

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

TAVISH DOMINIQUE YEARGIN,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000995

APPENDIX

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CHRIS GARY-DIRECT BY MS. HINTON

1 case. And he was not matched as well.

2 Q Okay. And if we could now, if we could turn to
3 the prints themselves. If you could go through first the
4 cards and how they're identified.

5 A Okay. This is a latent envelope. And this is
6 what -- what exactly Tony Robinson brought to me. It has
7 all the case information with the case number, the case
8 type, the Victim's information and any other information
9 that, you know, he may have that is pertaining to this
10 case. On a latent envelope -- or a latent fingerprint
11 card, the actual latent lifts, it looks something like
12 this. On one side they have all the information with the
13 case number. The same thing that was on the envelope, the
14 case number, where it was lifted. But on these they
15 actually have the information about where the latent lift
16 came from. Which is important to keep track of. So, if I
17 was working the scene, I would be dusting a scene and when
18 I lift a print, I would put where the print came from. If
19 it was from a piece of glass or if it were from a piece of
20 metal, I would document that as to where the fingerprint
21 came from. So, that I can say that the fingerprint on
22 this latent lift came from this surface. And I would
23 describe it the best I could so that we could, you know,
24 document that in our reports.

25 Q And was that done in this case on the 33 lifts?

CHRIS GARY-DIRECT BY MS. HINTON

1 A Yes, it was.

2 Q Okay. All right. I believe earlier I premarked
3 some of these with you?

4 A Yes, you did.

5 Q And I want to start with what's been marked as
6 State's Exhibit No. 32. Can you identify what that is?

7 A Yes, this is a latent fingerprint card.

8 Q Okay. And from the back, can you tell where
9 that was lifted from?

10 A Yes. Latent lift number 25, marked as State's
11 Exhibit 32, was lifted from the gas tank lid of a
12 Mitsubishi Lancer. And it is identified as being made by
13 the number two, which is the right index finger, of Nyia
14 Shanise Utsey.

15 Q And State's Exhibit No. 33, can you identify
16 that in the same fashion?

17 A Latent lift number 26, which is State's Exhibit
18 33, is from the gas tank lid of a Mitsubishi Lancer. And
19 it is identified as well as being the number two, right
20 index finger, of Nyia Shanise Utsey.

21 Q And you may have to refer to your report for
22 this but were those the only prints that were lifted from
23 the Mitsubishi Lancer?

24 A One second.

25 Q Sure.

CHRIS GARY-DIRECT BY MS. HINTON

1 A That is incorrect. There was one other latent
2 lift lifted from the Mitsubishi Lancer from the front
3 corner bumper of the driver's side. And it was
4 unidentified.

5 Q Okay. And what does that mean?

6 A Unidentified means that no one that we were
7 given standards for to compare, none of those people
8 matched that fingerprint. Or that that fingerprint was
9 not of enough quality in that fingerprint to actually
10 compare it to anyone. That's something we call not
11 comparable.

12 Q Do you know in this case whether it was
13 unidentifiable or not comparable? Do you differentiate?

14 A No, we don't differentiate in our notes. Only
15 if the entire case is not comparable is that when we
16 determine that the whole case is not comparable. But we
17 don't go through individual latent lifts and determine if
18 they were not comparable or unidentifiable. They're just
19 simply unidentifiable. Kind of just the way they group
20 them together. Is we did not make a fingerprint match on
21 that particular print.

22 Q So, the only known prints that you have from the
23 Mitsubishi Lancer connect back to Ms. Utsey, is that
24 correct?

25 A That is correct.

CHRIS GARY-DIRECT BY MS. HINTON

1 Q Okay.

2 Your Honor, at this time The State would
3 move State's Exhibit number 32 and 33 into evidence.

4 THE COURT: Any objection?

5 MR. DEJONG: I'm sorry, without objection, Your
6 Honor.

7 THE COURT: All right, without objection, the
8 same is admitted into evidence.

9 (WHEREUPON, State's Exhibits Nos. 32 & 33 were
10 marked for identification and received into
11 evidence.)

12 BY MS. HINTON:

13 Q Mr. Gary, next State's Exhibit No. 34 and 35, I
14 believe they are attached. So if you would refer to them
15 by their exhibit number and explain what those are.

16 A Okay. This is a latent fingerprint lift,
17 there's actually two of them.

18 Q Okay. And specifically as to State's Exhibit
19 34, what was that identified as?

20 A State's Exhibit 34. And this is from South
21 Carolina tag, [REDACTED], I believe it's a [REDACTED], is identified as
22 being made by the number eight, left middle finger of
23 Tavish Yeargin.

24 Q And as to State's 35, what is that?

25 A State's Exhibit 35 is an additional lift off of

CHRIS GARY-DIRECT BY MS. HINTON

1 the same surface. It is from a South Carolina tag [REDACTED]
2 [REDACTED]. And it is also -- or it is identified by being made
3 by the number nine, which is the left ring finger of
4 Tavish Yeargin.

5 Q Okay. And as to State's 36 and 37, those are
6 also attached, so if you would do those in the same
7 fashion. State's 36, what is that?

8 A State's 36 is from South Carolina tag [REDACTED].
9 And it is identified as being made by the number one.
10 Which is the right thumb of Tavish Yeargin.

11 Q Oaky. And -- I'm sorry, I forget. Are we on 36
12 or 37?

13 A Thirty-seven.

14 Q Thirty-seven, thank you. Could you explain what
15 that is?

16 A State Exhibit 37 which is the second lift from
17 the South Carolina tag [REDACTED]. Is identified as being
18 made by the right thumb finger as well as the left thumb
19 of Tavish Yeargin.

20 Q And I'm going to show you what's already been
21 introduced as State's 27. Can you read the numbers and
22 letters off of that?

23 A Yes. [REDACTED].

24 Q And Mr. Gary, as to State's Exhibit 38, can you
25 identify what that is?

CHRIS GARY-DIRECT BY MS. HINTON

1 A State's Exhibit 38, which is from a Pontiac
2 Grand Prix, is identified -- or is from the top driver's
3 side of the Grand Prix by the way. It is identified as
4 the right palm of Tavish Yeargin.

5 Q And as to State's Exhibit 39, can you identify
6 that?

7 A State's Exhibit 39, which is from the top
8 driver's side of a 2006 Pontiac, Grand Prix. Is
9 identified as being made by the right palm of Tavish
10 Yeargin.

11 MS. HINTON: Your Honor, at this time the State
12 would move State's Exhibit number 34, 35, 36, 37, 38 and
13 39 into evidence.

14 THE COURT: Yes, sir.

15 MR. DEJONG: No objection, Your Honor, as to
16 State's Exhibit 39, 37, 35, 34. I think I got all that.
17 I do have a bit of a problem with State's Exhibit No. 38.
18 I don't know. This is the first time I've seen these and
19 I'm not raising discovery issues, Your Honor --

20 THE COURT: Yes, sir.

21 MR. DEJONG: -- this is just the first time I
22 have seen them. Certainly aware of the report. But there
23 is a diagram -- or appears to be a diagram drawing on the
24 back of one of these cards. I don't know who did it.
25 Where it came from or anything else. As far as the prints

CHRIS GARY-DIRECT BY MS. HINTON

1 themselves, front side of the card I don't have a problem
2 with. The back side of the card I have a bit of a problem
3 with.

4 THE COURT: All right, can you lay a foundation
5 for the diagram itself?

6 MS. HINTON: He can. There's also a diagram on
7 39, which I don't think he objected to but I'm happy to
8 lay a foundation--

9 MR. DEJONG: Missed that one, Your Honor.

10 MS. HINTON: -- on 38.

11 BY MS. HINTON:

12 Q Mr. Gary, who did you receive those prints from,
13 again?

14 A I received those fingerprint cards from
15 Lieutenant Tony Robinson.

16 Q Okay. And when you received those cards, were
17 they in that condition?

18 A Yes, they were. Minus the fact that I did write
19 on here's the identifications that I made. As well as my
20 initials on the card when I accepted them.

21 Q So, you did not draw the diagram?

22 A No, I did not.

23 MS. HINTON: Your Honor, I think that there was
24 prior testimony from Lieutenant Robinson that he lifted
25 the prints and then placed them on these cards. So, I

CHRIS GARY-DIRECT BY MS. HINTON

1 think the -- it's the State's position that's sufficient
2 enough to lay a foundation.

3 THE COURT: Okay. Do you have a residual
4 objection to that foundation?

5 MR. DEJONG: I do not, Your Honor.

6 THE COURT: All right, without objection, the
7 same is admitted into evidence.

8 (WHEREUPON, State's Exhibits Nos. 34-39 were
9 marked for identification and received into
10 evidence.)

11 BY MS. HINTON:

12 Q Mr. Gary, were there any other prints lifted
13 from the license plate [REDACTED]?

14 A One second. Yes. There was one additional
15 fingerprint that was the lifted from South Carolina tag
16 [REDACTED].

17 Q Okay, and who did that print belong to?

18 A It was unidentified.

19 Q Okay. So, it was not identified as to Ms. Utsey
20 or Ms. Williams?

21 A That is correct.

22 Q And as to the Lancer, there was one unidentified
23 on that one as well, is that correct?

24 A That is correct.

25 Q And that did not -- was not able to be

CHRIS GARY-DIRECT BY MS. HINTON

1 identified as Mr. Yeargin or Ms. Williams?

2 A It was unidentified to anyone.

3 Q And just in the interest of full disclosure, you
4 had some prints as to Kayla Williams as well?

5 A Yes, that is correct.

6 Q Okay. And can you tell me what surfaces those
7 all originated from?

8 A Yes. Latent lift number 16, which is from back
9 of trunk lid of a 2006 Pontiac, Grand Prix. Is identified
10 as being made by the number two, which is the right index
11 finger, of Kayla Nicole Williams.

12 Latent lift number 17 from top of spoiler
13 on the trunk of a 2006 Pontiac, Grand Prix, is identified
14 as being made by the number one, which is the right, thumb
15 finger, of Kayla Nicole Williams.

16 Latent lift number 18, from top of spoiler
17 of trunk of a 2006, Pontiac, Grand Prix. And this is the
18 second lift from that location. Is identified as being
19 made by the right, thumb finger of Kayla Nicole Williams.

20 Latent lift number 19, which the from the
21 top of spoiler on trunk of a 2006, Pontiac, Grand Prix, is
22 identified as being made by the number six, which is the
23 left thumb finger, of Kayla Nicole Williams.

24 Latent lift number 20, from top of spoiler
25 on trunk of 2006, Pontiac, Grand Prix, is identified as

CHRIS GARY-DIRECT BY MS. HINTON

1 being made by the number six, which is left thumb finger,
2 of Kayla Nicole Williams. And that again is the second
3 lift from that location.

4 Latent lift number 21, from passenger side
5 of a 2006, Pontiac, Grand Prix, is being identified by the
6 number seven, which is the left index finger of Kayla
7 Nicole Williams.

8 Q So to be clear, all of Ms. Williams prints that
9 you have come from the Grand Prix, is that correct?

10 A That is correct.

11 Q And because we're here on Mr. Yeargin today, I
12 want to shift back to him. Did you memorialize your
13 finding in a report?

14 A Yes, I did.

15 Q Okay. And I'm going to show you what's been
16 marked as State's Exhibit No. 30, do you recognize that?

17 A Yes. This is a copy of my original report.

18 Q Referencing who, specifically?

19 A These are the fingerprint matches that we
20 detailed earlier that were identified as being made as
21 Tavish Dominique Yeargin.

22 Q Are you peer reviewed at all?

23 A Yes. Every identification we make that we write
24 a report on is peer reviewed by our supervisor.

25 Q And is that referenced on the report?

CHRIS GARY-DIRECT BY MS. HINTON

1 A Yes, that is.

2 Q And when you make these findings, do you report
3 them back to anyone? Do you left anyone know your
4 findings?

5 A Yes, we forward the reports we are issued, we
6 forward them to the agency that the fingerprint came from.
7 So, in this case, I did notify Lieutenant Tony Robinson
8 via email or phone call and told him about the
9 fingerprints. And then I emailed him a copy of the
10 report.

11 MS. HINTON: Your Honor, at this time we would
12 move State's Exhibit number 30 into evidence.

13 THE COURT: Any objection?

14 MR. DEJONG: Without objection.

15 THE COURT: All right, without objection, the
16 same is admitted into evidence.

17 (WHEREUPON, State's Exhibit No. 30 was marked
18 for identification and received into evidence.)

19 MS. HINTON: Mr. Gary, that's all I have.
20 Please answer any questions that Mr. DeJong may have.

21 THE COURT: Yes, sir.

22 MR. DEJONG: Thank you, Your Honor, may it
23 please the Court?

24 THE COURT: Yes, sir.

25 ///

CHRIS GARY-DIRECT BY MS. HINTON

1 ///

2 CROSS-EXAMINATION

3 BY MR. DEJONG:

4 Q Who did you say you were certified by, Mr. Gary?

5 A Certified by the International Association for
6 Identification.

7 Q All right, sir. Now, we talk about fingerprints
8 and comparing fingerprints, basically you talk about
9 points of comparison, is that correct?

10 A That is incorrect. Points of comparison is kind
11 of an older term that was that used before, you know, they
12 really had a grasp on the science. We examine the
13 totality of the fingerprint. The points of comparison,
14 kind of talking about, you know, I told you about the
15 ridges, where they divide and they end. That was kind of
16 the older term of thinking in that that was a means of
17 comparison. But now we use more than just those points
18 where they end and they divide. We use the pattern type,
19 the formations. Those ridge endings, the ridge endings
20 and bifurcations, as well as pore structure. The ridge,
21 the way it moves, the way it dips in. And as well as the
22 pore structure of those ridges.

23 Q Well, the point of that being, do you analyze
24 every ridge on those fingerprints?

25 A Yes, we look at the entire latent fingerprint

CHRIS GARY-CROSS BY MR. DEJONG

1 while we're doing the comparison.

2 Q Okay. So, every ridge, every dip; everything,
3 you look at everyone on every fingerprint?

4 A Of every latent fingerprint, yes, that is
5 correct.

6 Q Okay. Now, when we talk -- let's back up here
7 just a minute. You receive from Lieutenant Robinson, 33
8 latent prints or latent lifts, correct?

9 A That is correct.

10 Q How many total did you actually analyze?

11 A I analyzed all of them.

12 Q Well, how many did you file a report on?

13 A One second.

14 Q Pardon?

15 A One second, let me count.

16 Q Sure.

17 A I wrote a report based on 14 identifications to
18 three different individuals.

19 Q All right. So, you had, if my math's not good,
20 but you had 19 latents that are floating around out there?

21 A If your math is correct, sir.

22 Q Pardon?

23 A If your math is correct, yes.

24 Q Well, I'm not good at math, you might want to
25 check me out.

CHRIS GARY-CROSS BY MR. DEJONG

1 A There were 33 latents and there were 14 that
2 were identified. I do believe that is 19.

3 Q Okay. So, they're just floating around out
4 there?

5 A They're not floating around, they're in the
6 envelope secured. And they are unidentified.

7 Q Right. And that's the point. You were able to
8 identify some of the latents but 19 of the latents you
9 were not able to identify either to Tavish Yeargin, Kayla
10 Williams or Nyia Utsey?

11 A That's correct.

12 Q And were those latents -- never know to
13 pronounce that word, comparable. Could you compare them?

14 A Some of them were comparable and some of them
15 may have not been. Like I said, we don't -- we just lump
16 them together as unidentified prints.

17 Q All right, sir. Now, on the Lancer you have two
18 that were comparable?

19 A There were three latent lifts.

20 Q Three of them. All three were comparable.

21 A Like I said, the unidentified one is not, it's
22 just -- was a latent lift but it was unidentified.

23 Q Right. I don't know if we are geeing and hawing
24 here, okay? The fingerprints that you -- the latents that
25 you looked at, okay. So, if you don't identify them to

CHRIS GARY-CROSS BY MR. DEJONG

1 one of the knowns, you just say unidentifiable?

2 A No, that is incorrect. We actually take a step
3 to identify them. We do have a system that we can search
4 fingerprints on. And we did run the identifiable -- or
5 the comparable print into AFAS as well compare those
6 fingerprints to the victim and any other knowns that were
7 submitted. And we did not identify any of those prints.

8 Q Had to belong to somebody though, didn't they?

9 A They would have belonged to someone as it was
10 human friction ridge skin, but they not were not
11 identified in this case.

12 Q Yes, sir. Now, when we talk about fingerprints,
13 let's talk about Mr. Yeargin. I gather you still have
14 your report up there; is that correct?

15 A That is correct.

16 Q Now, lift 28, left middle finger of Mr. Yeargin,
17 what you report, correct?

18 A Yes, that is correct.

19 Q Then 29 is the let ring finger. Which I guess
20 those would be the two fingers right next to each other?

21 A That is correct.

22 Q And then 30 by the right thumb, the 31, I'm a
23 little confused there. Thirty-one -- 30 says right thumb,
24 31 is right thumb?

25 A That is correct.

CHRIS GARY-CROSS BY MR. DEJONG

1 Q Okay. And then 32 and 33 are actually palm
2 prints?

3 A That is correct.

4 Q All right. Now, in terms of that, when you have
5 these, shall we say multiple latent prints, that doesn't
6 mean that those prints were all put there at a different
7 time, does it?

8 A Could you clarify?

9 Q Sure. If you have a latent print that is my
10 thumb and a latent -- say my right thumb. Latent print
11 that's my left thumb, you can't say that they were put
12 there over numerous occasions?

13 A That is correct. There is no scientific basis
14 for saying how long a latent print has been on a surface.

15 Q And again, if I handle an object on all ten of
16 my fingers one time, there would be ten latent prints,
17 right?

18 A That is possible, yes.

19 Q But that would only indicate ten latent prints.
20 Would not indicate how many times I handled the object?

21 A That is correct.

22 Q So, you could have ten latent prints that were
23 put there all at the same time?

24 A That is correct.

25 Q You could have ten latent prints that were put

1 there at different times?

2 A That is also correct.

3 Q But now when you do it, when a lift is done for
4 a latent print, it is done print by print, right?

5 A Not always. If fingerprints are too close
6 together to lift them separately, they can be lifted
7 together. Which is the case where I identified as one
8 print being made by the right thumb and one print being
9 made by the left thumb, they couldn't be lifted separately
10 so they were lifted together.

11 Q And on the license plate you had one
12 unidentified latent?

13 A That is correct.

14 Q Now, talking about Kayla Williams, her prints
15 were found on the back trunk lid of the Grand Prix,
16 correct?

17 A The back trunk lid as well as the passenger side
18 of the Grand Prix.

19 Q Correct. And also, three on the spoiler?

20 A There were four from the spoiler.

21 Q Miscalculated. Four from the spoiler. Okay. So,
22 you have Kayla Williams on the passenger side, correct?

23 A That is correct.

24 Q Kayla Williams on the trunk?

25 A That is correct.

CHRIS GARY-CROSS BY MR. DEJONG

1 Q And Kayla Williams on the spoiler?

2 A That is correct.

3 Q Okay. And the only person you have on the
4 Lancer Mitsubishi is Nyia Utsey?

5 A That is correct.

6 Q Now, when you do latent lifts, as you indicated
7 a moment ago, I believe when you get a latent, you can't
8 tell when it was put there or how long it's been there or
9 anything else, right?

10 A That is correct.

11 Q And certainly there could be other individuals,
12 based on the surface that may have touched hand or
13 whatever the objects and there wouldn't be fingerprints?

14 A That is correct, as well.

15 Q So, you can't necessarily say based on
16 fingerprint or latents, that those are the only people
17 that ever handled those objects?

18 A No, I cannot say that. But I can that they did
19 touch -- the fingerprints that were identified were
20 touched by them at some in time. But I can't say what
21 timeframe they were touched.

22 Q And let me ask you this, on the Grand Prix, of
23 the 19 that were unidentifiable, how many came off of the
24 Grand Prix, if you know?

25 A I believe it was 18.

CHRIS GARY-CROSS BY MR. DEJONG

1 Q Eighteen came off of the Grand Prix?

2 A Total prints of the 33? Or unidentified?

3 Q No, the 19 you did not identify.

4 A Okay.

5 Q How many of those came off of the Grand Prix?

6 A It would be 17. Because there's one additional
7 from the license plate, one additional from the Lancer.
8 And 17 from the Grand Prix.

9 Q Do you know the location of the 17 that were
10 unidentifiable on the Grand Prix?

11 A Yes, I could read through those.

12 Q Please do.

13 A The driver's door, the rear driver's side door,
14 the passenger side front door, the passenger side front
15 door, the driver's side above the gas lid, the top spoiler
16 on the trunk, the top of the spoiler on the trunk again,
17 says from a Pontiac, Grand Prix. Passenger side front
18 door, passenger side front, the front of the hood, the
19 driver's door, the passenger side, the driver's door, the
20 driver's door, the front of the hood and the front of the
21 hood.

22 Q So, of the, and we'll keep it to the Grand Prix
23 now, still trying to do my math here. Think there were 29
24 on the Grand Prix, is that correct?

25 A I'll have to recount them.

CHRIS GARY-CROSS BY MR. DEJONG

1 Q Let's not go through that again. You had 33,
2 two from the Lancer, right?

3 A Three from the Lancer.

4 Q Three from the Lancer. So, that gets us down to
5 30?

6 A Yes.

7 Q Then you had two from the license plate?

8 A I believe there were more than that but I'd have
9 to count.

10 Q Okay. So, you had unidentifiable on the license
11 plate, other than one?

12 A No, I had one unidentifiable from the license
13 tag as well as four identifications to Tavish Yeargin on
14 the license tag. So, it would be five total.

15 Q Okay. Now, I got lost again.

16 A I believe we're at 25 on the Grand Prix.

17 Q Okay, 25 on the Grand Prix. But I think we
18 established, you had one unidentifiable on the Lancer, one
19 unidentifiable on that tag and that left us 17 remaining
20 unidentifiable?

21 A That is correct.

22 Q So, out of that -- all of those latent prints on
23 the Grand Prix more were unidentifiable than identifiable,
24 is that correct?

25 A That is correct.

CHRIS GARY-CROSS BY MR. DEJONG

1 Q And I believe you said, but I want to be sure.
2 You had known prints of the alleged victim in this case,
3 is that correct?

4 A That's correct.

5 Q So, you eliminated him from any of those unknown
6 prints?

7 A That's correct.

8 Q Okay. So, truly those unknowns are truly
9 unknowns?

10 A That is correct.

11 MR. DEJONG: Thank you, Mr. Gary.

12 THE COURT: Redirect?

13 MS. HINTON: No, Your Honor.

14 THE COURT: Thank you, you may step down.

15 MS. HINTON: May he be excused, Your Honor?

16 MR. DEJONG: No objection.

17 THE COURT: Thank you for being here, I
18 appreciate it.

19 THE WITNESS: Thank you.

20 THE COURT: All right, Mr. DeJong, do you have a
21 motion with respect to the next witness?

22 MR. DEJONG: I'm sorry, Your Honor?

23 THE COURT: Do you have a motion with respect to
24 the next witness? Did you indicate that --

25 MR. DEJONG: Yes, Judge, my apologies.

CHRIS GARY-CROSS BY MR. DEJONG

1 THE COURT: Okay. We'll let's take a short
2 break then. Then we'll come back in and resume testimony.

3 Ladies and gentlemen, we'll take 10 or 15 minute
4 break, and we'll come back in and resume testimony in this
5 case. Please don't discuss the case.

6 (WHEREUPON, the jury left open court at
7 approximately 10:56 a.m.)

8 THE COURT: All right, Mr. DeJong, before I hear
9 your motion I need to take a quick break. Looks like your
10 postured to take a break as well. So, come back on the
11 record in five or ten minutes.

12 MR. DEJONG: Thank you, Your Honor.

13 (WHEREUPON, a short break was taken.)

14 (WHEREUPON, State's Exhibits Nos. 40-42 were
15 marked for identification only.)

16 THE COURT: Okay, go ahead.

17 MR. DEJONG: May it please the Court, Your
18 Honor. With regard to the pathologist's testimony and or
19 reports, I would move the Court to not -- or to suppress
20 that part of the report both in the Report of Findings and
21 in the report itself. I ask the Court to suppress quoting
22 that The manner of death as homicide. The only case that
23 I was able to find directly on point was some State vs.
24 Commander South Carolina Supreme Court case 3 -- 396 S.C.
25 254. And in that case the Supreme Court did say it was

1 okay. The argument there being that it went to the
2 ultimate part of the case of the pathologist being able to
3 testify to that.

4 I certainly understand the Court's ruling. My
5 concern in even reading that case, Your Honor, is that the
6 Court notes, and I guess almost by dictum, and if I can
7 find it again. It's on my Page 14, I'm not sure of the --
8 I guess it's 421 of the report system. And I'm quoting
9 from that case, Your Honor. We further recognize that
10 practically speaking, there is a real possibility that a
11 lay jury person couldn't interpretate into our technical
12 definition of homicide is or her own preconceived notions
13 of criminal culpability. Depending on the circumstances,
14 the jury instruction of the meaning of homicide could
15 prove necessary to prevent any result in prejudice to the
16 criminal defendant.

17 What I find fascinating about that is the
18 Supreme Court recognizes that in allowing a pathologist to
19 testify as to the manner of death being homicide, that
20 there are certainly potential for great prejudice to the
21 Defendant. Now, I know they go on and say that I may be
22 cured with a jury instruction. That always fascinates me
23 because that's kind of like unringing the bell. If they
24 recognize, if our Supreme Court recognizes, that a lay
25 jury person certainly could interpolate -- through --

1 certainly could interpretate into our technical
2 definition, our technical definition, as in speaking of
3 the definition of the Supreme Court, their definition of
4 homicide, the jurors his or her preconceived notions of
5 criminal culpability.

6 And I think, Your Honor, that is the real danger
7 in the case. Especially in the society that we live in.
8 I suspect jurors watch television, they watch CSI
9 Homicide, Special Victim's Unit. And all the time we see
10 on television homicide, we never see that it could be
11 anything other than murder. And I thought it came out of
12 that case, I think to some degree it did come out of that
13 case. But I argue, as I had in my opening statement, that
14 murder is not always murder. However, I think if the
15 pathologist testifies homicide, the immediate thing, that
16 goes to culpability, that goes to malice aforethought, it
17 goes to everything else that an average juror, based on
18 our society, would tend to interpret homicide as being,
19 without any other justification, it could still be murder.
20 But it is not murder under the legal meaning of the words.

21 For those reasons, Your Honor, I would ask that
22 the pathologist not be allowed to testify has to the
23 manner of death. And I don't know if the State intends on
24 trying to introduce the reports or not, but if so, I would
25 move that they be redacted from the reports. If the Court

1 finds they are admissible, Your Honor.

2 THE COURT: Okay.

3 Argument from the State?

4 MS. HINTON: Your Honor, first, we do not intend
5 to introduce the reports into the record. So, that we can
6 depose of that need. Your Honor, it's either a homicide
7 or it's not. Homicide does not mean murder. I think the
8 law that Mr. DeJong quoted is very clear that him
9 testifying to it being a homicide is admissible. And that
10 if there is any inference that it may be murder, which I
11 think is an excellent point for Mr. DeJong to make on
12 cross-examination, which is what it's for, that homicide
13 does not mean murder. I think the law's very clear that
14 at best, a charge that homicide does not mean murder is
15 all that's required. I think that it's very clear that he
16 can still testify that his finding are that this was a
17 homicide.

18 THE COURT: Okay. All right. I'm going to deny
19 your motion. I don't know exactly what he's going to say.
20 And I don't know in what context he may say homicide. But
21 I will note and I agree you have the opportunity for
22 cross-examination. And I think that to the extent that it
23 may be prejudicial to your client, that is the utterance
24 of that word, you may be able to overcome that on
25 cross-examination. If after the fact of having heard it

1 in the record and find that the utterance of that word was
2 in some way and some deal prejudicial, inappropriately
3 prejudicial, then I will fashion a charge. Now, as I sit
4 here right now, I'm not so sure that's necessary. But
5 I'll consider it after having heard the testimony.

6 MR. DEJONG: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 Okay. Anything further before we bring the jury
9 back in?

10 MR. DEJONG: Not from the Defense, Your Honor.

11 MR. RICHARDSON: Nothing from the State.

12 THE COURT: Okay, good enough. It's my
13 understanding that the State has two additional witnesses?
14

15 MR. RICHARDSON: That's correct, Your Honor.

16 THE COURT: Okay, good enough.

17 All right, bring the jury, please.

18 (WHEREUPON, the jury came into open court at
19 approximately 11:15 a.m.)

20 THE COURT: Ms. Hinton, your case, ma'am.

21 MS. HINTON: Thank you, Your Honor, the State
22 would call Dr. James Fulcher.

23 THE CLERK: Place your left hand on the Bible,
24 raise your right.

25 JAMES FULCHER, after being duly sworn,

1 testified as follows:

2 THE CLERK: If you would, have a seat. State
3 your name for the record.

4 THE WITNESS: James William Fulcher.

5 DIRECT EXAMINATION

6 BY MS. HINTON:

7 Q Good morning, Dr. Fulcher, how are you?

8 A I'm well.

9 Q Where are you employed?

10 A I'm a forensic pathologist with Pathology
11 Associates of Greenville, South Carolina.

12 Q Okay. And can you tell the jury a little bit
13 about your educational background?

14 A Sure. I'm a medical doctor. I went to college
15 in Virginia, medical school in Virginia, did a four year
16 residency in anatomical and clinical pathology in
17 Virginia, in Richmond, Virginia. Then I had a one year
18 fellowship in forensic pathology in Richmond, Virginia at
19 the medical examiner's office there.

20 Q Do you have any additional training in this
21 field?

22 A I've been practicing here for four years. And
23 I'm also board certified as a forensic pathologist by the
24 American Board of Pathology.

25 Q Are you currently employed in any other capacity

JAMES FULCHER-DIRECT BY MS. HINTON

1 other than as a forensic pathologist?

2 A I am. I'm also an assistant professor of
3 pathology at the medical school in Greenville.

4 Q And how many autopsies have you performed?

5 A Approximately 1200 in my career.

6 Q Okay. And how many -- have you ever testified
7 as an expert before?

8 A I have.

9 Q How many times have you been called to testify

10 A Ten to 15.

11 MS. HINTON: Your Honor, at this time the State
12 would move Dr. Fulcher as an expert in forensic pathology.

13 MR. DEJONG: No questions, Your Honor.

14 THE COURT: All right, without objection, he's
15 admitted as an expert witness.

16 I remind you of my previous charge, ladies and
17 gentlemen of the jury.

18 You may proceed.

19 MS. HINTON: Thank you, Your Honor.

20 BY MS. HINTON:

21 Q Dr. Fulcher, did you have the opportunity to
22 perform an autopsy on Sean Dinneon?

23 A I did.

24 Q Okay, when was that autopsy?

25 A I'm going to refer to my notes. September 19th

JAMES FULCHER-DIRECT BY MS. HINTON

1 of 2011.

2 Q How do you become involve in cases in Pickens
3 County?

4 A The Pickens County Coroner, Candy Kelly, does an
5 investigation. And if she feels that an autopsy is
6 necessary, she sends the body to us for autopsy.

7 Q Okay. So, are all autopsies from Pickens County
8 performed with your office?

9 A Yes.

10 Q And when you get a body, what's the first thing
11 that you do?

12 A We do an external examine, make sure it's the
13 right person, identification. And then we do an external
14 examine, looking for wounds, tattoos, injuries, document
15 those.

16 Q And did you do that in this case?

17 A I did.

18 Q Was the body you had, in fact, Sean Dinneon?

19 A It was.

20 Q And did you notice any injuries on his body?

21 A Yes. There is a gunshot wound, an entrance
22 wound, on the right upper chest.

23 Q Okay. Using your body, would you point to the
24 jury where that wound was?

25 A Sure. The wound enters right at the clavicle,

JAMES FULCHER-DIRECT BY MS. HINTON

1 the collar bone. Actually fractures the mid point of the
2 clavicle as it enters the body on the right side.

3 Q Once it enters the body, were you able to
4 determine the path that the bullet took?

5 A Yes.

6 Q Can you explain to the jury what path that was?

7 A Yes. The bullet crosses diagonally downwards
8 towards the back, injuring the left lung, piercing the
9 diaphragm, which is in between the thoracic and abdominal
10 portions of the body. And then ends up right in front of
11 one of the large vessels. It does not injure that vessel.
12 So the fatal wound was, in fact, to the lung.

13 Q So just to be clear, it enters on the right?

14 A Correct.

15 Q Pierces the left lung.

16 A Right.

17 Q Right lung, thank you. Then lodges?

18 A Right below the diaphragm in front of inferior
19 vena cava, which is a large vessel in the body. And it
20 actually does injure a small of the liver on its way to
21 the inferior vena cava. Although, I did not feel that the
22 liver injury was life threatening.

23 Q And you say it punctures the lung --

24 A Yes.

25 Q -- can you explain a little bit about what that

JAMES FULCHER-DIRECT BY MS. HINTON

1 means?

2 A Sure. Bullets don't cut through anything,
3 they're really quite blunt. So when they enter the human
4 body, they create a fairly devastating pressure wave
5 which obliterates tissue in its path. In this case we had
6 a very large hemorrhagic wound going through the right
7 side of the lung, causing a significant amount of
8 bleeding.

9 Q And what are ccs?

10 A Ccs? A cc is a unit of volume. It's a cubic
11 centimeter. It's like you look at a ruler and look at
12 what a centimeter looks like, it's one of those cubed.

13 Q Were you able to determine -- well let me back
14 up. Are ccs used to measure blood loss?

15 A They are.

16 Q And you were able to determine how many ccs
17 Mr. Dinneon lost?

18 A Yes, approximately 800 ccs. A man his size
19 should have about 5000 ccs of blood or five liters of
20 blood in their body, approximately. So, this is almost
21 one fifth of the blood volume just in that side of the
22 chest.

23 Q And when someone has a wound such as
24 Mr. Dinneon, how did they actually die?

25 A From blood loss.

JAMES FULCHER-DIRECT BY MS. HINTON

1 Q Okay. And I'm going to show you what's been
2 marked as State's Exhibit No. 4. And this is in black and
3 white but are you able to see any blood loss in that
4 picture?

5 A Yes, there's a significant amount of blood
6 coming from the mouth and nose on the pavement. You can
7 see it glistening there near the face.

8 Q Just so the jury can see.

9 MR. DEJONG: Your Honor.

10 THE COURT: Yes, sir.

11 MR. DEJONG: It hasn't been introduced but I'm
12 objecting to it. I'm not sure --

13 MS. HINTON: It's already in evidence.

14 MR. DEJONG: Is that the one that's already
15 introduced? Okay, then I stand corrected. I'm sorry.

16 THE COURT: Okay, good enough.

17 MS. HINTON: And, Your Honor, just for the
18 record, referring to State's 4.

19 BY MS. HINTON:

20 Q And is this what you're referring to right here?

21 A Yes.

22 Q And is the blood loss?

23 A Yes.

24 Q When a bullet enters a body, are there certain
25 characteristics that help determine the distance --

JAMES FULCHER-DIRECT BY MS. HINTON

1 A Sure.

2 Q -- of the firearm?

3 A There are. We look for soot, deposition on the
4 skin, thermal injury to the skin. When you fire a modern
5 cartridge, a significant amount of powder and heat comes
6 out of the end of the barrel. And that can cause damage
7 to the skin that we can look at, at their body, in terms
8 of determining the range of fire.

9 Q Okay. And were you able to do that with
10 Mr. Dinneon's body?

11 A Unfortunately not. What we said was distance.
12 Meaning that by the time the bullet entered the body, that
13 soot and debris had already gotten taken up by the air.
14 So, none of that was deposited. The best I can tell you
15 is that it wasn't contact and it wasn't close range.
16 Depending on the weapon that's -- it wasn't within a foot.
17 It was likely greater than a foot.

18 Q And that's the best that you were able to tell
19 from the wound that you saw?

20 A Correct.

21 Q Were you able to determine the time of death?

22 A He was pronounced at 10:03 p.m, September 17th.
23 I can't do any better than that. It was presumably
24 several minutes before that. But the exact determination
25 of cause, like you might see in some popular drama shows,

JAMES FULCHER-DIRECT BY MS. HINTON

1 we cannot do that. It's more of a range of hours to days.
2 So, I cannot delineate any further than that.

3 Q Okay. And we talked about the bullet, were you
4 able to recover that bullet?

5 A I was.

6 Q Okay. Let me show you what's been marked as
7 State's 25, do you recognize that?

8 A Yes, that's the projectile?

9 Q And how do you know that's the projectile?

10 A Because it's the one I took out. It also has my
11 initials and handwriting are all over it.

12 Q When you took that bullet out of the body, who
13 did you give it to?

14 A I believe Tony, is it Robinson? Tony from
15 forensics from Pickens County. I have the receipt here.
16 Tony Robinson.

