witness
20 stand, any exhibits that have been made a part of the
21 record in this case and any stipulations of counsel.

22 I have the additional duty to charge you the law
23 applicable to this case. As the presiding judge, I am
24 the sole judge of the law of this case. It is your
25 duty as jurors to accept and apply the law as I now

JURY CHARGE

1 state it to you. If you already have an idea as to
2 what the law is or what the law ought to be and it does
3 not agree with what I tell you the law is, you must
4 abandon this idea because you are sworn to accept the
5 law and apply the law exactly as I state it to you.

6 In every case tried in this court before a jury,
7 the jury becomes the sole and exclusive judge of the
8 facts in that case. A trial judge cannot intimate,
9 state, comment on or make any statement to a trial jury
10 about the facts in the case. Since you, the jury, are
11 the sole judge of the facts in this case, you are not
12 to infer from what I've said during the progress of
13 this trial and ruling on the admissibility of the
14 evidence, or otherwise, or anything that I say now
15 during the course of this instruction to you that I
16 have any opinion about the facts in this case. The law
17 does not allow me to have an opinion about the facts in
18 this case. This is a matter solely for you, the jury,
19 to determine. As jurors, it is your duty to determine
20 the effect, value, weight and truth of the evidence
21 presented during this trial.

22 Now, the indictments in this case charge the
23 defendant with murder and first degree burglary. I
24 remind you that the fact that the defendant was
25 arrested, charged and indicted in this case is not

JURY CHARGE

1 evidence in this case and is not to be considered by
2 you as evidence of guilt in this case, nor does it
3 create any presumption or inference of guilt. These
4 documents are simply the formal written instruments
5 which contain the charges made against the defendant.
6 The indictments are simply the formal documents by
7 which the case is brought into this court.

8 The defendant has pled not guilty to both of these
9 indictments, and those pleas put the burden on the
10 State to prove the defendant guilty. A person charged
11 with committing a personal offense in South Carolina is
12 never required to prove himself innocent. I charge you
13 that it is an important rule of the law that the
14 defendant in a criminal trial, no matter what the
15 seriousness of the charge may be, will always be
16 presumed to be innocent of the crime for which the
17 indictment was issued unless guilt has been proved by
18 evidence satisfying you of that guilt beyond a
19 reasonable doubt.

20 This presumption of innocence does not end when you
21 begin your deliberations, but it accompanies the
22 defendant throughout the trial until you reach a
23 verdict of guilt based on evidence satisfying you of
24 that guilt beyond a reasonable doubt. The presumption
25 of innocence is like a robe of righteousness placed

JURY CHARGE

1 about the shoulders of the defendant which remains with
2 the defendant until it has been stripped from the
3 defendant by evidence satisfying you of the defendant's
4 guilt beyond a reasonable doubt.

5 The presumption of innocence is not mere legal
6 theory. It is not just a legal phrase. It is a
7 substantial right to which every defendant is entitled
8 unless you, the jury, are satisfied from the evidence
9 of the defendant's guilt beyond a reasonable doubt.

10 The State has the burden of proving the defendant
11 guilty beyond a reasonable doubt. Some of you may have
12 served as jurors in civil cases where you were told
13 that it is only necessary to prove that a fact is more
14 likely true than not true, such as by a greater weight
15 or preponderance of the evidence. In criminal cases,
16 the State's proof must be more powerfully than that; it
17 must be beyond a reasonable doubt.

18 Proof beyond a reasonable doubt is proof that
19 leaves you firmly convinced of the defendant's guilt.
20 There are very few things in this world that we know
21 with absolute certainty, and in criminal cases the law
22 does not require proof that overcomes every possible
23 doubt. If based on your consideration of the evidence
24 you are firmly convinced that the defendant is guilty
25 of the crimes charged, you must find the defendant

JURY CHARGE

1 guilty. If, on the other hand, you think there is a
2 real possibility the defendant is not guilty, you must
3 give the defendant the benefit of the doubt and find
4 him not guilty.

5 What is a reasonable doubt in the law? A
6 reasonable doubt is the kind of doubt that would cause
7 a reasonable person to hesitate to act. There are two
8 types of evidence which are generally presented during
9 the trial, direct evidence and circumstantial evidence.
10 Direct evidence is the testimony of a person who claims
11 to have actual knowledge of a fact, such as an
12 eyewitness. It is evidence which immediately
13 establishes the main fact to be proved. Circumstantial
14 evidence is proof of a chain of facts and circumstances
15 indicating the existence of a fact, it is evidence
16 which immediately establishes collateral facts from
17 which the main fact may be inferred. Circumstantial
18 evidence is based on inference and not on personal
19 knowledge or observation. The law makes absolutely no
20 distinction between the weight or value to be given to
21 either direct or circumstantial evidence, nor is a
22 greater degree of certainty required of circumstantial
23 evidence than of direct evidence.

24 You should weigh all of the evidence in the case.
25 After weighing all of the evidence, if you are not

JURY CHARGE

1 convinced of the defendant's guilt beyond a reasonable
2 doubt, you must find the defendant not guilty.

3 Necessarily, you must determine the credibility of
4 witnesses who have testified in this case. Credibility
5 simply means believability. It becomes your duty, as
6 jurors, to analyze and evaluate the evidence and
7 determine which evidence convinces you of its truth.
8 In determining the believability of witnesses who have
9 testified in this case, you may believe one witness
10 over several witnesses, or several witnesses over one
11 witness. You may believe a part of a witness's
12 testimony, and reject the remaining part of the
13 testimony of that same witness. You may believe the
14 testimony of a witness in its entirety, or reject the
15 testimony of a witness in its entirety. You may
16 consider whether any witness has exhibited to you any
17 interest, bias, prejudice or other motive in this case.
18 You may also consider the appearance and manner of a
19 witness while on the witness stand.

20 The rules of evidence ordinarily do not permit
21 witnesses to testify to opinions or conclusions. An
22 exception to this rule exists for witnesses we call
23 "expert witnesses," a witness who by education and
24 experience has become expert in some art, science,
25 profession or calling may state an opinion as to

JURY CHARGE

1 relevant and material matter in which the witness
2 claims to be an expert, and may also state the reasons
3 for the opinion.

4 You should consider any expert opinion received in
5 evidence in this case, and like any other evidence,
6 give it the weight you think it deserves. If you
7 decide that the opinion of an expert witness is not
8 based on sufficient education and experience, or if you
9 conclude that the reasons given in support of the
10 opinion are not sound or that the opinion is outweighed
11 by other evidence, you may disregard the opinion
12 entirely. An expert witness' testimony is to be given
13 no greater weight than that of other witnesses simply
14 because the witness is an expert. Further, you are not
15 required to accept an expert's opinion even though it
16 is not contradicted.

17 A statement alleged to have been made by the
18 defendant to law enforcement has been admitted into
19 evidence in this case. While the Court has determined
20 that the statement is admissible, I instruct you that
21 you make the ultimate decision of whether or not the
22 defendant made the statement. If the defendant did
23 make the statement, you must determine whether the
24 statement was made by the defendant voluntarily and of
25 his own free will. This means that the statement was

JURY CHARGE

1 not caused by pressure, force, fear, threats, coercion
2 or intimidation or by hope or a promise of leniency or
3 a reward of any kind.

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

21 You must carefully consider all of the surrounding
22 circumstances before you give any weight for an alleged
23 statement. The State has the burden of proving beyond
24 a reasonable doubt that the alleged statement was
25 voluntary. If you determine that it was, you may give

JURY CHARGE

1 the statement any further consideration that you deem
2 proper. You must decide what weight, if any, could be
3 given to the alleged statement. If you determine the
4 alleged statement was not the free and voluntary
5 statement of the defendant, you should not consider the
6 statement at all.

7 I instruct you, and emphasize, that the fact that
8 the defendant did not testify is not a factor to be
9 considered by you in any way in your deliberations and
10 in your consideration on the question of the guilt or
11 innocence of the defendant. It must not be considered
12 by you in any manner, whatsoever. A defendant has a
13 Constitutional right to remain silent, and the
14 assertion of this right must not be considered by you
15 in your deliberations. I repeat, under your oath, you
16 are to draw no conclusion, whatsoever, from the fact
17 that the defendant in this case did not testify. The
18 fact that the defendant didn't testify should not even
19 be discussed in the jury room. The burden of proof, as
20 I have stated to you, is on the State. The defendant
21 is not required to prove his innocence. The burden of
22 proof remains on the State to prove guilt beyond a
23 reasonable doubt.

24 The defendant is charged with murder. The State
25 must prove beyond a reasonable doubt that the defendant

JURY CHARGE

1 killed another person with malice aforethought. Malice
2 is hatred, ill-will or hostility towards another
3 person. It is the intentional doing of a wrongful act
4 without just cause or excuse and with the intent to
5 inflict an injury or under circumstances that the law
6 will infer an evil intent. Malice aforethought does
7 not require that malice exist for any particular time
8 before the act is committed, but malice must exist in
9 the mind of the defendant just before and at the time
10 of the act or at the time the act is committed;
11 therefore, there must be a combination of previous evil
12 intent and the act.

13 Malice aforethought may be expressed or inferred.
14 These terms "express" and "inferred" do not mean
15 different kinds of malice, but merely the manner in
16 which malice may be shown to exist; that is either by
17 direct evidence or by inference from the facts and
18 circumstances which are proved.

19 Expressed malice is shown when a person speaks
20 words which express hatred or ill-will for another, or
21 when the person prepared beforehand to do the act which
22 was later accomplished. For example, lying in wait for
23 a person or any other act of preparation going to show
24 that the deed was within the defendant's mind would be
25 expressed malice. Malice may be inferred from the

JURY CHARGE

1 conduct showing a total disregard for human life. If
2 one intentionally kills another during the commission
3 of a felony, an implication of malice may arise. If
4 facts are proved beyond a reasonable doubt sufficient
5 to raise an inference of malice, this inference is an
6 evidentiary fact to be taken into consideration by the
7 jury along with other evidence in the case.

8 I further charge you that the offense of first
9 degree burglary is a felony. The defendant is charged
10 with first degree burglary. The State must first prove
11 beyond a reasonable doubt that the defendant entered a
12 dwelling without consent. A dwelling is any building
13 or portion of a building in which a person ordinarily
14 sleeps. A building constructed as a dwelling that has
15 never been occupied cannot be considered a dwelling for
16 purposes of burglary, but a building is a dwelling even
17 if the residence is temporarily absent from the
18 building. In order to prove that the defendant entered
19 the dwelling, the State does not have to show the
20 defendant's entire body entered the dwelling, the
21 smallest entry is sufficient. It may be any part of
22 the body such as a hand, foot or even an instrument
23 such as a hook or other instruments. In addition, the
24 State does not have to prove that force was used to
25 gain entry. If a person enters a building by using

JURY CHARGE

1 deception or to trick or misrepresentation to get the
2 defendant to enter, this an entry without consent.

3 Next, the State must prove beyond a reasonable
4 doubt that the defendant intended to commit a crime,
5 either a felony or a misdemeanor, at the time of the
6 entry. The mere entry into a dwelling without consent
7 is not burglary. If the intent to commit a crime is
8 formed after the entry, it is not a burglary. On the
9 other hand, if the defendant intended to commit a crime
10 at the time of the entry, it is a burglary even if the
11 intent was abandoned after entry. It does not matter
12 that the intended crime was not complete. Intent may
13 be shown by acts, conduct of the defendant and other
14 circumstances from which you may naturally and
15 reasonably enter intent.

16 Finally, the State must prove beyond a reasonable
17 doubt, one, when entering while in the dwelling or when
18 fleeing the defendant or an accomplice was armed with a
19 deadly weapon or explosive. A deadly weapon is any
20 article, instrument or substance which is likely to
21 cause death or great bodily harm. Whether an
22 instrument has been used as a deadly weapon depends on
23 the facts and circumstances in each case. The
24 following are examples of instruments which may be
25 deadly weapons: A pistol, a shotgun, a rifle, a dirk,

JURY CHARGE

1 a dagger, a knife, a slingshot, metal knuckles, a
2 razor, gasoline, a fire bomb or Molotov cocktail,
3 lighter fluid, a gun may be a deadly weapon even if it
4 is not operating.

5 Or, number two, when entering while in the dwelling
6 or when fleeing the defendant or an accomplice caused
7 physical injury to anyone not participating in the
8 crime.

9 Or, three, when entering while in the dwelling or
10 when fleeing, the defendant or an accomplice used or
11 threatened to use a dangerous object.

12 Or, four, when entering while in the dwelling or
13 when fleeing, the defendant or an accomplice displayed
14 what was or appeared to be a knife, pistol, revolver,
15 shotgun, rifle, machine gun or other firearm.

16 Or, number five, the defendant entered or remained
17 in the dwelling in the nighttime. Nighttime is the
18 period between sunset and sunrise during which there is
19 not enough daylight to recognize a person's face except
20 by artificial light or moonlight.

21 If a crime is committed by two or more people who
22 are acting together in committing a crime, the act of
23 one is the act of all. A person who joins with another
24 to commit an unlawful act is criminally responsible for
25 everything done by the other person which happens as a

JURY CHARGE

1 probable or natural consequence of the acts done in
2 carrying out the common plan and purpose. For example,
3 two people can be guilty of killing another when only
4 one of the two had a gun, there was only one bullet,
5 and only one of the two fired the shot that caused the
6 death. If two or more people are acting -- are
7 together, acting together, assisting each other in
8 committing the offense, the act of one is the act of
9 all, or as it is sometimes said, The hand of one is the
10 hand of all.

11 Prior knowledge that a crime is going to be
12 committed without more is not sufficient to make a
13 person guilty of that crime. Mere knowledge that
14 another person is going to commit a crime, even if the
15 defendant is present when the crime is committed, is
16 not sufficient to convict the defendant as a principal
17 guilt as a -- guilt as a principal is shown by actual
18 or constructive presence at the scene as a result of
19 prior arrangement; therefore, a finding of a prior
20 arranged plan or common scheme is necessary for a
21 finding of guilt as a principal.

22 The State must prove beyond a reasonable doubt by
23 competent evidence the theory of the hand of one is the
24 hand of all. A principal in a crime is one who either
25 actually commits the crime or who is present, aiding,

JURY CHARGE

1 abetting or assisting in committing the crime. When a
2 person does an act in the presence and with the
3 assistance of another, the act is done by both. Where
4 two or more acting with a common plan or intent or
5 present at the commission of a crime, it does not
6 matter who actually commits the crime all are guilty.
7 The hand of one is the hand of all.

8 Present at the commission of the crime means to be
9 sufficiently near to aid and abet and assist in the
10 commission of the crime. However, again, mere presence
11 at the scene of a crime is not sufficient to convict
12 one as a principal on the theory of aiding and
13 abetting.

14 Intent is also a necessary element, for there must
15 have been a common design or intent to commit the
16 crime, and the crime must have been committed pursuant
17 thereto with the person aiding and abetting by some
18 overt act. Intent means intending the result which
19 actually occurs, not accidentally or involuntarily.
20 Intent may be shown by acts and conduct of the
21 defendant and other circumstances from which you may
22 naturally and reasonably infer intent. The State must
23 prove these elements beyond a reasonable doubt.

24 The indictments in this case allege two different
25 offenses against the defendant. The charges are

JURY CHARGE

1 Indictment No. 1, murder; Indictment No. 2, first
2 degree burglary. Each indictment charges a separate
3 and distinct offense. You must decide each indictment
4 separately on the evidence and the law applicable to it
5 uninfluenced by your decision as to any other
6 indictment. The defendant may be convicted or
7 acquitted on one or both of the offenses charged.

8 You may be asked to write -- you will be asked to
9 write a separate verdict of guilty or not guilty for
10 each indictment. Now, Mr. Foreman, there are two
11 possible verdicts which you may find on the indictment
12 in this case, guilty or not guilty. There is no
13 significance, whatsoever, in the order in which I state
14 these possible verdicts, it just means I have to state
15 one first and the other second.

16 Ladies and gentlemen, your verdict must be a
17 unanimous one. Mr. Foreman, when the jury agrees on
18 the verdict, you will write the verdict on the verdict
19 forms and sign your name as foreperson. Then, you will
20 knock on the jury room door and inform the bailiff that
21 you have reached a verdict. At that time, we will
22 bring you back into the courtroom. I'm going to send
23 you back into your jury room. I'm going to ask that
24 you not begin your deliberations until you are told to
25 do so by the clerk or the bailiff. There are some

JURY CHARGE

1 matters I have to take up with the lawyers. It might
2 -- I might have to bring you back into the courtroom, I
3 don't think so, but if I do, I will. However, if I
4 send in the exhibits in this case, and I send into you
5 a copy of the charge, which I will mark as Court's
6 Exhibit No. 2, and the verdict forms, that will be your
7 signal to begin your deliberations, all right. If I
8 bring you back out, I'll give you further instruction,
9 but if I send in the exhibits, the charge and the
10 verdict forms, you will begin. All right.

11 Now, the verdict forms are simple. They simply
12 state, As to the charge of burglary first degree, we,
13 the jury, unanimously find the defendant -- and you
14 circle one. Again, it makes no difference as to which
15 one is first, you just have to put them down in that
16 fashion. The second one says, As to the charge of
17 murder, we, the jury, unanimously find the defendant --
18 and you circle one. Mr. Foreperson, you will sign each
19 one.

20 Mr. Ropp, will you please take the jury into the
21 jury room? Will you segregate the alternates until I
22 give you further instructions.

23 (The jury exits at 12:17 p.m., and the following is
24 heard out of the presence of the jury.)

25 (Court's Exhibit 2 marked.)

JURY CHARGE

1 THE COURT: Mr. Diggs, I already noted your
2 objection concerning the charge on felony murder, and I
3 have noted your -- your request for a charge on
4 voluntary manslaughter. Would you add any grounds to
5 that, to just restate the ones you have?

6 MR. DIGGS: Just note the new -- no new grounds,
7 just the arguments we made previously. I think I
8 stated all of the grounds at that time, both with
9 respect to their request to charge, and the fact, from
10 our view, that charge requires the voluntary
11 manslaughter.

12 THE COURT: All right. Anything further?

13 MR. DIGGS: Nothing.

14 MR. HUCKS: No, sir.

15 THE COURT: Okay. If you would, gentlemen, come
16 forward, make sure that all of the exhibits are marked
17 and review the verdict forms.

18 (A discussion was had off the record.)

19 THE COURT: Do we have all of the exhibits?

20 MR. HUCKS: Yes, sir.

21 THE COURT: Bradley, if you would, take those and
22 the charge and the verdict forms and inform the foreman
23 that they may begin their deliberations. Let's bring
24 out the alternates.

25 (Whereupon, the jury starts deliberations at 12:21

JURY DELIBERATES

1 p.m., and the following is had out of the presence of
2 the jury.)

3 THE COURT: You were my alternates. Once the jury
4 begins deliberations, I don't inject my alternates back
5 in, so your service has been completed. I certainly
6 appreciate you being here. As I'm sure you've heard
7 this week, we could not hold court without your
8 willingness to be here. You have performed a very high
9 civil duty. Thank you for coming. You are welcomed to
10 stay with us if you would like. I can't let you back
11 in the jury room with your fellow jurors, but if you
12 choose, Keaton will take you -- make sure you get out
13 of the courthouse. You are released if that is what
14 you wish to do. Thank you again. Your service is
15 completed for the week, I believe. Thank you.

16 (Whereupon, the alternates are excused at 12:22
17 p.m., and the court is in recess.)

18 (The following takes place at 2:23 p.m. out of the
19 presence of the jury.)

20 THE COURT: The jury asked the question, Could we
21 see transcripts, Moon, Charlie Junior and Anthony. I
22 will simply tell them we have no transcripts.
23 Transcripts are not available, but we will play back
24 any testimony that they would like to hear. Anything
25 further from the State?

JURY QUESTION

1 MR. HUCKS: No, sir.

2 THE COURT: Defense?

3 MR. DIGGS: Nothing.

4 THE COURT: Bring them in.

5 (Court's Exhibit 3 marked.)

6 (The jury enters at 2:25 p.m., and the following is
7 heard in the presence of the jury.)

8 THE COURT: Mr. Foreman, I see you have a question,
9 Can we see transcripts of Moon, Charlie Junior,
10 Anthony. We have no transcripts. All of the testimony
11 is recorded. Earlier you may have heard one of the
12 lawyers refer to a page he had done. The day before he
13 had asked the court reporter to find a page for him.
14 It would take several days for a transcript to be
15 prepared, however, we have audio recordings of each of
16 these witness' testimony and we could certainly play
17 that back for you, any portion of it, all of it,
18 whatever you wish. We could do that for you in the
19 courtroom here. Is that what you would like,
20 Mr. Foreman?

21 FOREPERSON: That is what we would like.

22 THE COURT: Any order in which you would like to
23 have them played?

24 FOREPERSON: No.

25 THE COURT: I'm going to take you back in the jury

JURY QUESTION

1 room. I'm going to give my court reporter -- she'll
2 need five, ten minutes to download the recordings and
3 have them prepared to be played back when you return,
4 okay.

5 (A recess was taken.)

6 (Whereupon, the following is had in the presence of
7 the jury.)

8 THE COURT: All right. The jury is back in. Are
9 you ready?

10 (Whereupon, portions of the audio were played back
11 for the jury.)

12 THE COURT: They said that's good. Okay. I'll
13 return you to your jury room.

14 (Whereupon, the jury exits at 3:30 p.m., and court
15 is in recess.)

16 (The following is had out of the presence of the
17 jury.)

18 THE COURT: This is the question, With the "hand of
19 one," if the defendant was convicted for the burglary
20 in the first degree, does that mean that he is guilty
21 of murder because he was present?

22 MR. DIGGS: I would say you can't answer that
23 because, you know, you've charged on the law and that
24 would be like undermining what the Court's charge was
25 on the --

JURY QUESTION

1 MR. HUCKS: Recharge the "hand of one."

2 MR. DeBUSK: They have it back there.

3 MR. HUCKS: Oh, they do have it. So I don't think
4 it --

5 MR. DeBUSK: The law --

6 THE COURT: I'm going to say this. I'm going to
7 answer by saying this, Mere presence alone does not
8 mean that he is guilty of murder, then I'm going to
9 reread the "hand of one is the hand of all," which, I
10 believe, contains -- I was looking at the felony
11 murder.

12 MR. HUCKS: It is at the end of malice.

13 THE COURT: Okay. All right. I want to be very
14 careful about that. They are asking about the hand of
15 one is the hand of all. That is what I'm going to say,
16 unless you have something to add to it. I'll say, Mere
17 presence during the burglary does not mean that he is
18 guilty of murder because he was present, and then I'm
19 going to read -- reread my charge of the hand of one is
20 the hand of all, just a couple of pages. Bring them
21 in.

22 MR. HUCKS: May we approach briefly while the jury
23 is coming in?

24 THE COURT: Yes.

25 (Whereupon, a bench conference was had.)

JURY QUESTION

1 (Court's Exhibit 4 marked.)

2 (Whereupon, the jury enters at 3:35 p.m., and the
3 following is had in the presence of the jury.)

