

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

\_\_\_\_\_  
RYAN P. DELESTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001475

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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**Vol. III of III**  
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1 Q Okay. And did you advise him of his rights  
2 exactly as they appear on that card?  
3 A I did.  
4 Q And whose signature is that as the warning  
5 officer?  
6 A It's my signature.  
7 Q And how about the signature as the witness?  
8 A Detective Burckhardt's signature, yes.  
9 Q Okay. And when were those warnings  
10 administered?  
11 A Approximately 9:25 a.m. on the 30th of July,  
12 2003 -- 2012.  
13 MR. DURANT: Okay. Your Honor, at this time,  
14 we would offer State's 28 into evidence.  
15 THE COURT: Any objection?  
16 MR. PENNINGTON: No objection, your Honor.  
17 THE COURT: State's 28 into evidence without  
18 objection.  
19 (State's Exhibit No. 28 is admitted into  
20 evidence.)  
21 Q (By Mr. DuRant) Now, during the time you  
22 advised him of his rights, did he appear to understand  
23 what you were saying?  
24 A Yes, he appeared to understand.  
25 Q Did he tell you he understood his rights?

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1       A     He did.

2       Q     Did he sign a statement indicating --

3       A     Yes, he did.

4       Q     Did he appear confused?

5       A     No, he didn't.

6       Q     Did he respond appropriately to your questions?

7       A     He did.

8       Q     Did he appear to be under the influence of

9 alcohol or drugs or any other intoxicants?

10      A     No, he did not.

11      Q     And he was interviewed on two different

12 occasions that day; is that correct?

13      A     He was.

14      Q     One being in the morning; one being that

15 evening; correct?

16      A     Yes.

17      Q     Now, after you advised him of his rights, did

18 he indicate -- did he tell you he was willing to answer

19 questions, and did he answer questions?

20      A     He did.

21      Q     At any time during this entire process, that

22 morning or that evening, did you or anyone else, to your

23 knowledge, promise him anything?

24      A     No, we did not.

25      Q     Threaten him in any way?

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1           A     No, sir.

2           Q     Offer him leniency if he talked to you?

3           A     No, sir.

4           Q     Did you threaten him or his family or his loved  
5 ones?

6           A     No, sir.

7           Q     Did you offer any reward or inducement if he  
8 talked to you?

9           A     No, we did not.

10          Q     Now, once y'all got in and read him his rights,  
11 who took the lead on the interview?

12          A     Detective Burckhardt.

13          Q     And how did that go?

14          A     Detective Burckhardt and Mr. Deleston started  
15 clashing -- started being a little argumentative and  
16 such.

17          Q     And what did Mr. Deleston do?

18          A     Said he didn't want to talk anymore. He didn't  
19 want to talk, sir. Something so that effect.

20          Q     How long did that occur into the interview?

21          A     Ten minutes.

22          Q     And what did y'all do when you told him  
23 that -- when he told you he didn't want to talk anymore?

24          A     We left the room.

25          Q     Was he allowed to leave?

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1       A     No, he was not.  
2       Q     And why not?  
3       A     As I said, he -- he was being detained. He had  
4     an active warrant for, you know, possession of a firearm  
5     with a obliterated serial number.  
6       Q     So he was not free to leave; right?  
7       A     No, he was not.  
8       Q     But y'all left the room --  
9       A     We left the room.  
10      Q     -- is that correct?  
11      A     That's correct.  
12      Q     Now, how long were you out of the room?  
13      A     Approximately five minutes.  
14      Q     And did you stick your head in the room?  
15      A     Yes, I did.  
16      Q     For what purpose?  
17      A     To check on him, to ask if he wanted something  
18     to drink.  
19      Q     Did he want anything to drink?  
20      A     He did not. He did not.  
21      Q     Just tell us what happened when -- when you --  
22      A     I stuck my head in the room and asked if he  
23     wanted anything. He said, no, he didn't want anything.  
24     And he started talking to me, and he invited me to sit  
25     down.

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1 Q He started to ask you questions and stuff;  
2 correct?  
3 A Yes.  
4 Q And what did he end up doing, after he's asking  
5 these questions?  
6 A He started talking about --  
7 Q What did he tell you to do, is what I'm asking?  
8 A Told me to sit down.  
9 Q He said, Sit down, and what?  
10 A He wanted to talk to me. Talk to you for a  
11 minute. Let me talk to you.  
12 Q So what did you do?  
13 A Sat down and talked to him.  
14 Q Okay. Now, moving ahead about 30 minutes into  
15 the interview, did he mention something about an  
16 attorney to you?  
17 A He did.  
18 Q How did that come up?  
19 A Mr. Deleston was inquiring about the warrant,  
20 and I was explaining to him about the warrant. And he  
21 mentioned -- or he stated something to the fact that,  
22 that we couldn't charge him with that because we didn't  
23 catch the gun on him. I mentioned to him that we had  
24 him on surveillance of video footage, and he said he  
25 wanted to see the video. I need a lawyer, because if I

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1 have a lawyer, I can see the video.

2 Q And that happened about 30 minutes into the  
3 interview; is that correct?

4 A Yes.

5 Q Did you view that as a request for an attorney  
6 by him?

7 A No, I did not.

8 Q Did you expect that he was asking for the  
9 assistance of an attorney to assist him in the interview  
10 process?

11 A No, he did not.

12 Q What did you think he was asking for?

13 A He was merely asking to see the video. He  
14 wanted to review the video footage.

15 Q Now, by way of contrast, there was another  
16 occasion in the interview, about a little over an hour  
17 later, where he mentioned an attorney again. Do you  
18 remember that?

19 A Yes.

20 Q Tell us how that came up.

21 A I was showing Mr. Deleston the still footage --  
22 the pictures which he identified himself in that --

23 Q These are just still photos of what, sir?

24 A Still photographs of the surveillance camera  
25 during the transaction of him selling a pistol.

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1 Q Showing him selling the gun to the informant in  
2 this case; correct?  
3 A That's correct.  
4 Q Okay. And what did he do while you were  
5 showing those photographs?  
6 A He said something like, he needed a phone to  
7 get a lawyer down here, because the pictures didn't mean  
8 crap, basically. That didn't prove nothing; that's what  
9 he was saying.  
10 Q Okay. I don't think he used the word "crap,"  
11 but that's essentially what he said?  
12 A Right. Yeah, he did use some other words.  
13 Q And what did you do?  
14 A I simply asked him twice, do you want a lawyer?  
15 Are you asking for an attorney? And he says no.  
16 Q Okay. So at that time, you did think he was  
17 asking for an attorney; is that correct?  
18 A Well, I was confirming if he was asking for an  
19 attorney.  
20 Q And he said that he didn't want an attorney?  
21 A He said no.  
22 Q And, to the best of your knowledge, did he  
23 mention anything about an attorney for the rest of the  
24 interview that morning, or the interview at that time?  
25 A No, he did not.

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1           Q     Now, moving on a little bit, was there a point  
2 where he claimed to be tired?  
3           A     Yes, he did.  
4           Q     And when was that?  
5           A     It was about 11:50. Right about 12 o'clock.  
6           Q     And what did you do when he told you he was  
7 tired?  
8           A     I left the room.  
9           Q     Okay. And do you know how long he was left  
10 alone?  
11          A     He was left alone for about -- maybe about -- I  
12 think about two hours.  
13          Q     Okay. And during that time, do you know what  
14 he did?  
15          A     Took a nap, bathroom break, smoke break.  
16          Q     Read the newspaper?  
17          A     Read the newspaper.  
18          Q     And going back to that, during this entire  
19 interview process, was he allowed to go to the bathroom  
20 when he wanted to?  
21          A     Yes.  
22          Q     Was he taken outside for smoke breaks?  
23          A     He was.  
24          Q     Did he have anything to eat or drink?  
25          A     He did.

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1 Q And if he would have asked, you would have  
2 given it to him; is that correct?  
3 A That's correct.  
4 Q Sometimes you would ask even if he didn't ask?  
5 A That's correct.  
6 Q Now, after that couple of hour break, did y'all  
7 continue to talk to him?  
8 A We did.  
9 Q Okay. And do you remember how much longer you  
10 talked to him during -- I call it the morning session?  
11 A I think it was about 50 minutes.  
12 Q Okay. And did he ever admit to any involvement  
13 in the Marley Lion shooting?  
14 A He did not.  
15 Q Did he ever -- did he admit having sold the gun  
16 to the informant?  
17 A He did.  
18 Q And was he formally placed under arrest at the  
19 end of the interview?  
20 A He was.  
21 Q And do you recall what he was formally arrested  
22 for?  
23 A Yes.  
24 Q What was that?  
25 A Murder, attempted armed robbery, possession of

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1 a firearm during commission of a violent crime,  
2 possession of a firearm with obliterated serial number.

3 Q And do you recall what time -- that morning  
4 session, what time it ended?

5 A Three o'clock p.m.

6 Q Now, in the meantime, where -- after y'all  
7 finished talking to him, where was he kept?

8 A He was then moved downstairs to a holding cell.

9 Q At the Charleston Police Department  
10 headquarters --

11 A Yes.

12 Q -- is that correct?

13 A Yes..

14 Q And you left and did other things connected  
15 with this case; is that correct?

16 A That's correct.

17 Q I believe you went down to the ATF office and  
18 talked to Julius Brown?

19 A Yes.

20 Q Brought him down and continued interviewing  
21 him?

22 A Yes.

23 Q Okay. Moving ahead to 8:00 p.m. that night,  
24 did you have an occasion to meet with the Defendant once  
25 again?

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1           A     I did.

2           Q     And where was that?

3           A     Same room, upstairs at the police department,

4     investigation division.

5           Q     And who were you with on that occasion?

6           A     Detective Burckhardt.

7           Q     And, once again, was this interview audio and

8     video recorded?

9           A     Yes, it was.

10          Q     Did you read him his Miranda Rights again?

11          A     I reminded him, basically, he still -- he was

12     still covered under the Miranda from earlier that

13     morning, and he had the right to remain silent, and

14     anything you say can be used against him, and he had the

15     right to an attorney.

16          Q     Okay. He indicated he understood he was still

17     under Miranda?

18          A     Right.

19          Q     And did he continue to talk to y'all?

20          A     He did.

21          Q     And on this session, what did he end up telling

22     you about the Marley Lion issue, initially?

23          A     He indicated that he and his friends was in the

24     yard on Cashew Street and a gentleman by the name of

25     Tino came up to them and -- and he admitted that he was

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1 the one that shot Marley Lion.

2 Q Okay. And he, of course, was told -- y'all had  
3 already checked out Tino and knew he wasn't involved?

4 A Yes.

5 Q And after that, what did he tell you,  
6 generally?

7 A He said that -- basically, he, Julius Brown and  
8 Bryan Rivers went to rob Famous Joe's, and he indicated  
9 that -- he identified Julius Brown as the person walking  
10 across in front of the car of Marley Lion's vehicle, and  
11 he said that Bryan Rivers had the firearm and went up to  
12 the vehicle and shot into the vehicle.

13 Q So he said Bryan Rivers was the one that shot  
14 the vehicle?

15 A Yes.

16 Q The victim. Excuse me.

17 And how did Marley Lion -- how did Marley Lion  
18 figure into this? Because they went out to rob Joe's,  
19 what did he say about that?

20 A He said that when he went up to rob Joe's --  
21 when they went up to rob Joe's employees, not the  
22 business, but the employees, as they were closing up and  
23 coming out, and when they got there, the employees were  
24 coming out, Marley was just pulling in, and so the  
25 employees got in their vehicle and left, so they decided

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1 to rob Marley.

2 Q And both of these interviews were video  
3 recorded; is that correct?

4 A Yes.

5 MR. DURANT: Your Honor, at this time, we would  
6 offer State's Exhibit Number 29 and State's Exhibit 30.

7 THE COURT: Any objection?

8 MR. PENNINGTON: Subject to my earlier issues,  
9 your Honor, I have no additional claims, but I stand on  
10 my original objections.

11 THE COURT: State's 29 and 30 are into evidence  
12 over your objection, pursuant to our motions prior to  
13 start of the trial.

14 (State's Exhibit Nos. 29 and 30 are admitted  
15 into evidence.)

16 Q (By Mr. DuRant) Just a little bit more.  
17 Now, State's Exhibit 29 and 30, they're two different  
18 interviews; correct?

19 A Yes.

20 Q And according to State's Exhibits 29 and 30,  
21 Mr. Deleston was on that videotape from 8:48 in the  
22 morning until 3:00 p.m.; correct?

23 A Yes.

24 Q And then there was a -- about a five-hour gap.  
25 And then he was on tape again from about 8:00 until

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1 about 10:30 in the evening?

2 A That's correct.

3 Q So that's a total of about -- how many hours?

4 A About 14.

5 Q Okay. Now, you've been through that videotape

6 -- both of those videotapes; is that correct?

7 A That's correct.

8 Q How much of that 13 hours was he actually being

9 questioned concerning his involvement in this thing?

10 A He was interviewed for approximately four hours

11 and 20 minutes or so.

12 Q And that's on both occasions?

13 A That's together, yes.

14 Q And I hand you what has been marked -- been

15 marked as State's Exhibit 21 and ask if you recognize

16 that document, sir?

17 A Yes, sir.

18 Q And what is that?

19 A This is the time lapse of the span during which

20 Mr. Deleston was alone, and -- which was verified by me,

21 watching the video.

22 Q That just shows the time spans during that

23 period where he was not being questioned; is that

24 correct?

25 A That's correct.

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1 Q And you've compared that against State's  
2 Exhibit 29 and 30; correct?

3 A Yes, sir.

4 Q And it's accurate, to the best of your  
5 knowledge; correct?

6 A Yes.

7 MR. DURANT: Your Honor, at this time, we'd  
8 offer State's 31 into evidence, I believe without  
9 objection.

10 THE COURT: Any objection to 31? It's the  
11 summary of the time --

12 MR. DURANT: Do you need to see it?

13 MR. PENNINGTON: All right. No, I don't need  
14 to see it.

15 I still stand on my earlier objection, as it  
16 relates to the content of the same matters, and, so,  
17 therefore, I interpose the same objection. Other than  
18 that, no additional objections.

19 THE COURT: No objection to what's -- you are  
20 objecting to what's -- as to the video, but you're not  
21 objecting as to the accuracy of what's contained in the  
22 timeline; is that correct?

23 MR. PENNINGTON: I have no objection about the  
24 accuracy of the document.

25 THE COURT: All right. State's 31 into

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1 evidence.

2 (State's Exhibit No. 31 is admitted into  
3 evidence.)

4 MR. DURANT: Court's indulgence for just a  
5 moment?

6 THE COURT: Take your time.

7 MR. DURANT: If you would, please answer any  
8 questions that Mr. Pennington may have for you.

9 THE WITNESS: Yes, sir.

10 (Mr. DuRant and Mr. Pennington have a  
11 discussion off the record.)

12 MR. DURANT: In that case, your Honor, we would  
13 request to publish State's Exhibit 30. -- 29, excuse  
14 me.

15 THE COURT: All right. So at this time, you're  
16 publishing the video, and then you're going to save your  
17 Cross until after the video is published?

18 MR. PENNINGTON: That is correct, your Honor.

19 THE COURT: All right. Thank you.

20 And you wish for the detective to remain on the  
21 stand; is that correct?

22 MS. WILSON: Yes, ma'am.

23 THE COURT: Thank you.

24 (Time is 4:08 p.m.)

25 MR. DURANT: Your Honor, we've agreed to

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1 fast-forward through the parts that the officers are not  
2 actually in the room.

3 THE COURT: All right.

4 MR. PENNINGTON: That's correct, your Honor.

5 THE COURT: All right. Thank you.

6 (Time is 4:19 p.m.)

7 (Video is played.)

8 (Time is 4:45 p.m.)

9 THE COURT: Your Honor, the next segment is  
10 about 25 minutes long.

11 THE COURT: All right. We indicated we would  
12 stop at 5:00, so we'll just go ahead and stop.

13 Ladies and gentlemen, you indicated that you  
14 wish to stop at 5:00, so we're trying to end as quickly  
15 as -- or as close to 5:00 as we can. You also indicated  
16 that you could be here before 9:30 in the morning. The  
17 courthouse does not open its doors until 8:30. So we  
18 will begin -- if you will report at 8:55, we'll begin as  
19 close to that time as we can.

20 Is that acceptable to the State and to the  
21 Defendant?

22 MS. WILSON: Yes, ma'am.

23 MR. PENNINGTON: Yes, your Honor.

24 THE COURT: All right. Ladies and gentlemen,  
25 please remember all of my admonitions. Do not begin

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1 your deliberations. Do not discuss this case amongst  
2 yourselves. Please take your notepads with you, and  
3 we'll lock them up over the evening hours.

4 Please rise for the jury.

5 (The jury is escorted from the courtroom at  
6 4:52 p.m.)

7 THE COURT: Thank you. Be seated.

8 You may step down. I'll see you in the  
9 morning. You will need to be here and just take  
10 the -- take the witness chair in the morning.

11 Anything before we break?

12 MS. WILSON: No, ma'am, except that tomorrow --  
13 I'll try to draft something tonight regarding the  
14 redactions. We both agreed to redact certain portions  
15 that discuss polygraphs and things that are not  
16 admissible. And there are also some redactions in the  
17 plea agreement and proffer. I just want to call -- come  
18 up for something for you to instruct the jury that, you  
19 know, these blank spots aren't suspicious, that we've  
20 agreed they're irrelevant to this case and -- something  
21 like that.

22 MR. PENNINGTON: That's understandable. I can  
23 now -- I sort of gather where she's coming from, in the  
24 sense that we don't want to -- the jury to think that  
25 someone's tampered with it from the creation point of

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1 view. So we need to go ahead and claim that there have  
2 been certain things that the lawyers have agreed to have  
3 be eliminated.

4 THE COURT: All right.

5 MS. WILSON: I'll get you that.

6 THE COURT: Proposed charges?

7 MS. WILSON: Yes.

8 MR. PENNINGTON: I'll be sending E-mails  
9 shortly.

10 THE COURT: All right. 8:45.

11 MS. WILSON: Thank you.

12 THE COURT: We're at ease.

13 (The jury trial of this cause adjourned for the  
14 day at 4:54 p.m. on October 10, 2013.)

15 (End of Volume IV of V. Jury trial is  
16 scheduled to reconvene tomorrow, October 11th, 2013,  
17 at 8:45 a.m.)

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State of SC vs Ryan Deleston  
Jury Trial, October 10, 2013  
Volume IV of V

REPORTER'S CERTIFICATE

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY ) ss.

I, ROLAYNE M. VOLPE, Certified Court Reporter, CCR,  
and Registered Professional Reporter, RPR, do hereby  
certify that the transcript of the foregoing  
proceedings, Volume IV of V, accurately reflects the  
events that occurred before me to the best of my ability  
at the time and place set out on the caption hereto, the  
witnesses having been duly cautioned and sworn, or  
affirmed, to tell the truth, the whole truth, and  
nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,  
related to, nor employed by any of the parties to the  
action in which these proceedings were taken or to any  
attorney or counsel employed by the parties hereto, nor  
financially interested, directly or indirectly, in the  
outcome of this action.

CERTIFIED AND SIGNED on this 16th day of March,  
2014.

ORIGINAL

ROLAYNE M. VOLPE, CCR, RPR  
Certified Court Reporter and  
Registered Professional Reporter  
Commission Expires 12-30-2021

Reported By:  
Rolayne M. Volpe, CCR, RPR  
Official Court Reporter for the State of South Carolina

STATE OF SOUTH CAROLINA ) GENERAL SESSIONS COURT  
COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA, )  
vs. ) Case Nos.: 2011-GS-10-6361  
RYAN DELESTON, ) 2011-GS-10-6362  
 ) 2011-GS-10-6363  
Defendant. ) 2011-GS-10-6364

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TRANSCRIPT OF PROCEEDINGS  
JURY TRIAL, VOLUME V OF V  
HEARD BEFORE JUDGE KRISTI LEA HARRINGTON  
ON OCTOBER 11, 2013

---

ROLAYNE M. VOLPE, CCR, RPR  
Court Reporter for the State of South Carolina at Large  
Post Office Box 342  
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State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V

**A P P E A R A N C E S**

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1           The above-styled cause came on for hearing on  
2   the 11th day of October, 2013, at 8:45 a.m., before  
3   Judge Kristi Lea Harrington, Circuit Judge for the Ninth  
4   Judicial Circuit, presiding over the General Sessions  
5   Court for the County of Charleston, when the following  
6   proceedings were had and entered of record, to wit:

7                               PROCEEDINGS

8                               JURY TRIAL, VOLUME V OF V

9           (The Defendant is present with his counsel.)

10           THE COURT: Few housekeeping matters. Good  
11   morning. All right. Over the evening hour, I received  
12   a copy of a stipulation that was proposed by Ms. Wilson.

13           Mr. Pennington, you agreed that that  
14   stipulation was appropriate?

15           MR. PENNINGTON: Yes, ma'am.

16           THE COURT: So I will read that to the jury  
17   when they first come in because it applies to the video  
18   as well. Any objection to doing it that way?

19           MR. PENNINGTON: No, ma'am.

20           MS. WILSON: No, ma'am. Thank you.

21           THE COURT: And we are still waiting on at  
22   least one juror, so --

23           THE BAILIFF: They're all here.

24           THE COURT: Just quickly, as to -- any  
25   objection to the State's charges, from the Defense?

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1 MR. PENNINGTON: Your Honor, I have no  
2 objection to the one on -- what is styled felony murder.  
3 Although, I don't suppose the Court would read that  
4 caption, the language seems to me to be appropriate  
5 under that case.

6 Under the accomplice liability, I thought it  
7 was an excellent instruction, except for there was one  
8 sentence that -- and given the fact that this is an  
9 armed robbery gone bad scenario, specifically, where  
10 we're dealing with the Court instructing these jurors  
11 about how to apply the law in a case that involves an  
12 armed robbery, I object to the language that is -- what  
13 is the beginning of the second paragraph of accomplice  
14 liability, where it says: Specifically, it is  
15 immaterial whether the Defendant knew beforehand that  
16 the accomplice was going to harm the victim.

17 The basis for that is, the Constitution  
18 provides that the Court is not permitted to make a  
19 charge on the facts, and that this -- this strikes me  
20 that, in the context of this case -- I'm not saying that  
21 this is not a good law in the sense of South Carolina  
22 law, but I'm saying in the context of this case, it  
23 would be appropriate to redact that clause up to that  
24 semicolon.

25 And then in the next sentence, where it says:

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1 Accomplice liability applies to murder, which is the  
2 natural and probable consequence of -- I would insert  
3 the intended crime, rather than armed robbery.

4 Again, I think it crosses the line to being a  
5 charge on the facts. And so those are my only two  
6 exceptions. At first, I sort of read it and thought --

7 (Document is shown to Ms. Wilson.)

8 MR. PENNINGTON: -- the rest of it, I think,  
9 gets across the points of our --

10 THE COURT: You have no objection to the  
11 example given in the -- under State v. Hughey in the  
12 first paragraph?

13 MR. PENNINGTON: I did not. I do not.

14 THE COURT: All right.

15 MR. PENNINGTON: I think there -- it's sort of  
16 inescapable, and I don't -- I think that that is good  
17 law, so I do not object to that. I'm objecting only to  
18 -- I believe it's an inaccurate statement of fact and of  
19 law for the Court to say, categorically, that's it's  
20 immaterial -- that a fact is immaterial whether or not a  
21 defendant knew beforehand that the accomplice was going  
22 to harm the victim. I don't think that that is an  
23 accurate fact in terms of the jury's deliberation. I  
24 don't think that it is also -- I think it becomes a  
25 charge on the facts.

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1 THE COURT: All right, sir.

2 MR. PENNINGTON: So that one clause is the only  
3 thing that stands out to me.

4 THE COURT: All right. Any objection to the  
5 Defendant's charge, from the State?

6 MS. WILSON: Yes, ma'am. Do you want to hear  
7 from me on this issue?

8 THE COURT: No.

9 Any objections -- oh, I'm sorry. Mr. DuRant?

10 MR. DURANT: Your Honor, quite frankly, I just  
11 saw these charges 15 minutes ago, so I didn't have a  
12 chance to go through them.

13 MR. PENNINGTON: Here's a hard copy.

14 (Document is handed to Mr. DuRant from  
15 Mr. Pennington.)

16 MR. DURANT: But I would say I disagree with  
17 the Mattison charge, where it says that the alleged  
18 accomplice must have acted with the intention of  
19 encouraging and abetting the commission of the homicide,  
20 because I don't think that's the law. It has to  
21 act -- I know that they're quoting Am. Jur. there. But  
22 the law in this state says they have to be an accomplice  
23 in the commission of a criminal act, the natural and  
24 foreseeable consequence of which could be the death of  
25 someone. I don't think there's any requirement that

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1 there be prior knowledge that someone is going to get  
2 killed, and that instruction obviously implies that.

3 THE COURT: All right.

4 MR. PENNINGTON: Your Honor, it's a direct  
5 quote from the Mattison decision and, of course, you  
6 know, Justice Beatty. This whole decision is all about  
7 what is considered to be a desire to tighten up the  
8 language that we use and to require the language that  
9 we have contended is -- that we've given in bold in  
10 this charge. So it -- it does require that the  
11 alleged accomplice must have acted with the intent of  
12 committing -- of encouraging or abetting the commission  
13 of the homicide or the commission of the murder by the  
14 principal must have been a reasonably foreseeable  
15 consequence of the Defendant's acts. So I'm taking that  
16 straight from Mattison.

17 THE COURT: All right. Thank you.

18 MR. PENNINGTON: As an alternative --

19 THE COURT: Thank you, Mr. Pennington.

20 Mr. DuRant, my next question to you -- and I  
21 understand you haven't had an opportunity to review --  
22 is the charge dealing with credibility of testimony  
23 affected by inference. What's your position as to that?

24 MR. DURANT: Which is -- which number is that,  
25 your Honor?

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1 THE COURT: Is it not -- for some reason, that  
2 was not numbered. It's my fourth page.

3 MR. PENNINGTON: I believe it's number 9.

4 Is this the one that's entitled, Credibility of  
5 Testimony Affected by Interest, your Honor?

6 THE COURT: Yes.

7 MR. PENNINGTON: What I did was, I've now, this  
8 morning -- Joannie has filed for us copies of these  
9 charges that are numbered with the numbers that  
10 correspond on the --

11 THE COURT: All right.

12 (Document is handed to the Court.)

13 MR. PENNINGTON: -- and so this will help the  
14 Court and court reporter.

15 THE COURT: I'm going to mark this as Court's  
16 Exhibit Number 7.

17 (Court's Exhibit No. 7 is marked for  
18 identification.)

19 MR. DURANT: Your Honor, with all due respect,  
20 I'm really not prepared to do this now.

21 THE COURT: All right.

22 MR. DURANT: Like I said, I've actually only  
23 had these charges for 15 minutes --

24 THE COURT: Let's bring in -- let's go ahead  
25 and bring in the jury.

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1 MR. DURANT: I haven't even had a chance --  
2 THE COURT: Detective Osborne, please take the  
3 stand.  
4 Let's bring in the jury.  
5 And for the record, the Court's -- State's will  
6 be a copy of the State --  
7 I'm sorry. It's early.  
8 MS. WILSON: Detective Williams will be on the  
9 stand.  
10 THE COURT: Thank you.  
11 State's -- the State's proposed charges will be  
12 Court's 6.  
13 MS. WILSON: Thank you.  
14 (Court's Exhibit No. 6 is marked for  
15 identification.)  
16 THE COURT: Detective Williams, I remind you  
17 that you are still under oath.  
18 THE WITNESS: Yes, ma'am.  
19 (The jury is escorted into the courtroom at  
20 8:57 a.m.)  
21 THE COURT: Good morning. Ladies and  
22 gentlemen of the jury, if you complied with the Court's  
23 instructions over the evening hour, please raise your  
24 right hand. Thank you.  
25 Please let the record reflect that all the

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1 jurors have indicated they have complied with the  
2 Court's instruction.

3 Ladies and gentlemen, we are going to continue  
4 watching the video. Over the evening hour, it occurred  
5 to the parties involved, as well as to the Court, that  
6 there was some parts of the video that were silent. And  
7 since we've had a few technical issues throughout this  
8 trial, I just wanted to indicate to you that there was a  
9 reason for that. The attorneys for the State and for  
10 the Defendant have agreed to redact, or remove, some  
11 information irrelevant to the facts of this case in the  
12 State's Exhibit Number 6, which was Julius Brown's plea  
13 agreement; State's Exhibit Number 7, Bryan Rivers' plea  
14 agreement; State's Exhibit 22, George Brown's proffer  
15 agreement; State's Exhibit 29 and 30, which are the DVDs  
16 of Deleston's interview. In the written documents, the  
17 redactions appear as blocked-out text; on the DVDs, the  
18 sound is removed from the irrelevant portions of the  
19 interview.

20 You may continue with the playing of the video.  
21 The stipulation will be marked as Court's 8.

22 MS. WILSON: Thank you, ma'am.

23 MR. PENNINGTON: Thank you, your Honor.

24 (Court's Exhibit No. 8 is marked for  
25 identification.)

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1 (Time is 8:58 a.m.; the video is being played  
2 for the jury.)

3 CONTINUED DIRECT EXAMINATION  
4 OF S. LAMART WILLIAMS

5 BY MR. DURANT:

6 Q Detective, I have a question. Who were y'all  
7 trying to determine the identity of at that time?

8 A We were trying to determine the identity of the  
9 person he said that gave him the gun to sell. His name  
10 was Gee (phonetic).

11 Q Okay. Thank you.

12 (Video is played.)

13 Q (By Mr. DuRant) Detective, who did you have a  
14 picture of? Who did you show him a picture of?

15 A A picture of George Brown.

16 Q Thank you.

17 (Time is 9:25 a.m.)

18 (Video is played.)

19 Q (By Mr. DuRant) Detective, do you recall what  
20 that was a photograph of?

21 A I believe that was the photograph of the media  
22 release footage of the Marley Lion incident, the parking  
23 lot, and the person walking by the vehicle.

24 Q The person in the white T-shirt walking by the  
25 vehicle?

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1           A     Yes, yes.

2                     (Time is 9:45 a.m.)

3                     (Video is played.)

4           Q     (By Mr. DuRant) Detective, did I understand  
5 him to say that he received the money for the weed and  
6 not for the gun?

7           A     Yes. He basically said that the picture -- I  
8 think it was in the picture, he was making a transaction  
9 for the weed, received the weed from selling it.

10          Q     Y'all had a picture of the transaction from  
11 inside the car?

12          A     Yes, sir.

13          Q     And him receiving the money?

14          A     Yes, sir.

15          Q     Thank you.

16                     (Time is 9:54 p.m.)

17                     (Video is played.)

18           MS. WILSON: Your Honor, might be a good point  
19 to take a stretch break.

20           THE COURT: Take a break if you're so inclined.

21                     (Time is 10:11 a.m.)

22           MS. WILSON: Judge, may we approach?

23                     (Ms. Wilson and Mr. Pennington approach the  
24 bench for a discussion off the record.)

25           THE COURT: Mr. Foreperson, does anyone need a

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1 break?

2 THE FOREPERSON: Yes, your Honor.

3 THE COURT: All right. Please remember all my  
4 admonitions. Leave your notepads here. Let me know  
5 when you're ready to return.

6 Please rise for the jury.

7 (The jury is escorted from the courtroom at  
8 10:12 a.m.)

9 THE COURT: Thank you. Be seated. We'll just  
10 take a comfort break. No more than five minutes.

11 (A break was taken from 10:12 a.m. to  
12 10:24 a.m.; at which time, the proceedings continue as  
13 follows:)

14 THE COURT: Thank you. Be seated. All the  
15 jurors have had their comfort breaks. Anything before  
16 they come back in? Ms. Wilson?

17 MS. WILSON: No, ma'am.

18 MR. PENNINGTON: Just my client, your Honor.

19 (The Defendant enters the courtroom.)

20 MR. PENNINGTON: We're ready, your Honor.

21 THE COURT: Let's bring them in.

22 (The jury is escorted into the courtroom at  
23 10:25 p.m.)

24 THE BAILIFF: All jurors present, your Honor.

25 THE COURT: Okay. Thank you. Please be

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1    seated.

2            You may continue playing the video.

3            MR. DURANT: Thank you, your Honor.

4            (Video is played.)

5            Q    (By Mr. DuRant) Detective, what just went on

6   before that?

7            A    Warrants were served on -- on Ryan Deleston.

8            Q    Those were the warrants for murder and

9   attempted armed robbery and the two weapons offenses; is

10  that correct?

11          A    Yes, yes.

12          Q    Thank you.

13          (Video is played.)

14          Q    (By Mr. DuRant) Detective, that was the end

15  of the morning session; is that right?

16          A    Yes, it was.

17          (Time is 10:42 a.m.)

18          MR. DURANT: This is State's Exhibit 30, your

19  Honor.

20          (State's Exhibit 30 is played for the jury.)

21          (Time is 10:43 a.m.)

22          Q    (By Mr. DuRant) Detective, this is the

23  beginning of the evening session. This occurs about

24  8:00 p.m; correct?

25          A    That's correct.

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1 (Time is 10:44 a.m.)

2 (Video is played.)

3 (Time is 12:36 p.m.)

4 MR. DURANT: That would be the State's Exhibit  
5 No. 30, your Honor.

6 Could you please answer any questions that  
7 Mr. Pennington has?

8 THE COURT: All right. Ladies and gentlemen,  
9 it would be an appropriate time to take a break. Please  
10 let me know if you need a break at this time.

11 Mr. Pennington.

12 MR. PENNINGTON: I have no further questions.

13 THE COURT: All right. You may step down,  
14 Detective. Thank you.

15 Call your next witness.

16 MS. WILSON: Your Honor, the State rests.

17 THE COURT: Ladies and gentlemen, that  
18 indicates to the Court that there's a matter of law that  
19 I'm going to take up outside of your presence. Your  
20 lunch has arrived, so it will be an appropriate time for  
21 you to begin eating lunch. There are some things I must  
22 take up outside of your presence. We will receive you  
23 back into the courtroom shortly.

24 Please rise for the jury.

25 (The jury is escorted from the courtroom at

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1 12:38 p.m.)

2 THE COURT: Thank you. Be seated.

3 MR. DURANT: May I return the exhibits, your  
4 Honor?

5 THE COURT: You may.

6 Is there anything that we need to address as  
7 far as -- I think we went over last evening which  
8 exhibits have been admitted, and I think the Court's and  
9 the court reporter's and the State's list.

10 MR. DURANT: And I think we're all in  
11 agreement; correct?

12 THE COURT: Correct. That was my  
13 understanding. So with that, if there is nothing  
14 further from the State?

15 MR. DURANT: No, ma'am.

16 THE COURT: Mr. Pennington, any motions or  
17 matters?

18 MR. PENNINGTON: Yes, your Honor. At this  
19 time, we would move for a directed verdict of acquittal.  
20 Based on the pending evidence in its totality and  
21 putting in the light most favorable to the State, we  
22 contend that there is insufficient evidence for this  
23 case to move forward.

24 We further renew the objections made earlier,  
25 in that the -- with regard to the suppression of the

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1 statement of the two photographs that were put in with  
2 regard to the dying boy in this case that are  
3 inflammatory and prejudicial; and, finally, the  
4 inability to thoroughly cross-examine witnesses in  
5 relation to the prior shooting by Bryan Rivers of  
6 Chopper, as we've -- the Court has already ruled upon.

7 And if I may ask for the Court's indulgence.

8 Thank you, your Honor. That's all I have.

9 THE COURT: Any response from the State? Whose  
10 argument will this be?

11 MR. DURANT: Your Honor, I think, obviously,  
12 there's ample evidence to send it back to the jury on  
13 all the charges, based upon the direct testimony of the  
14 Codefendants and nothing else.

15 Sorry. I'm not talking loud enough, am I?

16 THE COURT: I'm struggling, so I always assume  
17 that my court reporter is as well.

18 MR. DURANT: I said that obviously there's  
19 ample evidence in this case, based upon the testimony of  
20 the Codefendants alone, to meet all the elements of  
21 the -- of the offenses that have been presented to the  
22 jury.

23 THE COURT: All right, sir.

24 Mr. Pennington, any response?

25 MR. PENNINGTON: No rebuttal, your Honor.

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1           THE COURT: Counsel, as you know, in ruling on  
2 a motion for a directed verdict, I must consider and  
3 view the evidence and all reasonable inferences in the  
4 light most favorable to the nonmoving party. So in this  
5 incident, it is the State. I am concerned only with the  
6 existence or nonexistence of the evidence.

7           Based upon the testimony that has been  
8 presented, considering all the testimony and the  
9 exhibits that have been presented, I deny your Motion  
10 for Directed Verdict as to the charge of murder,  
11 attempted armed robbery, possession of a handgun with  
12 obliterated serial number, and possession of a firearm  
13 during the commission of a violent crime. There is  
14 evidence to present all four of those Indictments to the  
15 jury.

16           As to your remaining motions, the Court stands  
17 by its rulings as -- and I believe that all of those  
1 motions which you've made at your directed verdict  
stage, Mr. Pennington, have been raised prior to this.  
2 Am I correct?

          MR. PENNINGTON: Yes, your Honor, that's  
correct.

          THE COURT: And as of now, I have heard nothing  
and no additional arguments that would cause the Court  
to change its ruling. Note your exception to my ruling.

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1 All right. Mr. Pennington, do you have  
2 witnesses besides your client that will testify?

3 MR. PENNINGTON: The Defense will rest.

4 THE COURT: All right. Just out of an  
5 abundance of caution, I want to inquire of your client.

6 Mr. Deleston, would you please stand?

7 And let's go ahead and reswear Mr. Deleston at  
8 this time.

9 THE DEPUTY CLERK OF COURT: Please raise your  
10 right hand.

11 (The oath is administered by the Deputy Clerk  
12 of Court, and the Defendant answers as follows:)

13 THE DEFENDANT: Yes.

14 THE DEPUTY CLERK OF COURT: Thank you, sir.

15 THE COURT: Mr. Deleston, please remain  
16 standing. Do you remember when I advised you of your  
17 right to -- that you could testify?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Do you need me to go over any of  
20 those things with you?

\ 21 THE DEFENDANT: No, ma'am.

22 THE COURT: Have you had an opportunity to meet  
23 with your attorneys, either separately or together, to  
24 discuss the benefits and the consequence of your right  
25 to testify?

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1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Do you need any additional time to  
3 meet with your attorneys?

4 THE DEFENDANT: No, ma'am.

5 THE COURT: Have you made a decision whether or  
6 not you will testify?

7 THE DEFENDANT: I will not testify.

8 THE COURT: All right. And thank you,  
9 Mr. Deleston. You may have a seat.

10 Mr. Pennington, do you need, based upon what  
11 has been presented today, to meet with your client is  
12 there as well -- we haven't had a break -- but to meet  
13 your client concerning that decision?

14 MR. PENNINGTON: I will, during the lunch hour,  
15 touch base with him just to confirm. But everything  
16 that I have -- all communications and understandings  
17 we've had up to this point would lead me to believe that  
18 that is a firm decision, and it's based on a thorough  
19 understanding of his circumstances.

20 THE COURT: I just wanted to make sure that  
21 you've had adequate opportunity to meet with him and to  
22 go over all of those consequences of his decision. So  
23 with that, the Defense rests.

24 All right. So then that leaves us just  
25 charging and closing; is that correct?

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1 MR. PENNINGTON: Yes, ma'am.