17 Q Was he present during the autopsy?

18 A He was.

19 Q Did you hand that bullet directly to him?

20 A I did.

21 Q Okay. Dr. Fulcher, exactly, I know he was
22 laying on his stomach, exactly what side of the body was
23 his wound on?

24 A The injury's on the right front. So, as we're
25 looking at it on the screen, would be right there,

JAMES FULCHER-DIRECT BY MS. HINTON

1 correct?

2 Q And up by his collar bone?

3 A Correct.

4 Q Okay. And Dr. Fulcher, just one final question.

5 Were you able to determine the manner of death in this

6 case?

7 A I was.

8 Q What was that?

9 MR. DEJONG: Your Honor, again, just for
10 precautionary purposes, I object to that, Your Honor.

11 THE COURT: Yes, sir, I understand.

12 Respectfully overrule the same.

13 MS. HINTON: Thank you, Your Honor.

14 BY MS. HINTON:

15 Q And Dr. Fulcher, what was the manner of death?

16 A The manner of death in this case is homicide.

17 MS. HINTON: Dr. Fulcher, I don't have anything

18 further at this time. Please answer any questions

19 Mr. DeJong may have.

20 THE WITNESS: Thank you.

21 MR. DEJONG: May it please the Court.

22 CROSS-EXAMINATION

23 BY MR. DEJONG:

24 Q Dr. Fulcher, you say the manner of death is

25 homicide?

JAMES FULCHER-CROSS BY MR. DEJONG

1 A I do.

2 Q Now, when we talk about homicide -- well, let me
3 ask you this. Are basically homicide and murder used
4 interchangeably?

5 A They're not.

6 Q They're not?

7 A They're not.

8 Q Okay. Tell me the distinction between homicide
9 and murder.

10 A Homicide for forensic pathologist is a legally
11 neutral term that does not imply guilt or culpability. It
12 simply means that this person died by the action of
13 another person.

14 Q All right. So that we're clear on that, just
15 the action of another person, it could have justified --

16 A Absolutely.

17 Q -- it could be unjustified, it could be any
18 number of things but not the equivalent of legal murder?

19 A You are absolutely correct, sir.

20 Q I'm not trying to get you into discussing law
21 with me but we agree that by your saying homicide, it is
22 of no way -- it can't be correlated to the legal term of
23 murder?

24 A That's correct.

25 Q All right, sir. Now, in this particular case,

JAMES FULCHER-CROSS BY MR. DEJONG

1 did you do a toxicology on Mr. Dinneon?

2 A We did.

3 Q What were your findings on the toxicology?

4 A Toxicology showed a blood alcohol concentration
5 of .268 percent weight by volume.

6 Q .26 whatever. High, low, medium?

7 A What does that mean?

8 Q Yeah.

9 A The legal limit to operate a motor vehicle in
10 the State of South Carolina is .08. So, this is several
11 times over the legal limit to operate a motor vehicle in
12 the State of South Carolina.

13 Q I believe we can say that Mr. Dinneon was
14 intoxicated, could we not?

15 A Absolutely.

16 Q Probably grossly intoxicated?

17 A Most likely.

18 Q Okay. Now, you found one wound and that came in
19 on the right shoulder? You say chest and I guess that
20 is --

21 A Right --

22 Q -- still in the chest.

23 A -- we define that as being the chest. You can
24 debate that, right.

25 Q I guess maybe put a little differently, it would

JAMES FULCHER-CROSS BY MR. DEJONG

1 be upper chest?

2 A Upper chest, yes.

3 Q Okay. Now, did that bullet hit the clavicle?

4 A It did. It did. It fractures the clavicle.

5 And I might have referred in my description the wound
6 path. It does fracture the midline clavicle, yes.

7 Q All right. Now, I note in your report you talk
8 about a small caliber projectile, I think. And I think
9 that's what you have just testified to?

10 A Yes.

11 Q I'm not asking you about the caliber but
12 especially when you get into smaller calibers, weapons. A
13 round, if it hits something, can veer or move around?

14 A It could.

15 Q Do you agree with that?

16 A Absolutely.

17 Q Okay. So to say that the path of the projectile
18 was diagonal, downward and to the left, whether or not
19 that was caused by the shot being fired or hitting the
20 clavicle, we couldn't really say?

21 A Correct.

22 Q Okay. So, by saying downward and -- especially
23 the downward, that doesn't necessarily mean that somebody
24 was standing over or above the deceased person and
25 shooting them?

JAMES FULCHER-CROSS BY MR. DEJONG

1 A That's correct.

2 Q All right. Now, on this case -- well, obviously
3 there was a gunshot?

4 A Yes.

5 Q But the cause of death was actually bleeding to
6 death is what it amounted to?

7 A Correct.

8 Q So, the -- I guess the gunshot wound was almost
9 secondary to the loss of blood?

10 A The gunshot wound caused the loss of blood, yes.

11 Q Right. But the actual cause of death was loss
12 of blood?

13 A Correct.

14 Q And again, so I'm clear, that small caliber
15 bullet could certainly have veered, moved whatever when it
16 hit the clavicle?

17 A Absolutely.

18 Q So, that path, as described by you, does not
19 necessarily show anything as far as the person who fired
20 the shot, aiming or anything else?

21 A Correct.

22 Q Okay. Now, let's talk a little bit about the
23 distance. If it is close range -- and I didn't understand
24 some of what you said and I apologize.

25 A Okay.

JAMES FULCHER-CROSS BY MR. DEJONG

1 Q So we may have to that plow that field again,
2 okay?

3 A Okay.

4 Q Close range, normally there's going to be some
5 type of I think we refer to as stippling or gun powder?

6 A Correct.

7 Q Now, to get stippling or gun powder during, what
8 would -- what would be the outside range if you can say,
9 where you're given to get stippling?

10 A I think that foot I gave earlier -- with a small
11 caliber weapon you want to be within a foot, maybe
12 slightly, 18 inches at the very most.

13 Q Okay. Now, what I did not understand when you
14 were testifying on direct, there was something you said,
15 if I understood you said you may have been lost because of
16 time or something. Or did I just go out in left field?

17 A No, nothing was lost.

18 Q Okay. Okay. All right. So, we know this was
19 not a wound that was made at close range?

20 A Correct.

21 Q Now, once you get out of that foot or slightly
22 larger or slightly greater than a foot, can you put any
23 other distances on it?

24 A No, you cannot.

25 Q Okay. It could be 5 feet, 15 feet, 100 feet, I

JAMES FULCHER-CROSS BY MR. DEJONG

1 guess?

2 A You're correct.

3 Q Okay. All Right. All right. I noticed in your
4 report you -- obviously you say you look at the external,
5 I guess condition, for one of a better term. You have
6 something in there about the shirt, the shirt being
7 wrinkled?

8 A Yeah, the shirt had a significant amount of
9 blood on it. And because of the blood and the coloration
10 of the shirt, I was unable to evaluate the shirt for
11 definitive gunpowder residue or soot.

12 Q Maybe that's what I heard you say. But there
13 was no gun powder residue that you could find?

14 A Correct.

15 Q Okay. And short of that, there's nothing that
16 you can say that this was done at close range?

17 A Correct.

18 Q I think you had something in there about the
19 wrinkling of the shirt or something?

20 A There's copious blood on the shirt and no
21 definitive gun powder residue or soot is present. And
22 there are some small defects on the shirt over linning the
23 area of the gunshot wound. I did not actually say it was
24 wrinkled but I think I know what you're inferring. There
25 were some small defects. And what often happens in these

JAMES FULCHER-CROSS BY MR. DEJONG

1 cases is when the shirt is wrinkled to some degree, the
2 bullet will pierce several different layers of the shirt
3 before it enters the body.

4 Q Okay. So, it would be like folding a cloth five
5 or six times and then firing through that?

6 A Exactly, yes, sir.

7 Q Okay.

8 MR. DEJONG: Thank you, Dr. Fulcher.

9 THE WITNESS: Thank you.

10 THE COURT: Additional questions?

11 MS. HINTON: No, your Honor. May he be excused?

12 MR. DEJONG: No objection.

13 THE COURT: Thank you, doctor. Thank you, very
14 much.

15 MR. RICHARDSON: Your Honor, the State calls
16 Shane Brummitt to the stand.

17 THE CLERK: Place your left hand on the Bible,
18 raise your right.

19 SHANE BRUMMITT, after being duly
20 sworn, testified as follows:

21 THE CLERK: If you would, have a seat, state
22 your name for the record.

23 THE WITNESS: My name is Daniel Shane Brummitt.

24 DIRECT EXAMINATION

25 BY MR. RICHARDSON:

SHANE BRUMMITT-DIRECT BY MR. RICHARDSON

1 Q Mr. Brummitt, where are you employed?

2 A Pickens County Detention Center.

3 Q Okay. And what are your duties at the Pickens
4 County Detention Center?

5 A I'm a detention officer.

6 Q Okay. And is Pickens County Detention Center
7 the one that's located at the law enforcement center?

8 A Yes, sir.

9 Q Okay. How long have you been in detention?

10 A Six weeks.

11 Q Okay. And were you working on Saturday evening,
12 this past Saturday evening?

13 A Yes, sir.

14 Q Okay. Do you recall that date?

15 A The 16th.

16 Q Okay. And when you were working, did you have
17 a -- or did the Defendant make contact with you?

18 A Yes, sir.

19 Q Okay. And when he made contact with you, did he
20 give you anything?

21 A Yes, sir.

22 Q What did he give you?

23 A He handed me a letter or a note.

24 Q Okay. All right. Did he hand you more than one
25 or do you recall?

SHANE BRUMMITT-DIRECT BY MR. RICHARDSON

1 A When he handed it to me it was fold up, so. At
2 the time I didn't but now it was four.

3 Q Okay.

4 A Four piece of paper.

5 Q Okay. And did you unfold that piece of paper?

6 A Not immediately.

7 Q Okay. At some point in time did you unfold it?

8 A Yes, sir.

9 Q And did you read it?

10 A Yes, sir.

11 Q Let me hand you what's been marked as State's
12 Exhibit 40, 41 and 42. Can you identify those three
13 exhibits, please sir?

14 A Yes, sir.

15 Q What are those?

16 A It's the letter that was written and handed to
17 me.

18 Q Okay, sir. And once you received this letter
19 and after you read it, what did you do with it?

20 A I asked my Senior Officer what I should do with
21 it. She told me to --

22 MR. DEJONG: Objection, as to what she told him,
23 Your Honor.

24 THE COURT: All right, I sustain as to hearsay.

25

SHANE BRUMMITT-DIRECT BY MR. RICHARDSON

1 BY MR. RICHARDSON:

2 Q Okay, don't tell what somebody said, but what
3 did you actually, physically do with the letter?

4 A I put it in my Lieutenant's box.

5 Q Okay. And at some point in time did you receive
6 those letters back?

7 A Yes, sir.

8 Q And when did you receive those letters back?

9 A This morning.

10 Q Okay. And when you received those letters back
11 this morning, what did you do?

12 A I read over them again to make sure they were
13 the same letters.

14 Q Okay. At that point in time, what did you do?

15 A Um. . .

16 Q Did you ever have any contact with Detective
17 Dow?

18 A Yes, sir.

19 Q Okay. And what did you tell Detective Dow?

20 A Those were the letter that was written to me.
21 Or written that I had seen.

22 MR. RICHARDSON: Your Honor, the State moves
23 Exhibits 40, 41 and 42 into evidence.

24 MR. DEJONG: Subject to my previous objection,
25 Your Honor.

SHANE BRUMMITT-DIRECT BY MR. RICHARDSON

1 THE COURT: All right, yes, sir. Let's just say
2 that the Court analyzed that letter in accordance with the
3 mandates of Jackson v. Denno and find that all of the
4 prerequisites have been met for the threshold of
5 admissibility. Therefore, I respectfully deny the motion.
6 And I'll admit those as State's Exhibit number?

7 MR. RICHARDSON: 40, 41 and 42.

8 THE COURT: 40, 41 and 42.

9 (WHEREUPON, State's Exhibits Nos. 40-42 were
10 admitted into evidence.)

11 BY MR. RICHARDSON:

12 Q Okay. Sir, when the Defendant gave you these
13 letters, what did he ask you to do with them?

14 A He asked me to give them to Utsey.

15 Q I'm sorry, say that again.

16 A He asked me to give them to Utsey.

17 Q Okay. Sir, I'm going to hand you State's
18 Exhibit 41.

19 Your Honor, at this time I would ask that
20 the witness be allowed to publish that to the jury.

21 THE COURT: Any objection, sir? Other than your
22 previous standing objection.

23 MR. DEJONG: Continuing objection.

24 THE COURT: Yes, sir.

25 All right, you may do so.

SHANE BRUMMITT-DIRECT BY MR. RICHARDSON

1 BY MR. RICHARDSON:

2 Q If you'd, please, read that to the jury.

3 (WHEREUPON, State's Exhibit 41 was
4 published to the jury.)

5 BY MR. RICHARDSON:

6 Q Okay, sir. And State's Exhibit 42, hand you
7 that. Would you, please, publish that for the jury.

8 (WHEREUPON, State's Exhibit No. 42 was
9 published to the jury.)

10 BY MR. RICHARDSON:

11 Q And I'll hand you what's been marked State's
12 Exhibit 40, what does that say?

13 A That was to Utsey.

14 Q Is that who he told you to give those to?

15 A Yes, sir.

16 MR. RICHARDSON: Thank you. Please answer any
17 questions Mr. DeJong may have for you.

18 MR. DEJONG: Thank you, Your Honor, may it
19 please the Court?

20 THE COURT: Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. DEJONG:

23 Q What sequence those letters were supposedly
24 written, you don't know; do you, Officer?

25 A No, sir.

SHANE BRUMMITT-CROSS BY MR. DEJONG

1 Q Okay. And you're saying both of them are handed
2 to you at the same time?

3 A Yes, sir.

4 Q Do the jailers at Pickens routinely reads notes
5 or letters or mail that inmates either send out or
6 receive?

7 A Yes, sir.

8 Q Okay. That is done routinely?

9 A Yes, sir.

10 Q All right, sir. Now, I note -- well, let me ask
11 you this. You didn't see Mr. Yeargin write the letters,
12 did you?

13 A No, sir.

14 Q Okay. He merely asked you to deliver the
15 letters?

16 A Yes, sir.

17 Q Did you ever deliver the letters?

18 A No, sir.

19 Q So, Ms. Utsey never got the letters, right?

20 A That is correct.

21 Q Okay. Then you got the letters and as I
22 understand it, you read them at that point in time, right?

23 A Yes, sir.

24 Q Then you put them in your lieutenant's box?

25 A Yes, sir.

SHANE BRUMMITT-CROSS BY MR. DEJONG

1 Q What action, if any, did the lieutenant take on,
2 if you know? Did he do anything about it?

3 A I do not know.

4 Q All right. But they went into the lieutenant's
5 box, then they came back to your box, correct?

6 A They came back to my hand.

7 Q From?

8 A My senior officer.

9 Q Who?

10 A My senior officer.

11 Q Who is that?

12 A Corporal Tomberline.

13 Q Okay. All right. So, went to your lieutenant
14 to -- or Corporal Tomberline, then back down to you,
15 right?

16 A Yes, sir.

17 Q All right. Then you take upon yourself to call
18 Detective Dow, right?

19 A No, sir.

20 Q Pardon?

21 A No, sir. He had been notified.

22 Q Do you know by whom?

23 A No, sir.

24 Q Okay. So, whoever this unknown person is that
25 notified Detective Dow, they don't do anything with the

SHANE BRUMMITT-CROSS BY MR. DEJONG

1 letters, they sent them back to you, right?

2 A Yes, sir.

3 Q When were the letters given to you?

4 A This morning.

5 Q When were the letters given to you, as you say,
6 by Mr. Yeargin?

7 A Saturday, four o'clock.

8 Q No action was taken on those letters until
9 sometime this morning?

10 A I returned to work -- my shift returned to work
11 this morning.

12 Q Okay. And that's when they went to Detective
13 Dow?

14 A I believe so.

15 Q So, basically somebody sat on those letters for
16 Saturday, Sunday, Monday, Tuesday until Wednesday morning;
17 right?

18 MR. RICHARDSON: Your Honor, I object to the
19 characterization.

20 MR. DEJONG: I'll rephrase the question.

21 BY MR. DEJONG:

22 Q Nothing was done about the letters until Sunday,
23 Monday, Tuesday -- well, three plus days, right?

24 A I don't know.

25 Q You didn't do anything?

SHANE BRUMMITT-CROSS BY MR. DEJONG

1 A I did not do anything.

2 Q Other than what's shared with us, right?

3 MR. DEJONG: Thank you, sir, no further
4 questions.

5 THE COURT: Redirect?

6 MR. RICHARDSON: Just briefly.

7 REDIRECT EXAMINATION

8 BY MR. RICHARDSON:

9 Q What you have in front of you, that's a actual
10 copies of those letters, right?

11 A Yes, sir.

12 Q And the originals had come folded up, initially?

13 A Yes, sir.

14 MR. RICHARDSON: Okay, thank you, that's all the
15 questions I have.

16 MR. DEJONG: Nothing on recross, Your Honor.

17 THE COURT: All right, thank you for being here,
18 I appreciate it. You may step down.

19 MR. RICHARDSON: Your Honor, may this witness be
20 excused?

21 THE COURT: Any objections?

22 MR. DEJONG: No, no objection. He may be
23 excused, Your Honor.

24 THE COURT: Anything further from the State?

25 MR. RICHARDSON: Your Honor, that's the case for

SHANE BRUMMITT-REDIRECT BY MR. RICHARDSON

1 the State.

2 THE COURT: All right.

3 All right, ladies and gentlemen, when the State
4 rests, then it's necessary that I hear some legal issues
5 from both parties. Therefore, we're going to take a short
6 break and then we'll come back in and we're going to do
7 one of two things. We're either going to resume the trial
8 and hear more testimony or we're going to break for lunch
9 and get ready for closing arguments and closing charge. I
10 don't know yet but I have to have a discussion with the
11 attorneys about that outside your presence. So, if you
12 would, please, retire to your jury room for the immediate
13 time being. Please don't discuss the case.

14 (WHEREUPON, the jury left open court at
15 approximately 11:50 a.m.)

16 THE COURT: All right, motions?

17 MR. DEJONG: Yes, Mr. Richardson, don't have any
18 so it's my turn. Your Honor, at this point in time, on
19 behalf of Mr. Yeargin, I would move for a directed verdict
20 on the murder case. I understand, Your Honor, at the --
21 on my motion for a directed verdict you must take the
22 testimony in light most favorable to the State. However,
23 in this case, we know there was a shooting. That's a
24 given. Now, once you get past that there was a shooting,
25 it is incumbent upon the State to prove malice

1 aforethought. In this case, Your Honor, there are a
2 couple of issues that I would argue with regard to
3 directed verdict motion. Number one, and I don't know the
4 answer to my question, and I'm not really going to pose it
5 as a question, but I don't really know the answer to what
6 I'm saying. And that is we get in my initial point would
7 be that we get into Belcher. I honestly don't know, Your
8 Honor, I hate to show my ignorance on the record, I don't
9 know if Belcher can be take into consideration on a motion
10 for directed verdict.

11 I say that simply to say, can, Your Honor, take
12 into consideration the use of a weapon as an inference of
13 malice when ruling on a motion for a directed verdict?
14 Now, I submit not, Your Honor. But again, and I would
15 argue not. And I would argue on Belcher that the Court
16 should not use that as an inference in determining the
17 evidence in the light most favorable to the state.
18 Because I believe, Your Honor, there has been sufficient
19 testimony in this case, albeit be it cross-examination,
20 but nonetheless, testimony on the record two things. I
21 believe there was testimony by Williams, parenthetically,
22 if I may note, I think Williams and Utsey are the crux of
23 this case.

24 Williams testified, as I recall on
25 cross-examination, That he was trying to, he, referring to

1 Mr. Yeargin, was trying to protect me.

2 Utsey says in her testimony albeit on cross,
3 When Dinneon and Williams were struggling, it was like he
4 was trying to rape her. Or something I think was the
5 words. So, certainly I think if you take that and I
6 believe that is sufficient under Belcher and I forgot --
7 probably has it -- I think State vs. Price was the case
8 that came out after Belcher on the inference of malice.
9 But I think under Belcher, there certainly is sufficient
10 evidence in this case to not have the inference of malice
11 through the use of a weapon. If you take that inference
12 of malice out through the use of a weapon, Your Honor, and
13 you compound that with Utsey's testimony, and the
14 Williams' testimony, then I think there's a total absence
15 of showing of malice in this case. And I would
16 respectfully move for the Court for a directed verdict.

17 THE COURT: Any response from the State?

18 MR. RICHARDSON: Well, Your Honor, obviously not
19 going to go through the evidence, but the testimony and
20 the evidence is replete with evidence of malice. A gun
21 can be used as evidence as to malice. Also, Your Honor, I
22 would submit to the Court that we have a felony murder
23 here. And that there's case law on that a felony murder
24 is an inference to malice, also. So, in the light most
25 favorable to the State, we would ask the Court to deny the

1 motion.

2 THE COURT: All right, I respectfully deny the
3 motion.

4 MR. DEJONG: Thank you, Your Honor.

5 THE COURT: Whether that legal theory applies in
6 a motion for directed verdict, I believe is not been
7 determined by the Appellate Courts of this state.
8 However, I will say that in my analysis of a directed
9 verdict, in this instance, I'm not making any inferences.
10 I'm simply looking at whether there is evidence. Not the
11 inferences to be drawn from evidence but merely the
12 existence of the evidence. And given that there is the
13 existence of evidence, not with standing any inference
14 that may be drawn therefrom, I find that a motion for
15 directed verdict or the granting of directed verdict would
16 be inappropriate. And I respectfully deny the same.

17 Okay. Anything further?

18 MR. RICHARDSON: Nothing further from the State,
19 Your Honor.

20 THE COURT: Okay.

21 Do I need to voir dire your witness with respect
22 to his right to testify, sir?

23 MR. DEJONG: I would ask that you do that. Then
24 I would ask if, Your Honor, would entertain letting us go
25 to lunch. And I'll discuss with him his final decision

1 over lunch.

2 Stand up, please, Mr. Yeargin.

3 THE COURT: That's what I intend to do. I'll
4 ask Mr. Yeargin the questions and then we'll break. Have
5 a short charge conference, then you can make the decision
6 over lunch. And we'll come back for one of two things.
7 Either charge and closing statements or additional
8 testimony.

9 MR. DEJONG: Very well.

10 THE COURT: Mr. Yeargin, if you would, please,
11 sir, raise your right hand.

12 TAVISH YEARGIN, after being duly
13 sworn, testified as follows:

14 EXAMINATION

15 BY THE COURT:

16 Q Mr. Yeargin, you have a right against
17 self-incrimination guaranteed under the Constitution.
18 Ordinarily known as the right to remain silent. Which
19 means you don't have to do or say or prove anything in
20 this proceeding today. You can remain silent and the
21 State will have the burden of proving each and every
22 element of the offenses beyond a reasonable doubt. You
23 don't have to prove anything. You don't have to prove
24 your innocence. But you also have the right to take the
25 stand and to testify. You could get on the stand the tell

TAVISH YEARGIN-EXAMINATION BY THE COURT

1 the jury your side of the story. You could tell them --
2 you could present evidence on your own behalf and in your
3 own defense. Now, understanding if you decide to do that,
4 then you would be subject to cross-examination. And the
5 State could ask you questions that bear upon your
6 credibility. And they can also ask you questions related
7 to any prior offense that you may have that would be
8 admissible under the rules. And I don't know whether
9 there is or not but they can ask you questions related to
10 that as well.

11 Now, sir, understanding all of your
12 Constitutional rights, most importantly your right to
13 remain silent and the State's burden of proving you
14 guilty; do you understand all that, sir?

15 A Yes, sir.

16 Q Have you had the opportunity to discuss that
17 with your lawyer before today, sir?

18 A Yes, sir.

19 Q Okay. And understand I'm going to give you an
20 additional opportunity to discuss your right to remain
21 silent or your corresponding right to testify in this
22 case. Do you understand?

23 A Yes, sir.

24 Q Okay. And you also understand the risks that
25 you assume by testifying?

TAVISH YEARGIN-EXAMINATION BY THE COURT

1 A Yes, sir.

2 Q And you also understand the risks that you
3 assume by not testifying?

4 A Yes, sir.

5 Q Okay. All right. All right, sir. Do you have
6 any questions that you'd like to ask me about your right
7 to remain silent and or your right to testify in this
8 case?

9 A No, sir.

10 THE COURT: Okay. I'll give you the opportunity
11 over the lunch break to discuss that in more detail with
12 your attorney. Okay.

13 Mr. DeJong, are you satisfied with those
14 questions? And are there any additional that you'd like
15 to add, sir?

16 MR. DEJONG: You may have said, Your Honor, I
17 have a tendency to come in and out a little bit. Did you
18 share with him if he does not testify that you have to
19 instruct the jury that they are not to take that into
20 consideration.

21 THE COURT: Yes, sir.

22 And you understand Mr. Yeargin, if you don't
23 testify, I'll instruct the jury that it was your
24 Constitutional right not to testify. And that not only
25 can they not hold that against you, that is, they can't

TAVISH YEARGIN-EXAMINATION BY THE COURT

1 hold against you your election to exercise your
2 Constitutional right, but they can't even discuss it in
3 their jury room. Do you understand that?

4 MR. YEARGIN: Yes, sir.

5 THE COURT: Okay, good enough.

6 MR. DEJONG: Thank you, Your Honor.

7 MR. RICHARDSON: Your Honor, I may?

8 THE COURT: Yes, sir.

9 MR. RICHARDSON: I would also ask that you
10 instruct him regarding his prior record for -- so that's
11 on the record for any possibly PCR.

12 THE COURT: What is the prior record that would
13 be admissible in this case?

14 MR. RICHARDSON: Your Honor, he has a 2005
15 burglary second, failure to stop. He has a 2006 breach of
16 contract. He has -- excuse me, 2007 he has six fraudulent
17 checks. In 2006 a bank robbery and unlawful possession of
18 a firearm.

19 THE COURT: Okay.

20 Mr. Yeargin, you recognize that the State would
21 attempt to ask you questions related to those charges and
22 introduce that prior record as evidence if you testified,
23 sir?

24 MR. YEARGIN: Yes, sir.

25 THE COURT: Okay, good enough. You can sit

1 down.

2 MR. DEJONG: Thank you, Your Honor.

3 THE COURT: All right. Gentleman, I'm going to
4 bring the jury back, I'm going to ask them to be back here
5 at -- I'm going to ask them to be back at 1:30 so that we
6 can discuss charge. Even if we don't go directly to
7 charge, still gives us the opportunity to have that
8 discussion.

9 (WHEREUPON, the jury came into open court at
10 approximately 12:00 p.m.)

11 THE COURT: All right, ladies and gentlemen, at
12 this point in time we're going to take a break for lunch.
13 I'm going to ask you to come back to court at 1:30 and
14 we'll resume the trial of the case. We'll either more
15 testimony or we'll go to closing arguments and the charge
16 on the law. So, please over the course of your lunch,
17 don't discuss the case, don't do any self help. One
18 administrative matter before we leave, I am going to
19 appoint Ms. Murphy as the foreperson of the jury.

20 Congratulations. The duties of a foreperson are
21 fairly ill defined and vague. What I can tell you,
22 however, is that your duty as foreperson of the jury is to
23 ensure that everyone in the jury room has a voice. That
24 is that everyone has the opportunity to speak and to be
25 heard during your deliberations. I can't tell you

1 anything further than that. I can't give you anymore
2 instructions regarding the actual deliberations that you
3 enter into because the jury room is your province. And I
4 can't enter into it. I can't even come in the jury room
5 during the trial of the case or it would be against the
6 law and we would have to declare a mistrial. So, I can't
7 tell you how to conduct your deliberations. But I can
8 tell you, Ms. Murphy, that your job is to make sure that
9 everyone has the opportunity to be heard in the jury room.
10 All right. Thank you, y'all have a good lunch.

11 (WHEREUPON, the jury left open court at
12 approximately 12:03 p.m.)

13 THE COURT: Okay, we'll go back on the record at
14 1:30. If y'all would like to meet me in my chambers we'll
15 have a short charge conference, talk through it. And any
16 objections or any formal charge matters that we have to
17 put on the record, we'll put on when we come back for
18 lunch.

19 MR. DEJONG: You want us back at 1:30 or 1:00,
20 Your Honor?

21 THE COURT: I want y'all to come back right now.

22 MR. DEJONG: Oh, right now?

23 THE COURT: Year, yeah.

24 MR. DEJONG: Okay.

25 (WHEREUPON, a lunch break was taken.)

1 THE COURT: All right. Gentlemen, I know that
2 when we had taken a recess, I had advised Mr. Yeargin of
3 his right to testify and his right to remain silent. Has
4 the Defendant made a decision in that regard?

5 MR. DEJONG: I'm sorry, Your Honor?

6 THE COURT: Has the Defendant made a decision
7 whether to testify?

8 MR. DEJONG: He has, Your Honor.

9 THE COURT: Okay. Mr. Yeargin, have you, in
10 fact, made a decision whether to testify or not?

11 MR. YEARGIN: Yes, sir.

12 THE COURT: And what is your decision in that
13 regard?

14 MR. YEARGIN: No, sir, I do not want to testify.

15 THE COURT: Okay. Good enough.

16 All right, anything further?

17 MR. DEJONG: With that, Your Honor, the Defense
18 rests. Before the jury comes back in I would renew my
19 motion for a directed verdict, Your Honor.

20 THE COURT: Okay, I respectfully deny the same
21 on the same basis.

22 So, I know that we had the opportunity to have a
23 short charge conference. Incident to that charge
24 conference, Mr. DeJong, do you have any motions to make,
25 sir?

1 MR. DEJONG: Your Honor, I do. And not to get
2 into the informal setting too much, I'm going to ask that
3 the Court not charge inference of malice by use of a
4 weapon and murder. I'm not sure exactly what, Your Honor,
5 position is.

6 THE COURT: Yeah, I am going to grant that. I
7 have already looked at the charge and I have taken that
8 out. Out of the wealth of caution, and I think under the
9 facts of this case, that it could be charged. And it
10 would be in accordance with the law. However, in this
11 instance I'm going to take it out. I'm going to take it
12 out.

13 MR. DEJONG: Thank you, Your Honor. Your Honor,
14 I would also move for a charge on defense of others. In
15 this case, again, albeit through cross-examination,
16 certainly one of the Co-Defendant's testified that her
17 perception was, not her words mine, characterized the
18 struggle between Williams and Dinneon. She characterized
19 It looks like he was trying to rape her something. I
20 would contend, Your Honor, as a result of that, certainly
21 the Williams would have had the right to defend herself
22 from that. Mr. Yeargin would have had a right, under what
23 I read on defense of others, had a right to come to her
24 defense and defending her on that, Your Honor.

25 THE COURT: Yes, sir.

1 Position of the State?

2 MR. RICHARDSON: Your Honor, yes, we would ask
3 that you not charge that. I believe the testimony was
4 laid out in my asking the question whether there was a
5 weapon involved. And also in regards to her talking about
6 a rape, I didn't see any type of testimony that came out
7 that said that she was in any position of harm or rape or
8 anything of that nature. I don't think the evidence is
9 there to support such a charge.

10 THE COURT: Okay. All right. I'm going to
11 respectfully deny the motion to charge defense of others
12 in this case.

13 MR. DEJONG: Thank you, Your Honor.

14 THE COURT: And I'll tell you -- put on the
15 record why. I heard that line of testimony as well. And
16 I know that you elicited answers to questions that were
17 posed in cross-examination. But I thought that each
18 witness who testified with respect to self-defense or
19 facts and circumstances which would purport to
20 self-defense and defense of others, in court they actually
21 denied that they thought that they were in any harm or
22 jeopardy. And also I would, and I don't -- I think it was
23 a very wise decision in your regard not to enter any
24 evidence into the record, particularly in the form of the
25 Defendant's testimony. However, without that and standing

1 alone on the evidence that has been presented, it just
2 doesn't rise to the level of a self-defense charge.

3 MR. DEJONG: Thank you, Your Honor. Finally,
4 Your Honor, I would move the Court for the charge on
5 involuntary manslaughter. Certainly do not need to
6 educate Your Honor on involuntary manslaughter, but simply
7 bring to the Court's attention, the intentional killing of
8 another without malice while engaged in a unlawful
9 activity, not naturally intending to cause death or great
10 bodily injury, to engaged in a unlawful activity, I don't
11 know that that would particularly apply in this particular
12 case. I would take the position that the grand larceny
13 auto, and I'm certainly aware of what the State is asking
14 you to charge.

15 THE COURT: Yes, sir.

16 MR. DEJONG: But on grand larceny or theft of
17 the vehicle, Your Honor, I would submit that that is not a
18 crime that will tend to cause death or great bodily
19 injury. Depending on what website you want to take into
20 consideration, over a million cars are stolen in the
21 United States a year. One website said that's a car every
22 24 seconds. Another said every 28 seconds. Either one,
23 that's a lot of cars. I would simply submit that that is
24 not a crime that would tend to cause death or great bodily
25 injury. And respectfully move the Court for a charge on

1 involuntary manslaughter.

2 THE COURT: Okay.

3 Position of the State?

4 MR. RICHARDSON: Likewise, Your Honor, we would
5 ask that you not charge that. Evidence that was presented
6 in trial, as I established, in no way, form or fashion to
7 have that type of charge.

8 THE COURT: Okay. In the case at bar, I don't
9 think the evidence supports a charge of involuntary
10 manslaughter. I'm just not going to state into record
11 involuntary manslaughter in all of the requisite--

12 MR. DEJONG: I'm sorry, Your Honor, I'm having a
13 very hard--

14 THE COURT: That's all right. I'm not going to
15 state into the record all the requisite elements, but I
16 find that it doesn't meet them. So, I'll respectfully
17 deny that request.

18 MR. DEJONG: Thank you, Your Honor.

19 THE COURT: Yes, sir.

20 Okay, anything further before we bring the jury
21 in?

22 MR. RICHARDSON: Nothing further from the State,
23 Your Honor.

24 THE COURT: Okay. So, the State argues first
25 then Defense. I don't believe you presented any evidence,

1 did you?

2 MR. DEJONG: I don't believe so, Your Honor. I
3 can't remember any.

4 THE COURT: I don't either.

5 MR. DEJONG: State argues first. Are you going
6 to charge the felony of murder inference charge?

7 THE COURT: Yes, sir, I am going to charge that.
8 I actually, while we're at recess for lunch, I looked up
9 the case and I went and that is an actual verbatim charge
10 suggested by the Supreme Court in a case like this. In
11 the case of State v. Norris, a 1985.

12 MR. DEJONG: Not quibbling, I just want to make
13 sure --

14 THE COURT: I understand.

15 MR. DEJONG: -- I wasn't sure if you were going
16 to argue that or not.

17 THE COURT: I understand. I just wanted to let
18 you know that I did my due diligence in that regard.

19 Okay. All right. Ready for the jury?

20 MR. RICHARDSON: State is.

21 MR. DEJONG: Ready for the Defense, Your Honor.

22 THE COURT: All right, bring the jury.

23 (WHEREUPON, the jury came into open court at
24 approximately 1:40 p.m].)

25 THE COURT: All right, ladies and gentlemen,

1 we're going to begin with closing arguments then the
2 closing charge on the law. You may have realize that the
3 Defense has elected not to put any evidence into the
4 record. And the Defendant has elected not to testify. I
5 will charge you that it is the Defendant's right not to
6 testify. He has a Constitutional right to remain silent.
7 Which means he's not compelled to do, say or prove
8 anything in this trial. The State has the burden of
9 proving each and every element of the offenses beyond a
10 reasonable doubt. Constitutional rights under our form of
11 government and our system of justice are sacrad rights.
12 And you cannot hold it against the Defendant that he
13 elected not to testify. That is you can't hold it against
14 him that he has elected to exercise a Constitutional
15 right. As a matter of fact, not only can you not hold it
16 against him in your deliberations, you can't even discuss
17 it in your deliberations. Because as I suggested, it's
18 his Constitutional right to remain silent.

19 Ladies and gentlemen, we're going to hear first
20 from the State who will argue. Then the Defense will have
21 an opportunity to argue. As I told you at the very
22 beginning of the trial, the other attorneys arguments are
23 not evidence. You have heard all of the evidence that you
24 will hear in this case. And now the attorneys are simply
25 arguing based on the evidence that has been presented in

1 this case.