4 THE COURT: Mr. Foreperson, I have your note, and
5 as I read it, it says, With the hand of one, if the
6 defendant was present for the burglary in the first
7 degree, does that mean he is guilty of murder because
8 he was present? Let me say this. Mere presence is not
9 enough to make him guilty of the murder. Mere
10 presence, alone.

11 I'm going to read to you again, perhaps it will be
12 clearer if I read it to you, my charge on "hand of one,
13 hand of all." Listen carefully.

14 If a crime is committed by two or more people who
15 are acting together in committing a crime, the act of
16 one is the act of all. A person who joins with another
17 to commit an unlawful act is criminally responsible for
18 everything done by the other person, which happens as a
19 probable or natural consequence of the act done in
20 carrying out the common plan and purpose. For example,
21 two people can be guilty of killing another when only
22 one of the two had a gun, there was only one bullet and
23 only one of the two fired the shot that caused the
24 death. If two or more people are together, acting
25 together, assisting each other in committing the

JURY QUESTION

1 offense, the act of one is the act all or as is
2 sometimes said, The hand of one, is the hand of all.

3 Prior knowledge that a crime is going to be
4 committed without remorse is not sufficient to make a
5 person guilty of that crime. Mere knowledge that
6 another person is going to commit a crime even if the
7 defendant is present when the crime is committed is not
8 sufficient to convict the defendant as a principal.
9 Guilty as a principal is shown -- guilt as a principal
10 is shown by actual or constructive presence at the
11 scene as a result of prior arrangement. Therefore, a
12 finding of a prior arranged plan or common scheme is
13 necessary for a finding of guilty as a principal.

14 The State must prove beyond a reasonable doubt by
15 competent evidence the theory of the hand of one is the
16 hand of all. A principal in a crime is one who either
17 actually commits the crime, or who is present, aiding,
18 abetting or assisting in the crime. When a person
19 doesn't act in the presence of and with the assistance
20 of another, the act is done by both. Where two or more
21 acting with a common plan or intent are present at the
22 commission of the crime, it does not matter who
23 actually commits the crime. All are guilty. The hand
24 of one is the hand of all.

25 Present at the commission of a crime means to be

JURY QUESTION

1 sufficiently near to aid and abet and assist in the
2 commission of the crime. Again, however, mere presence
3 of a crime -- mere presence at the scene of a crime is
4 not sufficient to convict one as a principal on the
5 theory of aiding and abetting. Intent is also a
6 necessary element where there must have been a common
7 design or intent to commit the crime, and the crime
8 must have been committed pursuant thereto with the
9 person aiding and abetting by some overt act.

10 Intent means intending the result which actually
11 occurs not accidentally or involuntarily. Intent may
12 be shown by acts and conduct of the defendant and other
13 circumstances from which you may naturally and
14 reasonably infer intent. The State must prove these
15 elements beyond a reasonable doubt. I hope that that
16 will help you with this. If you need further
17 assistance from the Court, please let us know. Okay.

18 (The jury exits at 3:41 p.m., and the following is
19 heard out of the presence of the jury.)

20 THE COURT: All right. We'll be at ease.

21 (The court was in recess.)

22 (Whereupon, the following is had out of the
23 presence of the jury.)

24 THE COURT: All right. I have a note from the
25 foreman of the jury. The foreman of the jury indicates

ALLEN CHARGE

1 that the jury is deadlocked. I intend to bring the
2 jury back in and give them the Allen charge, but I will
3 hear from you, Mr. Diggs.

4 MR. DIGGS: Your Honor, I never liked the Allen
5 charge, I always felt it pressured the jury into doing
6 something it wasn't inclined to do. You know, I would
7 -- the jurors are adults, mature, if they understand
8 they can't reach a verdict by agreement, then I would
9 submit they probably understand it and that they are
10 not going to reach a verdict, and so I would object to
11 the Allen charge.

12 THE COURT: All right.

13 MR. HUCKS: The State's position is that the Allen
14 charge is appropriate, it's been recognized as
15 appropriate the next step after a jury being locked up.

16 THE COURT: I think it is, and I'm going to give
17 them an Allen charge. I'll give it one time as
18 required by statute, and we'll see what happens. Bring
19 the jury in.

20 MR. HUCKS: Judge, may Mr. Diggs and I approach
21 briefly, I have a procedure question?

22 THE COURT: Yes. Hold them up at the door.

23 (Whereupon, a bench conference was had.)

24 (Court's Exhibit 5 marked.)

25 (Whereupon, the jury enters at 4:49 p.m., and the

ALLEN CHARGE

1 following was had in the presence of the jury.)

2 THE COURT: Mr. Foreman, I received your note that
3 you are deadlocked, and I know you have been working
4 hard and been working for quite a few hours now. It is
5 my duty to give you one additional charge, and it has
6 to do with trying to reach a verdict because,
7 hopefully, you can make another effort and reach a
8 verdict in this case. I have very brief comments that
9 I would like to make by way of further instruction on
10 the matter of you being able to reach a verdict.

11 As I have already told you, you are the sole judges
12 of the facts and the evidence in this case. Now, as
13 the judge, I'm not permitted to give even a hint as to
14 how I feel about any factual matter in this case,
15 certainly, you could give no -- and certainly could
16 give you no hint about what verdict you ought to reach
17 in this case. It is my duty to state the law of the
18 case as I have done, and it is your duty to bring in a
19 verdict now. But I can say this, that when a matter is
20 in dispute, and it is not always for two men or women
21 to agree, and when 12 of you must agree, it becomes
22 obviously correspondingly difficult. It is important
23 that litigation -- and this is litigation -- be ended,
24 if it may be ended, without a single one of you doing
25 violence to your own conscience. No juror is expected

ALLEN CHARGE

1 to give up an opinion based on reasoning satisfactory
2 to him or herself merely for the purpose of being in
3 agreement, and I want you to understand that. You are
4 not called upon very often to try cases, and there is
5 some 50 judges who work -- whose work it is is to try
6 cases from day-to-day throughout the year. It is not
7 very unusual -- almost unheard of -- for a jury to go
8 out and promptly return a verdict, this is what would
9 happen if a jury normally was in agreement to begin
10 with. At the same time, we usually get a verdict.

11 What this means is that it is normal for jurors to
12 disagree at first, but the fact that we normally get a
13 verdict also means that after reasonable persons lay
14 aside all extraneous matters and determine to decide a
15 case based on the law and the evidence, they do come to
16 a common understanding and write a verdict. It has
17 never been intended that the verdict of a jury should
18 be the verdict of any one person, on the other hand,
19 the verdict of the jury is the collective reasoning of
20 all persons put together, and that is why we have a
21 jury, so that we could have the benefit of collective
22 thought, collective reasoning.

23 It becomes your duty to tell the other jurors how
24 you feel about the case and why you think as you do,
25 and I'm sure that you have been doing just that. On

ALLEN CHARGE

1 the other hand, it becomes the other jurors' duty to
2 listen to you and to exchange views with you and to
3 give each other's thought such meaning as you think it
4 should have. So to some degree it could be said that
5 jury service is a matter of give and take.

6 If you do not agree on a verdict, it just means
7 that at some future term of court, before some other
8 judge perhaps, and that some other jury will sit where
9 you are sitting now, the same participants will come
10 and the same lawyers will probably come and ask
11 basically the same questions, and presumably and
12 probably they'll get pretty much the same answers, and
13 we'll go through the whole process again. I have no
14 reason to think that any other 12 citizens of Horry
15 County will be more capable of solving this controversy
16 than you.

17 So I'm going to ask you at this time to return to
18 your jury room and deliberate further and see if you
19 cannot write a verdict in this case. I want to close
20 this part of this added charge by reminding you again
21 that while it is important that litigation be ended, it
22 should be ended in the form of a verdict by which no
23 juror does violence to his own conscience. No juror is
24 expected to give up an opinion based on reasoning
25 satisfactory to himself or herself and merely for the

ALLEN CHARGE

1 purpose of being in agreement. With that added
2 instruction, I'm going to ask you to return to your
3 jury room and try one more time to reach a verdict.

4 (Whereupon, the jury exits at 4:59 p.m., and the
5 following is had out of the presence of the jury.)

6 THE COURT: Anything further from the State?

7 MR. HUCKS: No, sir.

8 THE COURT: Anything from defense?

9 MR. DIGGS: Nothing.

10 THE COURT: Okay.

11 (The court is in recess.)

12 (Whereupon, the following is had out of the
13 presence of the jury.)

14 THE COURT: We have a verdict. Bring in the jury.

15 (Whereupon, the jury enters at 5:56 p.m., and the
16 following is heard in the presence of the jury.)

17 THE COURT: Mr. Foreman, have you reached a
18 verdict?

19 FOREPERSON: Yes, we have.

20 THE COURT: Was it an unanimous verdict?

21 FOREPERSON: Yes, it was.

22 THE COURT: Will you give your verdict forms to Mr.
23 Ropp, please.

24 Madam clerk, you may publish the verdict.

25 THE CLERK: The Court of General Session,

VERDICT

1 Indictment No. 2013-GS-26-04043, State of South
2 Carolina, Horry County, State of South Carolina versus
3 Bradley Gerald Mullins. As to the charge of burglary
4 first degree, we the jury announce that we find the
5 defendant guilty, signed by foreperson, Michael Hawley,
6 December 5, 2013.

7 In the Court of General Sessions, Indictment
8 2013-GS-26-04042, State of South Carolina, County of
9 Horry, State of South Carolina versus Bradley Gerald
10 Mullins. As to the charge of murder, we the jury
11 announce we find the defendant guilty, signed by
12 foreperson, Michael Hawley, December 5, 2013.

13 Ladies and gentlemen of the jury, if this is your
14 verdict, so signify by raising your right hand.

15 THE COURT: Thank you. Mr. Diggs, any requests for
16 individual voir dire?

17 MR. DIGGS: Your Honor, I would --

18 THE COURT: I mean polling.

19 MR. DIGGS: Yes, sir.

20 THE CLERK: Please stand. When I call your number
21 I'll ask you two questions, after each question, please
22 be seated.

23 JUROR 311, is this your verdict?

24 JUROR 311: Yes.

25 THE CLERK: Is this still your verdict?

JURY POLLING

1 JUROR 311: Yes.

2 THE COURT: You may be seated.

3 THE CLERK: Juror 343, is this your verdict?

4 JUROR 343: Yes.

5 THE CLERK: Is this still your verdict?

6 JUROR 343: Yes.

7 THE CLERK: You may be seated. Juror 312, is this
8 your verdict?

9 JUROR 312: Yes.

10 THE CLERK: Is this still your verdict?

11 JUROR 312: Yes.

12 THE CLERK: Please be seated. 231.

13 JUROR 231: Yes, ma'am.

14 THE CLERK: Is this your verdict?

15 JUROR 231: Yes, ma'am.

16 THE CLERK: Is this still your verdict?

17 JUROR 231: Yes, ma'am.

18 THE CLERK: Please be seated. Juror 338, is this
19 your verdict?

20 JUROR 338: Yes.

21 THE CLERK: Still your verdict?

22 JUROR 338: Yes, it is.

23 THE CLERK: Juror 140.

24 JUROR 140: Yes.

25 THE CLERK: Is this your verdict?

JURY POLLING

1 JUROR 140: Yes, ma'am.

2 THE CLERK: Still your verdict?

3 JUROR 140: Yes, ma'am.

4 THE CLERK: Please be seated. Juror 228, is this
5 your verdict?

6 JUROR 228: Yes.

7 THE CLERK: Still your verdict?

8 JUROR 228: Yes.

9 THE CLERK: Please be seated. Juror 191 is this
10 your verdict?

11 JUROR 191: Yes.

12 THE CLERK: Is this still your verdict?

13 JUROR 191: Yes.

14 THE CLERK: Please be seated. Juror 129, is this
15 your verdict?

16 JUROR 129: Yes.

17 THE CLERK: Still your verdict?

18 JUROR 129: Yes.

19 THE CLERK: Please be seated. Juror 293, is this
20 your verdict?

21 JUROR 293: Yes, ma'am.

22 THE CLERK: Still your verdict?

23 JUROR 293: Yes, ma'am.

24 THE CLERK: Juror 196, is this your verdict?

25 JUROR 196: Yes.

JURY POLLING

1 THE CLERK: Still your verdict?

2 JUROR 196: Yes.

3 THE CLERK: Juror 137, is this your verdict?

4 JUROR 137: Yes.

5 THE CLERK: Still your verdict?

6 JUROR 137: Yes.

7 THE COURT: Thank you very much. All right. Mr.
8 Diggs, I'll hear you.

9 MR. DIGGS: Under the rule applicable to post-trial
10 situations, I would ask that we be permitted to submit
11 post-trial motions within the next ten day period.

12 THE COURT: Are you asking me to defer sentencing?

13 MR. DIGGS: Well, I would submit that the proper
14 time to sentence would be after some reflection on the
15 case, maybe tomorrow.

16 THE COURT: I'm not going to grant that. I'm going
17 to require you to make your motions now.

18 MR. DIGGS: Your Honor, we would make the motion,
19 but we would request the Court's indulgence to maybe
20 amend or modify those motions within the next ten days.
21 What we would do is ask for a new trial based on the
22 motions that we have made in the course of the
23 proceeding, specifically with respect to the Court's
24 decision to charge the inference of malice from the
25 burglary.

MOTION - MR. DIGGS

1 I would submit that, you know, the grounds that we
2 set forth at that time, specific grounds, prove to be
3 based on the questions that were asked by the jury
4 during the deliberations. It seemed to -- the factual
5 issues seemed to have come into play wherein that
6 charge might have been applicable, you know, in the
7 deliberations itself in terms of reaching the decision
8 on the murder charge. So we would ask for a new trial
9 based on the perceived error that we believe exists
10 because of the charge that was given, given at the
11 request of the State, Your Honor.

12 I remind the Court -- and of course there's no need
13 for us so do that, but the Court initially did not
14 include that charge in the instructions, and at the
15 request of the State made the decision to assert it.
16 So based on that, and the argument that we made at the
17 time, that if that charge was to be given, in the event
18 that there was only evidence in the record that
19 supported the use of that type of inference from the
20 burglary then the manslaughter charge would have been
21 appropriate as well, and because the Court refused at
22 that time to give the charge, we would assert that the
23 Court should reconsider the rulings that were made at
24 that time, grant a new trial based on those errors.

25 Your Honor, we also made a motion, if you recall,

MOTION - MR. DIGGS

1 about a rational trier of fact finding guilt beyond a
2 reasonable doubt based on the evidence in this case.
3 We believe that the evidence was not sufficient for a
4 rational finder of fact to prove guilt with respect to
5 murder beyond a reasonable doubt. That is based on
6 just the inconsistencies and in the statements that
7 were given by all of the State's witnesses who
8 professed as eyewitnesses to either watching the
9 shooting, in the case of Anthony, or lead to the
10 shooting -- alleged oral confessions in the presence of
11 Delilah, Verne Ray, Moon Mullins, I think Charlie
12 testified to that, and I'm not sure, but I know Arlie
13 did. I know he was out on the porch and he heard this
14 conversation. The fact that none of those statements
15 came into existence in effect until two years after the
16 initial interviews had been conducted by the detectives
17 in the case is simply not reliable evidence, not
18 reliable. It is untrustworthy the rational trier of
19 fact could not conclude under our system, I
20 respectfully submit, guilt beyond a reasonable doubt.

21 THE COURT: Mr. Hucks.

22 MR. HUCKS: Yes, sir. As to the charge on the
23 inference on malice, it is an appropriate charge. We
24 discussed it and we argued it at length. It is an
25 appropriate charge. It is the current state of South

MOTION - MR. DIGGS

1 Carolina state law and the current position of the
2 State Supreme Court was an appropriate charge and do
3 not believe that was in any error, whatsoever, and
4 would not entitle the defendant to a new trial.

5 Secondly, a rational trier of fact has just
6 returned a verdict of guilty in this particular case on
7 each of these charges, and we believe that there was
8 substantial evidence in the record to allow the jury to
9 make that decision, and now they have made that
10 decision. We believe that if those are the two issues
11 I wrote down, I believe that that would be the extent
12 of the response to each of those issues.

13 THE COURT: Mr. Diggs, do you want to respond?

14 MR. DIGGS: Your Honor, I don't know if I would
15 want to respond directly to what counsel said. I
16 believe we covered it in motions at this point, but I
17 would submit in this case, because it is an unusual
18 case, it would be appropriate to say -- and the fact
19 that the Court had given an Allen charge because a
20 previous announcement by the jury that they were
21 deadlocked and didn't want to reach a verdict, and the
22 Allen charge was given, I would ask the Court at this
23 point to make sure the jurors understand that they
24 can't change their mind later. Once they leave here,
25 that verdict is going to be in place and it is not

MOTION - MR. DIGGS

1 going to be possible for a juror to call tomorrow --

2 THE COURT: Mr. Diggs, I'm not going to reinstruct
3 this jury to rethink about their verdict again.

4 MR. DIGGS: I'm not asking to send them back and
5 think about it, but maybe just to let them know this is
6 a final verdict.

7 THE COURT: Well, certainly it is a final verdict
8 Mr. Diggs.

9 MR. DIXON: Pardon?

10 THE COURT: It certainly is a final verdict. I
11 listened to the case, and we've been going on this for
12 four days. I don't remember trying a murder case with
13 more overwhelming evidence than I have seen in this
14 case. We have eyewitnesses, we have witnesses who
15 implicated themselves in this matter, we have witnesses
16 who have no interest at this point and who have
17 testified. Delilah Mullins, how in the world would she
18 have even known about this incident to report it even
19 though it was some years later unless she was told?

20 MR. DIGGS: By Anthony. She was told by Anthony --
21 or Anthony's wife. But, Your Honor, I appreciate your
22 patience in listening to me and hearing us out. You've
23 been -- you've given us ample opportunity to express
24 all of the objections, and we appreciate that. I know
25 maybe it is an unusual request to ask about -- telling

MOTION - MR. DIGGS

1 the jury --

2 THE COURT: The jury understands this is a final
3 verdict.

4 MR. DIGGS: That is all I have.

5 THE COURT: I would respectively deny your motions.
6 Is the State ready to proceed with sentencing?

7 MR. HUCKS: Yes, sir. We have victims present, and
8 we're ready to proceed.

9 THE COURT: All right. Will the victims address
10 the Court?

11 MS. KELLY DELK: I'm Kelly Elliott Delk, D-E-L-K?
12 I'm just exhausted, and I'm sure everyone else is here.
13 (Deponent crying). I'll be brief. We've spent four
14 days talking about the killing of Joe Elliott, but no
15 one has a clue who he is. He was my father. He was
16 the grandfather of six grandchildren that he will not
17 get to see be raised. In the home that he was murdered
18 in is the home that my brother and I grew up in, and
19 that is where all of my childhood memories are. That
20 is where my dad's parents lived. That is where our
21 times of going back and seeing our grandparents are,
22 30 acres. I can barely drive down Dew Lane now. That
23 dirt road you have seen hundreds of pictures of, I
24 walked down that road every day to go to school, and I
25 walked down that road every day when I got off the bus,

SENTENCING

1 and never for one second did that with fear. I did
2 that many days by myself.

3 My mother, spent many nights in that house by
4 herself. When I was in college, I spent nights by
5 myself in that house, never in fear. It is haunting
6 me, the thoughts. It's bad enough this happened to my
7 dad. My dad thought he was Rambo. My dad, at eight
8 years old, taught me how to load shotgun shells, and if
9 he wanted to kill any of those men that night, I assure
10 you, he could have done it, because he could shoot a
11 target like no other man could. He didn't want to kill
12 them. He wanted them off his property, and he tried to
13 scare the fool out of them.

14 I think of myself as a good Christian girl, girl of
15 good character. I work hard and give back to the
16 community I live in. I know people do things and don't
17 mean to. I think this crime was extremely calculated,
18 meditated (sic), cruel, every bad word I can think of.
19 I don't know how any of these men could ever have the
20 right character to do good for their community. I
21 would like for the sentencing to reflect that. I think
22 of myself as a good Christian girl, and I'm not asking
23 for retaliation, I'm asking for justice to be served.
24 Thank you.

25 MR. COURTNEY MCKINNON ELLIOTT: My name is Courtney

SENTENCING

1 McKinnon Elliott, I go by Ken. Kelly Jo Elliott was my
2 father. My sister mentioned a lot about what the home
3 and the family farm meant to us. I have tax receipts
4 going back to the early 1920s from when my family
5 actually originally bought it.

6 I'm thinking about what we lived through for the
7 last five years. We got a call from the Horry County
8 Police Department in the middle of the night on a
9 Sunday night saying that our father was dead. It
10 wasn't until the following Monday morning that we
11 learned the circumstances of the case. I got to know
12 members of the Horry County Police Department on a
13 first-name basis. We share pictures of our children
14 now because of how long we have lived this case. For
15 over two years it was unsolved and we could never
16 appropriately grieve the death of our father because of
17 the uncertainty of the circumstances with which the
18 crime had occurred.

19 I was standing in an airport the day I got a call
20 that there was an arrest made in this case, and I
21 thought that would be the opportunity to grieve. But,
22 thankfully, today you all have given us the opportunity
23 to grieve. We have not been able to take our breath
24 without thinking about this case, without knowing what
25 happened until this week, and I thank you all as

SENTENCING

1 members of the jury for the work that you put into this
2 and, Your Honor, we thank you and the court for all of
3 the work that you all have put into this to help us to
4 get to that point where we can grieve.

5 My father had an expression that my sister relayed
6 in other circumstances around this case, and that was,
7 Front and center. When he said "front and center" you
8 knew you had screwed up and he was calling you to stand
9 in front of him to receive the punishment for however
10 you had screwed up. He was a strict disciplinarian,
11 and he believed in swift and just punishment for
12 whatever the deed was that my sister and I might done.
13 Today it is time for this man to stand front and center
14 and receive the punishment for what he's done. Thank
15 you.

16 MR. HUCKS: Your Honor, as far as anything further
17 from the State in sentencing, we -- I would go into
18 defendant's criminal history. We don't want to get
19 into the facts. You've been sitting here for four days
20 of it. You've heard every bit of it, and the State
21 would, with the Court's permission, go to the criminal
22 history.

23 THE COURT: Please do.

24 MR. HUCKS: The defendant has a 1998 misdemeanor
25 domestic assault. 1999, bad check. 1999, felony

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1 failure to appear on a felony charge. 2001, grand
2 larceny. 2002, operating a motor vehicle, habitual
3 offender under the felony statute. 2002, hit-and-run,
4 personal injury. 2002, public intoxication. 2002,
5 felony contempt of court. 2004 -- pardon me, 2005,
6 grand larceny. 2006, petty larceny.

7 MR. DIGGS: Your Honor, I apologize for
8 interrupting, but, you know, this is why I would submit
9 that sentencing should be delayed, because we have -- I
10 mean, I was given -- at this point I'm totally confused
11 about what the status of the criminal history is. I
12 would submit it is absolutely impossible for me to sit
13 here and be able to properly represent a client at
14 sentencing with this kind of --

15 THE COURT: Mr. Diggs --

16 MR. DIGGS: There is some things I have no idea
17 about. I'm not in a position to challenge it or
18 anything else.

19 THE COURT: Well, Mr. Diggs, we've been at this all
20 week long. Certainly you anticipated that this verdict
21 was a very real possibility. Your client is there with
22 you, he knows what is correct and incorrect. I'll give
23 him the benefit of doubt on anything he wants to
24 challenge by way of his criminal record.