2 THE COURT: All right. I have sent you a -- a  
3 draft -- the final draft of my charges. And over our  
4 lunch break, if you will just review those, and let me  
5 know if there's any additions, corrections, or deletions  
6 that need to be made. It is a compilation of the  
7 charges that you have sent, as well as my standard  
8 charges.

9 All right. Anything before we break?  
10 Ms. Wilson, you look perplexed.

11 MS. WILSON: No, I'm not perplexed. We were  
12 just scanning your charge, and in light of one of the  
13 things that came up in the video statement that I didn't  
14 think of before, we'd ask that you add a standard charge  
15 of voluntary intoxication.

16 THE COURT: It is. And I meant to bring that  
17 up. It's in there.

18 MS. WILSON: Oh, it is?

19 THE COURT: My charges are moving as -- as  
20 fluid as the testimony changes. And so that was in  
21 there, based upon the last discussions with --

22 MS. WILSON: Thank you.

23 THE COURT: -- Detective Osborne.

24 Any -- do you have an objection to voluntary  
25 intoxication, Mr. Pennington?

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1 MR. PENNINGTON: No. No, your Honor.

2 THE COURT: All right. Thank you.

3 MR. PENNINGTON: I -- your Honor, I do not  
4 have -- for some reason, I don't have my E-mail up. So  
5 I'm going to have to go back to my office to be able to  
6 pull that up.

7 THE COURT: I also sent it to Mr. Koz- --  
8 counsel, and so let me know. You'll receive two -- will  
9 have received two E-mails. It would be the last one, is  
10 the final one.

11 How long do you-all want for lunch? Well, let  
12 me ask you this: How long do you need?

13 MS. WILSON: I need an hour and 15 minutes.

14 MR. PENNINGTON: That sounds about right, your  
15 Honor. I'm going to -- would like for me to have a  
16 moment with me and his mother in the interview room, and  
17 I'll go over and start looking at the charge, and that  
18 should allow me enough time to eat and get back by, what  
19 we're saying is supposed to be 2:00, I guess?

20 THE COURT: All right. I'm going to give you  
21 until 1:45, with the understanding that if I receive  
22 from both of you -- and an understanding that the charge  
23 is perfect as given to you, that there's no major  
24 additions or corrections, then we'll begin at 2:00.  
25 Does that make sense?

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1 MR. PENNINGTON: I believe so.

2 THE COURT: All right. So I'm going to -- any  
3 objection to just -- to me letting the jury know what is  
4 happening when they can go, and giving them the  
5 admonition, or do you need me to bring them back -- you  
6 want me to bring them back in so you can rest?

7 MS. WILSON: (Moves head up and down.)

8 MR. PENNINGTON: However the Court wishes to  
9 proceed. I've done it the other way, where we just tell  
10 the jury that we rest. Or we could rest immediately  
11 before when they come back.

12 MS. WILSON: Either way, I think they need  
13 to -- he needs to rest before the jury. It doesn't  
14 matter if we do it now or later, but --

15 THE COURT: I was just going to go back, and  
16 that way that prevents them from coming in and out of  
17 the courtroom, if we can go ahead and begin our break.

18 All right. 1:45, if not, 2:00. Thank you.

19 MR. PENNINGTON: Thank you, your Honor.

20 (A break is taken from 12:47 p.m. until  
21 1:47 p.m.; at which time, the proceedings continue as  
22 follows:)

23 THE COURT: Thank you. Be seated.

24 (The Defendant is present in the courtroom and  
25 assisted by his counsel.)

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1 THE COURT: Ready to talk about the charges.

2 Mr. Pennington received an E-mail over the lunch hour  
3 indicating that it's 2, 6, 7, and 9?

4 MR. PENNINGTON: I believe that's correct, your  
5 Honor, yes, ma'am.

6 THE COURT: 2, 6, and 7 almost word for word in  
7 my charge. They're not laid out the same way, but  
8 they're all -- they're substantially similar, and  
9 there's many cases in 2, 6, and 7 and it's almost word  
10 for word.

11 MR. PENNINGTON: Yes, your Honor. The  
12 exception that I will raise, or at least the proposal  
13 that I would have under 2 is the language --  
14 particularly the last line of 2 that says, Suspicious  
15 circumstances like mere presence are not sufficient for  
16 a finding of guilt against any defendant.

17 In other words, I think what I'm going to do is  
18 submit the cases -- and I don't know why the cite has  
19 fallen off of here -- but that I believe the case, it  
20 talked about that a presence can create a suspicion, but  
21 that mere suspicion does not suffice.

22 THE COURT: All right. That is almost the word  
23 for word in my charge, mere presence at the scene is not  
24 sufficient to prove someone guilty, on page 14 of my  
25 charge.

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1 Anything further?

2 MR. PENNINGTON: Just that I ask the Court to  
3 add this language that simply is about suspicion.

4 THE COURT: It is preserved for the record. I  
5 have made your request copies of the Court's exhibit,  
6 specifically number 7.

7 MR. PENNINGTON: Thank you.

8 THE COURT: As to 9, what's the State's  
9 position as to request to charge 9?

10 MR. DURANT: Your Honor, I think 9 is -- that  
11 is the --

12 THE COURT: It's the credibility of the  
13 testimony affected by interest.

14 MR. DURANT: We have a big problem with that,  
15 your Honor. In fact, that's a great big old comment on  
16 the facts of the case. I think it's handled in the  
17 general charge. They're considered in the -- the  
18 witnesses' bias, interest, what they have to gain,  
19 things of that nature. And this, to me, seems to be  
20 nothing but a comment on the facts of this case.

21 THE COURT: I'm concerned about the fact that  
22 in 9, Mr. Pennington, that you indicate that one  
23 witness's testimony should be scrutinized with greater  
24 scrutiny than another witness. And I believe there is  
25 case law that says that that is an inaccurate statement

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1 of the law. I will not be charging 9 as requested. I  
2 have a very thorough charge on the credibility of  
3 witnesses. And, again, this is made copy -- your copy  
4 Court's Number 7, so it's part of the record.

5 MR. PENNINGTON: Thank you, your Honor. I  
6 would -- the Court may -- I wanted to briefly address  
7 it, if the Court will hear me, on Charge 6 and Charge 7.  
8 I just want to articulate that 6 is an attempt to  
9 address the --

10 THE COURT: Six is a word for word on my 14.  
11 If defendant's present where a crime is being committed  
12 or mere association with a person who commits a crime  
13 does not make a defendant an accomplice or an aider or  
14 abettor of the person committing the crime. I think the  
15 only word --

16 MR. PENNINGTON: I apologize --

17 THE COURT: I think the only word I left off  
18 was involved.

19 MR. PENNINGTON: I apologize profusely, your  
20 Honor.

21 THE COURT: Okay.

22 MR. PENNINGTON: I guess I was in a big rush  
23 and overlooked that. I apologize.

24 MR. PENNINGTON: Lastly, on Charge 7, the  
25 research, as I understand it, in the field of eyewitness

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1 identification is that witness confidence can be grossly  
2 misunderstood by juries. The old Telfair (phonetic)  
3 charge actually state it as a matter of law that jurors  
4 should put weight on witness confidence. And I note  
5 that your charge does not go as far as the old Telfair  
6 charge, and I had it in front of me, where there's a --  
7 see if I can find -- your charge on identification,  
8 which begins on page 12, has a sentence, the only  
9 sentence that I could find that would be remotely  
10 relevant, I suppose, is, You must also -- says, by the  
11 identification made by the witnesses' product or the  
12 witnesses' own recollection. You may then take into  
13 account both the strength of the identification and the  
14 circumstances under which it was made.

15 Strength, I take to be referring to this  
16 confidence issue. And what concerns me is, is that I  
17 think, as a matter of both empirical science and case  
18 law now is becoming more and more accepted that witness  
19 confidence is not an index of accuracy. And so I submit  
20 Jury Charge 9 has a mild corrective that just says  
21 that --

22 THE COURT: Jury Charge 7?

23 MR. PENNINGTON: Nine -- I'm sorry, 7. Yes.  
24 My mind is not engaged with my brain.

25 An eyewitness's certainty about an

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1 identification may have many sources and does not  
2 necessarily bear on the correctness of the  
3 identification.

4 THE COURT: What's your position, Mr. DuRant,  
5 as to 7?

6 MR. DURANT: I think -- I think there is no  
7 proven relationship between a witness's confidence and  
8 accuracy. A witness's testimony is basically a social  
9 science statement and has nothing to do with charge of  
10 the law --

11 THE COURT: So you object to 7?

12 MR. DURANT: Pardon me?

13 THE COURT: You object to admitting 7?

14 MR. DURANT: I object to 7.

15 THE COURT: And are you comfortable in any  
16 corrections to the Court's charge?

17 MR. DURANT: Not his corrections. I have a  
18 couple of my own.

19 THE COURT: All right. That was my question.

20 MR. DURANT: On the identification issue. On  
21 your identification charge, your Honor -- and I offer  
22 this because it concerns me. The first sentence of your  
23 identification charge, and then basically just before  
24 the end, an issue in this case is the identification of  
25 the Defendant as the person who committed the crime

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1 charged. I think that creates a problem in an  
2 accomplice liability case. And I would request some  
3 language to the fact that an issue in this case is the  
4 identification of the Defendant as the person who  
5 committed or participated in the crime charged.

6 And, once again, in the last paragraph of your  
7 identification charge says the same thing: This  
8 includes the burden of proving beyond a reasonable doubt  
9 the identity of the Defendant as the person who  
10 committed -- and you have "the crime." And I would ask  
11 that you add "or participated in the crime," because I  
12 think that is -- I think -- you know, accomplice  
13 liability situation. We don't have to prove that he's  
14 the shooter. We have to prove that he is a participant  
15 in the underlying crime which gave rise to the shooting.

16 (Mr. Pennington and Mr. DuRant speak off the  
17 record.)

18 MR. PENNINGTON: I really don't object to those  
19 modifications, your Honor. They seem appropriate.

20 THE COURT: Are there any other objections or  
21 corrections, additions by the Defendant, Mr. Pennington?

22 MR. PENNINGTON: No. Just those that I've  
23 already entered, your Honor.

24 THE COURT: Thank you.

25 Mr. DuRant?

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1           MR. DURANT: Your Honor, I did have one on your  
2 hand of one charge. On page 17, just below -- above the  
3 intent section -- one, two, three, four, five -- the  
4 fifth and sixth lines above that, where it said, intent  
5 means the -- intent means intending the result which  
6 actually occurs. I do not believe that that is an  
7 accurate statement of the law. Once again, in an  
8 accomplice liability-type -- in an accomplice  
9 liability-type crime, there has to be an intention to  
10 commit a crime, the reasonable and foreseeable  
11 consequence of which could be death or murder or  
12 something like that. But the way this reads is that  
13 there would have to be an intent to actually murder, and  
14 I don't believe that that is an accurate statement of  
15 the law.

16           THE COURT: Any position, Mr. Pennington?

17           MR. PENNINGTON: I'm sorry?

18           THE COURT: Do you have any position as to  
19 that?

20           MR. PENNINGTON: I would disagree, in that I  
21 think that this is exactly what the Supreme Court in  
22 Mattison was trying to address with Justice Beatty,  
23 where a lot of these instructions can be rather  
24 confusing, and the Supreme Court seems to be signaling  
25 that there has to be foreseeability as to the specific

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1 act or outcome that you apply for.

2 And so while the rest of the charge, I think,  
3 encompasses the principle that the Solicitor is seeking,  
4 I think that's an accurate statement of the law from our  
5 case law. And so I would ask the Court to allow it to  
6 remain as is.

7 THE COURT: Anything else, Mr. DuRant?

8 MR. DURANT: Your Honor, I just don't believe  
9 that's an accurate statement. I don't think --

10 THE COURT: Any other additions or corrections?

11 MR. DURANT: The only other thing -- yes, your  
12 Honor. With regard to your murder charge, and you  
13 charged felony murder as an inference of malice. I also  
14 thought it would be appropriate in this case for a use  
15 of a deadly weapon inference. I did not see that in  
16 there. This is certainly not a self-defense-type  
17 situation, which would bar a deadly weapon inference,  
18 and I would ask that that be included in your charge.

19 THE COURT: Mr. Pennington?

20 MR. PENNINGTON: I worry that inferences are  
21 only understood by lawyers, and the more we talk about  
22 inferences, the more it becomes a scenario where the  
23 jury is going to perhaps understand it as a presumption,  
24 a legal doctrine. It makes me uncomfortable, since  
25 we've already got one stated inference that's permissive

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1 that is covering the same conduct, which is the idea of  
2 the felony. I think it's covered adequately by your  
3 charge.

4 THE COURT: And what are you requesting,  
5 Mr. DuRant?

6 MR. DURANT: In most murder cases, when the  
7 Court charges malice and what malice is, and they say  
8 you can infer malice from the commission of a felony;  
9 you can infer malice from use of a deadly weapon; you  
10 can infer malice from conduct that's --

11 THE COURT: Just tell me what you want me to  
12 put in there.

13 MR. DURANT: I just want the inference with the  
14 deadly weapon, your Honor.

15 THE COURT: All right. Thank you. All right.  
16 Anything else?

17 MR. DURANT: Just one other thing, your Honor.  
18 On page 24 of your charge, this would be under the  
19 possession of a firearm during the commission of a  
20 violent crime, right at the end, the last sentence of  
21 that, a violent crime -- murder and armed robbery are  
22 considered violent crimes under the law of our state. I  
23 would just ask that armed robbery be changed to  
24 attempted armed robbery, as that's what he's actually  
25 indicted for.

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1 THE COURT: Any objection to making that --  
2 MR. PENNINGTON: No, your Honor, no objection.  
3 THE COURT: -- correction?  
4 MR. PENNINGTON: No objection.  
5 MR. DURANT: And that's all I had, your Honor.  
6 THE COURT: All right.  
7 All right. Who is doing the closings?  
8 MS. WILSON: I am for us.  
9 MR. PENNINGTON: I am.  
10 THE COURT: Mr. Pennington, you will need to  
11 rest in front of the jury before we bring the jury in.  
12 Is there anything before we bring the jury in?  
13 MR. PENNINGTON: I will -- if the Solicitor  
14 goes an hour, hour and a half, I don't know how long --  
15 I'm not trying to box her in in any way, but I'm  
16 concerned that there may need -- I may need a potty  
17 break before getting up.  
18 THE COURT: All right. I'll make that  
19 determination.  
20 MR. PENNINGTON: Plus, I'm concerned about --  
21 I'm going to use a PowerPoint, which is not something  
22 that I typically do, and I'd like a moment to kind of  
23 get configured.  
24 THE COURT: We'll make that determination as  
25 to --

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1 All right. So, Ms. Wilson, you are ready to  
2 bring the jury in?

3 MS. WILSON: I need the clerk to turn on that  
4 screen.

5 THE COURT: Well, we're going to -- we'll bring  
6 the jury in. He just stepped out for a moment. I need  
7 to advise them what we're doing, so that will give us  
8 just a few moments.

9 MR. DURANT: I E-mailed that exhibit list to  
10 your Clerk.

11 THE COURT: Thank you. Thank you so much.  
12 (The jury is escorted into the courtroom at  
13 2:05 p.m.)

14 THE COURT: Thank you. Please be seated.  
15 Counsel, approach just briefly.

16 THE COURT: All right. Ladies and gentlemen,  
17 did every member of the jury comply with the Court's  
18 instructions? If you did not comply with my  
19 instructions, please raise your hand.

20 All the jurors have complied with the Court's  
21 instructions.

22 Mr. Pennington.

23 MR. PENNINGTON: Yes, your Honor. The Defense  
24 rests.

25 THE COURT: Ladies and gentlemen, that

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1 indicates to the Court that you have now heard all of  
2 the evidence in this case and received into evidence all  
3 the exhibits that will be made part of the record in  
4 this case. As I've indicated to you throughout this  
5 trial, the exhibits that have been made part of the  
6 record in this case will actually go back with you  
7 during your deliberation into the deliberation room.

8 Ladies and gentlemen, we reached the stage in  
9 the trial where you will now hear closing arguments on  
10 behalf of counsel. Ladies and gentlemen, just as I  
11 indicated to you, what was contained in openings  
12 statements is not to be considered evidence, neither is  
13 what is contained in closing arguments.

14 After you've heard closing arguments on behalf  
15 of the State and the Defendant, I will instruct you on  
16 the law applicable to this case. Ladies and gentlemen,  
17 at that time, then you will retire to consider your  
18 verdict. Please give your strict attention.

19 Ms. Wilson.

20 MR. PENNINGTON: And just as an abundance of  
21 caution, your Honor, I would renew any motions that we  
22 discussed earlier.

23 THE COURT: Thank you. And the Court stands by  
24 all previous rulings. Thank you.

25 MR. PENNINGTON: Thank you.

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1 MS. WILSON: May it please the Court?

2 THE COURT: Yes, ma'am.

3 **CLOSING ARGUMENTS**

4 MS. WILSON: Thank y'all for being here. I  
5 know it's been a long week. You've had to put up with a  
6 lot, had to be very patient with our computers, one of  
7 which will be in the trash when we finish. But it's  
8 been clear that y'all have been alert and paid  
9 attention. We can tell that by the way you look at the  
10 witnesses, the way you watched the videos. I know it  
11 was a long time. As I said at the beginning, you saw a  
12 lot of people who got excused from this case, who got  
13 excused from this week. Y'all didn't try to do that.  
14 Y'all hung in there, and sincerely thank you. On behalf  
15 of Marley Lion's family, I thank you for your undivided  
16 attention.

17 Before I go into the facts of the case, I'm  
18 going to talk to you a little bit --

19 If we could just keep that one on and not that  
20 one.

21 THE DEPUTY CLERK OF COURT: Yes, ma'am.

22 MS. WILSON: I'm going to talk to you a little  
23 bit about the law. Now, you just sat through four hours  
24 of video, and while we appreciate Detective Burckhardt  
25 giving some of their version of the law, the law that

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1 you must follow is going to come from Judge Harrington,  
2 and she will tell you what the law is. I'm going to go  
3 over some of those principles, but she'll tell you in a  
4 whole lot more detail what the law is that you've taken  
5 an oath to follow. Some of that I talked with you about  
6 in opening.

7           The charges in this case sort of not talk much  
8 about that. We've got murder, attempted armed robbery,  
9 possession of a weapon during a violent crime, and  
10 possession of a firearm with an obliterated serial  
11 number. You will hear in detail the elements of those  
12 case -- of those charges. The gun charges are very  
13 self-explanatory. A murder occurred. An attempted  
14 armed robbery occurred. A gun was used during that.  
15 That's pretty obvious. You have a gun that was used in  
16 the murder. You have a gun that you saw video after  
17 video, heard two witnesses testify that this gun was  
18 sold to them, and then you heard the lady from SLED  
19 talking about the obliterated serial number that was on  
20 it. That's fairly simple.

21           The attempted armed robbery, you heard  
22 testimony galore about the motive to go down and rob  
23 Joe's, or the employees leaving Joe's, and Marley Lion  
24 comes and interrupts. They decide to hit that.  
25 Attempted armed robbery, you saw the shooter go up to

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1 the car, Ryan Deleston go up to the car, and you heard  
2 the testimony. The intent was to rob. I'll go into  
3 murder in just a second.

4 The issue here is not whether or not these  
5 crimes were committed. I doubt Mr. Pennington will  
6 argue that those crimes were committed. The question is  
7 who did it. That's what you're here for. And what we  
8 have to prove, and what we have to prove beyond a  
9 reasonable doubt, which means we have to leave you  
10 firmly convinced, firmly convinced that Ryan Deleston  
11 was an active participant in these crimes. Not that he  
12 was the trigger man, but that he was an active  
13 participant. And I submit you just heard several hours  
14 of recordings showing how active he was, how involved he  
15 was in these crimes.

16 I told you when we started out, and the Judge  
17 will tell you more about it, proof beyond a reasonable  
18 doubt does not mean beyond a shadow of a doubt. It  
19 means evidence that leaves you firmly convinced. We  
20 could never ever prove something to you 100 percent.  
21 And that's not what the law requires. So keep that in  
22 mind when you look at the evidence in this case, which,  
23 by the way, you're going to have all of that. I know it  
24 was probably frustrating for you when we introduce  
25 something and not show it to you. But, for example, you

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1 know, these plea agreements, if we pass this around to  
2 each of you to read, you know, four pages, single  
3 spaced, a plea agreement, we'd be here for longer than  
4 we needed to be. You will have it back there.

5           You will also have a laptop with a drive in it  
6 so that you can play the videos. The clerk will be  
7 giving you instructions so that you can control all  
8 that. Good luck to you. The Mantek video, as we told  
9 you, doesn't have a pause on it so it's a little bit  
10 difficult. But you're going to be able to watch it and  
11 watch it and watch it to your heart's content. You will  
12 be in control of that. I hope your laptop works better  
13 than ours. But if it doesn't, the clerk will be able to  
14 help y'all with that. All of that is going to be yours,  
15 yours to interpret, yours to analyze. And when you look  
16 at all of that, and when you remember what you heard and  
17 what you saw from that witness stand, you'll know that  
18 we've proved this case beyond a reasonable doubt. And  
19 we've proved it beyond a shadow of a doubt.

20           Murder is the killing of another person with  
21 malice aforethought, expressed or implied. What that  
22 means -- the expressed part means if someone were to  
23 say, I hate you. I'm going to kill you. Implied is  
24 another way for you to see or find malice. Not when  
25 someone expressly said it, but by their action you can

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1 tell that they're malicious. The use of a gun, shooting  
2 five times, shows malice. You will see, and the Judge  
3 will tell you, that a reckless disregard for someone's  
4 life is indicative of malice. There's no requirement  
5 that we prove that Ryan Deleston or Bryan Rivers, and  
6 Julius Brown, for that matter, that they knew Marley,  
7 that they hated him, that they had any feelings about  
8 him whatsoever.

9           What we have to show is that the act was done  
10 maliciously, not that they had some feeling towards him.  
11 And that video shows you the callousness, the wantonness  
12 of that execution. You think about that when you're  
13 thinking about proof beyond a reasonable doubt.  
14 Shooting five times.

15           You've heard a lot about this not only from the  
16 Codefendants and from the video, but you'll hear about,  
17 it more from the Judge, and I talked with you about this  
18 at the very beginning because this is very important.  
19 And that is the concept, the principle that we call the  
20 hand of one is the hand of all. And if a crime is  
21 committed by two or more people who are acting together  
22 in the commission of an offense, that act of one is the  
23 act of all. When accomplices are acting together,  
24 assisting each other, encouraging each other -- I don't  
25 want to go, you go, you go -- the act of one is the act

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1 of all; the hand of one is the hand of all.

2           There's another corollary, another similar  
3 principle in the law that you'll hear about. It is  
4 immaterial whether the Defendant knew beforehand that an  
5 accomplice was going to hurt the victim. It is not the  
6 State's position that when Marley Lion pulled into that  
7 parking lot, that there became this plan to kill him.  
8 There is no proof of that. That is not what the  
9 standard is. It does not matter that that was not the  
10 plan beforehand. What matters is when it is the natural  
11 and probable consequence of your actions when someone is  
12 involved in a violent crime. Armed robbery, attempted  
13 armed robbery, it is natural, even probable consequence  
14 that somebody's going to get hurt. That's why people  
15 are armed. The natural and probable consequence; was it  
16 foreseeable?

17           And you heard Mr. Pennington ask Bryan Rivers  
18 some questions about that. You were surprised. You  
19 didn't know that was going to happen. You didn't mean  
20 for that to happen. Julius said, bust out the window,  
21 or Julius said, hit it, whatever Julius said. I didn't  
22 know it was going to happen, didn't know he was going to  
23 do that. Well, guess what? How dare they say to  
24 Marley Lion, to Marley Lion's mother, oops, we didn't  
25 know that was going to happen when we took a loaded gun

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1 to a robbery. It doesn't work like that. The law  
2 doesn't allow that.

3 Foreseeability? Y'all might not have caught  
4 this, or -- or thought about why it was so important to  
5 this case when you were watching those three and four  
6 hours of the Defendant's statement. Towards the end,  
7 just this morning, when Detective Osborne comes in, he  
8 tells Deleston, I want to talk to you about some other  
9 things, some other crimes. And he starts going through  
10 and asking him about other instances. And some of them  
11 Deleston said, I don't know anything about. You might  
12 remember the one he did know something about or he  
13 claimed to. The shooting of a guy named Chopper.  
14 Remember that? He says Bryan Rivers shot a guy named  
15 Chopper with the murder weapon. Okay.

16 So Bryan Rivers is now alleged to have shot  
17 someone with a murder weapon. He knows about it, and he  
18 goes to an armed robbery with it? He buys into robbing  
19 Joe's, he helps out in attempting to rob Marley, and  
20 he's going to say it's an accident, it wasn't  
21 foreseeable? Bryan Rivers is a convict. You heard  
22 Mr. Pennington ask him. You heard me bring out assault  
23 with intent to kill, assault and battery of a high and  
24 aggravated nature. His friend, his buddy, that he goes  
25 to an armed robbery with a loaded gun. I submit to you

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1 the evidence is beyond the pale, that it was very  
2 foreseeable that this could happen, that somebody in the  
3 course of the armed robbery would be hurt.

4           You're going to hear a lot of talk about mere  
5 presence, I suspect. That's the other thing. I don't  
6 get to come back and talk to you again. I got to kind  
7 of guess what Mr. Pennington says. And I'm going to  
8 imagine that he's going to have a lot to say about mere  
9 presence, because it's hard to get around all the things  
10 that the Defendant says showing he has very intimate  
11 knowledge of what went on in that parking lot. There's  
12 the poster child for mere presence.

13           You want to see mere presence, you look at --  
14 if anybody was just merely present, it was Rayshawn  
15 "Duke" Milligan. Y'all might remember him. He was very  
16 short. He is the brother of Julius. He was raised up  
17 by his grandparents. He goes by "Duke." I think you  
18 could probably tell he was nervous as a cat. He said  
19 "yes, ma'am" whether it was Mr. Pennington, whether it  
20 was me. Every question he answered, he kind of  
21 hesitated, Yeah, yeah, yeah, the whole time. I think  
22 you could also tell that he probably -- well, he clearly  
23 was not very educated and may not have been that  
24 intelligent. But what every witness said about him is,  
25 he was not up for any armed robberies. That was not his

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1 bag. He was in the back of that Suburban as they rode  
2 around smoking weed, drinking beer, not involved. He  
3 didn't give a gun to anybody. He didn't drive the car.  
4 He did nothing. He lied. He lied when he was first  
5 asked about it. But you heard Mr. Deleston talking  
6 about being a snitch and how favorably that's looked  
7 upon. But when he started talking to the police, he  
8 told some very key things early, early on that they  
9 didn't know about.

10 But when you think about mere presence, compare  
11 Duke Milligan to this Defendant. There is no  
12 comparison. They set out to rob the Famous Joe's.  
13 Where is Duke Milligan? He's still in the carport,  
14 still drinking, still smoking. His girlfriend is  
15 calling and harassing him because he needs to be home.  
16 And she's still harassing him because he didn't come  
17 home. And look at what mess he's in now, having to sit  
18 up there in front of all this.

19 I'm going to show you a very rudimentary  
20 portion of video. You will have, again, the video back  
21 there. This section is at -- between 9:15 and 9:20.  
22 And what this shows you, if you can hear, is how  
23 intertwined Ryan Deleston was. And he explains why  
24 Julius is making the loop. And you'll hear Detective  
25 Burckhardt asking him, So tell us about Julius' role.

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1 Because all of these guys are minimizing their roles.  
2 There's no doubt about that. What did Julius do? Why  
3 was he doing it? Was he doing it so y'all could do that  
4 thing?

5 Yeah. Yeah.

6 That's what Deleston says. Not so Bryan Rivers  
7 could go do that thing. So they could go do that thing.

8 Mr. DuRant.

9 (Video is played.)

10 MS. WILSON: So you guys could do the thing.

11 Julius is making that loop because he thought  
12 Marley pulled up with somebody else in the truck. He's  
13 thinking somebody else was in there and they might have  
14 gone into Joe's. So Julius is going to check that out.  
15 Why? Because Deleston is telling him somebody else is  
16 there. He's in it. He's not merely present. He's in  
17 it. He's helping Julius. Julius is helping him.  
18 That's why Julius made the loop, for him and  
19 Bryan Rivers.

20 So Mr. Pennington, through his questions and  
21 perhaps through his argument, would have you believe  
22 that there's this big conspiracy on behalf, on behalf of  
23 Bryan Rivers, as if all these guys are so loyal and have  
24 such allegiance to Mr. Bryan Rivers that they're just  
25 throwing Mr. Deleston under the bus. They're just

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1 selling him out because they love their friend,  
2 Bryan Rivers. Think about that. You are put on this  
3 jury to use your common sense. Think about these  
4 relationships.

5 And let's start with Old Man Middleton, Frank  
6 Middleton. And -- let's start with Frank Middleton and  
7 the police. The police built this investigation brick  
8 by brick. They didn't just go get some old guy in jail  
9 who said, Oh, I think that might be Ryan Deleston, and  
10 arrest a guy. We know that that is not a positive  
11 identification. We know that Frank Middleton couldn't  
12 100 percent say, because he couldn't see the face of the  
13 shooter. But what does he tell the police? I've been  
14 with this guy, hanging out with him several times a week,  
15 for over a year, and it looks like him.

16 When I walked down the hall in my office just  
17 the other day -- and this is kind of embarrassing -- a  
18 guy says to me, I don't even have to look back and tell  
19 that's you, Scarlett. I can tell by the way you walk.  
20 That's horrible. But, as my mother would say, I walk  
21 like a gorilla. And people know that. Mothers, they  
22 can hear one syllable of their child's sentence and they  
23 know that it's their child. You get me in a K-Mart, and  
24 there can be a child who calls out "Momma," not every  
25 mother in the store runs. One mom runs because she

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1 knows. Frank Middleton knows Ryan Deleston, and he said  
2 he was aggressive in the way he approached, his stance,  
3 his build, his size, everything. Ryan Deleston. Frank  
4 Middleton knew.

5 And they didn't stop with Frank Middleton.  
6 Julius Brown and Rayshawn Milligan Brown -- or  
7 Brown Milligan. So they were supposedly all loyal to  
8 Bryan Rivers. How crazy that? Their sister is with  
9 this guy. He says on that tape, he calls her his wife.  
10 They're together. Yeah, they got in some squabble at a  
11 family reunion some time before, but on the day of his  
12 arrest, where is he living? He's living with her.

13 And by the way, you did hear a lot about calls,  
14 and you're going to have the Miranda card back there,  
15 where he was given his rights under the law. You see it  
16 on TV all the time. You don't have a right to a phone  
17 call. These are your rights. So I don't want you to  
18 get caught up on what you've seen on TV and the movies,  
19 that you have a right to this one call. Yeah, you have  
20 the right to a lawyer if you ask for one to help you  
21 answer questions. But he wants to call his girlfriend.  
22 They can't let him call his girlfriend, because remember  
23 what's going on? Her house is being searched. They  
24 can't allow him to do that. But this -- this is his  
25 so-called wife, he says.

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1           There's this fight at Edisto Beach at the  
2 family reunion. Who gets excommunicated? Who gets  
3 kicked out? Not that he ever had a key. Down and out,  
4 out of prison and he's flopping somewhere.

5           Bryan Rivers, after the big fight at the family  
6 reunion, gets kicked out. The Brown family didn't stand  
7 by Bryan Rivers. They stood by Ryan Deleston. Just  
8 last week you heard testimony. Rayshawn? He drove his  
9 sister to see him. There's no conspiracy to stand up  
10 for Bryan Rivers. They said Ryan Deleston was the  
11 shooter because he was, because he was.

12           George Brown, this is perhaps the best member  
13 of this so-called conspiracy, because George Brown --  
14 remember, he's like family to the Browns, of which his  
15 girlfriend, slash, wife is. He's at Ryan and  
16 Stephanie's house all the time. That's where they go;  
17 that's where they hang. He brings her cigarettes. They  
18 hang out together.

19           He was shot five times once before being a  
20 snitch. He says, I didn't want to talk because I didn't  
21 want to talk about Julius. Not because he loves Julius.  
22 He's scared of Julius, as he should be. That's why he  
23 didn't want to talk. But the kicker, the kicker with  
24 George Brown? He didn't know Bryan Rivers for two weeks  
25 when this happened.

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1 Remember, George told you he met -- or knew  
2 Bryan Rivers from the time Bryan got out of jail, got  
3 out of prison. Bryan got out of prison on June 1st.  
4 You heard that testimony. Just weeks before. So  
5 George Brown now all of a sudden is going to sell down  
6 Deleston for this guy he's known for two weeks? That  
7 doesn't make sense. George Rivers is -- George Brown,  
8 as hard as it was, and as bad as he wants to deny it,  
9 eventually told the truth, because he knew telling lies  
10 was not getting him anywhere. Every time he told a lie,  
11 he got caught. And maybe you might understand -- when  
12 someone who's been shot five times for being a snitch,  
13 for cooperating, maybe you can understand why he might  
14 be a little reluctant to tell it all from the start.

15 And then finally, there is Bryan Rivers.  
16 Obviously he wants to protect himself. I think  
17 everybody knows and understands that. And he recently  
18 gets out of prison. He's got nowhere to go. And he  
19 stays with Stephanie and Ryan Deleston. But he  
20 volunteers, he testified he didn't have any immunity.  
21 You'll have this plea agreement. You will see. He's  
22 not immune from prosecution. He has an agreement. He  
23 has pled guilty to voluntary manslaughter. He's looking  
24 at 30 years in prison. He's not going home. He doesn't  
25 think he's going home. He told you he didn't know if he

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1 was going to be charged with that. And what does he do  
2 with that robbery? Who does he frame for it? There's  
3 no video. You remember me asking about, have you seen  
4 any video of that? You're down on Rutledge Avenue, you  
5 heard one of the victims -- one of the victims from that  
6 come in, there's no video of that. But they weren't in  
7 this conspiracy about Raymond Ryan Deleston. Let's make  
8 it look good. Make him the shooter. Make him the  
9 robber. Nobody would ever know. We would never know.  
10 But they didn't do that.

11 George Brown told you Ryan and Bryan, Little B, got out.  
12 Rayshawn told you they got out. Rayshawn told you he  
13 didn't see who did it. They all could have said  
14 Ryan Deleston is the one who did that robbery.

15 Then we get Bryan Rivers himself who says, I  
16 got out. I went to go do this robbery. He looks and  
17 Ryan's gone. He chickened out or something. He went  
18 the other direction. If he's so busy trying to put  
19 Ryan Deleston under the jail, trying to frame him, make  
20 him the robber. That's not what he did. And he did it  
21 at his own peril.

22 The credibility of the witnesses here, as the  
23 Judge is going to tell you, is all yours, as I told you  
24 in the beginning. You can believe all of it, part of  
25 it, none of it. You, now that you have all the

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1 evidence, can consider how much alcohol was involved,  
2 how much pot was smoked, how late it was, how tired  
3 people were, and how people want to look out for  
4 themselves. You could watch it. Mr. Deleston's  
5 interview with Detective Burckhardt, Detective Williams,  
6 Detective Osborne is classic. It's classic in the way  
7 these things evolve. It's classic in showing how people  
8 want to distance themselves.

9           Just for -- as an example, I submit to you that  
10 you could see the psychology of it working. If someone  
11 has used the gun, when inevitably they'll say is, Oh, I  
12 just held it. I didn't fire the gun, but I held it.  
13 And if someone has only held the gun, they don't want to  
14 tell you they held it, but they'll say, Oh, I just saw  
15 it. They back themselves away. And it not only happens  
16 with things like that, it happens in, really, physical  
17 proximity. You can tell by the way Bryan and Julius are  
18 telling their story. What are they trying to do?  
19 They're trying to get away from that car. They're  
20 trying to put themselves behind that fence the whole  
21 time. And you'll see, as I go through this, they  
22 weren't always behind that fence. But that's a great  
23 barrier. It makes you feel less involved. They think  
24 it's convincing to you, or maybe even they think it's  
25 convincing to us, I was way, way back there; therefore,

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1 I wasn't all the way in it like he was. Don't fall for  
2 that. Be careful for that. Look at what fits and what  
3 doesn't. Look at how the witnesses fit together and how  
4 they differ in things that they're telling, how smart  
5 they are.

6 I talked to you about the plea agreements,  
7 which you'll have. The proffer agreement, George Brown  
8 told you -- showed you how the State will do what it  
9 says it's going to do. His agreement was, if you'll  
10 come in, if you'll tell the truth, nothing you say will  
11 be used against you. Well, he couldn't come in and tell  
12 the truth. He didn't tell us about the downtown  
13 robbery. He didn't tell us about them casing out Famous  
14 Joe's. Didn't tell us about that, and what happened?  
15 He also couldn't tell, he could not give up that that  
16 was his gun. Well, he messed around, he lost this, and  
17 he got charged with more charges. And he told you he's  
18 going to prison too. And he is. Plea agreements, plea  
19 negotiations are legal. It's not a dirty word. It is  
20 something that should cause you some concern. It causes  
21 us some concern.

22 But look at how their testimony fits together  
23 and look at where it doesn't. Here's -- here's the -- a  
24 prime example. Julius was adamant that when they were  
25 going back down to Famous Joe's to get that hat that was

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1 left behind the wall. Remember, he said he went. And  
2 then Ryan wouldn't go up and get it, and so he went and  
3 got it, and then they were stopped by the police. Not  
4 stopped, excuse me. They saw the police. And you  
5 remember we had Vance here, who said, I saw Deleston,  
6 and I knew him from a few weeks before when we had  
7 talked about the flashlight.

8 Julius was adamant that there was no  
9 conversation between Deleston and the cop. Does that  
10 mean that Julius was lying about it? I submit to you,  
11 no. I submit his memory is different. He remembers  
12 something about the cop. He remembers something about  
13 Deleston talking about the flashlight and that cop  
14 having stopped him before, but he doesn't remember it in  
15 the sense of there was an exchange. That's perfectly  
16 understandable that their memories of that would be  
17 different, when he wasn't the one engaged in that  
18 conversation. It's also perfectly understandable that  
19 the officer didn't see the hat. Nobody testified that  
20 anybody put on that red hat. Julius said he went and he  
21 picked it up. He's the one who got it.

22 Mr. Pennington tried to make the point that --  
23 that when the officer saw Ryan Deleston, you know, he  
24 only had on the clothes he had on, the white T-shirt and  
25 whatever, because he's already changed. But if he were

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1 trying to make these people say stuff just so it would  
2 fit together just to convince you, the things like that  
3 that don't fit, we'd correct. It ain't our place to  
4 correct that stuff. You got to see all that and make  
5 your own judgment. And I submit to you, where those  
6 things fit, who put the gun under the pool? Ryan  
7 Deleston says Little B did. Julius and Little B say  
8 Ryan Deleston did. All of those statements together  
9 tell you what? Somebody put the gun under the pool.  
10 And those are facts that where -- where they differ on  
11 who did what with that, you know that that happened.  
12 Think about that when you're looking at credibility and  
13 think about the opportunity to know. Were they drunk or  
14 how were they even there?

15           There's another example. Rayshawn tells you --  
16 everybody's consistent. This Defendant, after the  
17 shooting, changes his clothes. Well, Rayshawn said he  
18 didn't. He was bare-chested, didn't have on a shirt  
19 when he saw him when he left. Everybody else said he  
20 had on a white shirt, after he took off his shirt that  
21 he wore in the murder. Does that mean Rayshawn is  
22 lying? He remembers a change of clothing. He doesn't  
23 remember what Deleston had on. I submit to you that is  
24 not evidence of a lie. That's evidence of a different  
25 recollection. The key thing that he remembers is that

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1 the guy changes his clothes after the shooting. Why?  
2 There's no evidence that anybody else changed their  
3 clothes. One person is worried about what he's got on.  
4 One.