2 Having said that, Mr. Richardson, I believe it's
3 your argument, sir.

4 CLOSING STATEMENT

5 MR. RICHARDSON: Thank you, Your Honor, may it
6 please the Court.

7 Mr. DeJong.

8 Ladies and gentlemen, as the prosecutor in this
9 case it's incumbent upon me at this time to wrap up the
10 case for y'all as it was presented in testimony and
11 evidence that you have seen. And obviously, it was three
12 days of testimony and three days of evidence being put in.
13 I'm not going to sit up here for three days and talk to
14 y'all about every single piece of evidence. We have 12
15 people who come in, use their everyday common sense. All
16 of y'all heard that. What I'm going to try to do is give
17 you a guideline as I see the evidence and why the
18 Defendant is guilty of both charges.

19 As I said, it's incumbent upon me to wrap up the
20 facts of this case for y'all as the State has presented
21 it. It's incumbent upon the Judge and his job in this
22 courtroom, and I believe he's has already told you, he's
23 like a referee. But also at the end of this case, he's
24 going to charge y'all as to the law of the case. Part of
25 what I want to do at this point in time is give you a

1 brief outline of that law. What the Judge tells you the
2 law is, that's the law.

3 But starting with murder. Murder is a killing
4 of another person with malice aforethought. Grand larceny
5 is stealing property of another, taking property of
6 another, with the intent to permanently deprive that
7 person of that property. Now, in this particular case you
8 have to have a certain standard, it has to be over \$2,000.
9 Okay. That's a brief outline of the law. His Honor will
10 tell you much more specifically about that later.

11 Part to this law of murder is malice
12 aforethought. Now, what is malice aforethought? Well,
13 malice aforethought, ladies and gentlemen, is kind of like
14 a depraved heart or meanness. And there are certain
15 things that can be -- evidence that can be presented to
16 y'all that y'all can take as being malice in a murder
17 case. And one of those things is the fact that the
18 Defendant had a gun. And that, in fact, that gun was used
19 to kill the individual. That was a piece of evidence that
20 y'all can take and consider for malice. Another thing
21 that you can consider for malice -- and I'm tell you this
22 before I go there. Malice also is just -- you can look at
23 the totality of the circumstances and acts of the
24 Defendant and whether he had a depraved heart. But a gun
25 is a piece of evidence that you can take into

1 consideration.

2 Another piece of evidence that you can take into
3 consideration is did -- did the Defendant commit a killing
4 while in the commission of a felony? And His Honor is
5 going to charge you this today. It's the felony murder
6 inference. And you, as juror, can take that and if you
7 find beyond a reasonable doubt that he was in this
8 commission of a felony at the time that the killing took
9 place, then y'all may infer malice. It's a piece of
10 evidence but you also -- there's a inference. If y'all
11 believe beyond a reasonable doubt that the Defendant
12 killed during the commission of a felony. His Honor, will
13 tell you that grand larceny is a felony. Okay, that's a
14 brief outline of the law.

15 As far as the facts are concerned, ladies and
16 gentlemen. This case started way before September the
17 17th, 2011. This case started when that man became
18 knowledgeable of Sean Dinneon, the Victim in this case.
19 When he started living in his home, along with his family.
20 That's when he started to know this Victim. That's when
21 he started to realize that this Victim had property and
22 checks and things of that nature that he could get.
23 That's what this case is about when we come down to it,
24 it's going to be about money. It's a killing about money
25 and property. As sad as that is, that's what it boils

1 down to.

2 Market Hinson testified. She was the first one
3 that testified. Now, she got on the stand -- you couldn't
4 identify the Defendant, you didn't see the Defendant
5 there. Well, ladies and gentlemen, that's right, the
6 Victim knew the Defendant. He could not be in sight of
7 the Victim. Case gone, everything goes away. If the
8 Victim sees him, then he can't steal a car, he can't steal
9 that property. Because if he does that, the Victim knows
10 who did it. So, he has to stay hidden. So, the plan
11 starts out with Nyia and Ms. Williams. And they're going
12 to get together. And they're going to get into this
13 vehicle and they're going to go over there and rob him.
14 Friday night. You remember them testifying to that. And
15 let me say right now about their statements and testimony.
16 I'm not going to go into this a whole bunch.

17 But, ladies and gentlemen, they gave statements
18 to the police when they were arrested up in Asheville.
19 It's late at night, they'd been on the run, they're
20 teenagers. They're very young, they're in cuffs. And
21 they go through the 30 minute spill with this detective
22 about what happened that night. In 30 minutes. They're
23 not going to give every single detail. They're not going
24 to tell every little detail that happened. Of course,
25 we're all human, we're going to leave it out. I believe

1 Ms. Williams stated that she was asleep. They woke her
2 up. Started talking to her. But you know, ladies and
3 gentlemen, they were definitely consistent on one thing.
4 Who pulled the trigger and killed Sean? Who brought the
5 gun and killed Sean?

6 So, and they have a plan and they go to Sean's
7 house. And Sean's not there. He's not there to get to
8 the cars. He's got the gun at that time but he's not
9 there. So, they go home. Now, I'm talking to you about
10 malice again. This whole thing is planned, this is
11 Friday. This is before -- he could have called everything
12 off. But what does he do? He calls Nyia and Ms. Williams
13 up again. And this Defendant, the Defendant is making the
14 contact with Nyia and Ms. Williams. Nyia and
15 Ms. Williams, are just as guilty as him. Don't think I'm
16 not going to deal with them later on. They're not getting
17 away with anything. And you heard -- you heard Nyia get
18 up there and say that. The Defendant's own sister. She
19 wasn't expecting anything.

20 They get together, the Defendant calls them. He
21 makes contact with them. And he wants to use their car.
22 He wants to use the Mustang. And they go over there and
23 who goes and gets the gun? The Defendant. Not Nyia, not
24 Ms. Williams. The Defendant gets the gun.

25 Now, ladies and gentlemen, they -- Nyia

1 testified that she sees him loading the gun. If you are
2 going to steal something, you need to load a gun, then
3 it's going to be your intent to possibly use that gun.
4 And use it for one reason and one reason only. And that's
5 to get out of the situation if you have to. And that's
6 exactly what happened in this case. So, they go over to
7 Sean's house. And while they're at Sean's house, the
8 Defendant, now he's staying in the car. All the dirty
9 work's being done by the girls. He's staying in the car.
10 They knocked out the light. Once again, why did they
11 knock out the light in the car? So he could not be seen.
12 It makes complete sense. He can't be seen. We got to go
13 get Charles. And use Charles as the person who is going
14 to come and act like he's buying the car, okay. Wants to
15 go buy a car? The Defendant wants to go buy a car, why is
16 he sitting in the car and letting everything else do this?
17 And pretending Charles is the buyer?

18 And what happens? Charles gets nervous.
19 Charles says, No. I can't do this. And the start of this
20 nervous came when the Defendant gave -- had a BB gun.
21 That BB gun to use against that Margaret. That nice lady
22 that sat up here and testified. To use against her if
23 necessary. And I guess you probably wonder the whole time
24 why I was putting that into evidence. Well, that's why.
25 They both said, both of them said that this was to be used

1 in a violent manner against Margaret. Well, luckily
2 Margaret falls out of the picture. And the reason why
3 Margaret falls out of the picture, who knows. But if she
4 hadn't fallen out we would be here trying two murder
5 cases. She falls out of the picture because of Charles.
6 Charles get nervous and they go to the Hot Spot and he's
7 not coming back.

8 So, what happens then? In the car already,
9 as testified to by the Co-Defendants, is the gun. The gun
10 that's been loaded by that Defendant, the gun that was
11 hidden and brought to the scene -- to the car, I mean.
12 And the gun is now out in the open. He's got the gun.
13 And he says, he's mad. He's going back and I can't
14 remember which one testified said that he said, I'm going
15 to get him now. Malice. Depraved heart. I'm going to
16 get him now. So, they get back to the scene. Excuse me,
17 get back to the Victim's house. And once again, the girls
18 are out trying to get in a situation where they're going
19 to test drive this car. So, they can get the car away
20 from the home so they can steal the car. And using
21 blinkers he's using blinkers, that's part of the plan to
22 navigate Ms. Williams to a point. Now, they drive for a
23 while to the extent that Ms. Williams decides I'm going to
24 pull over. I got to see what we're going to do. What's
25 going on. And that's when it all comes down. And that's

1 when it all goes to this point.

2 The Victim, and we don't know why, we don't
3 know if the Victim saw the Defendant and said, Oh I
4 recognize him, something's up. Or just simply is this
5 fishy. This is fishy. And ladies and gentlemen, he was
6 intoxicated, there's no question about it. He is a good
7 person to go take advantage of at that time. And he gets
8 out of the car. And as testified to, he's stumbling. And
9 he throws the beer bottle. And he stumbling against the
10 car to get to the seat. Well, what does the Defendant do?
11 The Defendant tells Ms. Williams to get back into the car.
12 Because he wants that car. He is going to get that car
13 one way or another.

14 So, she jumps in it. And when she jumps in
15 it, she gets there faster than the Victim. I submit to
16 you because of his intoxication. And he starts trying to
17 get the keys out of the car. He is not going to let them
18 take his car. You have a right to do that in this State.
19 It's your car. You have the right to protect your
20 property. But ladies and gentlemen, is he protecting it
21 in a violent manner? No. You heard both girls testify
22 that he was not hitting them or striking them. He did not
23 have a weapon or he did not use a weapon.

24 Now, I submit to you, I don't know what the
25 defense is going to do, he's got last argument. But he

1 may come up here and say she the Defendant was trying to
2 defend these girls. That he was laying across one of
3 these girls. And when he does to that, I ask that you
4 remember the testimony. I think one girl said something
5 in the nature of he looked like he was rapping her or
6 something like that. But are we to believe that the
7 Defendant said, Oh my goodness, Ms. Williams is getting
8 rapped. It looks like she's getting rapped. So I'm going
9 to go over there and pull up in my Mustang, or her Mustang
10 for that matter, and shoot him dead.

11 Now, this highly intoxicated individual,
12 who do you do in that situation? You go and pull them
13 off. This is an innocent, no holds bar thing, you simply
14 go and you pull him off. Pull him off of her. That's all
15 he had to do and we would not be here. Sean would be
16 alive today. His family would be here to see him today if
17 he had simply gone and pulled Sean off her. That's all he
18 had to do. But what does he do? He takes it upon himself
19 to pull that gun out and tell him to get off her. Or I'm
20 going to shoot. And I believe the testimony was Sean said
21 something like Well kill me. Or something of that nature.
22 And he obliges him. And he shoots him dead. No chance
23 whatsoever for Sean. That's all he had to do. All he had
24 to do was pull him off her. He would have probably got
25 the car that way. And that's what he's doing. He's

1 killing him because he wants the car. And by God, he got
2 the car. Do you remember how it went? They leave the
3 parking lot. Then they switch cars. The girls went back
4 in the Mustang, he got the Grand Prix. He got the prize.

5 Now, they leave and they go back and he
6 keeps the car. And you've heard the testimony from the
7 fingerprints on the car. He is obviously, I submit to
8 you, trying to put a tag on the car, he did put a tag on
9 the car. You heard the testimony, they found a tag near
10 the car that had been stolen. His fingerprints were on
11 that tag. And the car had his fingerprints all over it.
12 You heard all that testimony. He got the car and he drove
13 it. We showed you some evidence of the Family Dollar the
14 next day there's a receipt. Or there's a receipt in the
15 back seat of the car that is found. And the Family
16 Dollar. And that incidentally is the day after the
17 murder. The day after the car is stolen. So, we go get
18 the video. And he's wearing a similar jacket that you saw
19 in the hotel room. There's pictures of that. The car's
20 in the background with the hubs. It looks similar to it.

21 Keep in mind, ladies and gentlemen, we're
22 giving you all the evidence we can so y'all -- it's like a
23 puzzle. You put the pieces together. These are just
24 pieces of evidence. And then what happens? Well, guilty
25 mind comes from those who flee. It's not that I was

1 trying to save my sister's girlfriend. Or I was trying to
2 save my sister. What does he do? He calls them back and
3 calls them again. He says, I got to come over and be with
4 y'all. I submit to you that he's got to be with them so
5 they don't talk. He has been in control of this situation
6 the entire time. He has them doing the dirty work. I
7 submit to you he does not want them to talk.

8 So, what do they do? They got to get out
9 of town. They get \$50.00, they put it in the Mustang and
10 they get out of town. And they try to find the money and
11 they go to Tennessee. That's their first flight. And
12 they're spending the night in the car. Then they flee
13 again. And they flee down to Spartanburg. In Spartanburg
14 they got to get money. And coincidentally, the Defendant
15 has the Victim's checks. Remember the stipulation? That
16 the Defense agreed to? They agreed he had the Victim's
17 checks after the murder. So, they're trying to get money
18 that way and they get money. He's fleeing from -- he's
19 fleeing from Spartanburg.

20 When's the next time they flee? Well, they
21 had to get some money so they go to Travelers Rest. And
22 in Travelers Rest, the police are on to them. There's a
23 set up. They thought they were going to get \$300.00 but
24 it ended up being a set up. But you remember the
25 important thing about that, do you remember what they said

1 the Defendant said? Yeah, we just cannot go to
2 Greenville. Well, why can you not go to Greenville?
3 Because he knows Greenville is where this happened, it's
4 where they're going to be looking for them. That's why he
5 can't go to Greenville. So, guilty mind. And he's
6 telling Kayla what to do. Where to run, where to go. And
7 they get away again. And they flee from there back to
8 Spartanburg, I believe.

9 Ultimately, they get to Asheville. And
10 that's two times he's flee from the police, trying to get
11 away from the thing. Basically, trying to get out of this
12 thing. He does not want to get caught. Then there's a
13 third time. Do you remember the testimony from the
14 officer in the hotel room? The officers come to his room
15 and what does he do? He tries to go out the window.
16 Luckily, there where officers outside and there were
17 officers inside at the door and he could not do that, he
18 was arrested. Once again, flight, getting away from the
19 situation, guilty mind.

20 I'm sorry ladies and gentlemen, I've had
21 this -- I apologize, I've had this cough for a while. And
22 then what's the last way he has tried to get out of this?
23 Well, what he's going to do, he's to the point now of
24 desperation. So, what he's going to do now is he's going
25 to try to fool you, you people. He's going to try to fool

1 the jury. And how is he going to try to fool the jury?
2 Well, let's put all this on Ms. Williams. What I got to
3 do is I got to get my sister in line. And remember,
4 ladies and gentlemen, this is his sister who has lived
5 with him for 17 years who got up here and testified. And
6 basically testified to the same thing that Kayla did. His
7 own blood.

8 So what does he do? Last ditch effort. He
9 gets a letter. You'll have these. You'll have these,
10 these are in evidence. A letter that he gives the
11 officer. Excuse me, two letters. To Utsey. And in these
12 letters he's decided that he's going to tell her what to
13 testify to. I'm not going to read you all the letter, I'm
14 just going to highlight certain points. Y'all have the
15 letters back there, you can read them. Right off the bat.

16 I'm your brother, she's not -- she's not
17 family. This is what you need to say when you take the
18 stand on me. September 17th, 2011.

19 And he goes into to telling things of what
20 Williams did. And let's put this on Williams and Williams
21 shot -- pulled the gun and shot him. Out of her purse.
22 He says in here, Say you and he writes Kyle [verbatim]
23 test drive. He wants to do defense of others. If that's
24 what he's going to come up and argue to y'all. He's
25 trying to make it so he's not even at the scene. He's

1 trying to have her testify he wasn't even there. Say you
2 left your brother at Kyle's. You drive behind her. He
3 goes on to say and brother Travis Yeargin was not there.
4 He didn't know what happened. He made this up -- she made
5 this up on me. And he tells why. Somewhere in here he
6 tells why she made it up. Oh, because he was -- you were
7 mad at me for not baby sitting. Please say you made up
8 the whole thing. Please tell the jury you and Kyle
9 planned this out. Said y'all lied on me. Do it for me.
10 If you love me. And uses the F word here, talking about
11 Ms. Williams.

12 That's not the only letter he wrote. Says,
13 Well -- this is another one. Well, you need to put
14 everything on Kyle by saying I was not there. So, if you
15 don't want to go alone -- along with my story is what he's
16 trying to say, let me know. Go along with his story.
17 This a insult to our system. He's influencing his sister
18 or attempting to.

19 Well, ladies and gentlemen, this was a
20 plan. This was a plan to get property. This was a plan
21 to get some money. This whole entire thing. And he
22 brought a loaded gun to a felony that he was attempting to
23 commit and he pulled that trigger when absolutely
24 unnecessary, as we're sitting here, it was unnecessary to
25 pull that trigger. And he killed the Victim. And then

1 whats the last thing, the last thing that happens after he
2 kills the Victim while they were still in the parking lot?
3 The last thing that he sees is that. That man laying on
4 the ground with blood coming out of his mouth either dying
5 or dead. And what does he tell his sister to do? Go get
6 his wallet. Does that sound like he's protecting
7 somebody? Once again, doesn't it come back to money?
8 Isn't that where we are. Isn't that malice? Isn't that
9 murder? Ladies and gentlemen, I respectfully ask that you
10 come back with a verdict of guilty of murder and grand
11 larceny against the Defendant. Thank you so much.

12 THE COURT: Mr. DeJong.

13 CLOSING STATEMENT

14 MR. DEJONG: Thank you, Your Honor, may it
15 please the Court.

16 Mr. Richardson.

17 Ms. Hinton.

18 Where did you put those letters, Mr. Richardson?

19 MR. RICHARDSON: Right there.

20 MR. DEJONG: Here they are.

21 The 13 of you have sat here patiently and
22 listened since sometime Monday through lunchtime today.
23 You have listened to a lot of things. Basically this
24 case, ladies and gentlemen, boils down to two witnesses.
25 If you take those two witnesses out, there's no gun, there

1 are some fingerprints on a vehicle. They can't even put
2 Mr. Yeargin at the scene without those two witnesses.
3 Now, His Honor, I think will share with you in his charge.
4 And you take the law as you hear it from His Honor, not
5 from me or Mr. Richardson, but I think he will charge you
6 on credibility of witnesses. The believability of
7 witnesses. What do they have to gain from their
8 testimony? What do they have to lose? And there's a bit
9 of a laundry list of things in there that he's going to
10 give you.

11 Now, Ms. Williams was certainly candid in one
12 regard. That said she expected to gain something from her
13 testimony. Ms. Utsey wasn't even that candid. Can
14 someone be so callous, so hard hearted or just an absolute
15 liar to say they're going to come into court voluntarily
16 and testify against their blood brother and have you
17 believe that she does not expect to gain something from
18 it? The same two witness that I submit this case hinges
19 on, please do not forgot they are charged with murder and
20 they are charged with grand larceny. Just a Mr. Yeargin
21 is. Yet, they voluntarily testify. They talk to the
22 solicitor office. Which is normal. Not saying that but
23 certainly they talk to the solicitor's office and they go
24 over their testimony.

25 Now, I'm not going the rehash all the testimony.

1 But here's what I would ask you to remember. Both
2 Ms. Utsey and Ms. Williams talked to the police on the
3 night of September the 21st of 2011 or the morning hours
4 of September the 22nd of 2011. So, if I say the 21st,
5 please take that it could have been after midnight, which
6 I think it probably was. Talked to Detective Dow, talked
7 to Detective Baker. Both of them gave written statements.
8 Neither of them, when they were talking to Detective Dow
9 and Detective Baker, knew at that point in time that they
10 were going to be charged with murder and grand larceny.
11 So, they gave those statements. And basically we heard
12 what those statements were. Now, after the fact,
13 Ms. Williams didn't give another statement except her
14 testimony in court. Ms. Utsey with, her attorney on April
15 the 30th, I believe it was in 2012, decides to go in and
16 talk to law enforcement again.

17 Now, I submit to you that they both know they
18 have been charged with murder and grand larceny. Now,
19 it's time for rubber to meet the road. Now, we've got to
20 come up with a story. You know, this stuff of they were
21 tired, they were sleepy and all of that, that doesn't
22 wash. Some insignificant details you might omit when
23 you're talking to police and they say Tell us what
24 happened that night. Do you omit the part where brother
25 goes to another brother and gets a gun? Do you omit that

1 part? Do you leave that part out?

2 Williams said, He put the gun in the trunk.
3 When she talked to the cops she wasn't sure where the gun
4 was. Not even sure where the gun came from. On the
5 initial statement from Utsey, I don't even believe, you
6 take the testimony as you heard it, but I do not believe
7 that she said anything about where a gun came from. So
8 now it's time for us to cover ourselves and we've got to
9 get out of this mess on murder so we're going to
10 voluntarily testify and come up with the cockamamie story.

11 Now, Mr. Richardson went over these letters.
12 I'm not going over the content of these letters but I'm
13 going to ask you to look at them. Not for the content. I
14 want you to look at three things in these letters. I want
15 you to look at the spelling, sentence structure -- four
16 things, grammar and punctuation. And in looking at that,
17 you look at that and I'm asking you look at it with the
18 view of the sophistication of the person that wrote that
19 letter. I submit to you that letter was written by --
20 those letters was written by a very simple minded person.
21 And yet these two women who are trying to cover their own
22 rear ends at this point in time, come in to you and say
23 that this simple minded person that wrote these letters,
24 came up with this grandiose scheme to steal a car.
25 Remember this, please.

1 According to Utsey, they went to Sean Dinneon's
2 house on the 16th. She didn't testify that Tavish Yeargin
3 said, I want that car, pointing or indicate the Grand
4 Prix. She indicated that the person that she was involved
5 in a relationship with, being Kayla Williams, said, I want
6 that car, I want that car. Now, who came up with the
7 plan? I want that car.

8 Now, they're saying, No, we didn't do this. And
9 the solicitor stands there and says, Tavish Yeargin wanted
10 that car. That's not the testimony you heard. The
11 testimony you heard was that Kayla Williams wanted that
12 car. At one point in time, as I recall the testimony,
13 Kayla Williams actually put the tag of the Mustang on her
14 car -- or excuse me, took the tag off of the Mustang and
15 put on the Grand Prix. He wants the car? I submit that
16 he did not want the car. Kayla Williams wanted that car.
17 I submit to you that Tavish got sucked down into the whole
18 thing by Kayla Williams and Nyia Utsey.

19 And their testimony again, talking about what
20 transpired afterwards. And again, I'm not going to point
21 out all the inconsistencies between the prior
22 statements -- this statement, there were many. But one I
23 founds very fascinating, Kayla Williams said in her
24 statement initially on September the 21st of 2011, that
25 she did not -- when they left the church parking lot and

1 went back to Yeargin and Utsey's momma's house, that she
2 stayed in the car. Yesterday she comes in to you with
3 this great story about how he went in and my client was
4 telling his momma, bragging about how he had shot and
5 killed someone and got her car back and all that stuff.
6 Then Nyia Utsey gets up there and said, No, she never came
7 into the house. So, what do you do when you're charged
8 with murder and larceny? You try to get out of the mess.
9 If that means lying, if it means lying under oath, who
10 cares. I want out of this mess.

11 Now, let's talk a little bit about this idea of
12 murder. The State must have more than a dead body to
13 prove murder. They must have malice aforethought. Think
14 for a moment, ladies and gentlemen, what darkness does to
15 you. Especially what it did to us as children. It brings
16 out a lot of fear and things in the dark look much
17 differently than they do in the daylight hours. On
18 September the 17th of 2011, three -- four people end up in
19 Crosswell Baptist Church parking lot. A Grand Prix with
20 three individuals in it, two women, one man, one man being
21 I believe, the owner of the car. I think that's what was
22 testified to.

23 Now, the State would say, Oh, Tavish Yeargin was
24 going to kill this man. But if he was going to kill the
25 man and they were in this dark parking lot, why would he

1 pull up behind the Grand Prix? Why not just get out and
2 shoot him and kill him? That's not what happened. What
3 happened was, and again, remember at this point in time,
4 if there was indeed a plan to steal the car, Mr. Dinneon
5 was not aware of that. Mr. Dinneon was very intoxicated.
6 He was in the car with two women. And I suspect he was
7 probably quite apparently intoxicated. But now, Williams
8 goes back to get into the car. Where Utsey is, my
9 recollection is not particularly clear. But what Utsey
10 does say is -- well not what she came in and testified to
11 yesterday but in her statement on September 21st of 2011
12 she said, He was grabbing at her. And I don't remember
13 exact words -- well, I think she said something along the
14 lines, He was grabbing at her like he was rapping her. Or
15 trying to rape her.

16 Now, if that's what she saw in the darkness of
17 this parking lot, from her advantage point, which I
18 believe was even closer than Mr. Yeargin's advantage
19 point, what did he see? Did he see this groping, this
20 grabbing as though this intoxicated man was trying to rape
21 Kayla Williams? Is that what he saw? I submit to you,
22 ladies and gentlemen, that is what he saw. And as a
23 result of seeing that, he then pulled, pull the Mustang up
24 beside the Grand Prix. Now, here we get back to the
25 testimony. Utsey said he was within two inches -- the

1 driver's door of the Mustang was two inches, maybe a
2 little more, of the passenger door of the Grand Prix.
3 That doesn't wash. If you take the fact that the Mustang
4 window did not roll down because it wasn't [verbatim]
5 broken according to the testimony. So then they say, Well
6 they opened the door. Well, again, looking at -- and that
7 if it was within two inches or four inches, it's not
8 physically possible that he could have opened the door.

9 Now, Williams on the other hand says, as I
10 recall, that when the Mustang pulled up beside the Grand
11 Prix, it was more like 15 feet from the Grand Prix. And
12 she says Yeargin opened the door.

13 If you have a fully loaded weapon and you intend
14 to kill someone, do you fire one round and stop? Or do
15 you unload the whole weapon? I submit to you, unload the
16 whole weapon. In this case, there's no question, as I
17 recall the testimony, that only one shot was fired.
18 Again, the gun was not recovered. Where ever it went, who
19 knows. One shot was fired.

20 Now, Dr. Fulcher, the pathologist in this case,
21 did bear out some degree, couldn't say it was 15 feet, but
22 the shot was not fired at close range. Now, let's say --
23 I think we can agree it wasn't within two to three inches
24 of the Grand Prix. Again, we're in the darkness of the
25 parking lot. One shot is fired. Let's say in the

1 direction of the Grand Prix. Now, that one shot being
2 fired, does that somehow malice aforethought? I submit it
3 does not. I submit to you that he, he Tavish Yeargin, if
4 he was the one that fired the shot, was simply trying to
5 get Sean Dinneon off of Kayla Williams. And I believe
6 there was testimony that Tavish Yeargin kept saying, Get
7 off of her, get off of her, get off of her. Then a shot
8 was fired. Malice aforethought I say is not there.

9 Additionally to that, ladies and gentlemen,
10 obviously, Sean Dinneon is dead, there's no question about
11 it. The question is, the shot that was fired, number one,
12 I submit to you it was not aimed. I submit to you that
13 there was no intention that he was going to be hit. Now,
14 he was hit but remember this, and this is Dr. Fulcher's
15 testimony. We talked about small caliber weapons. A
16 small caliber round, when it will hit a solid surface, as
17 I recall Dr. Fulcher's testimony, you take it as you heard
18 it. He said that shot broke the clavicle, I guess that's
19 the shoulder bone, I'm not a doctor so I don't know.
20 Somewhere, I think, right side, I'm pointing to the wrong
21 side here. And he agreed that when that round hit the
22 clavicle, that it very conceivably could have started, for
23 one of a better term, rolling around, changing direction,
24 or whatever. Had it been a higher caliber weapon, I would
25 submit it would have hit the clavicle, gone straight

1 through, you would have a entry wound, you would have had
2 and exit wound and that would have been the end of it.
3 So, Dr. Fulcher says, Well it went down, it entered
4 right -- he said chest but I think we agree it was way
5 upper chest, it was the chest. Certainly not the heart,
6 certainly not the head, basically the shoulder.

7 Now, if you're going to kill somebody are you
8 going to shoot them in the shoulder? Now just shoot them
9 one time in shoulder? I submit not. I submit you're
10 talking more. That you're trying to get this guy off of
11 Kayla Williams because you think he's hurting or he is
12 trying to rape her. And again, don't forget, this parking
13 lot is dark. Things look differently. Fear can become
14 much more prevailing in the dark than it can in the
15 daylight hours. Fear to what happens to Kayla Williams.

16 So, I would simply submit to you that that one
17 shot fired, if you have a fully loaded weapon, and I think
18 Utsey said it was fully loaded or loaded not sure if she
19 said it was fully loaded but she did he didn't know how
20 many rounds. Pow, pow, pow, however many rounds but he
21 didn't do that, he shot one time. In the shoulder. The
22 one thing I would submit, if you're shot in the heart and
23 the head. But one time in the shoulder. And I submit he
24 did know where. I submit to you he didn't even know if he
25 had been hit or not at that point in time. So, if you

1 don't if he's been hit, why didn't you unload the whole
2 gun, if you're going to kill him, to steal a car. That
3 does not make sense. Does not make any sense at all.

4 Fingerprints, let's talk about fingerprints.
5 And I'm going to hush here in just a minute. Tavish
6 Yeargin's fingerprints were found on the license plate and
7 on the vehicle. That was a given by the fingerprint guy
8 out of Greenville. What I found equally, if not more
9 interesting, is the location of Kayla Williams'
10 fingerprints on that vehicle. The spoiler, the trunk, the
11 passenger side. As I recall the driver's side. But you
12 take that as you heard the testimony. She wanted the car,
13 her fingerprints were all over the car. He had a
14 fingerprint or fingerprints, excuse me, on the license
15 plate, he had palm print, two palm prints, I think, on the
16 driver's side, exterior of the car. Look at that. Take
17 that into consideration. Who wanted this car? Who put
18 this whole thing together? And who came in to testify?
19 Because their plan, these who women, their plan blew up.
20 They got charged with murder and grand larceny. So, we're
21 going to blame it all on Tavish Yeargin. And that's what
22 they did yesterday when they came in.

23 One little bit of a note on these letters. And
24 reminds me of a lyrics of a song. Letters are written,
25 never meaning to be sent. Maybe these were meaning to be

1 sent but they were never sent. Obviously, were
2 intercepted by law enforcement and Nyia Utsey never got
3 those letters. Second thing that strikes me about the
4 letter from law enforcement's angle is they say they were
5 recovered on Saturday night. They went to box to box to
6 box at the jail and then finally came back to the first
7 guy that put them in the box. Apparently to me, the jail
8 didn't think much about them. Somebody at the midnight
9 hour said maybe we ought to get these to Detective Dow.

10 Some of you may have served on juries before, I
11 don't know. You may have served on a civil jury in which
12 you were told the burden of proof was by the preponderance
13 of the evidence. Preponderance of the evidence. If you
14 put the evidence in a scale, if that scale tips ever so
15 slightly, that's preponderance of the evidence. That is
16 not the burden of proof in a criminal case. The burden of
17 proof in a criminal case is beyond all reasonable doubt.
18 His Honor is going to share with you the definition of
19 reasonable doubt. If you're firmly convinced that the
20 State has carried its burden of proof, then you must find
21 the Defendant guilty. However, if you're not firmly
22 convinced, then you must resolve that lack of firmness on
23 behalf of the Defendant and find him not guilty.

24 Ladies and gentlemen, that is fundamental. Two
25 things are fundamental in this case. One is the

1 presumption of innocence. I am not going to rehash that.
2 His Honor has already shared with you, I don't know if he
3 will charge you again, obviously the Defendant did not
4 testify in this case. That is not to be considered by
5 you. It is not to be talked about by you. The second
6 fundamental thing in this case is beyond a reasonable
7 doubt. The State must prove beyond a reasonable doubt.
8 Not beyond a reasonable doubt that they have a dead body
9 in this case, they must prove beyond a reasonable doubt
10 that there was malice aforethought in that killing.
11 That's what I shared with you Monday. Murder is not
12 always murder. Homicide is not always homicide. They
13 have not born the burden of proof of malice aforethought,
14 which I submit they have not, you must find the Defendant
15 not guilty of murder. Those are rights. Those are rights
16 every citizens in this country has that is charged with a
17 crime. Absolutely, fundamental, most important rights
18 that we can have.

19 A great lawyer in this country one time said,
20 Our rights, your's, mine, everybody's, Our rights are not
21 safe unless we guarantee them to people who are charged
22 with the most heinous crimes. I'm asking you, ladies and
23 gentlemen, protect those rights. The State, you have a
24 dead body, that's a given. You have not proven beyond a
25 reasonable doubt that this shooting was with malice

1 aforethought. And bring back verdicts of not guilty.
2 Thank you so very much for your patience and your time.

3 THE COURT: All right, ladies and gentlemen, the
4 time has come for me to give you the charge on the law.
5 It's going to take about 20 minutes. So, I ask you before
6 I get started, is there anybody who wants to take a break
7 beforehand?

8 There was no response.

9 JURY CHARGE

10 Okay. Good. Ladies and gentlemen, I told you
11 at the very beginning of the case that you have certain
12 duties in the trial of the case and I have certain duties
13 in the trial of the case. Your duty in the trial of the
14 case is to be the judges of the facts in this case. So,
15 you will take all of the evidence and you will make
16 determinations based on the evidence that's presented in
17 this case. That's you're sole and exclusive province. I
18 can't encroach upon that. However, understand that I am
19 the judge of the law in this case. Which means that I am
20 responsible for giving you the law as it relates to the
21 evidence that was presented. You must under your oath
22 accept the law as I give it to you in this case. You may
23 come into this courtroom with certain notions of what you
24 think the law is or what you think the law should be.
25 But I tell you, disregard that. Because under your oath

1 you must accept the law as I give it to you in this case.

2 Now, as I read the law to you in this case,
3 there are going to be certain instances where I start to
4 read. I am reluctant to read a charge because I know that
5 it gets tedious and boring when I do that. It also
6 suggest to you that perhaps I'm either lazy or I'm not
7 very smart. And I don't want to put in the time or the
8 effort to learn the law. But this is serious case. And
9 because it's a serious case for both the State and the
10 Defense and for you, because you put in two and a half,
11 three days on this case, it's important that I get
12 everything right. And I don't want to just tell you what
13 I think off the top of my head but that I tell you precise
14 definitions precisely. So I may revert from reading from
15 time to time, just bear with me.

16 Ladies and gentlemen, as you know in this case
17 there are multiple charges. There are two charges which
18 are before you today. The murder indictment and also the
19 grand larceny indictment. Those are two separate and
20 distinct charges. What that means is you have to consider
21 then separately and distinctly. Consider each one without
22 with regard to the other. What the means is that the
23 State has the burden of proof as I suggested to you. They
24 have the burden of proof of proving each and every element
25 of each individual indictment. So, when you go to your

1 jury room and you begin your deliberations, you consider
2 each indictment and each charge independent of one
3 another. Understand that you can return a verdict on one
4 charge of not guilty and then return a verdict of guilty
5 on the other charge. Or vice versa. You -- it's not
6 necessary that you return the same exact verdict on each
7 indictment. Consider them separately and distinctly. And
8 you determine whether the State has met its burden of
9 proof in this instance.

10 Now, ladies and gentlemen, I told you at least
11 twice in this case, maybe three times, that the Defendant
12 is presumed innocent until proving guilty beyond a
13 reasonable doubt. He retains that presumption of
14 innocence until such time as you determine collectively in
15 your deliberations whether the State has met its burden of
16 proving each and every element of the offense beyond a
17 reasonable doubt. Now, ladies and gentlemen, before you
18 start your deliberations, I'm going to tell you again, in
19 this instance the Defendant elected to exercise his
20 Constitutional right not to testify. That is his
21 Constitutional right. I told you that. You can't hold
22 that against him. You can't hold it against him that he
23 merely elected to exercise a Constitutional right that we
24 all enjoy. You must not consider it. You must not even
25 discuss it in your during deliberations.

1 Now, ladies and gentlemen, I've talked to you
2 about -- I've said reasonable doubt any number of times.
3 So, it's important that I define that for you. And I will
4 tell you that you may have been in other cases or you may
5 have heard of other cases where the burden of proof is
6 either preponderance of the evidence or clear and
7 convincing -- clear -- by clear and convincing evidence.
8 In this case it is neither of those two. Those two are
9 forms of prove that are required in a civil setting, this
10 is a criminal setting. So, this is the highest burden of
11 proof. And it is proof beyond a reasonable doubt.

12 Now prove beyond a reasonable doubt is that
13 doubt -- is that prove which would firmly convince you of
14 the Defendant's guilt. Now, there's nothing in this world
15 we can know with absolute certainty. And the law does not
16 require that the State prove its case beyond any possible
17 doubt. But know, after your analysis of the testimony and
18 evidence in this case, you are firmly convinced of the
19 Defendant's guilt, you must return a verdict of guilty.
20 However, understand that after your review and analysis of
21 the evidence in this case, if you believe there is a real
22 possibility that the Defendant is not guilty, then under
23 your oath you must find him not guilty of the offense.