25 MR. HUCKS: For purposes of the record, the

SENTENCING

1 defendant's criminal history was turned over initially
2 in initial discovery.

3 MR. DIGGS: We were given a criminal history three
4 days ago that had one charge on it; am I correct?

5 MR. HUCKS: No. You were given --

6 MR. DIGGS: Let me find it. You can move on. I'll
7 find it, and I want that part of the record.

8 MR. HUCKS: 2008, felony, unlawful use of a vehicle
9 or larceny. 2009, contempt of court. 2004, escape
10 from incarceration, and 2006, giving false information
11 to police.

12 MR. DIGGS: Here is what I was provided, and there
13 may have been other things provided, but subsequent to
14 that, I was led to believe that this was the criminal
15 history.

16 THE COURT: That would be for impeachment purposes?

17 MR. HUCKS: That is a certified conviction of some
18 of the prior convictions for --

19 MR. DIGGS: One conviction. One.

20 THE COURT: Mr. Diggs, did you not anticipate they
21 would give you a list of charges that they may intend
22 to use for impeachment purposes if your client took the
23 stand? Isn't that something that is customarily done?

24 MR. DIGGS: I was given an NCIC printout sheet that
25 we -- my client and I discussed that was -- I mean, it

SENTENCING

1 was lengthy, but filled with inapplicable entries that
2 turned out not to have resulted in convictions, and
3 things like that. You know, I just -- I don't question
4 the Solicitor's veracity. You know, I don't think he's
5 --

6 THE COURT: I'll let you tell me what his criminal
7 record is and I'll rely on you as an officer of the
8 court.

9 MR. DIGGS: I suggest that the criminal record that
10 would be sufficient or appropriate to be considered at
11 sentencing is what we've handed up.

12 THE COURT: Mr. Hucks.

13 MR. HUCKS: That was the extent of the criminal
14 history. Just for purposes of the record, to clarify
15 the record, when I came into court prepared for trial,
16 I intended to cross-examine the defendant with his
17 prior history, because it is quite lengthy, as I read,
18 and it has multiple crimes of dishonesty and multiple
19 felonies. I requested certified convictions from the
20 agencies that convicted him to use for purposes of
21 impeachment and brought copies of those to Mr. Diggs,
22 and that is what you have in front of you, which is
23 common practice.

24 THE COURT: Anything further?

25 MR. HUCKS: No, sir.

SENTENCING

1 THE COURT: Mr. Diggs, I'll hear from you.

2 MR. DIGGS: He in my -- it is my understanding that
3 Mr. Mullins has the conviction where he was driving,
4 using his employer's truck, and I don't know -- many
5 years ago, in the 1990s, and he was -- had a probation
6 sentence as a result of that. There was -- it was a
7 driving violation, DUS type of charge, that resulted in
8 him going into incarceration, and that is about the
9 extent of his criminal history.

10 THE COURT: If you tell me as an officer of the
11 court that is all of his criminal record that is
12 correct --

13 MR. DIGGS: That is what my understanding is.

14 THE COURT: I'll go with it.

15 MR. DIGGS: I don't have access to law enforcement
16 the way the Solicitor's office does.

17 THE COURT: For purposes of this sentencing, I'll
18 consider a grand larceny. Proceed.

19 MR. DIGGS: Thank you, Your Honor.

20 THE COURT: I'll hear from you.

21 MR. DIGGS: Brad's family is here, some of them,
22 some of his family is here, and I know that they -- you
23 know we're in an extremely volatile situation. We just
24 had a verdict return with respect to a murder charge,
25 you have the victim's family here expressing views,

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1 which I assume are appropriate under the procedures as
2 victim impact statements, that type of thing, and it is
3 appropriate that the Court hears those things, but it
4 is extremely difficult to put -- to discuss this case
5 to have family members express to the Court their
6 feelings for their loved one, their brother, their
7 child, their nephew and, Your Honor, it is not -- you
8 know, I don't want to do anything that offends anyone,
9 and at the same time alienates the Court.

10 THE COURT: You are not going to alienate the
11 Court, Mr. Diggs. I've been doing this a long time,
12 and I promise you, my blood pressure hasn't gone up one
13 single degree.

14 MR. DIGGS: You know, Judge, I want it to stay that
15 way. I don't want to do anything that will change it,
16 but, Your Honor, there is some doubt in this case,
17 still, notwithstanding the verdict. There is some
18 dirty hands in this case, and I'll point to Anthony Ray
19 as an example, who is not going to be doing time for
20 murder.

21 THE COURT: I don't know --

22 MR. DIGGS: But, Your Honor, given the verdict that
23 the jury has entered, the Court has the discretion to
24 impose something less than life, and the legislature in
25 Columbia understood that. The case that has been

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1 brought by the prosecution is one wherein a punishment
2 of less than life is permitted.

3 THE COURT: 15 to life on burglary, 30 to life on
4 the murder.

5 MR. DIGGS: Right. Your Honor, I would ask that
6 the senses be concurrent, and I would ask Your Honor to
7 be merciful. I know it puts you Your Honor in a very
8 difficult position, but I would ask the Court to
9 consider all of the comments that have been made by the
10 victim's family in the case, the Elliotts, but also the
11 Mullins family, my client's family. I don't know if
12 they are in a position right now where they want to
13 stand up and speak, but I think the Court can
14 understand they would ask for leniency and mercy on
15 behalf of their family member.

16 You have a young man here, 35 years of age. We had
17 a chance to meet a couple of the family members during
18 the course of the trial. They love him. Your Honor,
19 I'm asking you to look at a very difficult situation
20 and impose a minimal sentence that is permitted under
21 the law, which is 30 years.

22 THE COURT: Do you not understand this could have
23 been a death penalty case?

24 MR. DIGGS: Yes, sir. In fact, I talked to the
25 solicitor about it, briefly, just mentioning, Look, you

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1 know, if the case is as the State alleges, it could be
2 a death penalty, but I think the solicitor -- and I
3 don't want to put words in their mouths -- but they
4 looked at the case and they saw the credibility
5 problems that they had with the witnesses. It was
6 difficult. I think they knew they probably couldn't
7 get a death verdict because of the lack of
8 trustworthiness of the witnesses. The conflicting
9 statements that they made, the untimeliness of the
10 statements made, all gave rise to questions about the
11 credibility of those witnesses, what was motivating
12 them to make -- to give the statements that they gave.
13 I would submit that is why the solicitor made the
14 decision not to seek the death penalty in the case.
15 Your Honor, I would urge the Court not to consider that
16 as justification giving my client -- simply because
17 they did not seek the death penalty against him, that
18 it would be giving him a break to sentence him to life
19 without possibility of parole, that is not something
20 that I would submit would be fair under the
21 circumstances given the questions with respect to the
22 reliability of the verdict. I mean, the sentence --
23 not the -- I would ask for a concurrent sentence for
24 the burglary.

25 THE COURT: All right. I will hear from your

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1 client, if you wish to make a statement, or any of his
2 family.

3 MR. DIGGS: How about mom, you want to come up?

4 KEENA STANLEY: First of all, I would like to say
5 I'm so sorry to the Elliott family for what happened to
6 their father, that is horrible, that is so horrible.
7 But I also want to say of all of my children -- I have
8 five kids, I have four boys and a girl -- of all of my
9 children, my son Bradley was the most kind hearted. He
10 was never violent when he was little. The kids would
11 pick at him sometimes, you know, the boys fussing and
12 going on. Bradley never was one to fight with them.
13 He never fit in school. He never had a violent temper
14 or a mean bone in his body. He had two kids. He would
15 feed those children, take care of them, the most loving
16 father that could ever be. I don't know what happened
17 here. I don't know. I live in Virginia. I have no
18 idea what happened in this murder case, but all I know
19 is my son, Bradley, is not capable of killing someone.
20 I do know that.

21 THE COURT: Thank you, ma'am.

22 MR. DIGGS: Also, my client would like to address
23 the Court.

24 MR. MULLINS: I, as well, would like to send my
25 heart out to you all. I have been found guilty of

SENTENCING

1 something that I would never do and that I would -- I
2 don't know how to express it. I know I'm going to
3 spend the rest of my life in prison, but I know in my
4 heart that I didn't do it, and I'll never be the person
5 that I have been made out here to be, no matter where
6 I'm at, because some day I have to answer to that man
7 upstairs, I'll be comfortable with answering to him,
8 but I assure you, the other three won't. They will
9 never be comfortable. Sorry for your loss.

10 THE COURT: All right. Mr. Mullins, this jury
11 after lengthy deliberations has found you guilty of the
12 offenses of burglary in the first degree and murder. I
13 have listened carefully to the evidence in this case,
14 and as I have mentioned a moment ago, I found the
15 evidence overwhelming, not only was it overwhelming,
16 but it was evidence of a violation of these offenses or
17 commission of these offenses in the most heinous
18 manner.

19 Listening to the evidence it became fairly clear to
20 me that Mr. Elliott was killed because he could
21 identify you, and that is probably the only way -- the
22 only reason he was killed. He was executed. The law
23 in this state provides for a penalty for burglary
24 between 15 years and life. That penalty is provided so
25 that the trial judge can exercise his discretion in

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1 determining where in that range this offense falls. I
2 can think of no situation worse or mortifying than
3 having someone evade your home and shoot you. Evade
4 your home for purposes of stealing from you. I can't
5 think of any way this burglary could be worse.

6 So I think the maximum sentence is required. On
7 Indictment Number 04042 -- excuse me, 43, burglary in
8 the first degree, sentence of the Court is that you be
9 confined to State Department of Corrections for the
10 balance of your life.

11 The murder was a cold, heartless execution, and on
12 Indictment 04042 for murder, the sentence of this Court
13 is that you be confined for the balance of your life.
14 These are current sentences. Thank you very much.

15 Do you have a sentencing sheet?

16 MR. DeBUSK: We're passing them up, Your Honor.

17 THE COURT: Ladies and gentlemen, of the jury,
18 thank you for your service. I know this was a
19 difficult, difficult week for you. It is difficult for
20 all of us. It is difficult for me as a trial judge.
21 As I mentioned a moment ago, I've been doing this for
22 many, many years, and it is never easy, particularly
23 sentencing. I believe that you, as jurors, did your
24 job well. You worked hard. I appreciate what you have
25 done. This community appreciates what you have done.

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1 It's probably one of the most difficult things you have
2 ever done, and you'll probably never be called upon to
3 do it again. I thank you for a service.

4 I'm a member of this community. I live here.
5 There is no telling where you may see me. If you have
6 an opportunity to see me, I don't -- I'm sure I can't
7 remember all of the jurors on my jury panels, but if
8 you do see me and you recognize me, please don't
9 hesitate to approach me and speak to me and tell me or
10 remind me that you were one of my jurors, because I
11 would love to speak to you.

12 I hope you have found this to be, at least, an
13 enlightening process, and in the end, you will find
14 that it is a rewarding process.

15 Mr. Ropp, if you would, make sure that they collect
16 their property. Mr. Hemingway, make sure security is
17 provided -- it is late in the evening -- to get them to
18 their vehicles. Thank you.

19 (The jury exits at 6:34 p.m., and the following is
20 heard out of the presence of the jury.)

21 MR. DIGGS: Mr. Hucks told me I needed to sign the
22 sheet, too; is that true?

23 THE COURT: I don't think you have to.

24 MR. HUCKS: I misspoke. I was thinking in a guilty
25 plea everyone signs the sheet, I misspoke.

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1 MR. DIGGS: I wasn't aware. I wasn't saying I was
2 going to refuse to do that, but thank you, Your Honor.

3 THE COURT: You are excused.

4 (Court's Exhibit 6 marked.)

5 (WHEREUPON, THE TRIAL OF BRADLEY G. MULLINS

6 CONCLUDED AT 6:35 P.M., DECEMBER 5, 2013.)

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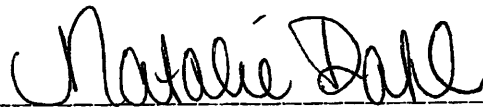
CERTIFICATE OF REPORTER

State of South Carolina)
County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina, on the 2nd through the 5th days of December, 2013.

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

January 24, 2014.



Natalie Dahl, RPR
Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED

MAR 05 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRADLEY GERALD MULLINS,

APPELLANT

APPELLATE CASE NO. 2013-002662

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offenses of murder and burglary in the first degree. R. p. 411. His case was called to trial on December 2, 2013 before the Honorable Larry B. Hyman, and a jury. William I. Diggs represented appellant. J. Scott Hucks and George DeBusk were the assistant solicitors. R. p. 1.

At the conclusion of the trial the jury found appellant guilty on both counts. R. p. 402, l. 25 – 403, l. 12. Judge Hyman sentenced appellant to life imprisonment for burglary in the first degree and life imprisonment for murder. R. p. 410, ll. 6-14.

This appeal follows.

ARGUMENT

The court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case.

Relevant Facts

Anthony Earl Ray was serving a fifteen-year prison term for first-degree burglary for his role in the crime in this case. R. p. 224, ll. 10-25. Ray admitted he also was charged with armed robbery and murder at the time he testified against appellant. R. p. 225, ll. 1-5. Appellant was Ray's first cousin. R. p. 224, ll. 22-24.

Ray testified on the date of the incident he was drinking beer and cooking out on a grill with eight to ten other people. R. p. 226, ll. 5-23. Ray claimed that he, appellant and two other men, "Little Charlie" and "Arlie Mullins," began talking about robbing the decedent's house to steal his guns. R. p. 227, ll. 5-13; 228, ll. 10-21. Ray maintained that he did not know the decedent but appellant knew the decedent, and appellant was aware that the decedent had guns at his house. R. p. 229, ll. 3-23. Gene Elliott, the decedent's cousin, estimated the decedent "at any given time" had about thirty guns at his house. R. p. 13, l. 23 – 17, l. 5.

Ray testified that when it started to get dark the men executed the plan. Ray claimed that appellant told Little Charlie where to drive. When the men arrived at the decedent's

house “all four of us got out.” Ray said he beat on the front door “a good five minutes.” Ray was trying “to see if he was home . . . because, I mean, we wouldn’t have went in if he was home.” Ray maintained the men went to the decedent’s house that evening with intention of stealing his guns. R. p. 230, ll. 23 – 232, l. 25.

Ray described how appellant allegedly went in the house first. The men took fifteen to twenty shotguns and rifles back outside, and put them on blankets in the backyard. R. p. 233, l. 1 – 235, l. 11. The men were making methodically making trips outside with the stolen guns, and they were not “trashing the house.” They were looking for “rifles, shotguns and pistols.” R. p. 235, ll. 1-22.

Ray told the jurors that the men finally reached a locked door to a bedroom. “We had been there probably twenty, twenty-five minutes, a good bit, and we figured that is probably where most of the guns were.” R. p. 236, ll. 1-12. It was a “big wooden door, and it is locked.” Ray claimed that appellant kicked at the bottom of the door but that appellant’s foot got “stuck, he fell down and he went to pull the foot out, and seconds later Mr. Elliott comes out shooting.” R. p. 236, ll. 3-22.

Ray testified that the decedent was naked and he had a pistol in his hand. Ray said that the decedent “was shooting . . . I tried to run for the door.” “Brad [appellant] was there, and we took off running.” Ray said the two men were trying to escape, and “Mr. Elliott comes out and has a gun pointed on him.” “I had a little .22 rifle in my hand. I hold it up, screamed at him to put the gun down, put the gun down, when he points the gun at me, I shot him. He fell down, and Bradley goes on top of him. This is kind of behind the couch, but Brad--- by the time I got there, Brad shot him in the head.” R. p. 238, ll. 1-16.

Ray claimed that he shot the decedent in the "shoulder, side area...because he pointed his gun at me." Ray maintained that it was appellant who shot the decedent in the head. R. p. 238, l. 1- 239, l. 4.

Ray claimed: "When I shot him in the shoulder, he fell down. Bradley shoots him in the head. I exited out of the back of the house. Bradley stays in there a minute. I run to the truck. Bradley eventually comes out with a sack of pistols . . . like a pillowcase full of pistols . . . we get in the truck and leave." R. p. 241, ll. 2-21. Ray said after the shooting "everybody was yelling at each other and it was - - I don't remember what we said..." R. p. 241, ll. 1-23.

Ray testified the men were wearing gloves during the burglary so they would not leave any fingerprints. Their plan was to steal anything valuable from the house, especially the guns. R. p. 251, ll. 11-14. Little Charlie was the driver and Arlie Mullins was also involved in the burglary. R. p. 251, l. 15 – 252, l. 7.

Horry County Police Officer Timothy Fike was doing a "welfare check" on September 14, 2008 when he discovered the decedent's body "in the living room area of the residence." The body was partially covered by a rug or some other material. R. p. 42, l. 12 – 47, l. 4.

Investigator Peter Cestare testified the broken glass and condition of the door indicated "a forced entry into the house commonly found in a burglary." R. p. 71, l. 8 – 72, l. 6. Charles Mullins Sr. testified that Anthony Ray confessed his role in the burglary, and he insisted appellant did the same although he was vague on when appellant allegedly confessed his role to him. R. p. 153, l. 15 – 162, l. 8.

Closing Argument

In his closing argument Assistant Solicitor Hucks told the jury “Brad Mullins and Anthony Ray went in Joe Elliott’s house. **They didn’t think he would be home.** They went in the nighttime to steal guns. Beat on the door. When he came out, they shot him, not one of them, both of them. They are both culpable for the burglary and murder of Joe Elliott.” R. p. 369, ll. 17-23. (emphasis added).

Charge Conference

At the earlier charge conference the judge told the solicitors and defense counsel that he intended to give a jury instruction that one who “intentionally kills another during the commission *of a felony*, **then an implication of malice may arise - - may arise.**” The judge also said he was going to instruct the jury that first degree burglary was a felony. R. p. 309, l. 13 – 310, l. 1.

Defense counsel objected to this instruction, stating the judge’s charge on murder was sufficient, and further that the jury instruction was going to be confusing to the jury given the facts of this case. Defense counsel noted that although the case involved a burglary the state also maintained that appellant “cold bloodedly shot this man in the head and killed him.” R. p. 310, l. 4 – 311, l. 14.

Defense counsel also argued if the facts involved a sudden struggle then appellant was entitled to a voluntary manslaughter instruction. R. p. 310, l. 4 – 311, l. 14. The judge stated that he was going to charge the jury as he proposed over appellant’s objection, and

that he was not going to give a voluntary manslaughter instruction based on State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001).¹ R. p. 311, l. 15 – 313, l. 5.

As seen above, solicitor argued the decedent surprised the men because they did not think “he would be home,” and he argued they should be convicted of both murder and burglary in the first degree. R. p. 369, ll. 17-23. The judge charged the jury:

If one intentionally kills another during the commission of a felony, an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice, this inference is an evidentiary fact to be taken into consideration by the jury along with other evidence in the case.

I further charge you that *the offense of first degree burglary is a felony*. The defendant is charged with first degree burglary.

R. p. 383, ll. 1-10. (emphasis added).

Defense counsel renewed his objection and exception. R. p. 390, ll. 1-13; R. p. 404, l. 18 – 406, l. 20. The assistant solicitor continued to maintain the charge on the inference of malice was proper. R. p. 406, ll. 22-25.

Discussion

The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802 (2002). It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). If a jury instruction is provided to the jury that does

¹ Shuler involved a defendant who attempted to steal an armored car. He asserted the guard in the back of the truck used excessive force in shooting at him while trying to make a citizen’s arrest. The Supreme Court held that the guard shooting could not be a sufficient legal provocation for purposes of voluntary manslaughter. The inquiry here is more complicated since the solicitor acknowledged the burglars did not think the decedent was home, and there was evidence the decedent came out shooting unexpectedly while the burglars attempted to flee.

not fit the facts of the case, it may confuse the jury. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury. State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946).

Defense counsel correctly argued that the “inference of malice” jury instruction the judge gave over his objection in this case would confuse the jury. There was evidence that, and indeed the solicitor argued, the burglary occurred because the burglars believed that the decedent was not home. Anthony Ray testified that the burglary would not have occurred if they knew the decedent was home. Ray beat on the decedent’s door for five minutes to be sure the decedent was not at home. The men were surprised when the decedent appeared with a gun from behind a locked door, and began shooting at them. Ray said they were attempting to escape when the decedent began firing, and he warned the decedent not to shoot again. Ray did claim that it was appellant who shot the decedent in the head, and Ray claimed it was done deliberately.

This was a very unusual fact scenario regarding the burglary that ended in a homicide, and defense counsel correctly argued that the judge’s charge on murder and malice aforethought were sufficient to cover the subject of murder. By entering into the jury instructions language about a burglary in first degree being a felony and an implication of malice the judge’s instructions became confusing to the jury as defense counsel argued. See State v. Peterson, 287 S.C. 244, 246-248, 335 S.E.2d 800, 801-802 (1985).²

Although State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), involved the Supreme Court holding that the jury instruction that malice may be inferred from the use of

² *Overruled on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

a deadly weapon is no longer good law in South Carolina where there is evidence presented that would reduce, mitigate, excuse or the justify homicide, it also serves as a reminder that the use of “inferences” or “implications of malice” in jury instructions should be carefully used to be sure that the inference or implication naturally and fully follows the underlining conduct.

Here, again, the use of the implication of malice from a burglary where even the solicitor told the jury that appellant and Ray did not think the decedent was home was sure to be confusing. It also was unnecessary given the murder charge instruction. The judge erred by giving the instruction over appellant’s objection.

The error was also not harmless. The judge gave an Allen³ charge after the jury stated it was deadlocked after four-and-a-half hours of deliberations. The jury returned with a guilty verdict about an hour after the Allen charge. R. p. 390, l. 25 – 392, l. 16. If ever there was an interesting case if the jury believed the decedent was shot with returned gunfire after he surprised Ray and appellant, and where the escaping burglars only returned fire, it was this case.⁴

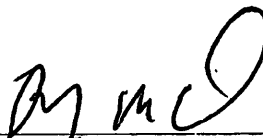
³ Allen v. United States, 164 U.S. 492 (1896).

⁴ Appellant does not, in any manner, assert the decedent did not have a right to protect his home. The interesting question involves the extent of criminal liability of appellant where the solicitor admitted the burglars did not expect the decedent to be at home, and where the decedent came out shooting as they tried to escape but shot back to save their own lives. This is not a harmless error case.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

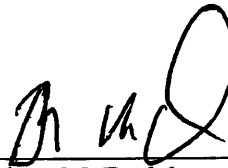
ATTORNEY FOR APPELLANT

This 5th day of March, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 5, 2015



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

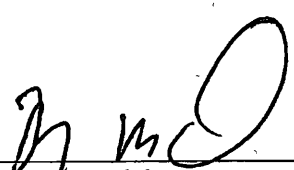
BRADLEY GERALD MULLINS,

APPELLANT

APPELLATE CASE NO. 2013-002662

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 Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of March, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2015.