5 So Bryan Rivers, all this has been done to  
6 protect Bryan Rivers. And what did he tell you? Well,  
7 he told me, I'll see y'all October 7th. You ain't got  
8 nothing on me. I'm ready to go to trial. That was  
9 -- that's how he felt. You got nothing on me, and I  
10 ain't look like -- what am I going to look like taking  
11 some deal for manslaughter? That -- all that means is  
12 saying, I killed somebody, when I know I didn't kill  
13 nobody.

14 This letter, going back to what I told you in a  
15 -- this letter shows what he's thinking about Marley,  
16 what he feels like he deserves, and what he feels like  
17 is right. He feels like, I didn't kill nobody. And  
18 while he may not have killed the -- pulled the trigger,  
19 he's guilty of killing Marley Lion. And at some point,  
20 somehow, some way, he realized that. And he and his  
21 lawyer came and took the deal.

22 And what did Bryan Rivers do? You're going to  
23 probably ask yourselves or -- the Judge will tell you  
24 this at the end -- all of these exhibits I told you will  
25 come back to you. If there's something that you want

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1 that you don't have, you can't have it. You've heard  
2 both sides in questioning refer to all sorts of things  
3 that are in evidence. That -- we have all kind of rules  
4 that allow what we do. Mr. Pennington, Mr. Deleston,  
5 they're not trying to hide from you. We're not trying  
6 to hide from you. The admissible evidence, it is -- is  
7 there for you.

8 But you will recall when I was questioning  
9 Bryan Rivers, and I asked him, Do you remember what you  
10 said when you were alone in that interview room? And  
11 now y'all have seen the interview room. And I said, Do  
12 you remember what you said 3:44 or 4:44, whatever time  
13 it was?

14 And he said, No, I don't remember that.

15 And I said, Will it refresh your recollection  
16 if you see a summary of what you said?

17 And he said, Yeah. And he looked at it. His  
18 memory was refreshed.

19 And I said, Mr. Rivers, what did you say when  
20 you were alone in that interview room when you thought  
21 nobody was looking, when you thought nobody was  
22 listening?

23 What does he say to himself? When he's there  
24 alone and he has a moment to reflect and he doesn't know  
25 we can know, he says to himself, the one person you

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1 don't lie to: F him. F him. He shoot that  
2 motherfucker.

3 Things that these guys, George Brown,  
4 Julius Brown, Bryan Rivers, told the police that they  
5 didn't know about. You'll see the pictures from the  
6 first search warrant that are just pictures of the  
7 kitchen, pictures of the bedroom. There's no zoom-in on  
8 the Clorox, because they didn't know the Clorox was  
9 important until later they were told Ryan Deleston  
10 washed his hands with Clorox, not because of his own --  
11 his own idea; because Julius told him to go wash his  
12 hands. He might have gunpowder on it.

13 They told them about the burn spot. There was  
14 no reason for the police to know to search for a burn  
15 spot in the backyard until George, and Julius, Rayshawn  
16 tell them that that guy burned his clothes. And so what  
17 do they do? They go back, because they have the first  
18 day of search warrants. They aren't looking for that.  
19 They do the interviews, they go back, and they're  
20 looking for it. What do they -- they find? They find  
21 some burned, melted things. They don't find a shirt.  
22 It's six weeks later. And I think Rayshawn said lighter  
23 fluid was used. But they find this stuff that nobody  
24 knows is that important. And then, lo and behold, we  
25 find out about the robbery downtown where a tan purse

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1 was taken. Do you remember the testimony that he also  
2 burned the purse? And what do they find in there?  
3 Buckles that look like purse buckles, little pieces of  
4 leather, snaps that go with a purse. That's how you can  
5 know and judge the credibility of those witnesses.

6 Bryan Rivers, downtown an hour before  
7 Marley Lion was executed, doing a robbery. You heard  
8 from the victim of that robbery, saying the build of  
9 Bryan Rivers, five-ten, five-eleven; 150 to 160. He's a  
10 beanpole. He could tell he was a beanpole. He told you  
11 he had on lighter pants, khakis, one hour before the  
12 robbery. The drive-thru of Famous Joe's that I told you  
13 about, the difference in the descriptions. Not my word.  
14 Their word. Again, five-eleven, 162; Ryan Deleston, six  
15 feet, 215. There's a big different in that.

16 You know who knows there's a big difference in  
17 that? Ryan Deleston knows there a big difference in  
18 that. The shoes. You show the shooter when he runs up.  
19 He's got on white shows. What did Bryan and Julius tell  
20 you? The Defendant has white Willie Dee's. Willie  
21 Dee's can be black; they can be white. He has white  
22 ones. You saw the picture of them in his house. I  
23 don't know why they didn't collect the other shoe, but  
24 you got pictures of both shoes in his house.

25 You will hear Mr. Pennington talk about DNA, I

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1 feel certain. Keep your eye on the ball, ladies and  
2 gentlemen. Remember not what I say, what the scientist  
3 said. Jeff Miller, who works for crime scene, said he  
4 swabbed areas where he thought that the Defendant had  
5 touched. And he didn't just swab the whole side of the  
6 car. He looked. He swabbed the handles of the -- the  
7 driver door and the driver back door. And then he swabs  
8 some other places. There were no results from that that  
9 could be tied to the Defendants, any of them. And what  
10 does she tell you? The reason she didn't go back and  
11 look at that driver door was because if she did those  
12 tests, it wouldn't be valid, it wouldn't be -- it was  
13 insufficient to make a positive identification. Okay.

14 So Mr. Pennington will say, Well, they could  
15 have excluded -- they could have excluded my client.  
16 We'll give him that. Your client's excluded, even  
17 though the scientist says, You can't do that test  
18 because it's not valid. You got to give him that. He's  
19 excluded. It doesn't matter. Why doesn't it matter?  
20 When you watch that video a thousand times, you're going  
21 to see what they saw and why they didn't raise cane with  
22 SLED about getting it tested. The shooter doesn't try  
23 to get in the front door. He just doesn't.

24 And we're going to show you just a piece of  
25 this clip. Hold up a minute. And just so you -- you

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1 know how fast it goes. This clip is going to start from  
2 just after he's run up. Watch this left shoulder and  
3 watch this left hand because he's going to come in fast,  
4 and it starts about right there. Watch how the shoulder  
5 turns and how he goes up. He's not doing that. He's  
6 not pulling on it. He's not touching it at all.

7 Again, you'll get to watch it over and over as  
8 many times as you want. When Ryan Deleston runs up to  
9 that car, he immediately does that, and does whatever he  
10 does with the window. He's not trying to get in that  
11 front door. There ain't anything in the front door for  
12 him. Remember, they've watched Marley get in the back  
13 seat. They watched Marley lock the door to keep himself  
14 safe. He knows exactly where Marley is. That's where  
15 he goes. I'm 100 percent positive that Ryan Deleston's  
16 DNA is not on that front door handle. He didn't touch  
17 it.

18 Showed you this at the beginning.  
19 George Brown, obviously; I don't have Rayshawn on here,  
20 way too short; Julius Brown, too short; and, again,  
21 Bryan Rivers, too skinny. Remember, one hour before  
22 this, the description of Bryan Rivers, he looked  
23 five-ten, 150 to 160 an hour earlier by someone who saw  
24 him. He didn't look 215. Ryan Deleston agrees with  
25 that. Ryan Deleston agrees that Bryan Rivers is too

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1 skinny to be the guy on that videotape. You know how  
2 you know? You don't have to take my word for it. You  
3 take his words for it. Before, while he's being  
4 interviewed, and they're talking to him about that  
5 video, and Detective Burckhardt is talking to him about  
6 how, Man, but you don't fit. It doesn't fit. You're so  
7 big. Bryan's skinny. What does he come up with? Now  
8 all of a sudden, in the middle of the summer, June 16th,  
9 2012, according to Ryan Deleston, Bryan Rivers, all of a  
10 sudden, has on four shirts. Four shirts. Come on,  
11 people.

12 (Video is played.)

13 MS. WILSON: He needs to make Bryan Rivers  
14 bigger. He needs to have a reason that Bryan Rivers is  
15 bigger. Bryan Rivers has just gotten out of prison. He  
16 probably doesn't have four shirts to his name. The  
17 shoes that he has came from Julius Brown. He's got  
18 black shoes. They are a size nine. He wears a size  
19 nine. Ryan Deleston, the bigger guy, size ten.

20 THE DEFENDANT: I wear 11.

21 MS. WILSON: He wears 11. He was squeezed in  
22 that thing.

23 When Ryan Deleston is put in the corner with  
24 the evidence in front of him -- when Ryan Deleston is  
25 put in a corner, he starts with the absurd.

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1 Bryan Rivers has -- now has on three or four shirts.

2 Bryan Rivers has on three or four shirts.

3 When you were thinking about mere presence,  
4 don't take my word. Take his word. Look at what he  
5 says about how close he was to Marley Lion, what he  
6 could see, and how Julius was coaching him from behind  
7 the fence.

8 (Video is played.)

9 MS. WILSON: the cell phone.

10 (Video is played.)

11 MS. WILSON: He's so close. So close.

12 Remember before, they couldn't tell how many people  
13 Marley had in the car with him. They were concerned  
14 about what was going on. They couldn't see from that  
15 back fence. He's so close that he could see Marley  
16 Lion, as he is scared to death that he's going to die,  
17 has a cell phone in his hand. He has a cell phone  
18 because he knows he's under attack. He's trying to get  
19 help as he's pulling away. Who could see that? He  
20 could see it because he was right there.

21 You heard hours of this video, and I hope, and  
22 I submit to you that those detectives, despite that  
23 guy's attitude, treated him with nothing but dignity and  
24 respect. They gave him his rights. The Judge will tell  
25 you that the only thing that's up -- for you to decide

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1 about that statement is whether or not it was knowing  
2 and willing and voluntarily and intelligently made.

3 Who was in control of that interview? Y'all  
4 watched that first hour. Ryan Deleston was very in  
5 control of what he was doing. You saw how he acted.  
6 And it doesn't matter how loud he got and how obnoxious  
7 he was, he knew exactly what he was saying. And he  
8 tried and he tried and he tried to wiggle out of it. He  
9 even brings up -- diming out some guy, Tino, who was  
10 alibied at Mosquito Beach. You know, there was nothing  
11 too low for him. A totally innocent guy, he's going to  
12 bring in and name. Those guys were professional. They  
13 were respectful. They gave him breaks. They gave him  
14 food.

15 You think about that when you look at the  
16 credibility of what he said. Deleston says at one point  
17 only five people know what really happened out there.  
18 And then he backs off, because he says it's me, it's  
19 Julius, it's Little B. Tino might, because Tino and  
20 Little B are tight, and Little B may have told him.  
21 He says Duke might know, but now I'm not sure about  
22 Duke. So really what he's saying is three people know  
23 what's out there. Three people know what happened.  
24 Only three people. Listen to what he says once again  
25 about how close he is, because, remember, they didn't

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1 release the whole video. And they told him throughout  
2 that interview that he doesn't know everything. And he  
3 says to them -- he tells them where he was. And he  
4 says, Don't know if y'all could see me. Listen to this.

5 (Video is played.)

6 MS. WILSON: Standing right there. But he was  
7 wrong, wasn't he? He was wrong. Not just three people  
8 knew. Marley Lion knew. When Officer Deal came up and  
9 Marley Lion was dying, what did he tell him? There was  
10 no reason for him to think Julius Brown had anything to  
11 do with this. Julius Brown was 12 minutes gone, if he  
12 even saw Julius walk through. Marley had been there a  
13 long time. Laid down to go to sleep. Doing what we  
14 hope our children will do when they make a bad decision  
15 to have too much to drink. We hope they'll pull over.  
16 We hope they'll sleep it off. We pray for that. He was  
17 in that car asleep. And when he was awoken by someone  
18 sticking a gun in his face, telling him to open the  
19 door, when he pulls that cell phone up, who can see it?  
20 Ryan Deleston can see it. When he's sitting there in  
21 fear of his life, when Officer Deal asks him, Who did  
22 this? He says there were two of them. One of them had  
23 on all black. He doesn't describe the other one. He's  
24 in pain. He's wondering when EMS will get there. He  
25 doesn't describe the striped golf shirt that Julius told

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1 you about, but you will be able to see on that video  
2 when you get a chance to watch it. There were two of  
3 them out there. Ryan Deleston told you that. He knew  
4 it too. That's why he's saying, Burckhardt, I don't  
5 know if y'all saw me or not. If he had been behind that  
6 fence, there's no chance, no chance that he was seen.  
7 He knows that Julius Rivers hadn't been seen --  
8 Julius Brown hadn't been seen because he went back  
9 there.

10 That's the hand of one. That's how you know  
11 that Ryan Deleston is in this thing up to his eyeballs.  
12 And I submit to you the reason that Ryan Deleston knows  
13 that Marley Lion was told to open the fucking door, give  
14 them the fucking money is because Ryan Deleston is the  
15 one that told him to do it.

16 Ladies and gentlemen, I'm about to sit down,  
17 and that's one of the hardest things to do when you  
18 don't get to stand back up again. At the very beginning  
19 I told you we were going to ask for a verdict that spoke  
20 the truth, and that's what we're asking for. The truth  
21 of this case is the hand of one is the hand of all. The  
22 truth of this case is that it was very foreseeable that  
23 someone would get hurt when a bunch of thieves are out  
24 committing armed robberies. The truth of this case is  
25 that someone so in need that they're willing to take and

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1 sell a gun that they know has been used to kill  
2 somebody, that they're so in need of money that they'll  
3 risk their freedom by selling a gun for 80 bucks when  
4 they know it's hot, when they know it's killed someone.  
5 Who does that? Someone who is desperate.

6 Ryan Deleston was desperate. Ryan Deleston did  
7 not care about Marley Lion or anybody else. You know,  
8 it's been said, I don't know by whom, but it's been said  
9 that the opposite of love is not hate. The opposite of  
10 love is indifference. They didn't care. It didn't  
11 matter.

12 But thank goodness the community did. Thank  
13 goodness. That's not something to be ashamed of.  
14 That's something to be proud of. You heard the  
15 detectives. Yes, people were upset. They were  
16 outraged, because they didn't just have to hear about  
17 it. They had to watch it on the news over and over and  
18 see how ridiculous it is.

19 For no reason that child was executed. He had  
20 everything to live for. There's no reason that a mother  
21 had to listen on her dead child's 18th birthday that  
22 these thugs were lying through their teeth. It didn't  
23 have to happen that way. And how dare they claim that  
24 they didn't know something like this could happen. And  
25 how dare anyone say that Ryan Deleston was merely

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1 present. How dare they. There's one person who was  
2 merely present. There was one person who was innocent  
3 that night. He was Marley Lion. He didn't deserve  
4 that. He didn't deserve it.

5 But Ryan Deleston deserves what you have to  
6 give him under the facts and the evidence of this case.  
7 Ryan Deleston deserves and has earned a guilty verdict.  
8 We have proven it beyond a reasonable doubt. And I ask  
9 you that you follow your oath and that you give him that  
10 guilty verdict.

11 THE COURT: Mr. Pennington.

12 MR. PENNINGTON: Please the Court.

13 **CLOSING ARGUMENTS**

14 MR. PENNINGTON: The evidence shows that Ryan  
15 thought that he was going to see Bryan Rivers rob  
16 Marley Lion. And when you looked at that video, it's a  
17 little bit surprising. Ryan did not foresee Bryan's  
18 murder 21 seconds after he'd run away, after Bryan had  
19 run away. He did not foresee that would make any sense  
20 to anyone under any circumstances to go back 21 seconds  
21 later and shoot. That hadn't been part of any plan that  
22 had been discussed or shared or thought about or that  
23 would be thinkable. The robbery had failed. It was  
24 over. The alarm came on. You've seen it. When you  
25 listen or look at the video, it's not like the alarm

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1 goes off and you run over, you jog back and they're  
2 shooting right away. Instead, there is this  
3 inexplicable 21 seconds. Twenty-one seconds. You know  
4 the robbery is all fouled up. You know that the car  
5 alarm is on. And so you see Bryan back away and run  
6 off, and you think it's over. And you wait. What's  
7 going on? It's over. It's over, isn't it? Nothing's  
8 happened yet. Shots. Because a new plan got hatched.  
9 A new plan between Julius and Bryan.

10 You heard testimony, undisputed testimony.  
11 Julius said, hit that guy; hit that guy. And for  
12 reasons known only to Bryan, he decided that it made  
13 some sort of inexplicable sense to go back and shoot out  
14 the windows. Was he trying to hurt somebody, kill  
15 somebody? Was he trying to think that if you break the  
16 window and then there'd be a good opportunity to have a  
17 regular stickup or search the car? It makes no sense.  
18 It's not foreseeable. You don't see this every day.  
19 It's not your textbook armed robbery gone bad.

20 So how do we know, first of all? Let's focus  
21 on why do we know it's Bryan That's the shooter? Well,  
22 there are a number of hugely important facts that we  
23 were able to elicit on Cross-Examination for you in this  
24 courtroom. Bryan had the gun that night. Bryan,  
25 earlier that day, had been out in the neighborhood with

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1 the gun. He had gone to this video production by Shawn  
2 Turner. You heard that testimony. And what does he do?  
3 He's described as intoxicated and crazy by  
4 Bobby Warthaw. And what does he do? He pulls out the  
5 pistol, and he's waving it around and frightening people  
6 and probably going to get someone to call the law in.  
7 And so it upsets and gets attention. It's aberrant.  
8 It's unusual. It's weird. He does it anyway.

9 And, by the way, Bobby describes him that day  
10 wearing black with Willie Dee's. He doesn't say black  
11 Willie Dee's. He says Willie Dee's. "Willie Dee's"  
12 doesn't tell you a color. He's not a guy that always  
13 wears all black. We know that from the video. You  
14 remember at first he thought he was going to get away  
15 with saying, Yeah, you know, I'm always wearing black.  
16 But then I had to refresh him a little bit that at the  
17 days succeeding this, you remember he sold that  
18 imitation crack, and he was wearing a white T-shirt. He  
19 doesn't always wear all black. He doesn't only have one  
20 shirt.

21 So let's stop and ask ourselves about these  
22 multiple shirts. Why does a guy wear multiple shirts if  
23 he's in the business as a stick-up artist? Use your  
24 common sense. It's the great throw-away shirt routine.  
25 You wear multiple shirts, you discard the shirt, and

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1 then the -- you can walk down the street and they're  
2 looking for the wrong-colored shirt guy. That's why you  
3 have multiple shirts on. That's why he looks more bulky  
4 than perhaps when he's been sitting in jail for over a  
5 year eating just jail food and waiting for his day in  
6 court, and he cuts his hair down for you, trying to look  
7 as groomed as possible.

8 Another fact, how do we know it's Bryan? How  
9 do we know it's Bryan? Well, Bryan is the fellow who,  
10 everybody agrees -- there's not a moment of dispute --  
11 is out one hour before, 2:45, on his own, sticking a gun  
12 in the face of two other people and robbing them. No --  
13 no dispute. Same gun. No dispute. And the other thing  
14 that's interesting is that Ryan's not there. You  
15 remember the plan had been that supposedly they were  
16 getting out to both do the robbery on Rutledge Avenue,  
17 but they described to you, then Ryan went the other way?  
18 He abandoned. He held back. He went away. He ended up  
19 down on what would be Spring Street, you know, in the  
20 Crosstown by the McDonald's. He had to call to get a  
21 lift back to Ardmore. Undisputed testimony.

22 So who was the guy that was acting crazy that  
23 night? Not Ryan. In fact, the testimony is, is that  
24 after that, there were other times where they were  
25 criticizing Ryan because he wouldn't get onboard with

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1 doing other robberies with these fellows. You remember  
2 the discussion during his interview, his interrogation  
3 by the police, he describes how one of the reasons there  
4 was a falling-out between him and the Brown clan was  
5 because he wouldn't go along with another armed robbery,  
6 the one at the barbershop.

7 He's the hesitant one. It's funny how roles  
8 change. But, you know, when police create a perfect  
9 avenue for people to flip the story around and suddenly  
10 the guy can play a new character. He can play the  
11 Ryan Deleston character, the guy that hung back, the guy  
12 that was just there kind of watching but was tentative.  
13 You remember the description of the guns passing back  
14 and forth. Of course, now the story there, according to  
15 Little B, is that, what did he say? You know, it was  
16 almost as if he was like a choirboy. He was saying, you  
17 know, I went and he tried to hand me back the gun, and,  
18 you know, I had a change of heart. I just didn't want a  
19 thing to do with it. So I kind of just backed away, and  
20 I went over and I stood. And then I kind of moved over  
21 here to where the gravel part was, and I really didn't  
22 have any part in this whole thing.

23 Now, this is a fellow who has -- he's kind of  
24 seemingly upside down, if that's what he did. And he  
25 really withdrew from the robbery, and he should be here

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1 in trial right now. But he didn't make that choice.  
2 And the Solicitor is so charitable as to suggest to you,  
3 in an absurd fashion, that the reason that he came in is  
4 because, whereas in August, you remember he wrote that  
5 nasty letter that you have in evidence, where he says,  
6 You know what, Solicitor? I'll see you in court. I  
7 didn't do anything. I'm innocent. I have -- I want a  
8 trial.

9 She describes that that change in September,  
10 that big difference was, is that somehow the remorse  
11 light bulb came on, and he began to feel guilty about  
12 the fact that he withdrew from the conspiracy and that  
13 he stood over there. Really, he's more of a witness.

14 Or is it really that he learned -- and this was  
15 through the Cross-Examination -- and admitted that he  
16 knew that the Codefendant, Julius, had made a deal weeks  
17 before, published -- publicly, that Julius Brown is  
18 going to testify for the State? So suddenly now he  
19 knows he is in big trouble. It's not going to be the  
20 easy walk in the park. Doesn't know exactly what he's  
21 going to say, but he knows that there's now a witness  
22 that's going to be against him. And so he decides, Boy,  
23 I better do exactly what the police said that I should  
24 do when I was in that interview room back on Lockwood,  
25 which is, I needed to get on board the team.

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1           So Bryan is the guy that has the gun earlier.  
2   Bryan's the guy who does a robbery of two people  
3   down -- random folks. So you have to ask yourself, how  
4   did we get in this kind of confused situation, where all  
5   the spotlight and all the focus and all the energy  
6   really gets turned to Ryan Deleston? And I submit to  
7   you that it's not through some sort of evil intent or  
8   bad will on anyone's part. But it's sort of human that  
9   we begin to believe what we want to see. It's our loss  
10   of objectivity about where you begin you think you know  
11   something and then everything else gets bent and  
12   squished and reshaped to fit what you want it to be.

13           So, you see, the police didn't yet know that  
14   Bryan had done another robbery the hour before. And  
15   yet, it's hard to be so charitable to the police in a  
16   sense, because two days after this crime, two days after  
17   this crime -- I'm sorry -- yeah, two days into this  
18   crime, two days, June 18th, Sergeant Osborne told us  
19   that they had gotten a tip from Leroy Townsend that  
20   Bryan Rivers was involved in this shooting. Two days in  
21   Bryan Rivers' name was at the top of the list from the  
22   community.

23           So there were signs that the truth was right  
24   there. Well, where do we go from there? The police  
25   naturally looked at several key factors. And they're

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1 very understandable. One is, is that you know that  
2 about 18 minutes after the shooting, you have Ryan and  
3 Julius at Julius' momma's house, 635, which is not  
4 exactly on top of Joe's. It's down the street a couple  
5 of blocks. Referring to State's Exhibit 4, which you'll  
6 have back in the jury room and you'll be able to see. I  
7 don't know that anyone's quite gotten this close. But  
8 this is our unfortunate crime scene. And the house that  
9 we're talking about is 635, right over here. So you can  
10 see several doors down.

11 Now, he's not wearing black. He's not wearing  
12 a striped shirt. He's wearing a white T-shirt tank top  
13 and gray shorts, on a bicycle. And we're not saying.  
14 Julius is not involved, and we're not saying that they  
15 weren't involved. I'm going to tell you why those  
16 Codefendants have kind of told you a whopper. You know,  
17 if you really think about the time, if you watch the  
18 video, what you get, if you look at timing, the first  
19 responder, Officer Deal, you can see from the individual  
20 itself that on Mantek time, which is the company that  
21 has the clock, it's 3:56. But we've agreed and talked  
22 about through the testimony that that was actually about  
23 11 to 12 minutes slow, so that we know that the actual  
24 shooting -- the actual shooting occurred the moment of  
25 the shot, not when the police responded. The moment of

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1 the shot was between 4:07 and 4:08 a.m. Okay?

2 Now, that's an important time. Remember that  
3 time. Okay? Because the next thing that you heard --  
4 and this was based on the call records of the  
5 officers -- is that we have -- do you remember we had  
6 Ulysius Vance, the man who responded, and he was going  
7 to back up the first officer? There was some kind of  
8 discussion and then had an encounter with Ryan. And he  
9 said -- he estimated that that time was from 4:20 to  
10 4:25 a.m. So being as generous and conservative, that  
11 gives you a difference of about 18 minutes max that the  
12 following would have had to have occurred.

13 Do you remember the litany that it was not just  
14 that they had run through the backyards at Balsam, but  
15 then they had come back all the way past White Oak  
16 through the backyards of Balsam? Remember there had  
17 been a stop along the way. And there, you remember that  
18 one of the stops was because, even though they didn't  
19 know it, you remember Julius said that Little B just  
20 went on down Evergreen. But I guess the story couldn't  
21 get quite set up right, and so you have now Little B  
22 admitting that he's over here at the pool where the gun  
23 is hidden. Then after that, they go back over here and  
24 back to Cashew Street right over here.

25 And a lot of things happen there. And I ask

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1 you to use your common sense. You've got 18 minutes  
2 that they've got to get back to and be knocking on the  
3 door of Dolores Brown's house, get inside, get the  
4 flashlight, get the bicycles, come out, all within 18  
5 minutes. Doesn't make sense that you could squeeze in,  
6 not just that trip, cover-up trip, which we concede  
7 happened, but there was also all this discussion and  
8 criticism of Ryan and that Ryan had to come up with a  
9 plan and Ryan washed his hands and Ryan smelled like  
10 bleach and he changed his clothes and then they walked  
11 down to her house. And they're feeling so bold that  
12 they're going to go right back to the scene where Ryan  
13 had just shot this poor young man to death. This is the  
14 fellow that's too timid to go and participate in the  
15 Rutledge Avenue robbery.

16 Or is it much more likely that they run their  
17 route back to the house, Bryan is hiding the gun, and  
18 then they get back and Bryan stays behind, and Julius,  
19 who has his mother's house to go to, but wants to see  
20 what's going on, and Ryan goes with him? Not nearly as  
21 nervous about being questioned because he knew he wasn't  
22 the shooter. And so he ends up down there.

23 Now, you hear the description of Julius.  
24 Julius even goes further in describing how they ride  
25 down to just look and see, and they're trying to get

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1 that hat that got dropped or left behind. And Ryan  
2 won't even go over to get the hat.

3 So what I'm saying is, is that the time frame  
4 doesn't fit, in terms of, it doesn't fit what we know  
5 happened. We know when the shots occurred, and we know  
6 when Ryan, my client, is at [REDACTED] White Oak. It does not  
7 make sense that you can squeeze in their version of the  
8 story, the way they say it happened, which was, is that  
9 we go back and we converse and there's criticism and a  
10 plan and we're going to bleach up the hands and change  
11 the clothes and make it back.

12 Let's move ahead. Obviously the police were  
13 focused on that they had him out there. They had a lot  
14 of people, but they had him out there. What was the  
15 next clue? Well, 11 days after the shooting, Ryan does  
16 something that was obviously stupid, especially if  
17 you're the shooter -- doesn't make sense if you're the  
18 shooter -- which is, is that you begin to let people in  
19 the community know that you've got a hot gun to sell. I  
20 mean to tell you, if you are the shooter, makes no  
21 sense. But if you're doing it for your friends,  
22 particularly not the shooter, but you're doing it for  
23 George and for Julius, and you're really not thinking  
24 too much about it, and it just seems like a way to make  
25 a little money and move that out of the way, that makes

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1 a lot more sense. Ryan was willing to try to sell a gun  
2 cheap, and he wasn't afraid, that these two -- to  
3 eliminate stat (phonetic), that the people in the  
4 community would know. And sure enough, it did get the  
5 community's attention. And Bobby Warthaw saw this great  
6 business opportunity. He calls the police and has a  
7 meeting on the 27th on the -- 11 days after this.

8 And he's pumping him up. You know, I think  
9 this could be the murder weapon. You know, we could  
10 really -- you know, could I get the reward? Now, that  
11 would naturally, I think, stir the police to think, Wow.  
12 Okay. This guy was out there. Now we've got him maybe  
13 connected to the gun, and maybe they're just thinking,  
14 Okay. Now we're finally getting some traction in this  
15 case where we have no clues and no leads. It's kind of  
16 exciting. It seems important. At least it's something  
17 positive that's coming in. And so they get a little bit  
18 psyched.

19 Again, what the police don't know is that three  
20 days later there is this falling out at the Brown family  
21 reunion. This bad blood begins to develop between  
22 George and Julius and Ryan, and even he has to go and  
23 stay at his mom's house for awhile because he and  
24 Stephanie are on the outs over this public -- where he  
25 had disrespected Stephanie.

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1 But why do I raise that? Well, what you have  
2 is, the community is talking and maybe talking a little  
3 bit more freely. But the -- the clincher, in the mind  
4 of Detective Osborne, is what happens because people are  
5 talking. He deliberately chooses as a strategy, the  
6 next strategy to derive the truth, the search for the  
7 truth, to find and secure the best evidence in this  
8 case, is to go to the jail and talk to the king of crime  
9 of Ardmore, who's been locked up, Frank Middleton. But  
10 not because he thinks he has some sort of divine powers  
11 of prophecy, but because he knows he has his ear to the  
12 ground and is going to have heard what's going on in the  
13 street, and he's looking for more intel.  
14 Understandable. Reasonable tactic. But that seems to  
15 be where the objectivity in this investigation began to  
16 just disappear.

17 They rely on a man who gives them inaccurate  
18 information about the first guy walking through. He  
19 says, Yeah, that could be Big Boy, a friend of  
20 Raphael Simmons. Eh. Mistake. Error. A guy from  
21 Melrose -- he describes in more detail this guy from  
22 Melrose. Again, inaccurate. But then he looks at the  
23 video. He can't see the face. Not out there himself.  
24 But he says, I think that's Ryan. And then by the time  
25 he gets to court, you could hardly hold him back. He

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1 was positive. Over and over again, I am certain that  
2 that's Ryan.

3 One thing we know is that he's certain that he  
4 wants you and you to think that it's Ryan because that's  
5 what's going to advance his cause. What makes him a  
6 little bit iffy on the reliability side is, this is a  
7 guy, when asked direct questions, simple questions, not  
8 hard, just softball questions like, you know, did you  
9 ask for anything at the end of the interview?

10 No.

11 Then he kind of softened a little bit.

12 Maybe.

13 And then you heard Detective Kosarko, who was  
14 right there immediately afterwards, and Kosarko was just  
15 as simple and straightforward, Of course. Yes, he did.  
16 He wanted something.

17 Now, it's not a big deal. It's normal to think  
18 that he might want something. But my point is, he came  
19 here and tried to mislead you good folks. He's got an  
20 agenda, and he's trying to make himself look like as  
21 good a witness as he can be to earn those brownie points  
22 that are going to get that armed robbery charge that he  
23 has legitimate concerns about, since it's minimum ten  
24 years. He's looking at going to the penitentiary for  
25 ten years unless these good folks knock that charge down

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1 to strong arm. So he's got a big dog in this fight  
2 himself.

3           You know, where you begin to realize that we've  
4 run off the track is when you begin to say that his I.D.  
5 matters. Here's a man who would look you in the eye and  
6 proudly say, right at the beginning of his testimony, I  
7 didn't hear any street talk in the jail. Don't know  
8 anything about what's going on in the street because  
9 I've been locked up. And yet we know beyond any doubt  
10 that that's the whole reason that the police went there  
11 to see him, because he would be very tied in with what  
12 was going on on the street. And what would he have  
13 heard on the street? What we're talking about now. He  
14 had a gun to sell. It's the buzz. And it becomes the  
15 big buzz, the thing that is going to sort of break open  
16 this case. And, of course, it did in a way. But does  
17 it solve the puzzle that I'm asking you that I think you  
18 must try to solve, which is, who is the shooter in this  
19 case? He's trying to solve it for you. I submit that  
20 he also is not worthy of your belief.

21           You know, one of the shocking -- is that it's  
22 so nonobjective, in the sense of, that he admits freely,  
23 on the one hand, I don't know how Bryan Rivers handles  
24 the gun. I don't know how Little B handles a gun. So  
25 he would dare -- talk about dare -- raise the question,

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1 how could he dare claim that he could make a convincing,  
2 positive, absolute, I'm certain I.D. of Ryan Deleston as  
3 the shooter, when he has nothing to compare it to? But  
4 what's even more shocking is that it kind of leaks out  
5 that he is the former roommate of Bryan Rivers at  
6 Allendale Prison. He knows Little B. They were  
7 roommates in prison. Maybe he wouldn't want to call  
8 Little B's name. Maybe Ryan is sort of fair game at  
9 this point because there's a falling out between him and  
10 the Browns and he's out there selling the gun, and maybe  
11 we can just sort of cast off Ryan. Ryan is expendable.  
12 Certainly the truth is expendable, because I'm not going  
13 to tell you that I asked for anything from the police.  
14 Y'all don't need to know the truth.

15 But something not so good happened from that  
16 moment on. Sergeant Osborne tells you that he became  
17 convinced, in looking at the video, that it was Ryan.  
18 And from that moment on, the train was on the track,  
19 where every question that was asked people was, isn't  
20 this Ryan? And when he gets -- the plan is, is that  
21 we're going to now use Bobbie Warthaw as our -- one of  
22 our guides on how to get the truth. And the truth is,  
23 is to lie to Bryan Rivers and see if Bryan Rivers will  
24 also join in the chorus and say that it's Ryan who did  
25 the crime. What a perfect opportunity for Bryan Rivers.

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1 He's charged, and he knows he's guilty. And they give  
2 him this golden opportunity to say, Wasn't me; it was  
3 him. And that's exactly what he did. That's exactly  
4 what he did. Is that objective, or is that just  
5 basically getting what you want to hear?

6 The police were very clear during the  
7 interrogations. They say, you know, This is your  
8 opportunity. They said, We want you on the team. If  
9 it's so clear, if it's so trustworthy and reliable, if  
10 it's the kind of thing that you can bank on and feel  
11 good about, why not go get a warrant at that point? Go  
12 to the judge and say, We have a reliable, confidential  
13 informant, and that confidential informant has sworn to  
14 us under oath, and he's reviewed the tape, and he can  
15 recognize the perpetrator? Why not? Well, because you  
16 know that Frank Middleton is not reliable. You know  
17 he's just not a good source. And so -- and then he has  
18 all these axes to grind that I just finished talking  
19 about. But that doesn't seem to stymie this commitment  
20 to move in the direction of, let's put on the blinders  
21 and just go for this Ryan who has the gun and see if we  
22 can't get things to begin to fit around that framework.

23 So there's no dispute. I want you to  
24 understand. I know I can see we've been talking awhile.  
25 I don't want to put y'all to sleep. But I have just a

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1 couple of more things to say that are kind of important.  
2 One is, is that we're not disputing that Ryan was out  
3 there as part of a plan to do a robbery of Marley.  
4 That's not the issue. The issue in this case is whether  
5 or not Bryan Rivers' outrageous and unforeseeable  
6 conduct in going back and shooting, Julius Brown's  
7 outrageous and unforeseeable conduct in saying, go hit  
8 that guy, it came out of left field.

9 Now, you can say I'm being too picky. You  
10 know, it's so convenient to be such a critic. All I'm  
11 doing is throwing around criticism. But how will we  
12 feel when they finally test that, -- Bryan Rivers' DNA  
13 and it's consistent with the door handle? The Solicitor  
14 can say you've looked at it and you can judge yourself.  
15 You can judge. You can -- how many times in your life  
16 do you go through life where you're so cocksure that you  
17 know something, and then suddenly you find out that  
18 things aren't what you thought they were? You know,  
19 we can think we know things, but "why" doesn't have any  
20 science at all. Why take evidence? Why test evidence?  
21 You know, they didn't send those deputies down there  
22 with those search warrants to get the swabs of  
23 Bryan Rivers' cheek just because it was something to do.  
24 It was because standard protocol is, is that you test  
25 the unknown evidence to find out what you're going to

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1 learn. It's a search for the truth. The only thing  
2 that can go wrong is, you'll have a no-result. But  
3 maybe we'd be sitting here with a different defendant  
4 sitting at that table.

5 Now, Bobby Warthaw, I don't want to get too  
6 wound up about Bobby Warthaw. He is what he is. The  
7 gun thing is kind of important, but it's also kind  
8 of -- doesn't answer the question that you're trying to  
9 get to in this case, because the ground plan letting  
10 Ryan be the face of the sale of that gun doesn't tell  
11 you a thing about who had the gun in their hand that  
12 night. It -- certainly, it shows that he's part of a  
13 cover-up. And if he was indicted for accessory after  
14 the fact of murder or accessory after the fact, which is  
15 a crime that is about covering up another person's  
16 crime, that'd be a different story. That's what selling  
17 that gun is all about. But it doesn't answer the  
18 question of who used that weapon on the 16th of June.

19 So let's go through, finally, and kind of a  
20 summation of where we really are. It was Julius's plan.  
21 Nobody disputes that. His own family says that he was  
22 the guy who was saying, Let's go. It's going to  
23 be -- let's go down to Joe's. It's George's gun. I  
24 think it was George who said it was Julius' plan.  
25 And -- but what's interesting is, is that they took the

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1 gun back. If they're like, you know what, Ryan, it's on  
2 you, it'd be like, I don't want to see that thing again.  
3 It's your baby now. You go deal with it. But, no.

4 A key moment in this case, maybe even the most  
5 important moment, I think, in figuring out that  
6 Bryan Rivers is the shooter, it's a tiny little moment,  
7 but I think if you think back, you will remember it with  
8 me, of something that I think was very revealing. The  
9 mask slipped and fell just a little bit. It came at  
10 that moment where -- I think he was on Direct  
11 Examination, and the question was asked: During the  
12 robbery, Bryan, was it knocking on the windows that set  
13 off the car alarm, or was it Marley who set off the car  
14 alarm?

15 And did you notice that he brightened up, and  
16 he stated with confidence, Oh, no, it was Marley that  
17 set off the car alarm? At that moment, you could tell  
18 that his whole testimony had been a fraud, because he  
19 had told you, you remember, that he was standing over at  
20 the gravel when all this thing happened. He came here  
21 to you, took an oath to tell the truth, said trust me,  
22 I'm going to give it to you, and then lied to you,  
23 because he was right there on top of the scene with the  
24 gun, and he could see the light from the cell phone as  
25 it's being activated, which mine is not. It's very

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1 revealing to me.