24 Now, ladies and gentlemen, in determining
25 whether in fact the State has met its burden of proof,

1 you're going to review all of the evidence that was
2 submitted in this case. And one of the things that you're
3 going to review in analyzing evidence is the credibility
4 of witnesses. And you are going to decide who to believe
5 and who not to believe. You will look at the witnesses
6 who took the stand, you saw them testify. You can use
7 your own common sense to look at them and say, what was
8 their body language? What was their facial expressions?
9 How did they say certain things? And you will look at all
10 of that collectively and determine whether you believe
11 them or not? You can also look and determine whether they
12 had anything to gain by function of their testimony.
13 Whether they had anything to gain or whether they had
14 anything to lose. You look at all of that and you apply
15 your common sense to it and you decide whether that
16 testimony was credible or not. Understand that you can
17 look at that testimony, you can take a portion of it and
18 you can decide that it was very credible and then discount
19 another portion of it. Meaning that you don't have to
20 take all of it and just accept it at face value. You
21 decide what's important and what you're going to believe
22 and what you're not going to believe.

23 The same is true with any evidence that you
24 receive in this case. You decide what weight to put on
25 the evidence that was introduced into the record. You

1 decide what's important. You decide what's not important.
2 You put whatever weight on it you think is appropriate
3 based on your analysis of the evidence that was presented
4 in this case.

5 I remind you, ladies and gentlemen, that you did
6 hear from expert witnesses, I've given you a charge on
7 that at least twice. And I would just remind you again
8 that a expert witness is a witness who by function of his
9 or her respective education or experience or expertise is
10 allowed to testify as to opinion witness. However,
11 understand that that witness does not receive any
12 preferential treatment. Just like any other piece of
13 evidence, you put whatever weight on it that you think is
14 appropriate under the circumstances.

15 Now, ladies and gentlemen, ordinarily evidence
16 will take one of two forms. And it's either going to be
17 direct evidence or circumstantial evidence. Now, the law
18 doesn't give preference to either direct or circumstantial
19 evidence. Direct evidence is that type of evidence which
20 immediately establishes the fact to be proven. That is it
21 immediately establishes that like an eye witness who sees
22 something. Direct evidence. Circumstantial evidence is
23 prove of a chain of facts or collateral evidence which
24 when put together proves the main fact to be proven, a
25 chain of facts.

1 So, let me give you an example of it so it will
2 make it perhaps a little bit more concrete for you. Let's
3 say that in a January evening you go to sleep and you walk
4 past your front door and you look out at your front yard
5 and you see that there's no precipitation, it's a clear
6 and blank front yard or parking lot. The next morning you
7 wake up and you walk past that very same window or door.
8 And you look out into your front lawn or parking lot and
9 you see that there's a blanket of snow covering the
10 grounds. Well, when you see that snow you recognize it.
11 You have direct evidence that it snowed that night.
12 Because you can see it. You can pick it up, you can taste
13 it, you can feel it. You can make a snowball out of it.
14 Direct evidence that it snowed last night. But you also
15 see in the snow footprints which led to your door and then
16 lead away. You have circumstantial evidence that someone
17 came to your door early that morning or that night and
18 then left. You don't see the person, you can't touch
19 them, you can't feel them, you can't taste them. But you
20 know because of the timing of when that snow fell, that
21 that person must have come to your door and left early
22 that morning or that night. That is circumstantial
23 evidence.

24 Now, ladies and gentlemen, crimes can be proven
25 by circumstantial evidence. The law makes no distinction

1 between the weight or value to be given to either direct
2 or circumstantial evidence. However, to the extent that
3 the State relies on circumstantial evidence, all of the
4 circumstances must be consistent with each other. And
5 when taken together point conclusively to the guilt of the
6 accused beyond a reasonable doubt. If these circumstances
7 merely portray the Defendant's behavior as suspicious, the
8 proof has failed. The State has the burden of proving the
9 Defendant guilty beyond a reasonable doubt. The burden
10 rests with the State regardless of whether the State
11 relies on direct or circumstantial evidence or a
12 combination of the two.

13 Now, ladies and gentlemen, I'll read a portion
14 to you but I'll sit down to do it for you. As I suggested
15 to you there are two indictments which you must consider
16 in this case. The first is murder. And I will read you
17 the law on the definition of murder. The State must prove
18 beyond a reasonable doubt that the Defendant killed
19 another person with malice aforethought. Malice is
20 hatred, ill will or hostility towards another person. It
21 is the intentional doing of a wrongful act without just
22 cause or excuse and with an intent to inflict an injury or
23 undue circumstances that the law will infer an evil
24 intent. Malice aforethought does not require that malice
25 exist for any particular time before the act is committed.

1 But malice must exist in the mind of the Defendant just
2 before and at the time the act is committed. Therefore,
3 there must be a combination of the previous evil intent in
4 the act. Malice aforethought may be expressed or
5 inferred. These terms expressed and inferred do not mean
6 different kinds of malice but merely the manner in which
7 malice may be shown to exist. That is entirely by direct
8 evidence or by inference from the facts and circumstances
9 which are proved. Expressed malice is shown when a person
10 speaks words which express hatred or ill will for another.
11 Or when a person prepared beforehand to do the act which
12 was later accomplished.

13 For example, lying in wait for a person or any
14 other acts of preparation going to show that the deed was
15 within the Defendant's mind would be expressed malice.
16 Malice may be inferred from conduct showing a total
17 disregard for human life. The law says if one
18 intentionally kills another during the commission of a
19 felony, the implication of malice may arise. If facts are
20 proven beyond a reasonable doubt sufficient to raise an
21 inference of malice to your satisfaction, this inference
22 would simply be an evidentiary fact to be take into
23 consideration by you along with all other evidence in the
24 case. And you may give it the weight that you decide it
25 should receive. I charge you that under the law in the

1 State of South Carolina grand larceny is a felony.

2 Ladies and gentlemen, the Defendant is also
3 charged with the grand larceny. The State must prove
4 beyond a reasonable doubt that the Defendant took and
5 carried away the property of another against the will or
6 without the consent of the other person. The slightest
7 removal of the property or the complete possession of the
8 property, even for an instance, by the Defendant is enough
9 to show that the taking and carrying away of the property.
10 The State must also prove beyond a reasonable doubt that
11 the Defendant intended to permanently deprive the owner of
12 the property. Finally, the State must prove that the
13 value of the thing taken was \$2,000 or more.

14 Y'all had the opportunity to look at those
15 verdict forms?

16 MR. DEJONG: I have, Your Honor. No objection,
17 Your Honor.

18 MR. RICHARDSON: None from the State.

19 THE COURT: All right.

20 Ladies and gentlemen, I have here two verdict
21 forms. As I suggested to you before, you have two
22 charges. You consider them independent of one another.
23 So, I have a verdict form for the grand larceny and I have
24 one for the murder as well. And in substance what this
25 says is, We, the jury, duly impaneled, enter the following

1 unanimous verdict. As to grand larceny, we find the
2 Defendant, two options, not guilty or guilty. And then
3 your signature. The other one for the murder is the exact
4 same. So, what you will do is you will return to your
5 jury room and you will deliberate. In your deliberations
6 you decision must be based on the evidence that was
7 presented in this trial. It can't be based on passion or
8 prejudice or any emotion or anything outside of what you
9 heard in this courtroom. It must be reasoned and
10 calculated based on the evidence that was presented at
11 trial. Also, your verdict must be unanimous. That is the
12 12 of you must agree on the verdict. Can't be 11 to one
13 or 10 to two or any other combination that had up to 12.
14 It must be a unanimous verdict.

15 Now, I'm going to send you back to your jury
16 room. And I'm going -- I'm not going to tell you to start
17 deliberating yet. Because I'm going to give the attorneys
18 the opportunity to correct anything that I may have said.
19 Or to tell me that I have left something important out.
20 So, if I, in fact, have misstated something or if I left
21 something out, then I will bring you back out and I'll
22 recharge you. Otherwise, if there are no exceptions, then
23 what I will do is I will send back to you these verdict
24 forms. And I will send back to you the evidence that was
25 presented in this case for your review and give you

1 instructions to begin your deliberations. So, with that
2 having been said, I ask you to retire to your jury room.

3 (WHEREUPON, the jury came into open court at
4 approximately 2:38 p.m.)

5 THE COURT: All right, exceptions to the charge?

6 MR. RICHARDSON: No objections from the State.

7 THE COURT: Okay.

8 MR. DEJONG: None as you charged, Your Honor.

9 But I would renew my request for the defense of others and
10 for involuntary manslaughter.

11 THE COURT: Okay. Good enough. You're
12 protected on the record in that regard from my
13 perspective, at least. And I respectfully deny the same.

14 I am going to -- I'm going hand these to the
15 Clerk. I am going to instruct the Bailiff to send to me
16 Ms. Chelsea James, juror number 76, the alternate. And
17 I'm going to release her from chambers. Okay. All right.
18 So, we'll be in recess until such time as we receive a
19 verdict. You can collect -- y'all can do an inventory of
20 the exhibits, make sure that everything is there. Hand
21 them the Bailiff.

22 And when you receive them, First Sergeant, you
23 can tell them to begin their deliberations.

24 THE BAILIFF: Yes, sir.

25 THE COURT: And would you send, please, to me

1 Ms. Chelsea James, the alternate.

2 (WHEREUPON, deliberations began at
3 approximately 2:54 p.m.)

4 (WHEREUPON, court was in recess awaiting a
5 verdict.)

6 THE COURT: All right, ladies and gentlemen, I'm
7 advised that we have a verdict.

8 The parties ready to receive the verdict?

9 MR. RICHARDSON: State's ready, Your Honor.

10 THE COURT: Ready to receive the verdict,
11 Mr. DeJong?

12 MR. DEJONG: We are, Your Honor.

13 THE COURT: Bring the jury in, please.

14 (WHEREUPON, the jury came into open court at
15 approximately 4:11 p.m.)

16 THE COURT: All right, Ms. Murphy, has the jury
17 reached a unanimous verdict on both charges?

18 MADAM FORELADY: Yes, sir.

19 THE COURT: Okay. Would you hand the same to
20 the Clerk of Court, please.

21 All right, Mr. Welborn, if you would please
22 publish the verdicts.

23 VERDICT

24 THE CLERK: This is case number 2011-GS-39-2149,
25 we, the jury, duly impaneled sworn to try this issue in

1 the above-entitled cases enter the following unanimous
2 verdict. To the charge of grand larceny, we, the jury,
3 find the Defendant, Mr. Tavish Yeargin, guilty.

4 This is case number 2011-GS-39-2148, we, the
5 jury, duly impaneled sworn to try this issue in the
6 above-entitled cases enter the following unanimous
7 verdict. To the charge of murder we, the jury, find that
8 Mr. Tavish Yeargin, guilty.

9 Is this is your verdict and still your verdict?
10 So say you all by raising your right hand.

11 (WHEREUPON, all members of the jury panel raised
12 their right hand.)

13 THE CLERK: Thank you, very much.

14 THE COURT: Anything further from this jury,
15 gentlemen?

16 MR. RICHARDSON: Nothing from the State, Your
17 Honor.

18 MR. DEJONG: Nothing from the Defense, Your
19 Honor.

20 THE COURT: Thank you, very much.

21 All right, ladies and gentlemen, I thank you for
22 your service on this case. I know it's difficult, it's a
23 difficult decision. I'm going to release you from jury
24 duty and ask you to call back tonight after 18 -- six
25 o'clock, not 18:00, okay. Before I release you what I'm

1 going to ask you just return to your jury room and I'm
2 going to come back and thank you a little less formally
3 and give you the opportunity to ask me questions that you
4 may have.

5 Counsel, I will proceed to sentencing after I've
6 spoken to them and released them informally. I'll come
7 right back in. I'll be less than ten minutes.

8 (WHEREUPON, the jury left into open court and
9 was excused at approximately 4:13 p.m.)

10 (WHEREUPON, a short break was taken.)

11 THE COURT: All right, gentlemen, if you'd come
12 forward for sentencing, please.

13 All right, Mr. Richardson, I've heard all the
14 facts in this case and received the jury's verdict. Is
15 there anything that you would like to add that bears upon
16 sentencing?

17 MR. RICHARDSON: I would, Your Honor. First,
18 I'm going to speak but the victims' family who live out of
19 state have given my victim advocate a statement to read at
20 the appropriate time. As far as we on behalf of the
21 State, Your Honor, this Defendant in October of 2005 was
22 convicted of burglary in second degree and a failure to
23 stop. He received a activity YOA sentence. He did in
24 2006 have a breach of trust, that's a Magistrate's Court
25 level offense, Your Honor.

1 THE COURT: Yes, sir.

2 MR. RICHARDSON: And then in 2027 he had six
3 counts of fraudulent checks. And then most disturbing,
4 Your Honor, is in November of 2006, he was convicted in
5 Federal Court of bank robbery and unlawful possession of a
6 firearm in which he received a 37 month sentence.

7 Your Honor, when the legislature set forth the
8 sentencing guidelines in this particular case, that being
9 30 years to life, it is my belief that the intent of the
10 legislature in doing that is for a life sentence to be
11 given in this type of circumstance. We have an individual
12 that's flaunted the law, has done violent crimes in the
13 past. He has also in this case, evidence didn't come out,
14 but we would allege that he did a bank robbery in
15 conjunction to all of this when he was on the get away.
16 That, of course, didn't come out to the jury but at this
17 time I would ask that, Your Honor, take that into
18 consideration. He's done another bank robbery on top of
19 this one he was convicted of in 2006. So, Your Honor, on
20 behalf of the State, we would respectfully ask for a
21 sentence of life.

22 THE COURT: Okay. All right.

23 I'll be happy to here from the Victim's family.

24 VICTIM'S ADVOCATE: Yes, Your Honor, Brittany
25 Roper from the Solicitor's Office.

1 THE COURT: Yes, ma'am.

2 VICTIM'S ADVOCATE: The family of Sean Dinneon
3 has asked that I address the Court on their behalf today.
4 His mother, Patricia Kinney, sister, Cassie Davenport and
5 daughter, Stephanie Dinneon, wanted to be here for the
6 trial. But unfortunately they live on the West coast and
7 were unable to be here due to travel constraints. They
8 ask Your Honor not to take their absence in court this
9 week as a lack of concern or interest in this case. They
10 continue to suffer from the loss of their father, their
11 son and their brother. Sean's mom wanted to express her
12 sorrow not only for the loss of her son but also for this
13 Defendant's mother and what she's going through because of
14 the actions of her son. The family respectfully asks,
15 Your Honor, to sentence this Defendant accordingly and
16 hopefully give Sean's family some semblance of closure.
17 Thank you.

18 THE COURT: Okay, thank you. All right.

19 Anything further from State?

20 MR. RICHARDSON: Nothing further, Your Honor.

21 THE COURT: Mr. DeJong, I'll be happy to hear
22 from you.

23 MR. DEJONG: Your Honor, a little late in the
24 game, we sort of went right into sentencing. But for the
25 record, even though we're half way through sentencing --

1 THE COURT: Yes, sir.

2 MR. DEJONG: -- at this point in time. For the
3 record, Your Honor, I would move the Court for a new trial
4 based on the fact that, in my opinion, the evidence does
5 not substantiate the verdict, Your Honor.

6 THE COURT: All right, sir, I respectfully
7 consider your motion in this case and deny the same.

8 MR. DEJONG: Thank you, Your Honor.

9 With regard to Mr. Yeargin, Your Honor, he's now
10 27 years of age. Prior to his arrest he did live in
11 Greenville. I think that probably came out through the
12 testimony. He had lived with his sister in Greenville for
13 four years and her two children. He is single, he has no
14 children. He was last employed at Michelin Warehouse. He
15 worked there for about two years. Worked there -- I
16 believe he loaded tires, if I can read my handwriting.
17 Eleventh grade education, no GED and attended Woodmont
18 High School. You've heard his prior record, Your Honor.
19 You heard the facts and obviously we have heard the
20 verdict of the jury. I would add, Your Honor, that he
21 lived in Greenville. Lived in this area all of life. His
22 father died before my client was born as a result of
23 motorcycle accident. His mother lives in Greenville, his
24 sisters live there. Three sisters, all live in
25 Greenville. They are younger. To his benefit, he never

1 failed to appear for court, Your Honor.

2 He has been in jail since September 21st or
3 22nd, albeit some in North Carolina prior to him waiving
4 extradition and coming down here. But he has been
5 continuously in jail since September the 21st of 2011. He
6 is a young man, Your Honor. Certainly he has a record.
7 The armed robbery or bank robbery, however they
8 characterized it, I'm not sure, obviously happened when he
9 was relatively young and he got a YOA for that. I'm not
10 sure if he was actually convicted of armed robbery or not
11 or pled to armed robbery. I questioned that a little bit
12 since he got a YOA. But the law has changed like
13 quicksand and I can't keep up with it.

14 But he is young, Your Honor. He does have
15 potentially some life ahead of him depending upon Your
16 Honor's sentence. I would ask the Court not to give him a
17 life sentence. But at least give him something, whatever
18 you have to give him, 30 years or over as, Your Honor, is
19 very well aware, he has to serve it day for day without
20 any eligibility for parole or early release. So, I would
21 ask the Court to take all that into consideration.

22 THE COURT: All right, Mr. DeJong, thank you.

23 Mr. Yeargin, anything you'd like to say, sir?

24 MR. YEARGIN: No, sir.

25 SENTENCING

1 THE COURT: Mr. Yeargin, it's indeed unfortunate
2 and regrettable that we find ourselves here today. This
3 was a tragic situation. And it had tragic consequences
4 for if Victim in this case and it had tragic consequences
5 for your co-defendants. But again, unfortunately,
6 regrettably it has tragic consequences for you as well.
7 This was a cold and calculated decision that you made.
8 And you assumed a when you under took this enterprise.
9 And when you shot the individual, whether you meant to
10 kill him or not, I don't know. But certainly, certainly
11 your actions caused the death of the Victim in this case.

12 Sentence of the Court is that you be committed
13 to the Department of Corrections for a period of 60 years.
14 Concurrent, credit for time served. On your grand
15 larceny, sentence of the Court is that you be committed to
16 the Department of Corrections for five years. Concurrent,
17 credit for time served. Good luck to you, sir.

18 MR. DEJONG: Thank you, Your Honor.

19 MR. RICHARDSON: Thank you, Your Honor.

20 (WHEREUPON, the proceedings were concluded.)
21
22
23
24
25

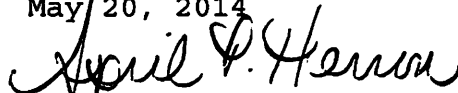
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
General Sessions for Pickens County, South Carolina, on
the 18-20 day of November, 2013.

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

May 20, 2014



APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Robin B. Stilwell, Circuit Court Judge

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JUL 28 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TAVISH DOMINIQUE YEARGIN,

APPELLANT

APPELLATE CASE NO. 2013-002508

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in refusing to charge the jury on “defense of others” in light of testimony that at the time of the shooting the deceased was heavily intoxicated and was in the driver’s seat of a moving vehicle on top of a woman, grabbing her arm firmly enough to cause bruising and struggling with her in a manner suggesting a rape attempt?

- II. Did the trial court err in refusing to charge the jury on involuntary manslaughter in light of evidence that Appellant Tavish Yeargin reasonably believed it was necessary for him to draw a weapon due to a physical altercation posing a risk of serious bodily harm, but may not have intended to fire the weapon?

- III. Did the trial court err in admitting into evidence letters Yeargin attempted to send to a witness concerning the witness’s testimony at trial, where such letters did not contain any unlawful threats or solicit false testimony and were never received by the witness?

STATEMENT OF THE CASE

Appellant Tavish Yeargin was indicted by a Pickens County Grand Jury for Murder and Grand Larceny, along with two co-defendants, Kayla Williams and Nyia Utsey. On November 18-20, 2013, a jury trial was held before the Honorable Robin B. Stilwell on the charges against Yeargin. Williams and Utsey testified for the State at Yeargin's trial. At the close of the evidence, Judge Stilwell sent the case to the jury after denying defense motions to charge the jury on the law of defense of others and involuntary manslaughter. (R. p. 315, line 13 – p. 318, line 17; p. 330, lines 5-13.) Yeargin was convicted on both counts and sentenced to 60 years on the Murder count. Williams and Utsey eventually pled guilty to reduced charges. This direct appeal is taken from Yeargin's convictions. He seeks a new trial.

STATEMENT OF FACTS

On Saturday, September 17, 2011, Sean Dinneen was shot in the parking lot of the Crosswell Baptist Church in Easley, South Carolina. The shooting allegedly arose out of an altercation involving Dinneen, Williams, Utsey and Yeargin. Dinneen died from the single gunshot wound he received that evening. (R. p. 296, line 20 – p. 298, line 25.) Four days later, Williams, Utsey and Yeargin were located and arrested at a hotel in Asheville, NC, and each was charged with murder and grand larceny. (R. p. 94, lines 3-11; p. 130, line 24 – p. 132, line 16.) Yeargin's case went to trial first, and he exercised his right not to testify.

There were no witnesses to the immediate sequence of events that led to Dinneen's death other than Williams and Utsey. Both were facing murder charges at the time they testified for the State at Yeargin's trial. After the testimony was given, and Yeargin was convicted, Williams and Utsey were permitted to plead to lesser charges, receiving sentences that were a small fraction of what Yeargin received. *State v. Williams*, No. M521464; *State v. Utsey*, No. M521463, Pickens County General Sessions Court. Consequently, the evidence submitted to the jury, and the foregoing Statement of Facts, derives almost entirely from the highly self-interested testimony of State's witnesses Williams and Utsey.

In September 2011, Williams was in an intimate relationship with Utsey, and they were living together with Utsey's three-year old son. (R. p. 137, lines 16-25; p. 201, line 25 – p. 202, line 14.) Neither was working, and their sole means of transportation was a blue Ford Mustang that belonged to Williams' grandfather. (R. p. 138, lines 14-15; p. 204, lines 5-7.) Williams' right to use the vehicle was disputed, and other members of her family were attempting to get it back. (R. p. 203, line 21 – p. 204, line 11.) Williams wanted to get rid

of the Mustang as soon as possible because she was concerned that her family would report it stolen and the police would be looking for it. (R. p. 243, line 20 – p. 244, line 4.) Williams had a telephone conversation with Yeargin, who is Utsey's brother. (R. p. 204, lines 11-25.) Williams and Yeargin discussed the possibility of getting a vehicle from Yeargin's former roommate Dinneen, who was trying to sell two cars. (Id.)

On Friday, September 16, 2011, Williams drove to Dinneen's home in Easley with Utsey in the passenger seat and Yeargin in the back seat. (R. p. 208, line 22 – p. 209, line 8.) However, Dinneen was not home. (R. p. 210, line 24 – p. 211, line 2.) Williams, Utsey and Yeargin looked at Dinneen's vehicles, which were parked outside. (R. p. 210, lines 17-19.) When Williams saw a 2006 Pontiac Grand Prix parked outside Dinneen's residence, she exclaimed "ooh, ooh, I want that car, I want that car." (R. p. 210, lines 20-21; p. 242, lines 12-21.)

The following night, Saturday, September 17, 2011, Williams again drove to Dinneen's house, this time with Utsey in the passenger seat and Yeargin and his brother Charles in the back seat. (R. p. 151, lines 2-9; p. 153, lines 12-18.) They planned to tell Dinneen they wished to test-drive the vehicles, and then to take them. (R. p. 153, line 22 – p. 154, line 12.) Dinneen was not at home when they got to his house, but he arrived shortly thereafter. (R. p. 157, lines 6-19.)

Williams and Utsey talked to Dinneen while Yeargin stayed in the back seat of the Mustang. (Id.) Charles initially got out of the car but then began walking away from the conversation. (R. p. 157, lines 19-23.) He became uncomfortable with the idea of stealing the cars and did not want to be involved. (R. p. 157, line 23 – p. 158, line 5.) Apparently realizing that Charles might jeopardize their plans, Williams and Utsey then told Dinneen

they would need to use the restroom at a nearby gas station and return in a few minutes. (R. p. 221, lines 11-17.) When they got to the gas station they left Charles there and returned to Dinneen's house. (Id.)

When Williams, Utsey and Yeargin returned to Dinneen's house, Williams and Utsey again approached Dinneen about taking a test drive. Dinneen started the Grand Prix and got into the back, with Williams driving and Utsey in the passenger seat. (R. p. 224, line 16 – p. 225, line 8.) By all accounts, Dinneen was heavily intoxicated and brought with him a bottle of malt liquor. (R. p. 8, lines 22-25; p. 163, line 21 – p. 164, line 6; p. 225, lines 9-14; p. 302, lines 13-17.) Williams began driving the Grand Prix, with Yeargin following in Williams' grandfather's blue Mustang. (R. p. 225, lines 5-25.) Williams claims she was continuously looking back to Yeargin and following his turn signals. (R. p. 164, line 24 – p. 165, line 7.) However, Williams eventually decided to stop following Yeargin's directions and pulled into the Crosswell Baptist Church parking lot. (R. p. 165, lines 11-17; p. 226, lines 1-5.) Yeargin, in the Mustang, pulled in behind the Grand Prix. (R. p. 226, lines 11-18.)

Utsey got out of the Grand Prix and walked back to where Yeargin was parked in the Mustang. (R. p. 226, lines 19-21.) Utsey claims Yeargin told her that Williams should get back on the road and keep driving. (R. p. 226, line 22; p. 257, lines 8-11.) Utsey then returned to the Grand Prix and Williams got out and walked back to talk with Yeargin. (R. p. 166, line 21.) According to Williams, Yeargin told her to get back in the Grand Prix. (R. p. 167, lines 14-17; p. 193, lines 20-23.) During this time, Dinneen got out of the back seat and began making his way to the driver's side of the Grand Prix, stumbling due to his intoxication. (R. p. 167, lines 2-10; p. 227, lines 21-24.) When Williams saw Dinneen

move toward the driver's side, she ran back to the Grand Prix. (R. p. 167, lines 18-19; p. 228, lines 1-2.)

Williams and Dinneen each attempted to get into the driver's side of the Grand Prix before the other. Williams got in first and Dinneen jumped on top of her. (R. p. 167, lines 18-25; p. 228, lines 4-14.) They began to fight over control of the car. (Id.) Dinneen was on top of Williams and was grabbing her arm forcefully enough to cause bruising. (R. p. 167, line 24 – p. 168, line 7; p. 194, lines 2-21.) As Utsey later told the police, it appeared that Dinneen was trying to hurt or even rape Williams. (R. p. 255, line 12 – p. 256, line 3.) During the struggle, Williams managed to get the car moving, with the lower half of Dinneen's body hanging out the driver's side. (R. p. 169, lines 9-14; p. 194, line 22 – p. 195, line 8; p. 228, lines 23-25.) At some point during the struggle, Dinneen's shoe came off and he threw the glass bottle, smashing it on the pavement. (R. p. 126, line 22 – p. 127, line 7; p. 228, lines 15-25.)

As the heavily intoxicated Dinneen was on top of Williams, fighting with her in a manner Utsey perceived to be a possible rape attempt, Yeargin, driving the Mustang, pulled alongside the passenger door of the Grand Prix, opened the door of the Mustang, and shouted at Dinneen to get off of Williams. (R. p. 230, lines 3-4; p. 258, line 13 – p. 259, line 21.) Dinneen refused, and Yeargin pointed a gun out the open car door of the Mustang toward Dinneen. (R. p. 169, lines 1-7; p. 230, lines 3-7.) Dinneen continued struggling with Williams and told Yeargin to go ahead and shoot. (R. p. 169, line 7; p. 230, lines 5-6.) A shot was fired, striking Dinneen in the shoulder. (R. p. 57, line 18; p. 169, lines 8, 17-19; p. 230, lines 17-22; p. 296, line 20 – p. 297, line 2.) Williams immediately threw Dinneen out

into the parking lot and quickly drove away by herself in the Grand Prix. (R. p. 170, lines 5-16; p. 230, line 23 – p. 231, line 3.)

Eventually, Yeargin and Utsey caught up with Williams and they switched vehicles, with Williams and Utsey returning home in Williams' grandfather's Mustang and Yeargin driving the Grand Prix. (R. p. 170, line 17 – p. 171, line 8; p. 231, line 22 – p. 232, line 8.) By the following day, news accounts disclosed that Dinneen had died. (R. p. 234, line 24 – p. 235, line 5.) Williams and Utsey retrieved their security deposit at the InTown Suites where they had been living and left the Greenville area with Yeargin in the Mustang, abandoning the Grand Prix. (R. p. 175, lines 4-12; p. 236, line 12 – p. 237, line 5.) They were nearly apprehended at a Wal-Mart in Travelers Rest, South Carolina, but Williams, driving the Mustang, was able to evade law enforcement. (R. p. 239, line 4 – p. 240, line 12; p. 262, line 16 – p. 263, line 14.) On the evening of September 21, 2011, all three were located at a hotel in Asheville, where Williams and Utsey were staying in one room and Yeargin in another. (R. p. 94, lines 3-11; p. 130, line 24 – p. 132, line 16; p. 181, line 9 – p. 182, line 6; p. 240, line 16 – p. 241, line 14.) Williams and Utsey gave statements to the police and all three were later charged with murder and grand larceny. (R. p. 96, lines 1-9.)

ARGUMENT

- I. **The trial court erred in refusing to charge the jury on “defense of others” in light of testimony that at the time of the shooting the deceased was heavily intoxicated and was in the driver’s seat of a moving vehicle on top of a woman, grabbing her arm firmly enough to cause bruising and struggling with her in a manner suggesting a rape attempt.**

- a. **Standard of Review**

The law to be charged is determined from the evidence presented at trial. *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial. *Fairchild v. S. Carolina Dep’t of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012).

- b. **A “Defense of Others” Charge Was Warranted**

The evidence at trial supported a jury charge on defense of others. “Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense.” *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). To establish self-defense, a defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. *Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997); *State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 451 (1996).

The touchstone of a defense of others claim is the requirement that the defendant reasonably believe another person is in imminent danger of sustaining serious injury. It is not necessary that other witnesses have such belief or that, viewing the evidence after the fact, the defendant's belief turns out to have been correct. *Maye v. State*, 49 So.3d 1124, 1132 (Miss. 2010) (defendant is entitled to act based on "the facts of the case as they reasonably appeared to him"); *State v. McNeil*, 109 P.3d 1125, 1128 (Idaho Ct. App. 2005) (defendant may act "under the reasonable belief that a third person is in imminent danger of violent injury"); *State v. Augustin*, 63 P.3d 1097, 1098 (Hawaii 2002) (it is error to evaluate the reasonableness of a defendant's viewpoint based on circumstances "shown in the evidence" but of which the defendant was not aware).

The decision to stop in the parking lot of the Crosswell Baptist Church was not made by Yeargin. (R. p. 165, lines 11-17; p. 226, lines 1-5.) He specifically told both Utsey and Williams to get back in the Grand Prix and keep driving. (R. p. 167, lines 14-17; p. 193, lines 20-23; p. 226, line 22; p. 257, lines 8-11.) He took no steps to identify himself to Dinneen, confront Dinneen or forcibly remove Dinneen from the Grand Prix. In short, the evidence strongly indicates that Yeargin's intention was to avoid a confrontation in the church parking lot. These circumstances are clearly adequate to establish a jury question as to whether Yeargin was "without fault in bringing on the difficulty."¹ *State v. Frazier*, 401

¹ While it is true that Williams and Utsey blame Yeargin for planning the theft of the Grand Prix and bringing the gun, such testimony must be viewed with considerable skepticism in light of Williams' and Utsey's motive to minimize their roles and exaggerate Yeargin's. Moreover, a defendant can arm himself lawfully even if he is unlawfully in possession of a firearm. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). Even if Yeargin had an ulterior motive for following the Grand Prix, and even if he unlawfully brought a loaded gun with him, he still could have acted lawfully in arming himself when subsequent events required that he act in defense of others. *Id.*

S.C. 224, 235, 736 S.E.2d 301, 307 (Ct. App. 2013) (self-defense charge should have been given where “there is evidence in the record from which a jury could find [defendant’s] conduct was not reasonably calculated to bring on the difficulty”).

When the confrontation did occur, Yeargin did not immediately insert himself into it. Rather, he acted only after seeing a violent and dangerous struggle develop between Dinneen and Williams. Witness testimony established that Dinneen was heavily intoxicated and was on top of Williams, behaving as though he was trying to hurt or rape her. (R. p. 255, line 12 – p. 256, line 3.) Dinneen was holding a 40-ounce bottle (which he then threw at some point during the altercation), was attempting to throw Williams out of the moving vehicle, and was grabbing her arm hard enough to cause bruising. (R. p. 167, line 24 – p. 168, line 7; p. 194, lines 2-21; p. 228, lines 15-21; p. 229, lines 23-24.) The physical evidence demonstrated that Dinneen’s shoe came off during the struggle and that the vehicle traveled more than 40 feet further, based on the location of Dinneen’s body. (R. p. 110, lines 14-20; p. 228, lines 23-24.) This suggests that the vehicle must have been moving both before and after the shoe came off. Thus, by the time Yeargin pulled up alongside the passenger side of the Grand Prix, there were numerous circumstances suggesting a risk of serious injury or death to Williams.

Despite the imminent danger, Yeargin had the presence of mind to shout to Dinneen to get off of Williams. (R. p. 230, lines 3-4; p. 258, line 13 – p. 259, line 21.) Notably, he did not order Dinneen to “get out of the car,” as he presumably would have if his only interest were to steal the car. Rather, his instruction to Dinneen merely to get off of Williams suggested his immediate concern was to prevent injury to Williams rather than eject Dinneen from the vehicle.

Only when Dinneen flatly refused to discontinue his struggle with Williams did Yeargin fire the gun. He fired a single shot at Dinneen's shoulder. (R. p. 57, line 18; p. 259, lines 22-24.) Once again, if Yeargin was firing the weapon to kill Dinneen and facilitate the theft of the Grand Prix, it is unlikely he would have fired only once or shot at Dinneen's shoulder rather than his head or chest. It is also far more likely Yeargin would have shot Dinneen when Dinneen was outside the vehicle, which would have offered a clearer shot, avoided the risk of injury to others in the vehicle, and avoided the possibility of damage to the vehicle.

In short, there is ample evidence to suggest that Yeargin did not have any plan or intent to shoot Dinneen, but did so only when it became apparent, based on the violent struggle between Dinneen and Williams, that Williams might be severely injured or killed. The jury should have had the benefit of an accurate instruction on the law of defense of others so as to properly resolve this issue.

By failing to instruct the jury on defense of others, the trial court deprived Yeargin of a critical defense strategy. The evidence in this case reflected that whatever the ultimate plan may have been with respect to Dinneen's vehicle, and whatever role (if any) Yeargin might have had in formulating that plan, things went off course very quickly in the church parking lot. There is no evidence that Yeargin planned to initiate a deadly assault on Dinneen by shooting into the Grand Prix. Thus, the jury's task in this case was, in large part, to determine Yeargin's culpability for his actions in response to events that he had not planned. Refusing to charge the legal standard for defense of others, especially combined with the charge that the jury could infer malice from the fact that the shooting occurred in connection with the commission of a felony, was the

functional equivalent of telling the jury that Yeargin could be found guilty of murder even if all he was doing was trying to prevent serious injury to Williams. Based on the charge it received, the jury could very well have believed that if Yeargin participated in a plan to steal the vehicle, he was criminally responsible for whatever happened in the church parking lot no matter what his reason may have been for firing the gun.

The trial court's failure to charge defense of others is especially prejudicial to Yeargin because the State would have borne the burden of proof on that issue. The State bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). When a self-defense charge is warranted, the charge must include language making clear that the State bears this burden. *State v. Burkhardt*, 350 S.C. 252, 260-64, 565 S.E.2d 298, 302-04 (2002); *State v. Addison*, 343 S.C. 290, 293, 540 S.E.2d 449, 451 (2000). Given that defense of others is an outgrowth of self-defense, the State should likewise bear the burden to disprove defense of others beyond a reasonable doubt. Although there is no authority directly on point in South Carolina, this appears to be the rule elsewhere. *See, e.g., Duckett v. State*, 966 P.2d 941, 948 (Wyo. 1998) (prosecution must disprove defense of others beyond a reasonable doubt where the defense is raised and reasonably supported by the evidence); *State v. Acosta*, 939 P.2d 1081, 1087-88 (N.M. Ct. App. 1997) (same); *Barone v. State*, 858 P.2d 27, 29 (Nev. 1993) (same); *Commonwealth v. Monico*, 373 Mass. 298, 304, 366 N.E.2d 1241, 1244 (1977) (same). Failure to charge defense of others was clearly prejudicial.

II. The trial court erred in refusing to charge the jury on involuntary manslaughter in light of evidence that Appellant Tavish Yeargin reasonably believed it was necessary for him to draw a weapon due to a physical altercation posing a risk of serious bodily harm, but may not have intended to fire the weapon.

a. Standard of Review

A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. *State v. Chatman*, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). If there is any evidence from which the jury could infer the defendant committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense. *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004).