Rhonda Demese Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021

ORIGINAL**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge**

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THE STATE,**Respondent,****v.****BRADLEY GERALD MULLINS,****Appellant****Appellate Case No. 2013-002662**

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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge**

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v.

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Whether the court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in instructing the jury on implied malice pursuant to *State v. Norris* where the murder occurred during the commission of a burglary in the victim's home at night.

STATEMENT OF THE CASE

Appellant Bradley Mullins was indicted by the Horry County Grand Jury for the charges of murder and burglary in the first degree. (R. p. 411). Attorney William I. Diggs represented Mullins at a jury trial which began December 2, 2013, before the Honorable Larry B. Hyman, Jr. in Horry County. (R. p. 1). J. Scott Hucks and George DeBusk of the Fifteenth Circuit Solicitors Office prosecuted the case which lasted four days. (R. p. 1). Mullins was convicted on each charge by a jury, and Judge Hyman sentenced Mullins to two concurrent terms of life imprisonment. (R. p. 410, lines 4-14). This appeal follows. (R. p. 415).

STATEMENT OF FACTS

Appellant and others gathered on Thursday, September 11, 2008, at a relative's home for a cookout. (R. p. 226, line 2 – 227, line 6). Conversation developed into the formulation of a trip to rob the victim's home of his vast gun collection. (R. p. 228, line 10 – 229, line 15). Near dark, Appellant and three others traveled approximately thirty minutes to the victim's residence in a Blazer sport utility vehicle. (R. p. 185, lines 2-10). Appellant gave driving directions to the destination. (R. p. 184, lines 13-24). According to co-defendant Anthony Earl Ray, they arrived at dark, because robbery was "not something you do in the daytime." (R. p. 232, lines 6-25). Upon arrival, Ray banged on the front door to see if the victim was home. (R. p. 231, lines 1-6; R. p. 232, lines 11-15). Appellant broke out a windowpane on the back door, entered the house, and started packing up the victim's gun collection. (R. p. 231, line 23 – 235, line 22). After about twenty minutes, the only unexplored room in the victim's home was locked, and Appellant kicked in the bottom panel of that door to gain access. (R. p. 235, line 23 – 236, line 15). The victim, who had been in his locked bedroom asleep, alone and unclothed, then exited his bedroom pointing a revolver at Appellant and Ray. (R. p. 236, line 17, R. p. 238, line 5). The victim fired his own gun into the home and, after initially running away from the victim, Ray aimed a rifle at the victim and shot the victim in his side. (R. p. 238, lines 9-25; R. p. 261, lines 1-8; R. p. 265, lines 4-14). Appellant then stood over the fallen victim and shot him in the head with a pistol. (R. p. 238, lines 13-22; R. p. 263, lines 9-14; R. p. 268, lines 3-11).

Both co-defendant Ray and Appellant exited the victim's home with "a sack of pistols" and a blanket full of shotguns and rifles stolen from the victim's home. (R. p.

235, lines 1-22; R. p. 241, lines 10-16). Later, other family members listened to the Appellant's telling the account of his robbing the victim, who was not supposed to be home at the time of the robbery, and killing him in the process. (R. p. 120, lines 8-19; R. p. 121, line 10 – 122, line 24; R. p. 144, line 12 – 146, line 1).

On the following Sunday, September 14, 2008, a pair of the victim's friends visited the victim's home because they had not heard from him since six days prior. (R. p. 34, lines 6-24). Because it had recently rained, they could tell from the lack of tire tracks that the victim's car had not been moved for a few days. (R. p. 35, lines 3-11). Approaching the victim's back door, they noticed that the home had been broken into. (R. p. 35, lines 12-18). Then, they entered the home to, as one friend described, "the smell that you would recognize as the smell of death." (R. p. 38, line 18 – 39, line 6). They immediately went outside and called 911. (R. p. 39, lines 7-24). Law enforcement determined a forced entry into the victim's home "commonly found in a burglary" had occurred based upon indications that the glass on the back door "was broken from outside to inside . . . closest to the door locks" (R. p. 71, line 10 – p. 72, line 6). No intact firearms were recovered from the home. (R. p. 72, line 9 – p. 74, line 10). Investigation recovered two additional projectiles, which a crime scene reconstructionist identified as having been fired from the vicinity of the victim's bedroom door, upwards into the living room and towards the kitchen/dining area of the home. (R. p. 80, line 20 – p. 83, line 14). After autopsy, the forensic pathologist concluded that the victim died as a result of a gunshot to the left side of the head, just above the ear. (R. p. 167, line 21- p. 168, line 25).

ARGUMENT

- I. Under these facts, the trial judge properly charged the jury on implied malice because the murder occurred during Appellant's commission of a felony.

Appellant stood trial and was convicted for the charges of murder and burglary in the first degree. At the charge conference, the State requested and the court agreed to charge the "standard *Norris* charge" on implied malice based upon the felony-murder scenario presented by the State's case against Appellant. (R. p. 308, line 11- p. 310, line 2). That charge read:

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, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with all other evidence in the case, and you may give such weight as you determine it should receive.

State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985).¹ Appellant objected to the charge on several bases: that the court's proposed jury instructions elsewhere sufficiently covered the elements of murder, because the charge was confusing, and because the *Norris* charge "speaks to a different degree of malice" due to evidence indicating Appellant did not know the victim was present in the home at the time of the burglary.

¹ The standard jury charge in the current bench book reads slightly differently, but Respondent postures that any differences in diction do not alter the overall effect of the charge. The bench book charge reads:

If one intentionally kills another during the commission of a felony, 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 simply be an evidentiary fact to be taken into consideration by you, **[the jury,]** along with all other evidence in the case, and you may give **it the weight that you decide** it should receive.

Suggested Jury Instructions-Criminal, Felony Murder Inference, 154-55 (available at <http://www.sccourts.org/juryCharges/GS%20InstructionsJune2013.pdf>) (differences from *Norris* charge demarcated in bold type).

(R. p. 310, line 4 – p. 311 line 11). The trial court overruled this objection. (R. p. 313, lines 2-5).²

In its jury instruction, the trial judge did include the following *Norris* charge after giving an instruction on the elements of murder, including the definition of malice:

If one intentionally kills another during the commission of a felony, an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice, this inference would simply be an evidentiary fact to be taken into consideration by the jury, along with all other evidence in the case.

(R. p. 383, lines 1-7; R. p. 435 – 436). The trial judge further charged “that the offense of first degree burglary is a felony,” and immediately instructed the jury on the elements of first degree burglary. (R. p. 383, lines 8-9; R. p. 435 – 436). To aid the jury, the trial judge provided the jury with a copy of to the charge in the deliberation room.³ (R. p. 372, lines 13-24; R. p. 418 – 445).

Standard of Review

“Appellate courts review only errors of law and will not reverse a trial court’s decision concerning jury instructions unless the trial court abused its discretion.” *State v. Miller*, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). “An abuse of discretion occurs when the [trial] court’s decision is unsupported by the evidence or controlled by an error of law.” *State v. Garris*, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

² Appellant preserved his objection at the conclusion of the jury charge, and again during post-trial motions. (R. p. 390, lines 6-11; R. p. 404, line 21 – p. 405, line 11).

³ “A trial court may, in its discretion, submit its instructions on the law to the jury in writing.” *State v. Turner*, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). The copy provided to the jury included the headings as written in the bench book, but the trial judge did not include those headings in this oral instruction.

This Court “must consider the [trial] court’s jury charge as a whole in light of the evidence and issues presented at trial.” *State v. Adkins*, 353 S.C. 312, 577 S.E.2d 460, 463 (Ct. App. 2003). “If as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.” *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994)).

A) It was necessary to instruct the jury on implied malice pursuant to *Norris* because that is the prescribed jury instruction for a felony-murder scenario.

“The law to be charged to the jury must be determined by the evidence presented at trial.” *State v. Harris*, 382 S.C. 107, 113, 674 S.E.2d 532, 535 (Ct. App. 2009) (citing *State v. Patterson*, 367 S.C. 219, 231-32, 625 S.E.2d 239, 245-46 (Ct. App. 2006)). In crafting a jury instruction, “judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21; *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). In doing so, “the trial judge must charge the correct and current law of the state.” *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). **“If there is any evidence to support a charge, the trial judge should grant the request.”** *Id.* (emphasis added).

It is long-held that South Carolina does not distinguish felony-murder from murder. *Norris*, 285 S.C. at, 93, 328 S.E.2d at 342-43 (“we take this opportunity to remind Bench and Bar that South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder”)); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982); *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982); *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946). Instead, our State calls for an implied malice

instruction in cases where a defendant executes a murder during the commission of an enumerated felony. *State v. Norris, supra*; *Lowry v. State*, 376 S.C. 499, 506 n.4, 657 S.E.2d 760, 764 n.4 (2008) (finding felony murder instruction in the initial jury charge similar to the *Norris* charge, which is the “proper charge on implied malice”) (quoting *State v. Norris, supra*). Burglary in the first degree is a felony. S.C. Code Ann. § 16-11-311.

Appellant argues that the trial judge unnecessarily charged the jury pursuant to *Norris*. To the contrary, the implied malice instruction was not only proper, but required as the correct and current law of the State. *Shuler, supra*. Appellant forcibly entered the victim’s home at night and with the intent to burglarize the home of the victim’s vast gun collection. (R. p. 231, line 23 – p. 235, line 22). In the moments that ensued, Appellant delivered a fatal gunshot wound to the victim’s head at a time when a co-defendant’s prior gunshot left him incapacitated. (R. p. 238, lines 9-25; R. p. 263, lines 9-14; R. p. 268, lines 3-11). Sometime thereafter, Appellant exited the victim’s home with a sack full of pistols. A blanket full of rifles was also collected from the home. (R. p. 235, lines 1-22; R. p. 241, lines 10-16). As a result, the present murder clearly occurred during the commission of the enumerated felony of first-degree burglary. As a result, the implied malice charge is required, and the trial judge properly instructed the jury in its use of the textbook *Norris* charge.

- B) The implied malice charge is proper because it relates to the requirement that malice exist at the time of and only slightly before the murderous act, not at the start of the burglary.

Appellant postures that the trial judge improperly charged implied malice because

during trial, evidence surfaced from which the jury could conclude that Appellant did not think the victim was home when he commenced the burglary.⁴ However, Appellant's argument transposes the element of malice as a component of first-degree burglary, not murder. The State must prove each element of a crime beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970). The jury must deliberate separately on each indictment. *United States v. Lane*, 474 U.S. 438, 450, 106 S.Ct. 725, 732 (1986).

Any mistaken belief regarding the victim's absence from the home at the time Appellant forcibly entered does not go towards the requisite mental state for the charge of murder, but of burglary.⁵ Burglary in the first degree does not include the element of malice; burglary requires the intent to commit a crime inside the dwelling at the time of entry. S.C. Code. Ann. § 16-11-311. As to the murder charge, the jury was to decide whether malice, as an element of murder, existed at Appellant's pulling of the trigger. S.C. Code Ann. § 16-3-10 ("Murder is the killing of a person with malice aforethought, either express or implied."). Malice must exist at the time of the act producing the resulting death, and it need not exist for any appreciable length of time before that act's

⁴ Delilah Mullins, Appellant's aunt once-removed, testified to overhearing Appellant relate that the victim was not supposed to be home at the time of the burglary. (R. p. 120, lines 13-16). Co-defendant Ray testified that he would not have forcibly entered the house if the victim had been home, which is why the co-defendants beat on the door before entering. (R. p. 232, lines 11-17). During closing argument, the State included in its summation that Appellant entered the victim's home thinking that the victim was absent. (R. p. 369, lines 17-19).

⁵ Appellant neither argued nor requested a jury charge on the defense of mistake of fact at the time of trial. *See State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review."). Mistake of fact constitutes a viable defense where the mistake negates the mental element of the crime charged. *State v. Kelsey*, 331 S.C. 50, 77-78, 502 S.E.2d 63, 77 (1998).

commission. *State v. Harvey*, 220 S.C. 506, 514-15, 68 S.E.2d 409, 412-13 (1951), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Fuller*, 229 S.C. 439, 445, 93 S.E.2d 463, 467 (1956), *overruled on propriety of implied malice portion of jury instruction by State v. Belcher, infra*. In the present case, Appellant broke into the victim's home at night to steal firearms, ultimately firing a single fatal gunshot into the head of the victim. (R. p. 238, lines 13-15). Prior to that act, the victim had fallen to the floor as a result of co-defendant Ray's gunshot, which debilitated the victim by penetrating the lungs and lodging in the vertebral column. (R. p. 169, lines 4-23; R. p. 241, line 10). Appellant traversed to the downed victim, stood over his fallen body, and shot him in the head. (R. p. 238, lines 13-22). Under *Norris* and its antecedents, malice may be implied, *inter alia*, when one commits murder while carrying out a felony such as first degree burglary, but the murder occurring in the throes of a burglary is merely one fact for the jury's consideration on that element. *Norris*' implied malice instruction expressly reflects the same. Thus, the charge was appropriate because Appellant's state of mind regarding the burglary is not the hinge upon which a determination of the existence of malice pivots.

Even more, any belief by Appellant that the victim was not home at the time Appellant commenced either criminal offense does not amount to evidence that would reduce, mitigate, excuse or justify the homicide. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (where evidence is presented that would reduce, mitigate, excuse or justify a homicide caused by the use of a deadly weapon, juries shall not be charged that

malice may be inferred from the use of a deadly weapon). Even under *Belcher*'s holding,⁶ any evidence that Appellant did not believe the victim was home *at the time of break-in* cannot determinatively apply to the requirement of malice at the time Appellant fired a gunshot at the victim's head.

C) Instructing the jury on implied malice defined the term malice in a manner fitting for the case at bar.

"The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." *State v. Aleksey, supra*. A violation of due process may be found where "it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense." *Lowry*, 376 S.C. at 506, 657 S.E.2d at 763 (2008).

"The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). However, Appellant postures that the implied malice charge was confusing to the jury because it included "language about a burglary in the first degree being a felony and an implication of malice" (Final Br. of Appellant p. 10). To the contrary, the *Norris* charge's delivery could not act to confuse the jury. The implied malice portion is syntactic:

The defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.

⁶ Respondent further notes that *Belcher* affirmed the *Norris* charge as appropriate in a felony-murder scenario. 385 S.C. 597 at n.9, 685 S.E.2d 802 at n.9.

Malice is hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time of the act or at the time the act is committed. Therefore, there must be a combination of previous evil intent and the act.

Malice aforethought may be expressed or inferred. These terms "express" and "inferred" do not mean different kinds of malice, but merely the manner in which malice may be shown to exist; that is either by direct evidence or by inference from the facts and circumstances which are proved. Expressed malice is shown when a person speaks words which express hatred or ill-will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the defendant's mind would be expressed malice.

Malice may be inferred from the conduct showing a total disregard for human life.

If one intentionally kills another during the commission of a felony, an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice, this inference is an evidentiary fact to be taken into consideration by the jury along with other evidence in the case. I further charge you that the offense of first degree burglary is a felony.

The defendant is charged with first degree burglary. The State must first prove beyond a reasonable doubt that the defendant entered a dwelling without consent . . .

(R. p. 381, line 24 – p. 383, line 12; R. p. 434 – 437). The portion of the charge at issue transitions between the elements of murder and first degree burglary.

The implied malice portion also supplements a necessary definition of the term as it relates to the case at bar, but without delivering a specific comment on the facts. Any jury instruction on murder necessarily must *define* malice for the jury's use in

deliberation, an assertion which bears historic and precedential support: “[i]n law, malice is a term of art, importing wickedness and excluding a just cause or excuse.”⁷ *State v. Doig*, 2 Rich. 179, 31 S.C.L. 179, 182 (Ct. App. 1845). Instructing any jury on S.C. Code § 16-3-10 compels an explanation of the term malice in order for the jury to apply the evidence to that element. “The court here was instructing the jury with reference to murder, and malice as an essential ingredient.” *State v. McDaniel*, 68 S.C. 304, 47 S.E. 384, 387 (1904).

Moreover, the textbook-driven charge does not include any constitutionally infirm phrases raising a burden shifting or conclusive presumption, but instead creates only a permissive inference. The instruction “made clear that malice would not be presumed from the commission of a felony, only that it *could* be inferred by the jury.” *Norris*, 285 S.C. at 92, 328 S.E.2d at 342 (emphasis in original). The malice instruction as a whole “make[s] it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence.” *State v. Peterson*, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985). In sum, the malice charge instructs the jury to consider any inference of malice alongside the total weight of the evidence in reaching its verdict. Also, the jury received a copy of the entire instruction in the deliberation room, further aiding any confusion in its understanding of the charge as a whole. Ultimately, the jury charge defined malice under the law and to the extent needed for the jury to apply it to the situation at bar.

⁷ “This is substantially the famous definition of malice[, which,] in common acceptance, means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse.” *State v. McDaniel*, *infra*.

D) Any error in charging implied malice was harmless beyond a reasonable doubt because the instruction did not contribute to the verdict based upon the conclusive nature of the State's case.

"Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. The Court should uphold a conviction if it determines, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

"Whether or not the [implied malice charge] was harmless is a fact-intensive inquiry" as to whether the charge contributed to the guilty verdict rendered. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Where there is no indication that the jury based its verdict on an improper malice portion of the charge, any error in that instruction is harmless. *See Arnold v. State*, 309 S.C. 157, 163-65, 420 S.E.2d 834, 837-38 (1992). A court makes this determination by first identifying what evidence the jury actually considered in reaching its verdict, and then by weighing the probative force of that evidence against the probative force of the improper presumption alone. *Lowry*, 376 S.C. at 508, 657 S.E.2d at 765.

The State delivered a case succinctly probative of guilt, as evidenced by the jury's verdict. Substantial witness testimony proved probative that these crimes were not committed by mere misfortune or accident. The totality of witness testimony constructed a consistent narrative which began at a family cookout. Four men, including Appellant and co-defendant Ray, left and drove to the victim's home that night. (R. p. 185, lines 2-10; R. p. 228, line 10 – p. 229, line 15). Accomplice Anthony Earl Ray delivered an eyewitness account of the crimes from start to finish. (R. p. 224 – 280). He testified as to

the method break-in, the looting of the guns, the mode of transporting the guns out of the home, Appellant's breaking into the victim's bedroom, the victim's emergence, and the resulting gunfire. Ray testified that the victim came out of his bedroom and shot into the home. Ray began to run away, turned, and shot at the victim, who fell down when struck by Ray's first bullet. Ray's eyewitness testimony further described Appellant's fatal action in standing over the downed victim and shooting him in the head. (R. p. 238, lines 13-22; R. p. 263, lines 9-14; R. p. 269, lines 3-11). Of note, Ray was already serving time for a conviction of first degree burglary at the time of his trial testimony. (R. p. 224, lines 10-15).

Scientific evidence corroborated co-defendant Ray's testimony. The forensic pathologist who conducted the autopsy testified as to the wound in the victim's side. That bullet would have caused its recipient to fall upon impact, just as co-defendant Ray described. The only other gunshot wound was sustained by the victim in the left side of his head. (R. p. 167, line 21 - p. 168, line 25). Also consistent with Ray's account of the victim's firing into the home, a crime scene reconstructionist testified that the two bullets recovered from the interior of the home appeared to have been fired from a position near the victim's bedroom door. (R. p. 80, line 20 – p. 83, line 14).

The State's narrative grew stronger as corroborating lay witnesses testified to listening to Appellant's rendition of the burglary, including his description of delivering a gunshot wound to the victim's head. (R. p. 120, lines 8-19; R. p. 121, line 10 – p. 122, line 24; R. p. 144, line 12 – 146, line 1). Each of those witnesses are Appellant's familial relations (if not now, they were related at the time of the murder), yet each testified as to their knowledge and understanding of Appellant's role in delivering the fatal blow. The

family members who rode to and from the victim's home in the car with Appellant that night testified as to Appellant's dumping a sack into a creek. (R. p. 189, lines 2-10; R. p. 203, line 21 – 204, line 6; R. p. 215, lines 1-18) Co-defendant Ray testified that Appellant dumped the sack of stolen pistols, including the murder weapon, into a swamp. (R. p. 243, lines 11-19). The family also testified as to guns appearing in an elder's shed after the night of the burglary. (R. p. 139, line 7 – p. 140, line 9; R. p. 190, line 23 – p. 191, line 5; R. p. 245, lines 20-22). An entirely consistent narrative grants the State's witnesses' testimony important credibility and probative force.

Moreover, in its summation of the evidence, the State did not frame to the jury that malice could be implied from the fact that the murder occurred during a burglary. Instead, the prosecution squarely presented the proposition that each charge was conclusively proven beyond a reasonable doubt on its own merits. The State did not present to the jury that the burglary could be utilized to prove an element of the other charge of murder. Malice was presented to the jury at closing as follows:

What is murder? Murder is a killing . . . with malice aforethought. Malice is a lot of things. Malice is the key to murder. Just taking someone's life is not always murder. It requires malice, an element of malice. Malice could be expressed or implied.

Now, what is malice? Malice, under the law, means that you have the wrongful intent to injure a person when you kill him, that you meant to strike the fatal blow. 'Aforethought; means that when you struck the fatal blow, you meant to do it. Malice is a wrongful intent, and 'aforethought' means you meant to do it. It means you had a wrongful intent and you meant to commit the wrongful intent. You meant to do the action you did that took the life of another person.

Murder is one of the shortest statutes we have in South Carolina because it is really that simple. Did you kill someone and mean to do the action you did when you killed them?

(R. p. 316, line 12 – p. 317, line 6). “Malice is a lot of things,” but the State did not pose malice to the jury as being inferred from the act of burglary. Given the clarity and weight of the direct evidence, the State did not need to draw that additional conclusion in its closing argument. The only time the jury heard the proposition of implied malice was during the jury instruction itself.

The probative value of direct evidence of Appellant’s guilt and the manner in which the prosecution parsed Appellant’s guilt on each charge weighs strongly against the probative force of the inference of malice. Further, Appellant presented neither a defense at trial suggesting he acted without malice,⁸ nor evidentiary support confronting the malice issue that would act to amplify any prejudice resulting from the instruction. *Belcher*, 385 S.C. at 612, 685 S.E.2d at 810. Since the evidence presented did not suggest and Appellant never offered any alternative theory to imply that he or another acted without malice, and the jury concluded Appellant *did* act, one must logically conclude that the jury found the State’s witnesses and physical evidence more compelling than Appellant’s defense at trial.

Because the jury accepted the prosecution’s theory as to Appellant’s criminal acts, there exists no reason to believe the jury rejected or was confused by the prosecution’s theory regarding malice. The jury’s questions submitted throughout deliberation

⁸ Additionally, the victim’s friends’ testimony regarding the victim’s target practice hobby works against the probative value of a self-defense claim, had one been presented. (R. p. 16, line 21 – p. 17, line 5). When considering the victim’s target practice hobby alongside his vast gun collection, the evidence tends to show that the victim was familiar with firearms and likely could have wounded Appellant and Ray had he chosen. Instead, he fired upwards into the walls and surrounding structure.

highlights apparent lack of confusion regarding the implied malice charge. The jury did ask for clarification and the judge did re-instruct on hand of one is the hand of all. (R. p. 393, lines 18 – p. 397, line 17). The jury also asked for a replaying of the testimony of the three people present in the car to and from the victim’s home. (R. p. 391, line 20 – p. 393, line 13). Regardless of the trial judge’s administration of an *Allen* charge, given that the jury did not ask about implied malice but did ask about another portion of the jury instruction, it is evident that any underlying confusion as to the elements of the crimes charged did not center on the definition of malice. Therefore, the State’s evidence outweighed the probative force of the challenged malice instruction itself.