2 He admitted that he went to Jason's pool.

3 There is no way on God's green earth that he would have  
4 had a reason not to do what Julius said he did, which is  
5 to just shoot straight down -- I mean, run straight down  
6 Evergreen back to Cashew, if he was this guy who was as  
7 he represented himself to be, just sort of this  
8 hanger-on, he had no good reason to want to try to be  
9 involved in hiding that pistol, running through the  
10 backyards of Cashew.

11 You know, the -- Chris McCandlish, the  
12 gentleman that came in here that was robbed the night of  
13 an hour before, he described that Bryan was wearing a  
14 dark shirt and lighter pants. He wasn't sure now. He'd  
15 said khakis on the night of the crime. But, of course,  
16 he was focused on the weapon and focused on his  
17 girlfriend or his friend, and all the other  
18 circumstances that he was able to relate to you in  
19 pretty clear detail. But interesting is that, when you  
20 remember Rayshawn, who was the brother that's not  
21 charged, Bryan's the one -- I mean, rather, he told  
22 Osborne explicitly that Bryan Rivers, Little B, had on  
23 dark clothes, and so does Bobby Warthaw. You remember  
24 the description of clothes that Bobby Warthaw gave from  
25 the music video. Dark clothes. So don't get all balled

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1 up about the confusion of an armed robbery witness  
2 about -- because he's a little bit shy and tentative  
3 about that. Bobby's waving the gun around, and it fits  
4 what Rayshawn told you too.

5 We know Bryan Rivers, convicted -- convicted  
6 previously of assault with intent to kill, and on a  
7 separate occasion, assault and battery of a high and  
8 aggravated nature. Look at Julius' statement on June  
9 21st. Kind of a teller here. You know, there's certain  
10 things that you can sort of tell where an attorney gets  
11 skipped over, but if you sort back -- I cross-examined.  
12 And Julius remembered that he had, in an interview, June  
13 21st -- however many days that is, five, six days  
14 afterwards -- he had been interviewed by the police in  
15 an informal, noncustodial, he had gone down, he'd been  
16 put on tape, he was interviewed, and he -- he gave quite  
17 a little description. He said, you know, the person  
18 that you really need to be looking at on this is this  
19 guy, Bryan Rivers, Little B. Just got out of prison.  
20 And he gave kind of a litany to the detective -- I think  
21 it was Detective Burckhardt -- that day, six days in,  
22 that it was Little B. The police knew that. They're  
23 trying to tell you the truth, but people aren't  
24 listening. We've now made up our minds.

25 Then look at how things changed. I've already

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1 covered how Ryan being involved with slapping Stephanie  
2 sort of turning things upside down between him. And  
3 then you hear today further, from the video, that there  
4 had been disputes and problems between Julius and Ryan  
5 over drugs that kind of put him on the outs. Truth is,  
6 is that the -- he is, in their view, expendable. He is  
7 the moocher who was with his -- their sister, taking  
8 advantage of her and her check. And the reality is, is  
9 that he was sort of the guy that they were willing  
10 to -- sort of like "let Mikey do it." We'll let Ryan  
11 sell the gun and let him be out front on this thing.

12           You've been through almost, I say, it's sort of  
13 like some sort of torture of watching that long video.  
14 I apologize that videos go so long, but it's the best  
15 evidence, and I thank you for your attention. But what  
16 did you get? The take-away was, he told you and he told  
17 you and he told you and he told you. He kept telling,  
18 and nobody was listening: I -- I was there. I knew  
19 what was going on, but I didn't -- I'm not the shooter.  
20 I'm not the shooter. I'm not the shooter. They weren't  
21 listening. Fortunately, you can.

22           You know, if our case hinged on my client,  
23 Ryan, being a gentleman and always using good language  
24 and being educated and well-bred and polite, we're going  
25 to lose. But I hope that you will forgive him for his

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1 bad language. If he was on trial for bad language and  
2 being uncouth and unpleasant, then there'd be only one  
3 verdict to render, which would be guilty. But that's  
4 not what he's on trial for. And what he tried to do, he  
5 tried to mask and hide, he tried to protect George, he  
6 didn't want to be a snitch. He didn't trust them with  
7 the truth. He kept telling you, you know, I don't think  
8 there's anybody on my side of this. There's nobody on  
9 my side of this.

10 And so he then got into that scenario where he  
11 finally was willing to open up and tell them and trust  
12 them, that I'll tell you what really happened, and it  
13 was that I was there, but I didn't do this. I stepped  
14 out. I saw what was happening, looked -- the alarm went  
15 off, we ran. Julius was the one who said, Hit him, hit  
16 him, hit him, and Bobby went back and shot that boy.  
17 It's outrageous. It's upsetting. It's wrong. It's  
18 unforeseeable. It didn't fit the plan. It didn't fit  
19 the 21 seconds.

20 The law says that trials are really not a  
21 search for you to be able to answer with precision every  
22 question. The question you're only asked is whether or  
23 not -- on the murder indictment, whether or not this  
24 idea of the hand of one is the hand of all completely  
25 fits this case. If it does, he's guilty; if it does

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1 not, then the only true and just verdict is not guilty.  
2 And the law that the Judge is going to give you is that  
3 there must have been a common design or intent to commit  
4 the crime, and the crime must have been committed  
5 pursuant thereto with the person aiding and abetting by  
6 some covert act. The intent means intending the result  
7 which actually occurs. Let me say that again. Intent  
8 means intending the result that actually occurs, not  
9 accidentally or involuntarily.

10 Intent may be shown by acts and conduct of the  
11 Defendant and other circumstances which you may  
12 naturally and reasonably infer intent. It's a lot of  
13 language. You're going to hear more language like that  
14 from the Judge. But that's a highlight of what we're  
15 talking about and what I talked about in my opening  
16 statement, that when we go and we agree to do crime A,  
17 when that ends, in other words, when we withdraw from  
18 that because it didn't work, when your Codefendant goes  
19 back and he does an unforeseeable crime B, the law says  
20 that if you didn't sign up for it, it's not yours.

21 We're here on this murder charge. You can't  
22 always feel good to have to sort through this. You guys  
23 have sacrificed a week heroically in service to this  
24 community by patiently listening to this. And now the  
25 hard work is about to begin. And, you know, with all

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1 the expectation and pressure for this high-profile case,  
2 there can be this notion that we don't want to  
3 disappoint, we don't want to let anybody down, we don't  
4 want to let the community down. But the truth is, is  
5 that you have no one to reward and no one to punish.  
6 Your obligation, just like a judge has an obligation, is  
7 to be objective and to let your verdict speak to what  
8 has been proven.

9           The question is, has there been proof? You, as  
10 jurors, have to do that individually and, soon,  
11 collectively. But when you go back there in your jury  
12 room and you're actively talking about this, the law  
13 says that my client, or any person that's on trial, you  
14 or me, is not guilty where there's a real possibility  
15 that the defendant is not guilty. "Not guilty" meaning  
16 the reasonable doubt. Where there's reasonable doubt, a  
17 doubt that creates for you a real possibility in your  
18 mind that the Defendant is not guilty, then the only  
19 verdict you can render is not guilty. The Judge will  
20 tell you that.

21           So the question is going to be, what is a real  
22 possibility? Is it a real possibility that  
23 Rayshawn Brown Milligan, the ride-along in the armed  
24 robbery downtown, if he's defined as being sort of a  
25 bystander that's not guilty, you have to admit that he's

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1 there. You have to admit that he had to have heard all  
2 of the discussion. They were cruising around looking  
3 for targets, but the Solicitor told you that, in her  
4 view, he is the mere presence. He's merely present. He  
5 doesn't have that cache, that quality of joining in due  
6 to some sort of overt act in support of the crime.

7 Now, my client is on trial for attempted armed  
8 robbery, and for that you should find him guilty,  
9 because he's told you he's guilty of attempted armed  
10 robbery. But there was a break, a 21-second break,  
11 where things changed. And like Rayshawn, he was there  
12 as a bystander, watching the outrageous conduct of other  
13 people.

14 And so when you go back to your jury room and  
15 you're kicking around what is the correct and true  
16 verdict in this case, it may not feel good to say that  
17 we don't know all the answers, and that we have a  
18 legitimate concern that when that DNA is ultimately  
19 tested someday and it's consistent with Bryan Rivers,  
20 that we will not have done our job well by convicting  
21 the wrong man.

22 THE COURT: Can I have you move it just  
23 a little bit more, Mr. Pennington?

24 MR. PENNINGTON: I'm sorry?

25 THE COURT: Little bit more.

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1 MR. PENNINGTON: Should it go back over here,  
2 perhaps?

3 THE COURT: Just move it closer to my bailiff.  
4 Thank you.

5 Ladies and gentlemen, do y'all need a short  
6 break?

7 THE FOREPERSON: I think we're fine.

8 JURY CHARGE

9 THE COURT: Ladies and gentlemen, I remind you  
10 that during this trial you and I have had certain duties  
11 to perform. As the trial judge, it has been my  
12 responsibility to preside over the trial of this case,  
13 and I have the duty to rule on the admissibility of the  
14 evidence that has been offered during this trial. You  
15 are to consider only the evidence before you. If there  
16 was any testimony ordered stricken from the record, you  
17 must disregard that testimony. You are to consider only  
18 the testimony that has been presented to you from the  
19 witness stand, the exhibits that have been made part of  
20 the record in this case, as well as the stipulations of  
21 counsel.

22 I have the additional duty to charge you the  
23 law applicable to this case. Ladies and gentlemen, I  
24 typically do not send a copy of these charges back to  
25 you, so it is vitally important that you pay close

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1 attention.

2 As the presiding judge, I am the sole judge of  
3 the law in this case. It is your duty to accept and  
4 apply the law exactly as I state it to you now. If you  
5 have any idea as to what the law is or what the law  
6 ought to be and it does not agree with what I'm about to  
7 tell you, you must abandon your own idea, because you  
8 are sworn to accept the law and apply the law exactly as  
9 I state it to you.

10 In every case tried in this court before a  
11 jury, the jury becomes the sole and exclusive judges of  
12 the facts. A trial judge may not make any comment  
13 regarding the facts in this case. Do not think by  
14 anything that I have said or done throughout the  
15 progress of this case or during my charge on the law  
16 that I have any opinion about the facts in this case.  
17 The law does not allow me to have an opinion about the  
18 facts in this case. This is a matter solely for you to  
19 determine. As jurors, it becomes your duty to determine  
20 the effect, value, and weight, and the truth of the  
21 evidence that has been presented.

22 The Indictments in this case charge the  
23 Defendant with murder, attempted armed robbery,  
24 possession of a handgun with obliterated serial number,  
25 and possession of a firearm during the commission of a

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1 violent crime. I remind you the fact that the Defendant  
2 was arrested, charged, and indicted in this case is not  
3 evidence in this case and cannot be considered by you as  
4 evidence of guilt, nor does it create any presumption or  
5 inference of guilt. The Indictment is simply the formal  
6 document that contains the charge made against the  
7 Defendant. It is the formal document by which this case  
8 was brought into court.

9 Just as the Indictments in this case are not  
10 evidence, any terminologies or labels that have been  
11 used to refer to the individuals involved in this case  
12 cannot be considered as evidence. For example, the word  
13 "defendant" is merely a formal label. It may not be  
14 consider by you as evidence in this case.

15 The Indictments in this case allege four  
16 different offenses against the Defendant. The charges  
17 are Indictment 2012-GS-10-6361, murder; Indictment  
18 2012-GS-10-6362, attempted armed robbery;  
19 2012-GS-10-6363, possession of a handgun with an  
20 obliterated serial number; and Indictment  
21 2012-GS-10-6364, possession of a firearm during the  
22 commission of a crime. There is no significance in the  
23 order that I referenced the above Indictments. It's  
24 simply, something must go on the paper first. Each  
25 Indictment charges a separate and distinctive charge.

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1 You must decide each Indictment separately on the  
2 evidence and the law applicable to it, uninfluenced by  
3 your decisions as to the other Indictments. The  
4 Defendant may be convicted or acquitted on any or all of  
5 the offenses charged.

6 Mr. Foreperson, you will be asked to write a  
7 separate verdict for each offense.

8 The Defense -- the Defendant has pled not  
9 guilty to each Indictment. A person charged with  
10 committing a criminal offense in South Carolina is never  
11 required to prove himself innocent. I charge you it is  
12 an important rule of law that the Defendant in a  
13 criminal trial, no matter what the seriousness of the  
14 charge may be, will always be presumed to be innocent of  
15 the crime for which the Indictment was issued, unless  
16 guilt has been proven by evidence satisfying you of that  
17 guilt beyond a reasonable doubt. This presumption of  
18 innocence does not end when you begin your  
19 deliberations, but it accompanies the Defendant  
20 throughout the trial until you reach a verdict based  
21 upon the evidence. The presumption of innocence is not  
22 mere legal theory. It is not a legal phrase -- it is  
23 not just a legal phrase. It is a substantial right to  
24 which every defendant is entitled, unless you, the jury,  
25 are satisfied from the evidence of the Defendant's guilt

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1 beyond a reasonable doubt.

2           The State has the burden of proving the  
3 Defendant guilty beyond a reasonable doubt. Some of you  
4 may have served as jurors before in civil cases, where  
5 you were told that it is only necessary to prove that a  
6 fact is more likely true than not true, such as by a  
7 greater weight or preponderance of the evidence. In  
8 criminal cases, the State's proof must be more palatable  
9 than that. It must be beyond a reasonable doubt. Proof  
10 beyond a reasonable doubt is proof that leaves you  
11 firmly convinced of the Defendant's guilt. There are  
12 very few things in this world that we do know with  
13 absolute certainty. And in criminal cases, the law does  
14 not require proof that overcomes every possible doubt.  
15 If, based upon your consideration of the evidence, you  
16 are firmly convinced that the Defendant is guilty of the  
17 crimes charged, you must find the Defendant guilty. On  
18 the other hand, if you think there is a real possibility  
19 that the Defendant is not guilty, you must give the  
20 Defendant the benefit of the doubt and find him not  
21 guilty.

22           There are two types of evidence that are  
23 generally presented throughout a trial: Direct evidence  
24 and circumstantial evidence. Direct evidence is --  
25 excuse me -- crimes may be proven by circumstantial

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1 evidence. The law makes no distinction between the  
2 weight or values to be given either direct or  
3 circumstantial evidence. Direct evidence directly  
4 proves the existence of the fact and does not require a  
5 deduction. Circumstantial evidence is proof of a chain  
6 of facts and circumstances indicating the existence of  
7 fact. To the extent the State relies on circumstantial  
8 evidence, all of the circumstances must be consistent  
9 with each other, and when taken together, point  
10 conclusively to the guilt of the accused beyond a  
11 reasonable doubt. If these circumstances merely portray  
12 the Defendant's behavior as suspicious, the proof has  
13 failed.

14           The State has the burden of proving the  
15 Defendant guilty beyond a reasonable doubt.  
16 This burden rests with the State regardless of whether  
17 the State relies on direct evidence, circumstantial  
18 evidence, or some combination of the two. Necessarily,  
19 you must determine the credibility of the witnesses who  
20 have testified in this case. Credibility simply means  
21 believability. It becomes your duty as jurors to  
22 analyze the evidence and determine which evidence  
23 convinces you of its truth.

24           In determining the believability of the  
25 witnesses who have testified in this case, you may

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1 believe one witness over several witnesses or several  
2 witnesses over one witness. You may believe part of the  
3 testimony of a witness and reject the remaining part of  
4 the testimony of that same witness. You may believe the  
5 testimony of a witness in its entirety or reject the  
6 testimony of a witness in its entirety. You may  
7 consider whether the witness has exhibited to you any  
8 interest, bias, prejudice, or other motive in this case.  
9 You may also consider the appearance and manner of the  
10 witness while on the witness stand.

11 A person who has a past criminal record is  
12 competent to testify during the trial. A past record  
13 does not affect the ability of that witness to testify.  
14 The past record may be considered by you, if at all, in  
15 determining the witness' believability. Remember, you  
16 are the sole judges of the facts in this case and of the  
17 believability of any and all of the witnesses.

18 The rules of evidence ordinarily do not permit  
19 witnesses to testify to opinions or to conclusions. An  
20 exception to this rule exists for witnesses we call  
21 expert witnesses. A witness who by education and  
22 experience has become expert in some art, science,  
23 profession, or calling may state an opinion as to  
24 relevant and material matter in which the witness claims  
25 to be an expert and may also state the reasons for that

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

14 I instruct and emphasize the fact that the  
15 Defendant did not testify is not a factor to be  
16 considered by you in any way in your deliberations and  
17 in your consideration on the question of the guilt of  
18 the Defendant. It must not be considered by you in any  
19 manner whatsoever. A Defendant has the constitutional  
20 right to remain silent, and the assertion of this right  
21 must not be considered by you in your deliberations. I  
22 repeat, under your oath, you are to draw no conclusion  
23 whatsoever with the fact that the Defendant in this case  
24 did not testify. The fact that this Defendant did not  
25 testify cannot and should not be discussed in the jury

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1 room.

2 Mr. Foreperson, that is one of your  
3 responsibilities as the -- presiding over the jury.

4 The Defendant is not required to prove his  
5 innocence. The burden of proof remains on the State to  
6 prove guilt beyond a reasonable doubt.

7 A statement alleged to have been made by the  
8 Defendant has been admitted into evidence. While I have  
9 determined that the statement is admissible, I instruct  
10 you that you make the ultimate decision of whether or  
11 not the Defendant made this statement. If the Defendant  
12 did make the statement, you must determine whether the  
13 statement was made by the Defendant voluntarily and of  
14 his own free will. This means the statement was not  
15 caused by the pressure, force, fear, threats, coercion,  
16 or intimidation for a hope of promise of leniency or a  
17 reward of any kind. In determining whether the  
18 statement was voluntary, you should consider the  
19 characteristics of the Defendant and the details of the  
20 questioning. Some of the factors that you must consider  
21 are the age of the Defendant, the Defendant's education  
22 or lack of education, the Defendant's mental ability or  
23 capacity, the Defendant's IQ, the Defendant's background  
24 and environment, the place and length of detention, the  
25 nature of the questioning, and the advice or lack

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1   thereof to the Defendant of his constitutional rights,  
2   including, but not limited to, the right to remain  
3   silent; that any statement could have -- could be used  
4   against him in a court of law; the right to have a  
5   lawyer present, but if he could not afford a lawyer, a  
6   lawyer would be appointed to represent him without any  
7   cost; and that he could stop making his statement at any  
8   time. You must carefully consider all of the  
9   surrounding circumstances before you give any weight to  
10  an alleged statement.

11           The State has the burden of proving beyond a  
12  reasonable doubt that the alleged statement was  
13  voluntary. If you determine it was, you may give the  
14  statement any further consideration that you deem  
15  proper. You must decide what weight, if any, should be  
16  given to the alleged statement. If you determine the  
17  alleged statement was not the free and voluntary  
18  statement of the Defendant, you should not consider the  
19  statement at all.

20           You have heard evidence that the Defendant  
21  committed bad a act other -- other than the one for  
22  which the Defendant is now on trial. You must not  
23  consider this testimony as proof of the Defendant's  
24  guilt of the charge we are trying today.

25           An issue in this case is the identification of

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1 the Defendant as the person who committed or  
2 participated in the crimes charged. The State has the  
3 burden of proving identity beyond a reasonable doubt.  
4 You must be satisfied beyond a reasonable doubt of the  
5 accuracy of the identification of the Defendant before  
6 you may convict the Defendant. Identification testimony  
7 is an expression of belief or impression by a witness.  
8 You must determine the accuracy of the identification of  
9 the Defendant.

10           You must consider the believability of the  
11 identification witness in the same way as any other  
12 witness, considering whether the witness is truthful and  
13 whether the witness has the capacity and the opportunity  
14 to make a reliable observation on the matter other than  
15 the witness's testimony. You may consider whether the  
16 witness has an adequate opportunity to observe the  
17 person at the time of the offense. This will be  
18 affected by things like how long or short a time is  
19 available, how far or close the witness was, the  
20 lighting conditions, and whether the witness had the  
21 chance to see or know the person in the past.

22           You must also be satisfied that the  
23 identification made by the witness was the product of  
24 the witness's own recollection. You may take into  
25 account both the strength of the identification and the

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1 circumstances under which the identification was made.  
2 You may consider the length of time that lapsed between  
3 the occurrence of the crime and the next opportunity the  
4 witness had to see the Defendant as a factor bearing on  
5 the reliability of the identification. You may also  
6 take into account any indications in which the witness  
7 failed to make an identification of the Defendant or  
8 make an identification that was inconsistent with his  
9 identification at trial.

10           Once again, I instruct you, the burden of proof  
11 on the State extends to every element of the crime  
12 charged, and this includes burden of proving beyond a  
13 reasonable doubt the identity of the Defendant as the  
14 person who committed or participated in the crime. If,  
15 after examining the testimony, you have reasonable doubt  
16 as to the accuracy of the identification, you must find  
17 the Defendant not guilty.

18           Mere presence at the scene is not sufficient to  
19 prove someone guilty. A defendant's presence where a  
20 crime is being committed or mere association with the  
21 person who commits a crime does not make a defendant an  
22 accomplice or an aider and abettor of the person  
23 committing a crime.

24           The burden is on the State to prove every  
25 element of the crime charged. If you find, after

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1 reviewing all of the evidence, that the State has proved  
2 that the Defendant was only present at the scene of the  
3 crime and that they have not proved beyond a reasonable  
4 doubt any other participation in the crime, then you  
5 must find the Defendant not guilty. The law is, the  
6 proof at the scene of the crime is not sufficient to  
7 find someone guilty.

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

25           Prior knowledge that a crime is going to be

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1 committed without more is not sufficient to make a  
2 person guilty of a crime. Mere knowledge that another  
3 person is going to commit a crime, even if the Defendant  
4 is present when the crime is committed, is not  
5 sufficient to convict the Defendant as a principal.  
6 Guilt is a principal, if shown by actual or constructive  
7 presence at the scene, as a result of a prior  
8 arrangement. Therefore, a finding of a prior arranged  
9 plan or scheme is necessary for the finding of guilt as  
10 a principal. The State must prove beyond a reasonable  
11 doubt by competent evidence the theory of the hand of  
12 one is the hand of all.

13           A principal in a crime is the one who either  
14 actually commits the crime or who is present, aiding,  
15 abetting, or assisting in committing a crime. When a  
16 person does an act in the presence of and with the  
17 assistance of another, the act is done by both. Where  
18 two or more acting with a common plan or intent are  
19 present at the commission of a crime, it does not matter  
20 who actually commits the crime. All are guilty. The  
21 hand of one is the hand of all. Present at the  
22 commission of a crime means to be sufficiently near to  
23 aid and abet and assist in the commission of a crime.  
24 However, mere presence at the scene of the crime is not  
25 sufficient to convict one as a principal on the theory

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1 of aiding and abetting.

2 Intent is also a necessary element where there  
3 must have been some common design or intent to commit  
4 the crime, and the crime must have been committed  
5 pursuant thereto with the person aiding and abetting by  
6 some overt act. Intent may be shown by acts of conduct  
7 of the Defendant and other circumstances from which he  
8 may naturally and reasonably infer intent. The State  
9 must prove these elements beyond a reasonable doubt.

10 In order to establish criminal liability,  
11 criminal intent is required. For example, the mental  
12 state required to be proven by the State for a  
13 particular crime might be purpose, intent, knowledge,  
14 recklessness, or criminal negligence. Criminal intent  
15 must be proven by the State beyond a reasonable doubt.  
16 Criminal intent is always a matter that must be  
17 determined by the jury from the circumstances shown to  
18 have existed surrounding the situation. There is no way  
19 to prove intent to a mathematical certainty. Because  
20 there is no way to tell with exact certainty what the  
21 person had in mind, the law says that criminal intent  
22 may be inferred from the circumstances shown to have  
23 existed. This is how you make a determination of  
24 whether or not the element required and the intent was  
25 present. It is not necessary to establish intent by

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1 direct and positive evidence. But intent may be  
2 established by inference in the same way as any other  
3 fact by taking into consideration the acts of the  
4 parties and all the facts and circumstances of the case.

5 Criminal intent is a mental state, a conscious  
6 wrongdoing. It is up to you to determine what the  
7 Defendant intended to do based upon the circumstances  
8 shown to have existed. Criminal intent can arise from  
9 actions or a failure to act. It may arise from  
10 negligence, recklessness, or an indifference to duty or  
11 to consequences that is considered by the law to be the  
12 equivalent of criminal intent.

13 Insanity caused by the use of drugs or alcohol  
14 may be a defense if the insanity is permanent and  
15 destroys the Defendant's ability to know right from  
16 wrong. However, when voluntary intoxication has not  
17 produced permanent insanity, it is not a defense to a  
18 crime. A person who voluntarily becomes intoxicated is  
19 just as responsible for the facts committed while  
20 intoxicated as when the person is not intoxicated.

21 The Defendant is charged with murder. The  
22 State must prove beyond a reasonable doubt that the  
23 Defendant killed another person with malice  
24 aforethought. Malice is hatred, ill-will, or hostility  
25 towards another person. It is the intentional doing of

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1 a wrongful act without just cause or excuse and with an  
2 intent to inflict injury or under circumstances that the  
3 law will incur an evil intent.

4 Malice aforethought does require that malice  
5 exists for any particular time before the act is  
6 committed, but malice must exist in the mind of the  
7 Defendant just before and at the time the act is  
8 committed; therefore, there must be a combination of the  
9 previous evil intent and the act. Malice aforethought  
10 may be expressed or inferred. These terms, "expressed"  
11 and "inferred," do not mean different types of malice,  
12 but merely the manner in which malice may be shown; that  
13 is, either by direct evidence or by inference from the  
14 facts which are proved. Expressed malice is shown when  
15 a person speaks words or which -- words which express  
16 hatred or ill-will of another person or when the person  
17 prepared beforehand to do the act which was later  
18 accomplished. For example, lying in wait for a person  
19 or any other acts of preparation going to show that the  
20 deed was within the Defendant's mind would be expressed  
21 malice.

22 Malice may be inferred from conduct showing a  
23 total disregard for human life. Inferred malice may  
24 also arrive when the deed -- may arise when the deed is  
25 done with a deadly weapon. A deadly weapon is any

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1 article, instrument, or substance which is likely to  
2 cause death or great bodily harm. Whether an instrument  
3 has been used as a deadly weapon depends upon the facts  
4 and circumstances of each case. The following are  
5 examples of instruments which may be deadly weapons: A  
6 pistol, a shotgun, a rifle, metal knuckles, razor,  
7 lighter fluid. A gun may be a deadly weapon even if it  
8 is not operated. If one intentionally kills another  
9 during the commission of a felony, the inference of  
10 malice may arise. A felony is a serious crime usually  
11 punishable by imprisonment for more than one year. If  
12 facts are proved beyond a reasonable doubt sufficient to  
13 raise an inference of malice to your satisfaction, this  
14 inference simply would be an evidentiary fact to be  
15 taken into consideration by you, along with all other  
16 evidence in this case, and you may give it the weight  
17 that you think that it should receive.

18 I charge you that attempted armed robbery is a  
19 felony under South Carolina law. The Defendant is  
20 charged with attempted armed robbery. An attempt is an  
21 effort to accomplish a crime which does not succeed.  
22 Attempt includes a specific intent to do a particular  
23 criminal act along with an act falling short of the act  
24 intended. The State must show more than mere  
25 preparation and intent. There must be some overt act

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1 committed in the effort to commit the crime.

2 Intent means intending the result which  
3 actually occurs. Again, that's accidentally or  
4 involuntarily. Intent may be shown by act and conduct  
5 of the Defendant and other circumstances from which you  
6 may naturally and reasonably infer intent. A person is  
7 guilty of attempted armed robbery if the person has a  
8 specific intent to commit armed robbery.

9 For the offense of armed robbery, the State  
10 must prove that the Defendant took personal property  
11 from the person or presence of another person. Property  
12 is in the presence of another if it is within the  
13 person's reach, inspection, observation, or control so  
14 that person could, if not overcome with violence or  
15 prevented by fear, keep possession of the property.

16 For the offense of armed robbery, the State  
17 must also prove that the Defendant carried the property  
18 away intending to permanently deprive the owner of the  
19 property and to keep the property for the Defendant's  
20 own use. The slightest removal of the property or the  
21 complete possession of the property even for an instant  
22 by the Defendant is sufficient to show the taking and  
23 carrying away of the property. The taking and carrying  
24 away of the property must have been done with violence  
25 or by putting the owner of the property in fear of

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1 violence.

2 Finally, for the offense of armed robbery, the  
3 State must prove that the Defendant was armed with a  
4 deadly weapon during the robbery. A deadly weapon is  
5 any article, instruments, or substance which is likely  
6 to cause death or great bodily harm. Again, as I  
7 instructed you previously, whether an instrument has  
8 been used as a deadly weapon depends upon the facts and  
9 circumstances of each case.

10 The Defendant is charged with possession of a  
11 handgun with an obliterated serial number. The State  
12 must prove beyond a reasonable doubt that the Defendant  
13 knowingly bought, sold, transported, pawned, received,  
14 or possessed a stolen handgun or one from which the  
15 original serial number was removed or obliterated.  
16 Obliterated means to wipe out, rub off, or erase, or to  
17 remove from existence, or to destroy all traces of.

18 The Defendant is charged with possession of a  
19 firearm during the commission of a violent crime. The  
20 State must prove beyond a reasonable doubt that the  
21 Defendant was in possession of a firearm or visibly  
22 displayed what appeared to be a firearm during the  
23 commission of a violent crime. A firearm means a  
24 machine gun, automatic rifle, revolver, pistol, or any  
25 weapon which will or is designed to or may be readily

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1 converted to expel a projectile. In order to find the  
2 Defendant guilty of possession of the weapon during the  
3 commission of a violent crime, you must first find the  
4 Defendant guilty of either committing a violent crime or  
5 attempting to commit a violent crime. Murder and  
6 attempted armed robbery are considered violent crimes  
7 under laws of South Carolina.

8           You have heard testimony considering and  
9 concerning the penalty a person can serve for the crimes  
10 alleged in the Indictment. In determining the guilt or  
11 innocence of the Defendant, you cannot consider any  
12 possible punishment for any particular crime. The  
13 punishment for the crimes is a matter for me to  
14 determine and should never be considered by you in any  
15 way whatsoever in arriving at a fair and impartial  
16 verdict as to the guilt or the innocence of the  
17 Defendant.

18           Ladies and gentlemen, I'm now going to go over  
19 the verdict forms with you. As I indicated to you,  
20 there's absolutely no significance in the way that I'm  
21 going to read the charges or what's contained on the  
22 verdict form. It's simply, something has to go on the  
23 paper first.

24           There -- Mr. Foreperson, you have a separate  
25 verdict form for each offense, and you must consider

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1 each one, as I indicated to you, separate and distinct  
2 from the others. Mr. Foreperson, the verdict -- verdict  
3 must be unanimous, meaning all 12 of you must agree.

4 In the Court of General Sessions for the 9th  
5 Judicial Circuit, 2012-GS-10-6361, as to the Indictment  
6 for murder, we, the jury, find the Defendant not guilty;  
7 or we, the jury, find the Defendant guilty. After you  
8 have reached a unanimous decision on that verdict, you  
9 will sign the verdict form, Mr. Foreperson, and date the  
10 verdict form.

11 Indictment 2012-GS-10-6362, on the Indictment  
12 for attempted armed robbery, we, the jury, find the  
13 Defendant not guilty; or we, the jury, find the  
14 Defendant guilty. Again, that must be a unanimous  
15 decision of the jury. You will sign that verdict form,  
16 date it.

17 On the Indictment for possession of a handgun  
18 with an obliterated serial number, we, the jury, find  
19 the Defendant not guilty; or we, the jury, find the  
20 Defendant guilty. Again, unanimous decision as to that  
21 Indictment. On that verdict form was -- you will sign  
22 that, once you have reached a unanimous decision, and  
23 date the verdict form.

24 Indictment 2012-GS-10-6364, on the Indictment  
25 for possession of a firearm during the commission of a

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1 violent crime, we, the jury, find the Defendant not  
2 guilty; or we, the jury, find the Defendant guilty.  
3 Again, you will sign on the verdict form indicating that  
4 you have reached a unanimous decision as to that  
5 Indictment and date the Indictments.

6           Once you have completed all four verdict forms,  
7 you will knock on the jury room door and indicate to the  
8 bailiff that you have reached a verdict.

9           Mr. Foreperson, several forepersons prior to  
10 you have asked. You will not be reading the verdict  
11 form. I go over the verdict form, and then the clerk  
12 reads them out. So that does not need to be a  
13 consideration as you are preparing to come back into the  
14 room.

15           Ladies and gentlemen, is there any member of  
16 the first 12 that, for whatever reason, you feel that  
17 you cannot continue with your deliberations at this  
18 time? If you feel that you cannot continue with your  
19 deliberations -- I'm going to now send you to the jury  
20 room -- please let me know at this time. Is there any  
21 of my first 12 that cannot continue with your -- or  
22 begin your deliberations at this time? If so, please  
23 signify by raising your hand.

24           All 12 jurors have indicated that they are  
25 ready to begin deliberations.

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1 Ladies and gentlemen, this is the last time  
2 that I'm going to say this to you. Do not begin your  
3 deliberations at this time. Do not begin deciding any  
4 issue in this case. Do not discuss this case amongst  
5 yourselves. We are gathering the verdict forms and all  
6 of the evidence to go back to you, and as you know, it's  
7 quite a bit. It's going to take us just a few moments  
8 to accomplish all of that. So until you are told to  
9 begin your deliberations, once the bailiffs -- the  
10 bailiffs will bring you the exhibits and the verdict  
11 forms, and then they'll indicate to you when you may  
12 begin your deliberations. So until you are told to do  
13 so, do not begin your deliberations.

14 To my alternates, you are going to stay with us  
15 for just a few moments. The same admonition to you.  
16 I'm going to keep you separate from the first 12, but  
17 the three of you will remain together. So, please,  
18 again, same admonitions to you. Do not begin discussing  
19 this case or deliberating in any way.

20 Ladies and gentlemen, you are excused. We'll  
21 be bringing the evidence back to you.

22 Please rise for the jury.

23 (The jury is escorted from the courtroom at  
24 4:26 p.m.)

25 THE COURT: Thank you. Be seated.

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1 Any objections, corrections, addition to the  
2 charge as read?

3 MS. WILSON: No, ma'am, not from the State.

4 MR. PENNINGTON: Your Honor, from the Defense,  
5 we would renew our request for the jury charge 9 on the  
6 credibility of those who have entered into agreements or  
7 been made promises. And with regard to 7, my request,  
8 which was -- is that there will be no proof of  
9 relationship between witness and confidence and accuracy  
10 of the I.D.

11 THE COURT: You requests are again noted, and  
12 yours are Court's Number 7.

13 Anything I need -- Counsel, just come and  
14 review the verdict forms before they go back. And as to  
15 whether or not the Indictments go back, your preference,  
16 Ms. Wilson --

17 MS. WILSON: Yes, ma'am.

18 THE COURT: Thank you.

19 MR. PENNINGTON: I have no objection.

20 (Ms. Wilson and Mr. Pennington are at the bench  
21 with the Judge going over the verdict forms.)

22 (The attorneys reviewed all of the exhibits.)

23 THE COURT: All right. Ms. Wilson, you were in  
24 agreement with the verdict forms, the Indictments going  
25 back, and all the evidence; is that correct?

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1 MS. WILSON: Yes, ma'am.  
2 THE COURT: Mr. Pennington?  
3 MR. PENNINGTON: Yes, ma'am.  
4 THE COURT: Anything before we await the  
5 verdict?  
6 MR. DURANT: Nothing from the State, your  
7 Honor.  
8 MS. WILSON: Do you have our numbers?  
9 (Admitted exhibits, verdicts forms, and  
10 Indictments go back to the jury at 4:35 p.m.)  
11 (Notified of jury verdict at 6:37 p.m.)  
12 (The Judge resumes the bench at 6:46 p.m.)  
13 THE COURT: We have a verdict. Anything before  
14 we bring in the jury, from the State?  
15 MS. WILSON: No, ma'am.  
16 MR. PENNINGTON: No, ma'am.  
17 THE COURT: Just so you know, the three  
18 alternates decided to stay. They have been kept in a  
19 separate room and -- but they wish to see the verdict.  
20 So I'm going to bring them in. I just didn't want  
21 anybody to be concerned that they had been part of the  
22 deliberation.  
23 We received two notes from the jury. I have  
24 E-mailed both of you to indicate what they were.  
25 Neither one of you had any problems with the Court's

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1 response. Those will be Court's 9 and 10.

2 (Court's Exhibit Nos. 9 and 10 are marked for  
3 identification.)

4 THE COURT: Let's bring in the jury. Go ahead  
5 and bring in the alternates first.

6 All right, ladies and gentlemen, those are the  
7 alternates. You may be seated. The jury is in the  
8 elevator. So it will be just a few moments.

9 (The jury is escorted into the courtroom at  
10 6:49 p.m.)

11 THE BAILIFF: Jurors present, your Honor.

12 THE COURT: Thank you. Please be seated.

13 Mr. Foreperson, I understand that you have  
14 reached a verdict. If you will hand the verdict forms  
15 to the bailiff.

16 (Document is handed to the bailiff and then to  
17 the Judge.)

18 (Respite.)

19 THE COURT: I put them in numerical order for  
20 you.

21 THE DEPUTY CLERK OF COURT: Thank you.

22 (Defendant rises.)

23 **VERDICT**

24 THE DEPUTY CLERK OF COURT: As to Indictment  
25 Number 2012-GS-10-6361, State of South Carolina versus

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1 Ryan Deleston, on the Indictment for murder. We, the  
2 jury, find the Defendant guilty. Signed, Gregory Hibbs,  
3 October 11th, 2013.

4 Case number 2012-GS-10-6362, State of South  
5 Carolina versus Ryan V. Deleston. We, the jury, find  
6 the Defendant guilty on the Indictment for armed  
7 robbery. Signed, Foreperson, October 11th, 2013.

8 As to Case Number 2012-GS-10-6363, State of  
9 South Carolina versus Ryan Deleston, on the Indictment  
10 for possession of a handgun with an obliterated serial  
11 number. We, the jury, find the Defendant guilty.  
12 Signed, Gregory Hibbs, October 11, 2013.

13 Indictment Number 2012-GS-10-6264, The State of  
14 South Carolina versus Ryan Deleston, on the Indictment  
15 for possession of a firearm during the commission of a  
16 violent crime. We, the jury, find the Defendant guilty.  
17 Signed, Gregory Hibbs, Foreperson, October 11th 2013.

18 Mr. Foreperson, ladies and gentlemen of the  
19 jury, if this is your verdict, please indicate by  
20 raising your right hand.

21 Thank you, your Honor.

22 THE COURT: Anything further required of the  
23 jury, from the State?

24 MS. WILSON: No, ma'am.

25 THE COURT: From the Defendant?

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1 MR. PENNINGTON: We request they be polled,  
2 your Honor.

3 THE DEPUTY CLERK OF COURT: Ladies and  
4 gentlemen of the jury, whenever I call your juror  
5 number, you're going to be asked two questions. Please  
6 respond to each question appropriately.