“Importantly, our courts have long emphasized that to warrant a court’s eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010) (emphasis in original; citations omitted). When a defendant is being tried for murder, and there is any evidence warranting a charge on involuntary manslaughter, the charge must be given. *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). *See also, State v. Battle*, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (Ct. App. 2014) (“our jurisprudence makes clear that when determining whether a charge on involuntary manslaughter is proper, the trial court must look to the presence of evidence, not its weight”).

b. An Involuntary Manslaughter Charge Was Warranted

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause

death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); *State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). For purposes of the second prong of this standard, a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

In this case, there is evidence supporting a reasonable inference that the shooting was not intentional but at worst the product of reckless disregard for the safety of others. *See, State v. Crosby*, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003) (involuntary manslaughter must be based on “a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others”). Yeargin did not make the decision to stop at the church parking lot. He told both Utsey and Williams to get back in the Grand Prix and keep driving (R. p. 167, lines 14-17; p. 193, lines 20-23; p. 226, line 22; p. 257, lines 8-11), most likely in an effort to avoid precisely the confrontation that occurred. There is evidence that Yeargin took steps to avoid the altercation and that assaulting Dinneen was never his intention, but was instead the product of his hasty reaction to the struggle between Williams and Dinneen. This is distinct from the majority of cases involving the denial of an involuntary murder charge as a lesser included offense, which typically involve evidence of the defendant’s prior intention to use a weapon to injure the victim. *See, e.g., State v. Cabrera-Pena*, 361 S.C. 372, 383–84, 605 S.E.2d 522, 528 (2004) (appellant not entitled to involuntary manslaughter charge where he armed himself with a deadly weapon and waited to confront victim); *State v. Hinson*, No. 2014-UP-113, 2014 WL 2582763, at *4 (S.C. Ct. App. Mar.

19, 2014) (denying involuntary manslaughter charge where “[e]arlier on the day of the shooting, Appellant exchanged murderous threats with Victim in front of Victim's house”). The evidence concerning the events leading to the shooting in this case establishes that Yeargin did not want to confront Dinneen in the church parking lot (or anywhere else) and that he tried to convince Utsey and Williams to drive away before a confrontation took place.

Yeargin did not draw a weapon until after the altercation between Dinneen and Williams had reached the point of creating a risk of serious bodily harm. Specifically, from Yeargin’s perspective, the following events had occurred immediately before he pulled the Mustang alongside the Grand Prix and drew his weapon:

- (1) Dinneen, heavily intoxicated, had jumped on top of Williams (R. p. 167, lines 18-25; p. 228, lines 4-14);
- (2) Dinneen was struggling with Williams, grabbing her arm forcefully enough to cause bruising (R. p. 167, line 24 – p. 168, line 7; p. 194, lines 2-21);
- (3) it appeared Dinneen may have been attempting to rape Williams (R. p. 255, line 12 – p. 256, line 3);
- (4) at some point in the course of the struggle, Dinneen brandished and then threw a glass beer bottle (R. p. 126, line 22 – p. 127, line 7; p. 228, lines 15-21);
- (5) the Grand Prix was moving despite the open driver’s side door and the fact that either Dinneen or Williams could have been ejected from the vehicle at any moment (R. p. 167, line 21 – p. 168, line 7); and
- (6) Dinneen’s body was hanging out the door and was most likely being dragged, leading to the loss of his shoe (R. p. 110, lines 14-20; p. 228, lines 23-24).

The combination of these factors during a very short period of time would have created a confusing and disorienting picture. Yeargin, having arrived alone in the Mustang, did not have the benefit of knowing what was being said or what Dinneen might do next.

While there is no direct evidence as to Yeargin's intent, the record reflects that he fired only one shot, and that he made no attempt to fire again after hitting Dinneen in the shoulder, which would normally be expected to result in a non-fatal injury. In other words, Yeargin took no action suggesting he meant to kill Dinneen. *Cf. State v. Tucker*, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996) (denying involuntary manslaughter charge where "[e]ven if the first shooting was unintentional, the same cannot be said of the second"); *State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585 (1982) (involuntary manslaughter charge not warranted "when at least one of the two shots was fired deliberately"), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Murray*, 404 S.C. 300, 303-04, 744 S.E.2d 607, 609-10 (Ct. App. 2013) (denying involuntary murder charge where even if first two shots were unintentional, all evidence showed third shot was intentional). A single shot to the shoulder, with no attempt by Yeargin to inflict any further injury, points toward involuntary manslaughter.

The evidence also creates a jury question as to whether Yeargin meant to fire the gun at all. An involuntary manslaughter charge can be appropriate even if the defendant's own testimony suggests a voluntary pulling of the trigger. *See State v. Crosby*, 355 S.C. 47, 53, 584 S.E.2d 110, 112 (2003) (reversing denial of involuntary manslaughter charge despite defendant's confession to police that "I closed my eyes and pulled the trigger"); *State v. Burriss*, 334 S.C. 256, 267, 513 S.E.2d 104, 110 (1999) (reversing denial of involuntary manslaughter charge despite finding that "[w]ith regard to the [fatal] shot, appellant . . . stated his own 'hand was on the trigger. The trigger was pulled or whatever.'"). There is at least a question for the jury as to whether under the circumstances – attempting to confront the aggressor in a violent struggle inside a

moving vehicle with the potential for serious injury to either combatant – Yeargin intended to fire the weapon. It is entirely plausible that the gun discharged without his specific intention to shoot.

While it may have been reckless for Yeargin to have inserted a loaded weapon into an already dangerous situation, there is evidence to support the view that it was merely reckless – that Yeargin drew his weapon in a misguided effort to ensure the altercation between Dinneen and Williams did not end in someone getting thrown out of a moving car, hit or cut with a broken bottle or otherwise severely injured. The jury should not have been denied the opportunity to be instructed on and apply the law of involuntary manslaughter.

It is particularly important to observe the “any evidence” standard for an involuntary manslaughter charge in the context of this case, in which the only witness testimony concerning the shooting was provided by co-defendants who were highly motivated to cooperate in the State’s effort to characterize this as a murder case. Most involuntary manslaughter arguments are based on defendants’ self-interested testimony concerning their intent. Here, however, the available evidence comes from sources hostile to the defense. Thus, it was especially inappropriate for the trial court to ignore the circumstantial evidence suggesting the possibility of an unintentional shooting.

The failure to charge involuntary manslaughter constitutes reversible error because, without it, the charge as a whole gave an incomplete picture of the applicable law. *State v. Burkhardt*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) (failure to give requested jury instructions is prejudicial error where the instructions given, on the whole, do not adequately cover the law). This was a case in which the vast majority of the most important testimony was provided by two co-defendants testifying for the State as they awaited

disposition of their own murder charges. Utsey and Williams had powerful motives to minimize their own involvement and exaggerate Yeargin's culpability. Their willingness to do so was critical to the State's case: although an independent witness testified that Williams and Utsey drove away with Dinneen in his Grand Prix just moments before his death (R. p. 9, lines 12-21), no independent witnesses could place Yeargin anywhere near the stolen vehicle or the scene of Dinneen's death on the evening in question.

Inasmuch as the jury heard about the events of September 17, 2011, entirely through the highly self-interested testimony of Utsey and Williams, it was essential that the jury instructions fairly advise the jury of its option to reach a verdict short of the murder conviction the State was seeking and Utsey and Williams were peddling on the witness stand. By refusing to charge on involuntary manslaughter, the trial court deprived the jury of any means of expressing any reasonable doubts it might have had about Utsey's and Williams' testimony, and in particular their implausible insistence that Yeargin was the shadowy mastermind behind everything that occurred. Under the circumstances of this case, the denial of an involuntary manslaughter charge was highly prejudicial.

III. The trial court erred in admitting into evidence letters Yeargin attempted to send to a witness concerning the witness's testimony at trial, where such letters did not contain any unlawful threats or solicit false testimony and were never received by the witness.

a. Standard of Review

A trial court's decision to admit or deny evidence is subject to review for abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Such a decision may be reversed on appeal for abuse of discretion or the commission of legal error, resulting in prejudice to the defendant. *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (Ct. App.

2004). To establish that the erroneous admission of evidence was prejudicial, an appellant must show that that “there is a reasonable probability the jury’s verdict was influenced by the challenged evidence.” *Fields v. Reg’l Med. CR. p. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

b. Admission of the Letters to Utsey Was Prejudicial Error

On the morning of the third and final day of trial, the State notified the trial court and defense counsel that it was in possession of notes purportedly given to an employee of the Pickens County Detention Center by Yeargin. (R. p. 265, line 15 – p. 266, line 17.) The notes were supposedly received from Yeargin on the Saturday before the trial started, but for reasons never explained, the Pickens County Detention Center sat on them for several days before turning them over to the Solicitor. (R. p. 265, line 15 – p. 266, line 1.) The State sought to introduce the letters, which Yeargin allegedly had intended to be delivered to Utsey. The letters appear to reflect a request that Utsey testify to a description of events concerning the Dinneen shooting that minimize the role of Yeargin. (R. pp. 336-339.)

Defense counsel objected to the admission of the letters, pursuant to Rule 404(b), South Carolina Rules of Evidence, on the grounds that they were being offered merely as character evidence despite Yeargin not having put his character in issue. (R. p. 266, line 22 – p. 267, line 22; p. 269, lines 3-23; p. 306, lines 22-25.) The trial court overruled the objection. (R. p. 307, lines 1-10.) The trial court concluded that the letters constituted “a request to another Defendant to tell something less than the truth on the stand.” (R. p. 268, lines 13-15.) The court found that the content of the letters was relevant to Yeargin’s “culpability.” R. p. 268, lines 15-18; p. 269, line 25 – p. 270, line 2.

The trial court erred in overruling counsel's Rule 404(b) objection. There is scant authority concerning the admissibility of a non-testifying defendant's written request to a witness to testify in a particular way, where such request never actually reaches the witness and is not accompanied by any threats or attempts to intimidate the witness. However, the authorities that come closest to the facts of this case strongly suggest that the letters were not properly admissible.

In *State v. Edwards*, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007), this Court faced the question whether a defendant's threats against a witness were admissible. Finding little South Carolina law on point, this Court undertook an extensive survey of legal precedents in other jurisdictions. This Court noted that both state and federal courts generally admit evidence of a defendant's threats against witnesses as proof of the defendant's "consciousness of guilt." *Id.* at 238, 644 S.E.2d at 70. Among the authorities this Court cited was *U.S. v. Pina*, 844 F.2d 1, 9 (1st Cir.1988), in which the First Circuit Court of Appeals held that a defendant's threats against an adverse witness showed "that the defendant is willing to go to extreme measures to exclude relevant evidence from trial"). Ultimately, this Court concluded that "[j]ust as conflicting statements and attempts to flee are indicative of 'guilty knowledge and intent,' so too are the threats communicated here." *Edwards*, 373 S.C. 230, 240, 644 S.E.2d 66, 71 (citations omitted).

The South Carolina Supreme Court affirmed this Court's decision, modifying on other grounds but agreeing with this Court that "witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt." *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009). The Supreme Court expressly relied on a concurring opinion in *State v. Goodson*, 225 S.C. 418, 429, 82 S.E.2d 804, 809 (1954),

which had recognized that “[e]vidence that a person charged with [a] crime procured or attempted to procure [the] absence of a witness or to bribe or suppress testimony against him tends to show unrighteousness of defendant’s cause and a consciousness of guilt.”

The core holding of both *Edwards* opinions and the many authorities cited therein is that “consciousness of guilt” is reflected in the fact that the defendant is attempting to subvert the legal process by impeding the prosecution’s presentation of evidence to the jury. To put it simply, the defendants in such cases know they will lose a fair fight, so they are cheating. Such rationale cannot extend to this case, however. Yeargin’s letters were not threatening or intimidating. They did not seek to intimidate or coerce Utsey into not testifying, nor did they ask her to lie.

The letters asked Utsey to testify to a particular set of events. (R. pp. 336-339.) Specifically, they urged Utsey to testify that Yeargin did not take part in the events of September 17, 2011 at all, and that Williams was primarily responsible. (Id.) While this testimony conflicts with the testimony Utsey ultimately gave, and with Williams’ testimony, it was not inconsistent with the physical evidence. No other witness placed Yeargin anywhere near Dinneen’s residence or the church parking lot on the night in question. The weapon used to shoot Dinneen has never been located, and no forensic evidence was offered to identify Yeargin as the shooter or show that he was in either the Grand Prix or the blue Mustang on September 17, 2011. Although Williams and Utsey testified that Utsey’s brother Charles rode with them to Dinneen’s house, neither Charles nor any other disinterested witness was called to testify about Yeargin’s involvement.

For the trial court to characterize Yeargin’s letters as “a request to another Defendant to tell something less than the truth on the stand” is to make a factual determination that

Utsey and Williams must have been telling the truth and Yeargin's contrary description of events in the letters must have been a lie. This is not a judge's role in a jury trial. It amounted to pre-judging the case and punishing Yeargin for sending a private communication stating a view of the facts different from that of the State's witnesses.

The testimony the letters asked Utsey to give may have differed from the testimony she eventually gave, from the State's theory of the case, and even from the jury's verdict. That does not mean the trial court could pre-emptively declare the letters "a request to another Defendant to tell something less than the truth on the stand" and admit them as proof of "culpability." Barring some clear, objective proof that the version of events the letters posited was false, the trial court erred in construing the letters as evidence of "consciousness of guilt" comparable to threatening witnesses, flight or giving conflicting statements.

The prejudice caused by this error was especially acute given that Yeargin did not put his character in issue and exercised his Constitutional right not to testify. As such, it was not appropriate for the State to impeach Yeargin's credibility. In *State v. Sloan*, our Supreme Court disapproved of using evidence of a criminal defendant's interaction with witnesses as evidence of bad character against a non-testifying defendant:

Appellant next contends the trial court erred in admitting evidence that appellant had at one time threatened a State's witness.

...

Appellant had not testified and his character was not at issue. . . . [T]he evidence was not relevant to any issue conceivably before the jury. The testimony should not have been admitted.

State v. Sloan, 278 S.C. 435, 439, 298 S.E.2d 92, 94 (1982) (internal citations omitted).

The principle recognized in *Sloan* is that the State cannot use attacks on a non-testifying criminal defendant's character in place of evidence pertinent to the facts in dispute.

By preemptively concluding that the account of events in Yeargin's letters was false and allowing the letters into evidence on the theory that Yeargin must have been guilty because he tried to ask a witness to lie, the trial court permitted a highly damaging and unanswered assault on Yeargin's character. Without taking the witness stand, Yeargin had no meaningful opportunity to explain to the jury that the letters were not a request that Utsey lie, but rather a request that she tell the truth, resisting the pressure to carry water for the State. The letters became a vehicle for second-guessing Yeargin's exercise of his right not to testify: if he really wasn't involved in the shooting, as his letters claimed, why didn't he take the stand and say so?

The letters did not contain any admissions; they merely reflected a version of events contrary to the State's theory. Contradicting the State's theory cannot fairly be conflated with lying. Offered for no purpose other than to establish "culpability" by painting Yeargin as a liar, there is every reason to believe the letters had their intended effect. They served as a powerful distraction from the salient question whether the State proved its case beyond a reasonable doubt and offered the jury an improper shortcut via character evidence. The admission of the letters was highly prejudicial and provides an independent basis for granting Yeargin a new trial.

CONCLUSION

Yeargin respectfully submits that he is entitled to a new trial due to the errors described above, namely, the failure to charge the jury on the law of defense of others, the failure to charge the jury on the law of involuntary manslaughter, and the erroneous and prejudicial admission of letters to Utsey. Taken independently or cumulatively, such errors warrant reversal and remand for a new trial.

Respectfully submitted,

By: RF M Cl
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ATTORNEYS FOR APPELLANT

This 28th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens CountyRobin B. Stilwell, Circuit Court Judge
_____**RECEIVED**

JUL 28 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

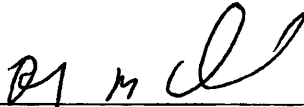
V.

TAVISH DOMINIQUE YEARGIN,

APPELLANT

CERTIFICATE OF SERVICE

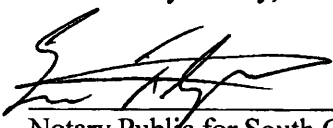
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of July, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of July, 2015.



Notary Public for South Carolina

(L.S.)

My Commission Expires: October 30, 2022.

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SC Court of Appeals

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

Appeal from Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appeal Case No. 2013-002508

THE STATE**RESPONDENT,****V.****TAVISH DOMINIQUE YEARGIN,****APPELLANT**

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in refusing to charge the jury on "defense of others" in light of testimony that at the time of the shooting the deceased was heavily intoxicated and was in the driver's seat of a moving vehicle on top of a woman, grabbing her arm firmly enough to cause bruising and struggling with her in a manner suggesting a rape attempt?

II. Did the trial court err in refusing to charge the jury on involuntary manslaughter in light of evidence that Appellant Tavish Yeargin reasonably believed it was necessary for him to draw a weapon due to a physical altercation posing a risk of serious bodily harm, but may not have intended to fire the weapon?

III. Did the trial court err in admitting into evidence letters Yeargin attempted to send to a witness concerning the witness's testimony at trial, where such letters did not contain any unlawful threats or solicit false testimony and were never received by the witness?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court abused its discretion in denying Appellant's request for a defense of others jury instruction where there was no evidence his co-defendant had the right to kill the victim in self-defense, and Appellant was not without fault in bringing on the difficulty that resulted in the shooting of the victim?
- II. Whether the trial court abused its discretion in denying Appellant's request for an involuntary manslaughter jury instruction when the argument raised on appeal was not presented to the trial court, and there was no evidence Appellant was acting lawfully with reckless disregard for the safety of others, and Appellant's firing of the gun was intentional?
- III. Whether the trial court abused its discretion in admitting two letters written by Appellant while at the Pickens County Detention Center when the letters were admissible, relevant as to his culpability, and any error in admitting the letters was harmless?

STATEMENT OF THE CASE

On November 18-20, 2013, Appellant Tavish Dominique Yeargin ("Appellant") was tried by a jury for the murder of Sean Timothy Dinneen and one count of grand larceny. (Indictments, R. pp. 340-41). Appellant was tried in the Pickens County Court of General Sessions before the Honorable Robin B. Stilwell, Circuit Court Judge. John Dejong, Public Defender for Pickens County, represented Appellant. The State was represented by Assistant Solicitors Doug Richardson and Brandi Hinton, both of the Solicitor's Office for the Thirteenth Judicial Circuit.

On November 20, 2013, Appellant was convicted of murder and grand larceny. (R. p. 332). He was sentenced to sixty years confinement for the murder conviction and five years confinement for the grand larceny conviction, both to be served concurrently. (R. p. 335).

Before this Court is Appellant's direct appeal of his convictions. Appellant requests this Court reverse his convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

RESPONDENT'S STATEMENT OF FACTS

On September 17, 2011, Appellant shot and killed Sean Dinneen in the parking lot of Crosswell Baptist Church in Easley, SC. Dinneen was shot once. The shot entered in his right upper chest, right at the clavicle. (R. p. 296). The shot fractured the mid-point of the clavicle, crossed diagonally downwards towards the back, injured the left lung, pierced the diaphragm, and ended up right in front of one of the large vessels. (R. p. 297). Dinneen died as a result of blood loss resulting from the wound to the right side of the lung. (R. pp. 297-99).

Appellant plans to steal a car from the victim

Appellant and his two co-defendants, Kayla Williams and Nyia Utsey,¹ initially planned to steal one of two cars the victim had for sale. The victim had a teal Pontiac Grand Prix and a blue Mitsubishi Lancer for sale, and he was asking \$7000 for each car. (R pp. 2-3).

Kayla testified that she initially received a call from Appellant on September 16, 2011. Nyia also indicated that she received a call from Appellant asking if he could get a ride from Kayla. (R. p. 203). Appellant had informed Kayla and Nyia that he had some cars in Easley that he wanted to pick up. (R. pp. 139-41, 204-05). Appellant indicated that he needed a ride to get the cars from Easley. (R. pp. 204-05). Kayla, who at the time drove a Ford Mustang, agreed to assist as long as Appellant provided her with gas money. (R. pp. 140, 142, 204-05). The three initially met on Friday, September 16, after Kayla and

¹ Nyia Utsey is one of Appellant's sisters. Kayla Williams was Nyia's girlfriend at the time. (R. pp. 136, 201-02).

Nyia dropped off Nyia's son at Nyia's mother's house.² (R. pp. 141, 205-06). During the drive to the victim's house, Appellant indicated to Kayla and Nyia that he planned on robbing the victim. (R. p. 144). Kayla noted that Appellant stated he wanted to tie the victim up with zip ties and knock him out. (R. p. 144). Nyia stated that Appellant had told them that the plan would be for Kayla and Nyia would get the victim to come to his front door, and while they were talking with the victim Appellant would enter from the back door, get the car keys, and tie the victim up. (R. pp. 206-07). Nyia indicated that before they left the house that Friday, she saw Appellant get a long barreled gun from their brother Michael, and she further noted she saw them load the gun. (R. pp. 207-08). Appellant placed the gun in the trunk of Kayla's Mustang. (R. p. 208).

On that Friday, when the three went to the victim's home, no one was there. (R. pp. 145, 209-11).

The Three Regroup for a Second Attempt on Saturday

The next morning, Appellant called Kayla and Nyia again, asking if they would take him back to the victim's house.³ (R. pp. 147, 211-12). After Appellant agreed to provide Kayla with gas money, they agreed to again help Appellant. (R. pp. 147, 212). The two picked up Appellant after they dropped Nyia's son off at Nyia's mother's house. (R. p. 148, see R. p. 213). Kayla testified that while at the mother's house, Appellant obtained a long barreled gun from his brother Michael. (R. p. 149). Nyia testified that they picked Appellant up from her

² Nyia indicated that they dropped off her son at her sister Tequala's house, and they then picked Appellant up from her mother's house. (R. p. 206).

³ Nyia believed the conversation may have been on the evening of September 17th. (R. p. 211-12).

sister's house, but they went to her mother's house so Appellant could pick up the gun. (R. pp. 213, 246). Appellant put the gun in the trunk of Kayla's Mustang. (R. pp. 150, 214, 246). The three then went to Taylors and picked up Appellant's brother Charles. (R. pp. 152, 215-16).

The group started with a plan to convince the victim that they wanted to purchase both cars the victim had for sale. (R. pp. 153-54, 215, 216). Appellant made the initial contact with the victim by telephone. (R. p. 215, see R. p. 250). When the group arrived at the victim's house, Kayla, Nyia and Charles walked up to the victim's house to meet with him.⁴ (R. pp. 157, 219).

Margaret Hinson, the victim's neighbor, testified that on September 17, the victim received calls from a male wanting to look at the two cars he had for sale. (R. p. 4). She noted that at least one of the calls was to her house phone. (R. pp. 3-4). Later that evening, as it was just getting dark, she noted three people came to see the car. (R. pp. 4-6). Hinson indicated there were two females who were looking at the cars, and a male was midway down the hill in the driveway from the victim's house. (R. pp. 5-6).

The three looked at both the Grand Prix and a Mitsubishi Lancer the victim had for sale. (R. pp. 157, 219-20). At some point during the initial meeting with the victim, Charles expressed reluctance about continuing with the group's plan. (R. pp. 157-58, 219-20). Kayla and Nyia informed the victim that they needed to go to a local gas station to use the restroom, and that they would return. (R. pp.

⁴ Appellant remained in Kayla's Mustang; he did not want the victim to recognize him because he had previously lived with the victim. (R. pp. 154-55, see R. p. 215).

158, 221). Hinson noted that when the group left, the victim brought the Grand Prix down from his house and parked it in front of her house. (R. pp. 7-8). She also stated that the victim was heavily intoxicated, and that he was drinking. (R. pp. 8-9).

The group left the victim's house, went to a gas station, and left Charles at the station. (R. pp. 159, 222). Appellant, Kayla, and Nyia then returned to the victim's residence; Kayla and Nyia went back to the house to look at the two cars. (R. pp. 160-61, 223). Nyia noted that she saw the gun in the backseat of the Mustang at this point. (R. p. 223). They were unable to start the Lancer and keep it running.⁵ (R. p. 161).

Hinson testified that when the group came back, they pulled into the victim's driveway. (R. p. 8). The victim had indicated to her that they planned on taking the Grand Prix for a test drive. (R. pp. 8, 9). Kayla and Nyia then requested to test drive the Grand Prix. (R. pp. 162, 224). During the test drive, Kayla drove the Grand Prix, and Nyia sat in the front passenger seat. (R. pp. 163, 192, 225, 252). The victim sat in the back seat of the Grand Prix. (R. pp. 163, 192, 225, 252). Both Kayla and Nyia testified that he was heavily intoxicated, and he was drinking during the test drive. (R. pp. 163-64, 225, 252). Appellant remained in Kayla's Mustang, and he followed the Grand Prix during the test drive. (R. pp. 164, 225).

⁵ Both Nyia and Hinson indicated the attempt at operating the Lancer occurred during their first contact with the victim. (R. pp. 6, 219-20).

The Two Cars Stop in a Church Parking Lot

Kayla testified that during the test drive, she followed signals from Appellant as directions of where he wanted her to take the car. (R. pp. 164-65, 191-92).⁶ Eventually, Kayla pulled into the parking lot of Crosswell Baptist Church because she was tired of driving. (R. pp. 165, 226). She pulled into the parking lot, and Appellant pulled in behind her. (R. p. 226). Once they were stopped, Nyia got out of the Grand Prix and went back to the Mustang to talk with Appellant about their next move. (R. pp. 165-66, 193, 226, 254). After talking with Appellant, Nyia went back to the Grand Prix to talk with Kayla. (R. pp. 166, 226-27). Kayla then went back to the Mustang to talk with Appellant. (R. pp. 166, 193, 227-28, 254). While the two were talking, they noticed the victim had gotten out of the car and was starting to walk towards the driver's side of the car.⁷ (R. pp. 166-67, 227-28; see R. p. 195). Kayla ran back to the Grand Prix and jumped in the driver's seat before the victim could get into the seat. (R. pp. 167, 193, 227-28, 254-55). Kayla then tried to start the car. (R. pp. 167, 228). The victim got on top of Kayla and attempted to jerk the keys out of Kayla's hand. (R. p. 167). During cross-examination, Kayla indicated that the victim was grabbing at her, and at some point, she showed where she was bruised to law enforcement. (R. p. 194).

⁶ Nyia testified that this was done according to the instructions by Appellant. (R. pp. 223, 253).

⁷ Kayla noted that the victim did have a beer bottle in his hand when he was walking towards the driver's side of the car. (R. p. 195). Kayla did not know when the beer bottle was broken in the parking lot. (R. p. 195). She also did not know if it was thrown or dropped. (R. p. 195).

Kayla testified that he also attempted to put the car in park while she was attempting to put the car in drive. (R. pp. 167-68, 195). Nyia also confirmed the victim Kayla and the victim were engaged in a struggle over the car. (R. p. 228). Nyia observed the victim throw the beer bottle behind him, and further saw him lose a shoe after Kayla got the car to go a little bit. (R. p. 228).

Kayla noted, "[the victim]'s not hitting me, he's just trying to get me out of the car, trying to pull me out." (R. p. 168, ll 6-7). She also noted that the victim was not saying anything. (R. p. 168). Nyia testified the victim was laying on top of Kayla. (R. p. 229). His hands were on the driver's seat and, at some point in time, on the ignition switch. (R. p. 229). She also stated that she did not see him hit her, but he "[m]ight be pushing her a little bit." (R. p. 229, ll 21-22).

The Shooting

Kayla described what happened next as follows:

It happened so fast. Tav [Appellant] pulled up beside the car, the Grand Prix that we were in. And the window was rolled down on the passenger side of the Grand Prix. And my window won't roll down in my Mustang on the driver's side. So, he opens his door, sticks the gun out and tells him to get up off me or he's going to shoot him.

And Dinneon says, Shoot me, I don't care.

And he shoots him on top of me.

(R. p. 169, ll 1-8). Nyia recalled, "[s]o the Defendant, he drives around and he told Sean he said, Get off her. And Sean looked up at him and said, Kill me. And he had the gun pointed at the window. And he shot him." (R. p. 230, ll 3-8). Nyia also indicated Appellant had pulled up to the passenger side of the Grand Prix, opened the Mustang door, and fired the gun towards the victim. (R. pp.

230, 258-60). Nyia acknowledged the victim was not using any weapons, and he was not threatening Kayla in any way. (R. p. 231).

Kayla indicated that immediately prior to the shooting, the victim had half of his body in the Grand Prix and had his legs dangling out of the Grand Prix. (R. p. 169). Kayla testified that she saw Appellant shoot the victim. (R. p. 169). After he was shot, the victim went limp. (R. p. 169). Nyia also admitted she saw Appellant shoot the victim. (R. p. 230).

During cross-examination, Kayla testified that she could not tell what Appellant may have seen during the confrontation between her and the victim. (R. p. 198). She also did not know what Appellant could see when he shot the victim. (R. p. 197). Kayla surmised Appellant was just trying to get the victim off of her. (R. pp. 197).

Kayla testified that after Appellant shot the victim, she panicked. (R. p. 170). She pushed the victim off of her, started the Grand Prix, and sped out of the parking lot. (R. p. 170). Nyia also confirmed that Kayla pushed the victim out of the car and took off. (R. pp. 230-31). Eventually, Appellant and Nyia were able to catch up with Kayla in Kayla's Mustang. (R. pp. 170-71, 231). Kayla and Appellant switched cars, and they drove back to Appellant and Nyia's mother's house. (R. pp. 171, 231-32). Kayla testified that Appellant was bragging about shooting the victim at his mother's house. (R. p. 171). She also noted Appellant said that he got his mother's car back. (R. p. 171).

That night, Kayla and Nyia went back to their hotel. (R. p. 234). The next day, September 18, they received a call from Appellant. (R. pp. 173, 235). They

later picked up Appellant, and over the course of several days, travelled from Greenville area to Gatlinburg, TN, back towards Spartanburg, SC, Traveler's Rest, SC, and eventually to Asheville, NC. (R. pp. 175-81, 237-40). The three were apprehended at a Sleep Inn in Asheville. (R. pp. 79-80, 130-34, 181, 241).

Law Enforcement Investigation

The victim was still breathing shallowly, but was otherwise unresponsive when the first officer arrived to the scene. (R. pp. 41, 43). The first deputy to arrive noted that the victim was face down, and there was blood on the ground when he arrived. (R. p. 43). The victim was lifeless by the time EMS arrived. (R. pp. 45, 46, 49).

At the scene, a broken liquor bottle and a tennis shoe were located several feet away from the victim's body. (R. pp. 52-53, 55, 110-11). Law enforcement was able to identify the victim via his driver's license. (R. p. 55).

Law enforcement obtained a lead when a detective spoke with Ms. Hinson about the call she received. (R. pp. 61-62). Hinson provided a detective with the phone number from which she had received a call about seeing the cars. (R. pp. 61-62, 100). Law enforcement traced the number to Harold Sloan. (R. p. 21). Sloan testified that the number was for a cell phone that he provided to Taznick Utsey, one of Appellant's sisters.⁸ (See R. pp. 21-22, 62). Law enforcement later made contact with Taznick, and they were able to establish Appellant, Kayla, and Nyia as possible suspects. (R. pp. 66-67).

⁸ Josqueze Thomas, one of Taznick's ex-boyfriends, testified that he recalled seeing Appellant use the phone on September 17, 2011. (R. pp. 24-5, 26).

The Grand Prix was found in Greenville on Monday, September 19, by the US Marshal Service. (R. pp. 68-69). Near the car was a rolled up license plate. (R. p. 72). A receipt from a Family Dollar dated September 18, 2011 was found in the car. (R. pp. 74-75). Video from the Family Dollar on the date and time of the timestamp on the receipt reflected that an individual with a similar appearance to Appellant came to the store in the Grand Prix and made a purchase inside the store. (R. pp. 77-78).

After Appellant and his co-defendants were arrested, Kayla's Mustang was searched. (R. pp. 79-83). A BB gun was found underneath the passenger seat.⁹ (R. p. 83).

The victim's blue Lancer was processed for fingerprints. (R. pp. 101, 113-14). Three prints from the Lancer were matched to Nyia. (R. pp. 280-81, 290). The Grand Prix and the license plate found behind the Grand Prix were also processed for fingerprints. (R. pp. 118-21, 125). Prints from the rolled up license plate were matched to Appellant. (R. pp. 282-83, 292). Prints from the Grand Prix were matched to Appellant and to Kayla. (R. pp. 284, 287-88, 289).

⁹ Kayla had testified that Appellant gave her a BB gun on the night of the shooting, and he told her to use it on the lady (Ms. Hinson) with the victim when they were initially looking at the cars. (R. p. 156). Nyia confirmed Appellant gave Kayla the gun, and further confirmed that Appellant told Kayla to use it to keep the lady with the victim from going anywhere to call the police. (R. p. 217). Nyia also testified that Charles threatened to punch Kayla if she hit the lady with the gun. (R. p. 221).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION REGARDING THE DEFENSE OF OTHERS; THERE WAS NO EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE CHARGE.

The trial court did not abuse its discretion in denying Appellant's request for a defense of others charge. First, there was no evidence to support a finding that Kayla Williams, the individual Appellant asserted he was defending, would have had the right to kill the victim in self-defense. Second, there was also no evidence that Appellant was not without fault in bringing on the difficulty that led to the shooting.

Argument at trial

At trial, Appellant requested a jury instruction for defense of others.

I would also move for a charge on defense of others. In this case, again, albeit through cross-examination, certainly one of the Co-Defendant's testified that her perception was, not her words mine, characterized the struggle between Williams and Dinneon. She characterized It looks like he was trying to rape her something. I would contend, Your Honor, as a result of that, certainly the Williams would have had the right to defend herself from that. Mr. Yeargin would have had a right, under what I read on defense of others, had a right to come to her defense and defending her on that, Your Honor.

(R. p. 315, ll 14-24).

In response, the State argued there was no evidence supporting such a charge.

Your Honor, yes, we would ask that you not charge that. I believe the testimony was laid out in my asking the question whether there was a weapon involved. And also in regards to her talking about a rape, I didn't see any type of testimony that came out that said that she was in any position of harm or rape or

anything of that nature. I don't think the evidence is there to support such a charge.

(R. p. 316, ¶ 2-9).

The trial court denied the request for a defense of others jury instruction.

And I'll tell you -- put on the record why. I heard that line of testimony as well. And I know that you elicited answers to questions that were posed in cross-examination. But I thought that each witness who testified with respect to self-defense or facts and circumstances which would purport to self-defense and defense of others, in court they actually denied that they thought that they were in any harm or jeopardy. And also I would, and I don't -- I think it was a very wise decision in your regard not to enter any evidence into the record, particularly in the form of the Defendant's testimony. However, without that and standing alone on the evidence that has been presented, it just doesn't rise to the level of a self-defense charge.

(R. p. 316, ¶ 14 – 317, ¶ 2).

Appellant did renew the request after the conclusion of jury instructions.

(R. p. 330). The request was again denied. (R. p. 330).

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at

445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997)). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas, 332 S.C. at 73, 504 S.E.2d at 310. To establish self defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000)(citing State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999)).

Appellant was not entitled to a defense of others jury instruction because Kayla, the person who Appellant claims he was defending, did not have the right to kill the victim in self-defense.

Contrary to Appellant's assertions, Appellant could not kill the victim under a theory of defense of others (specifically Kayla) because Kayla was not entitled to act in self-defense against the victim. First, Kayla was not without fault in bringing on the difficulty. At the time of the shooting, Kayla was actively engaged in a plan to steal the victim's car. In fact, the "struggle" between Kayla and the victim occurred when Kayla ran and jumped into the driver's seat of the victim's Grand Prix in an effort to thwart the victim's attempt at avoiding having his car stolen. (R. pp. 167, 193, 227, 255).

"[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self defense" Ferdinand S. Tinio, Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense, 55 A.L.R.3d 1000, 1003 (1974). Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide. 40 Am.Jur.2d Homicide § 149 (1999). "[A] robber, who is met with such violent resistance by his victim that he has no opportunity to convince [the] victim that he has abandoned his criminal intentions and only wants to withdraw, may not claim self defense if he injures or kills his victim." 55 A.L.R.3d at 1003-04; see also United States v. Thomas, 34 F.3d 44 (2d Cir.1994) (one who commits or attempts a robbery armed with deadly force and kills the intended victim when victim responds with force may not avail himself of the defense of self-defense); People v. Couch, 436 Mich. 414, 461 N.W.2d 683 (1990) (a robber or other wrongdoer engaged in felonious conduct has no privilege of self-defense); Stiles v. State, 829 P.2d 984 (Okla.Crim.App.1992) (one who kills while committing armed robbery is an aggressor and an aggressor is not entitled to a claim of self-defense).