Beyond a reasonable doubt, the error complained of did not contribute to the verdict in this case. Even if an error occurred, the lack of alternative theories rendered the probative force of the inference of malice so weak that the evidence relied on substantially outweighed the presumption. Therefore, even if the trial court erroneously charged implied malice, this Court should find that the error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the appellant’s convictions.

Respectfully submitted,

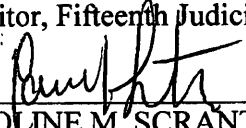
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March 3, 2015
Columbia, South Carolina

ATTORNEY(S) FOR RESPONDENT

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge**

THE STATE,

Respondent,

v.

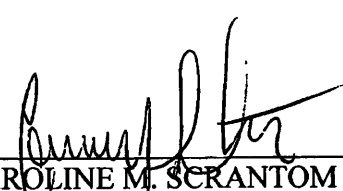
BRADLEY GERALD MULLINS,

Appellant

Appellate Case No. 2013-002662

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent, complies with Rule 211(b), SCACR, and the August 13, 2007, Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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March 3, 2015
Columbia, South Carolina

ATTORNEY FOR RESPONDENT

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge**

RECEIVED
MAR 03 2015
SC Court of Appeals

THE STATE,

Respondent,

v.

BRADLEY GERALD MULLINS,

Appellant

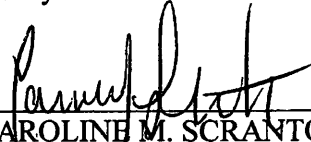
Appellate Case No. 2013-002662

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Robert M. Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 3rd day of March, 2015.


CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Bradley Gerald Mullins, Appellant.

Appellate Case No. 2013-002662

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-062
Heard December 7, 2015 – Filed February 17, 2016

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and
Assistant Attorney General Caroline M. Scrantom, all of
Columbia; and Solicitor Jimmy A. Richardson, II, of
Conway, for Respondent.

PER CURIAM: Bradley Gerald Mullins (Appellant) appeals his convictions for murder and first-degree burglary, arguing the circuit court erred in instructing the jury on implied malice when the charge was unnecessary, confusing, and prejudicial given the facts of the case.

We hold the circuit court did not abuse its discretion when it issued the jury instruction on implied malice because the charge was neither unnecessary nor confusing in light of the facts presented at trial. *See State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))). At trial, Delilah Mullins testified she overheard Appellant say he went to the victim's house to rob it. Anthony Ray also testified the men had a conversation about going to the victim's house "for a robbery of [the victim's] guns." Ray added that it was dark when the men arrived at the victim's house, and testimony revealed the men entered the home by breaking a window pane on the victim's back door. Therefore, the State presented ample evidence for the jury to find the homicide occurred during the commission of the felony of first-degree burglary. *See* S.C. Code Ann. § 16-11-311 (2003) (providing a person is guilty of first-degree burglary if the person enters a dwelling without consent with the intent to commit a crime inside, and the entering occurs in the nighttime). Accordingly, the instruction on implied malice was appropriate. *See State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) ("The evidence presented at trial determines the charged jury instruction."); *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) ("If there is any evidence to support [an instruction], the [circuit court] should grant the request."); *State v. Avery*, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) ("If a person intentionally kills another during the commission of a felony, malice may be inferred.").

Additionally, Appellant's belief about whether the victim was at home has no bearing on whether the implied malice instruction was appropriate. Ray testified that during the burglary the victim exited a room in the home while firing a revolver. Ray ordered the victim to put his gun down, and then shot the victim when the victim pointed the gun at Ray. According to Ray, Appellant then got on top of the victim and delivered the fatal shot to the victim's head. Medical evidence confirmed Ray's initial gunshot wound penetrated the victim's lungs and likely would have knocked him down. Ray testified, "[The victim] was no threat after I shot him. He was on the ground. We could have left." In *State v. Belcher*, the supreme court held an implied malice instruction in a murder prosecution was improper when evidence was presented "that would reduce, mitigate, excuse or

justify the killing." 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009). Here, even if the *Belcher* limitation on implied malice applied, there was no evidence presented that "would reduce, mitigate, excuse or justify the killing" given that the victim was on the ground no longer presenting a threat when Appellant delivered the fatal shot. *Id.*

AFFIRMED.

SHORT, GEATHERS, and MCDONALD, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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FAX: (803) 734-1839
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March 07, 2016

The Honorable Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: The State v. Bradley Gerald Mullins
Lower Court Case No. 2013Gs2604042, 2013GS2604043
Appellate Case No. 2013-002662

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Caroline M. Scrantom, Esquire
John W. McIntosh, Esquire
Jimmy A. Richardson, II, Esquire

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF

HORRY

IN THE COURT OF COMMON PLEAS

358052 BRADLEY GERALD MULLINS
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

16 3050
APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention PERRY CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence HORRY CO. GEN. SESSIONS
3. Name(s) of co-defendant(s) (if any) CHARLES H. MULLINS / ARLIE E. MULLINS / ANTHONY E. RAY
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-26-04042
 - (b) 2013-GS-26-04043
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 12-5-13 LIFE
 - (b) 12-5-13 LIFE

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South CAROLINA Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 2-17-2016
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2016-UP-062
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
 (b) SEE ATTACHMENT - 10 B
 (c) Applicant has the right to Amend application at ANY time.

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

- (a) SEE ATTACHMENT - 11 A
 (b) _____
 (c) _____

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

- (a) any petition in a State Court under South Carolina Law? NO
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO

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

- (a) the specific nature thereof: N/A
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed: N/A
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof: N/A
 i. _____
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition: N/A
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition: N/A
- i. _____
- ii. _____
- iii. _____
- iv. _____

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

NO

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

- (a) which grounds have been presented: N/A
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised: N/A
- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) SEE ATTACHMENT 16A
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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

- (a) the name and address of each attorney who represented you: S.C.
- i. William I. Diggs, 1700 Oak St. Suite D. Myrtle Beach 29577
- ii. Robert M. Dudek, 1330 Lady St. Suite 401, Columbia S.C. 29201
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. ARRAIGNMENT / TRIAL / SENTENCING
- ii. APPEAL
- iii. _____

19. State clearly the relief you seek in filing this application:

NEW TRIAL

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

NO.

STATE OF SOUTH CAROLINA)

County of)

16 3050
VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Bradley G. Mellins

SWORN to and subscribed before me this 2nd
day of May, 2016.

Nancy M. Mink (L.S.)
Notary Public

My Commission Expires: 1-23-2023

2016 MAY -5 PM 3:01
CLERK OF COURT

At achment 10-3

20 16

3050

- 1) PETITIONER'S 5th, 6th AND 14th Amendment rights to the U.S. Constitution AND coinciding State Law HAVE BEEN VIOLATED DUE TO THE INEFFECTIVENESS OF TRIAL COUNSEL FOR FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT;
- 2) PETITIONER'S 5th, 6th AND 14th Amendment rights to the U.S. Constitution AND coinciding State Law HAVE BEEN VIOLATED DUE TO, AND OR TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILURE TO OBJECT TO JUDGE'S IMPROPER JURY INSTRUCTION; APPELLATE COUNSEL'S FAILURE TO ARGUE FOR DIRECT APPEAL ON ABUSE OF DISCRETION / ERROR OF LAW;
- 3) PETITIONER'S 5th, 6th AND 14th Amendment rights to the U.S. Constitution AND coinciding State Law HAVE BEEN VIOLATED DUE TO NEWLY / AFTER DISCOVERED EVIDENCE CONCERNING CO-DEFENDENT'S POST-TRIAL RECANTED TESTIMONY;
- 4) PETITIONERS 5th, 6th AND 14th Amendment Rights to the U.S. Constitution AND co-

→

cont.(4.)

- Inciding State Law have been violated due to Newly / After discovered evidence concerning witness tampering by the State;
- 5.) Petitioner's 5th, 6th and 14th Amendment rights to the U.S. Constitution and co-inciding State Law have been violated due to Trial Counsel's Ineffectiveness for failing to attain and utilize Expert Forensic Witness;
- 6.) Petitioner's 5th, 6th, and 14th Amendment rights to the U.S. Constitution and co-inciding State Law have been violated due to Trial Counsel's Ineffectiveness for failing to Independantly investigate Serological Evidence;
- 7.) Petitioner's 5th, 6th and 14th Amendment Rights to the U.S. Constitution and co-inciding State Law have been violated due to Trial Counsel's Ineffective Assistance for failing to procure and utilize Exculpatory Defense Witness;

Attachment 11-11

- 1.) The Prosecution Illegally entered testimonial evidence used to show Intent by his/her own prejudicial comments;
- 2.) Jury Instructions provided by Trial judge were improper because the "Implied malice" element relied on illegally entered evidence;
- 3.) Co-Defendant has recanted his trial testimony blaming Petitioner for Murder;
- 4.) Newly / After discovered evidence has been found showing Witness Coersion/provoked by State;
- 5.) Expert Witness needed to rebut State pathologist testimony concerning Bullet size and firearms.
- 6.) Independent investigation necessary because State pathologist claims bullet was left in body, yet there were "exit wounds" he/she did not mention
- 7.) Defense witness that was available and ready to testify was needed to provide testimony of exculpatory nature to show petitioner did not administer "kill" shot.

● ATTACHMENT - 16 A

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11689
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 3, 2015

Bradley Gerald Mullins, #358052
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Re: Your Case

Dear Mr. Mullins,

This is to confirm our telephone conversation wherein we discussed post-conviction relief. Following oral argument in your case, and the issuance of the opinion in your case, I do not think that the Supreme Court would grant certiorari in your case. Consequently, as we discussed, I have enclosed two applications for post-conviction relief for you. You can use the first one as a draft, and the second one to be the application you actually file with the Clerk of Court in the county of your conviction. It is very important that in addition to alleging ineffective assistance of counsel that you also allege after-discovered evidence as a grounds for relief. You should put in the factual presentation that Anthony Ray has recanted his trial testimony blaming you for the murder.

Please be aware that there is a **one year statute of limitations for filing an application for post-conviction (PCR) relief**. This is one year from the date of the enclosed opinion. This statute of limitations is **very strictly enforced**, so please be sure that you comply with it. Please understand *it is your responsibility alone to be sure this PCR application is timely filed*. **This application must be filed with the clerk of court in the county of your conviction**. There is also now a **one year statute of limitations for filing for federal habeas**. However, you must **exhaust your PCR claims** in state court, before raising them in federal court.

You are welcome to telephone me about this letter but please understand that the one-year statute of limitation in PCR is very strictly enforced, and that writing or telephoning me does not stay the time for timely filing the application for post-conviction relief.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Bradley Gerald Mullins, #358052,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2016-CP-26-3050

**RETURN AND
PARTIAL MOTION TO DISMISS**

2017 FEB -1 PM 2:10
CLERK OF COURT
HORRY COUNTY, SC

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on May 5, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Horry County. Applicant was indicted by the Grand Jury for Horry County for murder (2013-GS-26-4042) and burglary, 1st degree (2013-GS-26-4043). Applicant was represented by William I. Diggs, Esquire, at trial. On December 5, 2013, Applicant was convicted as indicted of both charges. Applicant was sentenced on December 5, 2013 by the Honorable Larry B. Hyman, Jr. to concurrent life sentences for murder and burglary, 1st degree.

Applicant filed a timely notice of appeal. An appeal was perfected by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed February 17, 2016. State v. Mullins, Op. No. 2016-UP-062 (S.C. Ct. App. 2016). The Remittitur was returned on March 7, 2016.

Attached herewith and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial,

Applicant's appellate records, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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

1. Ineffective Assistance of Trial Counsel
 - a. "Failure to object to prosecutorial misconduct."
 - b. "Failure to object to improper jury instruction."
 - c. "Failure to attain and use expert forensic witnesses."
 - d. "Failure to independently investigate [evidence]."
 - e. "Failure to procure and utilize exculpatory defense witness."
2. Ineffective Assistance of Appellate Counsel
 - a. "Failure to argue for direct appeal on abuse of discretion/error of law."
3. Newly Discovered Evidence
 - a. "Concerning co-defendant's post-trial recanted testimony."
 - b. "Concerning witness tampering by the State."
4. Prosecutorial Misconduct
 - a. "The prosecution illegally entered testimonial evidence used to show intent by his/her own prejudicial comments."
 - b. "Concerning witness tampering by the State."

III.

Applicant claims ineffective assistance of trial counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a

ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges ineffective assistance of appellate counsel in his application. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey,

469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this allegation.

V.

Applicant seeks relief on the basis of newly discovered evidence. A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to

the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005). Before the Court will hold an evidentiary hearing, the Applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). While under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence could have been ascertained, Applicant has failed to set forth with any specificity how it would have affected the outcome if used at trial or why such alleged evidence was not readily discoverable at the time of trial. Respondent submits that Applicant's claim of newly discovered evidence fails to make a prima facie showing that he is in actual possession of such evidence or that evidence would likely change the result if a new trial were to be granted. Therefore, Respondent submits that this allegation should be summarily dismissed.

VI.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). For the aforementioned reasons, Respondent submits that this allegation should be summarily dismissed.

VII.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

IX.

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

[Signature block to follow]

X.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

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

By: 
ATTORNEYS FOR RESPONDENT

January 30, 2017

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BRADLEY G. MULLINS, #358052,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

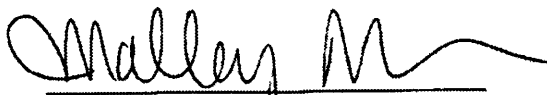
IN THE COURT OF COMMON PLEAS

2016-CP-26-3050

AFFIDAVIT OF SERVICE BY MAIL

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

Mr. Steven W. Fowler, Esquire (by email)
1018 Highway 17 South
North Myrtle Beach, SC 29582

DATED this 30th day of January, 2017.


Mallory Morris, Legal Assistant
 For Respondent

FILED
 2017 FEB -1 PM 2:10
 CLERK OF COURT
 HORRY COUNTY, SC

1

2 State of South Carolina) Court of Common Pleas
3 County of Horry) 2016-CP-26-03050

4

5

6 Bradley G. Mullins)
7 vs.) Transcript of Record
8 State of South Carolina)

9

10

November 29th, 2017
Conway, South Carolina

11

12

BEFORE:

13 Honorable William H. Seals, Judge.

14

APPEARANCES:

15

16 Steven W. Fowler, Esq.
Attorney for the Applicant

17

18 Johnny E. James, Jr., Esq.
Attorney for the State

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Teresa J. F. Bautz, RPR
Official Court Reporter

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I N D E X

WITNESS	DIR	CROSS	RED	REC
Bradley G. Mullins				
Mr. Fowler	5	--	33	--
Mr. James	--	32	--	--
William I. Diggs				
Mr. Fowler	40	--	--	--
Mr. James	--	55	--	--

E X H I B I T S

NO.	DESCRIPTION	ID	EV
No exhibits submitted.			

Exhibits retained by Clerk of Court.

1 (WHEREUPON, The hearing commenced at approximately
2 10:45 a.m.)

3 THE COURT: I'm ready when you are.

4 MR. JAMES: Thank you, Your Honor. The State
5 calls the matter of Bradley Gerald Mullins versus State
6 of South Carolina. It is Docket No. 2016-CP-26-3050.
7 If we can wait just one moment, we need Mr. Mullins out
8 here in the courtroom.

9 Starting again from the top out of an abundance of
10 caution, Your Honor, this is Bradley Mullins versus
11 State of South Carolina, Docket No. 2016-CP-26-3050.
12 Mr. Mullins is present here in the courtroom today and
13 is represented by Mr. Stephen Fowler, Esquire.

14 Mr. Mullins was indicted by the Horry County Grand
15 Jury for murder and burglary in the first degree. He
16 was represented on those charges by Mr. William Diggs,
17 Esquire. He proceeded to trial on December 2nd, 2013,
18 before the Honorable Larry B. Hyman and was convicted
19 on both charges on December 5th, 2013. Judge Hyman
20 thereafter sentenced Mr. Mullins to concurrent life
21 sentences for both the murder and burglary first
22 degree.

23 Mr. Mullins timely filed a notice of an appeal,
24 and an appeal was perfected by Mr. Robert Dudek,
25 Esquire, with the office of Appellate Defense. The

1 South Carolina Court of Appeals affirmed his conviction
2 in an unpublished opinion dated February 17, 2016.
3 That was remitted March 7th, 2016. Mr. Mullins
4 thereafter filed this application for relief on
5 May 5th, 2016.

6 Your Honor, before we proceed, it occurs to me
7 that the State previously filed a partial motion to
8 dismiss in this matter as to Mr. Mullins' allegations
9 of newly discovered evidence. Since the time that we
10 made that motion we have been provided documents
11 somewhat to make a prima facie showing, Your Honor, in
12 adjudicating the appropriateness of this motion.

13 My concern is the existence of some kind of
14 evidence, not necessarily its credibility. And so,
15 Your Honor, the State will withdraw that motion at this
16 time and is prepared to proceed on those allegations on
17 the merits today.

18 THE COURT: Okay.

19 MR. JAMES: And with that said, we will concede
20 the floor to Mr. Fowler and Mr. Mullins.

21 THE COURT: Ready when you are.

22 MR. FOWLER: I would like to call Mr. Bradley
23 Mullins to the stand, please.

24 BRADLEY G. MULLINS, after being duly sworn,
25 testified as follows:

1 THE CLERK: Please have a seat. State your name
2 for the Court, please.

3 THE APPLICANT: Bradley Mullins.

4 DIRECT EXAMINATION

5 BY MR. FOWLER:

6 Q Mr. Mullins, you filed an application for PCR
7 relief in this case; haven't you?

8 A I have.

9 Q And you and I have spoken about this at least on
10 two occasions and I think maybe two more times more; is
11 that correct?

12 A Yes.

13 Q Okay. In the application you spell out your
14 claims for relief in this matter; correct?

15 A Yes.

16 Q Do you understand what a PCR hearing is; correct?

17 A Yes.

18 Q Can you tell me and the Court what in your
19 estimation a PCR hearing does.

20 A It is the showing of...

21 THE COURT: Hold on one second. Why don't you let
22 him go ahead and let him leave the courtroom.

23 Q Because you're familiar with -- let me strike
24 that, strike that. You're familiar with what a PCR is;
25 correct?

1 A Yes. It's post conviction relief.

2 Q All right. Now, who is your attorney in these
3 matters?

4 A Isaac Diggs.

5 Q And tell me a little bit about your professional
6 relationship, how you came to know Mr. Diggs.

7 A I only spoke to Mr. Diggs maybe a couple times in
8 about four months that he prepared his self for this
9 trial.

10 Q Was he your only attorney in this matter?

11 A No. I had Robert Dudek as an appeal attorney.

12 Q Okay. But Mr. Diggs was your --

13 A Yes.

14 Q Who this PCR is about today; correct?

15 A Yes.

16 Q And you say you only spoke to him a few times in
17 four months?

18 A Yes.

19 Q Did he come to the jail facility, or how did you
20 talk to him?

21 A Only at the jail a couple times.

22 Q Okay. And what were those conversations like?

23 A He would just ask -- the first time he came, he
24 might have visited me maybe 15 minutes. And he said
25 they were going to take me to trial, they was ready to

1 take me to trial then. I told him there is no way that
2 it was possible because there is no time for him to
3 deal with the issues that I had going on.

4 Q So how long -- you mentioned the term four months
5 earlier. So how long was your total -- how long from
6 when Mr. Diggs came on board as your attorney did you
7 go to trial, how long a time was it?

8 A About three months.

9 Q So you don't think that was -- do you think that
10 was enough time for him to prepare?

11 A Absolutely not.

12 Q Why not?

13 A I don't think that the information that was gave
14 up into the case was -- gave him enough time to
15 investigate everything.

16 Q Did you indicate that to him beforehand, did you
17 tell him --

18 A Yes.

19 Q How did you tell him that?

20 A I was trying to explain to him that the guys had
21 lived in Horry County and all that. They'd had arrest
22 records, and I needed time to get all of that. Their
23 kids had went to school here. Nobody put none of that
24 evidence up, and he never even tried to get it.

25 Q Now, who are -- now, you said the guys. Who

1 are --

2 A My codefendants.

3 Q Okay. Now, who were you codefendants in this
4 case?

5 A Anthony Ray, Charles Mullins and Arlie Mullins.

6 Q Okay. So you felt like -- did your attorney
7 adequately in your mind investigate those codefendants
8 and what their relationship was to you in this matter?

9 A No.

10 Q And why not?

11 A I just don't -- I don't think he took it to
12 interest. I don't think he had any interest in the
13 case.

14 Q Okay. And it was also a fairly short time span
15 too; wasn't it?

16 A Yes.

17 Q Was he a public defender or private retained
18 counsel?

19 A Public defender.

20 Q In your application you go over several issues
21 primarily in number 11 and 10. And I think you've
22 got -- you can add some meat to the bones
23 metaphorically here about this.

24 In your number 11 on your application, you said,
25 and I'm quoting here, that "the prosecution illegally

1 entered testimonial evidence used to show interest by
2 his or her own prejudicial comments." Can you explain
3 to the Court what you mean by that.

4 A He offered up evidence saying that Ray shot the
5 man with a .22.

6 Q Um-hum.

7 A There was never no evidence whatsoever brought
8 into the motion to discovery whatsoever to even prove
9 that there were a .22. The pathologist backed up that
10 along with the ballistics report. And I have both of
11 those.

12 Q Okay.

13 A They had led the jury to believe that --

14 Q Let me stop you right there. Let's go back to
15 your first sentence or so in your statement.

16 A All right.

17 Q You're saying -- what did you say he said, that
18 there was a .22 involved?

19 A Yes.

20 Q Okay. Now, tell me about that. Was there a .22
21 involved or not? Or tell me a little bit about that.

22 A Only what Ray had testified to.

23 Q Your codefendant?

24 A The codefendant. Other than that, there was no
25 evidence whatsoever of a .22.

1 Q Okay. So you're -- but you're saying your
2 attorney told the Court that there was a .22?

3 A Well, he allowed it to go through.

4 Q Okay.

5 A With the showing that there never was, which he
6 should have objected to.

7 Q Okay. And you're saying that -- and that's in the
8 transcript; correct?

9 A Yes.

10 Q Okay. And you're saying your attorney never
11 objected to it?

12 A He never objected to it.

13 Q Okay. And I didn't mean to interrupt you, but I
14 wanted to kind of parse this out. Once again,
15 repeating, number one, that illegally entered testimony
16 or evidence used to show intent by his or her own
17 prejudicial comment.

18 So basically you're saying it was the discussion
19 of your attorney of the .22 that was -- that you're
20 saying only Ray mentioned in this case; correct?