7 Juror 122, is this your verdict?

8 THE JUROR: Yes.

9 THE DEPUTY CLERK OF COURT: Is this still your  
10 verdict?

11 THE JUROR: Yes.

12 THE DEPUTY CLERK OF COURT: Thank you, sir.

13 Juror Number 65, is this your verdict?

14 THE JUROR: Yes.

15 THE DEPUTY CLERK OF COURT: Is this still your  
16 verdict?

17 THE JUROR: Yes.

18 THE DEPUTY CLERK OF COURT: Thank you, sir.

19 Juror Number 299, is this your verdict?

20 THE JUROR: Yes.

21 THE DEPUTY CLERK OF COURT: Is this still your  
22 verdict?

23 THE JUROR: Yes.

24 THE DEPUTY CLERK OF COURT: Thank you, ma'am.

25 Juror Number 204, is this your verdict?

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1 THE JUROR: Yes.

2 THE DEPUTY CLERK OF COURT: Is this still your  
3 verdict?

4 THE JUROR: Yes.

5 THE DEPUTY CLERK OF COURT: Thank you.  
6 Juror Number 249, is this your verdict?

7 THE JUROR: Yes.

8 THE DEPUTY CLERK OF COURT: Is this still your  
9 verdict?

10 THE JUROR: Yes.

11 THE DEPUTY CLERK OF COURT: Thank you, sir.  
12 Juror 121, is this your verdict?

13 THE JUROR: Yes.

14 THE DEPUTY CLERK OF COURT: Is this still your  
15 verdict?

16 THE JUROR: Yes.

17 THE DEPUTY CLERK OF COURT: Thank you, sir.  
18 Juror Number 188, is this your verdict?

19 THE JUROR: Yes.

20 THE DEPUTY CLERK OF COURT: Is it still your  
21 verdict?

22 THE JUROR: Yes.

23 THE DEPUTY CLERK OF COURT: Thank you, ma'am.  
24 Juror Number 61, is this your verdict?

25 THE JUROR: Yes.

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1 THE DEPUTY CLERK OF COURT: Is this still your  
2 verdict?  
3 THE JUROR: Yes.  
4 THE DEPUTY CLERK OF COURT: Thank you, ma'am.  
5 Juror Number 288, is this your verdict?  
6 THE JUROR: Yes.  
7 THE DEPUTY CLERK OF COURT: Is this still your  
8 verdict?  
9 THE JUROR: Yes.  
10 THE DEPUTY CLERK OF COURT: Thank you, ma'am.  
11 Juror Number 98, is this your verdict?  
12 THE JUROR: Yes.  
13 THE DEPUTY CLERK OF COURT: Is this still your  
14 verdict?  
15 THE JUROR: Yes.  
16 THE DEPUTY CLERK OF COURT: Thank you very  
17 much, sir.  
18 Juror Number 35, is this your verdict?  
19 THE JUROR: Yes.  
20 THE DEPUTY CLERK OF COURT: Is this still your  
21 verdict?  
22 THE JUROR: Yes.  
23 THE DEPUTY CLERK OF COURT: Thank you.  
24 Juror Number 223, is this your verdict?  
25 THE JUROR: Yes.

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1 THE DEPUTY CLERK OF COURT: Is this still your  
2 verdict?  
3 THE JUROR: Yes.  
4 THE DEPUTY CLERK OF COURT: Your Honor, the  
5 jury has been polled, and the verdict stands.  
6 THE COURT: Anything further required of the  
7 jury, from the Defendant?  
8 MR. PENNINGTON: No, your Honor.  
9 THE COURT: Thank you. You may be seated.  
10 Ladies and gentlemen, this completes your  
11 service to this case. If you would please return to the  
12 closest deliberation room. I know that you were  
13 deliberating downstairs. I will be in in just a moment  
14 to thank you for your service to Charleston County.  
15 Please rise for the jurors.  
16 (The jury is escorted from the courtroom at  
17 6:54 p.m.)  
18 THE COURT: Thank you. Be seated.  
19 Outside the presence of the jury, anything  
20 further required of the jury?  
21 MR. PENNINGTON: Of the jury, no, your Honor.  
22 THE COURT: All right. Is the State prepared  
23 for sentencing?  
24 MS. WILSON: Yes, ma'am.  
25 THE COURT: And you have the appropriate

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1 sentencing sheets at this time?

2 MS. WILSON: I do.

3 THE COURT: You do?

4 MR. PENNINGTON: Your Honor, I think it would  
5 be appropriate for me to renew my --

6 THE COURT: Hold on one second. If she has the  
7 sentencing sheets, in order to continue, it takes us a  
8 while to check them. So. . .

9 MR. PENNINGTON: I'm sorry.

10 (Document is handed to the Deputy Clerk of  
11 Court.)

12 THE COURT: Now, Mr. Pennington, you may  
13 proceed.

14 MR. PENNINGTON: Thank you, your Honor. We  
15 would renew our motions that we -- we would renew  
16 our motions at the -- the conclusion of the State's  
17 case, a motion for a directed verdict or a verdict  
18 notwithstanding the verdict that we hear of the jury,  
19 based on the insufficiency of the evidence, as a matter  
20 of law, and based upon the objections that I've rendered  
21 earlier for the Court.

22 THE COURT: Anything further, Mr. Pennington?

23 MR. PENNINGTON: No, your Honor.

24 THE COURT: Any response, Ms. Wilson?

25 MS. WILSON: No, ma'am.

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1 THE COURT: I deny -- I stand by the Court's  
2 rulings as throughout the trial and deny any motion.  
3 Stand by the Court's original ruling. Note your  
4 exception to my ruling.

5 Anything further, Mr. Pennington?

6 MR. PENNINGTON: No, your Honor.

7 THE COURT: Do you need a moment to speak with  
8 your client for sentencing?

9 MR. PENNINGTON: I believe we're prepared to  
10 move forward.

11 THE COURT: State's ready, Ms. Wilson?

12 MS. WILSON: Yes, ma'am. Has the jury been  
13 asked if they wanted to --

14 THE COURT: I haven't -- I usually  
15 give -- that's when I -- I go back when you're getting  
16 the sentencing sheets. So you have disrupted my normal  
17 flow by being so efficient. So thank you. I'm going to  
18 take just a few moments. What does the State have to  
19 present?

20 MS. WILSON: Your Honor, I believe there will  
21 be a few members of the victim's family that would like  
22 to address you. I've also handed up some DVDs and  
23 testimony -- DVDs and some testimony. There are two  
24 statements and some photographs as well.

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

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1 just a few moments.

2 (A break is taken from 6:56 p.m. to 7:01 p.m.,  
3 and the proceedings continue as follows:)

4 THE COURT: The jury is coming in, so please --  
5 all members of the jury wish to remain. So please bring  
6 in the jury.

7 (Jury is escorted back into the courtroom at  
8 7:01 p.m.)

9 THE COURT: Thank you. Be seated.

10 SENTENCING

11 THE COURT: I have the sentencing sheets. I'll  
12 be happy to hear from the State.

13 MS. WILSON: Thank you, your Honor. Your  
14 Honor, Marley's mother and grandmother wish to address  
15 the Court.

16 THE COURT: Okay. Thank you.

17 MS. WILSON: We'll start with -- Marley's  
18 grandmother would like to address you first.

19 THE COURT: Ma'am, I need you to state your  
20 full name for the record, and please spell your last  
21 name.

22 MS. MIZELL: Patricia Mizell, M-i-z-e-l-l.

23 THE COURT: Thank you, Ms. Mizell.

24 MS. MIZELL: I am Elizabeth Paige's mother and  
25 Marley's grandmother. Marley was an unusual person. He

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1 had so many gifts. He was an athlete, charismatic, good  
2 musician, great family member, so sweet and indulgent to  
3 his little cousins and nieces, and would play those  
4 silly games, and he would play on until I said, Y'all,  
5 leave Marley alone. Let -- you know, he's a teenager.  
6 Let him do his thing now. That's enough.

7           So many impacts. It's really dreams that will  
8 never happen that come to my mind. Marley graduated  
9 from Academic Magnet High School, and he was working  
10 that summer and going to Clemson to Mandarin and  
11 international studies. So I assumed we would -- I would  
12 be saving up my money and going to China to see him in  
13 his business world. I thought, you know, I would see  
14 him cooking -- baking cookies to take to him at Clemson.  
15 I thought I would be going to his graduation. Happy,  
16 always proud of him. And the worst thing for me is, I  
17 thought I would see his beautiful babies. He was a  
18 beautiful, beautiful, sweet baby. Most of all, it's  
19 changed my daughter, and it affected her, and she was  
20 such a wonderful mother to Marley.

21           MS. PAIGE: I'm Elizabeth Paige. I'm Marley's  
22 mother. P-a-i-g-e, Paige.

23           My mom covered a lot of things that I feel and  
24 we all feel of -- I could not have enough time to tell  
25 you all the great things about my son on that. So a lot

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1 of those things are sort of obvious, of all the holidays  
2 and all that kind of stuff, because, obviously, I don't  
3 have my son here anymore. But I thought -- in the  
4 impact statement, I thought maybe I would share with you  
5 some things that people that don't necessarily think  
6 about or don't understand about the impact that it has  
7 on you besides just the obvious things. So I just wrote  
8 some things down, just some questions, just some, kind  
9 of, thoughts that came to my mind.

10           How many times a day do I pull into a parking  
11 lot? Here we go again at the scene of my son's murder  
12 every time I pull into a parking lot. Every time. How  
13 many times will I be asked, how many kids do you have?  
14 Do I give the short answer? Two. Do I give the long  
15 answer and watch their face fall as they learn of the  
16 ugly death of a beautiful young man? And this has  
17 happened to me a lot over the last year. I don't know  
18 what to say, and if I want -- started a family  
19 friendship with someone that I feel that, you know, how  
20 can I be friends with this person if they don't  
21 understand that about me? So I want to share it with  
22 them, and it's so awkward. They feel terrible. Their  
23 eyes well up with tears, and they don't know what to  
24 say. And I'm telling them, like, it's okay, and I know  
25 you feel awkward, and it's just hard.

Reported By:  
Rolayne M. Volpe, CCR, RPR  
Official Court Reporter for the State of South Carolina

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 Will I ever go to a high school reunion? I  
2 just had my high school reunion that I did not go to  
3 because I would be asked over and over and over again,  
4 how many kids do you have now? How's everything going?  
5 And I did not want to say, Oh, I'm just preparing to go  
6 to that murder trial. Can't wait. Yeah, it's  
7 just -- it just makes my day-to-day life very awkward.

8 What's wrong? That's like a totally loaded  
9 question, if I'm having a hard day and someone doesn't  
10 understand what's happened to us and they just go,  
11 What's wrong? You seem like you have a bad attitude  
12 today, or you seem upset about something. And it's  
13 like, Oh, yeah, I'm upset about a whole lot of stuff.

14 Will I keep on missing these events, or will I  
15 continue to, you know, other occasions of catching up  
16 with people, and they might not have any idea that  
17 Marley was murdered? And how many times am I going to  
18 see ambulances and police cars rushing to a scene and  
19 imagine my son trying to talk to the paramedic and then  
20 rushing to the scene?

21 How many times am I going to go to MUSC and  
22 walk in MUSC knowing this is where he died, the gurney  
23 is going in, and all these details that are going on?  
24 How many times will I hear a song and know that Marley  
25 could have written this song? How many times am I going

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Official Court Reporter for the State of South Carolina

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 to see a handsome, broad-shouldered, six-four,  
2 225-pound, young man and just -- they're wondering why  
3 am I staring. Why is this lady staring at me? And I'm  
4 just, you know, thinking of Marley and thinking back to  
5 my son, who's gone, and my grandkids that I won't be at  
6 the birth of, and who would the woman be that he would  
7 marry, and the holidays and all that. And one of the  
8 main things is the adult friendship that I was, you  
9 know, so close, so close of paying my dues and 12  
10 o'clock curfew and really trying to do the right thing  
11 and all that.

12 And I had a very gentlemanly son, who opened  
13 the door for people, who brightened up the room when he  
14 walked in, all that good stuff. I taught him the best I  
15 could. And I really did. And sometimes it was a little  
16 struggle, because he was becoming a young man, and I  
17 didn't get to get around that corner and have to -- that  
18 friendship with him where he says, you know, Mom, glad  
19 you did -- glad you gave me that tough love, Mom. Glad  
20 you did all of those things. I didn't get to that. I  
21 could see it. I just had a little taste, but -- this  
22 statement does not begin to touch what it's like, the  
23 whispers that I hear, there's the one, that's the lady,  
24 that's the one whose son was murdered. Mrs. Paige, we  
25 saw you on the news.

Reported By:  
Rolayne M. Volpe, CCR, RPR  
Official Court Reporter for the State of South Carolina



State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 But I do have 100 percent confidence that all  
2 things will be made right and that Jesus is going to  
3 wipe away the tears, and I have no doubt whatsoever in  
4 my mind about that. And in the meantime, I'm going to  
5 continue to live life, be a strong person, and live to  
6 the fullest, as my son would want us to do, and as we  
7 are all doing to honor him.

8 And while we are doing that, in the meantime, I  
9 hope that Ryan Deleston and the others will be in jail  
10 for the maximum amount of time that they can be there,  
11 and we will be living on and living life, and they can  
12 be totally figuring out where they went wrong and get  
13 straightened out.

14 That's all I have to say. Thank you very much.

15 THE COURT: Thank you, Ms. Paige and  
16 Ms. Mizell. You have my condolences and sympathies on  
17 your loss.

18 Ms. Wilson.

19 MS. WILSON: Thank you, your Honor. You know,  
20 he was a big boy, big life, and I don't mean to be flip,  
21 but he deserves a big sentence. We are here. We had a  
22 trial because we want the max. This case calls out for  
23 life. You know, one of the things that has been a  
24 struggle from the start of this case was that we knew,  
25 we knew from day one -- you heard testimony about there

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Official Court Reporter for the State of South Carolina

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 being a press conference, that it was a big deal to CPD.  
2 What I think it's important for the public to know and  
3 for y'all to know, CPD puts their heart and soul into  
4 every murder investigation. Some of them get more  
5 publicity than others, and that's a decision made by  
6 people beyond Detective Osborne or Detective Burckhardt  
7 or Detective Williams. That's the media. They put  
8 their heart and soul into it. And, yes, Marley was  
9 special. But the investigation that they did in this  
10 case, and that they do in all of these unfortunate  
11 murder cases, is really incredible.

12 This case was unusual, and one of the reasons  
13 that it got so much attention was because it was  
14 unsolved for six weeks, and it really -- there really  
15 was a search that was on, and there was a video of what  
16 happened. So the media, thank goodness, really played  
17 that up and helped us find who the killer was.

18 Another thing that -- that came out in the  
19 testimony that I think is important for the -- the  
20 broader public to know is how many criminals, common  
21 criminals, came forward to try to help these guys solve  
22 this murder because they saw how senseless, how  
23 ridiculous this was. It was not a racial thing. It  
24 wasn't a white thing or a black thing. The whole  
25 community came together to search for the person who did

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Official Court Reporter for the State of South Carolina

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 this, the people who did this.

2 And one of the hardest pills for this family to  
3 swallow, and for our team to swallow, is that we had to  
4 make a deal with those devils. But we knew on day one,  
5 the way this thing unfolded with the lack of physical  
6 evidence, that we were going to have to go to the people  
7 involved and make a deal. And what that now means is  
8 that they will get a sentence less than what they really  
9 deserve because that's the way our system works. Yes,  
10 they will be in prison. Yes, George Brown will be fully  
11 prosecuted for his continual lies. But by Mr. Deleston  
12 not accepting responsibility, we're here today seeking a  
13 sentence of life.

14 We appreciate the Court's patience, the Court's  
15 perseverance through this. I know the -- we played four  
16 hours of testimony. The Court had to review 13 hours of  
17 Ryan Deleston taking a nap, eating a pizza, reading the  
18 paper. She had to do it all. And we really appreciate  
19 that. We know you did it on your time, not making this  
20 jury wait, not making us wait. You did it on the  
21 nighttime and on the weekends, and we really appreciate  
22 that. We appreciate your professionalism. And, again,  
23 we just ask for the maximum sentence.

24 THE COURT: Mr. Deleston's prior convictions?

25 MS. WILSON: Your Honor, he does not have an

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 extensive prior record. He has a 2002 possession of  
2 heroin, possession with intent to distribute within  
3 proximity, for which he got a YOA, suspended -- youthful  
4 offender suspended sentence. He has a DUS, a loitering,  
5 and I believe at one point his parole was revoked.

6 THE COURT: Anything further from the State?

7 MS. WILSON: No, ma'am.

8 THE COURT: All right. Mr. Pennington, I'll be  
9 happy to hear from you --

10 MR. PENNINGTON: Thank you, your Honor.

11 THE COURT: -- your client, anyone regarding  
12 sentencing. I am aware that you have probably advised  
13 your client not to address the Court --

14 MR. PENNINGTON: That's correct.

15 THE COURT: -- for appellate purposes, and as  
16 you know, I will not take that into consideration when I  
17 impose my sentence.

18 MR. PENNINGTON: Thank you very much, your  
19 Honor.

20 I'll be relatively brief. I believe the  
21 conviction actually was in '03, October of '03, unless  
22 I'm mistaken.

23 MS. WILSON: I think the charge was probably  
24 '02.

25 MR. PENNINGTON: Right. For -- it was one

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State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
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1 plea, one day here in General Sessions on possession  
2 with intent to distribute heroine in proximity of a  
3 school, cocaine; received a suspended YOA, two years'  
4 probation.

5 Your Honor, this is a heartbreaking case. I  
6 don't need to comment on it any further. I will simply  
7 say that I have been representing Ryan for this year and  
8 several months. I've learned that he was 30 years old  
9 at the time of his arrest, and his arrest date was July  
10 30th of 2012.

11 He has his mother present here in the  
12 courtroom, Ms. Ebelena (phonetic) Jenkins; as well as  
13 two aunts, Sheila Richardson, Gloria Deleston. There's  
14 a niece, there's a cousin, and the mother of his  
15 eight-year-old daughter who's present as well.

16 In researching and studying a little bit of his  
17 background, Mr. Deleston has suffered from fairly severe  
18 disadvantages throughout his life, meaning that the  
19 father was not in the picture. And as he was examined,  
20 it was determined that he suffered from a borderline  
21 level of intellectual functioning, which I believe in  
22 this case, as the evidence would have shown, made him  
23 relatively easy to manipulate and very suggestible.  
24 He has come from a very impoverished background. And I  
25 would say that positive -- one of the positive things

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State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
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1 for me is that, before this incident, he was employed  
2 for six months at the -- a local restaurant in West  
3 Ashley. He had lost that employment. He -- this crime  
4 occurred. And then he actually went back to work and  
5 had been working for weeks at the time of his arrest,  
6 and according to the reports of his employer, was  
7 actually someone who they appreciated having on staff.

8 So that Ryan is more than the act that he  
9 stands convicted of here, he and I have spent time  
10 discussing the likely lengthy periods of incarceration  
11 that he would be facing. He has expressed to me,  
12 explicitly at times, his regret for all that has  
13 transpired here. There were times where he -- the  
14 Codefendants were not anxious to plead guilty, and we  
15 explored whether or not there would be an opportunity,  
16 perhaps, to negotiate some outcome with the State. That  
17 never materialized. But I do not think that my client  
18 is utterly without feeling for what has happened here  
19 and has asked me to express his sorrow to the Court.

20 THE COURT: Mr. Pennington, you've advised  
21 your -- is there anyone else that wishes to address the  
22 Court?

23 MR. PENNINGTON: I don't believe so, your  
24 Honor. I would say there is one sentencing wrinkle that  
25 I'll remind the Court of. And that is that given -- in

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State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V Sentencing

1 cases under the possession of a firearm during the  
2 commission of a violent crime, the Subsection A provides  
3 that it does not apply in certain instances. And so if  
4 the Court does impose a life without parole sentence,  
5 then that essentially mutes out that statute.

6 So I don't know what the Court is  
7 contemplating. We would ask for as much mercy as the  
8 Court can find. And -- but if the Court is considering  
9 a life without parole on the murder, then I believe that  
10 essentially negates that one conviction -- or that one  
11 sentence under 16-23-490(A). I have a copy of the  
12 statute for the Court.

13 THE COURT: Are you going forward under (A) or  
14 (E)?

15 Or at this point, Ms. Wilson, does it -- tell  
16 me which Subsection you're going forward on. It doesn't  
17 indicate in the Indictment.

18 MS. WILSON: Can I take a look at it?

19 (Mr. Pennington and Ms. Wilson speak off the  
20 record.)

21 MS. WILSON: May we approach?

22 THE COURT: Yes.

23 (Ms. Wilson and Mr. Pennington approach the  
24 bench for an off-the-record discussion.)

25 THE COURT: As far as sentencing, you agree

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State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
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1 that, on the murder, it's the minimum mandatory of 30  
2 to life? Is that what you advised your client,  
3 Mr. Pennington?

4 MR. PENNINGTON: That is, your Honor.

5 THE COURT: And it's classified as a violent  
6 and a most serious, and that's what you advised your  
7 client?

8 MR. PENNINGTON: Yes, ma'am.

9 THE COURT: As to the attempted armed robbery,  
10 not more than 20?

11 MR. PENNINGTON: Yes, ma'am.

12 THE COURT: Violent and most serious?

13 MR. PENNINGTON: Correct.

14 THE COURT: As to the possession of a handgun  
15 with obliterated serial number, that carries up to five  
16 years and a potential of \$2,000 fine?

17 MR. PENNINGTON: That is correct, your Honor.

18 THE COURT: And as to the possession of a  
19 firearm during the commission of a violent crime, it  
20 does carry five years, and I could impose that  
21 consecutive to anything that I impose less than life?

22 MR. PENNINGTON: That is correct. That's my  
23 reading of the statute.

24 THE COURT: You have advised your client what  
25 the classification of violent and most serious means to

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Official Court Reporter for the State of South Carolina



State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
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1 him?

2 MR. PENNINGTON: Yes, I have.

3 THE COURT: And you have advised your client as

4 to his appellant rights?

5 MR. PENNINGTON: We certainly have.

6 THE COURT: Anything before I impose sentence?

7 MR. PENNINGTON: No, ma'am.

8 THE COURT: Anything further from the State?

9 MS. WILSON: No, ma'am.

10 THE COURT: Mr. Deleston, please stand as I

11 impose sentence.

12 Mr. Deleston, you have had the benefit of an

13 exceptional attorney. He has provided the Court with

14 the necessary documents, and I -- as the Solicitor

15 indicated, I have spent last week, over the weekend, and

16 now all of this week listening to the confession and to

17 all of the case law that your attorney has provided to

18 me. I have sat here throughout this week, and my one

19 question has always been why. And the common word that

20 I've heard from witness after witness is that this was

21 senseless. I have been unable to make sense of why you

22 committed these acts, why you would be in a position to

23 allow yourself to continue to be around people that

24 commit these acts, and I just don't have that answer.

25 And so taking into account that I don't have an

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Official Court Reporter for the State of South Carolina

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
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1 answer as to why, there's absolutely no explanation as  
2 to what caused you to commit these crimes, it's the  
3 order of the Court, on Indictment 2012-GS-10-6361, that  
4 you be committed to the State Department of Corrections  
5 the rest of your natural life.

6 It's the order of the Court, on Indictment  
7 2012-GS-10-6362, that you be committed to the State  
8 Department of Corrections for a term of 20 years.

9 It's the order of the Court, on Indictment  
10 2012-GS-10-6363, that you be committed to the State  
11 Department of Corrections for a term of five years.

12 Those Indictments will run concurrent.

13 So ordered the Court, on 2012-GS-10-6364, that  
14 I cannot impose a sentence due -- under Subsection A  
15 because I have imposed a life sentence.

16 Good luck to you, sir.

17 MR. PENNINGTON: Thank you, your Honor.

18 THE COURT: Anything further?

19 MS. WILSON: No, ma'am.

20 MR. PENNINGTON: No, your Honor.

21 THE COURT: I need for you to make arrangements  
22 for the firearms and for the maps. I am going to  
23 release the jury. Anything further needed?

24 MR. PENNINGTON: Not from the Defense.

25 MS. WILSON: No, ma'am.

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State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V

1 THE COURT: Thank you.

2 WHICH WAS ALL THE EVIDENCE ADDUCED AT THIS  
3 CAUSE.

4 (The jury trial of this cause concluded  
5 at 7:24 p.m., on October 11th, 2013.)  
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Official Court Reporter for the State of South Carolina

State of SC vs Ryan Deleston  
Jury Trial, October 11, 2013  
Volume V of V

R E P O R T E R ' S   C E R T I F I C A T E

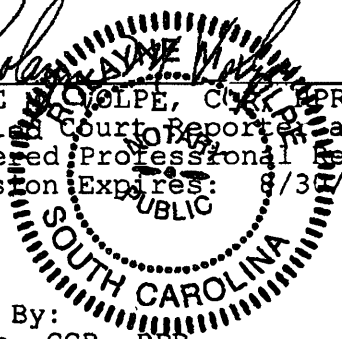
STATE OF SOUTH CAROLINA       )  
                                          ) ss.  
COUNTY OF BERKELEY            )

I, ROLAYNE M. VOLPE, Certified Court Reporter, CCR,  
and Registered Professional Reporter, RPR, do hereby  
certify that the transcript of the foregoing  
proceedings, **Volume V of V**, accurately reflects the  
events that occurred before me to the best of my ability  
at the time and place set out on the caption hereto, the  
witnesses having been duly cautioned and sworn, or  
affirmed, to tell the truth, the whole truth, and  
nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,  
related to, nor employed by any of the parties to the  
action in which these proceedings were taken or to any  
attorney or counsel employed by the parties hereto, nor  
financially interested, directly or indirectly, in the  
outcome of this action.

CERTIFIED AND SIGNED on this 16th day of March,  
2014.

ORIGINAL

  
ROLAYNE M. VOLPE, CCR, RPR  
Certified Court Reporter and  
Registered Professional Reporter  
Commission Expires: 8/30/2021  


Reported By:  
Rolayne M. Volpe, CCR, RPR  
Official Court Reporter for the State of South Carolina

DBD20120805712

## WITNESSES

Charleston City Police Department

## AGENCY CASE NUMBER

1209910

ARREST WARRANT NUMBER  
2012A1010900083

## DATE OF ARREST

July 30, 2012

## ACTION OF GRAND JURY

Foreperson of Grand Jury  
Date:

OCT 30 2012

## VERDICT

Guilty

Foreperson of Petit Jury

Date:

INDICT.DOT

DOCKET NO. 2012GS1006361

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

October 2012 Term

THE STATE

vs.

RYAN DELESTON

DOB: [REDACTED]

B/M

Indictment for

MURDER

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

## INDICTMENT

At a Court of General Sessions, convened on October 8, 2012, the Grand Jurors of Charleston County present upon their oath:

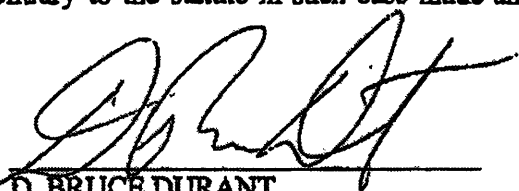
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MURDER

---

That in Charleston County on or about June 16, 2012, while in concert with others and with malice aforethought, RYAN DELESTON did kill and murder Marley Lion by means of shooting him with a handgun, and that Marley Lion did die in Charleston County as a proximate result thereof on June 16, 2012; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended.

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

  
D. BRUCE DURANT  
ASSISTANT SOLICITOR

DBD20120805712

## WITNESSES

Charleston City Police Department

## AGENCY CASE NUMBER

1209910

## ARREST WARRANT NUMBER

2012A1010900084

## DATE OF ARREST

July 30, 2012

## ACTION OF GRAND JURY

Foreperson of Grand Jury  
Date:

OCT 8 2012

## VERDICT

Guilty

Foreperson of Petit Jury

Date:

10-11-2013

INDICT.DOT

DOCKET NO. 2012GS1006362

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

October Term 2012

THE STATE

vs.

RYAN DELESTON

DOB: [REDACTED]

B/M

Indictment for

ATTEMPTED ARMED ROBBERY

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

## INDICTMENT

At a Court of General Sessions, convened on October 8, 2012, the Grand Jurors of Charleston County present upon their oath:

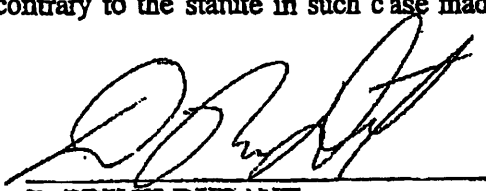
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**ATTEMPTED ARMED ROBBERY**

---

That on or about June 16, 2012, in Charleston County, South Carolina, at 1662 Savannah Highway, while acting in concert with others, the Defendant, RYAN DELESTON, by use of force, threats or intimidation, in concert with others and while armed with a deadly weapon, to wit: a handgun, did attempt to take and carry away goods and/or monies from the person or immediate presence of Marley Lion with the intent to permanently deprive him of possession thereof, in violation of Section 16-11-330(B) of the South Carolina Code of Laws, 1976, as amended.

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

  
D. BRUCE DURANT  
CHIEF DEPUTY SOLICITOR



DBID20120805712

DOCKET NO. 2012GS1006363

## WITNESSES

The State of South Carolina

County of Charleston

Charleston City Police Department

## AGENCY CASE NUMBER

1209910

COURT OF GENERAL SESSIONS

December 2012 Term

## ARREST WARRANT NUMBER

2012A1010900085

## DATE OF ARREST

July 30, 2012

THE STATE

vs.

RYAN DELESTON

DOB: [REDACTED]  
B/M

## ACTION OF GRAND JURY

**TRUE BILL**

Foreperson of Grand Jury

Date:

DEC 09 2012

Indictment for

POSSESSION OF A HANDGUN WITH AN  
OBLITERATED SERIAL NUMBER

VERDICT

*Guilty*

Foreperson of Petit Jury

INDICT.DOT

12-11-2012  
Date:

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

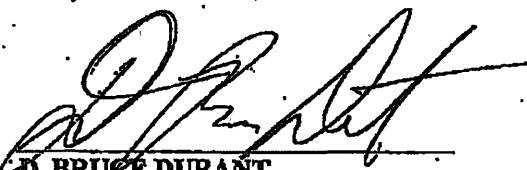
## INDICTMENT

At a Court of General Sessions, convened on December 3, 2012, the Grand Jurors of Charleston County present upon their oath:

**POSSESSION OF A HANDGUN WITH AN OBLITERATED SERIAL NUMBER**

That in Charleston County, South Carolina, on or about July 15, 2012, the Defendant, RYAN DELESTON, did unlawfully have in his possession a Sig Sauer handgun from which the original serial number had been removed or obliterated. All in violation of Section 16-23-30 of the South Carolina Code of Laws (1976) as amended.

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

  
D. BRUCE DURANT  
CHIEF DEPUTY SOLICITOR

DBD20120805712

## WITNESSES

Charleston City Police Department

## AGENCY CASE NUMBER

1209910

ARREST WARRANT NUMBER  
2012A1010900086DATE OF ARREST  
July 30, 2012

ACTION OF GRAND JURY

**TRUE BILL**Foreperson of Grand Jury  
Date:

OCT 08 2012

VERDICT

Guilty

Foreperson of Petit Jury

Date:

10-11-2013

INDICT.DOT

DOCKET NO. 2012GS1006364

The State of South Carolina  
County of Charleston

COURT OF GENERAL SESSIONS

October 2012 Term

THE STATE

vs.

RYAN DELESTON  
DOB [REDACTED]

B/M

Indictment for

POSSESSION OF A FIREARM DURING  
THE COMMISSION OF A  
VIOLENT CRIME

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

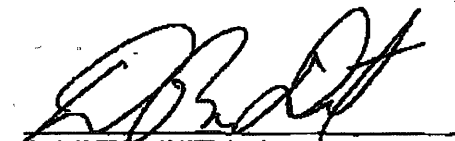
## INDICTMENT

At a Court of General Sessions, convened on October 8, 2012, the Grand Jurors of Charleston County present upon their oath:

**POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME**

That in Charleston County, South Carolina, on or about June 16, 2012, the Defendant, RYAN DELESTON, did possess a handgun or visibly display what appeared to be a handgun during the commission, or attempted commission, of the violent crimes of murder and attempted armed robbery. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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

  
D. BRUCE DURANT  
CHIEF DEPUTY SOLICITOR

## STATE OF SOUTH CAROLINA

COUNTY OF Charleston  
 STATE VS.  
Ryan P Deleston

AKA: \_\_\_\_\_  
 Race: BLACK Sex: M Age: 32

DOB: [REDACTED] SS# [REDACTED]

Address: Cashew St

City, State, Zip: Charleston, SC 29407

DL#: [REDACTED] SID#: SC01422120

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was  
 TO: Murder

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1006361

A/W#: 2012A1010900083

Date of Offense: 6/16/2012

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 §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

Durant, D. Bruce

1801  
 SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
 for a determinate term of 1801 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
 and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment  
 of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied  
 by the State Department of Corrections.

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

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

## SPECIAL CONDITIONS:

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

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

Payment Terms: \_\_\_\_\_

☐ Set by SCDPPPS

Recipient: \_\_\_\_\_

\*Fine:

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

PTUP

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly  
 pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Appointed PD or appointed other counsel,  
 § 47.12 requires \$500 be paid to Clerk  
 during probation.

Clerk of Court/Deputy Clerk

Court Reporter: Rolayne V. Lee

Presiding Judge

Judge Code:

Sentence Date: 10/11/13

1176

## STATE OF SOUTH CAROLINA

COUNTY OF  
STATE

Charleston

VS.

Ryan P Deleston

AKA:

Race: BLACK Sex: M Age: 32

DOB: [REDACTED] SS# [REDACTED]

Address: [REDACTED] Cashew St

City, State, Zip: Charleston, SC 29407

DL#: [REDACTED] SID#: SC01422120

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Attempted Armed Robbery

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1006362

A/W#: 2012A1010900084

Date of Offense: 6/16/2012

S.C. Code §: 16-11-0330(B)

CDR Code #: 0026

## SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-11-0330(B) of the S.C. Code of Laws, bearing GDR Code # 0026

☐ 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

DuRant, D. Bruce

SC Bar# 1801

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 20 ~~months~~ <sup>years</sup> or ☐ under the Youthful Offender Act not to exceed 20 years

and/or to pay a fine of \$ 100.00; provided that upon the service of 20 days/months/years and/or payment

of \$ 100.00; plus costs and assessments as applicable\*; the balance is suspended with probation for 20

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: 2012-GS-10-6361; 2012-GS-10-6363☒ 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. 2012-GS-10-6364 (18)☐ 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 ☐ OrderedTotal: \$ 100.00 plus 20% fee: \$ 20.00

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) | \$      | \$ 3.40   |
| TOTAL                                  | \$      | \$ 133.40 |

Clerk of Court/ Deputy Clerk

Court Reporter: Robene Votce

PTUP

20 days/hours Public Service EmploymentObtain 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 FundOther:                     

☐ Appointed PD or appointed other counsel,  
§ 47.12 requires \$500 be paid to Clerk  
during probation.

Presiding Judge Kristi HargisJudge Code: 101571Sentence Date: 10/11/13

STATE OF SOUTH CAROLINA

COUNTY OF  
STATE

Charleston

VS.

Ryan P Deleston

AKA:

Race: BLACK Sex: M Age: 32

DOB: -1981 SS#

Address: Cashew St

City, State, Zip: Charleston, SC 29407

DL#: SID#: SC01422120

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Unlawful Possession of a Pistol (By Minor/Stolen/etc)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1006363

A/W#: 2012A1010900085

Date of Offense: 6/16/2012

S.C. Code § : 16-23-0030, 0050(A)(1)

CDR Code #: 2364

## SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-23-0030, 0050(A)(1) of the S.C. Code of Laws, bearing CDR Code # 2364

☒ 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

Durant, D. Bruce

SC Bar# 1801

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
 for a determinate term of 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 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) | \$      | \$ 3.40   |
| TOTAL                                  | \$      | \$ 133.40 |

Clerk of Court/ Deputy Clerk

Court Reporter: Rolayne Vata

SCCA/217 (03/2011)

## PTUP

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Appointed PD or appointed other counsel,  
 § 47.12 requires \$500 be paid to Clerk  
 during probation.

Presiding Judge: [Signature]Judge Code: 10/11/13Sentence Date: 10/11/13

1178

## STATE OF SOUTH CAROLINA

COUNTY OF Charleston  
 STATE VS.  
Ryan P Deleston  
 AKA:

Race: BLACK Sex: M Age: 32

DOB: -1981 SS#: [REDACTED]

Address: Cashew St

City, State, Zip: Charleston, SC 29407

DL#: [REDACTED] STD#: SC01422120

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was  
 TO: Possession of a Firearm or Knife During Commission of a Violent Crime

in violation of § 16-23-0490

of the S.C. Code of Laws, bearing CDR Code # 0549

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

The charge is: ☒ As Indicted ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

DuRant, D. Bruce

1801  
 SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
 for a determinate term of 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 by the State Department of Corrections.

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

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

## SPECIAL CONDITIONS:

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

Total: \$        plus 20% fee: \$       

Payment Terms:       

☐ Set by SCDPPPS       

Recipient:       

|                                        |         |
|----------------------------------------|---------|
| *Fine:                                 | \$      |
| § 14-1-206 (Assessments 107.5 %)       | \$      |
| § 14-1-211(A)(1) (Conv. Surcharge)     | \$100   |
| § 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    |
| § 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 (SCCA Surcharge)          | \$5     |
| 3% to County (if paid in installments) | \$      |
| TOTAL                                  | \$      |

Clerk of Court/ Deputy Clerk       

Court Reporter:       

SCCA/217 (03/2011)

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1006364

A/W#: 2012A1010900086

Date of Offense: 6/16/2012

S.C. Code §: 16-23-0490

CDR Code #: 0549

## SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

       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  
 pmts. of \$        beginning       

\$        paid to Public Defender Fund

Other:

Sentence cannot be imposed  
under 16-23-490 (A)  
as a sentence imposed  
on 2012-GS-10-6361

☐ Appointed PD or appointed other counsel,  
 § 47.12 requires \$500 be paid to Clerk  
 during probation.

Presiding Judge       

Judge Code: 2151

Sentence Date: 10/11/13



## FORM 5

STATE OF SOUTH CAROLINA )

County of CHARLESTON )Ryan P. Deleston #307106 )

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

v. )

IN THE COURT OF COMMON PLEAS

2017-CP-10-4561

APPLICATION FOR

State of South Carolina )

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 Perry Correctional Institution, 430 Oaklawn Rd.  
Pelzer, SC. 29669
2. Name and location of Court which imposed sentence Charleston County General Sessions
3. Name(s) of co-defendant(s) (if any) Bryan Rivers and Julius Brown
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2012-GS-10-6361 (murder)
  - (b) 2012-GS-10-6362 (armed robbery)

- (c) 2012-GS-10-6364; 2012-GS-10-6363 (weapons offenses)
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 11, 2013 (life without parole)
- (b) October 11, 2013 (20-years confinement)
- (c) October 11, 2013 (5-year concurrent terms)
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty n/a
- (b) after a plea of not guilty trial by jury
- (c) after a plea of nolo contendere n/a
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. South Carolina Supreme Court
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. denied relief
- ii. cert. denied as improvidently granted
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. February 10, 2016
- ii. July 19, 2017
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2016-UP-055
- ii. 2017-MO-013
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a
- (b) \_\_\_\_\_

(c) n/a

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

(a) Ineffective Assistance of Counsel

(b) denial of due process

(c) \_\_\_\_\_

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

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

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

(a) any petition in a State Court under South Carolina Law? no

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no

(d) any other petitions, motions or applications in this or any other Court? no

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

(a) the specific nature thereof:

i. n/a

ii. n/a

iii. n/a

iv. n/a

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

i. n/a

ii. n/a

iii. n/a

iv. n/a

(c) the disposition thereof:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(d) the date of each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

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

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

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?

first filing for post conviction relief

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

(a) which grounds have been presented:

- i. n/a
- ii. n/a
- iii. n/a

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

- i. n/a
- ii. n/a
- iii. n/a

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) first filing for post conviction relief  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_

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

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

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

(a) the name and address of each attorney who represented you:  
 i. D. Ashley Pennington, John J. Kozelski  
Charleston County Public Defenders Office  
 ii. Robert Dudek, Esq.  
South Carolina Office of Indigent Defense  
 iii. n/a  
 (b) the proceedings at which each such attorney represented you:  
 i. trial and sentencing  
 ii. Direct appeal  
 iii. n/a

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

~~vacate sentences and convictions and remand for new trial~~  
 , or in the alternative affix the relief deemed appropriate in  
 the instant matter.