Bryant, 336 S.C. at 345, 520 S.E.2d at 322.

Second, Kayla's testimony reflected that she was not in actual danger of losing her life or suffering great bodily injury, and she did not actually believe she was in imminent danger. Kayla never indicated in her testimony at trial that she was in fear for her life from the victim. She noted that the victim never threatened her with a weapon. (R. p. 182). Dinneen never beat her in any way. (R. p. 182). Kayla was not harmed in the entire incident, except for some possible bruising. (R. pp. 183, 194). Furthermore, there was no testimony that supported a finding that Appellant thought Kayla was in actual danger of losing her life or suffering great bodily injury. Appellant did not testify, and none of the witnesses testified that Appellant made any statements reflecting such a belief. To the contrary, Kayla testified Appellant bragged about shooting the victim to his mother. (R. p. 171).

Third, there was no evidence to support a finding that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that Kayla was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life. Both Kayla's and Nyia's testimony confirm this. While both confirmed that the victim did have his beer bottle in his hand when he initially moved towards the driver's seat, Nyia testified that the victim threw the bottle away as he attempted to turn the car off. (R. p. 228). Nyia also noted that the victim was not hitting Kayla, and at most, he may have pushed Kayla a little bit.

(R. p. 229). She also noted that she did not see the victim using any weapons or threatening Kayla in any way. (R. p. 231).

Finally, Kayla clearly had other means by which to avoid the danger. Both Nyia and Kayla indicated that the victim was clearly attempting to avoid having his car taken from him. Kayla could have simply disengaged from the struggle and allowed the victim to take his car.

Appellant relies upon Nyia's statement that it appeared that the victim was attempting to rape Kayla when he was trying to wrestle control of the car away from her as support for his argument that Appellant reasonably believed Kayla was in danger of imminent harm. (R. pp. 255-56). Respondent submits this statement was not enough to warrant a defense of others charge. First, there was no testimony or evidence that Nyia's initial impression of the victim's actions was what Appellant viewed. Nyia also testified that Appellant was in the Mustang behind the Grand Prix, whereas Nyia was viewing the interaction between Kayla and the victim from the front seat of the Grand Prix. Furthermore, the impression by Nyia does nothing to negate the lack of evidence to support a finding that Kayla was not without fault in bringing on the difficulty, or that Kayla had other means to avoid the danger that did not require she kill the victim. Respondent would note that even under Appellant's version of events, he could not have acted in the defense of Kayla because Kayla was actively engaging in an attempted theft of the victim's car when the confrontation occurred.

Altogether, since Kayla did not have the right to kill the victim in self-defense, Appellant was not entitled to do so. Thus, the trial court did not err in denying his request for a defense of others jury instruction.

Appellant was also not entitled to a defense of others instruction because he was also not without fault in bringing on the difficulty.

The trial court was correct in not granting Appellant's request for a defense of others jury instruction because Appellant was at fault in bringing on the difficulty in this case. Appellant developed the plan for stealing the victim's Grand Prix. Also, Appellant was the one who instigated Kayla's attempt at preventing the victim from driving away in his own car. Kayla testified that Appellant told her "to run, go get in the car before he [the victim] gets in it." (R. p. 167, ll 16-7).

"The doctrine of freedom from fault in bringing on a difficulty as a condition precedent to a plea of self-defense applies with equal force to a case in which one person interferes in a difficulty between two others in behalf of, or to protect one of them; and generally speaking a person who does this will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing, since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong."

State v. Cook, 78 S.C. 253, 257, 59 S.E. 862, 863 (1907) (quoting Wharton on Homicide § 332 (3d Ed. 1907)).

In such case the right to take the life of such assailant upon such unprovoked assault extends to any relative, friend, or bystander who would likewise have the right to take the life of such assailant if such act was necessary to save the person so wrongfully assailed from imminent danger of being murdered by such assailant. In other words, if the assailant makes a malicious and unprovoked assault with a deadly weapon upon one person with the apparent malicious intention to take the life of the person assailed and thereby commit murder, then, where the danger of the commission of such murder is imminent, any relative, friend, or bystander would have the right to take the life of such assailant if necessary in order to prevent the commission of such murder, provided there was no other reasonable means of escape for the person so assailed, and **provided both the person assailed and the person coming to**

his defense were without legal fault in bringing on the difficulty.

State v. Hays, 121 S.C. 163, 168, 113 S.E. 362, 363 (1922) (emphasis added).

Since Appellant was at fault in bringing on the difficulty in this case, his request for a defense of others instruction was properly denied. His convictions should therefore be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN INVOLUNTARY MANSLAUGHTER JURY INSTRUCTION.

The trial court correctly denied Appellant's request for an involuntary manslaughter jury instruction. First, Appellant's argument on appeal is not preserved for appellate review as it was not presented to the trial court. Second, there is no evidence in the record to support a finding that Appellant was acting lawfully in defense of Kayla Williams. Nor was there evidence that Appellant acted in reckless disregard for the safety of others. To the contrary, the evidence relating to the shooting reflected Appellant's actions were unlawful and intentional. Thus, he was not entitled to an involuntary manslaughter charge.

What occurred at trial

After the request for a defense of others jury instruction was denied, Appellant requested an involuntary manslaughter jury instruction.

I would move the Court for the charge on involuntary manslaughter. Certainly do not need to educate Your Honor on involuntary manslaughter, but simply bring to the Court's attention, the intentional killing of another without malice while engaged in a unlawful activity, not naturally intending to cause death or great bodily injury, to engaged in a unlawful activity, I don't know that that would particularly apply in this particular case. I would take the position that the grand larceny auto, and I'm certainly aware of what the State is asking you to charge. . . .

But on grand larceny or theft of the vehicle, Your Honor, I would submit that that is not a crime that will tend to cause death or great bodily injury. Depending on what website you want to take into consideration, over a million cars are stolen in the United States a year. One website said that's a car every 24 seconds. Another said every 28 seconds. Either one, that's a lot of cars. I would simply submit that that is not a crime that would tend to cause death or great bodily injury. And respectfully move the Court for a charge on involuntary manslaughter.

(R. p. 317, ll 4-14, 16 – R. p. 318, l 1).

The State contended that there was no evidence presented to support a charge of involuntary manslaughter. (R. p. 318). The trial court denied the request. (R. p. 318, ll 14-7). Appellant renewed the request after the jury was charged. (R. p. 330). The request was again denied. (R. p. 330).

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

The presence of evidence to sustain a conviction for the crime of a lesser degree determines whether it should be submitted to the jury. State v. Rucker, 319 S.C. 95, 98, 459 S.E.2d 858, 860 (Ct. App. 1995) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976)); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. State v. Patterson,

337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999). It is not error to refuse to charge the lesser included offense unless there is evidence tending to show that the defendant was guilty only of the lesser offense. State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (citing State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); State v. Mickle, 273 S.C. 71, 254 S.E.2d 295 (1979)).

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006). To constitute involuntary manslaughter, there must be a finding of criminal negligence. State v. Wigginton, 375 S.C. 25, 35, 649 S.E.2d 185, 190 (Ct. App. 2007) (citing State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003)). Criminal negligence for involuntary manslaughter is statutorily defined as “the reckless disregard of the safety of others.” S.C. Code Ann. § 16-3-60 (2007). “Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating.” State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

“A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense.” Crosby, 355 S.C. at 51, 584 S.E.2d at 112. Evidence of a struggle between the defendant and the victim over a weapon supports submission of an

involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

Appellant's argument on appeal is not preserved for appellate review.

At trial, Appellant contended that he was entitled to an involuntary manslaughter charge based upon the first category upon which one can be found guilty of involuntary manslaughter. He specifically argued that Appellant was engaged in an unlawful act amounting to a felony (grand larceny), and not naturally tending to cause death or great bodily harm. (R. p. 317-18). At no point did Appellant argue that he was engaged in a lawful act, or that he acted with reckless disregard to the safety of others. On appeal, Appellant argues that the second category of involuntary manslaughter applies. He contends that Appellant was acting lawfully in the defense of Kayla Williams, and that he acted in reckless disregard in shooting the victim. This argument is not preserved for appellate review because it was not presented to the trial court, and was not subject to the trial court's ruling denying the request for the charge. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Appellant was not entitled to an involuntary manslaughter charge. There is no evidence in the record to support a finding that Appellant was acting lawfully, and there is no evidence to support a finding that he acted in reckless disregard for the safety of others.

Contrary to Appellant's assertions, there was no evidence to support his request for an involuntary manslaughter jury instruction. First, there was no evidence to support a finding that Appellant was acting lawfully because, as discussed in Argument I, there was not sufficient evidence at trial to support a finding that Appellant was lawfully acting in defense of Kayla Williams. As noted above, Kayla was not entitled to act in self-defense because she was not without fault in bringing on the difficulty. There was no evidence that she was actually in fear of losing or life or suffering great bodily injury, nor was there evidence that she feared she was in imminent danger of losing her life or suffering great bodily injury. Also, there was a lack of evidence to show that a reasonable prudent person would have believed Kayla was imminent danger of losing her life or suffering great bodily injury. Finally, Kayla had other means by which to avoid the danger.

Furthermore, there was no evidence presented at trial that would support a finding the shooting was not intentional. The only evidence reflecting the intent of Appellant's actions in shooting that night stems from the testimony of Nyia and Kayla. Kayla testified that Appellant told the victim to get off of Kayla or he would shoot. (R. p. 169). Both Nyia and Kayla indicated that the victim told Appellant to either shoot him or kill him. (R. pp. 169, 230). Both reflected Appellant pointed the gun out of the door of the Mustang into the window of the Grand Prix, and that he fired the gun. (R. pp. 169-70, 230, 257-60).

There is no evidence in the record that the shot that was fired was unintentional. Appellant points to no evidence in the record to support his argument that the firing of the weapon was unintentional. This case is clearly distinguishable from Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). In Crosby, the defendant was convicted of voluntary manslaughter in the shooting death of the victim. 355 S.C. at 49, 584 S.E.2d at 111. The two had been among a group of people gathered at an apartment that were drinking and playing cards. Id. At some point during the evening, the victim angered the defendant by telling him that he was going to take his girlfriend, who was also in attendance at the gathering. Id. at 50, 584 S.E.2d at 111. Later that evening, the defendant assisted in breaking up a fight involving the roommates and another female. Id. The victim told him not to touch one of the women involved in the fight. Id. The defendant told police that he saw the victim charging at him with one hand behind his back. Id. He then stated that he pulled his gun out, closed his eyes, and pulled the trigger. Id. He further stated that he did not know that he had pulled the trigger. Id. Others testified at trial that the defendant stated he did not mean to do it, and one witness testified that the defendant said the gun had slipped. Id.

The trial court denied the defendant's request for an involuntary manslaughter charge. Crosby, 355 S.C. at 51, 584 S.E.2d at 111. The Court of Appeals affirmed the trial court's decision, finding the defendant's actions were intentional and unlawful. Id., 584 S.E.2d at 111-112. However, the South Carolina Supreme Court reversed, finding that more than one inference could

have been made from the defendant's statement. Id. at 53, 584 S.E.2d at 112. Specifically, the Supreme Court noted that the defendant's statement that he did not even know he had pulled the trigger was evidence that inferred the gun was accidentally discharged. Id. Thus, an involuntary manslaughter charge was warranted. Id., 584 S.E.2d at 112-13.

Here, there is no testimony or evidence reflecting Appellant did not know he had pulled the trigger or that the gun he used was accidentally discharged. To the contrary, the testimony from Nyia and Kayla, which is the only testimony and evidence reflecting the circumstances regarding the shooting, reflect that the shooting was intentional.

Appellant's reliance upon State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), is similarly misplaced because Burriss is inapplicable in this case. In Burriss, the South Carolina Supreme Court held that a person could be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. 334 S.C. at 265, 513 S.E.2d at 109. In Burriss, the defendant was threatened and then attacked by the victim and another male. Id. at 258, 513 S.E.2d at 106. After being pushed to the ground, the defendant drew a gun and fired two shots at the ground. Id. at 258-59, 513 S.E.2d at 106. Both men backed away. Id. at 259, 513 S.E.2d at 106. As the defendant attempted to get off the ground, one of the attackers moved to attack the defendant again. Id. The defendant picked up his gun, and it went off, killing the victim. Id. The Supreme Court found that the defendant was lawfully armed in self-defense. Id. at 269, 513 S.E.2d at 109. Since there

was evidence that the firing of the gun was not intentional, the defendant in Burriss was entitled to an involuntary manslaughter charge. Id. This case is distinguishable from Burriss because: 1) Appellant was not lawfully armed in self-defense or in defense of Kayla, and 2) the firing of the gun was intentional.

"[T]he essence of involuntary manslaughter is the involuntary nature of the killing." State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010). The evidence presented at trial only reflected that the shot that killed the victim was fired intentionally by Appellant. There was no testimony or evidence that would support a finding that the shot was fired unintentionally. Thus, Appellant was not entitled to an involuntary manslaughter instruction. See State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996)(finding involuntary manslaughter charge not warranted where testimony reflected one of shots fired was intentional); Thompson, 278 S.C. at 7, 292 S.E.2d at 585 (same); Mickle, 273 S.C. at 73, 254 S.E.2d at 296 (1979)(finding trial court did not err in denying request for involuntary manslaughter charge where defendant stated shooting was intentional, was to stop decedent). Appellant's convictions should therefore be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE LETTERS APPELLANT WROTE TO HIS SISTER CO-DEFENDANT, NYIA, IN AN EFFORT TO CHANGE HER TESTIMONY. THE EVIDENCE WAS RELEVANT AS EVIDENCE OF APPELLANT' CULPABILITY, AND WERE PROPERLY ADMITTED BY THE TRIAL COURT. ANY ERROR IN ADMITTING THE LETTERS WAS HARMLESS.

What occurred pre-trial

The third issue stems from letters from Appellant to Nyia introduced into evidence during his trial. Before the third day of trial started on November 20, 2013, the State advised the trial court that it was in receipt of letters written by Appellant to his co-defendant, Nyia, while he was at the Pickens County Detention Center. (R. pp. 265-66). During the discussion, Appellant argued the letters should not be admitted into evidence. He noted that he did not know the basis for seeking admission of the letters. (R. pp. 266-67). Appellant further contended that he did not see how they could be used to impeach one of the State's witnesses. (R. p. 267).

The trial court indicated that if the State laid the proper foundation, it believed the letters could be admissible.

I tend to -- I tend to believe it would be admissible if he lays the appropriate foundation and indicates that he got it from the Defendant. I have looked at the letter and I haven't read it word for word, but it would appear to me generally speaking what it is, is a request to a another Defendant to tell something less than the truth on the stand. And you know, generally the purpose of its introduction, I would suspect, is essentially to lend to his culpability in this crime, asking another witness to tell an untruth on the stand. Whether it was conveyed to the actually witness or not is a completely and entirely different issue. And I don't think it's relevant to it. It is a voluntary statement by the Defendant that was willfully and voluntarily transferred to a jailer. If he lays the appropriate foundation, I believe that it's admissible. Now, there may be objections to be posed when and if he testifies. But at this point, generally speaking, in a vacuum, I think that it would be admissible.

(R. p. 268, l 8 – 269, l 2).

In response, Appellant argued that admitting the letters would either show Appellant is asking someone to lie or that Appellant is a liar. He contended that would get into Appellant's character, and that would be inappropriate because the defense had not put Appellant's character at issue during the trial. (R. p. 269).

The trial court then stated,

I understand. I haven't heard the testimony yet. I don't anticipate that it's an impeachment of his character or credibility. I think what it goes to is culpability. That's my understanding of it without having heard the foundation to be laid by the State in this case. So, I'm not suggesting at this point that any evidence with respect to his character is admissible.

(R. pp. 269, l 24 – 270, l 6).

During trial, Shane Brummitt, a detention officer at the Pickens County Detention Center, testified that on Saturday, November 16th, Appellant made contact with him and handed him a letter or note. (R. p. 304). It consisted of four pieces of paper. (R. p. 305). Brummitt later unfolded it, and asked a senior officer what he should do with it. (R. p. 306). Brummitt later had contact with Investigator Dow. (R. p. 306). The letters were admitted and published to the jury over Appellant's objections. (R. pp. 307-08). Specifically, Appellant objected based upon his previous objection. (R. p. 306). The trial court stated it "analyzed that letter in accordance with the mandates of Jackson v. Denno and find that all of the prerequisites have been met for the threshold of admissibility. Therefore, I respectfully deny the motion." (R. p. 307, ll 2-5).

During cross-examination, Brummitt noted that he never delivered the letters, and Nyia never got them. (R. p. 309).

In the letters, Appellant requests Nyia blame the entire incident on Kayla. (State's Exhibit 40-42, R. pp. 336-39). He further provides instructions on what she should say happened, including that Kayla shot the victim with a gun that was in her pocketbook. (State's Exhibit 40-42, R. pp. 336-39). Appellant requests that Nyia testify that he was not there. (State's Exhibit 40-42, R. pp. 336-39). He also asks that she testify that he provided a license plate to them after they requested one from him. (State's Exhibit 40-42, R. pp. 336-39).

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, S.C. R. EVID. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App.

1998). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001).

The trial court did not abuse its discretion in admitting the letters. The letters were admissible.

The two letters from Appellant to Nyia were admissible at trial. The trial court essentially found the two letters constituted written statements by Appellant. He further found the statements were voluntary under Jackson v. Denno, and they were admissible.

Appellant has not shown the letters were not admissible. "As a general rule, statements or declarations made by one accused of a crime are admissible against him." State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (quoting State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)). Such evidence must meet the threshold test of admissibility, i.e., relevance. See Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Further, the letters were admissible because each constituted a "statement against penal interest" under Rule 804(b)(3), SCRE, by a declarant who was unavailable under Rule 804(a). See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). Contra

State v. Terry, 339 S.C. 352, 53-58, 529 S.E.2d 274, 276-77 (2000) (defendant who chose not to testify could not introduce his own confession as statement against penal interest), *cert denied*, 531 U.S. 882 (2000). Also, each letter was admissible as an admission of a party-opponent under Rule 801(d)(2)(A), SCRE, and as a statement by a co-conspirator made in furtherance of a conspiracy to steal from and murder the victim, since it was unquestionably made in an effort to obstruct the prosecution of Appellant and Nyia. See Rule 801(d)(2)(E), SCRE; State v. Gilchrist, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000) ("While mere conversation or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible") (quoting United States v. Arias-Villanueva, 998 F.2d 1491, 1502 (9th Cir.1993)); accord State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); Yeager v. Murphy, 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987) (statements made by co-conspirators in furtherance of the conspiracy are admissible). Contra State v. Anders, 331 S.C. 474, 477, 503 S.E.2d 443, 444 (1998) (admission to crime is not statement in furtherance of conspiracy for purposes of co-conspirator hearsay exception).

Furthermore, contrary to Appellant's assertions, the letters did not constitute impermissible character evidence under Rule 404(b), SCRE. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. Evidence of other crimes is generally

admissible when it is necessary to establish a material fact or element of the crime charged. State v. Byers, 277 S.C. 176, 178, 284 S.E.2d 360, 361 (1981); State v. Cheatham, 349 S.C. 101, 108, 561 S.E.2d 618, 622 (Ct. App. 2002).

Evidence of prior bad acts is admissible when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime.

State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511-12 (Ct. App. 2004) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see Rule 404(b), S.C. R. EVID. "[T]he 'bad act' must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). If the prior bad act evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." State v. Nix, 288 S.C. 492, 497, 343 S.E.2d 627, 630-631 (Ct. App. 1986)). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." Sweat, 362 S.C. at 128, 606 S.E.2d at 514.

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.

State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008) (internal citations omitted).

Appellant's contention that the letters constitute improper character evidence under Rule 404(b) is without merit. "[W]itness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt." State v. Edwards, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009). In Edwards, the Supreme Court found no abuse of discretion in the admission of death threats made by the defendant against the victim to the victim's mother in a criminal sexual conduct with a minor case. The Supreme Court noted that witness intimidation could be expressed "in a litany of other forms." Edwards, 383 S.C. at 69, n.2, 678 S.E.2d at 407, n.2. The Supreme Court ultimately found that evidence of witness intimidation was admissible.

In so doing, the Court noted its approach was consistent with the majority of other jurisdictions that have addressed the issue, citing specifically to United States v. Hayden, 85 F. 3d 153 (4th Cir. 1996). In Hayden, the Fourth Circuit stated, "[e]vidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable." Hayden, 85 F.3d at 159. This proposition derives from longstanding precedent "that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent." United States v. Reamer, 589 F.2d 769, 770 (4th Cir. 1978)(citing Wilson v. United States, 162 U.S. 613,

620-21, 16 S.Ct. 895 (1896); United States v. Jamar, 561 F.2d 1103, 1106-07 (4th Cir. 1977).

Respondent submits these longstanding principles support a finding the trial court did not abuse its discretion in admitting the letters written by Appellant into evidence. First, it cannot be said that the letters do not constitute witness intimidation. While Appellant did not threaten harm to the intended recipient, it is clear that he was attempting to sway Nyia's testimony. Thus, while the letters do not neatly fit within example of witness intimidation, it is similarly reflective of consciousness of guilt and criminal intent. Respondent would note that the fact Appellant did not threaten harm to Nyia in the letters also supports a finding that the probative value was not substantially outweighed by danger of unfair prejudice. Altogether, the trial court did not err in finding the letters were admissible.

Any error by the trial court in admitting the letters was harmless.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result: State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

There was overwhelming evidence of Appellant's guilt outside of the letters. First, Appellant's co-defendants testified that Appellant was the one who came up with the plan to steal cars from the victim. (R. pp. 141-44, 205-08). Nyia noted that Appellant was the one who first made contact with the victim. Appellant could be tied to the phone number that made the initial calls to the victim about the vehicles the victim intended to sell. Both co-defendants also testified that when they stopped in the parking lot, Appellant attempted to get them to continue with the ruse of a test drive in order to further the attempt to steal the victim's car. (R. pp. 165-67, 227-28, 254-55). Both testified Appellant was the one who brought the gun used in the shooting, and both witnessed Appellant shoot the victim. (R. pp. 149-50, 169, 214, 230, 246).

Appellant's fingerprints were found on the Grand Prix and on a license plate found behind the Grand Prix. (R. pp. 118-21, 125, 282-84, 287-88, 289, 292). Also, video from a Family Dollar reflected Appellant was driving the car the day after the victim was killed. (R. pp. 77-78). The Grand Prix was found abandoned in Greenville. (R. pp. 68-69).

In addition to the physical evidence connecting Appellant to the vehicle and the testimony from his co-defendants, the State also presented evidence that Appellant fled the jurisdiction after the shooting. Both co-defendants indicated Appellant contacted them the next day after hearing that law enforcement was looking into the victim's death. (R. pp. 173-74, 235-36). Over the course of the next few days, the three absconded from the jurisdiction. (R. pp. 175-81, 237-40). Flight from prosecution is admissible as guilt. Thompson, 278 S.C. 1, 292

S.E.2d 581, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). Altogether, the State presented overwhelming evidence of Appellant's guilt of both crimes before the letters to Nyia were presented. As such, any error in admitting the letters was harmless. Appellant's convictions should therefore be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his convictions in the murder of Sean Dinneen and grand larceny.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appeal Case No. 2013-002508

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THE STATE

RESPONDENT,

V.

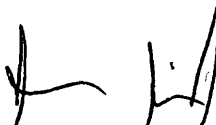
TAVISH DOMINIQUE YEARGIN,

APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 3th day of August, 2015.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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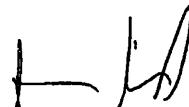
APPELLANT

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Jeffrey P. Dunleavy, Esq., Stephenson & Murphy, LLC, 207 Whitsett Street, Greenville, South Carolina 29601, and to Robert Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of August, 2015.



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(803) 734-6305

ATTORNEY FOR RESPONDENT

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

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

The State, Respondent,

v.

Tavish Dominique Yeargin, Appellant.

Appellate Case No. 2013-002508

Appeal From Pickens County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2016-UP-043
Heard January 5, 2016 – Filed January 20, 2016

AFFIRMED

Jeffrey P. Dunlaevy, of Ogletree Deakins Nash Smoak &
Stewart, PC, of Greenville, and 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 Alphonso Simon, Jr., all of
Columbia; and Solicitor William Walter Wilkins, III, of
Greenville, for Respondent.

PER CURIAM: Tavish Dominique Yeargin appeals his convictions for murder and grand larceny, arguing the trial court erred in (1) refusing to instruct the jury on defense of others, (2) refusing to instruct the jury on involuntary manslaughter, and (3) admitting in to evidence letters Appellant wrote to one of his codefendants concerning her testimony at trial because the letters did not contain unlawful threats and the codefendant never received them. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in refusing to instruct the jury on defense of others: *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) ("[T]he trial court is required to charge only the current and correct law of South Carolina."); *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) ("The law to be charged to the jury is determined by the evidence presented at trial."); *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608–09 (Ct. App. 2012) ("When reviewing the [trial] court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant."); *State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013) (holding appellate courts will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion); *State v. Starnes*, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000) ("[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." (alteration provided in *Starnes*) (quoting *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998))); *id.* at 322–23, 531 S.E.2d at 913 ("Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense."); *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (outlining the four requirements that must be satisfied in order for a defendant to be justified in using deadly force in self-defense); *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide.").

2. As to whether the trial court erred in refusing to instruct the jury on involuntary manslaughter: *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014), *reh'g denied*, (Nov. 7, 2014) ("Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless

disregard for the safety of others."); *State v. Burriss*, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999) (finding that the pivotal issue when determining whether to charge the jury on involuntary manslaughter in the case was "whether [a]ppellant was engaged in a lawful activity at the time of the killing"); S.C. Code Ann. § 16-13-30 (2015) ("Larceny of goods, chattels, instruments, or other personalty valued in excess of two thousand dollars is grand larceny. Upon conviction, the person is guilty of a felony . . ."); *State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 479 (2008) (holding that a trial court should refuse to charge the lesser-included offense of involuntary manslaughter where there is no evidence the defendant committed the lesser offense).

3. As to whether the trial court erred in admitting into evidence letters Appellant wrote to his codefendant concerning her testimony at trial: Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina."); Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *State v. Lyles*, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008) ("Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." (quoting *State v. Preslar*, 364 S.C. 466, 475, 613 S.E.2d 381, 386 (Ct. App. 2005))); *id.* at 337, 665 S.E.2d at 206 (finding any evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent); *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("The trial [court] is given broad discretion in ruling on questions concerning the relevancy of evidence, and [its] decision will be reversed only if there is a clear abuse of discretion."); *State v. Howard*, 384 S.C. 212, 220–21, 682 S.E.2d 42, 47 (Ct. App. 2009) ("An abuse of discretion occurs when the [trial court's] ruling is based on an error of law or a factual conclusion that is without evidentiary support."); *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) (determining a showing of prejudice requires that there be a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof); *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015) ("An error is harmless if it did not reasonably affect the result of the trial."); *id.* ("[A]ppellate courts must determine the materiality and prejudicial character of the error in relation to the entire case."); *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result.").

AFFIRMED.

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



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 01, 2016

The Honorable Harold P. Welborn, Jr.
PO Box 215
Pickens SC 29671-0215

REMITTITUR

Re: The State v. Tavish Dominique Yeargin
Lower Court Case No. 2011GS3902148, 2011GS3902149
Appellate Case No. 2013-002508

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
Jeffrey P. Dunlaevy, Esquire
Alphonso Simon, Jr., Esquire
William Walter Wilkins, III, Esquire
John W. McIntosh, Esquire

FORM 5

2017 FEB 10 PM 3 41

STATE OF SOUTH CAROLINA)

County of Pickens)Tarish Dominique Yeargin # 317173)

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

v.)

State of South Carolina)

CLERK OF COURT
IN THE COURT OF COMMON PLEAS
PICKENS COUNTY
SOUTH CAROLINA2017-CP-39- 0170

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 the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution,
Post Office Box 205, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Pickens County
Court of General Sessions, Pickens S.C.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) M-521460, M-521463, M-521461
 - (b) 2011GS3902148 ~~X~~ 2011GS3902149

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence: November 20th, 2013
- (a) M-521460-16-3-10,0020 SIXTY YEARS CONFINEMENT
- (b) M-521463-16-3-10,0020 SIXTY YEARS CONFINEMENT
- (c) M-521461-16-13-30(13) 5 years current with 60 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Unknown
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Denied the effective assistance of counsel at trial
- (b) Denied the effective assistance of counsel at sentencing.
- (c) Denied the effective assistance of counsel on appeal.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel Failed to competently argue due process violation.
- (b) Counsel Failed to argue against § 16-3-10
- (c) Counsel Failed to investigate Exculpatory Evidence.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (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:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

NO

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

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Due to Defective assistance of Counsel.
 - (b) PCR is the remedy for Prejudice, For ineffective
 - (c) Assistance of Counsel, and For challenging section 817-27-20.
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, Prisoner Tavish D. Yeargin, #317173
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. John DeLong
 - ii. Susan B. Hackett, Appellate Defender,
P.O. Box 11589, Columbia SC 29211-1589
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial- Sentencing
 - ii. Appeal - Initial Brief
 - iii. Appeal- Final Brief

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

Conviction Rev'd, Remand and a new trial CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

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

NO

STATE OF SOUTH CAROLINA)

County of Pickens)

VERIFICATION

I, Tanish O. Yeargin, 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.



SWORN to and subscribed before me this 1st
day of February, 2017.

Luchean Bryant (I.S.)
Notary Public

My Commission Expires: May 26, 2020 ^{2/3}

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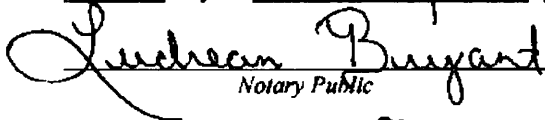
CLERK OF COURT
 APPLICATION TO PROCEED WITHOUT PAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF

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

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


 Applicant

SWORN or affirmed to and subscribed before me this
1st day of February, 2017.


 Notary Public

My Commission Expires: May 26, 2020

2017 FEB 10 PM 3 41

STATE OF SOUTH CAROLINA
 COUNTY OF PICKENS
 IN THE COURT OF GENERAL SESSIONS
 PICKENS COUNTY
 SOUTH CAROLINA THIRTEENTH JUDICIAL CIRCUIT

Tavish D. Yeargin #317173
 Defendant,

vs.

STATE OF SOUTH CAROLINA
 Respondent,

"RULE #60(b) MOTION TO BE
 RELIEVED FROM JUDGMENT

Arrest Warrant # M521460,

Indictment No. # 2011-65-39-2149

"RULE #60(b)(3) & (4)."

The defendant, Tavish Dominick Yeargin #317173, hereby petition this Honorable Court of General Sessions as a Pro-se litigant and moves for "Motion to be Relieve From Judgment" in Pursuant to Rule #60(b)(3) & (4), of the SCRCP, for the following reasons:

3. Fraud, misrepresentation, or other Misconduct of the Adverse Party;
4. The Judgment is Void.

" MISREPRESENTATION " Part #1

The defendant contends that he is entitled to relief in Pursuant to Rule # 60(b)(3), of the SCRPC, for misrepresentation.

A lawyer shall competent representation to their client, and that competent representation requires the legal knowledge, skill, thoroughness and preparation of reasonably necessary for effective results. SCACR # 407.

On September 17th, 2011 Officer Benjamin Dow did with reckless disregard for the truth, sworn by oath, and say upon the Arrest Warrant Affidavit sworn before the Magistrate Judge Bruce E. Ander on 9-21-2011, that on said date the defendant Tavish Dominick Yeargin, did with malice and aforethought, kill the victim, Sean Timothy Dinneon. The incident occurred at 217 South Fish Trap Rd. Greenville, SC. within Pickens County. The defendant killed the victim then took the vehicle, which was later recovered.

Three (3) days later on 9-22-2011. Detective Cory Burton of the Asheville Police Department

" MISREPRESENTATION " Part #2

Obtained an Application For Search Warrant, Sworn before Magistrate's Judge _____, on 9-22-11. To search in the Following Premises Room 222 OF the Sleep Inn located at 1918 Old Haywood Road, Asheville, NC 28806. And in this vehicle(s) 1998 Ford Mustang SC Registration CQH6 27, Blue in color Vin-1FAFP4041WF123009.

The Facts to establish Probable Cause reads on 9-17-2011 Mr. Sean Timothy Dinneon was shot killed with .22 caliber handgun. Inv. From the Pickens County Sheriff's Office, identified Talvish Dominique Yeargin as the Primary suspect in this homicide, and homicide warrants on file. See Exhibit No. # _____.

on Page 2 in continuation of this search warrant Application specifically say any handgun capable of firing .22 caliber bullet. etc. See Exhibit No. # _____.

"MISREPRESENTATION" Part #3

On 9-22-2011 Kavla and Nyia made statements ~~before~~ Detective Benjamin Dow and Sworn Officer Cory Burton for seizure of property related to the death of Sean Dinneen. The Property Sought lists any .22 hand gun in Sleep Inn, Room 222, Asheville, N.C. See Search Warrant - Exhibit No. #_____.

NO .22 caliber hand gun Found on Applicant Persons. The officer's admit by signing a statement made voluntary at the Asheville, Department by Kavla. Nyia statement show place signed at ~~Sleep Inn~~, Room 302 Asheville, NC.

Any evidence obtained by an false disregard for the truth is a violation of the defendant's Personal Liberty. Cite - Franks v. Delaware, 439 U.S. 154, 98 S.Ct. 2674, 57 LE2d 667 (1978).

At trial, On Direct - By Mr. Richardson - Mr. Robinson give testimony that no weapon was found at the scene. NO bullets found NO where in the parking lot, nor any spent casings left like evidence to point at an particular person in a homicide. Tr. 248 Ln. 11-24. Mr. Robinson also continue to say. We found a bullet wound on the body. but no other bullet found. Tr. 241 Ln. 20-22. See Exhibit No. # 25 is the projectile removed ^{from} Mr. Dinneen by Mr. Fulmer, and was directly placed in him hand during the autopsy. Tr. 251 Ln. 23-25. Tr. 252-253 Ln. Ln. 1-8. Tr. 534 Ln. 3-25. ~~He~~ say the evidence was secure in two bags, and later carried it to Greenville to have it compare to a case over there to see if it matched a weapon that they had in evidence?

" MIS REPRESENTED " Part #4

under Rule 608. ~~The~~ evidence of Bias, Prejudice with a motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Direct - BY MS. Hinton. Mr. Fulcher testified that an AUTOPSY on Sean Dennean body was conducted on 9-19-11. After Pickens County Coroner Kandy Kelly completed her investigation. Tr. 528 Ln. 24-25. Tr. 529 Ln. 1-9. Applicant object. "Cause there was no certified statement(s) ~~given~~ verifying chain custody by MS. Kelly showing she comply with Rule 6.(C), ~~in~~ 2 Criminal Prosecution, any reports or papers mentioned in sections (a) or (b) shall be available to the defendant or his attorney at the preliminary hearing, in which no hearing was ~~held~~ held. And if no hearing is held, not later than eleven days prior to the trial of this case. Cite - State v. Hatcher (S.C. App. 2009) 681 S.E.2d 925.

On November 20th, 2013. A Petit Jury found the Applicant guilty of offense murder and Grand ~~larceny~~ larceny. The Trial Court sentence him to 60 years, which is improper. Pursuant to Rule 52. The Court shall find specifically and state separate conclusion of law thereon: and judgment shall be entered pursuant to Rule 58.

During trial / NO objection, by trial counsel DeJohn, when the Prosecutor stipulated to Kayle while she here under his "Sub Poena". Tr. 308 Ln. 15-16. Tr. 357 Ln. 22-25. Tr. 358-359 Ln. 1-8.

Under Rule 13. SCR crim. And Rule 45. Every subpoena shall (A) state the name of the Court room which it is issued; (B) state the title of the action it is pending.

"MIS REPRESENTATION" Part #5

IAC shown where counsel did not protect Applicant rights' for not rebut; and or made no effort to possess information prior to trial, which created an Brady violation. Id. 397 U.S. 753 (1970). The United States Supreme Court held that the Prosecutor must tell defendant's about evidence that could help prove his innocence. But withholding this evidence is prejudice.

Applicant was charged with the murder of an 44 year old man. Physician Report of Findings Point to Specifically Cause on Page 1, Page and Page 3 OF AUTOPSY * A-11-403. DISTANT RANGE PENETRATING GUNSHOT WOUND TO THE CHEST, see EXHIBIT NO. #

The Prosecutor knowingly misrepresented a BB gun as a .22 caliber handgun. "The Prosecutor knew the BB gun shoot Pellet.