21 A Yes.

22 Q Okay. Was there anything else in that paragraph
23 that you said was prejudicial or lack of evidence? Or
24 was it mainly the issue of the .22?

25 A It was mainly the issue of the .22. And when I

1 was tried, I was tried under hand of one, hand of all.
2 And on page 490 of the transcript, you can look, it
3 will show that he said it didn't matter who pulled the
4 trigger, all were culpable of it. So the jury was
5 under the understanding --

6 Q And who said that?

7 A The solicitor.

8 Q Okay.

9 A Mr. Hucks.

10 Q Right.

11 A And also the jury asked, could they find me guilty
12 of burglary and not find me guilty of the murder. And
13 there was a little argument over that. And the judge
14 said, I'm going to read the hand of one, hand of all
15 again. But I'm going to walk lightly on it. And that
16 was on page 502.

17 And he goes on to read the hands of one, hand of
18 all again. And it doesn't matter who pulled the
19 trigger.

20 Q The judge said that?

21 A Yes. All are guilty.

22 Q Okay. So you --

23 A But I --

24 Q Go ahead, I'm sorry.

25 A But I'm the only one doing a life sentence.

1 Q So you feel like your attorney should have
2 objected to that or brought a different -- brought a
3 different meaning to that; is that what you're saying?

4 A Yes.

5 Q How so?

6 A I feel like that that is an open and shut
7 question. If you ask somebody a question and saying
8 if -- can I find him guilty of a burglary and find him
9 guilty -- or find him guilty of the murder, that's a
10 yes or no question. To me, I got prejudiced on that
11 because they read the hands of one, hand of all again.

12 Then when they -- they couldn't reach a decision
13 again, they pushed forth and forced the Allen charge.
14 So I don't feel like that anybody got anything out of
15 this but me for something that I didn't even do to
16 begin with.

17 Q Now, you said that you're the only one getting a
18 life sentence; correct?

19 A I'm the only one doing a life sentence.

20 Q Do you know what the other codefendants received?

21 A Yes.

22 MR. JAMES: Objection, relevance.

23 THE COURT: Sustained.

24 MR. FOWLER: Okay, I'll move on.

25 Q So is there anything else about the prejudicial

1 matter that you mentioned in your number one in 11-1
2 that you feel might be relevant?

3 A No.

4 Q Okay. Your second statement says, jury
5 instructions provided by the trial judge were improper
6 because the implied malice element relied on illegally
7 entered evidence. Tell me a little bit about that.

8 A The implied malice, the judge only implicated
9 malice because of the testimony that was given. And
10 the .22 being allowed into the case relied on them
11 saying, well, I was the only one that knew him.

12 So the judge relied on that to convict me on
13 malice when that wasn't the truth. If the proper
14 investigation had been done, it would have showed that
15 everybody had lived in Horry County prior to this.

16 Q Now, you had requested that a Kareem Harry be
17 brought to court; is that correct?

18 A Yes.

19 Q Now, are you saying that Mr. Harry can shed light
20 on the apparently alleged lack of information?

21 A Yes.

22 MR. JAMES: Objection. That's for Mr. Harry to
23 testify to.

24 THE COURT: Correct.

25 MR. FOWLER: We're just trying to shed some light

1 on what he's talking about in terms of investigation,
2 who his lawyer apparently could have talked to and how
3 he could have talked to him.

4 THE COURT: What was your question again?

5 MR. FOWLER: My question was in terms of
6 Mr. Harry, does my client -- I think my question was,
7 does he feel like he could provide light on the
8 investigation that his attorney should have apparently
9 provided.

10 THE COURT: Can he provide light as to what his
11 attorney should have done?

12 MR. FOWLER: I'm asking if Mr. Harry, if he feels
13 could provide information on the alleged lack of
14 information and the investigation.

15 THE COURT: Is that going to be a witness in this
16 matter?

17 MR. FOWLER: Yes, sir.

18 THE COURT: Why don't we just wait and ask
19 Mr. Harry.

20 MR. FOWLER: Okay, very good. Thank you.

21 Q But you're talking about the implied malice.
22 Anything else on that; I mean, what do you feel in
23 regards to that matter?

24 A I just feel that the judge was misled by the
25 solicitor to believe that I was the only one that knew

1 him, and the only reason that I shot him was because he
2 could identify me.

3 Q And are you saying that your attorney could have
4 provided additional information --

5 A Yes.

6 Q -- onto -- you know, to get you out of that theory
7 that you were the only one who knew him?

8 A Yes.

9 Q Okay. And so you mentioned the investigation on
10 the stand a moment ago. How do you feel like your
11 attorney -- what could your attorney have done to
12 investigate the matter more thoroughly?

13 A He could have investigated my codefendants, again,
14 showing that they had had an arrest record prior to
15 this within a mile of this man's house.

16 Q Let me stop you right there. When you say he
17 could have investigated your codefendants. How so? I
18 mean, are you talking about just seeing their criminal
19 history, or you talking about --

20 A Yes.

21 Q -- asking them questions before trial; how
22 specifically would you recommend that he have
23 investigated your codefendants?

24 A He could have asked them questions about, had they
25 ever lived in Horry County, did the kids go to school

1 here, had they been here prior to Mr. Elliott's death,
2 working, anything like that. And he would have gotten
3 the truth out of it because there's places where they
4 have rented, kids going to school. Like I said, Ray
5 had been arrested within a half a mile of the man's
6 house. Arlie had been arrested within a mile of the
7 man's house.

8 Q So do you feel a basic investigation on your
9 codefendants could have been helpful to you in this
10 case?

11 A Absolutely.

12 Q Okay. Number three, you said codefendant has
13 recanted his trial testimony blaming petitioner for
14 murder. Can you explain that to the Court, what you
15 mean in your application.

16 A After my dad passed away, he was pretty close with
17 Anthony. And he had made a phone call to my mom, and
18 he apologized to her --

19 MR. JAMES: Objection, hearsay.

20 THE COURT: Sustained. You don't need to answer
21 that.

22 THE APPLICANT: He has a --

23 THE COURT: Ask another question.

24 MR. FOWLER: Okay.

25 Q Well, just in brief, but are you saying based in

1 this application that -- you said a codefendant, are
2 you referring to Anthony Ray?

3 A Yes.

4 Q Are you saying that based on your knowledge, that
5 he may have recanted his trial testimony?

6 A Yes, he has. He has --

7 MR. JAMES: Objection, hearsay.

8 THE COURT: Sustained.

9 MR. FOWLER: I'm not -- okay, all right.

10 Q But you do stand by that comment?

11 A Yes. There's a statement.

12 MR. JAMES: Objection, hearsay.

13 MR. FOWLER: I'm just asking him what he put in
14 the application, Your Honor. So we'll move on.

15 Q In number four you said newly after discovered
16 evidence has been found showing witness coercion
17 provoked by the State. That's your words, not mine.
18 What kind of evidence do you feel like might have been
19 discovered?

20 A It shows that they -- coercion by the State. They
21 offered deals to get a conviction.

22 Q Okay. Now, you say they offered deals?

23 A Yes.

24 Q Are you personally aware of any deals that they
25 offered? I mean, did they come to you, or how are you

1 saying that they offered deals, and what do you mean by
2 that?

3 A When they spoke to my uncle and --

4 Q Well, let's --

5 MR. JAMES: Objection, hearsay.

6 Q Okay. Well, let's move away from the uncle.

7 Based on what you have personally observed and seen,
8 are you saying that you feel like they have offered
9 something -- you said deal, what do you mean by that?

10 A For their testimony they got a lighter sentence.

11 Q So you're -- so what were -- your codefendants,
12 what were their sentences, if you recollect?

13 MR. JAMES: Objection, relevance.

14 THE COURT: Sustained.

15 MR. FOWLER: Your Honor. Yeah. All right.

16 Q Let's go back to the main part of the question,
17 newly discovered evidence. What have you personally
18 observed or noticed that's come to your hand or that
19 you're aware of that is newly discovered evidence?

20 A I have documents showing that when they offered
21 the .22, there was no evidence of it. I have pictures
22 in the pathologist's office showing that there was an
23 exit wound to the right back area.

24 Q Well, now, how did you get this information?

25 A I had wrote the pathologist.

1 Q And do you know the pathologist's name?

2 A Yes. Edward Proctor.

3 Q And so you're saying you personally communicated
4 with this person, and they provided you information?

5 A The office.

6 Q Okay. Now, you said something about -- what were
7 you talking about that they provided you some
8 information about the exit wound or something along
9 those lines?

10 A Yes. During trial it was brought out that both
11 bullet hole wounds were identical, 1.5 centimeter. And
12 with the offering of the .22, the pathologist said that
13 he had left the projectile in the body.

14 Q Is this in the trial testimony?

15 A Yes.

16 Q Okay.

17 A And so when I wrote him a letter, and I have it,
18 asking him why he would leave critical evidence in a
19 body that was decomposed that could exonerated me from
20 the charges.

21 MR. JAMES: Objection. That's a prior -- that's
22 hearsay. He's testifying to a prior out-of-court
23 statement, and I'm not entirely sure it's relevant.

24 MR. FOWLER: I think this could be found in the
25 transcript about the issue of the bullet holes and

1 whether they were found to be --

2 THE COURT: Show me if it's in the transcript.

3 MR. JAMES: Right now he's testifying to a letter
4 that he sent to another person outside of this
5 courtroom.

6 THE COURT: Sustained.

7 Q Okay. As to the transcript and the testimony in
8 the courtroom, in the courtroom that day or during the
9 trial, you're saying that there was a discrepancy
10 between the bullet holes and a .22?

11 A Yes.

12 Q Okay. So you're saying that your attorney did not
13 bring up the issue of that discrepancy?

14 A No, he didn't. He didn't object to the .22 even
15 being offered into the case. Dr. Proctor said that
16 both bullet holes wounds were identical, were 1.5
17 centimeter.

18 Q And that's in the transcript?

19 A Yes, yes.

20 Q Okay.

21 A And that one of them was oval and one of them was
22 round. And Diggs asks him, why would one of them be
23 oval. And he told him it would be because of the angle
24 of the shot. But nobody said anything about a exit
25 wound to the right back area.

1 Q All right.

2 A So I started digging, and I finally found it. And
3 there is a exit wound to the right back area with the
4 pictures and to the police log and all. But nobody
5 never mentioned it. Dr. Proctor never mentioned it,
6 nobody never mentioned it.

7 Q Did your attorney ask for more time before the
8 trial to the Court in any way?

9 A No.

10 Q Is this something that you think with some basic
11 investigation that he could have found out?

12 A Yes.

13 Q Why do you say that?

14 A Once getting -- digging into the motion, it was a
15 lot of paperwork, it started coming to light. And I
16 think if he would have had more time to investigate my
17 case, that he would have found it himself.

18 Q And this would have helped you in your defense;
19 correct?

20 A Yes. It would exonerate me from these charges.

21 Q Very good. Moving on in your application, I
22 believe we've covered through four. You stated in
23 number five, expert witness needed to -- and this may
24 relate to what you just said -- number 11-5, expert
25 witness needed to rebut State pathologist testimony

1 concerning bullet size and firearms.

2 Relating to transcript and the trial testimony,
3 you're saying that -- are you saying that an expert
4 witness was needed on your side?

5 A Yes.

6 Q Why?

7 A Because the ballistics showed that all three shots
8 had been fired from the exact same gun. Ray testified
9 that he had shot the man. And the pathologist report
10 pretty much backs it up. But they kept allowing the
11 .22 to be offered into my case.

12 Q So you're saying that in the trial there were
13 bullet holes that reflected a non .22 exit and entry;
14 right?

15 A Yes.

16 Q But then the .22 was continued to be brought in;
17 right?

18 A Yes. The only weapon that was ever come to the
19 exact point of what was used was a .38 or a .357.

20 Q Okay. Now, not to get into what the pathologist
21 responded to you, but you're saying that after the
22 trial, after you had gone to SCDC that you did some
23 investigative work; correct?

24 A Yes.

25 Q And what did you do -- not getting into what they

1 sent back, but what did you do personally to
2 investigate this?

3 A Just digging deep into the motion of discovery
4 that they had give not only to me but to the other --
5 you know, my codefendants. All of them were the same.
6 The ballistics report says all three projectiles were
7 fired from the exact same gun. Pathologist's report
8 pretty much backs that up, but yet nobody mentions the
9 exit wound.

10 Then I start digging on into it, and I find
11 pictures of the police log showing that there were an
12 exit wound with a tragedy rod in place in Dr. Proctor's
13 office.

14 Q Okay.

15 A So my question was --

16 Q Go ahead.

17 A -- how do you leave a projectile in a body, and
18 you got an exit wound also. But yet you're offering up
19 a .22 that you don't even have no proof of. And I got
20 convicted on that.

21 Q Yeah. But, now, you didn't do this investigation
22 -- did you feel it was your attorney's responsibility
23 to do this kind of investigation?

24 A Yes.

25 Q Okay. Do you feel like there was enough time in

1 the four months or so that you were represented to him
2 that he could have done this or?

3 A No.

4 Q Okay. So do you feel like your attorney should
5 have asked for more time before going to trial?

6 A Yes, I do.

7 Q Was there any kind of motion or discussion between
8 you and your attorney by trying you separate than your
9 other, you said, three codefendants; correct?

10 A (Nodding.)

11 Q Was there any kind of discussion of having a
12 separate trial for you?

13 A No. I thought because they said, you know, it's
14 the hands of one, hand of all, I thought we were all
15 going to trial together.

16 Q Did you ever think about having your own separate
17 trial or bringing that issue to your attorney's mind?

18 A No, I didn't. I didn't know anything about it.

19 Q Okay.

20 A I mean, what I'm saying is, I thought under the
21 hand of one --

22 MR. JAMES: Objection to entire line of
23 questioning runs contrary to the evidence and facts of
24 the case. Mr. Mullins was tried by his lonesome..

25 MR. FOWLER: Well, he said codefendants, so I was

1 just --

2 THE COURT: Why don't you go ahead and speak to
3 that a little bit.

4 MR. FOWLER: I am, Your Honor. Thank you.

5 Q In terms number six, 11-6, independent
6 investigation necessary because State pathologist --
7 and I think we've covered this, but you're saying that
8 there is some pathology work that your attorney should
9 have done?

10 A Yes.

11 Q Okay. And that would have exonerated you;
12 correct?

13 A Yes.

14 Q Okay. And then number seven, defense witnesses
15 that was available and ready to testify was needed to
16 provide testimony of exculpatory nature to show
17 petitioner did not commence a field shot.

18 And, once again, you're saying that there should
19 have been some additional -- there should have been
20 more pathology work by your attorney; correct?

21 A Yes.

22 Q And do you feel like he did an adequate job in
23 doing that?

24 A I mean, he didn't do any.

25 Q Okay.

1 A If he had of, he would have found what I found.

2 Q And you're saying that's a fairly big part of the
3 trial?

4 A Yes.

5 Q Okay, all right. You also mentioned that several
6 of your constitutional rights were violated, number ten
7 of your application, for failure to object to
8 prosecutorial misconduct. What are your thoughts on
9 that? Why did you add that in your application?

10 A Well, I felt like them allowing to offer the .22
11 and stuff, how am I going to get a fair trial without
12 -- if I tell you your suit is purple, but it's black
13 right now, I got to prove it within a shadow of a doubt
14 that it was purple before you put it on.

15 They didn't do that in my case. They just
16 whatever they could get a conviction or how ever they
17 wanted to do it to go about it, they done it.

18 Q Okay. You also mentioned that your trial counsel
19 was ineffective for failure to object to the judge's
20 jury instruction. Tell me a little bit about that.

21 A I think I touched on that when I was talking about
22 the hands of one, hand of all.

23 Q Right. Okay. You also now -- you also mentioned
24 in your application in this case that appellate
25 counsel's failure to argue for direct appeal are abuse

1 and discretion error of law. What did you mean by
2 that; is that in your appeal or in this case?

3 A I think that was in my appeal.

4 Q Okay, all right. Continuing on, you said,
5 newly -- and some of this may be duplicate, but it's in
6 your application, and I want to make sure that you can
7 address the Court on it. You said newly after
8 discovered evidence concerning codefendants post-trial
9 recanted testimony. You're saying that there was --
10 you're saying that you feel like there is evidence out
11 there after trial that could provide for a new trial?

12 A Yes.

13 Q Okay.

14 A Ray has recanted his statement.

15 MR. JAMES: Objection and hearsay.

16 THE COURT: Sustained, okay.

17 Q Now, is that something you feel like you can
18 possibly go back to court and win on --

19 A Yes.

20 Q -- or have a good case?

21 A Yes.

22 Q All right. Now, also in your application you
23 mention tampering by the State, number 10-4. What do
24 you mean by that, what's your thoughts on that?

25 A I'm sure I'm getting ready to get shut down for

1 this, but all of the coercion that they went about
2 getting the conviction on me.

3 Q Now, stop right there. When you say they, do you
4 mean the prosecution?

5 A Yes.

6 Q Okay. Go ahead.

7 A Because all of the misleading evidence that my
8 codefendants gave them, it was all falsified,
9 everything.

10 Q And you're saying that your attorney should have
11 looked into that; correct?

12 A Yes.

13 Q Did you have any conversations with your attorney
14 about that, what you just mentioned is falsified
15 evidence?

16 A Yes.

17 Q And what did your attorney say at that time?

18 A His -- well, I'll check into it. And I'm telling
19 him the whole time that they had lived here, and they
20 were lying on the stand and purging them self. And
21 nobody done nothing about it.

22 Q Well, what -- how could your lawyer have done
23 something about that in your mind?

24 A If he had have done an investigation in my case,
25 he could have objected to them saying that they was not

1 from South Carolina.

2 Q All right. I keep coming back to this, and we'll
3 close out here in a second, but you said that there was
4 only four months between your initial representation
5 meeting or knowledge of him representing you to trial.
6 Do you feel like you had enough time yourself to
7 adequately go over these issues before trial with your
8 attorney?

9 A No. I had my motion maybe two months before I got
10 convicted of this murder.

11 Q When you say motion, what do you mean?

12 A The motion to discovery.

13 Q Okay. So you only had two months to look at
14 discovery?

15 A Yes.

16 Q And do you feel like that was enough time?

17 A No.

18 Q Okay. You also mentioned in your application the
19 trial counsel's ineffectiveness for failing to
20 independently investigate evidence, so once again, you
21 feel like he did not investigate properly?

22 A Right.

23 MR. JAMES: Objection, asked and answered.

24 THE COURT: Sustained.

25 MR. FOWLER: Sorry.

1 Q And do you feel like -- how would you describe
2 your trial lawyer's representation of you in this
3 matter?

4 A It was very poor. Pretty much what he had to go
5 on was what I was trying to tell him. But he did no
6 investigation whatsoever. My trial wasn't in his best
7 interest. During trial he went and done a bail
8 hearing, and we had to wait on him.

9 Q In another?

10 A In another courtroom, yes.

11 Q Right.

12 A And I'm just setting here in the courtroom waiting
13 on an attorney. If he had my case in his best
14 interest, that bail hearing could have waited. He
15 could have waited.

16 Q So you're saying while you were on trial for --

17 A Murder.

18 Q -- yeah, murder, he was in another courtroom doing
19 something on another case?

20 A Yes.

21 Q Do you feel like that was a poor performance on
22 his part representing you?

23 A I would think so.

24 Q Okay. Anything else that you feel like -- you
25 know, you've wrote a very extensive application.

1 Anything else that you feel like might be relevant to
2 this matter in terms of bringing it to the Court's
3 attention?

4 A I do.

5 THE APPLICANT: Your Honor.

6 MR. FOWLER: And go ahead, I'm sorry.

7 THE APPLICANT: When I was sentenced, I was
8 sentenced under hand of one, hand of all. And I was
9 sentenced to a life sentence for the same crime that
10 Ray said he done. He's doing 15 years for a charge
11 that they denied me. They denied me a voluntary
12 manslaughter to be handed down with a murder charge.
13 Six months after they found me guilty of murder, they
14 let him plead guilty to voluntary manslaughter. They
15 let him plead guilty to first-degree burglary before I
16 ever went to trial and gave him 15 years.

17 MR. JAMES: Objection, Your Honor. Relevance.

18 THE COURT: Sustained.

19 THE APPLICANT: I just don't feel like that I got
20 a fair trial under the hands of one, hand of all,
21 because the jury didn't want to find me guilty of the
22 murder anyways, because Ray said he had shot that guy.

23 So if I'm going to have to set in prison for
24 something that I didn't do, why should I have to do any
25 more than what he's got to do. And I'm asking the

1 Court that if they don't grant me a new trial, that
2 they grant me the time that he's doing. And I don't
3 think that's too much to ask for.

4 MR. FOWLER: No further questions, Your Honor.

5 THE COURT: All right. Cross?

6 MR. JAMES: I will be very brief, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. JAMES:

9 Q Mr. Mullins, prior to trial and prior to coming to
10 the State of South Carolina, you were in prison in the
11 state of North Carolina; is that correct?

12 A No, sir.

13 Q Were you imprisoned in some other state?

14 A I was imprisoned in Virginia.

15 Q In Virginia, okay. My apologies for the error.

16 You were in the State of South Carolina under an
17 interstate detainer agreement; is that correct?

18 A Yes, sir. That I willingly came here on.

19 Q We still appreciate that. You do not dispute that
20 Anthony Ray testified against you at trial; correct?

21 A No.

22 Q And he testified that he shot the victim with a
23 .22 rifle; correct?

24 A That's what he testified to.

25 Q Okay. You do not dispute that a number of other

1 individuals testified against you at trial; correct?

2 A I do.

3 Q All right. And I won't go over them each
4 individually but a number of individuals at trial
5 testified that they overheard you claiming that you had
6 killed a man; correct?

7 A All of it -- at first was what Anthony had heard.
8 And then when I was brought to South Carolina, then it
9 was, oh, Bradley told me all this.

10 Q But at trial they testified that they overheard
11 you?

12 A Yes. After multiple statements.

13 MR. JAMES: Beg the Court's indulgence for just
14 one moment. No further questions for this witness,
15 Your Honor.

16 THE COURT: Thank you very much. You may step
17 down.

18 MR. FOWLER: Your Honor, can I redirect?

19 THE COURT: Go ahead.

20 REDIRECT EXAMINATION

21 BY MR. FOWLER:

22 Q You said after multiple statements in response to
23 the Attorney General's question. What did you mean by
24 that?

25 A When the detectives went to Georgia and questioned

1 Mr. Mullins, Charles Mullins, Sr., he said Anthony told
2 him this.

3 MR. JAMES: Objection, hearsay.

4 MR. FOWLER: Your Honor.

5 THE COURT: Sustained.

6 Q When you said multiple statements, are you talking
7 about multiple statements at trial that day or during
8 the trial; or what do you mean?

9 A No. During their investigation, the police's
10 investigation, there were multiple statements given by
11 all of the codefendants.

12 Q So various -- when you say multiple, do you mean
13 that you just can't take one sentence as the Attorney
14 General asked you, you got to put it in context. Is
15 that what you're saying?