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

no

STATE OF SOUTH CAROLINA )

VERIFICATION

County of Greenville )

I, Ryan P. Deleston, 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.

Ryan P. Deleston

SWORN to and subscribed before me this 31st  
 day of August, 2017.

Tamara Conwell (L.S.)  
 Notary Public

My Commission Expires: September 25, 2023

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

I, Ryan P. Deleston, 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  
31st day of August, 2017.

Tamaric Connell  
Notary Public

My Commission Expires: September 25, 2022

**RECEIVED**

AUG 31 2017

P.C.I. MAILROOM

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS  
)

Ryan P. Deleston  
Applicant,

)  
)

2017-CP-10-4561

MEMORANDUM OF LAW IN SUPPORT OF

~~VS~~

)

APPLICATION FOR POST CONVICTION

State of South Carolina  
Respondent,

)  
)

RELIEF

COMES NOW, above captioned Applicant, Ryan P. Deleston, pro-se, seeking relief in this Honorable Court pursuant to S.C. Code Ann. §§ 17-27-20 through 160, claiming that his rights were violated during trial including but not limited to his Sixth Amendment right to the guarantee of effective assistance of counsel and his Fourteenth Amendment right to a fair trial.

Applicant submits that through the issues presented, statement of facts and citations of authorities relied on he will show unto this Honorable Court is entitlement to the relief requested.

Respectfully Submitted,

/s/ 

Ryan P. Deleston



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Ryan P. Deleston -- Applicant,

-vs-

State of South Carolina -- Respondent,

MEMORANDUM OF LAW IN SUPPORT OF  
APPLICATION FOR POST CONVICTION RELIEF

Ryan P. Deleston  
SCDC# 307106  
Perry Corr. Inst.  
430 Oaklawn Rd.  
Pelzer, SC. 29669

## ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S EXPRESS MALICE INSTRUCTION THAT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE BY USING HYPOTHETICAL EXAMPLES OF THE FACTS OF APPLICANT'S CASE THAT PREMATURELY DIRECTED A VERDICT FOR THE STATE.

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FACTS

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Applicant submits he was denied the effective assistance of counsel when counsel that denied him a fair trial when counsel failed to object to the trial court's express malice jury instruction. The following was recorded:

Expressed malice is shown when a person speaks words which -- words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within [the Defendant's [mind] would be express malice. Tr.p.1132, 1.14-21.

As is seen in the above cited charge the Court used "hypothetical examples" stressed by the solicitor's just finished closing", and told the jury if they [concluded] "lying in wait or any other act going to show that the deed was [within the Defendant's] mind ... would be express malice." A reasonable juror could have interpreted the Court's statement "this would be express malice" meaning the State had carried their burden of proving malice if the State proved any of the aforementioned examples provided by the Court and they, the jury had to look no further to convict Applicant of murder.

## DISCUSSION

Applicant submits he was denied the effective assistance of counsel when counsel failed to object to trial court's jury instructions on express malice that impermissibly commented on the facts of Applicant's case. *Strickland v. Washingt*, 466 U.S. 668 (1984).

"In reviewing jury charges for error, the Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when read as a whole, it contains the correct definition and adequately covers the law." *Id* at 318, 577 S.E.2d at 464; also see *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423 (SC.App.2003), rehearing and cert. denied.

A judge may not become a participant in the verdict of the jury by indicating an opinion [at any] stage of the trial on "an issue of fact." *Jones v. Elbert*, 38 S.E.2d 796 (S.C.1945). The requirement that the judge "shall declare the law" means that he shall explain so much of the criminal law as applicable to the issues made by the evidence adduced. *State v. White*, 211 S.C. 276, 44 S.E.2d 741 (1947)

Conjoined with [the duty] to refrain from trespassing upon the domain of the facts is [mandatory] and [nondelegable duty] imposed upon the judge of declaring the law. *Eaddy v. Jackson Beauty Supp. Co.* 244 S.C. 256, 136 S.E.2d 297 (SC.1964).

As the South Carolina Supreme Court said in *State v. Hartley*, 414 S.E.2d 182 at 183, \* \* \* art.V, §21 of the South Carolina Constitution prohibits judges of South Carolina from commenting

on the facts, but requires they shall declare the law. A Judge shall not intimate in his charge, or express his opinion as to the weight or existence of evidence or whether any such evidence or testimony is to receive consideration from them without violating the prohibition as commenting on the facts.

~~In the instant matter the trial court while instructing the~~  
jury on express malice used hypothetical examples of the facts of Applicant's case and reiterated points stressed in the solicitor's just finished closing that a reasonable juror could have interpreted as a judicial endorsement that had a substantial and injurious effect on the verdict.

The error complained of here is structural and requires reversal of the conviction and cannot be considered harmless beyond a reasonable doubt. In conducting harmless error analysis of constitutional violations, the U.S. Supreme Court repeatedly has reaffirmed that "[s]ome constitutional violations... by their very nature cast so much doubt on the fairness of the trial process that as a matter of law, they can never be considered harmless. *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988); also see *Neder v. U.S.* 527 U.S. 1, 7 (1999).

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), a five-Justice majority of the Court (*Id* at 306-312 elucidated this rule of per se prejudice (sometimes called the "rule of automatic reversal), *Id* at 294, *Satterwhite supra* 486 U.S. at 257, by distinguishing between the concepts of "structural" and "trial" errors: "structural defects in the constitution of the trial mechanism, 499 U.S. at 309 are per se prejudicial, while "trial errors occurring during the presentation of the case to the jury, 499

U.S. at 307 are subject to harmless error analysis. Structural errors such as this one must be corrected regardless of its affect on the trial because they violated basic protections without which a criminal trial can reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

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Fulminante, supra 499 U.S. at 310.

Here counsel failed to recognize the error and lodge an objection to allow the trial court to correct the error. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant is entitled to a new trial on this issue.

## ISSUE (B)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S VOLUNTARY INTOXICATION INSTRUCTION THAT RELIEVED THE STATE OF PROVING THE MENTAL STATE REQUIRED TO ESTABLISH CRIMINAL INTENT BEYOND A REASONABLE DOUBT?

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FACTS

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Applicant submits he was denied the effective assistance of counsel when counsel failed to object to the trial court's "voluntary intoxication" instruction that relieved the State of proving the essential mens rea element. *Strickland v. Washington*, 466 U.S. 668 (1984).

The Court instructed the jury: "In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proved by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence. Criminal intent must be proved by the State beyond a reasonable doubt." Tr.p.1130, 1.10-15.

Noting that in South Carolina "murder and attempted armed robbery are crimes that require "specific intent." (emphasis added).

The Court then instructed the jury: "This is how you make a determination of whether or not the element required and the intent was present. It is not necessary to establish intent by direct and positive evidence. But intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case." Tr.p.1130, 1.23-p.1131, 1.4.

Coming directly after the Court instructed the as recorded:

Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

The Defendant is charged with murder. The State must prove that [the Defendant] killed another person with malice aforethought. Tr.p.1131, 1.13-24.

Applicant submits the above cited portions of the trial court's charge relieved the State of it's burden of proving "specific intent" which is an essential element in South Carolina. The statutory definition has not altered in anyway the ingredients which common law deemed essential. 16-3-10, in no wise affects the essential elements which are necessary to constitute murder, but leaves them exactly and in every particular as they stood at common law. State v. Judge, 208 S.C. 497, 505, 38 S.E.2d 715, 719 (1946) and in this matter is also applicable to attempted robbery. State v. Trhailkill, 73 S.C. 314, 314, 53 S.E. 482 (1906)("criminal intent" ... is an essential element in every common law crime).

Applicant was tried and convicted of murder under South Carolina's law of parties, which holds each participant in a dangerous felony liable as a principal for all of the foreseeable consequences of that felony. State v. Woods 189 S.C. 281, 1 S.E. 190 (1939). According to this view, the State was required to do

more than prove Applicant's intent to participate in the robbery of Lions in order to convict him as Lion's murderer. Applicant recognizes that the jury could have convicted him under an accomplice liability theory, State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1979). However, the S.C. Supreme Court held in State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800 (801-802) (1985),

South Carolina's law of accomplice liability is inapplicable unless the jury finds that a homicide was the probable result of the acts actually agreed upon by the co-conspirators.

Thus, the nature and scope of the prior felonious agreement, and the extent to which parties were acting in accord with the agreement when the killing occurred, are questions of fact which must be determined by the jury on the basis of the evidence presented. In this case, the jury could have been left with a reasonable doubt as to Applicant's guilt under accomplice liability principles solely based on Applicant's intoxication that could have precluded the required specific intent.

#### DISCUSSION

In State v. King, 155 S.E.2d 409 (1930), our Supreme Court held that .. the State must never be given the benefit of any doubt. The crucial issue at trial was whether Lion's death bore any connection to the robbery, but whether Applicant's own criminal intent was sufficient to warrant holding him liable for Lion's death under South Carolina's law of accomplice liability.

In a long line of cases culminating in Yates v. Evatt, 500 U.S. 391 (1991), the U.S. Supreme Court recognized that the prosecution must prove each and every element of the crime charged beyond a reasonable doubt, citing In re Winship, 397 U.S.



158 (1970). The burden of proof on any element cannot be shifted to the defense, because in so doing it decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the Supreme Court considered a Maine Rule which required a defendant charged with murder to prove he acted in a heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden on any element of the crime to the defendant, finding the risk described to be intolerable, reversing the conviction. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

The Court overturned another conviction in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when a person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the judge instructed the jury that "the law presumes a person intends the ordinary consequences of his voluntary acts. Id at 512. After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense. The Court reiterated that a State must prove every element beyond a reasonable doubt and the defendant cannot be required to prove any elements of his defense or disprove any element of his crime, holding "a reasonable juror might have interpreted the instruction either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction "unconstitutional."

In *Francis v. Franklin*, 472 U.S. 307 (1985), the Court found that the use of a "rebuttable" presumption was also

unconstitutional for the same reasons set forth in Sandstrom supra.

Following Sandstrom v. Montana, supra, Mullaney v. Wilbur, supra, and Francis v. Franklin, supra, the case of Yates v. Evatt, 310 S.E.2d 805 (1982), 474 U.S. 896 (1985)(Yates v. Aiken), and 500 U.S. 391 wound it's way through the judicial system on identical issues. This matter is thus stare decisis in South Carolina.

In Hyman v. Aiken, 824 F.2d 1405 (4th Cir.1987), a South Carolina capitol case involving somewhat similar circumstances, the Fourth Circuit granted habeas relief. In Hyman, the record contained abundant evidence that the defendant Hyman actually killed the victim. In granting habeas relief, the Fourth Circuit noted that evidence of "Hyman's voluntary intoxication could have provided a basis upon which the jury might reasonably have doubted that he acted with malice. 824 F.2d at 1410. Here the reasons for doubting Applicant's malicious intent are far more compelling than was true in Hyman. The trial record contains an abundance of evidence of intoxication, however unlike in Hyman there's no evidence Applicant was the actual shooter or that Lion's death was result of acts "actually agreed upon" by the co-conspirators.

Under the facts of Applicant case, the State's partial reliance on accomplice-liability theory and the trial court's voluntary intoxication instruction relieved the State of it's burden of proof on the required mental state, specific intent.

Applicant is entitled to a new trial on this issue.

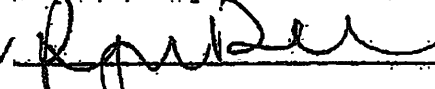
## CONCLUSION

WHEREFORE, based on the foregoing statement of facts, issues presented and citations relied on Applicant respectfully prays this Court will grant the requested relief of a new trial.

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Respectfully Submitted,

/s/



Ryan P. Deleston

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

**Ryan P. Deleston,  
S.C.D.C. No. 307106,**

**Applicant,**

**V.**

**STATE OF SOUTH CAROLINA,  
Respondent.**

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT

**Case No. 2017-CP-10-4561**

## RETURN

In response to the post-conviction relief application filed September 5, 2017, Respondent would show this Court:

I.

Ryan P. Deleston ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of Charleston County Clerk of Court. During its October 2012 term, the Charleston County Grand Jury indicted Applicant for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. Thereafter, during its December 2012 term, the Charleston County Grand Jury also indicted Applicant for possession of a handgun with an obliterated serial number. The charges stem from the shooting death of Marley Lion, a recent high school graduate, during an attempted armed robbery while he was asleep in his vehicle.

Applicant was represented by Ninth Circuit Public Defender D. Ashley Pennington and Assistant Public Defender John J. Kozelski. The prosecution was represented by Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Bruce DuRant. On October 7, 2013, the case was called before the Honorable Kristi Lea Harrington and a jury. On October 11, 2013, the jury found the Applicant guilty of all the charges. Judge Harrington sentenced Applicant to life without parole for murder, twenty years concurrent for attempted armed robbery, and five years

concurrent for possession of a handgun with an obliterated serial number. The trial court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Applicant was sentenced to life without parole.

Applicant filed a timely notice of appeal on October 14, 2013. He was represented on appeal by Chief Appellate Defender Robert M. Dudek and Appellate Defender Lara M. Caudy, both of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. The State was represented by Deputy Attorney General Donal J. Zelenka. On appeal, Applicant argued the trial court erred in refusing to allow Applicant to cross-examine two witnesses regarding an armed robbery that occurred two weeks prior to the instant murder and the trial court erred in instructing the jury that the trial was “a search for the truth in an effort to make sure that justice is done.” Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant’s convictions and sentences in an unpublished opinion. State v. Ryan P. Deleston, 2016-UP-055 (Ct. App. Filed February 10, 2016). Applicant petitioned for rehearing on February 25, 2016. The petition for rehearing was denied by the Court of Appeals on April 21, 2016. Thereafter, Applicant petitioned for certiorari to the South Carolina Supreme Court, which granted certiorari on December 1, 2016. Following briefing and oral argument, the Supreme Court dismissed certiorari as improvidently granted. State v. Ryan M. Deleston, 217-MO-013 (filed July 19, 2017). The Remittitur was returned to the circuit court on Jul7 19, 2017.

## II.

In his *pro se* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully due to ineffective assistance of counsel for: “failing to object to the trial court’s express malice instruction that impermissibly commented on the facts of the case by using hypothetical examples of the facts of Applicant’s case that prematurely directed a verdict

for the state" and "failing to object to the trial court's voluntary intoxication instruction that relieved the State of proving the mental state required to establish criminal intent beyond a reasonable doubt."

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

### III.

Applicant alleges counsel was ineffective for failing to object to two different jury instructions given by the trial court. First, Applicant contends counsel was ineffective for failing to object to the following jury instruction on express malice:

Expressed malice is shown when a person speaks words or which - words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice.

Tr. 1132 lines 14-21.

Applicant similarly asserts trial counsel was ineffective for failing to object to the trial court's instruction on voluntary intoxication:

Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit, as both jury instructions were correct statements of law and were properly supported by the testimony and evidence presented during trial. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (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 trial counsel's performance was deficient Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either 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.

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), SCRCP. 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, SCRCP. 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), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

#### V.

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



## VII.

WHEREFORE, having made its Return, Respondent requests an evidentiary hearing on Applicant's allegations of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

By: Megan Harrigan Jameson  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

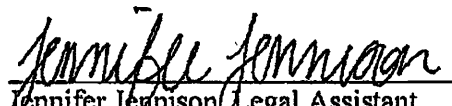
12/12, 2017

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|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) |                              |
|                          | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON     | ) |                              |
|                          | ) | 2017-CP-10-4561              |
|                          | ) |                              |
| RYAN DELESTON, #307106   | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) |                              |
| vs                       | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                          | ) |                              |
| STATE OF SOUTH CAROLINA, | ) |                              |
|                          | ) |                              |
| Respondent,              | ) |                              |
| _____                    | ) |                              |

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

Christopher L. Murphy, Esquire  
Murphy Law Offices, LLC  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492

DATED this the 12<sup>th</sup> day of December, 2017.

  
Jennifer Jannison Legal Assistant  
For Respondent

|                          |   |                                |
|--------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS   |
| COUNTY OF CHARLESTON     | ) | FOR THE NINTH JUDICIAL CIRCUIT |
|                          | ) |                                |
| Ryan P. Deleston,        | ) |                                |
| S.C.D.C. No. 307106,     | ) | Case No. 2017-CP-10-4561       |
| Applicant,               | ) |                                |
|                          | ) |                                |
| v.                       | ) | <b>AMENDED RETURN</b>          |
|                          | ) |                                |
| STATE OF SOUTH CAROLINA, | ) |                                |
| Respondent.              | ) |                                |

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In response to the post-conviction relief application filed September 5, 2017, as amended by email, Respondent would show this Court the following in its Amended Return. The Respondent made an initial return on December 12, 2017 :

I.

Ryan P. Deleston ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of Charleston County Clerk of Court. During its October 2012 term, the Charleston County Grand Jury indicted Applicant for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. Thereafter, during its December 2012 term, the Charleston County Grand Jury also indicted Applicant for possession of a handgun with an obliterated serial number. The charges stem from the shooting death of Marley Lion, a recent high school graduate, during an attempted armed robbery while he was asleep in his vehicle.

Applicant was represented by Ninth Circuit Public Defender D. Ashley Pennington and Assistant Public Defender John J. Kozelski. The prosecution was represented by Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Bruce DuRant. On October 7, 2013, the case was called before the Honorable Kristi Lea Harrington and a jury. On October 11, 2013, the jury found the Applicant guilty of all the charges. Judge Harrington sentenced Applicant to life

without parole for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for possession of a handgun with an obliterated serial number. The trial court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Applicant was sentenced to life without parole.

Applicant filed a timely notice of appeal on October 14, 2013. He was represented on appeal by Chief Appellate Defender Robert M. Dudek and Appellate Defender Lara M. Caudy, both of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. The State was represented by Deputy Attorney General Donald J. Zelenka. On appeal, Applicant argued the trial court erred in refusing to allow Applicant to cross-examine two witnesses regarding an armed robbery that occurred two weeks prior to the instant murder and the trial court erred in instructing the jury that the trial was “a search for the truth in an effort to make sure that justice is done.” Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant’s convictions and sentences in an unpublished opinion. State v. Ryan P. Deleston, 2016-UP-055 (Ct. App. Filed February 10, 2016). Applicant petitioned for rehearing on February 25, 2016. The petition for rehearing was denied by the Court of Appeals on April 21, 2016.

Thereafter, Applicant petitioned for certiorari to the South Carolina Supreme Court, which granted certiorari on December 1, 2016. Following briefing and oral argument, the Supreme Court dismissed certiorari as improvidently granted. State v. Ryan M. Deleston, 217-MO-013 (filed July 19, 2017). The Remittitur was returned to the circuit court on July 19, 2017.

#### RESPONDENT’S STATEMENT OF FACTS:

This case involves a senseless murder stemming from an attempted robbery. On the night of June 15, 2012, Marley Lion, a recent high school graduate, attended a house party with a

friend. [R.p. 78, l. 7- p. 79, l. 1; p. 80, ll. 13-18, Tr. 274, l. 7- p. 275, l. 1; p. 276, ll. 13-18.]

Marley had been drinking that night. He drove his friend Katherine Ridgeway home around 3:00

a.m. and then "said he was heading home." [R. p. 81, l. 7- p. 82, l. 7, Tr. 277, l. 7- p. 278, l. 7.]

Before making it to his destination Marley decided he was too intoxicated to drive and pulled

into the parking lot of Famous Joe's to get some sleep. [R. p. 101, ll. 12-18; see R. p. 108, ll. 3-

14, Tr. 298, ll. 12-18; see Tr. 305, ll. 3-14.] While parked in the parking lot of Famous Joes,

Marley was shot five times and killed.<sup>1</sup> The state's version was that Appellant shot Marley

during an attempted robbery with Bryan Rivers and Julius Brown. The jury was instructed and

the State argued his guilt under accomplice liability, although it also asserted that Deleston was

the trigger person.

## II.

In his *pro se* application for post-conviction relief, Applicant alleged:

In the *pro se* application Deleston raises the following grounds :

### A. Ineffective Assistance of Trial Counsel :

1. Counsel was ineffective in failing to object to the following jury instruction on expressed malice:

"Expressed malice is shown when a person speaks words or which -- words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice."

Tr. 1132 lines 14-21. Counsel failed to take issue with the "lying in wait" example which was an improper comment on the facts.

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<sup>1</sup> Marley Lion's death was ruled a homicide by the forensic pathologist and the cause of death was determined to be a gunshot wound to the chest with perforations or injuries of the abdominal aorta, the spleen, and the liver. [R. p. 683, ll. 3-6, Tr. 934, ll. 3-6.] Marley also suffered several gunshot wounds to the left thigh and groin region, and a gunshot wound to the right arm. [See R. p. 683, l. 11 - p. 696, l. 21, See Tr. 934, l. 11 - p. 947, l. 21.]

2. Counsel was ineffective for failing to object to the trial court's instruction on voluntary intoxication:

"Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20.

In correspondence with his current PCR counsel Christopher Murphy, he asserts the following additional grounds:

3. Counsel was ineffective in failing to request a lesser included offense or relay any deals or plea offers for lesser included offenses.
4. Counsel did not advise the Applicant on not taking the witness stand. (Court inquiry of Deleston on decision to not to testify (Tr.p. 771- 776, p. 1040-1042, ROA 541 -544, 771-772).
5. Counsel did not cross-examine witnesses;
6. Counsel did not recall Bryan Rivers and cross-examine him on the Chopper shooting" when the State opened the door by presenting the Deleston statement.

Attached to the original Return and incorporated herein are the records of the Charleston Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcripts, and Applicant's appellate records.

### III.

Applicant alleges counsel was ineffective for failing to object to two different jury instructions given by the trial court.

#### 1. Express Malice and Lying in Wait.

Applicant initially contends counsel was ineffective for failing to object to the following jury instruction on express malice:

Expressed malice is shown when a person speaks words or which - words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice.

Tr. 1132 lines 14-21. A review of the trial record reveals that there was a charge conference on October 11, 2013. Tr. p. 1025-1031. The record does not evidence any initial objection to the expressed malice charge. After the instructions were given, no objection was raised concerning the expressed malice instruction. Tr.p. 1140.

MS  
#5  
The Applicant presently asserts that the lying in wait instruction within the expressed malice instruction was a charge on the facts. He asserts that the charge on express malice which includes: "For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice" is improper under the South Carolina Constitution. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). However, the law of malice is that "lying in wait" is expressed malice as the charge stated.

The record does not reveal why the defense counsel did not object to the instruction. To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, supra, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, supra, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

Although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, \_\_\_ U.S. \_\_ ( Jan. 19, 2011).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair



trial, a trial whose result is reliable." *Id.*, at 687. See Harrington v. Richter, \_\_ U.S. \_\_ (Jan. 19, 2011).

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. \_\_\_, \_\_\_ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. *Id.*, at 696. This does not

require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id., at 693. Harrington, supra.

The record reveals reasonable performance on the part of counsel Pennington. Respondent could not locate any prior opinion of the South Carolina Supreme Court which concluded that the instruction on expressed malice or lying in wait violated the State Constitution. Nevertheless, the allegation probably raises a question of fact based upon the reasoning of counsel Pennington concerning a failure to object which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## 2. Voluntary Intoxication Instruction

Applicant similarly asserts trial counsel was ineffective for failing to object to the trial court's instruction on voluntary intoxication:

Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20. As above, no objection was made to this instruction. Tr.p. 1140.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit as the instruction was a correct statement of law and properly supported by the testimony and evidence presented during trial. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

Respondent submits Applicant cannot satisfy either 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).

**3. Assertions that counsel should have sought a lesser offense or negotiated a lesser plea deal.**

*3*  
*#9* In his third ground the Applicant contends that trial counsel failed to pursue a lesser offense. If this allegation concerns a failure to reveal a plea offer for a lesser included offense, the Applicant has not shown in his allegation the existence of any plea offer that was not revealed to the Applicant. If the allegation is that counsel should have vigorously sought a plea offer, the Applicant has failed to show that the Applicant's counsel failed to seek or negotiate a plea offer with the approval of the Applicant.

If this ground concerns that the counsel should have sought an instruction for a lesser included offense, he has failed to show any evidence that would support any instruction for a lesser offense. 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).

**4. Advice of Right to Testify. Counsel did not advise the Applicant on not taking the witness stand. (Court inquiry of**

**Deleston on decision to not to testify (Tr.p. 771- 776, p. 1040-1042, ROA 541 -544, 771-772).**

Respondent submits that ground 4 is conclusively refuted by the record which reveals when the critical decision was made on whether the Applicant would waive his right to testify, he was fully advised by his counsel concerning that matter. The Applicant contends that trial counsel did not adequately advise the Applicant of his right to testify. Respondent submits that the record of the trial conclusively disputes this allegation. Pertinent to this ground, the trial court made two specific inquiries of the Applicant relevant to this assertion.

Prior to the state's case, Judge Harrington made the preliminary of the Applicant:

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*AD-*  
THE COURT:

Mr. Deleston, at this time I'm going to explain to you certain of your rights. We typically do this at the close of the State's case, but there's been a lot of testimony over the past two days, and I anticipate that there may be a point tomorrow that the State will rest. And so I wanted you to have as much time to go over these rights with your attorney. Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT:

If at any time you do not understand anything that I explain to you or you need me to explain anything in further detail, please let me know. Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT:

At some -- when I ask you these questions, and it will not be tonight, but we will have reached the stage in the trial where you're going to need to make the decision what type of defense you're going to present. You have a right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States. This Amendment states, in part, that no person shall be compelled in any criminal case to be a witness against himself. That means that you cannot be required to testify in this case. You have the right to testify on your own behalf; however, no one can make you testify. This is a personal right, and no one can waive this right except for you. If you decide to testify, you will be subject to the same rules that govern the other witnesses and you may be examined and cross-examined on any relevant issue in this case. In addition, if you have convictions involving dishonesty or false statements or for crimes

punishable by imprisonment for more than one year, and I determine that the probative value of admitting that evidence outweighs its prejudicial affect to you, the Solicitor will be able to introduce your record to attack your credibility.

Mr. Pennington, we've already addressed which convictions would be appropriate for impeachment; is that correct?

MR. PENNINGTON: Yes, ma'am.

THE COURT: And, Solicitor Wilson, you agree with that?

MS. WILSON: Yes, ma'am.

THE COURT: If you decide to testify, this decision on your part must be freely, voluntarily, and intelligently made, with the knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever, and I will instruct them there's to be absolutely no prejudice to you because you did not testify. As a matter of fact, I instruct the jurors that they are not to discuss the fact that you did not testify in the jury room whatsoever. It is left entirely up to you whether or not you testify. You have the opportunity over this evening hour and throughout tomorrow to discuss with your attorney, either together or separately, your family, your friends, or anyone else, but the final decision is left entirely up to you.

Do you understand what I have explained to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need for me to explain any of these issues in further detail to you?

THE DEFENDANT: No, ma'am.

THE COURT: Do you understand what convictions could be used against you if you decide to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: You understand the instructions that I will give to the jurors if you decide not to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you had discussions with your attorney regarding these issues?

THE DEFENDANT: Not yet.

THE COURT: Not yet? All right. Thank you.

Mr. Pennington, do you need for me to explain anything further to your client regarding his right to testify?

MR. PENNINGTON: I don't believe so, your Honor. I believe that was a great -- a very thorough explanation. Obviously, in the run up to trial, there's been discussions about the subject. Because he's in custody, because we've been working very long hours, I would ask for an opportunity to have -- we can start at 9:30 tomorrow. That way I'll have -- he will get here at 8:30. They'll bring him up here, and I would have a chance to talk with him before we commence in the morning, if that's all right.

THE COURT: Counsel, I could have him here earlier than that if I instruct them to have him here; correct?

MR. PENNINGTON: I think it would only be like a 15-minute conversation. So I think we could work it in by 9:30 easily.

THE COURT: So if he is here no later than 8:30, you will have sufficient time in the morning; is that correct?

MR. PENNINGTON: Yes, ma'am.

Trial Tr. (Vol. 3) p. 772, l. 3- p. 777, l. 5.

Subsequent in the trial prior to the close of the case, Judge Harrington made the following inquiry of the Applicant and defense counsel.

COURT: All right. Mr. Pennington, do you have witnesses besides your client that will testify?

MR. PENNINGTON: The Defense will rest.

THE COURT: All right. Just out of an abundance of caution, I want to inquire of your client.

Mr. Deleston, would you please stand? And let's go ahead and reswear Mr. Deleston at this time.

THE DEPUTY CLERK OF COURT: Please raise your right hand. (The oath is administered by the Deputy Clerk of Court, and the Defendant answers as follows:)

THE DEFENDANT: Yes.

THE DEPUTY CLERK OF COURT: Thank you, sir.

THE COURT: Mr. Deleston, please remain standing. Do you remember when I advised you of your right to -- that you could testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need me to go over any of those things with you?

THE DEFENDANT: No, ma'am.

THE COURT: Have you had an opportunity to meet with your attorneys, either separately or together, to discuss the benefits and the consequence of your right to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need any additional time to meet with your attorneys?

THE DEFENDANT: No, ma'am.

THE COURT: Have you made a decision whether or not you will testify?

THE DEFENDANT: I will not testify.

THE COURT: All right. And thank you, Mr. Deleston. You may have a seat.  
Mr. Pennington, do you need, based upon what has been presented today, to meet with your client is there as well -- we haven't had a break -- but to meet your client concerning that decision?

MR. PENNINGTON: I will, during the lunch hour, touch base with him just to confirm. But everything that I have -- all communications and understandings we've

had up to this point would lead me to believe that that is a firm decision, and it's based on a thorough understanding of his circumstances.

THE COURT: I just wanted to make sure that you've had adequate opportunity to meet with him and to go over all of those consequences of his decision. So with that, the Defense rests. All right. So then that leaves us just charging and closing; is that correct?

Trial Tr. (Vol. 5), p. 1041-1041.

Respondent submits that the Applicant's sworn statements in open court that he had consulted with counsel carry a presumption of verity. "[s]olemn declarations in open court carry a strong presumption of verity". Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). This ground is subject to dismissal.

#### 5. Counsel Failed to Cross-examine witnesses.

In his allegation, Applicant makes a conclusory allegation that counsel failed to cross-examine witnesses. The record reflects that the Applicant did not cross-examine the following state witnesses at trial:

1. Elizabeth Page - Tr. 256 (Marley lived with them and she was unable to get in touch with him after midnight when he failed to return home.)
2. Katherine Ridgway - Tr. 272 (Friend of Marley and went to party that night after he picked her up and dropped her off that night at her apartment after 3 am and told her he was going home).
3. Lauren Mulkey - Tr. 279 (Investigator with Charleston Police Department and reviewed the surveillance video of d.d. Packers which revealed the victim's



vehicle at 4:08 lights blinking after seeing a black male in a white shirt going towards the direction of victim's vehicle at 3:55).

4. Christopher Singleton - Tr. 789 ("Little Chris" was Bobby Warhaw's cousin and assisted in purchasing the gun from Applicant which he turned over to the police in return for reward money)
5. Jeffrey Robertson - Tr. 816 (Charleston Police investigator conducted surveillance on the controlled purchase of the weapon from the Applicant)
6. George Bradley - Tr. 830 (Charleston Police sergeant also conducted surveillance on the controlled purchase of the weapon from the Applicant)
7. Mary Phillips - Tr. 838 (Crime scene investigator described contact with six shell casings and did not recover fingerprints, collected a gun out of vehicle and introduced photos).
8. Michael J. Kaplan - MD - Tr. 927 (pathologist who performed autopsy)
9. S. Lamart Williams - Tr. p 997 (described man named Gee who gave him the gun to sell and asserted in the picture shown he was making a transaction for weed and not the gun).

The Applicant has failed to allege any particular deficiency as to any of these witnesses. He has failed to allege any line of inquiry that was constitutionally necessary under the Sixth Amendment.

Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). But see Berryman v. Morton, 100 F.3d 1089, 1097-1099 (3rd Cir. 1996). The Second Circuit expands by

stating that whether to engage in cross-examination, its extent and its manner, is a strategic decision of counsel. (U.S. v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). See also U.S. v. Corcoran, 855 F.Supp. 1359, 1369 (E.D.N.Y. 1994).) The Ninth Circuit has also said that allegedly inadequate cross-examination was not shown by the record and the petitioner failed to show prejudice from the alleged deficiency. Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990). See also Little v. Johnson, 162 F.3d 835, 861 (5th Cir. 1998) (record showed vigorous cross). The Ninth Circuit also said that the defendant had failed to show that the result would be different with further cross-examination (U.S. v. Claiborne, 870 F.2d 1463, 1469 (9th Cir. 1989).) Hunt v. Smith, 856 F.Supp. 251, 258 (D. Md. 1994) found no defective cross or prejudice even if the cross had been more to the liking of defense attorney experts on habeas. See also Routly v. Singletary, 33 F.3d 1279, 1288-1289 (11th Cir. 1994); U.S. v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995) (failure to show what further cross-examination would produce and how it would affect the result); Pickens v. Gibson, 206 F.3d 988, 1002 (10th Cir. 2000) (no prejudice where failed to show how cross-examination could have been better); Carroll v. Schriro, 243 F.3d 1079, 1099-1100 (8th Cir. 2001) (state disposition of ineffective cross-examination claim was reasonable application of Strickland under the AEDPA).

Other circuits have also recognized the strategic and tactical nature of cross-examination. Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) (choice of emphasis in cross-examination is prototypical example of strategy); Henderson v. Norris, 118 F.3d 1283 (8th Cir. 1997) (a delicate task entrusted to the professional discretion of counsel); Battle v. Delo, 19 F.3d 1547, 1556 (8th Cir. 1994) (limited cross of state serology expert to avoid highlighting); U.S. v. Garcia-Rosa, 876 F.2d 209, 232 (1st Cir. 1989); Barnes v. U.S., 859 F.2d 607, 608 (8th Cir. 1988); Williams-Bey v. Trickey, 894 F.2d 314, 316 (8th Cir. 1990) (tactical decision not to

cross-examine assault victim about prior incident so as not to create greater sympathy). To the same effect is Bergman v. McCaughtry, 65 F.3d 1372, 1379-1380 (7th Cir. 1995) (decision not to cross-examine sympathetic prosecution witness). So-called "dainty" cross-examination was not found wanting in U.S. v. Reveron-Martinez, 836 F.2d 684, 688 (1st Cir. 1988). More extensive cross may have been perceived by the jury as unfair badgering said Hoguc v. Scott, 874 F.Supp. 1486, 1541 (N.D. Tex. 1994).

Although cross-examination may not have been as effective as hoped, flawless cross-examination is rare, said the court in Sherron v. Norris, 69 F.3d 285, 290-291 (8th Cir. 1995). The question is not whether the prosecution witness was attacked on every conceivable point but whether the testimony was subjected to adversarial testing. Johnson v. Nagle, 58 F.Supp.2d 1303, 1355, n. 42 (N.D. Ala. 1999).

Failure of defense counsel to cross-examine a prosecution expert about a subject was not prejudicial in Middleton v. Evatt, 855 F.Supp. 837 (S.C. 1994) where the subject had been raised by the prosecution cross-examination of defendant's expert. No ineffectiveness in cross was found in Gomez v. Ahitow, 29 F.3d 1128, 1136 (7th Cir. 1994) and U.S. v. Fish, 34 F.3d 488, 494 (7th Cir. 1994). The latter noted a possible strategic reason and the lack of prejudice in any event considering the cross-examination that was conducted. Defense experts who criticized cross-examination gave only "a grading of the quality of counsel's cross-examination" which was not of the magnitude to place counsel's cross outside prevailing professional norms. Hunt v. Nuth, 57 F.3d 1327, 1333 (4th Cir. 1995). An attorney does not have to ask every cross-examination question suggested by the client. U.S. v. Smith, 62 F.3d 1073, 1078 (8th Cir. 1995).

Absent such greater specificity, Respondent submits that the allegation should be dismissed. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). Before the Court will hold an evidentiary hearing, the Applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum prima facie showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act. See e.g. Aubut v. Maine, 431 F.2d 688, 689 (1<sup>st</sup> Cir. 1970) ("The petition should set out substantive facts that will enable the court to see a real possibility of constitutional error.") "Unsupported, conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing." Nickerson v. Lee, 971 F.2d 1125, 1136 (4<sup>th</sup> Cir. 1992), *overruled on other grounds* Gray v. Netherland, 518 U.S. 152, 165-66 (1996). Alternately, the Court may construe the allegation as raising a question of fact which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

6. **Failure to Recall Bryan Rivers concerning the "Chopper Shooting" after door opened by admission of the statement.**

In his final amended allegation by PCR counsel, Applicant contends that counsel erred in failing to seek to recall Bryan Rivers after the State opened the door in presenting Deleston's statement. This issue derives from the presentation of the similar issue in the direct appeal. However, in the direct appeal, the issue raised was whether the Applicant was initially entitled to present the issue on cross-examination at an earlier point of the trial.

Therein Applicant contended he was allegedly deprived of his constitutional right to present a defense. He asserted the trial court precluded the presentation of evidence during the cross-examination of accomplices Bryan Rivers and Julius Brown that two weeks prior to the murder of Marley Lion, Rivers and not Petitioner was the actual triggerperson in a separate shooting of Leroy "Chopper" Townsend with the same weapon that shot Lion. Deleston contends that the evidence was admissible under S.C. Rule of Evidence 404(b), as evidence of "third party guilt" under the precedent of State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), and as his constitutional right to present a meaningful defense under Holmes v. South Carolina, 547 U.S. 319 (2006). The Petitioner contended that this evidence of the other crime was relevant to his defense because he claimed that Rivers was the triggerperson in Lion's death and that the excluded evidence would support that he was merely present at Lion's death, even though he was also present at the Townsend shooting.

In denying relief, the trial judge initially rejected the proffer under Rule 404(b), South Carolina Rules of Evidence, concluding that there was not a close degree of similarity between the crimes and therefore did not demonstrate a common scheme or plan to establish Rivers as the shooter of Lion. The trial court further rejected the claim that there was a due process violation.

However, the record subsequently revealed after the testimony of Rivers and Brown, Solicitor Wilson revised her prosecution strategy<sup>2</sup> prior to the conclusion of the

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<sup>2</sup> At the outset of the opening argument, Solicitor Wilson stated, although the State would show "that it was Deleston that pulled that trigger" that night (R.p. 42, ll. 1-4, Tr.p. 238, ll. 1-4), it was relying on the principle of the hand of one is the hand of all" liability and that "when we prove to you that Julius, 'Little B' [Rivers] and Ryan Deleston were acting together, who pulled the trigger will not be of importance to you." R.p. 42-43, Tr.p. 238-239. Importantly, throughout the opening statement by Solicitor Wilson, no mention is made of her intent to introduce the taped statements of Deleston of July 30, 2012. R.p. 41-51, Tr.p. 237-247. No mention is made of the Petitioner's statement.

state's case and introduced similar of Thompson shooting to the jury through the introduction of a partially self-serving statement of Ryan Deleston, without objection. This statement included information about Rivers shooting Townsend earlier with the same murder weapon. A new trial therefore was inappropriate where no reversible error occurred.