SO/ Applicant request to DNA Forensic Testing Under section 17-28-110. (A) nothing in this article prohibits a Person and a solicitor or the Attorney General, as applicable, from consenting to and conducting post-conviction DNA testing by agreement of the parties. The Person may use the exculpatory results of the DNA test as the grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure.

In Faretta v. California, 422 U.S. 806, 819 n. 15 []. The Fourteenth Amendment guarantees that no shall be deprived of Liberty with due process of law to include a right to be heard and to offer testimony.

2017 FEB 10 PM 3 41
 STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS
 COUNTY OF PICKENS CLERK OF COURT
 PICKENS COUNTY THE THIRTEENTH JUDICIAL CIRCUIT
 SOUTH CAROLINA

Tavish D. Yeargin, #317173
 Applicant,

Vs.

STATE OF SOUTH CAROLINA,
 Respondent,

"CONCLUSION"

WHEREFORE, The Applicant Tavish D. Yeargin, come now and moves this Honorable Court to relieved Applicant From Judgment in Pursuant to S.C. Code of "Laws" in Pursuant to Section 5 17-27-20 and Section 5 17-28-30. The Applicant Prays for following relief to be granted if the Courts Find Favor in his application. the Applicant would request that his Conviction and Sentence be Rev'd, Remanded or New Trial.

Respectfully submitted
 signed: Tavish D. Yeargin
 Tavish D. Yeargin #317173
 L.C.J. Wando #
 P.O. Box 205
 Ridgerville SC 29472

2017 FEB 10 PM 3 41
 STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS
 COUNTY OF PICKENS CLERK OF COURT
 PICKENS COUNTY FOR THE THIRTEENTH JUDICIAL CIRCUIT
 SOUTH CAROLINA

TAVISH D. Yeargin #317173

Defendant,

V.S.

STATE OF SOUTH CAROLINA
 Respondent,

"DECLARATION"

"DECLARATION"

I, TAVISH D. Yeargin #317173, hereby declare and attest, that I am the defendant in this matter; depose and say under the penalty of perjury that all relevant information therein; are true and correct to the best of my knowledge and that contains matter that may be subjected to the correction / setting aside, new trial or vacation of conviction and sentence being challenged.

Respectfully Submitted

signed: *Tavish D. Yeargin*

Mr. TAVISH D. Yeargin #317173

L.C.I. Wando-13 #

P.O. Box 205

Ridgeville, SC 29472

2017 FEB 10 PM 3 41

STATE OF SOUTH CAROLINA
CLERK OF COURT
COUNTY OF PICKENS ~~PICKENS~~ COUNTY
SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Tavish D. Yeargin #317173 }

Defendant, }

VS. }

STATE OF SOUTH CAROLINA }

Respondent, }

" VERIFICATION "

ARREST WARRANT # M- 521 463

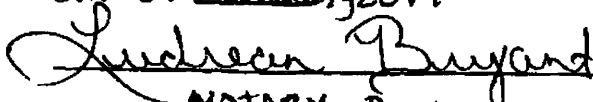
Indictment NO. # 2011-GS-39-2149

" VERIFICATION "

PERSONALLY appearing before me Tavish D. Yeargin #317173,
first being duly sworn upon my Oath, depose and say that he
is the defendant in this foregoing action, and that he fully
understands and subscribed to the contents therein; that
contains and includes every ground known thereof; For
either Rev'd, Remanded, New Trial, or Vacating his
Conviction and Sentence. All information therein are true
and correct to the best of my knowledge.


TAVISH D. Yeargin #317173

Sworn to subscribed before me this 1st
day of February 2017


NOTARY PUBLIC

MY COMMISSION EXPIRES: May 26, 2020

2. Give the date of the entry of the judgment and sentence:

NOVEMBER 18 THROUGH NOVEMBER 20, 2013. Sixty Years.

and current place of incarceration:

3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:

(a) COURT OF APPEALS

(b)

(c)

4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: Hair tissue, Fingerprints, Scrappings, Clothing, blood

Samples, Skin tissue, ~~BB Pellet~~, BB Gun, Serial # 16201133
241717, Red shirt, Black Pant, white sneakers ~~20~~ 20 caliber
~~bullet found by hand~~ Gun capable of firing. Any keys related Grand Jury
Identify specific type of DNA testing being sought: Pathology, Autopsy report,
~~Scientific Forensic Serology~~ Scientific Forensic Serology

5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:

The Applicant's identity is a significant issue during the original proceedings, but counsel was inadequate and failed to provide effective service. Applicant pled not guilty and claim actual innocence. Is entitled to challenge DNA testing in Pursuant to S.C. Code of laws § 17-28-30(a).

6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requester

DNA test would provide a substantially more probative result:

Counsel For the Applicant helped the State bolster the case against his client. Physical evidence is the main issue that Counsel should have challenge and the Chain of Custody. The state has Failed to meet all elements of the offense charged. DNA Testing would Prove my innocence.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

DNA Testing can be an valuable tool that would constitute new evidence that would change the results of the Applicant's conviction and sentence. If a new trial be granted it could exonerate the Applicant from an wrongful conviction and sentence. It's a fact Counsel did not know about forensic DNA testing Application.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice. Yes.

9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:

- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
- (b) The Court may assess the cost of any DNA testing against me;
- (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
- (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Tavish D. Yeargin

Print Applicant Name

Signature of Applicant

2017 FEB 10 PM 3 41

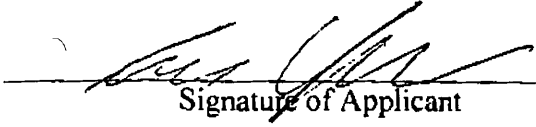
STATE OF SOUTH CAROLINA

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

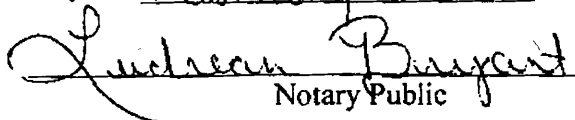
VERIFICATION

County of Pickens

I Travis D. Veargin, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.


Signature of Applicant

SWORN to and subscribed before me this 1st
day of February, 2017.


Notary Public (L.S.)

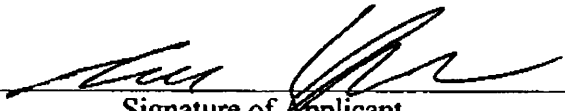
My Commission Expires: May 26, 2020

2017 FEB 16 APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

I Tavish D. Yeam'g'n, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true.

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


Signature of Applicant

SWORN to and subscribed before me this 1st
day of February, 2017.

Luclean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA 2017 FEB 10 PM 3 41
 IN THE COURT OF COMMON PLEAS
 COUNTY OF PICKENS CLERK OF COURT
 PICKENS COUNTY THIRTEENTH JUDICIAL CIRCUIT
 SOUTH CAROLINA

Tashish D. Yeargin #317173 }
 Plaintiff, }
 Vs. }
 STATE OF SOUTH CAROLINA }
 Respondent, }

RULE 71.1 POST-CONVICTION RELIEF ACTIONS

Now comes into this court Tashish Dominique Yeargin #317173. (herein - after "Plaintiff") and appearing through representation of Counsel under the Procedure for Post-Conviction relief is provided by the Uniform Post-Conviction Act (Act), S.C. Code Ann. §§ 17-27-10 to - 120 (1985). The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.

(d) Appointment of Counsel for hearing. After the state has filed its return, the Application presents questions of law or fact which will require a hearing, the court shall promptly appoint Counsel to assist the applicant if he is indigent. insure that all available grounds for relief are included in the application and shall amend the application if necessary.

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South Carolina Code Ann. § 16-3-10 _____	5
South Carolina Code Ann. § 17-27-26(a) _____	5
S.C. Const. Art. 1 § 10 _____	3
S.C. Const. Art. 1 § 15 _____	5
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U.S.C.A. Const. Amend. 5 _____	2
U.S.C.A. Const. Amend. 6 _____	2
U.S.C.A. Const. Amend. 8 _____	5, 8

STATEMENT OF THE CASE

Applicant Tavish Yeargin was illegally indicted by a Pickens County improper Grand Jury for murder and Grand Larceny. On November 18-20, 2003, a jury trial was held before the Honorable Robin B. Stilwell on the charges against Yeargin. Williams and Utsey was subpoenaed by the state and testified for the state at Yeargin's trial. Yeargin was convicted on both counts and sentenced to 60 years on the murder count. Williams and Utsey pled guilty to involuntary manslaughter after testifying against Yeargin. Yeargin Appeal

WAS TRIAL COUNSEL INEFFECTIVE FOR FAILURE TO REQUEST
FOR IMPANELING DOCUMENTS THAT SUPPORTED EVIDENCE
OF GRAND JURY CONVEY FOR PROCUREMENT RELATED
TO IMPROPER INDICTMENT?

The Respondent's agrees that the Grand Jury had the Power to hand down an indictment on Said Month, day, Year. That date must be included in computing the 18 month life of the grand jury as understood in S.C. Code Ann. § 14-7-151a. U.S.C.A. Const. Amend. 5.

Applicant believes he was not lawful indicted for offense murder in warrant number ~~M~~M521460, ~~M~~M521461. which the State submitted no evidence to Grand Jury for murder.

To the merit of this issue, the Applicant point to deficiency by Defense DeJohn did not at any time ~~investigate~~ investigate / or made no effort to secure information upon this matter, where Defense Counsel abandoned his duty to protect Applicant rights for not employ investigator to find out if any physical evidence or biological material presented to say that Grand Jury agreed with decision. Good law - Ex Parte V. State, 272 S.C. 373, 252 S.E.2d 126 S.C. (1979).

Presume due to Counsel's representation fell below the standards of reasonable objectively unreasonable. U.S.C.A. Const. Amends. 5, 6

WAS DEFENSE COUNSEL INEFFECTIVE IN RELATED TO THE
APPLICANT RIGHTS TO CHALLENGE THE AFFIDAVIT
FOR ARREST, SEARCH AND SEIZURE?

The Applicant was thereby deprived life, liberty on September 22nd, 2011 By Detective Cory Burton, Asheville, North Carolina, Detective Benjamin Dow and others LAW ENFORCEMENT AGENCIES FOR Alleged Fact Set Forth in Arrest Warrant And Application For Search Warrant at the Sleep Inn, Room 222, Asheville, North Carolina.

The AFFIDAVIT to Arrest Warrant # M521460 reads On September 17th., 2011 The defendant Tavish Dominick Yeargin did with malice ~~un~~forethought, Kill Victim Sean Timothy Dinneon.

Application For search warrant lists the Facts to Establish Probable Cause Shows On September 17, 2011 Mr. Sean Timothy Dinneon was shot and killed in Pickens, SC. Mr. Dinneon was killed with a .22 handgun. Page 2 in the continuation of a search warrant Application in the matter of: Tavish Dominick Yeargin

ITEMS TO BE SEIZED (1) Any handgun capable of firing a .22 caliber bullet (2) Any items identifiable as belonging to Sean or reference to the individual (3) Any belong to a Pontiac Grand Prix (4) Any blood spatter, blood smudges, or other trace evidence on the Ford Mustang (5) Any clothing items that would be identifiable as matching those worn by the suspect the evening of the homicide. See Exhibit's NO.

Const. Art. 1 § 10; U.S.C.A. Const. Amend. 4.

WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO
ASKS THE TRIAL COURT TO POLL THE JURY
INDIVIDUALLY BY NAME TO DETERMINE
WHETHER THIS THEIR VERDICT?

The Applicant Point to the Fact that was improper by the Clerk; in a Procedure that's fundamentally UnFair. The Clerk read Verbatim in the record / Case Number #2011-GS-39-2148; 2149. We the Jury impaneled Sworn to be try this issue in the above-entitled cases enter the following unanimous verdict to the charge OF Murder. We the Jury Find the Defendant, MY Mr. Tavish Veargin, guilty.

IS this is your verdict and still your verdict?
 So say you all by raising your right hand. Tr. 608
 Ln. 24-25. Tr. 609 Ln. 1-13.

Applicant was prejudice, and denied effective Assistance Counsel as Substantive's under the Sixth Amendment. It A Fact all Jury members did not raised hand. And the Trial Court was Bias in permitting. Citing- Sincox v. United States, 571 F.2d 876 (CAS 1978).

DID THE CIRCUIT COURT ERR / IN THE ABUSE OF
AUTHORITY WHERE APPLICANT SENTENCE OR CONVICTION
EXCEEDS THE MAXIMUM AUTHORIZED BY LAW?

A Petit Jury For Applicant guilty of the
Crime of Murder on November 20th, 2013. The
Honorable Judge A. Stillwell Sentence the Applicant
to a Period of 60 Years, to be served in the
State Penitentiary. Tr. 615 Ln. 1-13.

It was Counsel De John ineffectiveness for
not objecting to a sentence that outside the
Scope of the Law in S.C. Code Ann. § 16-3-10.

Under this Section, the Legislature set forth
guidelines ~~be~~ thirty years to Life. Applicant
Sentence is obviously in violation of State
and the United States Constitution. Const. Art.
1 § 15; U.S.C.A. Const. Amend. 8.

The Applicant is Challenging his Conviction and sentence
§ 17-29-20. Person may institute proceeding; exclus-
iveness.

Appellate Counsel was ineffective for failing to brief
~~issue~~ trial Abuse of Authority. Martinez v. Ryan, 132 S.Ct. 1318.
1

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

THE COURT OF ~~General~~ SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Tavish D. Yeargin #317173

Defendant

VS.

STATE OF SOUTH CAROLINA

Respondent

"CONCLUSION"

Wherefore, The defendant, Tavish D. Yeargin #317173, comes now and moves this Honorable Court of General sessions with this motion to be relieved from judgment in Pursuant to the SCRPC, Rule #60(b), (3), & (4). The defendant Prays for Following reliefs to be granted if the Courts Find Favor in this motion. The defendant would request that his conviction and Sentence be Rev'd, Remanded, new Trial, or Vacated.

Respectfully Submitted



Tavish D. Yeargin #317173

LCI - Wando - B #2

Ridgeville, SC 29472

Pro-Se

2017 FEB 10 PM 3 42

STATE OF SOUTH CAROLINA
 COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

Tawish D. Yeargin #317173

Defendant,

VS.

STATE OF South Carolina

Respondent,

#Arrest Warrant #MS21460

Indictment Number #2011-
GS-39-2148, 2149"VERIFICATION"

PERSONALLY appearing before me Tawish D. Yeargin, #317173 First being duly sworn upon my oath / depose and say that he is the defendant in this foregoing action / and that he FULLY understands and subscribed to the Contents therein; that it contains and includes grounds known thereof; for either correcting / Rev'd / Remand / New Trial or vacate his conviction or sentence. All information therein are true and correct to the best of my knowledge.

Sworn to and subscribed before me
 this 1st day of February, 2017

Lushan Bryant
 NOTARY PUBLIC

Tawish D. Yeargin #317173

MY COMMISSION EXPIRES: May 26, 2020

2017 FEB 10 PM 3 42

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

CLERK OF COURT

COUNTY OF PICKENS

AND PICKENS COUNTY

THIRTEEN JUDICIAL CIRCUIT

SOUTH CAROLINA

Tavish D. Yeargin #317173

Defendant

vs.

STATE OF SOUTH CAROLINA

Respondent.

"DECLARATION"

I, Tavish D. Yeargin #317173, hereby declare and ~~state~~ that I am the defendant in this matter, depose and say under the Penalty of Perjury that all relevant information therein are true and correct to the best of my knowledge and that contains matters that may be subjected to the correction, Rev.d, Remanded, new Trial or Vacation of Conviction and Sentence being Challenged.

Respectfully Submitted,



Mr. Tavish D. Yeargin #317173

LCI. Wando - B#2

P.O. BOX 205

Ridgeville, SC 29472

2017 FEB 10 PM 3 40

CLERK OF COURT
 PICKENS County
 214 E. MAIN STREET
 PICKENS, SC 29671

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

2017-CP-39. 0170

Dear Honorable Clerk,

Enclosed is an DNA Testing application /
 Post-conviction Relief Application along with
 an motion to be relieved from judgment
 in Pursuant to the SCRPC Rule #60(b), (3) & (4).
 To be Presented to the Court ~~DA~~ which the
 Applicant was convicted and adjudicated.
 Please be advised that the Applicant would
 like a clocked, stamped Filed COPY For
 his record.

Thank You For Your Cooperation in this matter.

Dated: _____

Respectfully Submitted.

Tavish D. Yeargin

Tavish D. Yeargin #317173
 LCI, Wando - B#Z
 P.O. BOX 205
 Ridgerville, SC 29472

2017CP39 0170

PICKENS County Clerk of Court
 Office of the Clerk
 214 E Main ST
 Pickens SC 29671



RICHARD B BEEKMAN #347134
 LEE CORRECTIONAL INSTITUTION
 F-1-A Unit Room # 1115
 990 WISACKY HWY
 Bishopville, South Carolina

29010

2017 FEB 10 PM 4 27
 CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

* emailed to Judy Carey
 2/13/17 mb ✓

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	
Tavish Dominique Yeargin, #317173,	)	2017-CP-39-0170
Applicant,	)	
	)	RETURN AND PARTIAL
v.	)	MOTION TO DISMISS
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on February 10, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. In April 2012, the Pickens County Grand Jury indicted Applicant for murder (2011-GS-39-2148) and grand larceny, value more than \$2,000, but less than \$10,000 (2011-GS-39-2149). John DeJong, Esquire represented Applicant. Assistant Solicitors Doug Richardson, Esquire and Brandi Hinton, Esquire prosecuted the case. On November 18-20, 2013, Applicant proceeded to trial before the Honorable Robin B. Stilwell. The jury found Applicant guilty as indicted. Judge Stilwell sentenced Applicant to imprisonment for concurrent terms of sixty years for murder and five years for grand larceny.

Applicant filed a timely notice of appeal. Robert Michael Dudek, Esquire, of the Office of Appellate Defense and Jeffery P. Dunleavy, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 20, 2016. State v. Yeargin, Op. No. 2016-UP-043 (S.C. Ct. App. filed January 20, 2016). The remittitur was returned to the circuit court on March 1, 2016.

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

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. "Counsel failed to competently argue due process violation."
 - b. "Counsel failed to argue against § 16-3-10"
 - c. "Counsel failed to investigate exculpatory evidence."
 - d. "Trial counsel was ineffective for failure to request for impaneling documents that supported evidence of grand jury convene for procurement related to improper indictment."
 - i. "Applicant point to deficiency by Defense DeJong did not at any time investigate or make no effort to secure information upon this matter, where defense counsel abandoned his duty to protect applicant rights for not employ investigator to find out if any physical evidence or biological material presented to say that grand jury agreed with decision."
 - e. "Defense counsel was ineffective in related to Applicant rights to challenge the affidavit for arrest, search and seizure."
 - f. "Trial counsel was ineffective for failing to asks the trial court to poll the jury individually by name to determine whether this their verdict."
 - g. "It was counsel DeJong ineffectiveness for not objecting to a sentence that outside the scope of law in S.C. Code Ann. § 16-3-10."
 - h. "IAC shown where counsel did not protect Applicant rights' for not rebut and or make no effort to possess information prior to trial, which created an Brady violation."
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellate counsel was ineffective for failing to brief issue 'trial abuse of authority.'"
3. Brady Violation
 - a. "The prosecutor knowingly misrepresented a BB gun as a .22 caliber handgun. 'The prosecutor knew the BB gun shoot pellet.'"
4. Trial Court Error
 - a. "The circuit court err in the abuse of authority where Applicant sentence or conviction exceeds the maximum authorized by law. Under this section, the Legislature set forth guidelines be thirty years to life. Applicant sentence is obviously in violation of State and the United States Constitution."

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the

record does not conclusively refute. Accordingly, 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.

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 alleges a Brady v. Maryland, 373 U.S. 83 (1963) violation. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Respondent submits that this ground for relief is without merit. However, the allegation concerning a Brady violation probably raises questions of fact that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this ground for relief. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

The allegation of trial court error should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

Here the Applicant states the circuit court erred in its abuse of authority where Applicant sentence or conviction exceeds the maximum authorized by law. Applicant was found guilty of murder. Under South Carolina law a person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. S.C. Code Ann. §16-3-20. Additionally, "life" or "life imprisonment" means until death of the offender without the possibility of parole. S.C. Code Ann. §16-3-20. Because of this, Applicant's claim is without merit.

Additionally, even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These issues are improper for post-conviction relief because they could have been raised on direct appeal and are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief.

For these reasons and pursuant to Rule 12(b)(6), SCRPC, the Court should dismiss the Application for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

VII.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VIII.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and Brady violation. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws 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.

IX.

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

X.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and Brady violation.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: DJm
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 26, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

2017-CP-39-0170

TAVISH DOMINIQUE YEARGIN, 317173)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

R. Mills Ariail, Jr., Esquire
11 North Irvine Street; Suite 11
Greenville SC 29601

DATED this 26th day of July, 2017.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Tavish Dominique Yeargin,	)	Case No(s):2017CP3900170
	)	
Applicant,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

October 25, 2017
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

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

R. MILLS ARIAIL, Esquire
Attorney for the Applicant

DESHAWN MITCHELL, Esquire
Attorney for the Respondent

Teresa B. Johnson, CVR-M-CM,
Circuit Court Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Motions	4			
Tavish Yeargin				
by Mr. Ariail	6			
by Mr. Mitchell		14		
John DeJong				
by Mr. Ariail	17			
by Mr. Mitchell		23		
Certificate of Reporter	29			

EXHIBITS PAGENO.DESCRIPTIONID EV**APPLICANT EXHIBITS**

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(Proceedings begin on the 25th day of October,
2017 at approximately 12:26 p.m.)

THE COURT: Good afternoon, Mr. Yeargin.

MR. YEARGIN: Good afternoon.

THE COURT: Yes, sir?

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

THE COURT: Yes, sir.

MR. MITCHELL: This is 2017-CP-39-0170,
Tavish Dominique Yeargin versus the State of
South Carolina. Pardon me. The applicant is
presently confined in the South Carolina
Department of Corrections pursuant to orders of
commitment of the Pickens County Clerk of Court.
In April 2012, the Pickens County Grand Jury
indicted Applicant for murder and grand larceny,
value more than 2000, but less than 10,000.
Mr. John DeJong represented Applicant.

On November 18th through the 20th, 2013,
Applicant proceeded to trial before the
Honorable Robin B. Stilwell. The jury found
Applicant guilty as indicted. Judge Stilwell
sentenced Applicant to imprisonment for
concurrent terms of 60 years for murder and five

1 years for grand larceny.

2 Applicant filed a timely notice of appeal.
3 Mr. Robert Michael Dudek, of the Office of
4 Appellate Defense, and Jeffrey Dunleavy
5 perfected the appeal. The South Carolina Court
6 of Appeals affirmed Applicant's conviction on
7 January 20th, 2016. Remittitur was returned to
8 the Circuit Court on March 1st, 2016.

9 He is present in the courtroom today
10 represented by Mr. Mills Ariail.

11 **THE COURT:** Mr. Ariail?

12 **MR. ARIAIL:** Thank you, Your Honor. We are
13 ready to proceed.

14 **THE COURT:** Yes, sir.

15 **MR. ARIAIL:** We would call Mr. Yeargin to
16 the stand.

17 **THE COURT:** All right.

18 **THE CLERK:** Mr. Yeargin, please step over
19 to the witness booth. Place your left hand on
20 the Bible and raise your right hand, best you
21 can. Sir?

22 **THE WITNESS:** You said left hand, right?

23 **THE CLERK:** Left hand; raise your right
24 hand.

25 **THE WITNESS:** Okay.

1 **THE CLERK:** There you go.

2 **TAVISH YEARGIN**

3 having first been duly sworn, testifies as follows:.

4 **THE CLERK:** Thank you. You may be seated.

5 Please state your full name for the record.

6 **THE WITNESS:** Tavish Yeargin.

7 **DIRECT EXAMINATION**

8 **BY MR. ARIAIL:**

9 **Q** All right. Mr. Yeargin, how are you doing
10 today?

11 **A** Okay.

12 **Q** I'm going to start over. How are you doing
13 today?

14 **A** I'm doing good. How about you?

15 **Q** Good. Good. Now, we've talked in depth
16 about your case. I've gone through it, and I've read
17 your transcript and looked at everything in regards
18 to it. There are a lot of things that you kind of put
19 forth that I want to go through and get on the record
20 today, to make sure that this is your time to be able
21 to tell the Judge how you believe that Mr. DeJong was
22 deficient, or didn't do what you requested him to do
23 to represent you. Okay?

24 **A** Okay.

25 **Q** I know he represented you, and this was a

1 murder case, correct?

2 **A** Correct.

3 **Q** Okay. And you went to trial; is that right?

4 **A** Correct.

5 **Q** Now, let me understand, how long before you
6 went to trial, do you believe, that Mr. DeJong
7 represented you?

8 **A** Probably since 2011.

9 **Q** Okay. From 2011 until, I guess, you went to
10 trial in November of 2013, did y'all meet and discuss
11 your case?

12 **A** Yes, we did.

13 **Q** How many times do you think you met him?

14 **A** I really can't remember how many times.

15 **Q** A pretty good amount of times?

16 **A** Yeah, probably about 10 times.

17 **Q** 10 times?

18 **A** Yeah.

19 **Q** Did y'all go over the evidence that could
20 be used against you?

21 **A** No.

22 **Q** During these -- during these meetings, what
23 did y'all discuss?

24 **A** What we discussed was -- wait a minute. Let
25 me think what we discussed. We actually discussed --

1 he was just telling me about the case. That was
2 pretty much it.

3 **Q** Was he telling you what people could
4 testify to, what the evidence was against you?

5 **A** No, not at all, sir.

6 **Q** Did he tell you anything about one of the
7 witnesses was your sister and she may testify against
8 you?

9 **A** No, that was later on, right before trial.

10 **Q** Okay. Were you aware that there were some
11 witnesses that potentially could testify against you
12 about what happened, during this case?

13 **A** No.

14 **Q** So you didn't know that?

15 **A** No.

16 **Q** He didn't ever tell you that?

17 **A** Huh-no.

18 **Q** Did he ever go over discovery with you or
19 give you information about that?

20 **A** No.

21 **Q** Did you ever get a plea offer or anything
22 in this case?

23 **A** No, never got a plea offer.

24 **Q** He never told you whether or not they would
25 allow you to plead to something less than what they

1 were seeking?

2 **A** No.

3 **Q** Okay. Did you have any discussions with him
4 about any defenses you had or anything that could be
5 done to be able to help you in this case?

6 **A** Yes, I did. I told him about my alibis. And
7 he told me -- at the time, he said he couldn't
8 contact them or he didn't have time because his
9 investigator had retired.

10 **Q** Okay. So tell me what were those
11 discussions in regards to.

12 **A** My defense of where I was, at the time.

13 **Q** An alibi?

14 **A** Yes.

15 **Q** Okay. Who was that alibi?

16 **A** That was my cousin, two of my cousins.

17 **Q** Okay. And who are they?

18 **A** There was Tracy, the other was Steve.

19 **Q** Okay. Tracy and Steve?

20 **A** Uh-huh.

21 **Q** Those were alibi witnesses you wanted him
22 to talk to?

23 **A** Yes.

24 **Q** He did not talk to them, is what you are
25 saying?

1 **A** Yes.

2 **Q** What would they have said?

3 **A** They would've told them where I was, at the
4 time that the murder occurred.

5 **Q** Okay. And they would've said that you were
6 not where the murder took place, you were somewhere
7 else?

8 **A** Yes, correct.

9 **Q** Okay. Did he fail to investigate or do
10 other things that you asked him to do outside of the
11 alibi witnesses?

12 **A** Yes.

13 **Q** What did he fail to do?

14 **A** What he failed to do is -- okay. Besides
15 the alibis, I asked him to get a preliminary hearing.

16 **Q** Okay.

17 **A** And I -- and I never got it, at all.

18 **Q** Did you -- how long after you were arrested
19 was he appointed to represent you?

20 **A** Probably two or three days.

21 **Q** Do you know if a preliminary hearing was
22 held at some time, or if he waived it, or anything of
23 that nature?

24 **A** No, because -- no, I asked him for one, at
25 the time. He said it wasn't no use to me going. I

1 told him I wanted to go.

2 **Q** How do you think that prejudiced you by not
3 having a preliminary hearing?

4 **A** What they -- what is the word I am looking
5 for? -- not by -- basically, whatever they said I did
6 or accused me of doing.

7 **Q** Okay. So you were thinking you might have
8 learned earlier on, kind of, what they were alleging
9 against you?

10 **A** Yes, correct.

11 **Q** Now, any other items that you think he did
12 -- I guess, let's just go into what he did during
13 trial that you believe he should have done that could
14 have helped you or hurt you during the trial?

15 **A** Any items?

16 **Q** Yeah.

17 **A** What do you mean by "items"?

18 **Q** What I'm trying to figure out is, was there
19 anything during trial that you say he should have
20 done or didn't do that caused me issues. For
21 instance, he didn't object to something, or he didn't
22 call a witness you wanted him to, or anything like
23 that.

24 **A** Yes, the witnesses that he didn't call,
25 that was just one of the parts.

1 **Q** Okay. You asked him, specifically, to call
2 them?

3 **A** Yes.

4 **Q** Okay. You put a lot of things in your
5 application. Some of these don't apply. Are there
6 other things that you want to bring up to the Court
7 which would help the Court understand what you are
8 seeking here today?

9 **A** What I'm seeking today is a new trial.
10 That's what I want.

11 **Q** Right. To be able to get that, you've got
12 to -- we're putting forth what Mr. DeJong didn't do
13 that could have prejudiced you and that, as a result
14 of that, you should be allowed to have a new trial?

15 **A** Uh-huh.

16 **Q** Okay?

17 **A** Okay.

18 **Q** All right.

19 **A** Okay. I was told what they said about these
20 co-defendants that I have. If we was all charged with
21 murder, why is they out and I'm still locked up?

22 **Q** What did he have to do with that and the
23 sentencing of those individuals, and how did that
24 prejudice you?

25 **A** How that prejudiced me is, they got a

1 lesser offense by testifying on me.

2 **Q** Right. At trial, if I remember correctly
3 from reading through the transcript, he did go into
4 that they were testifying and they -- you know, they
5 hadn't been sentenced yet. He tried to cross-examine
6 them in regards to potentially getting a deal for
7 their testimony. Did he do that, from your
8 recollection?

9 **A** Yeah, he cross-examined them and all of
10 that.

11 **Q** One of those were your sister, correct?

12 **A** Correct.

13 **Q** Okay. Is there anything, in regards to your
14 sister, that he could have done differently that you
15 wanted him to do? She, specifically, testified
16 against you that you did do the shooting.

17 **A** Huh-uh.

18 **Q** I mean, was there anything you wanted him
19 to do with her or anything you could have helped --
20 he could have done differently?

21 **A** Yeah, I wish I would've known that they was
22 going to testify on me, before the trial.

23 **Q** Okay. You're saying you didn't have an
24 understanding of that testimony -- her testimony that
25 could be used against you in trial?

1 **A** Yes.

2 **Q** I guess my question is, were you aware --
3 were you are aware that she was a potential witness
4 and that she could be used at trial?

5 **A** No.

6 **Q** Okay. He never told you that?

7 **A** No.

8 **MR. ARIAIL:** Your Honor, that's all the
9 questions I have.

10 **THE COURT:** All right. Any questions for
11 this witness?

12 **MR. MITCHELL:** Just briefly, Your Honor.

13 **CROSS-EXAMINATION**

14 **BY MR. MITCHELL:**

15 **Q** Good afternoon, Mr. Yeargin. How are you?

16 **A** I'm doing good. How about you?

17 **Q** Good. I heard Mr. Ariail ask you if you met
18 with your attorney prior to trial. You met with him,
19 correct?

20 **A** Yeah, I met with him.

21 **Q** So did he go over discovery with you, at
22 all?

23 **A** No, not really, not at all, sir.

24 **Q** Now really or not at all?

25 **A** Not at all. I'm sorry. Not at all.

1 **Q** Not at all. Do you recall discussing with
2 him about possible defenses to the case?

3 **A** No.

4 **Q** No?

5 **A** No.

6 **Q** Did he ever tell you what his theory of the
7 case was or what you guys were going to do, going to
8 trial?

9 **A** No.

10 **Q** No?

11 **A** No, sir.

12 **Q** Do you ever remember receiving plea offers
13 in this case?

14 **A** No, sir.

15 **Q** No?

16 **A** No.

17 **Q** Let me ask you about -- you said you had
18 alibi witnesses that were going to testify at trial?

19 **A** Yes.

20 **Q** He didn't contact them?

21 **A** No, he said, when he contacted them, he
22 said he couldn't get no response. He also stated when
23 he tried to -- I gave him the address. I gave him the
24 address and all the information he needed. He said
25 when he got ready to go there, he said he was going

1 to send his investigator, but he said his
2 investigator had retired, at that time. Some days
3 before the trial, his investigator retired, so he
4 couldn't go out there to get the alibis.

5 **Q** Do you have the witnesses here today to
6 testify for you about your alibi?

7 **A** No, sir.

8 **Q** Okay. You said that the co-defendants got
9 lesser sentences. Mr. DeJong, he cross-examined those
10 co-defendants; didn't he?

11 **A** Yes, correct.

12 **Q** He bought out information in regards to
13 them being involved in the crime with you, correct?

14 **A** Yes, correct.

15 **MR. MITCHELL:** Judge, that's all the
16 questions I have.

17 **THE COURT:** Any other questions for this
18 witness?

19 **MR. ARIAIL:** No follow-up, Your Honor.

20 **THE COURT:** Sir, you can step down.

21 **THE WITNESS:** Okay.

22 **MR. ARIAIL:** Your Honor, I would call
23 Mr. DeJong to the stand.

24 **THE COURT:** All right. Mr. DeJong.

25 **JOHN DEJONG**

1 having first been duly sworn, testifies as follows:

2 **THE CLERK:** Thank you. Please state your
3 full name for the record.

4 **THE WITNESS:** John William DeJong,
5 D-e-j-o-n-g.

6 **DIRECT EXAMINATION**

7 **BY MR. ARIAIL:**

8 **Q** Mr. DeJong, how are you doing, once again?

9 **A** I'm about to get wore out, right now,
10 Mr. Ariail.

11 **Q** I know. We've been running through them. I
12 know. This is the last one. Now, in regards to
13 Mr. Yeargin's case, how long did you represent him on
14 this case?

15 **A** I think -- I want to say I got Mr. Yeargin
16 from pretty much the get-go, from the time he was
17 arrested and went into the jail.

18 **Q** One of the key issues in the case is
19 whether or not you discussed the discovery with him
20 and informed him of what could be used against him at
21 trial?

22 **A** I definitely did. We did it at the Pickens
23 County Law Enforcement Center.

24 **Q** That was my question. Did he ever get out
25 on bond at any time?

1 **A** No, sir.

2 **Q** So you went down there, how many times? He
3 said, I think, you met with him about 10 times?

4 **A** At least, I would say.

5 **Q** Okay. This was a significant charge. It was
6 a murder charge.

7 **A** Yes, absolutely.

8 **Q** One of the key things in the case, I guess,
9 there were two witnesses that were there that said
10 they had witnessed the shooting that they say
11 Mr. Yeargin committed?

12 **A** Correct.

13 **Q** Okay. And one of those was his sister, and
14 another was another lady that was with him?

15 **A** That was correct.

16 **Q** Was he aware of those witnesses, and was he
17 put on notice of those?

18 **A** He was because -- I don't remember the
19 exact date of the trial, but -- in my notes, on
20 September 22nd, 2013, I went to -- I've got a
21 notation of a jail visit. We discussed both his
22 sister and Ms. Williams. We took it pretty much from
23 the get-go, and worked all the way through. He was
24 definitely -- he was definitely aware that -- I don't
25 know that he thought his sister would testify against

1 him ---

2 Q Right.

3 A --- initially.

4 Q Right.

5 A I think he became aware of that later on.

6 During the course of the trial, he had -- the Pickens
7 County Detention Center had given a letter to the
8 Solicitor's Office that he had written to his sister
9 about testifying?

10 Q Okay. Was he aware, I guess, of the
11 specifics that she was going to testify to?

12 A I don't know about the specifics, but,
13 certainly, whatever was alleged in the -- or set
14 forth in the discovery, shall we say.

15 Q All right. I guess the question is, was he
16 aware that she was going to testify that he did the
17 shooting?

18 A I think, towards the end, we became aware
19 of that.

20 Q Okay. And did you discuss with him, well,
21 if she testifies, it could go this way, or if she
22 doesn't testify, it could go a different direction?

23 A True.

24 Q Did you also test -- I guess, discuss with
25 him that even she doesn't testify, there's another

1 witness that could testify against you?

2 **A** I did. He was aware of that.