16 A Yes. To be more exact, it's in the motion. On
17 the 15th day of, I think, May, Ray had gave a statement
18 to the --

19 Q And you're saying this is in the discovery?

20 A Yes.

21 Q Okay.

22 THE COURT: Let me, attorneys come up here real
23 quick, approach, please.

24 (Discussion off the record.)

25 Q Just finish your statement, please.

1 A There was just multiple statements by Ray, Harley,
2 Charlie. None of them went together. On the 15th Ray
3 said he wasn't in the house.

4 MR. JAMES: Objection, hearsay.

5 THE COURT: Sustained.

6 THE APPLICANT: And then on the 23rd another
7 statement was made that now me and him both was in the
8 house.

9 Q All right. Very good.

10 MR. FOWLER: No further questions.

11 THE COURT: All right.

12 MR. JAMES: Nothing, Your Honor.

13 THE COURT: You may step down, thank you.

14 THE APPLICANT: Your Honor, can I ask you to look
15 at a piece of paper that I brought from the prison with
16 me?

17 THE COURT: Why don't you show it to your lawyer
18 and talk to your lawyer first.

19 THE APPLICANT: Okay.

20 MR. FOWLER: Before he leaves the stand, may I
21 approach?

22 THE COURT: Go ahead.

23 MR. FOWLER: Your Honor, I've spoken to my client
24 and we'll address it at the appropriate time.

25 THE COURT: Thank you.

1 (Witness excused.)

2 THE COURT: Any other witnesses?

3 MR. FOWLER: Let me speak with my client once he
4 comes down off the stand.

5 (Discussion off the record.)

6 MR. FOWLER: Your Honor, I've spoken with my
7 client and addressed various issues with him about this
8 matter. And we do not have any further witnesses at
9 this point.

10 THE COURT: Good, thank you. All right, recognize
11 the State.

12 MR. JAMES: Your Honor, before the State proceeds,
13 the State would respectfully motion for a directed
14 verdict as to the allegations of ineffective assistance
15 of appellate counsel, newly discovered evidence and
16 prosecutorial misconduct. No evidence was introduced
17 in Applicant's testimony to show that the State engaged
18 in any wrongdoing, any coaching or any tampering of
19 evidence. There was just broad, nonspecific claims to
20 that effect.

21 There were no allegations as to any details as to
22 what if anything appellate counsel did wrong in his
23 representation of the Applicant on direct appeal. And
24 there was no testimony as to any evidence that has been
25 discovered since trial that would tend to show the

1 innocence of the Applicant. There were only vague
2 insinuations.

3 And I reference this, under my prior objections
4 which were sustained, that another witness against him
5 had recanted his statement. So those recanted
6 statements were not introduced. The individual who is
7 said to have recanted those statements is not on the
8 stand to testify. And so there is no evidence to
9 support that allegation.

10 So, again, in summary, the State respectfully
11 requests a directed verdict as to ineffective
12 assistance of appellate counsel, newly discovered
13 evidence and prosecutorial misconduct.

14 THE COURT: All right. Mr. Fowler?

15 MR. FOWLER: Your Honor, we feel like we discussed
16 this on the stand. We went through the application
17 thoroughly, we discussed all of these issues. My
18 client indicated that he has done his own research once
19 he got to SCDC that he should have -- that his attorney
20 could have done and perhaps should have done before the
21 trial. So we respond that the directed verdict is
22 without merit.

23 THE COURT: He's talking about the appellate
24 counsel. How do you respond to that?

25 MR. FOWLER: One moment. We have no objection to

1 the appellate counsel, Your Honor.

2 THE COURT: All right. I'll grant a directed
3 verdict in that regard. All right. How about the
4 other two grounds?

5 MR. FOWLER: The other two grounds, we feel like
6 we went over everything on the stand, Your Honor. My
7 client has provided information to this Court through
8 his testimony that he did his own work. He has
9 provided the information to the Court today, and we
10 feel like we have the opportunity to present that, and
11 we'll be more than happy to cross-examine their
12 witnesses to bring that evidence out as well.

13 Your Honor, my client has indicated that there are
14 various grounds for his attorney at trial who did not
15 apparently do an excellent -- in my client's words, did
16 a poor job, lack of research, lack of investigation.
17 There is pathology reports that my client discussed on
18 the stand that the attorney did not go into. He did
19 not go into --

20 THE COURT: Specifically, you made a motion in
21 regards to newly discovered evidence and prosecution
22 misconduct?

23 MR. JAMES: Yes, Your Honor.

24 THE COURT: All right. Respond to those
25 specifically.

1 MR. JAMES: To make it abundantly clear, the State
2 does not seek a directed verdict against the claim of
3 ineffective assistance of trial counsel.

4 THE COURT: Correct.

5 MR. FOWLER: Your Honor, we have no objection to
6 those other two in light of the Attorney General's
7 clarification.

8 THE COURT: All right, directed verdict granted.
9 If you'll go ahead and call your first witness.

10 MR. JAMES: Thank you, Your Honor. If I may have
11 a brief five-minute recess to call off a phone witness
12 who is chained to his desk in Columbia right now.

13 THE COURT: How about a two-minute recess to call.

14 MR. JAMES: Thank you, Your Honor. Furthermore,
15 may the State's witnesses under subpoena, Mr. George
16 DeBusk and Mr. J. Scott Hucks, be excused?

17 THE COURT: They may.

18 (WHEREUPON, a brief recess was taken at
19 11:29 a.m.)

20 THE COURT: Go ahead and call your first witness.

21 MR. JAMES: All right. The State calls defense
22 counsel, Mr. William Diggs.

23 WILLIAM I. DIGGS, after being duly sworn,
24 testified as follows:

25 THE CLERK: Please be seated. State your name for

1 the Court, please.

2 THE WITNESS: William Isaac Diggs. I go by Bill.

3 DIRECT EXAMINATION

4 BY MR. JAMES:

5 Q Good morning, Mr. Diggs.

6 A Good morning.

7 Q It's a pleasure to say good morning, I expected to
8 say good afternoon to you. How long have you been
9 practicing law?

10 A I practiced for 33 years.

11 Q And how much of that was criminal law?

12 A Most of it.

13 Q Are you presently practicing law?

14 A No. I'm retired.

15 Q Is there a particular reason why you retired from
16 the practice of law?

17 A There was a suspension of my license.

18 Q Thank you.

19 A Following my wife's illness. And so we just
20 retired.

21 Q Did that suspension have -- relate to any facts
22 arising out of your representation of Mr. Mullins?

23 A No.

24 Q Were you appointed or retained to represent
25 Mr. Mullins?

1 A I think that I was appointed. I can't recall
2 specifically at this point.

3 Q Do you recall about how many times you met with
4 Mr. Mullins in the course of your representation?

5 A It would have been several. I heard his
6 testimony. It wasn't a lot of times, but there were
7 several times that we had met and discussed the
8 evidence in the case.

9 Q Did you discuss the indictments, offenses and
10 their elements with the client?

11 A Yes.

12 Q Did you review the possible punishments against
13 him?

14 A Yes.

15 Q Did you explain to him all of his constitutional
16 rights such as the right to remain silent and confront
17 his witnesses, so on and so forth?

18 A Typically I would do that with a case, and I feel
19 certain that I did do that with Bradley's case.

20 Q Did you explain the State's burden of proof in the
21 case, beyond a reasonable doubt?

22 A Yes.

23 Q Did he appear to understand everything that you
24 told him?

25 A Yes.

1 Q Could you discern any mental or intellectual
2 disability on his part?

3 A No.

4 Q Did y'all have any discussions ahead of time about
5 whether or not he would testify at his trial?

6 A Yes, I'm sure we did.

7 Q Okay. Do you recall what determination y'all made
8 prior to trial about whether or not he would testify?

9 A I think pretty consistently it was his decision,
10 and I agreed with him, I would advise him not to
11 testify in the case. He agreed with that. And I think
12 that was his decision.

13 Q What if anything did Mr. Mullins tell you about
14 what happened?

15 A He stated to me he wasn't present at the time of
16 the shooting, and so he didn't discuss anything with me
17 that happened.

18 Q Did he give you any leads to pursue?

19 A No, not with respect to -- let me just say no.

20 Q He didn't suggest to go talk to this witness or
21 that witness?

22 A Well, I did speak with members of his family. I
23 don't recall him suggesting any additional witnesses
24 that I should speak to. And I don't recall that
25 arising in my mind, no pun (phonetic) going through the

1 evidence in the case.

2 Q Do you recall those family members that you spoke
3 to, did that include some of the family members that
4 ultimately testified against him at trial?

5 A Yes. Yes. Yes.

6 Q Did you conduct any additional investigation into
7 the facts, either personally or through an
8 investigator?

9 A No, I didn't use an investigator. I did go out to
10 the property of the case where this happened. And this
11 was several years after the actual shooting, I think
12 the shooting was in 2008. And the trial didn't arise
13 until 2013. So just looking at the property and going
14 through the evidence that the State did provide in the
15 case was basically what I did in preparation for the
16 case.

17 Q But the structure in which the crime occurred, was
18 it still standing so you could investigate?

19 A Yes. Yes.

20 Q In the course of your representation, did you file
21 requests pursuant to Rule 5 Brady?

22 A I'm sure I did, I don't specifically recall. But
23 that would be what I normally did, and I'm sure I would
24 have done that in this case. And notwithstanding that,
25 we did receive a lot of material from the State.

1 Q Okay. Did you review all of those materials?

2 A Yes.

3 Q All right. And did you review them with your
4 client?

5 A Yes. I didn't sit there with him and go through
6 every document or every page. But we did meet and
7 discuss the evidence in the case.

8 Q To be specific, did you review the pathologist's
9 report in this case?

10 A Yeah, of course.

11 Q All right. Do you recall what the findings of
12 that report were?

13 A Two -- two bullet wounds to the body, each of
14 which would have been fatal. One bullet was recovered
15 out of the skull and had entered into the side of the
16 head and lodged against the other side, the skin,
17 didn't break the skin coming through the skull. And
18 the other one, I believe, was stuck in part of the back
19 bone.

20 And I think Dr. Proctor said both of those would
21 have been fatal. The head wound was immediately fatal,
22 and the other one in time would have resulted in death.

23 Q Were there any prior statements offered by the
24 witnesses against your client that were made available
25 to you?

1 A Yes. I mean, I think all of the witnesses had
2 made prior statements that were inconsistent with their
3 trial testimony. And I think that's the approach we
4 took was that was the best impeachment evidence that we
5 had with respect to the State's witnesses. Because all
6 of them had modified their statements, changed the
7 statements, and had made -- had gone through
8 significant years delays in terms of reporting what
9 they knew to police authorities, law enforcement
10 authorities.

11 Q And we'll circle back around to that in a moment.
12 If you could, could you just give us a brief overview
13 what the State's case was against Mr. Mullins?

14 A This gentleman, the victim in the case, collected
15 guns. He was a gun collector, an enthusiast. He had a
16 makeshift firing range in his backyard in the property
17 that he had. Bradley and his family knew of his gun
18 collection, I think Brad had rented property from him
19 and so did one of the older generation Mullins, or at
20 least a statement was made in -- to that effect.

21 And the decision was made that they would go, four
22 of them, four of the boys, young boys in Bradley's
23 generation, would go out to the property and, if
24 possible, break into the house and steal the weapons.

25 Unfortunately, after they did break in, the victim

1 came out, he had apparently been asleep in the bedroom.
2 He was awakened by the people in the house. He came
3 out, shots were fired and resulted in his being killed.

4 Q What was your gauge of the strength of the State's
5 case against your client?

6 A Well, to me, I think Judge Hyman stated at
7 sentencing he thought it was overwhelming. I didn't
8 agree with the judge at that point. I thought the
9 evidence was unreliable. The evidence was that Bradley
10 executed the gentleman, shot him in the head at point
11 blank range and killed him instantly.

12 That was the State's theory. And we argued that
13 Brad was not there. And we had good evidence to use to
14 make that argument in good faith, and we did. I think
15 we did a credible job, and I think that's borne out by
16 the fact that the jury came back a couple of times with
17 questions, and they were at one point indicating they
18 were hung and didn't want to make a decision.

19 So I didn't agree with the judge that the evidence
20 was overwhelming. But if you bought the evidence that,
21 you know, was presented by the State, then it would be
22 overwhelming. There was an eye witness to an execution
23 style killing.

24 Q But if your determination and your years of
25 experience, you felt that you had a defensible case

1 prior to trial?

2 A Yes. I think we had -- and I think that that was
3 borne out during the course of the trial. I think
4 there was a lot of doubt in that case, a lot of reason
5 to question it. Maybe, you thought, well, he might
6 have done it, but there is that legal proof, you know,
7 burden of proof standard that has to be met. And I
8 felt like the State -- that was questionable in my
9 mind.

10 Q And you went over all the strengths and weaknesses
11 of the case with your client?

12 A Yes.

13 Q Okay.

14 A And he knew that. I think we all knew, we both
15 knew of the inconsistent statements, prior inconsistent
16 statements that all of the witnesses had made and the
17 years delay in terms of reporting those to the police.

18 Q Did you explain to Mr. Mullins your strategy of
19 focussing on impeaching the witnesses --

20 A Yes.

21 Q -- by prior inconsistent statements?

22 A Yes.

23 Q Did you feel adequately prepared to proceed to
24 trial on this strategy?

25 A Yes.

1 Q Did you need any more time?

2 A I don't know what else could have been done. I
3 think that we had adequate time, and I think we were
4 prepared for trial. I don't think there were ever any
5 discussions about delaying it and doing more work in
6 order to prepare. So I think we were ready, you know,
7 in that situation.

8 Q Did you ever consider retaining the employ of an
9 expert witness for this case of any kind?

10 A That's something I think every attorney goes
11 through in a case like this. I didn't see anything
12 really that an investigator would do. I mean, the
13 evidence was what it was. And it was sufficiently
14 nebulous, questionable that we were able to reasonably
15 argue that it was one weapon that was used, that we
16 didn't buy the State's case that it was a .22, we
17 argued that all of the bullets were the same, and that
18 Dr. Proctor said, you know, that might be the case. He
19 couldn't rule it out, but he wouldn't commit either,
20 you know, in either direction.

21 Q So you looking at the evidence...

22 MR. JAMES: My apologies, Your Honor, I'm trying
23 to think of a way to phrase this question without it
24 being leading.

25 Q With your knowledge of the evidence and

1 understanding what your strategy at trial was going to
2 be, did you feel retaining an expert witness would have
3 fit your trial strategy?

4 A Would it what?

5 Q Fit your trial strategy.

6 A Fit it. I didn't really -- based on the evidence
7 that we had, the fact that the weapon had been disposed
8 of, I really didn't know anything additional
9 investigation would have done. The forensic people,
10 for example, I don't know what they could have added
11 that would have been any more conclusive than what was
12 already in the record.

13 Q All right.

14 A Or available to us.

15 Q Okay. Did any problems arise in the course of
16 trial, arise -- my apologies -- did any problems arise
17 in the course of trial as to how you went about
18 executing your trial strategy, did anything unexpected
19 occur?

20 A I don't recall anything of that nature.

21 Q Okay. But as you already indicated -- well.

22 After the end of the State's case in chief, did you
23 again talk to your client about his right to testify at
24 trial?

25 A I think so. I don't -- I'm sure that would be in

1 the record. That would be the normal practice. Judge
2 Hyman always required that of the attorneys.

3 Q Ultimately you did make the decision to present
4 some witnesses?

5 A Yes.

6 Q Why did you do so?

7 A We wanted -- I was attempting in that situation to
8 do a couple of things. One was to show that Bradley
9 was not the kind of person that would -- if he had done
10 this, he probably would have confided in his sister or,
11 you know, with his mother, instead of just making
12 public statements that everybody heard except them.
13 And also the possibility of maybe establishing an alibi
14 defense for him.

15 But I think because so much time had passed, and
16 there was a lot of speculation about what we would have
17 been doing, what they would have -- you know, where
18 they were exactly at the time of the shooting. And we
19 argued that there was some even question about when the
20 shooting took place.

21 I didn't feel like we could fit it in the
22 requirements that were applicable to an alibi,
23 specifically an alibi defense. But I wanted to put
24 them up and say, look, this is -- we didn't hear the --
25 we were at all of the gatherings that the family had

1 that took place. We never heard any of these things.

2 But there was one occasion when they were out at
3 some other location, Abington, or something like that.
4 And we talked about the possibility of using that as an
5 alibi. But we couldn't -- at that time I couldn't pin
6 down with them specifically when that happened.

7 And so I thought, well, we'll go about it in a
8 more nebulous way and just raise that possibility. And
9 I think we kind of got there. But of course, the State
10 objected and the judge kept that out because we didn't
11 provide an alibi notice. But the reason we didn't do
12 the notice was because we couldn't pin down a date. It
13 had been several years, of course.

14 Q Is there a particular reason why your client chose
15 not to testify?

16 MR. FOWLER: Objection, Your Honor. That would be
17 a question for my client to answer, not him.

18 THE COURT: Not necessarily.

19 MR. FOWLER: Okay.

20 THE COURT: Overruled, go ahead.

21 Q Was there any particular reason why your client
22 didn't testify?

23 A I think that it had to do with his incarceration
24 at the time, we just didn't need to get into that. And
25 it was obvious in, you know, some of the other

1 witnesses have been incarcerated. They had all been
2 interviewed while in prison by the detectives in the
3 case. And so we didn't get into that and just -- you
4 know, just to bring that, interject that into the trial
5 of the indication, we kind of had the upper hand on
6 that issue. Plus the witnesses --

7 Q If I may interject --

8 A Yeah.

9 Q -- were you able to get into the incarcerated
10 status or prior histories of the witnesses?

11 A Well, more at my -- to my way of thinking at that
12 time, that was apparent, you know, because they had
13 been -- the interviews had taken place, a lot of them
14 in jail. But I felt like the more -- the stronger
15 approach would be to focus on the inconsistent
16 statements, prior statements. And that's what we did
17 in trial.

18 And of course we tried to press the codefendant,
19 Anthony Ray as to the specifics of the plea bargain
20 that he was hoping to get from the prosecution.

21 Q So you did press Ray on the fact that he was
22 testifying pursuant to a potential reward?

23 A Of course.

24 MR. JAMES: Beg the Court's indulgence just one
25 moment.

1 Q Let's get to the jury charge. The State requested
2 a number of charges, or at least the Court charge the
3 jury on a number of subjects, one of which included
4 hand of one, hand of all. Did you object to that?

5 A If I remember the charge correctly, I don't think
6 we objected to that particular charge directly. We did
7 object to that Norris charge which I felt was more
8 applicable to the facts presented in our case. Because
9 I felt like that was confusing, like I didn't want to
10 give -- to my way of thinking I didn't -- if the jury
11 thought Bradley didn't execute this fellow, I didn't
12 want to give the State a fallback position and say,
13 okay, we don't believe that, but then we have this
14 burglary thing going on over here. And so we'll get
15 the murder from that direction. I didn't want to give
16 the State that opportunity.

17 But we lost on that. And so we -- at least I
18 tried to argue, well, if you're going to go -- if
19 you're going to give the State that opportunity, then
20 that would justify the voluntary manslaughter charge
21 that we requested.

22 So, you know, I just look at it differently, I was
23 looking at it differently at that time from the way
24 Bradley looks at it now. I didn't feel like it was --
25 that wasn't what was important to me, it was that

1 other -- the Norris, the implied malice by way of the
2 commission of the burglary.

3 Q And I suppose that to an extent answers my next
4 question of whether or not you objected to the implied
5 malice charge?

6 A Yes.

7 Q You felt that was most important?

8 A Yes.

9 Q And how did the Court rule on those objections?

10 A Well, the Court ruled with the State, overruled my
11 objection. That was kind of what the issue was on
12 appeal, if I remember correctly.

13 Q Did the jury send out any notes during their
14 deliberations?

15 A I believe so. I know that they had some
16 questions.

17 Q Did you propose any particular -- or what course
18 of action or response did you propose in response to
19 their notes?

20 A Well, what would happen was the judge would get
21 those, Judge Hyman would get those, call the attorneys
22 over and say, here's what I'm inclined to do or give me
23 your thoughts about it. And I think that's the way it
24 was handled.

25 Q Okay.

1 A I don't remember. I think there was one
2 discussion, again, about the voluntary manslaughter
3 charge. If he was going to go down that road, that he
4 should give us that charge because it raised -- that
5 meant the jury was relying on the very evidence that
6 would fall within the scope of that charge, and that
7 would justify the additional charge on our behalf of
8 the voluntary manslaughter.

9 Q Now, did you get that charge?

10 A No.

11 MR. JAMES: I have no further questions for this
12 witness, Your Honor.

13 THE COURT: All right. Cross.

14 CROSS-EXAMINATION

15 BY MR. FOWLER:

16 Q Do you remember when you first began representing
17 him?

18 A I'm sorry, I can't. I can't pin that down for
19 you.

20 Q Do you remember how long it was from the beginning
21 of your representation to trial?

22 A I can't, I can't remember that.

23 Q Yes.

24 A I could -- I don't have the file with me.

25 Q Were you in the courtroom earlier when my client

1 testified?

2 A Yes. For most of it.

3 Q He said, I think on his testimony, that it was
4 about four months; would you say that's about accurate?

5 A I don't have any reason to contest that.

6 Q Okay.

7 A So if he says that is the amount of time, I don't
8 have anything to dispute that with.

9 Q Okay. With the facts of this case, it's a fairly
10 substantial job; isn't it? I mean --

11 A Yes. It's a messy case. You got a lot of
12 witnesses, all of them have inconsistent statements.

13 Q Right.

14 A You have a long delay of time.

15 Q Right.

16 A So it was, yeah, I would agree with you.

17 Q So on the inconsistent statements, you touched on
18 it in your direct, but tell me a little bit about that.
19 The other persons involved in this case, you mentioned
20 it earlier, but just to be specific, so you're saying
21 there was some discrepancies in terms of what they
22 said?

23 A Yes.

24 Q How so?

25 A Well, discrepancies. Moon, the gentleman named

1 Moon, for example.

2 Q Inconsistencies.

3 A Changes, slight alterations, not necessarily
4 inconsistent, 180-degrees inconsistent, but adding.

5 Brad was correct, for example, when he said, well,
6 initially, you know, these boys over here were
7 involved. And then after a couple of years, the story
8 evolved and said to include Brad, and Brad became
9 involved. And I think that specifically happened with
10 Moon, the gentleman named Moon.

11 Q So you're saying that initially that the, and I'll
12 term the codefendant, said one or more of the
13 codefendants initially did not name my client?

14 A Correct.

15 Q Okay.

16 A But neither did they exclude him, okay.

17 Q Well --

18 A They explained it like, well, here's -- you know,
19 we were focused on this person at this time, not Brad.
20 And so they didn't volunteer Brad when they were
21 discussing the other codefendants involved.

22 Q But the trial court eventually determined that he
23 was the shooter; correct?

24 A Well, the jury did.

25 Q Well, the jury did, excuse me. So at the

1 beginning of their statements or at Moon's statements
2 or whoever, you're saying that they didn't name Brad
3 even though the jury later found that he might be the
4 shooter?