The summary order by the Court of Appeals suggested in its citations that the Court of Appeals opined that the evidence of the other criminal act by Rivers was not relevant because it was not sufficiently similar to be admissible and lacked a sufficient degree of similarity, citing State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). Respondent submit that the conclusion is correct, but there are also additional reasons why a new trial would not be warranted.<sup>3</sup>

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However, counsel Pennington does present his defense theory that Bryan Rivers "used the weapon at 2:45 am, one hour before this murder downtown on Rutledge Avenue, to rob that couple that you heard about downtown. And at 4:07 am, he used it again to murder Marley Lion." R.p. 57, ll. 16-20. Also R.p. 59. Tr.p. 253, ll. 16-20. Also Tr.p. 255. ("It is whether or not the State has truly removed all reasonable doubt to show that ---in this instance, that Ryan Deleston would have seen the crazy, irrational act of Bryan Rivers coming."). Counsel Pennington made no mention of Deleston's statement in his opening either. During the testimony of Detective Williams of the Charleston Police Department, the State introduced evidence that Deleston in the evening statement had indicated, among other things that Bryan Rivers had the firearm and went up to the vehicle and shot into the (Lion's) vehicle. R.p. 758, ll. 7-15, Tr.p. 1012, ll. 7-15.

<sup>3</sup> In its opinion, the Court of Appeals concluded as follows:

1. As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts ... may ... be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), cert. denied, 135 S.Ct. 400 (2014) ("Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan."); id. ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." (quoting State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); id. at 338 n. 4, 748 S.E.2d at 205 n. 4 (noting we must look at the

***A. The Admission of Separate Evidence of the Earlier Shooting of Chopper Townsend by Rivers with the Murder Weapon through the Petitioner's Own Statement (State Exhibit 30) and the Solicitor's Subsequent Comment Concerning the Evidence of the Shooting in Closing Argument Renders the Prior Limitation on Cross-examination Harmless Error and Failure to Present Rivers after As Non-prejudicial under Strickland.***

Any exclusion of the proffered evidence through cross-examination of Rivers and Brown that Rivers was the triggerperson in the shooting and attempted armed robbery of "Chopper" Townsend was not prejudicial under the Sixth Amendment because similar evidence was actually admitted within the admitted statement of the Petitioner in the State's case. This evidence from the Deleston statement (State Exhibit 30) was directly commented upon by the Solicitor in her closing statement to the jury. For this initial reason, the complaint about the earlier exclusion of similar evidence issue must be dismissed where the similar information was presented to the jury later.

At the conclusion of the case, Defense counsel Pennington did not make this specific request at trial after the evidence was introduced through their client's statement based upon the

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commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); *id.* at 341, 748 S.E.2d at 206 ("The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)."); Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534 ("[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." (emphasis added)); Cope, 405 S.C. at 339, 748 S.E.2d at 205-06 (addressing a similar due process argument in which the appellant relied on Holmes v. South Carolina, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from Holmes; holding "[i]t was not the strength of the State's case that led to exclusion of evidence of [the alleged guilty third party's] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible").

State v. Deleston, No. 2013-002224, 2016 WL 526592, at \*1 (S.C. Ct. App. Feb. 10, 2016)

state opening the door under Rule 611, instead merely restating the motion. R.p. 769-770. [As noted below, the evolving defense strategy in not recalling Rivers or Brown may be evident because it would have only further emphasized Deleston's involvement and knowledge of the earlier violent crime and the foreseeability of the Lion shooting potential, where Rivers's earlier weapon possession was now before the jury based upon Deleston's own interpretation of that incident through his statement.]. It may be suggested that the defense abandoned the request to cross-examine Rivers and Brown about the Chopper incident after the evidence was presented which opened the door to the glaring evidence within the statement. No specific defense objection or request was made concerning the earlier denial throughout the remainder of the trial.

*M*  
*§ 22*

**1. Deleston's Admitted Statement About the "Chopper" Shooting by Rivers**

Prior to the conclusion of the state's case in chief, the State introduced State Exhibit 30, a videotape of the July 30, 2012 evening session of the interrogation of Ryan Deleston. At the 9:33:40 portion of Exhibit 30, Deleston brings up about another robbery they did, but he claimed he did not participate in where they shot a drug dealer named Chopper. At the 9:45 PM portion of the tape, it reflects that Detective Osborne asks Deleston what he knows about the Chopper shooting. Deleston then tells Detective Osborne that Chopper was a big drug dealer and that he had stopped selling to them so they got someone else to call him. According to Deleston, Julius Brown, Bryan Rivers, George Brown and Valentino "Tino" Heyward jumped in the truck to go do the "lick." Deleston stated that they returned with money, dope and Chopper's cell phone. Deleston stated he heard that Rivers (Lil B) had shot Chopper. He said they had two guns with them that they put out beside the house. Deleston says that Tino and Lil B actually did lick while Julius and George stayed in car. Deleston says one of the guns was the murder weapon and other



was a 45. Deleston stated that they got about 5 grand and 2 cookies in robbery. R.p. 766- p. 767, Tr.p. 1036- p. 1037. State Exhibit 30 (9:30 – 9:50).

**2. Solicitor Wilson's Closing Comments Concerning Rivers Shooting of Chopper.**

Solicitor Wilson commented upon the "Chopper" shooting in her closing argument. In particular, Solicitor Wilson stated:

Foreseeability? Y'all might not have caught this, or -- or thought about why it was so important to this case when you were watching those three and four hours of the Defendant's statement. Towards the end, just this morning, when Detective Osborne comes in, he tells Deleston, I want to talk to you about some other things, some other crimes. And he starts going through and asking him about other instances. And some of them Deleston said, I don't know anything about. You might remember the one he did know something about or he claimed to. The shooting of a guy named Chopper. Remember that? He says Bryan Rivers shot a guy named Chopper with the murder weapon. Okay.

So Bryan Rivers is now alleged to have shot someone with a murder weapon. He knows about it, and he goes to an armed robbery with it? He buys into robbing Joe's, he helps out in attempting to rob Marley, and he's going to say it's an accident, it wasn't foreseeable?

R.p. 781, l. 3-21, Tr.p. 1064, l. 3-21. (emphasis added). See State Exhibits 29 and 30. (Statements of Deleston); R.p. 766-767, Tr.p. 1036-1037.

**3. Sixth Amendment Prejudice not shown when similar evidence is admitted.**

In order for this Court to grant post-conviction relief, prejudice must be shown. Strickland v. Washington, supra. Here, we submit that had counsel Pennington introduced further cross-examined Rivers that there is no reasonable probability that the result of the proceeding would have been different. Because the admitted State Exhibit 30 (Petitioner's statement) included his assertion that Rivers shot Chopper with the murder weapon - the information he sought to develop through the cross-examination of Rivers and Brown - any exclusion or limitation on the cross-examination is harmless and without Sixth Amendment

prejudice. Its earlier exclusion was not prejudicial because it would be cumulative to other evidence that was ultimately admitted. The earlier limitation on cross-examination does not warrant a new trial.<sup>4</sup>

#### HOW THE ISSUE WAS INITIALLY RAISED AT TRIAL

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Prior to the trial, on October 7, 2013, the State made a written motion *in limine* regarding excluding from the record evidence that Bryan Rivers shot Leroy "Chopper" Townsend two weeks earlier the same weapon used in the Marley Lion killing as inadmissible under Rule 404(b) and third party guilt. R.p. 3, Tr.p. 124. See *Motion In Limine Re: Reverse 404(B) Evidence by State*. R. p. 866-873. The defense had made a companion "Motion to Reveal" Rule 404(b) Evidence to determine what information about Appellant's past criminal acts the state intended to use on October 1, 2013. R. p. 3, Tr. p. 124. *Motion to Reveal*. R. p. 874-876. On October 7, 2013, the defense filed a "*Defense's Response to the State's Motion in Limine Re: Reverse 404(B), SCRE Evidence*." R. p. 877-890.

In the state's motion in *limine*, the State initially sought to prohibit the Appellant from

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<sup>4</sup> It is unclear from the record why the defense did not specifically seek to have Rivers or Julius Brown recalled to further inquire as to the "Chopper" shooting specifically based on the admission of the Petitioner's statements. Perhaps defense counsel, aware of the fact that the admission of this part of Petitioner's statement likely "opened the door" to allow the further development of the evidence within the State's case and would allow witnesses to be recalled within the State's case or presented within the defense case in chief, the defense did not want to lose the right to make the final statement in closing argument. When a defendant in a criminal case offers no evidence, he is entitled to the final closing argument to the jury. State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397, 398 (Cl.App.2005); State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) (citing State v. Gellis, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930)). However, rather than seek to re-open the state's case based upon the statement, immediately after State Exhibit 30 is played and the state closes its case, counsel Pennington merely renewed his motion about the inability to cross-examine witnesses in relation to the prior shooting by Bryan Rivers of Chopper without even mentioning or arguing that the similar evidence was presented in Petitioner's statement. R.p. 768, l. 24- p. 769, l. 6, Tr.p. 1038, l. 24- p. 1039, l. 6. Judge Harrington denied the motion. R.p. 770, l. 1-25, Tr.p. 1040, l. 1-25. At that point the defense rested its case without further presentation of any witnesses.

offering remote and irrelevant testimony regarding Bryan Rivers's use of a murder weapon during an armed robbery two weeks before the murder of Marley Lion. The motion urged that Appellant would not be prejudiced by the exclusion because it anticipated that Bryan Rivers would admit that he used and possessed the weapon within hours of the shooting of Lion's.<sup>5</sup>

In the pretrial motion, the State declared that the anticipated facts of the case as follow:

During the early morning hours of July 16, 2012, Bryan Rivers, Julius Brown, Appellant Ryan Deleston and others left Defendant's house in the Ardmore area to find someone to rob. They made their way downtown where George Brown's gun was used by Rivers and Defendant to rob a couple walking near Rutledge Avenue. The two stole the woman's purse but did not get any cash. The crew left downtown and discussed robbing the Famous Joe's bar in the West Ashley area of Charleston County. As they approached Ardmore, they pulled through the Famous Joe's and continued to discuss the Famous Joe's robbery.

Shortly before 4 AM, Defendant, Rivers and Julius Brown walked down the street with plans to rob Famous Joe's employees as they left the bar with money. They were staking-out the area as Marley Lion pulled into the parking lot of Famous Joe's. Lion was concerned that he had too much to drink so he parked his white Nissan Pathfinder and climbed into the backseat to "sleep it off."

Within 10 minutes of Marley's climbing in the backseat, a surveillance video shows Julius Brown walking at a fast pace by Marley's car in the parking lot. The video shows that approximately 12 minutes later, Defendant approached the car and appeared to attempt to open the door to the backseat. When Marley's car alarm sounded, Defendant backed out of camera view for several seconds then re-approached the car and began shooting. In all, he struck Marley 5 of the 6 times he shot at Marley.

An investigation ensued and Defendant, Rivers and Julius Brown were developed as suspects. An undercover operation secured the purchase of the murder weapon from the Defendant. As a result of the undercover operation, George Brown gave information that Julius Brown, Rivers and Appellant were involved in Marley's murder. Upon his arrest, Defendant gave a statement implicating Julius Brown, Rivers and himself-- though he claimed Rivers was the trigger man. Since their own guilty pleas, Julius Brown and Rivers have confirmed their own involvement in the attempted armed robbery of Marley Lion after the Joe's plan fell through. They confirm that the Defendant shot Marley Lion using George Brown's firearm. Julius Brown and Rivers also admitted their involvement in the robbery of the couple downtown. According to both of them, Rivers used the same George Brown firearm that later was used to kill Lion.

<sup>5</sup> At trial, Rivers did in fact testify and he confirmed that he had the murder weapon earlier that night when they robbed the couple. R.p. 259, l. 6- p. 262, l. 18, Tr.p. 479, l. 6- p. 482, l. 18. ("I had the gun").

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 1-3. R. p. 866-868.

Pertinent to this question, the prosecution pointed to the "Chopper" shooting evidence that they initially sought to exclude:

Julius Brown, George Brown and Rivers also revealed that the Marley Lion murder weapon was used on June 1, 2012, by Rivers and another man (Valentino Heyward) when they robbed and shot Leroy "Chopper" Townsend. Chopper survived. According to all of them, Chopper is a drug dealer who they knew would have cash. Furthermore, Rivers had disliked Chopper for years. They rode with George Brown in his SUV to an area where they had created a ruse in which Chopper believed he was meeting someone to buy drugs at an apartment. When Chopper came out of the apartment, Rivers and Heyward robbed him of \$1300 and Rivers shot Chopper with George Brown's gun.

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 1-3. R. p. 866-868.

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#26  
In the motion, the prosecution relied up the recent decision in *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) in which the defense attempted to put in evidence other crimes committed by James Sanders to support an assertion the Sanders had acted alone in the instant case without Cope. The Court concluded the trial judge was correct in excluding the evidence because they were not similar enough to the charged crime. As noted in *Cope*, "a close degree of similarity is required."

In their initial analysis as to why the "Chopper" shooting should be excluded, the prosecution's motion asserted that the Chopper robbery did not fall within the *State v. Lyle* exceptions of motive, identity, common scheme, the absence of mistake or accident or intent. The state asserted that the defense had no need to show these items because "[P]roving that Bryan Rivers used the murder weapon a full two-weeks prior does not prove his identity as the shooter, and the facts of the two cases are so wildly different that there is no common scheme or plan and it does not establish identity (it is not a "signature" crime)." *State's Motion in Limine Re Reverse 404(B) Evidence*, p. 5. R. p. 870. Although it conceded that the evidence of the

Chopper shooting was clear and convincing, its probative value was outweighed by the prejudicial effect. As the State asserted (and showed), the defense was able to show that Bryan Rivers used the murder weapon in an armed robbery downtown Charleston within hours of Lion's murder which was part of the *res gestae* of the Lion killing. In their motion the State asserted that the temporal proximity of the various crimes was critical:

The State's and Defendant's evidence will also show that the murder weapon actually belonged to George Brown. Others' access to the murder weapon will be obvious throughout the trial. The real and obvious reason that the Defendant seeks to introduce the robbery and shooting of Chopper is an attempt to prove that Rivers' acted in "conformity therewith" and, therefore, must have killed Marley Lion. This use of other bad acts is strictly prohibited by the Rule, even if offered in exculpation by a Defendant. The admission of this evidence is highly prejudicial to the state and the victim in this case and under Rule 403, SCRE, the evidence should be excluded.

27- State's Motion in Limine Re Reverse 404(B) Evidence, p. 6. R. p. 871. The prosecution asserted that the evidence was remote in time and would only cast clumsy aspersions that Rivers was the triggerperson. As stated therein, Deleston was not prejudiced by the exclusion of the Chopper shooting because there will be ample testimony that the gun did not belong to Appellant and others had ample access to the gun, including by Rivers during the robbery hours earlier.

In the motion, consistent with Cope, the State attached a summary of the similarities and differences between the crimes. *State's Motion in Limine Re Reverse 404(B) Evidence*, p. 8. R. p. 873.

| DATE: June 1                           | Chopper Shooting | Marley Lion's murder |
|----------------------------------------|------------------|----------------------|
| Targeted victim                        | X                |                      |
| Victim Known to Assailants             | X                |                      |
| "Bad Blood" with victim                | X                |                      |
| Victim b/m 30 yoa                      | X                |                      |
| Victim shot once creating minor injury | X                |                      |
| Victim forced to strip                 | X                |                      |
| Victim robbed of \$1300                | X                |                      |
| Assailants Driven to Crime             | X                |                      |

|                                                      |   |   |
|------------------------------------------------------|---|---|
| scene                                                |   |   |
| Partner in Robbery. Valentino Heyward                | X |   |
| Shooting at Apartment complex                        | X |   |
| Shooting not in Ardmore                              | X |   |
| Shooting early-mid evening approx. 9:30 pm           | X |   |
| George Brown's gun used                              | X | X |
| DATE: JUNE 16                                        |   | X |
| Victim of Circumstance                               |   | X |
| Victim unknown to assailants                         |   | X |
| No bad blood with victim                             |   | X |
| Victim W/M 17 yoa                                    |   | X |
| Victim shot 5 times fatally                          |   | X |
| Victim not actually robbed                           |   | X |
| Assailants walked to Crime Scene                     |   | X |
| Partners in Att. Robbery : Deleston and Julius Brown |   | X |
| Shooting in Parking lot businesses                   |   | X |
| Shooting in Ardmore                                  |   | X |
| Shooting in early morning hours                      |   | X |

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 8. R.p. 873.<sup>6</sup>

<sup>6</sup> The defense responded to the motion on October 7, 2013. He contended that the evidence was admissible as "third party guilt" as well as Rule 404(b). He contends that the admission of the Chopper shooting showed facts "inconsistent with [the defendant's] own guilt . . . and raises a reasonable inference or presumption as to . . . a defendant's own innocence", citing *State v. Gregory, supra. Defense Response to State Motion*, p. 3. R.p. 879. He contends that other crime standard for third party guilt should be a lower standard for admissibility. *Defense Response to State Motion*, p. 3. R.p. 879. The defense asserted that it must be reversible error to exclude evidence that Bryan Rivers was serially committing similar crimes at the time of the offense at issue in participated in the offense. *Defense Response to State Motion*, p. 6-7. R. p. 882-883. The defense further asserted that there was a sufficient similarity between the Chopper shooting and the liens shooting where he contends that the crimes were plan by the same individuals that there was a common plan to rob an individual which was executed under their theory by Bryan Rivers in the same manner to rob an individual at gunpoint and with the same weapon during the

### The Motion Hearing

During the preliminary motions before Judge Harrington, the State made its argument as to why the potential evidence should be excluded consistent with their motion. R.p. 3- 6, Tr.p. 124-127. Solicitor Wilson noted the argument was undercut by the fact that Rivers used the gun an hour before the Lions shooting. R.p. 4, Tr.p. 125. The solicitor argued that if there is a need to show that someone else had used the murder weapon other than Deleston, the Defense has an armed robbery that occurred about one hour prior to the shooting using the same weapon. The solicitor claimed the two shootings were nothing alike. She stated that Chopper was someone who was known by Bryan Rivers and the other codefendants. She asserted that they had set out to rob Chopper whereas "Marley Lion just happened to be in the wrong place and the wrong time" and were not the "intended target." She contend that George Brown drove the men to the Chopper shooting while the men walked to Famous Joe's the night of the Marley Lion shooting. [R.p. 5, ll 1-20, Tr. 126, 11. 1-20.]. Additionally, the solicitor claims that the evidence is more prejudicial than it is probative. She opined that was not probative because it was nothing like the shooting of Marley Lion. [R.p. 5, l. 21 - p. 6, l. 1., Tr. 126, l. 21 - p. 127, l. 1.].

The defense contended that this does not reach the *Lyle* analysis because it is evidence of 3<sup>rd</sup> party guilt. They asserted that the evidence of the Chopper shooting was evidence that somebody else use this weapon in the very same manner as it was used in the lions shooting and that it showed that somebody else was the shooter in the Lion murder as third party guilt evidence. Ignoring "the hand of one hand of all" theory of the State, the defense urged that he

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nighttime. The appellant further asserted in the motion that the two-week time difference does not preclude admission of other act evidence under *Lyle*. He contends that the admission of evidence of Rivers' other crimes is relevant evidence of intent and the identity of the person who really shot Lion's. He asserts that they passage of a mere 2 weeks did not make the June 1 shooting so remote to preclude them from being a common plan or scheme. Finally he contends that unlike *Cope*, the evidence was not being offered against a codefendant's rights on trial were trying to be protected. *Defense Response to State Motion*, p. 6-7. R.p. 882-883.

should be entitled to present a defense because he did not do this and that somebody else was the triggerman. R.p. 6, Tr.p. 127. The defense opined that the evidence was probative that somebody else committed the murder, did not prejudice anyone and was only probative of Deleston's innocence. He additionally contended that due process should allow him to present a defense saying that he was not the shooter and that it is more likely than not that Bryan was the shooter due to the earlier incident.

Ms. 30.  
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Solicitor Wilson responded that you have to look at the relevance of their request and that just because another armed robbery took place 2 weeks before does not automatically make it probative in this particular case. She pointed out that in the June 1 shooting the evidence would be that Chopper was called on the telephone told to be at a certain place under the ruse of buying drugs and there he was ambushed, robbed, and shot. She noted this is nothing like the shooting of Marley. It was her contention that under the defense analysis every armed robbery would involve a plan to hold someone at gunpoint, which is what armed robbery is, and that is not a sufficient similarity to allow the admission. However, the defendant cannot be prejudiced when there will evidence that the crimes that night began with a gun in Bryan Rivers' hand committing an armed robbery before Marley Lion attempted robbery. R.p. 11, Tr.p. 132. See also, R.p. 12-16, Tr.p. 133-137.

### **The Trial Court's Rulings.**

Judge Harrington ruled to exclude the admission of the Chopper shooting by the defense. In its pertinent part, she stated in denying the admission under Rule 404(b):

Rivers' armed robbery and the shooting of Leroy "Chopper" Townsend and the Marley Lion attempted armed robbery and shooting are not sufficiently similar, based upon the testimony that has been presented, to prove a common scheme or plan. The Chopper shooting involved a victim that was known and



targeted by the assailants. The assailants created a ruse to lure him out of his apartment.

The Marley Lion shooting involved a victim of circumstance who was unknown to the assailants. While there was bad blood, according to testimony, of the chart that was given, between the victim and the assailants, there was no bad blood between the victim and the assailants in the Marley Lion murder.

The victim in the Chopper shooting was a 30-year-old African male, while Marley Lion was a 17-year-old white male. In the Chopper shooting, the victim was shot once, was forced to strip and received a minor injury. Marley Lion was shot five times fatally. In the Chopper shooting, they were driven to the crime scene.

In the current case, the assailants walked to the crime scene. And Rivers' partner in Rodney Chopper was Valentino Hayward. Other partners in the attempted robbery of Marley Lion's were Rivers, Deleston, and Brown. Finally, the Chopper shooting occurred at 9:30 at an apartment complex. Marley Lion was killed at approximately 4:00 a.m. in the parking lot of a business.

The similarities between the two shootings and the fact that the gun used belonged to George Brown, and that Rivers was present at that crime scene, accordingly, Rivers' prior bad act of shooting Chopper is not sufficiently similar to the shooting of Marley Lion to qualify for the common scheme or plan under Rule 404(b).

R.p. 21, l. 15- p. 22, l. 24, Tr.p. 211, l. 15- p. 212, l. 24.<sup>7</sup>

Judge Harrington next addressed the issue concerning excluding the evidence under third party guilt.

As to the issue involving third-party guilt, the rule governing the admissibility of the evidence under third-party guilt doctrine provides that evidence offered by the accused as to the commission of the crime by another

<sup>7</sup> Solicitor Wilson clarified that George Brown drove Deleston, Julius Brown and Rivers to the apartment complex where the Chopper shooting took place, along with Valentino Heyward. She stated that Tino and Rivers were the ones that actually did the robbery of Chopper and Rivers is actually the man who shot Chopper. R.p. 24, l. 1-10, Tr.p. 214, l. 1-10. Further, Solicitor Wilson clarified that in the Lion case, an hour before the (Lion) robbery, an attempted robbery, George Brown drove the perpetrators through a parking lot and they went home. Brown's truck stayed at the location. At some point after that the Appellant, Bryan Rivers, and Julius Brown discussed looking for people to rob and then walked the third of a mile down to Joe's where Marley interrupted the employees leaving. Solicitor Wilson clarifies that this meant George Brown did not drive anyone to the Lion robbery, unlike the Chopper case when he did drive them to the apartment. R.p. 24, l. 1-24, Tr.p. 214, l. 1-24.

person must be limited to such facts that are inconsistent with his own guilt and to such facts as raise a reasonable inference of presumption as to his own innocence. Evidence that has no other fact other than to cast a suspicion upon another or to raise a conjectural inference as to the commission of the crime is not admissible. The evidence of third-party guilt may include facts that are inconsistent with the Defendant's guilt and evidence raising a reasonable inference as to the accused innocent.

The evidence, again, to be sought by the Defendant's Motion to -- to Include Third-Party Guilt Evidence does not pass the same for admissibility. The evidence in question exceeds the scope of the facts that are inconsistent with his own guilt. It does not pertain to the commission of the crime currently before this Court or the Defendants involved in it whatsoever.

Despite his contention that -- despite Deleston's contention that Bryan Rivers was the shooter and that Bryan Rivers used the same weapon used in the submission of the crime currently before this Court, I do not find that the Defendant states a sufficient factual basis to cast more than a mere suspicion upon a third party. I find that the introduction of this evidence would also amount to solely a conjectural inference as to commission of a crime by third party.

And I find that the evidence sought to be admitted is inadmissible as it pertains to the third-party guilt of Bryan Rivers. Again, noting your exception to my ruling.

R.p. 26, l. 7 -- p. 27, l. 16, Tr.p. 216, l. 7 -- p. 217, l. 16.

The next morning, the defense pursued a ruling on the exclusion of the Chopper evidence under their due process argument. Counsel Pennington noted that in their response to the State's motion, they had also included a chart purporting to show similarities in the two crimes. R.p. 28-29, Tr.p. 224-225. Counsel Pennington noted that Rivers would testify that he was the shooter in the June 1 incident and that it is the same gun that was used by him later on the night of this incident against two victims. He contended that this supports identity and intent and is consistent with targeting individuals in the nighttime at gunpoint.

Judge Harrington opined that the Appellant's due process arguments were addressed in her earlier orders. R.p. 30-31, Tr.p. 226-227.

### The Trial Evidence Concerning "Chopper" Townsend's Shooting

During the trial, further discussion occurred about the Chopper incident prior to the testimony of Julius Brown. The State made a court exhibit the full incident report about the Chopper shooting. Court Exhibit 5. The State called Julius Brown in camera who testified concerning the Chopper shooting. R.p. 125-143, Tr.p. 329-347. In direct, he testified that Julius Brown, Rayshawn Milligan, Ryan Deleston, George Brown and Valentino went to where Chopper was. R.p. 125-126, Tr.p. 329-330. He stated that Chopper was a drug dealer known by Rivers and the witness and had bought drugs from him before. R.p. 126, Tr.p. 330. Julius recalled that George Brown drove them to Andrews Garden Apartments. He was aware that they decided they were going to rob Chopper that day. Valentino in Bryan Rivers was supposed to do the robbery. Julius Brown stated that George, Rayshawn and Deleston stayed in the truck and could not see the robbery take place. After they had let out Tino and Bryan Rivers, he next saw them running from the apartment and got in the car with them. Julius Brown testified that around \$1300 was taken from Chopper and the six of them split it up between them. R.p. 129-130, Tr.p. 333-334. Julius Brown testified that he did not see who shot Chopper. R.p. 130, Tr.p. 334.

During the *in camera* cross-examination, Julius Brown testified that he had not been charged with the robbery of LeRoy Townsend. He stated that it was something that was planned and agreed that Deleston actually knew there were going over the Saint Andrews Garden Apartments to commit a robbery. R.p. 138, l. 17-19, Tr.p. 342, l. 17-19. He stated that when Rivers and Tino got out they were carrying the same pistol that was later used to shoot Marley Lion. R.p. 139, Tr.p. 343. He also stated that it was in the nighttime and that they had approached Mr. Townsend on foot with the plan to rob him at gunpoint. He described Bryan and

Tino returning to the Shires where they had parked and initially ran past the truck because the police had come through. R.p. 141, Tr.p. 345. He stated the plan was always that they would provide the transportation, which they did. R.p. 143, Tr.p. 347.<sup>8</sup>

During Julius Brown's trial testimony before the jury, he confirmed that that they had agreed to "hit a lick" and drove in George's car with Bryan Rivers and Ryan Deleston in the backseat (on the night of Marley's shooting). R.p. 173, Tr. 378. He stated that they had George Brown's gun to use which they carried around often. R.p. 173, Tr.p. 378. He stated that they spotted a boy and girl who were walking. He stated that Rivers and Deleston got out and Bryan had the gun. R.p. 175, Tr.p. 380. He saw Bryan Rivers point the gun and get the pocketbook from the couple. R.p. 175-176, Tr.p. 380-381. At that time he said while Bryan ran back to the

<sup>8</sup> Solicitor Wilson stated that she did not have anything further to add to the arguments other than if the court were to reconsider its position, this witness does not have enough facts about the shooting itself independently about who shot. R.p. 143, l. 17-23, Tr.p. 347, l. 17-23.

Counsel Pennington stated that he understood Bryan Rivers would be called that afternoon. He stated that he desired to cross-examine Rivers about an interview with Detective Osborne when Rivers was asked about his involvement in the robbery at St. Andrews Garden Apartments with Tino. Pennington stated that Rivers denied involvement, which was not truthful. Counsel Pennington stated he sought to use that to show when Rivers needed to rely he knew how to lie. He also stated that with regards to a follow-up conversation that Rivers had on July 30 and 31, he admitted that on June 1 he rode along with a preplanned robbery of Mr. Townsend, that he got \$1300 in cash and drugs, that he used the Marley Lion murder weapon to rob Townsend, that he shot Townsend in the leg, that it was George Brown's gun, that is not been charged with this arm robbery pursuant to his proffer agreement, and that he is also not been charged with attempted armed robbery pursuant to the agreement. R.p. 145, l. 1-11, Tr.p. 349, l. 1-11.

Solicitor Wilson stated that she took issue with the assertion that Rivers not being charged with the Chopper shooting was not pursuant to any agreement with the Solicitor's office. She stated that their agreement was only that they could not use Rivers words against him and that they could make a case from other folks against them and that he does not have immunity from that prosecution. R.p. 145, Tr.p. 349. See also, R.p. 243-244, Tr.p. 451-452. Solicitor Wilson reaffirmed that even the limited testimony of Julius Brown shows the stark difference between the Chopper shooting and the Lion shooting. R.p. 146, Tr.p. 350. Counsel Pennington renewed his objection concerning the Chopper shooting proffer. R.p. 146-147, Tr.p. 350-351.

car, Deleston walked the other way and they met Deleston at McDonalds after he called George to pick him up there. R.p. 176, Tr.p. 381.<sup>9</sup>

He stated that next plan was to rob Famous Joe's, which the appellant had discussed robbing before. Julius testified that they drove through the parking area and then Julius told Ryan he did not think it was a good idea. R.p. 179, Tr.p. 384. Julius Brown said the gun was under the driver's side mat after Bryan gave it to George. Julius testified that when they got back to Cashew, Deleston wanted to go back and check out Famous Joe's again. Julius stated that he was to be the lookout in the wonder robbed them was going to be the appellant. R.p.181, Tr. p. 386. Julius recalled the George gave the list and the gun before they left and he put it inside his pants on his hip. R.p. 181, l. 12-13, Tr.p. 386, l. 12-13. He stated that he walked down to Famous Joe's with Rivers and the appellant. The plan was to wait for the people inside Joe's to come out with the moneybag. He stated that Rivers role was also to be a lookout. R.p.182, Tr.p. 387.

Julius testified there was a discussion and a decision was made to change the plan after Marley Lion pulled up into the area. He said Deleston was going to try to see what Marley had. R.p. 183-184, Tr.p. 388-389. He stated that he later then saw Deleston and Bryan discussing who was going to do what and passing the gun back and forth. R.p. 187-188, Tr.p. 392-393. Julius testified that he then saw Deleston approach Marley's truck and tell him to open the door and

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<sup>9</sup> Chris McLandish testified about the initial robbery on Rutledge Avenue. R.p. 700-712, Tr.p. 953-965. He described walking with his girlfriend on June 16 between 2:45 AM and 3:00 AM. He stated that they heard a man behind them and then the person came in front of them with a gun. He testified he pointed the gun at him and that they only saw one man. He stated that after his girlfriend gave the purse to him the man ran off to the right and he heard a car door but did not see anything. R.p.702-704, Tr. 955-957. See also R.p. 707, Tr. 960. He confirmed that he only saw one person attempting to rob him. R.p. 711, Tr. 964.

Marley set off the alarm, which caused him to run back. At that time Julius testified he told the appellant to "bust the window" and Deleston turned back around and started shooting. R.p. 188, Tr.p. 393. He stated after the appellant shot five times he took off running. R.p. 189, Tr.p. 394. When they got back to Cashew Street, both Julius and Rivers cursed at Deleston for shooting for nothing. Deleston stated that he thought Julius had told him to shoot. R.p. 192, Tr.p. 397. Julius confirmed that Exhibit 23 was the gun used to kill Marley Lion owned by George Brown and that Deleston had it and that it was used by Bryan Rivers that date to rob the couple. R.p. 212, Tr.p. 417. Julius confirms that on the video he is telling Deleston with the white shoes and striped shirt to bust the window. R.p. 213-214, Tr.p. 418-419.

*M 36-  
#36-* On cross-examination, Julius confirms that Rivers got out with the gun to rob the couple and that Ryan had gone away from the robbery. R.p. 223, Tr.p. 440.

At the conclusion of the cross-examination, counsel Pennington renewed his request to go further, implicitly concerning the Chopper case. The court denied the motion. R.p. 240, Tr.p. 447. There was a further discussion about no further need to proffer Rivers testimony concerning the Chopper incident. R.p. 243-244, Tr.p. 451-452.

Bryan Rivers testified about his involvement in the couple's robbery and the Marley Lion incident. He stated he was involved in the shooting of Marley Lion with Julius Brown, George Brown and Ryan Deleston. R.p. 246-247, Tr.p. 466-467. He testified that he pled guilty to voluntary manslaughter for the killing of Marley Lion because the hand of one is a hand of all. R.p. 255, Tr.p. 475. He testifies on that night that he went downtown with Deleston, Julius, George, and Rayshawn looking for robberies to be done with George Brown's gun. He stated that he had seen a couple that looked like they had been drinking which would be a good target.

He thought George spotted them first and they pulled over in part. He stated that George gave him the gun and that he and Deleston got out. Although the appellant was supposed to help him, Rivers thought he did not help him and that he walked the other way. Rivers stated that he approach the couple and held them at gunpoint and the female victim gave her purse to him. R.p. 260-261, Tr.p. 480-481.

He stated that he later picked up the appellant when they ran into him at McDonalds. R.p. 263, Tr.p. 483. Then, they drove around and scoped out the scene at Famous Joe's parking lot. Rivers stated that everybody was planning to rob the people coming out of Joe's. R.p. 264, l. 9-11, Tr.p. 484, l. 9-11. He stated in on this planning was himself, Deleston, Julius and George. Because they did not see anybody in the parking lot, Rivers thought that gave them the idea to continue with the robbery. R.p. 265, Tr.p. 485. They returned to Cashew Street and then Rivers left with Deleston and Julius. R.p. 265, Tr.p. 485. Rivers stated that they walked and that Deleston had the gun he had gotten from George Brown. R.p. 266, Tr.p. 486. Rivers stated that after the earlier robbery, he had given the gun back to George Brown. He saw that Deleston had the gun before they left for Famous Joe's because he tucked it under waistline. R.p. 267, Tr.p. 487. Deleston had on a striped shirt. R.p. 267, l. 2-22, Tr.p. 487, l. 2-22.

Rivers stated he saw Marley Lion pull up while the employees were leaving. R.p. 269, Tr.p. 489. The big fish money was leaving according to Rivers. He stated that Julius check out the scene while Deleston had the gun. Rivers stated that Deleston tried to pass the gun to him, but he pushed it back. R.p. 270-271, Tr.p. 490-491. Also R.p. 309-310, Tr.p. 529-530. He said his attention was not to rob the boy, but to get the person with the bag coming out of Joe's. R.p. 270-271, Tr.p. 490-491. He told Deleston to go ahead. R.p. 271; R.p. 310, Tr.p. 491; Tr.p. 530. ("to rob Marley Lion"). He described Deleston walking up to the window and knocking on it

and the alarm went off. R.p. 271, Tr.p. 491. Deleston then initially ran back towards them and Rivers heard Julius say "get him" to continue with the robbery, but not as to shot the man. R.p. 272, Tr.p. 492. However, instead of robbing the man, the appellant started shooting the man about 5 times. Rivers stated he knew that the appellant hit him because the way the victim was yelling and screaming. At that point he turned and started running. He also thought the appellant turned and start running also and caught up with them. On the way back Deleston hid the gun under a pool. R.p. 274, Tr.p. 494. Rivers confirmed to this on the video of the crime scene. R.p. 282-283, Tr. 502-503. Rivers admitted that he was wearing all black and testified that Appellant was wearing a striped shirt and white sneakers called Willic Dee's. [R.p. 261, ll. 9-12; Tr. 267, ll. 1-17, Tr. 481, ll. 9-12; Tr. 487, ll. 1-17.]

On cross-examination, Rivers confirmed he had the weapon earlier that night and robbed the woman of her purse. R.p. 293, Tr. 513. As to the second robbery, Rivers testified that he did not know the appellant was going to do something like that. R.p. 297, Tr. 517.

At the conclusion of Rivers's examination, counsel Pennington renewed his motion pursuant to the motion *in limine*. R.p. 308-309, Tr. 528-529.<sup>10</sup>

<sup>10</sup> George Brown, the gun owner, testified consistently with Julius and Rivers. He testified that during the first robbery that he had the gun in his vehicle and gave it to Rivers. R.p. 457, Tr.p. 686. After the robbery of the couple, Rivers returned with the purse. He stated that Deleston had gotten out with Rivers, but they had split up. He said Deleston called him on his cellphone and they picked him up at the McDonald's. R.p. 458-459, Tr.p. 687-688. After they returned to Cashew Street after casing out Famous Joe's, George stated he did not want to be part of robbing Joe's. However, he stated that Rivers had returned the gun to him after the first robbery, but gave it to Deleston who put it in his waistband when he left. R.p. 462-463, Tr.p. 691-692. He saw Deleston, Rivers and Julius leave. When they returned, they were made with Deleston. R.p. 463-464, Tr.p. 692-693. George stated he did not know what happened but gleaned that Ryan had shot someone because he came back and washed his hands. R.p. 465, Tr.p. 694. George learned the next day that someone had been killed from the news. R.p. 467, Tr.p. 696. When he viewed the footage, George Brown identifies Deleston as the shooter from



The state subsequently introduced the video of the Appellant's statements the next day, reflecting a change in strategy. On the day of his arrest, Appellant was interviewed twice. In the morning interview, he denied involvement in the crime. State Exhibit 29 (9:48-9:54, 10:59 - 11:03, 2:19-2:20, 2:49). In the evening interview, State Exhibit 30, he initially named "Tino" as the perpetrator. State Exhibit 30 (8:00:12). Subsequently, in the interview, he named Bryan Rivers as the person who shot Marley Lion. State Exhibit 30 (8:16:25). He admits being with Rivers and Julius and described how it occurred. State Exhibit 30 (8:16 - 8:30). He claimed that Julius and Rivers were the ones who went up to rob the employees of Famous Joe's but then decided to rob Marley. He "identified Julius Brown as the person walking across in front of . . . Marley Lion's vehicle, and said that Bryan Rivers had the firearm and went up to the vehicle and shot into the vehicle." R.p. 756, l. 23- p. 759, l. 1, Tr. 1010, l. 23 - p. 1013, l. 1. State Exhibit 30. Deleston also stated at some point during the event at Joe's, Rivers gave the gun to him and wanted him to go up to the car but he did not want any part of it and gave the gun back to Rivers. State Exhibit 30 (8:17 - 8:30).