3 **Q** I'm sure you probably went through that not
4 only are there eyewitnesses, but there's also
5 circumstantial evidence that was out there that tied
6 him to this, correct?

7 **A** Quite a bit of circumstantial evidence,
8 yes.

9 **Q** So understanding all of that, was he aware
10 of all the information that was out there?

11 **A** To my knowledge, he was.

12 **Q** Okay. Did he, at any time, ask you can
13 plead to something less or did you receive a plea
14 offer of something less?

15 **A** I don't think he ever asked about pleading,
16 and I don't believe the solicitor ever offered me any
17 kind of offer in this case. I think I went to the
18 solicitor to try to get manslaughter. The solicitor
19 would not agree to it. I don't think I ever had an
20 offer from the solicitor.

21 **Q** Okay. Were there any other -- I guess,
22 these alibi witnesses, did you ever run them down, or
23 get any information that he was somewhere different
24 than where he was?

25 **A** I personally did not. I know he gave me --

1 well, there were quite a few addresses involved, some
2 apartment complexes in Greenville and around there.
3 That may be who he had asked me to try to contact. I
4 don't think -- I know I didn't, but I don't think my
5 investigator ever made any contact with any of those
6 witnesses.

7 **Q** So you had no one that you talked with
8 that, specifically, said Mr. Yeargin was somewhere
9 different than where these two witnesses said he was
10 at the time of this murder?

11 **A** I'm not aware of anybody that would've
12 testified to that.

13 **Q** If you did have that, you probably would've
14 utilized it during trial?

15 **A** Absolutely. I, frankly, didn't think, from
16 my reading --

17 I'm always a little puzzled in PCR
18 hearings, Your Honor -- and I'm not trying to be
19 funny -- of getting into privileged information. I
20 know he's been convicted, but I always hesitate, when
21 I'm answering questions, if I'm going to cross that
22 line.

23 **THE COURT:** I think your privileges can be
24 waived, but I certainly understand that if it
25 were to be -- if this case were to go back for a

1 new trial, what position that would put you in.
2 I will let you say whatever you feel is
3 appropriate.

4 **THE WITNESS:** Thank you, Your Honor. Based
5 on my conversations with Mr. Yeargin, I never
6 believed that identity, or his identity, or
7 placement at the crime scene, was in question.

8 **BY MR. ARIAIL:**

9 **Q** So you didn't think that was a strong point
10 that you could dispute at trial, I guess?

11 **A** I don't follow.

12 **Q** Well, I'm trying to figure out, you thought
13 there was a question as to him being there, or no?

14 **A** No.

15 **Q** Okay. So you didn't think that was an
16 option that you had at trial to try to dispute that
17 he was not there?

18 **A** Correct.

19 **Q** I know you sought a charge in the defense
20 of others?

21 **A** Right.

22 **Q** Did you think that was a strong point of
23 your case to try to --

24 **A** Not necessarily a strong point, Mr. Ariail,
25 but, certainly, we tried to put it up as a defense.

1 **Q** Correct. Saying that he was trying to
2 defend against the individual that was in the car?

3 **A** I believe it was Ms. Williams, if I'm not
4 mistaken.

5 **Q** That didn't -- you weren't able to get the
6 charge; were you?

7 **A** I was not.

8 **MR. ARIAIL:** Your Honor, I have no further
9 questions.

10 **THE COURT:** All right. Any questions for
11 this witness?

12 **MR. MITCHELL:** Yes, Your Honor. Thank you.

13 **CROSS-EXAMINATION**

14 **BY MR. MITCHELL:**

15 **Q** Last time, today, I'll ask you questions,
16 Mr. DeJong, promise?

17 **A** No, it won't. But for today, it will be.
18 Okay.

19 **Q** So, if you could briefly -- I know we
20 touched on it -- if you can recall the facts of the
21 actual case and the allegations of what happened, if
22 you could tell us.

23 **A** I'll be as brief as I can. The allegations
24 were that Mr. Yeargin, along with his sister and
25 another female, came from Greenville to Easley to

1 look at a vehicle. In the course of looking at -- let
2 me back up, the victim in this case was very
3 intoxicated. I mean, the police reports bear that
4 out.

5 Mr. Yeargin, I think they went to Easley in
6 a Mustang. It was a Pontiac, I think, they were
7 looking at, of some sort or another. One -- either
8 his sister or Ms. Williams wanted to test drive the
9 car. Mr. Yeargin stayed in the Mustang and drove it.
10 I don't recall if it was a sister or Ms. Williams
11 that drove the Pontiac, if I'm correct on that.
12 Mr. Yeargin followed them.

13 They, ultimately, ended up at a church --
14 the name of the church, I can't remember -- on Fish
15 Trap Road, almost on the Pickens/Greenville County
16 line. While there, Mr. Yeargin was still in the
17 Mustang. Something transpired between the victim and
18 one, or both, of the females. I don't think, as I
19 recall, that there was any physical -- anything
20 physical going on. But in the course of that, the
21 allegations were that Mr. Yeargin shot the victim.

22 Q Okay. After being appointed to Mr. Yeargin,
23 you discussed with him the charges and the potential
24 sentences he was facing in regards to those charges?

25 A Yes, sir.

1 **Q** One of those charges was murder. I'm
2 assuming you informed him that the penalty for murder
3 is 30 years to life, correct?

4 **A** 30 years to life, and my understanding, it
5 was day for day. There would be no parole.

6 **Q** Okay. Did he ever indicate to you that he
7 didn't understand any of those things?

8 **A** No.

9 **Q** Okay. And I know you touched on it, very
10 briefly, earlier, about investigation into the case.
11 Do you recall what type of investigation you did in
12 regards to this case, at all?

13 **A** I looked at the evidence in the State's
14 possession. I drove out to the church parking lot,
15 certainly, much after the fact, but nonetheless went
16 out there. As I shared with Mr. Ariail, I believe we
17 tried to locate some witnesses, but we were never
18 successful.

19 **Q** But you made a diligent effort to do so?

20 **A** As I recall, yes.

21 **Q** Okay. Did you ever discuss any possible
22 defenses with Mr. Yeargin?

23 **A** Yes, I did. I think Mr. Ariail touched on
24 one of them, was defense of another. We talked
25 possibly about self-defense. We talked not so much by

1 way of defense. But, again, I was either trying to
2 get a charge for defense of others or self-defense,
3 which we do not get. And we also, I believe, talked
4 about trying to get a lesser included of
5 manslaughter.

6 Q Going into trial -- was self-defense or
7 defense of others, was that the theory of the case
8 going into trial?

9 A Pretty much -- from my perspective, that's
10 pretty much all we had to work with.

11 Q I'm assuming this -- the applicant helped
12 you come up with this, or he was okay with that?

13 A Well, based on what he shared with me.

14 Q Sure.

15 A Obviously -- well, he didn't say defense of
16 another person, but the facts, as he shared them with
17 me, that's what I came up with.

18 Q I know we touched on it earlier, as well.
19 But, ultimately, the co-defendants testified against
20 the defendant, correct?

21 A Both of them, yes, sir.

22 Q Then, in your opinion, how fatal was that
23 to the case?

24 A How what?

25 Q In your opinion, how fatal was that to the

1 case?

2 **A** 100 percent.

3 **Q** 100 percent?

4 **A** Yes, sir.

5 **Q** And, I guess, after they testified, did you
6 ever discuss with him about him possibly testifying
7 at trial?

8 **A** We did. We talked about that more than
9 once, even before he went to trial. I shared with
10 Mr. Yeargin what I share with all of my clients,
11 don't make that decision now. We make that decision
12 after the State rest. We ask for a brief recess from
13 the judge. We briefly go over whether my client
14 testifies or does not testify is solely up to them.
15 That was certainly the case with Mr. Yeargin.

16 **MR. MITCHELL:** Judge, that's all the
17 questions I have.

18 **THE COURT:** Any other questions for this
19 witness?

20 **MR. ARIAIL:** Nothing further, Your Honor.

21 **THE COURT:** So, you can step down.

22 **THE WITNESS:** May I step out as well,
23 Your Honor?

24 **THE COURT:** Yes, sir.

25 **MR. ARIAIL:** If I may approach. I have a

1 part of the application. I've looked at that. I
2 don't think that is anything that we need to
3 proceed on.

4 **THE COURT:** Okay. All right. Very well
5 then. All right. Well, I'm going to want to take
6 this under advisement. I'm going to want to look
7 at the file in this case and go over it and go
8 over what you've testified to here today. I'd
9 anticipate a decision within a couple of weeks.
10 All right.

11 Good luck to you.

12

13 (Proceedings conclude at approximately

14 12:53 p.m.)

15

16

17

18

CERTIFICATE

[illegible]

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Pickens, South Carolina, on this 21st day of August, 2018.

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

Teresa B Johnson

Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

Tavish Dominique Yeargin, #317173)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2017-CP-39-0170

ORDER OF DISMISSAL

CLERK OF COURT
THIRTEENTH JUDICIAL CIRCUIT
GREENVILLE, SOUTH CAROLINA

2018 MAY 21 A 8:32

This matter comes before the Court by way of an application for post-conviction relief filed on February 10, 2017 by Tavish Dominique Yeargin (Applicant). Respondent made its Return on or about July 26, 2017. An evidentiary hearing into the matter was convened on October 25, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by R. Mills Ariail, Jr, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel John W. DeJong, Esquire. This Court had before it a copy of the records of the Pickens County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. In April 2012, the Pickens County Grand Jury indicted Applicant for murder (2011-GS-39-2148) and grand larceny, value

more than \$2,000, but less than \$10,000 (2011-GS-39-2149). John DeJong, Esquire represented Applicant. Assistant Solicitors Doug Richardson, Esquire and Brandi Hinton, Esquire prosecuted the case. On November 18-20, 2013, Applicant proceeded to trial before the Honorable Robin B. Stilwell. The jury found Applicant guilty as indicted. Judge Stilwell sentenced Applicant to imprisonment for concurrent terms of sixty years for murder and five years for grand larceny.

Applicant filed a timely notice of appeal. Robert Michael Dudek, Esquire, of the Office of Appellate Defense and Jeffery P. Dunleavy, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 20, 2016. State v. Yeargin, Op. No. 2016-UP-043 (S.C. Ct. App. filed January 20, 2016). The remittitur was returned to the circuit court on March 1, 2016.

FACTUAL HISTORY

On September 17, 2011, Applicant shot and killed Sean Dinneen in the parking lot of Crosswell Baptist Church in Easley, SC. Dinneen was shot once. The shot entered in his right upper chest, right at the clavicle. (Tr. 529). The shot fractured the mid-point of the clavicle, crossed diagonally downwards towards the back, injured the left lung, pierced the diaphragm, and ended up right in front of one of the large vessels. (Tr. 530). Dinneen died as a result of blood loss resulting from the wound to the right side of the lung. (Tr. 530-32).

Applicant plans to steal a car from the victim

Applicant and his two co-defendants, Kayla Williams and Nyia Utsey,¹ initially planned to steal one of two cars the victim had for sale. The victim had a teal Pontiac Grand Prix and a blue Mitsubishi Lancer for sale, and he was asking \$7000 for each car. (Tr. 78-9).

¹ Nyia Utsey is one of Applicant's sisters. Kayla Williams was Nyia's girlfriend at the time. (Tr. 308, 392-93).

Kayla testified that she initially received a call from Applicant on September 16, 2011. Nyia also indicated that she received a call from Applicant asking if he could get a ride from Kayla. (Tr. 394). Applicant had informed Kayla and Nyia that he had some cars in Easley that he wanted to pick up. (Tr. 311-13, 395-96). Applicant indicated that he needed a ride to get the cars from Easley. (Tr. 395-96). Kayla, who at the time drove a Ford Mustang, agreed to assist as long as Applicant provided her with gas money. (Tr. 312, 314, 395-96). The three initially met on Friday, September 16, after Kayla and Nyia dropped off Nyia's son at Nyia's mother's house.² (Tr. 313, 396-97). During the drive to the victim's house, Applicant indicated to Kayla and Nyia that he planned on robbing the victim. (Tr. 316). Kayla noted that Applicant stated he wanted to tie the victim up with zip ties and knock him out. (Tr. 316). Nyia stated that Applicant had told them that the plan would be for Kayla and Nyia would get the victim to come to his front door, and while they were talking with the victim Applicant would enter from the back door, get the car keys, and tie the victim up. (Tr. 397-98). Nyia indicated that before they left the house that Friday, she saw Applicant get a long barreled gun from their brother Michael, and she further noted she saw them load the gun. (Tr. 398-99). Applicant placed the gun in the trunk of Kayla's Mustang. (Tr. 399).

On that Friday, when the three went to the victim's home, no one was there. (Tr. 317, 400-02).

The Three Regroup for a Second Attempt on Saturday

The next morning, Applicant called Kayla and Nyia again, asking if they would take him back to the victim's house.³ (Tr. 319, 402-03). After Applicant agreed to provide Kayla with gas money, they agreed to again help Applicant. (Tr. 319, 403). The two picked up Applicant after they dropped Nyia's son off at Nyia's mother's house. (Tr. 320, see Tr. 404). Kayla

² Nyia indicated that they dropped off her son at her sister Tequala's house, and they then picked Applicant up from her mother's house. (Tr. 397).

³ Nyia believed the conversation may have been on the evening of September 17th. (Tr. 402-03).

testified that while at the mother's house, Applicant obtained a long barreled gun from his brother Michael. (Tr. 321). Nyia testified that they picked Applicant up from her sister's house, but they went to her mother's house so Applicant could pick up the gun. (Tr. 404, 445). Applicant put the gun in the trunk of Kayla's Mustang. (Tr. 322, 405, 445). The three then went to Taylors and picked up Applicant's brother Charles. (Tr. 324, 406-07).

The group started with a plan to convince the victim that they wanted to purchase both cars the victim had for sale. (Tr. 325-26, 406, 407). Applicant made the initial contact with the victim by telephone. (Tr. 406, see Tr. 449). When the group arrived at the victim's house, Kayla, Nyia and Charles walked up to the victim's house to meet with him.⁴ (Tr. 329, 410).

Margaret Hinson, the victim's neighbor, testified that on September 17, the victim received calls from a male wanting to look at the two cars he had for sale. (Tr. 80). She noted that at least one of the calls was to her house phone. (Tr. 79-80). Later that evening, as it was just getting dark, she noted three people came to see the car. (Tr. 80-2). Hinson indicated there were two females who were looking at the cars, and a male was midway down the hill in the driveway from the victim's house. (Tr. 81-2).

The three looked at both the Grand Prix and a Mitsubishi Lancer the victim had for sale. (Tr. 329, 410-11). At some point during the initial meeting with the victim, Charles expressed reluctance about continuing with the group's plan. (Tr. 329-30, 410-11). Kayla and Nyia informed the victim that they needed to go to a local gas station to use the restroom, and that they would return. (Tr. 330, 412). Hinson noted that when the group left, the victim brought the Grand Prix down from his house and parked it in front of her house. (Tr. 83-4). She also stated that the victim was heavily intoxicated, and that he was drinking. (Tr. 84-5, 102).

⁴ Applicant remained in Kayla's Mustang; he did not want the victim to recognize him because he had previously lived with the victim. (Tr. 326-27, see Tr. 406).

The group left the victim's house, went to a gas station, and left Charles at the station. (Tr. 331, 413). Applicant, Kayla, and Nyia then returned to the victim's residence; Kayla and Nyia went back to the house to look at the two cars. (Tr. 332-33, 414). Nyia noted that she saw the gun in the backseat of the Mustang at this point. (Tr. 414). They were unable to start the Lancer and keep it running.⁵ (Tr. 333).

Hinson testified that when the group came back, they pulled into the victim's driveway. (Tr. 84). The victim had indicated to her that they planned on taking the Grand Prix for a test drive. (Tr. 84, 85). Kayla and Nyia then requested to test drive the Grand Prix. (Tr. 334, 415). During the test drive, Kayla drove the Grand Prix, and Nyia sat in the front passenger seat. (Tr. 335, 377, 416, 451). The victim sat in the back seat of the Grand Prix. (Tr. 335, 377, 416, 451). Both Kayla and Nyia testified that he was heavily intoxicated, and he was drinking during the test drive. (Tr. 335-36, 416, 451). Applicant remained in Kayla's Mustang, and he followed the Grand Prix during the test drive. (Tr. 336, 416).

The Two Cars Stop in a Church Parking Lot

Kayla testified that during the test drive, she followed signals from Applicant as directions of where he wanted her to take the car. (Tr. 336-37, 376-77).⁶ Eventually, Kayla pulled into the parking lot of Crosswell Baptist Church because she was tired of driving. (Tr. 337, 417). She pulled into the parking lot, and Applicant pulled in behind her. (Tr. 417). Once they were stopped, Nyia got out of the Grand Prix and went back to the Mustang to talk with Applicant about their next move. (Tr. 337-38, 378, 417, 453). After talking with Applicant, Nyia went back to the Grand Prix to talk with Kayla. (Tr. 338, 417-18). Kayla then went back to the Mustang to talk with Applicant. (Tr. 338, 378, 418-19, 453). While the two were talking,

⁵ Both Nyia and Hinson indicated the attempt at operating the Lancer occurred during their first contact with the victim. (Tr. 82, 410-11).

⁶ Nyia testified that this was done according to the instructions by Applicant. (Tr. 414, 452).

they noticed the victim had gotten out of the car and was starting to walk towards the driver's side of the car.⁷ (Tr. 338-39, 418-19; see Tr. 380). Kayla ran back to the Grand Prix and jumped in the driver's seat before the victim could get into the seat. (Tr. 339, 378, 418-19, 453-54). Kayla then tried to start the car. (Tr. 339, 419). The victim got on top of Kayla and attempted to jerk the keys out of Kayla's hand. (Tr. 339). During cross-examination, Kayla indicated that the victim was grabbing at her, and at some point, she showed where she was bruised to law enforcement. (Tr. 379).

Kayla testified that he also attempted to put the car in park while she was attempting to put the car in drive. (Tr. 339-40, 380). Nyia also confirmed the victim Kayla and the victim were engaged in a struggle over the car. (Tr. 419). Nyia observed the victim throw the beer bottle behind him, and further saw him lose a shoe after Kayla got the car to go a little bit. (Tr. 419).

Kayla noted, "[the victim]'s not hitting me, he's just trying to get me out of the car, trying to pull me out." (Tr. 340, ll 6-7). She also noted that the victim was not saying anything. (Tr. 340). Nyia testified the victim was laying on top of Kayla. (Tr. 420). His hands were on the driver's seat and, at some point in time, on the ignition switch. (Tr. 420). She also stated that she did not see him hit her, but he "[m]ight be pushing her a little bit." (Tr. 420, ll 21-22).

The Shooting

Kayla described what happened next as follows:

It happened so fast. Tav [Applicant] pulled up beside the car, the Grand Prix that we were in. And the window was rolled down on the passenger side of the Grand Prix. And my window won't roll down in my Mustang on the driver's side. So,

⁷ Kayla noted that the victim did have a beer bottle in his hand when he was walking towards the driver's side of the car. (Tr. 380). Kayla did not know when the beer bottle was broken in the parking lot. (Tr. 380). She also did not know if it was thrown or dropped. (Tr. 380).

he opens his door, sticks the gun out and tells him to get up off me or he's going to shoot him.

And Dinneon says, Shoot me, I don't care.

And he shoots him on top of me.

(Tr. 341, ll 1-8). Nyia recalled, "[s]o the Defendant, he drives around and he told Sean he said, Get off her. And Sean looked up at him and said, Kill me. And he had the gun pointed at the window. And he shot him." (Tr. 421, ll 3-8). Nyia also indicated Applicant had pulled up to the passenger side of the Grand Prix, opened the Mustang door, and fired the gun towards the victim. (Tr. 421, 457-59). Nyia acknowledged the victim was not using any weapons, and he was not threatening Kayla in any way. (Tr. 422).

Kayla indicated that immediately prior to the shooting, the victim had half of his body in the Grand Prix and had his legs dangling out of the Grand Prix. (Tr. 341). Kayla testified that she saw Applicant shoot the victim. (Tr. 341). After he was shot, the victim went limp. (Tr. 341). Nyia also admitted she saw Applicant shoot the victim. (Tr. 421).

During cross-examination, Kayla testified that she could not tell what Applicant may have seen during the confrontation between her and the victim. (Tr. 383). She also did not know what Applicant could see when he shot the victim. (Tr. 382). Kayla surmised Applicant was just trying to get the victim off of her. (Tr. 382, 384).

Kayla testified that after Applicant shot the victim, she panicked. (Tr. 342). She pushed the victim off of her, started the Grand Prix, and sped out of the parking lot. (Tr. 342). Nyia also confirmed that Kayla pushed the victim out of the car and took off. (Tr. 421-22). Eventually, Applicant and Nyia were able to catch up with Kayla in Kayla's Mustang. (Tr. 342-43, 422). Kayla and Applicant switched cars, and they drove back to Applicant and Nyia's mother's house. (Tr. 343, 422-23). Kayla testified that Applicant was bragging about shooting the victim at his

mother's house. (Tr. 343). She also noted Applicant said that he got his mother's car back. (Tr. 343).

That night, Kayla and Nyia went back to their hotel. (Tr. 427). The next day, September 18, they received a call from Applicant. (Tr. 345, 426). They later picked up Applicant, and over the course of several days, travelled from Greenville area to Gatlinburg, TN, back towards Spartanburg, SC, Traveler's Rest, SC, and eventually to Asheville, NC. (Tr. 347-53, 428-31). The three were apprehended at a Sleep Inn in Asheville. (Tr. 182-83, 295-99, 353, 432).

Law Enforcement Investigation

The victim was still breathing shallowly, but was otherwise unresponsive when the first officer arrived to the scene. (Tr. 130, 132). The first deputy to arrive noted that the victim was face down, and there was blood on the ground when he arrived. (Tr. 132). The victim was lifeless by the time EMS arrived. (Tr. 145, 146, 149).

At the scene, a broken liquor bottle and a tennis shoe were located several feet away from the victim's body. (Tr. 155-56, 158, 246-47). Law enforcement was able to identify the victim via his driver's license. (Tr. 158).

Law enforcement obtained a lead when a detective spoke with Ms. Hinson about the call she received. (Tr. 164-65). Hinson provided a detective with the phone number from which she had received a call about seeing the cars. (Tr. 103, 164-65, 231). Law enforcement traced the number to Harold Sloan. (Tr. 106). Sloan testified that the number was for a cell phone that he provided to Taznick Utsey, one of Applicant's sisters.⁸ (See Tr. 106-07, 165). Law enforcement later made contact with Taznick, and they were able to establish Applicant, Kayla, and Nyia as possible suspects. (Tr. 169-70).

⁸ Josqueze Thomas, one of Taznick's ex-boyfriends, testified that he recalled seeing Applicant use the phone on September 17, 2011. (Tr. 110-12, 113).

The Grand Prix was found in Greenville on Monday, September 19, by the US Marshal Service. (Tr. 171-72). Near the car was a rolled up license plate. (Tr. 175). A receipt from a Family Dollar dated September 18, 2011 was found in the car. (Tr. 177-78). Video from the Family Dollar on the date and time of the timestamp on the receipt reflected that an individual with a similar appearance to Applicant came to the store in the Grand Prix and made a purchase inside the store. (Tr. 180-81, 192-93).

After Applicant and his co-defendants were arrested, Kayla's Mustang was searched. (Tr. 182-86). A BB gun was found underneath the passenger seat.⁹ (Tr. 186).

The victim's blue Lancer was processed for fingerprints. (Tr. 232, 249-50). Three prints from the Lancer were matched to Nyia. (Tr. 502-03, 518). The Grand Prix and the license plate found behind the Grand Prix were also processed for fingerprints. (Tr. 255-58, 262-63). Prints from the rolled up license plate were matched to Applicant. (Tr. 504-05, 520). Prints from the Grand Prix were matched to Applicant and to Kayla. (Tr. 506, 509-10, 517).

ALLEGATIONS

1. Ineffective Assistance of Trial Counsel

- a. "Counsel failed to competently argue due process violation."
- b. "Counsel failed to argue against § 16-3-10"
- c. "Counsel failed to investigate exculpatory evidence."
- d. "Trial counsel was ineffective for failure to request for impaneling documents that supported evidence of grand jury convene for procurement related to improper indictment."
 - i. "Applicant point to deficiency by Defense DeJong did not at any time investigate or make no effort to secure information upon this matter, where defense counsel abandoned his duty to protect applicant rights for not employ investigator to find out if any physical evidence or biological material presented to say that grand jury agreed with decision."
- e. "Defense counsel was ineffective in related to Applicant rights to challenge the

⁹ Kayla had testified that Applicant gave her a BB gun on the night of the shooting, and he told her to use it on the lady (Ms. Hinson) with the victim when they were initially looking at the cars. (Tr. 328). Nyia confirmed Applicant gave Kayla the gun, and further confirmed that Applicant told Kayla to use it to keep the lady with the victim from going anywhere to call the police. (Tr. 408). Nyia also testified that Charles threatened to punch Kayla if she hit the lady with the gun. (Tr. 412).

affidavit for arrest, search and seizure.”

- f. “Trial counsel was ineffective for failing to asks the trial court to poll the jury individually by name to determine whether this their verdict.”
 - g. “It was counsel DeJong ineffectiveness for not objecting to a sentence that outside the scope of law in S.C. Code Ann. § 16-3-10.”
 - h. “IAC shown where counsel did not protect Applicant rights’ for not rebut and or make no effort to possess information prior to trial, which created an Brady violation.”
- 2. Ineffective Assistance of Appellate Counsel
 - a. “Appellate counsel was ineffective for failing to brief issue ‘trial abuse of authority.’”
 - 3. Brady Violation
 - a. “The prosecutor knowingly misrepresented a BB gun as a .22 caliber handgun. ‘The prosecutor knew the BB gun shoot pellet.’”
 - 4. Trial Court Error
 - a. “The circuit court err in the abuse of authority where Applicant sentence or conviction exceeds the maximum authorized by law. Under this section, the Legislature set forth guidelines be thirty years to life. Applicant sentence is obviously in violation of State and the United States Constitution.”

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant’s Testimony

Applicant testified Trial Counsel represented him from 2011 until the time of trial in November of 2013. He testified Trial Counsel met with him a good amount of times and if he had to estimate probably ten times. Applicant testified Trial Counsel discussed the case with him but never discussed potential witnesses. He testified he did not know his sister would testify at trial until the night before she testified. Applicant testified he told Trial Counsel about an alibi witness but Trial Counsel told him he could not track them down because he did not have enough time and his investigator retired. He testified his cousins Tracy and Steve where his alibi witnesses and they would have testified at trial that he was somewhere else when this crime took place. He testified Trial Counsel failed to get a preliminary hearing after he asked for one but Trial Counsel told him he did not need one. Applicant testified he thought he could have learned more about the allegations at a preliminary hearing if he would have had one. He testified Trial

Counsel should have called his alibi witnesses at trial and he was prejudiced because his co-defendant got less time for testifying. Applicant testified he wanted to know who the witnesses were that were going to testify at trial and Trial Counsel failed to inform him of them.

On cross-examination, Applicant testified he met with Trial Counsel but he did not go over discovery with him at all and never discussed facts of the case with him. He testified Trial Counsel never discussed any plea offers with him either. Applicant testified he gave Trial Counsel addresses and names of his alibi witnesses but Trial Counsel said he could not locate them because his investigator retired. He testified Trial Counsel did cross-exam his co-defendant regarding their involvement and if they were receiving a lesser sentence for testifying.

Trial Counsel's Testimony

Trial Counsel testified he represented Applicant from the time of his arrest. He testified he definitely discussed the discovery and reviewed everything with Applicant because he met with him at least ten times during his representation of Applicant. Trial Counsel testified two witnesses said they saw the shooting including Applicant's sister who was Applicant's co-defendant. He testified on September 22, 2013, he went to the jail to visit Applicant and discussed with him that his sister and other witnesses would be testifying. Trial Counsel testified Applicant thought initially his sister would not testify against him and Applicant had written a letter to his sister about her potential testimony. He testified he discussed with Applicant different variables regarding Applicant's sister's testimony. Trial Counsel testified these variables included other witnesses testifying and other circumstantial evidence that may be introduced at trial. He testified there was never any plea offer from the state and Applicant did not say he wanted to plead guilty. Trial Counsel testified he thought Applicant gave him names of potential alibi witnesses but he did not have any luck finding the alibi witnesses. He testified

based on his conversations with Applicant he never believed Applicant's identity or placement at the crime scene was ever in question. Trial Counsel testified he sought a jury charge of defense of others and tried to use that as a defense in Applicant's case but was unsuccessful in getting the charge.

On cross-examination, Trial Counsel testified to the facts of the case. He testified Applicant was with his sister and another women and they had come from Greenville to Easley to look at a vehicle for sale. He testified the victim in this case was very intoxicated and after a test drive of the vehicle the parties involved ended up at a church. Trial Counsel testified something transpired between the victim and the females and Applicant shot the victim. He testified he reviewed all of Applicant's charges with him and the sentences he could face including that murder carried a sentence of thirty years to life day for day. Trial Counsel testified he looked at the evidence in the case, went to the crime scene, and tried to locate witnesses. He testified he was unable to find any witnesses despite diligent efforts. Trial Counsel testified the possible defenses in this case for Applicant were self-defense and defense of others. He testified he reviewed the discovery with Applicant. Trial Counsel testified both of Applicant's co-defendant testified against him including his sister and those testimonies where fatal to Applicant's case. He testified he discussed with Applicant about testifying in his defense many times and told him to decide after the state rested their case but that the decision to do so was solely up to Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly.

These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant proceeded on the following allegations:

Ineffective Assistance of Counsel

Applicant alleged Trial Counsel was ineffective in his representation. This Court finds Applicant has failed to prove Trial Counsel was ineffective. This Court would first note Trial Counsel provided effective assistance in this case. Trial Counsel is a trial practitioner who had experience in the trial of criminal offenses. Trial Counsel conferred with Applicant on multiple occasions, during which time Trial Counsel discussed the pending charges, the State's evidence, possible defenses and courses of action, and answered all of Applicant's questions.

This Court also finds Trial Counsel thoroughly investigated Applicant's case and Applicant failed to show how any further investigation would have helped his case. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Counsel testified credibly that not only did he review all of the discovery, he went to the crime scene, and tried to locate witnesses. This Court finds Trial Counsel's investigation was beyond reasonable.

This Court further finds Trial Counsel's search for Applicant's alibi witnesses was reasonable. First, this Court notes any claims surrounding the failure to investigate alleged alibi

witness assumes the testimony from the alleged alibi witnesses would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of the alleged alibi witness, this Court finds Applicant has failed to demonstrate he suffered any prejudice.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleged Appellate counsel was ineffective for failing to brief the issue "trial abuse of authority." At the evidentiary hearing, Applicant informed this Court he was waving the

claim of ineffective assistance of appellate counsel. This Court finds this claim was expressly waived by Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Brady Violation/Prosecutorial Misconduct

Applicant alleged the State committed a Brady¹⁰ violation or prosecutorial misconduct by knowingly misrepresenting a BB gun as a .22 caliber handgun. This Court construes this allegation as prosecutorial misconduct. This Court finds Applicant failed to present any information on this allegation. This Court finds Applicant has failed to meet his burden of proving actual prosecutorial misconduct. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Therefore, this allegation is denied and dismissed with prejudice.

Trial Court Error

Applicant alleged the circuit court erred in the abuse of authority where Applicant sentence or conviction exceeds the maximum authorized by law. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); Clark v. State, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no discretion to correct a sentence given within statutory limits. To be entitled to relief, the Applicant must prove that the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. Clark, Id.; State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). Applicant was charged with and ultimately convicted of murder. The criminal offense of murder carries a sentence of thirty years to life imprisonment. Applicant was sentenced to sixty years. This Court finds the trial court committed no error in sentencing Applicant. Accordingly, Applicant has failed to show his sentence was a result of any of the above mentioned factors.

¹⁰ Brady v. Maryland, 373 U.S. 83 (1963)

Therefore, this allegation is denied and dismissed with prejudice.

CONCLUSION

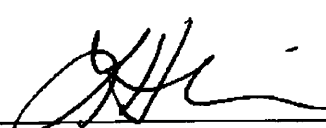
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. *See* Rule 71.1 (g), SCRCR. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15 day of May, 2018.



LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)

INDICTMENT FOR
 MURDER

At a Court of General Sessions, convened on

the Grand Jurors of Pickens

APR 17 2012

County present upon their oath:

That TAVISH DOMINIQUE YEARGIN did in Pickens County, on or about the 17th day of September, 2011, unlawfully and with malice aforethought kill SEAN TIMOTHY DINNEEN by means of shooting the victim, and that SEAN TIMOTHY DINNEEN died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Certified Copy

Harold P. Vetter

**Clerk of Court
 Pickens County, SC**

Dated Feb 20 2017

MB

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

[Signature]
 SOLICITOR

787

WITNESSES

Benjamin Dow

Pickens County Sheriff's Office

10/6/2011

ARREST WARRANT NUMBER

M521460

ACTION OF GRAND JURY

~~TRUE BILL~~

Date

APR 17 2012

Foreperson of Grand Jury

VERDICT

guilty

Dean P. Murphy 11/20/13
Foreperson of Petit Jury Date:

DOCKET NO. 2011-GS-39-2148
WDR

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

APR 17 2012 TERM 2011

THE STATE

vs.

TAVISH DOMINIQUE YEARGIN

Indictment for

0116

MURDER

VIOLATION § 16-03-0010, 0020

Certified Copy

Handed P. Walker

Clerk of Court

Pickens County, SC

Dated

MS

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
GRAND LARCENY

At a Court of General Sessions, convened on **APR 17 2012** the Grand Jurors of Pickens

County present upon their oath:

That TAVISH DOMINIQUE YEARGIN did in Pickens County on or about the 17th day of September, 2011, feloniously take and carry away the personal property of SEAN TIMOTHY DINNEEN to wit: a Pontiac Grand Prix, with a total value of more than Two Thousand Dollars with the intent to deprive the owner permanently of such property. This is in violation of §16-13-0030 of the South Carolina Code of Laws (1976) as amended.

Certified Copy

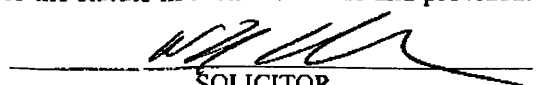
Harold P. Walker

**Clerk of Court
Pickens County, SC**

Dated Feb 2017

MB

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


SOLICITOR

789
WITNESSES

Benjamin Dow

Pickens County Sheriff's Office

10/6/2011

ARREST WARRANT NUMBER
M521461

ACTION OF GRAND JURY

~~TRUE BILL~~

~~Date~~
~~APR 17 2012~~

Foreperson of Grand Jury
[Signature]

VERDICT
guilty

[Signature] 11/20/13
Foreperson of Petit Jury Date:

DOCKET NO. 2011-GS-39-2149
WDR
The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS
APR 17 2012 TERM 2011

THE STATE

vs.

TAVISH DOMINIQUE YEARGIN

Indictment for
3420

GRAND LARCENY
VIOLATION § 16-13-0030(B)

Certified Copy
Harold P. Walker
Clerk of Court
Pickens County, SC
Dated *Feb 2017*
ms

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Pickens

VS.

Tavish Dominique Yeargin

AKA:

Race: BLACK Sex: M Age: 27

DOB: 1986 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Greenville, SC 29605

DL#: [REDACTED] SID#: SC00838313

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

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS3902148

A/W#: M521460

Date of Offense: 9/17/2011

S.C. Code §: 16-03-0010, 0020

CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Richardson, Doug

66112

SC Bar#

Defendant

John W. DeJoy

Attorney for Defendant

00/620

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 60 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

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

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: _____

Clerk of Court

Pickens County, SC

Dated: Feb 20 2013

☐ Appointed PD or appointed other counsel MB§ 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:

Sentence Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

791

COUNTY OF
STATE

Pickens

VS.

Tavish Dominique Yeargin

AKA:

Race: BLACK Sex: M Age: 27

DOB: 1986 SS#: [REDACTED]

Address:

City, State, Zip: Greenville, SC 29605

DL#: SID#: SC00838313

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Larceny / Grand Larceny, value more than \$2,000 but less than \$10,000

INDICTMENT/CASE#: 2011GS3902149

A/W#: M521461

Date of Offense: 9/17/2011

S.C. Code §: 16-13-0030(B)

CDR Code #: 3420

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-13-0030(B) of the S.C. Code of Laws, bearing CDR Code # 3420

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Richardson, Doug

66112

SC Bar#

Defendant

John W. DeTig

Attorney for Defendant

001620

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 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
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TOTAL	\$	\$ 133.90

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

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

\$ _____ paid to Public Defender Fund

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Pickens County, SC

Dated Feb 20 2013 MB

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Presiding Judge

Judge Code:

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