5 A Yeah. In the initial statements, I think the
6 focus of the investigation was on Anthony Ray.

7 Q Okay.

8 A And what we argued at trial was that Moon favored
9 Anthony Ray, and upon learning that he was the actual
10 guilty party. And he was, I mean, he admitted he shot
11 -- he admitted he shot the shot that lodged in the
12 spinal column, okay. So Moon said, yeah, he did that.
13 And initially he didn't volunteer Brad also had been
14 involved in the burglary and in the shooting.

15 And it seems like, I mean, even at that point, you
16 know, those witnesses were giving as limited amount of
17 information as they could about the case. And the
18 detectives knew about Anthony.

19 So we'll talk about that. But nobody volunteered
20 additional evidence to include Brad until later to the
21 point basically when the trial was scheduled.

22 Q Okay. So he was not named on any of the
23 statements until much later; is that correct?

24 A I think that is correct. I think probably it took
25 a year or so, you know, for Brad to work into the mix.

1 And we argued that at trial. That was our entire
2 theory of the case. And we never conceded that a .22
3 was used. We argued that all of the bullets were the
4 same and came from the .38.

5 Q Okay. So -- okay. So getting back to the .22,
6 you were here earlier when my client --

7 A Yes.

8 Q -- stated the discrepancy between the .22 and the
9 bullet holes with the .38 and .357, I believe. So if
10 the bullet holes were of a different type, then why
11 would the .22 continue to be mentioned at trial?

12 A I don't think -- well, it was mentioned because
13 Anthony Ray testified that's what he used. Okay. Now,
14 Dr. Proctor, the body had decomposed to a certain
15 extent, and he's correct with respect to the angle of
16 the shooting.

17 So Dr. Proctor would not discount -- he wouldn't
18 say my theory of the case was wrong, but neither would
19 he agree with it. You know, he said, here's what we
20 think, and. It could have been the same bullet, and so
21 -- or the same gun, same weapon. So we argued
22 throughout the course of the trial that it was the same
23 weapon, that the .22 hadn't been used. But...

24 Q But the pathologist testified at trial; correct?

25 A Yes, he did.

1 Q Okay. And what he testified to was perhaps
2 problematic for my client; correct?

3 A No. I thought it was helpful. Because he said
4 the entry wounds were basically could have been made by
5 the same weapon, both. Okay. Now, understand the
6 State's theory of the case, the first shot was a .22
7 because that's what Anthony Ray said he used. The most
8 fatal shot was the second shot that killed the
9 gentleman instantly, and that was a .38 or a .35 --
10 .357 or somewhere in that.

11 Q Right. Did you discuss with my client the
12 possibility of looking further into the pathology
13 reports before trial?

14 A I didn't see any need to do that.

15 Q Okay. But that the pathologist was fairly
16 important witness in the case; correct?

17 A He was what?

18 Q A fairly important witness in the case; correct?

19 A Sure.

20 Q All right. So you didn't -- in terms of the
21 discovery, when did my client get the pathology report
22 in the discovery packet?

23 A I don't know, I can't answer that. Would have
24 been the same time that we got it.

25 Q Okay. In terms of my client in the initial

1 portion of this, did you ever discuss a mental
2 evaluation with him?

3 A For Bradley?

4 Q Yes.

5 A I don't recall doing that.

6 Q Okay.

7 A Typically I would do it with clients. Certainly
8 if it had been a death penalty case -- you go back and
9 look at the transcript, there was some discussion of
10 that at the sentencing -- we would have done that. But
11 because it wasn't and because Bradley didn't appear to
12 me to have any kind of mental health issue, I didn't
13 suggest it.

14 Q But you don't recall going over that with him; do
15 you?

16 A You know, I don't recall.

17 Q Okay, all right. In terms of, you spoke about the
18 leads, and you spoke about his family. Did you ever
19 speak with a Barbara Jernigan about the case?

20 A I don't recall.

21 Q Did you ever speak with a Jerry --

22 A Could you tell me who she is.

23 Q I believe she's a family member. I believe she's
24 one of my client's codefendants' sister, relative. Do
25 you remember speaking with her?

1 A I don't recall.

2 Q Okay. Well, let me phrase it this way. You said
3 you spoke earlier on direct examination. You said you
4 got leads and you spoke with his family. Who did you
5 speak with in his family?

6 A His sister and his mom.

7 Q That was it?

8 A There was an additional female, I don't recall
9 what her name was.

10 Q With the codefendants' offering, as you said,
11 somewhat, at least somewhat, inconsistent testimony,
12 how did you --

13 A Right.

14 Q -- did you interview them or speak with them?

15 A The codefendants?

16 Q Yes.

17 A No.

18 Q Okay. Do you feel like speaking with their -- did
19 you speak with their attorneys or?

20 A I'm sure I did.

21 Q Okay. And nothing came up in terms of that would
22 benefit my client that you recall?

23 A Well, we knew -- we had their statement. I knew
24 the extent of their inconsistencies, and so I didn't --
25 I don't remember getting anything additional that

1 would, you know, impeach their credibility more than
2 what we already had. So I felt comfortable with the
3 extent of the discovery that we had relating to those
4 witnesses.

5 Q All right. Was my client ever given like any kind
6 of gun residue powder test on his hands?

7 A Well, it was years later, but I don't know.

8 Q Okay. Did you ask for one?

9 A No.

10 Q Okay. Now --

11 A You understand the shooting was in 2008?

12 Q Right.

13 A Okay. And he was arrested in 2013.

14 Q Right. In terms of the sentencing of the
15 codefendants versus my client, was there a discrepancy
16 in how much time they got?

17 A Yeah. I didn't attend any of their sentencing
18 proceedings. I think they took place after our trial.
19 I didn't attend them.

20 Q Do you know if there was a discrepancy between
21 what they got and what my client got?

22 MR. JAMES: Objection, relevance.

23 THE COURT: Sustained.

24 Q Did you look for any kind of alibi witnesses --

25 A Yeah.

1 Q -- for my client?

2 A Yeah.

3 Q Who did you --

4 A His mom and his sister. In my testimony in
5 direct, you know, we talked about the possibility of an
6 alibi. But we couldn't -- the witnesses couldn't pin
7 down a specific date. And so that's why we didn't
8 pursue it.

9 And I didn't -- I did not want to say, look,
10 here's an alibi, of course, September the 10th or the
11 11th, and then have the State say, well, you know, it
12 could have -- 24 hours later he could have -- you know,
13 I didn't want to get into that situation, to be honest
14 with you. And we couldn't pin down the date anyway.

15 Q Now, you stated that you did a Norris to the jury;
16 correct?

17 A I did an objection to the instruction.

18 Q Right. But you did not do that to the hand of
19 one, hand of all?

20 A I don't think so.

21 Q Okay. Why did you not do the hand of one, hand of
22 all?

23 A I didn't perceive it to be as important. You
24 know, the issue was if the jury felt -- my take on the
25 evidence at that time was if the jury determined Brad

1 was there, then they're probably going to determine he
2 shot -- he did the execution, okay.

3 That just -- that was 95 percent of the evidence,
4 you know, versus 5 percent of the evidence. I don't
5 think the jury was going to say, well, Bradley was
6 there, but he didn't do any of the shooting.

7 MR. FOWLER: Just a moment, Your Honor, please.

8 Q Now, and final question, I think. In terms of the
9 exit wounds on the body, what was your investigation
10 into that?

11 A Well, it consisted of looking at the reports that
12 Dr. Proctor had done. I don't recall any exit wound
13 there, but I don't -- you know, thinking about it, it
14 didn't have anything to do with the fatality of the
15 shootings. I mean, the two shots that were fatal were
16 accounted for. So if there was another shot, so then
17 there were five shots. Whether it occurred in the
18 struggle or in the execution or whether it occurred as
19 described by Anthony, I don't know that it would have
20 affected anything in terms of our approach to the case.

21 MR. FOWLER: No further questions, Your Honor.

22 THE COURT: All right. Anything further from the
23 State?

24 MR. JAMES: No further questions, Your Honor.

25 THE COURT: You may step down.

1 (Witness excused.)

2 THE COURT: Any other witnesses?

3 MR. JAMES: No, Your Honor.

4 THE COURT: All right. I'll take the matter under
5 advisement, and I'll have a ruling by the end of the
6 week. Thank you very much.

7 MR. JAMES: Thank you, Your Honor. May Mr. Diggs
8 be excused?

9 THE COURT: Yes.

10 (The hearing concluded at approximately
11 12:09 p.m.)

12 (End of Transcript of Record)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court
Reporter for the Fifteenth Judicial Circuit of the
State of South Carolina, do hereby certify that the
foregoing is a true, accurate and complete Transcript
of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative
to appeal, in the Court of Common Pleas for Horry
County, South Carolina, on the 6th day of June, 2018.

I FURTHER CERTIFY that I am neither of
kin, counsel nor interest to any party hereto.

S/Teresa J. F. Bautz

TERESA J.F. BAUTZ, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

Bradley Gerald Mullins,) Case No.: 2016-CP-26-03050
S.C.D.C. No. 358052,)
)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

2018 MAR 13 PM 1:02
Horry County
Clerk of Court
Horry County, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Bradley Gerald Mullins ("Applicant") on May 5, 2016. Respondent made its return on or about January 30, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, November 29, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, William I. Diggs ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September 2013 term of the Horry County Grand Jury for murder (2013-GS-26-04042), and burglary, first

degree (2013-GS-26-04043). William I. Diggs represented Applicant. J. Scott Hucks and George DeBusk, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 2, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on December 5, 2013. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of life.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudck, Esq., who raised the following issue:

Whether the court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case?

By opinion decided February 17, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Mullins, Op. No. 2016-UP-062 (S.C. Ct. App. 2016). The Remittitur was issued on March 7, 2016.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, due to:
 - a. "Failure to object to prosecutorial misconduct."
 - i. "The Prosecution illegally entered testimonial evidence used to show Intent by his/her own [prejudicial] comments;"
 - b. "Failure to object to improper jury instruction."
 - i. "Jury instructions provided by Trial judge were improper because the 'implied malice' element relied on illegally entered evidence;"
 - c. "Failure to attain and use expert forensic witnesses."

- i. "Expert Witness needed to rebut State pathologist testimony concerning Bullet size and firearms."
- d. "Failure to independently investigate [evidence]."
- i. "Independent investigation necessary because State pathologist claims bullet was left in body, yet there were 'exit wounds' he/she did not mention"
- e. "Failure to procure and utilize exculpatory defense witness."
- i. "Defense witness that was available and ready to testify was needed to provide testimony of exculpatory nature to show petitioner did not administer 'kill' shot."
- 2. Ineffective assistance of appellate counsel, due to:
 - a. "Failure to argue for direct appeal on abuse of discretion/error of law."
- 3. Newly discovered evidence:
 - a. "Concerning co-defendant's post-trial recanted testimony."
 - i. "Co-Defendant has recanted his trial testimony blaming Petitioner for Murder;"
- 4. Prosecutorial misconduct, in that:
 - a. "The prosecution illegally entered testimonial evidence used to show intent by his/her own prejudicial comments."
 - b. "Concerning witness tampering by the State."
 - i. "Newly/After-discovered evidence has been found showing Witness Coersion/provoked by State;"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or

she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Object to Prosecutorial Misconduct – Claim of .22 Rifle

Applicant alleges Counsel was ineffective in failing to object to alleged acts of prosecutorial misconduct. At the evidentiary hearing, Applicant testified Counsel should have objected to statements by the prosecution indicating the existence and use of a .22 caliber rifle in the course of the crime. "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Smith v. State, 375 S.C. 507, 522-23, 654 S.E.2d 523, 531-32 (2007)

At trial, multiple witnesses testified to the theft and/or use of a .22 caliber rifle, in addition to the fatal .38 or .357 round recovered from the victim's head. Crime scene reconstruction expert, Peter Cestarc, of the Horry County Police Department, testified the victim suffered two wounds: one in the head and one in the right side. (Tr. 151-52). Verne Allen Ray, testified he was asked to clean and oil a number of stolen weapons, including a .22 caliber rifle. (Tr. 222-23.) Charles Mullins Sr., a/k/a "Moon," testified Applicant explicitly confessed to the theft and use of the .22 caliber rifle by co-defendant Anthony Ray:

A: They went to the man's property, and they went into his cabin by the pond and had taken two, three guns out of the cabin. During the course of those guns, I suppose one was a .22 rifle.

Q: Don't suppose nothing, just tell us what he said.

A: One was a .22 rifle. They found shells to it. When they left the cabin, they went to the main house, went inside of it and searched the rooms and gathered several guns, all but one, and when they tried to enter the room, the room was locked. By rattling the door, the man hollered, came out of the door naked with a handgun. He said they were running through the house, and they separated. He had my nephew, [Applicant], pinned in the living room and was going to shoot him with a handgun.

[...]

A: Anthony was standing in the other end of the house somewhere, and shot the man with a .22 rifle in the shoulder area. The man turned the gun on Anthony, when he turned the gun on Anthony, [Applicant] said he took him to the floor and took the pistol away from him, the man begged him not to kill him, [Applicant] said you were going to kill me, good night, and pulled the trigger, he said, shot him in the head.

(Tr. 251-53.) The State's forensic pathology expert, Dr. Edward Proctor, testified the victim suffered two gunshot wounds: "one gunshot wound to the left head just above the ear, and a gunshot wound to the right chest in the posterior axillary line towards the back area." (Tr. 274, ll. 22-25.) Dr. Proctor testified the bullet that pierced the back was "difficult to find" and, consequently, left "within the vertebral body adjacent to the spinal cord." (Tr. 276, ll. 17-20.) Dr. Proctor could not determine the caliber of the bullet that caused the back wound without the projectile itself. (Tr. 280-81). Co-conspirator Anthony Ray testified to a version of events closely matching that reported by Applicant to Moon:

A: [Applicant] was here. Mr. Elliott was here with a gun turned on him. I turned around. As we had been collecting guns, I had a little .22 rifle in my hand. I hold it up, screamed at him to put the gun down, put the gun down. When he points the gun at me, I shot him. He fell down, and [Applicant] goes on top of him.

This is kind of behind the couch, but [Applicant] — by the time I got up there, [Applicant] shot him in the head.

Q: How did [Applicant] shoot him in the head?

A: It was with a pistol.

(Tr. 346, ll. 8-17.) The guns stolen from the victim's house were sold in Louisiana. (Tr. 249-50, 353-54.) The State tied together Anthony Ray's testimony and the forensic evidence in its closing argument—that Ray shot the victim with a .22 from across the room, knocking the victim, at which point Applicant executed the victim. (Tr. 486-87.)

At the evidentiary hearing, Applicant testified no evidence of a .22 caliber rifle existed—aside from Anthony Ray's testimony. Applicant argued Counsel should have objected to testimony regarding the .22, and that nobody ever said anything about an alleged exit wound in the victim's lower back. Applicant questioned how Dr. Proctor's report regarding an "exit wound" and Dr. Proctor's testimony that a bullet was left in the victim's body could be reconciled.

Counsel testified the victim suffered two wounds: one bullet in the head and one bullet lodged in the victim's backbone. Counsel did note that the stories provided by the witnesses to law enforcement changed over time—they did not initially include Applicant, but did not exclude him either. Counsel indicated his belief that Moon favored Anthony Ray. Counsel recalled that Ray testified to using a .22, that the victim's body had decomposed by the time he was discovered, and that the trajectories determined by the State's crime scene expert appeared accurate upon his review of the case.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Applicant offers no basis on which Counsel could have conceivably objected. Despite Applicant's assertions to the contrary, sufficient evidence existed for the State to argue the victim was shot

by two different weapons: a .22 caliber rifle fired by Anthony Ray from across the room and a .38 or .357 caliber pistol fired by Applicant standing over the victim. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Object to Improper Jury Instruction

Applicant alleges Counsel was ineffective for failing to object to the "implied malice" jury instruction because it was based upon the "illegally entered evidence" of a .22 rifle. This Court's findings in the above section are dispositive as to this allegation—the evidence of the .22 was not "illegally entered," but rather founded upon the entirely admissible testimony of a co-defendant. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

3. Failure to Obtain and Utilize an Expert Witness, Investigate

Applicant alleges Counsel was ineffective in failing to retain an expert witness to investigate and challenge the findings of the State's expert witness, Dr. Edward Proctor. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Reeves v. State, 415 S.C. 366, 375-76, 782 S.E.2d 747, 752 (Ct. App. 2015) (quoting Strickland, 466 U.S. at 691). "At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id. (quoting Ard v. Caloe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007)). "A particular decision to not investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. (quoting Strickland, 466 U.S. at 691). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. (quoting Strickland, 466 U.S. at 690-91).

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

No expert testimony was offered at the evidentiary hearing. Applicant, as noted in Section II.A.2, above, complained that the forensic reports indicated two exit wounds and that the victim was shot twice, but that a bullet was left inside the victim. Counsel testified he did not see the use in retaining any expert on the case. In Counsel's opinion, the "sufficiently nebulous" evidence against Applicant only served to support his trial strategy and arguments. Counsel further noted the case was messy and only came together after a long delay.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The testimony and evidence at trial, as well as the testimony and record before this court, consistently shows the same story: the victim was shot once in the right side of his chest and once in his head. Furthermore, Counsel articulated a reasonable trial strategy of deliberately preserving "sufficiently nebulous" evidence; to the extent expert investigation could have revealed anything, it could have further incriminated Applicant. Whether or not an expert could have discovered

anything helpful to Applicant is unknown to this Court, as no expert testimony was proffered. As such, any prejudice Applicant might have suffered is merely speculative. For these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

4. Failure to Object to Hand-of-One, Hand-of-All

Applicant did not allege in his application, but alleged in his testimony at the evidentiary hearing that Counsel was ineffective for failing to object to the Judge's instructions to the jury on hand-of-one, hand-of-all. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002).

The testimony excerpts in Section II.A.1, above, are a sample of extensive testimony at trial that evidenced Applicant, alongside his co-conspirators, went to the victim's house to burglarize it and steal his known gun collection. In the process, the victim was shot and killed with his own weapons.

At the evidentiary hearing, Counsel testified the question of whether "hand-of-one, hand-of-all" was an appropriate instruction was not an important subject of interest. Counsel posited that the trial strategy was to argue Applicant was not there at all, and that if the jury concluded otherwise, they would almost certainly also conclude that Applicant was the executioner.

The Court finds no deficiency on the part of Counsel nor prejudice therefrom. Abundant evidence existed to justify the hand-of-one, hand-of-all jury instruction. Counsel would have had no valid basis for an objection to the instruction. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

B. All Other Allegations

At the close of Applicant's presentation at the evidentiary hearing, the State moved for a directed verdict as to all allegations relating to ineffective assistance of appellate counsel, newly-discovered evidence,¹ and prosecutorial misconduct, arguing Applicant failed to introduce any evidence to support any of these grounds. This Court affirms its ruling on Respondent's motion for a directed verdict,² and finds Applicant failed to introduce any admissible evidence to support these claims. Respondent's motion for a directed verdict is **GRANTED**, and Applicant's claims of ineffective assistance of appellate counsel, newly-discovered evidence, and prosecutorial misconduct are **DISMISSED**.

[Conclusion and signature on following page]

¹ Applicant endeavored repeatedly in the course of his own testimony to introduce the out-of-court statements of various individuals. Respondent, understandably, objected vociferously to the repeated attempts at hearsay. This Court sustained those objections.

² The Court granted the motion orally and witnesses for the State on these allegations were excused.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. Sec Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of March, 2018.


WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina

WITNESSES

John Townsend Horry County Police Department

ARREST WARRANT NUMBER

M840245

CDR: 0116 16-03-0010, 0020

DOA: 6/21/2013

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

SEP 23 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-26-04042

The State of South Carolina

County of Horry

J. Scott Hucks

13H02972

COURT OF GENERAL SESSIONS

September, 2013 TERM

THE STATE

VS.

Bradley Gerald Mullins



ATTORNEY: Diggs, William I.

Indictment for

MURDER

ORIGINAL

Jimmy A. Richardson, II, Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

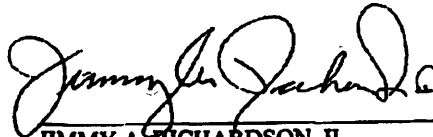
At a Court of General Sessions, convened on September 25, 2013, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010, 0020

That Bradley Gerald Mullins did in Horry County, on or about September 11, 2008, willfully, feloniously, and intentionally kill the victim, Kelly Joe Elliott, with malice aforethought, either express or implied, by means of a gunshot wound to the chest and the head, and the victim did die as a proximate result thereof on or about September 11, 2008, in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

John Townsend Horry County Police Department

DOCKET NO. 2013-GS-26- **04043**

The State of South Carolina

County of Horry

J. Scott Hucks

13H02972

COURT OF GENERAL SESSIONS

September, 2013 TERM

ARREST WARRANT NUMBER

M840246

CDR: 0079 16-11-0311

DOA: 6/21/2013

THE STATE

VS.

Bradley Gerald Mullins
W/ M



ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: *[Signature]* Sep 25 2013

VERDICT

ATTORNEY: Diggs, William I.

Indictment for

**BURGLARY
FIRST DEGREE**

CRIGINAL

Foreperson of Petit Jury

Date:

Jimmy A. Richardson, II, Solicitor

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

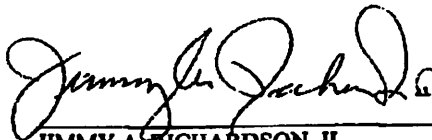
At a Court of General Sessions, convened on September 25, 2013, the Grand Jurors of Horry County present upon their oath:

BURGLARY, FIRST DEGREE

CDR: 0079 16-11-0311

That Bradley Gerald Mullins did in Horry County on or about September 11, 2008, enter the dwelling of Kelly Joe Elliott located at [REDACTED] Dew Lane Loris SC, without consent and with the intent to commit a crime therein and the defendant did so in the nighttime, in violation of Section 16-11-0311(A), S. C. Code of Law, 1976, as amended.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE VS.Bradley Gerald Mullins

AKA: _____

Race: WHITE Sex: M Age: 35INDICTMENT/CASE#: 2013GS2604042A/W#: M840245Date of Offense: 9/11/2008S.C. Code § : 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder☒ CONVICTED OF or ☐ PLEADSin 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 ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ARREST:

SCB76948Hucks, J. Scott

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of LIFE days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

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

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

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.00</u>
TOTAL		\$ <u>133.00</u>

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, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Natalie Dahl

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2152Sentence Date: 12-5-13

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Horry

VS.

Bradley Gerald Mullins

AKA:

Race: WHITE Sex: M Age: 35

D. [REDACTED]

A. [REDACTED]

C. [REDACTED]

D. [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Burglary / Burglary (After June 20, 1985) - First degree

in violation of § 16-11-0311

of the S.C. Code of Laws, bearing CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEYS:

Hicks, J. Scott

SCB76948

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

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

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

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 15.00TOTAL \$ 195.00

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2604043

A/W#: M840246

Date of Offense: 9/11/2008

S.C. Code § : 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEYS:

Hicks, J. Scott

SCB76948

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

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

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

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 15.00TOTAL \$ 195.00

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,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2152

Sentence Date: 12-5-13