At the conclusion of the state's case, counsel Pennington renewed his motion to thoroughly cross-examine witnesses in relation to the prior shooting of Chopper, although never mentioning similar evidence had been presented through the statement, nor rely upon SCRE Rule 611. R.p. 769, l. 4-6, Tr.p. 1039, l. 4-6. The Court denied the motion asserting that it had heard nothing to change its ruling. R.p. 770, Tr.p. 1040.

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the video he viewed. R.p. 467-468, Tr. p. 696-697. He described the person as wearing the clothes that appellant had on that day and he had the physical characteristics of Deleston, as opposed to Rivers (too skinny). R.p. 468-469, Tr.p. 697-698. State Exhibit 1 (Video). R.p. 469, l. 9-10, Tr.p. 698, l. 9-10. Detective Osborne testifies that Deleston fit the description of the shooting on the video, not Julius or Rivers. R.p. 611-615, Tr.p. 857-861. State Exhibit 1 (Mantek Video).

In his defense closing argument, counsel Pennington urges the jury to accept that Rivers was the shooter. The factors he points out are that Bryan had the gun that night, he had the gun earlier that day at Shawn Turner's video production and was waving it around,<sup>11</sup> that Rivers was the gunman during the robbery on Rutledge Avenue when Deleston walked away. R.p. 808-809, Tr.p. 1091-1092. He also described the tip that the police had received from Leroy Townsend that Bryan was involved in the shooting. R.p. 812, Tr.p. 1095.<sup>12</sup> In addition, counsel Pennington argued that Appellant was not wearing black or a striped shirt when he is stopped riding the bicycle shortly after the crime. R.p. 813, Tr.p. 1096.<sup>13</sup> However, counsel stated that "we're not disputing that Ryan was out there as a part of a plan to do a robbery of Marley." R.p. 823, Tr.p. 1106, l. 2-4. Counsel also thought a moment of revelation during the examination of Rivers was when the question was asked about what set off the alarm and whether it was set off by Lion. R.p. 825, Tr.p. 1108.<sup>14</sup> Counsel claimed that this proved that he was close enough to see the cell phone light. Id. Counsel further asserted that he indicated that his involvement in trying to hide the pistol. R.p. 826, Tr.p. 1109. Counsel described that the Appellant's statement was what really happened and that it was unforeseeable and did not fit the plan. R.p. 829, Tr.p. 1112. After the verdict, counsel renewed his motions, which were denied. Tr.p. 1148-49.

<sup>11</sup> Bobby Warthaw testified that on the day of the murder, he had been up in Ardmore earlier in the day. Shawn Turner was doing a music video shoot and Bryan Rivers was out there and had pulled the pistol out, waving it around. Rivers was intoxicated & acting a little crazy. R.p. 535-536, Tr.p. 765-766. Accord, R.p. 664, Tr.p. 915 (Det. Osborne testifies about the tip he had received from Warthaw about Rivers waving the gun around at the video shoot).

<sup>12</sup> Two days after the murder, Leroy Townsend contacted police & named Bryan Rivers as a suspect. R.p. 654-655, Tr.p. 905-906.

<sup>13</sup> Officer Vance testified that around 4:20 am., he stopped Deleston for not having a light on his bicycle with another person and that they were both wearing white shirts. R.p. 152, 155-157, Tr.p. 357, 360-362.

<sup>14</sup> See R.p. 271, l. 21-24, Tr.p. 491, l. 21-24.

***Evidence of the "Chopper Shooting" did not pertain to the commission of the crime involving the death of Marley Lion and thus was not admissible under a "third party guilt" theory.***

The third party guilt claim is a "red herring" in this case. Contrary to the bare assertion by the Petitioner, the evidence of the Chopper shooting is not inconsistent with his guilt for the Marley Lion shooting. The additional evidence actually supports the culpability of Deleston in the Lion shooting as being involved in the violent incident with knowledge and foreseeability. A new trial on this claim is without merit. Deleston contends that he was entitled to present the evidence of the Chopper shooting by Rivers as evidence of third party guilt of Rivers in Lion's death.

(M #4) - The foundation of his claim is that the Townsend evidence only suggests that at the Lion crime, only Rivers possessed the weapon rather than Deleston. However, this assertion does not absolve Deleston of his criminal culpability in Lion's death. There was no dispute at the trial that Rivers was involved in the attempted robbery of Lion that led to his death. In fact, Rivers admitted his personal guilt to the jury under hand of one hand of all and that he had pled guilty to the Lion crime. R. 255, Also ROA pp. 246-247, 269-282, 297. Under the state's version, although it could prove that Deleston was the triggerperson in Marley's death, under the theory of "hand of one hand of all," Deleston would have been guilty, even if Rivers shot the weapon because he had been a participant in the crime.<sup>15</sup> In fact, the defense acknowledged in their closing argument that "Ryan was out there as a part of the plan to do a robbery of Marley." R.p. 823, Tr.p. 1106. "Third party guilt" therefore was not at issue in the case. To the contrary, the Petitioner also ignores that as to the Chopper Townsend shooting, Deleston would

<sup>15</sup> During the jury instructions, the jury was advised about "aider and abettor" (R.p. 844, l. 10-17, Tr.p. 1127, l. 10-17), mere presence (R.p. 844, l. 18-23, Tr.p. 1127, l. 18-23), and "the act of one is the act of all." R.p. 845, l. 8- p. 845, l. 2, Tr.p. 1128, l. 8 - p. 1130, l. 2.

have been as guilty as Rivers of the Chopper crime even though he was not the triggerperson but was involved in the planning, went to the scene, and although he remained in the vehicle he shared in the proceeds. As recognized in the Court of Appeals opinion, the rule for the admissibility of evidence of third party guilt comes from State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, our Supreme Court stated:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104-105, 16 S.E.2d at 534-535 (internal citations omitted). In Gregory, the Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. 198 S.C. at 105, 16 S.E.2d at 534. See 20 Am.Jur. Evidence § 265 (1939)); State v. Burgess, 391 S.C. 15, 23, 703 S.E.2d 512, 517 (Ct.App.2010) (accord).

The evidence of Bryan Rivers' involvement with the Chopper shooting coupled with the evidence that he robbed a couple at gunpoint hours before the Marley Lion shooting does not "tend[s] clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot into his car. It ignores the fact that Petitioner was also involved. It ignores the fact that Petitioner conceded in his statement that he was present and aware of the intended robbery. It ignores that fact that proof of earlier possession by Rivers of the weapon is not inconsistent with Petitioner's guilt for the crime of murder. Petitioner failed to show that

there was a clear “train of facts or circumstances” between all three known armed robberies – the Townsend shooting two weeks before, the admitted robbery of the couple by Rivers, and the Lion robbery and shooting on the same date.

Although the similar perpetrators were involved and the same gun used, the Chopper shooting differs greatly from the circumstances surrounding the Marley Lion shooting and the armed robbery of the couple downtown. The shooting of Leroy “Chopper” Townsend was one that was targeted and involved “bad blood.” The armed robbery of the couple downtown and the attempted robbery and shooting of Marley Lion were both acts toward random victims who the codefendants did not know.

✓ The trial court’s holding that the “evidence in question exceeds the scope of the facts that are inconsistent with his [Petitioner’s] own guilt [and] does not pertain to the commission of the crime currently before this Court” was not an abuse of discretion. The evidence of the Chopper would only cast “a mere suspicion upon a third party” and “the introduction of this evidence would . . . amount to solely conjectural inference as to commission of a crime by [a] third party.” [R.p. 26, l. 7- p. 27, l. 16, Tr. 216, l. 7-p. 217, l. 16.]. Under the discrete circumstances of the case where the proffered evidence was not inconsistent with Petitioner’s guilt, a new trial is not warranted.

The Constitution guarantees “a meaningful opportunity to present a complete defense,” Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quotation marks omitted), but “not an unlimited right to ride roughshod over reasonable evidentiary restrictions,” Rockwell v. Yukins, 341 F.3d 507, 512 (6th Cir.2003) (en banc). The right to present a complete defense - including the purported third-party culpability defense raised here - thus does not mean

that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be "arbitrary" or "disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 325–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Here, the defense was allowed to explore the fact that Rivers had possessed the murder weapon prior to the Lion incident. R. p 293. The assertion that Rivers had possessed the murder weapon in an armed robbery immediately prior to the Lion killing was an uncontested fact. R. 260-261. The robbery of the couple just two hours before was documented throughout the trial by evidence from each of the perpetrators – Julius Brown, Bryan Rivers, George Brown, and the victim. R.175-176, 260-61, 457-458, 702-704. In addition, evidence was presented that during the day before the two robberies, Rivers was waving a gun at the video shoot. R. 535-536. Further, Rivers conceded that prior to Lion's killing he had a discussion with Petitioner where they attempted to pass the gun between each, a discussion that was documented within the testimony of Rivers, Julius Brown and Petitioner's own evening statement. R. 270-271. Simply put, the exclusion of the Chopper evidence did not prevent Petitioner from articulating that Rivers had used the weapon in a robbery, a robbery that in fact had close temporal proximity to the Lion crime.

The evidence that Rivers had possessed George Brown's gun two weeks before during a robbery that Deleston was a participant was minimally relevant to prove that Rivers possessed the weapon at the Lion robbery, in light of the more temporally probative evidence supporting that defense theory. The exclusion did not undermine his Deleston's right to present a defense. There was extensive evidence presented about Rivers prior possession of weapons during a robbery before the jury. See United States v. Lucas, 357 F.3d 599, 606–07 (6th Cir.2004)

(exclusion of third party's prior conviction did not violated defendant's right to present a defense where defendant "was able to explore her theory that [another individual] was in fact the culprit" through other evidence). The Court "may exclude marginally relevant evidence and evidence posing an undue risk of confusion of the issues without offending a defendant's constitutional rights." United States v. Alayeto, 628 F.3d 917, 922 (7th Cir.2010) (citing Holmes v. South Carolina, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).

**Any error in the alleged exclusion was not prejudicial under Strickland**

 Evidence about the Chopper robbery and shooting by Rivers was developed in the admitted statement of Deleston the evening of July 30 and commented on by the Solicitor in her argument. Evidence that Rivers possessed the weapon within two hours of the Lion shooting was presented, as well as evidence that Petitioner and Rivers were conferencing with each other at the Lion crime on who would have the weapon. There was overwhelming evidence of Petitioner's criminal participation in the Lion incident through the testimony of Julius Brown, the surveillance videos which identified similarities with Deleston as opposed to the other perpetrators, and portions of Petitioner's own statement where he acknowledged involvement in the Lion attempted robbery.

As noted, the record does not state the reasons why defense counsel Pennington failed to recall Bryan Rivers after the statement was introduced.

Under these discrete circumstances, post-conviction relief is not warranted.

IV.

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Ryan Deleston, #307106,

Applicant,

v.

State of South Carolina,

Respondent.

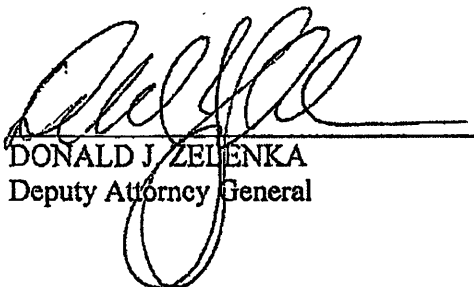
IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-10-4561

## 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 **Amended Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Christopher L. Murphy, Esq.  
 Murphy Law Offices, LLC  
 234 Seven Farms Drive, Suite 128  
 Charleston, SC 29492

DATED this 23<sup>rd</sup> day of May, 2018.


DONALD J. ZELENKA  
 Deputy Attorney General



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS  
2017-CP-10-04561

|                          |   |                            |
|--------------------------|---|----------------------------|
| RYAN DELESTON,           | ) |                            |
| Applicant,               | ) | TRANSCRIPT OF RECORD       |
| -vs-                     | ) | May 24, 2018               |
| STATE OF SOUTH CAROLINA, | ) | Charleston, South Carolina |
| Respondent.              | ) |                            |

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

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

Christopher Murphy, Esquire  
Attorney for the Applicant

Kelly Oppenheimer, Esquire  
Donald Zelenka, Esquire  
Attorneys for the Respondent

Amanda K. Haffenden, RPR, CRR  
Circuit Court Reporter

|    |                         |               |              |                 |                |
|----|-------------------------|---------------|--------------|-----------------|----------------|
| 1  | E X A M I N A T I O N S |               |              |                 |                |
| 2  | <u>WITNESS</u>          | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
| 3  | Ashley Pennington       | 7<br>45       | 19<br>--     | 29<br>--        | 30<br>--       |
| 4  | Ryan Deleston           | 31            | 37           | --              | --             |
| 5  | Scarlett Wilson         | 48            | 52           | ---             | ---            |
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1 (May 24, 2018.)

2 (10:16 a.m., in open court, applicant and  
3 counsel present.)

4 THE COURT: What you got this morning?

5 MS. OPPENHEIMER: May it please the Court,  
6 Your Honor: This is Ryan Deleston versus the State of  
7 South Carolina, docket number 2017-CP-10-04561. Myself  
8 and Deputy Attorney General Donald J. Zelenka will be  
9 representing the State in this matter.

10 During its October 2012 term, the Charleston  
11 County grand jury indicted applicant for murder,  
12 attempted armed robbery, and possession of a weapon  
13 during the commission of a violent crime. Thereafter,  
14 during its December 2012 term, the Charleston County  
15 grand jury indicted applicant for possession of a handgun  
16 with an obliterated serial number. Circuit Public  
17 Defender D. Ashley Pennington and Assistant Public  
18 Defender John J. Kozelski, both of the ninth circuit  
19 public defender's office, represented him on these  
20 charges. Solicitor Scarlett A. Wilson and Chief Deputy  
21 Solicitor Bruce DuRant, both of the ninth circuit  
22 solicitor's office, prosecuted the case.

23 On October 7 through 11, 2013 applicant  
24 proceeded to a jury trial before the Honorable Kristi Lea  
25 Harrington. The jury convicted applicant as indicted on

1 all counts. Judge Harrington sentenced applicant to a  
2 term of imprisonment of life for murder, twenty years for  
3 attempted armed robbery, and five years for possession of  
4 a handgun with an obliterated serial number. Judge  
5 Harrington did not sentence applicant for possession of a  
6 weapon during the commission of a violent crime pursuant  
7 to section 16-23-490(a) of the South Carolina code. The  
8 sentences were to be served concurrently.

9           Applicant filed a timely notice of appeal,  
10 and chief appellate defender Robert M. Dudek and  
11 appellant defender Lara Caudy, both of the South Carolina  
12 Commission on Indigent Defense, office of appellate  
13 defense, perfected an appeal on applicant's behalf. On  
14 appeal, applicant raised the following issues: Whether  
15 the trial Court erred by refusing to allow applicant to  
16 cross-examine witnesses about an armed robbery and  
17 shooting that occurred approximately two weeks before the  
18 murder where it was undisputed that Brian Rivers was the  
19 shooter in a prior robbery and that the same firearm was  
20 used in both cases since this prevented applicant from  
21 fully developing and presenting his defense at trial;  
22 namely, that Brian Rivers was the shooter who killed the  
23 decedent, Marley Lion, and that applicant was merely  
24 present at the scene in violation of Rule 404(b) of the  
25 South Carolina rules of evidence, the rule on third party

1     guilt, and applicant's due process right to present a  
2     defense; and the second issue is whether the trial Court  
3     erred by informing the jury during the Court's opening  
4     instruction that a trial was a search for the truth and  
5     an effort to make sure that justice is done since this  
6     instruction was fundamentally incorrect, was burden  
7     shifting and decimated the proper standard in jury  
8     inquiry of whether the State had to prove the applicant's  
9     guilt beyond a reasonable doubt.

10             Following briefing and oral argument, the  
11     South Carolina Court of Appeals affirmed applicant's  
12     conviction and sentence by unpublished opinion on  
13     February 10th, 2016. Applicant petitioned for rehearing,  
14     which was denied by written order April 21st, 2016.  
15     Subsequently, applicant petitioned to the South Carolina  
16     Supreme Court for a writ of certiorari by written order  
17     dated December 1st, 2016. Supreme Court granted  
18     applicant's petition for writ of certiorari.

19             Following briefing and oral argument, the  
20     Supreme Court dismissed certiorari as improperly granted  
21     by memorandum opinion on July 19, 2017. The remittitur  
22     was issued the same day. On September 5, 2017, applicant  
23     filed an application for post-conviction relief alleging  
24     ineffective assistance of counsel for failing to object  
25     to the Court's malice instruction, that, quote,

1 impermissibly commented on the facts of the case by using  
2 hypothetical examples of the facts of applicant's case,  
3 by prematurely directing a verdict for the State, and for  
4 failing to object to the Court's involuntary intoxication  
5 instruction that would, quote, relieve the State of  
6 proving the mental state required to establish criminal  
7 intent beyond a reasonable doubt. Applicant also raised  
8 an allegation he was denied due process.

9           The State made its return on December 12,  
10 2017 requesting an evidentiary hearing be held.  
11 Thereafter, through his counsel, applicant amended his  
12 application to include allegations of ineffective  
13 assistance of counsel for failing to request a lesser  
14 included offense, failing to advise applicant about his  
15 right to testify, failing to cross-examine witnesses, and  
16 failing to recall Brian Rivers and cross-examine him on  
17 the Chopper shooting when the State opened the door by  
18 presenting applicant's statements.

19           The State made its amended return, I believe  
20 filed today, and applicant is represented by Christopher  
21 Murphy and both are present today.

22           THE COURT: All right. Mr. Murphy, are you  
23 ready to go?

24           MR. MURPHY: Judge, just by way of  
25 background, just so I could give you kind of a factual

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1 scenario, this incident was over by the Famous Joe's off  
2 17 behind that Chik-fil-A as you're heading toward  
3 Ravenel and the victim, Marley Lions, was in a car. It  
4 was alleged at trial -- or he was convicted at trial that  
5 Mr. Deleston attempted to rob him and shot him in the act  
6 of doing so. The two co-defendants, who are witnesses,  
7 cooperated with the State and testified against  
8 Mr. Deleston and thus his conviction, so that's kind of  
9 just a factual basis of what was going on here.

10 In order to start presenting this case, we  
11 would call Mr. Ashley Pennington to the stand.

12 ASHLEY PENNINGTON,  
13 having been first duly sworn,  
14 was examined and testified as follows:

15 DIRECT EXAMINATION

16 MR. MURPHY: Thank you, Your Honor.

17 BY MR. MURPHY:

18 Q. Mr. Pennington, you're familiar with Mr. Ryan  
19 Deleston?

20 A. I am.

21 Q. And you represented him in a murder trial; is that  
22 correct?

23 A. That's correct.

24 Q. And I see you brought your file here with you.

25 A. I have.

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1 Q. Now, can you tell us how many times you went to  
2 visit Mr. Deleston during the course of representation?

3 A. I can't tell you a number. I was the lead counsel  
4 in the case, and so I met with Ryan right after the event  
5 occurred and we assumed representation, and I probably  
6 saw him at least on a monthly basis, if not more.

7 Q. Did you have any problems communicating with  
8 Mr. Deleston at all?

9 A. No.

10 Q. Was he able to assist in his defense in this case?

11 A. He was.

12 Q. Now, you heard me give a summation of the facts,  
13 kind of a skeleton summation of the facts just now,  
14 correct?

15 A. Yes, sir.

16 Q. And is that accurate or did I leave anything out  
17 or -- you give us a summation of what was going on.

18 A. It was accurate, yes.

19 Q. And tell me, in this case, you had a defense going  
20 in -- let me ask you this: Prior to this case going to  
21 trial, did you have any negotiations with Ms. Wilson or  
22 the solicitor's office at all?

23 A. Yes.

24 Q. And what were those negotiations?

25 A. I met with Mr. Deleston and we evaluated the case,



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1 and with his permission, I sought repeatedly to try to  
2 find a way to get a sentence of something less than life  
3 without parole.

4 Q. And were you able to do that?

5 A. No.

6 Q. And tell the Court, what did you do to try to get  
7 this sentence of possible -- something less than life?

8 A. To the best of my recollection, I discussed this  
9 question with the solicitor on multiple occasions, and  
10 that culminated at one point with some phone calls and  
11 meetings with the judge to see whether or not there was  
12 room for the Court to simply take a straight-up plea that  
13 would result in something less than life without parole.  
14 That ultimately did not appear to be the case.

15 Q. And, ultimately, did you get any offers to  
16 anything less than less than life without parole?

17 A. No.

18 Q. So that left trial as your only option?

19 A. Yes.

20 Q. Now, heading into trial, did you have a defense  
21 or -- tell the Court, what was your defense going into  
22 trial?

23 A. The defense in the case was that Ryan had gone  
24 along with what he thought was going to be a robbery of a  
25 store, a restaurant, Famous Joe's, and,

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1 opportunisticly, the three defendants discovered there  
2 was a parked vehicle with what appeared to be someone  
3 inside. Our theory of defense is that when they  
4 attempted to enter the vehicle, the alarm was set off.  
5 Ryan was essentially left and that the co-defendant,  
6 Brian Rivers, who was carrying a handgun, inexplicably,  
7 21 seconds afterwards, goes back to the vehicle and  
8 shoots into the vehicle, and that's what resulted in the  
9 death. So we argued that there was a disconnect between  
10 the original agreement, the plan, and then the events and  
11 the victim that was ultimately killed.

12 Q. And at trial, who was the State alleging was the  
13 shooter in this case?

14 A. Mr. Deleston.

15 Q. All right. And your defense was that it was Brian  
16 Rivers who was the shooter, not Mr. Deleston?

17 A. That's what I argued, yes.

18 Q. Now, going to trial -- as you approached or right  
19 before there were some pretrial motions. Do you recall  
20 those?

21 A. You know, this was almost five years ago. I have  
22 to confess that's why I brought my file because I was up  
23 until about 11:00 last night reading and trying to  
24 refresh, so my answer is my memory is incomplete, but  
25 certainly I remember the trial, and I'll do my best to

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1 answer your questions.

2 Q. Let's talk about -- the one issue dealt with the  
3 handgun and Brian Rivers. We talked about the armed  
4 robbery that happened a few weeks beforehand that was  
5 kind of a key issue in this case from a defense  
6 standpoint; is that correct?

7 A. Yes, indeed.

8 Q. And if I recall correctly, was it the State that  
9 filed a motion in limine to preclude any testimony about  
10 that?

11 A. That's what I recall, and I tried this case with  
12 John Kozelski in the public defender's office. John  
13 helped me insofar as helping to put together what we call  
14 the defense response to State's motion in limine  
15 regarding reverse 404(b) and an argument for third party  
16 guilt admissibility in this case.

17 Q. And if you could tell the Court kind of factually  
18 why you thought that this information was important and  
19 why it was important to your defense in this case.

20 A. All right. Factually, what we had learned in the  
21 course of the case was that our defendant was not  
22 involved in what would have amounted to two other earlier  
23 robberies by Brian Rivers, a co-defendant in this case,  
24 and he used exactly the same gun. The time frame  
25 involved was that there was an event 12 days or maybe 15

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1 days beforehand in which less than a mile away they had  
2 gone at night and committed an armed robbery of someone  
3 and in the same manner as this case. For reasons that  
4 are unclear to anyone other than Mr. Rivers himself, he  
5 ended up shooting that victim in that robbery as he was  
6 running away.

7           The very night in question that Mr. Lions was  
8 killed, earlier in the same evening a group of people  
9 that included Brian Rivers and my client were in downtown  
10 Charleston essentially roaming around looking for someone  
11 to rob. My client gets out, then goes the other way,  
12 leaves the scene, and it's Mr. Rivers who -- and he  
13 testified to this at trial, essentially stuck up a young  
14 couple at gunpoint, using the same weapon that hours  
15 later we contend he used to kill Mr. Lions.

16       Q. Now, let's talk about -- the State moved in limine  
17 to preclude this evidence, or this testimony; is that  
18 correct?

19       A. Yes, sir.

20       Q. And did you file a memo in response, or opposing  
21 that?

22       A. We did.

23       Q. And, ultimately, the Court granted the State's  
24 request; is that a fair statement?

25       A. Yes.

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1 Q. And then because motions in limine are not  
2 binding, the issue came up during cross-examination; is  
3 that correct?

4 A. Yes. That was the intent, was to raise this --  
5 present this to the jury in cross-examination.

6 Q. And what witness were you trying to cross-examine  
7 on the issue?

8 A. Brian Rivers himself. He had made a deal. He had  
9 proffered to the State, and he testified for the State in  
10 the trial.

11 Q. And when you tried to raise this issue with Brian  
12 Rivers, what happened?

13 A. Well, the Court essentially affirmed its earlier  
14 ruling, finding that this was not admissible.

15 Q. And did you think this was an important piece of  
16 information for the defense?

17 A. Absolutely.

18 Q. In terms of strength, did you have any other  
19 information that would support a defense verdict or  
20 support your defense other than this information?

21 A. I'm not sure what you're asking.

22 Q. Well, let me ask you this: If you had to judge on  
23 a scale of one to ten how important this evidence was,  
24 ten being the highest, where would you rank it?

25 A. Well, last night I reread my closing argument, and

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1 basically the thrust of the entire argument was that  
2 there were circumstances that showed that Lil B, which is  
3 what his nickname was, was the shooter, and we were  
4 differentiating the fact that there was essentially one  
5 scheme that had failed because the business was closed  
6 and that this was improvisational by Mr. Rivers that  
7 didn't involve our client.

8           So it was central to that to show that Mr. Rivers  
9 was someone who had the propensity and, in fact, we  
10 presented the Court with a chart of similarities that we  
11 thought would more than clear the hurdle of  
12 admissibility. Since Mr. Rivers himself was not a  
13 defendant, we felt there was a lower standard of  
14 admissibility for purposes of Lyle because Mr. Rivers was  
15 not in jeopardy in that trial, and under the Holmes  
16 decision, which says that the defense has an affirmative  
17 right, a due process right, to present a defense that  
18 this would be admissible for the jury to consider as to  
19 whether or not we were making more sense than the State's  
20 theory.

21           Throughout the entire trial, we were basically  
22 saying that the prosecution had been duped. They had run  
23 with a theory based on an informant and built the case,  
24 perhaps unwittingly, around the wrong shooter.

25           Q. And this chart you mentioned, I believe that was

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1 attached to your memo in opposition to this motion in  
2 limine; is that correct?

3 A. Yes, it was. It was filed.

4 Q. And all these issues that you're talking about  
5 were raised in that motion in opposition; is that  
6 correct?

7 A. Yes, it was.

8 Q. Now, at some point -- and I understand the Court  
9 excluded this testimony, both in limine and when you  
10 tried to bring it up with Mr. Rivers -- there was a  
11 matter when Mr. Deleston's statement was admitted, which  
12 would have opened the door to this cross-examination. Do  
13 you recall that?

14 A. I don't remember the exact content of the  
15 testimony. I haven't had a chance to reread it yet, but  
16 in reading the pleadings that the State prepared for the  
17 Court of Appeals and in rediscussing the matter yesterday  
18 it refreshed me that it had been a part of my client's  
19 long statement to law enforcement in which there was  
20 reference to this. I can't remember the content, but the  
21 State argued that that had opened the door and therefore  
22 that could have provided me with a new means by which to  
23 say now I'm entitled to cross-examine Mr. Rivers, and  
24 that's exactly what I raised at my directed verdict  
25 motion.

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1 Q. And, obviously, this evidence is that the State  
2 opened the door during their case in chief?

3 A. I didn't raise that it opened the door in my  
4 directed verdict motion because I did reread that last  
5 night, but I did say I was objecting -- I was renewing my  
6 objection to my inability to cross-examine Mr. Rivers  
7 who, I believe, acknowledged this conduct 12 days before  
8 in his proffer to the State, so it would have been  
9 relatively uncontested facts.

10 Q. And let's talk about that a little bit. Can you  
11 tell -- the question is, is whether or not Mr. Rivers --  
12 or what he would have said if he would have admitted  
13 being involved in the shootings. You mentioned a proffer  
14 agreement. What other evidence could you have  
15 cross-examined Mr. Rivers about?

16 A. This is vague in my mind, so I'm going to follow  
17 my oath and just tell you what I can remember at this  
18 moment, which is spotty. My recollection is that  
19 Mr. Rivers had denied participation in this, in this  
20 Marley Lions killing, and it was essentially during the  
21 proffer to the State that it became -- we had a  
22 confirmation.

23 Now, other people proffered to the State as well,  
24 and -- the robbery that occurred 12 days before, 15 days  
25 before, whatever the number of days it was, involved



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1 George Brown as well. George was the owner of this  
2 pistol. He was present, and he had also proffered, so  
3 there were likely multiple ways to have been able to  
4 raise this, cross-examine Mr. Brian Rivers about it, and  
5 potentially impeach him with other defendants, had he  
6 decided to resist the acknowledgement, but my impression  
7 is that he had come round and acknowledged the -- we call  
8 it the St. Andrews Garden Apartment shooting with the  
9 same gun.

10 Q. Now, ultimately, when the State rested, did you  
11 put up any defense at all?

12 A. No.

13 Q. Did you talk to Mr. Deleston about testifying on  
14 his behalf?

15 A. Yes.

16 Q. And what was your recommendation, or did you  
17 recommend that he testify or not testify?

18 A. My recollection is that I did not recommend that  
19 he testify, and we had discussed that before, during, and  
20 immediately before the Q and A with the Court the morning  
21 that we rested.

22 Q. Now, if the door was open to cross-examine Brian  
23 Rivers on these prior crimes, the shooting and the  
24 robbery, could you have called him as a witness in the  
25 defense and questioned him directly?

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1       A. I could have attempted to. It was something I  
2 never thought of.

3       Q. And when you say you never thought of that, could  
4 you explain exactly what you mean.

5       A. Well, to be honest, what happened is, as I  
6 discussed the case with Mr. Deleston and looked at the  
7 pleadings, it dawned on me that it was right. I could  
8 have at least attempted to call Mr. Rivers in my case and  
9 forced another ruling, giving the Court another  
10 opportunity to consider since, essentially, we were  
11 making the Holmes argument all the way through, that we  
12 have the right to put on a defense, so it would have been  
13 another opportunity to raise the issue, which I failed to  
14 do.

15       Q. And do you have an opinion whether or not that  
16 impacted the case or your closing statements at all?

17       A. I think it was very troubling that you have the  
18 same weapon used in the same manner within a short period  
19 of time within a geographically close period of time and  
20 that it would have had an impact on the jury's mind.

21       Q. And I do a lot of defense work. It seems to me  
22 that that information, or that evidence that the jury  
23 heard, that would be even more important in light of the  
24 fact that Mr. Deleston was not taking the stand to deny  
25 the shooting?

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1       A. Right. The closing argument, which is in the  
2 record, basically argued what were the reasonable  
3 inferences from all these circumstances, and the thrust  
4 of my argument was that Brian Rivers was the shooter  
5 acting spontaneously and unforeseeably, and that was  
6 essentially the theme of the closing, the theory of the  
7 case.

8               MR. MURPHY: Thank you. That's all I have,  
9 sir.

10              THE COURT: Cross?

11              MR. ZELENKA: May it please the Court:

12                              CROSS-EXAMINATION

13 BY MR. ZELENKA:

14       Q. Just a little background. Mr. Pennington, how  
15 long have you been the public defender for Charleston  
16 County?

17       A. This go-round, I became a circuit defender in '08.  
18 I was a PD for a year before that, in '07.

19       Q. And approximately how many murder cases have you  
20 handled?

21       A. Several hundred.

22       Q. Okay. And how many of those cases went to trial?

23       A. A significant number. Most of them have been  
24 resolved without trial, but I've had many murder trials.

25       Q. Okay. Let's go first to your discussions, your

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1 plea discussions, with the solicitor's office. Did you  
2 ever ask the solicitor for a lesser included offense to  
3 murder?

4 A. No, I don't think I did.

5 Q. And your reason for not making that request was  
6 what?

7 A. The context of the case was that this was a  
8 shooting of what was an uninvolved, innocent victim, and  
9 there was tremendous public clamor and concern about this  
10 case, and it became -- it was clear to me that if there  
11 was going to be a resolution that the State was going to  
12 agree to, it was going to have to be in the context of  
13 some sort of -- something in the murder range. I can't  
14 swear that I never mentioned manslaughter, but it did not  
15 seem like a bridge too far. That's my recollection of  
16 it.

17 Q. And in your communications with the solicitor's  
18 office, at one time you offered to plead straight up to  
19 the murder and seek an offense in the 30- to 45-year  
20 range; correct?

21 A. Yes, sir. That's correct.

22 Q. And part of your negotiation with that was based  
23 upon your client's age and life expectancy of 71 years,  
24 anything beyond that would essentially be a life without  
25 parole sentence, in your mind, right?

~~ASHLEY PENNINGTON - CROSS-EXAMINATION~~

1 A. Yes, sir.

2 Q. And the solicitor's reaction to that was what?

3 A. Again, it's hard to remember -- basically, the  
4 ultimate thing was that it was a no. There was an  
5 opportunity at one point that we spoke to Judge  
6 Harrington, and there was a chance that perhaps she was  
7 going to be able to reach a determination of what she  
8 would give and give me a reason to plead the case  
9 straight up. That never really gelled, and so those are  
10 the things I can remember.

11 Q. Okay. And that communication you had with the  
12 judge was with a nod to the solicitor's office, correct?

13 A. She was present. She was aware we were doing  
14 that, and I want to say we even had a face-to-face -- I'm  
15 pretty sure we had a face-to-face. I know we talked to  
16 her on the phone.

17 Q. In preparation for your trial, you reviewed the  
18 statement the defendant gave?

19 A. Yes, sir.

20 Q. And that statement was a videotaped statement,  
21 correct?

22 A. It was.

23 Q. And within that statement, he made mention of the  
24 Chopper shooting and his knowledge about that shooting;  
25 isn't that correct?

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1       A. I believe so, again, relying on your pleadings and  
2 what we talked about. I just haven't reviewed it  
3 recently, so I believe that's correct.

4       Q. Okay. In your defense, how did you intend,  
5 without your client testifying, to put in evidence that  
6 Brian Rivers was actually the trigger person in the case?

7       A. Based on the circumstances of it and also through  
8 the use of the Lyle kind of showing prior consistent  
9 conduct using the same weapon.

10      Q. Okay. And as part of that showing that was  
11 actually presented was Mr. Rivers's use of a weapon  
12 earlier the same day of Mr. Lions' death, correct?

13      A. Yes, sir.

14      Q. And on that occasion, was the defendant present  
15 during that situation?

16      A. Present, not at the time -- not where the robbery  
17 occurred. He had been in the vehicle previous. The two  
18 had gotten out and then separated and gone in different  
19 directions, and then Mr. Deleston was picked up after he  
20 called at a separate location.

21      Q. Okay. But Mr. Deleston was aware of that earlier  
22 conduct?

23      A. He was in the car, so you have to assume that he  
24 was aware of what was being said.

25      Q. Okay. And the circumstances that the State

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1 presented concerning the Lions' shooting, there was a  
2 passing of the weapons back and forth between Mr. Rivers  
3 and your client, correct?

4 A. From what I recall, the weapon was passed around,  
5 and I just don't remember the sequence, but yes.

6 Q. Okay. And the information -- also had information  
7 that your client was aware of the earlier shooting that  
8 Mr. Rivers had done, the Chopper shooting?

9 A. The Chopper shooting, yes.

10 Q. And according to the proffer that was presented  
11 during the trial, Mr. Deleston was on the scene of the  
12 Chopper shooting, correct?

13 A. No. My understanding of that was Deleston was not  
14 involved at all in that.

15 Q. But he was present at the scene, correct?

16 A. Of the Chopper shooting?

17 Q. Yes.

18 A. No.

19 Q. You don't recall him waiting in the car?

20 A. No, I don't recall that. What I recall --  
21 basically, I'm relying on what I put into my proffer that  
22 went into the motion, and that was June 1, and it was  
23 Julius Brown, George Brown, Brian Rivers, and Valentino  
24 Heyward. It did not involve Ryan Deleston.

25 Q. Okay. But you could be refreshed on that, based

## ASHLEY PENNINGTON - CROSS-EXAMINATION

1 upon what was presented in the record itself, correct?

2 A. Certainly.

3 Q. Okay. But your client was aware that Mr. Rivers  
4 had previously used the weapon and fired the weapon in  
5 that armed robbery, correct?

6 A. It's hard to answer with the kind of specificity  
7 you're asking. What I know is what I said earlier, that  
8 there was -- in his statement to the city police, he knew  
9 about that and mentioned that that earlier incident  
10 occurred. The details are eluding me at this time.

11 Q. Did you have discussions with your client about  
12 that?

13 A. About the Brian Rivers earlier shooting?

14 Q. Yes.

15 A. I don't have any recollection of it, but I'm sure  
16 I would have because we would have talked about our  
17 theory of the case, and this was an important part of  
18 that.

19 Q. Okay. And was that discussed, about potential  
20 testimony he could give at the time of trial?

21 A. Which testimony, my client's testimony?

22 Q. Yes.

23 A. We certainly talked about his -- you know,  
24 whatever he could say, yes.

25 Q. And an issue being presented here today is



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1 whether, essentially, he properly waived his right to  
2 testify at the time of the trial, based upon --

3 A. I've heard that allegation, yes, if that's the  
4 question.

5 Q. And had the applicant testified, what would he  
6 have testified occurred at the time of the shooting of  
7 Marley Lions?

8 A. Based on my recollection, he would have said what  
9 our theory of the case was, that he was not the shooter,  
10 and it would have been Brian Rivers.

11 Q. Did that information get to the jury independent  
12 of your client's potential testimony?

13 A. The -- that, yes. It came from the proffer -- not  
14 the proffer, the interview that was recorded by city  
15 police when they arrested him.

16 Q. Okay. Is it correct that you attempted to keep  
17 your client's statement from the jury?

18 A. There was a pretrial motion arguing that he had  
19 asserted his right to counsel and that they had not  
20 respected that. So, yes, in the pretrial stages of the  
21 case, we argued that its inadmissibility -- once it was  
22 ruled admissible, then we had to deal with it.

23 Q. If the State had not put in that statement, would  
24 you have recommended that your client testify at the time  
25 of the trial?

## ASHLEY PENNINGTON - CROSS-EXAMINATION

1       A. I don't know. I mean, it's hard to reconstruct  
2 clearly in my mind how I would have approached that  
3 tactical question if we had gotten there. I don't want  
4 to be elusive. I just can't clearly and accurately  
5 answer.

6       Q. But is it correct that that's also recognition  
7 that as a case moves forward, strategic decisions are  
8 consistently made throughout the trial, independent of  
9 what the original game plan was when the trial started?

10      A. Yes, yes.

11      Q. So your strategy could have, in fact, changed,  
12 depending upon the circumstances which occurred prior to  
13 your client making the decision, ultimate decision, on  
14 whether to testify or not, correct?

15      A. You're always factoring everything together, so  
16 yes is the answer to that.

17      Q. With respect to jury instructions that were given,  
18 did you have the opportunity to review the malice  
19 instruction, particularly the instruction on express  
20 malice?

21      A. I know that when I was rereading the transcript  
22 last night that there was a -- when the State's last  
23 witness testified, Judge Harrington began to discuss her  
24 charge. I can't remember if she distributed it or not,  
25 but I certainly did -- we had an overnight, and I would

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1 have considered whatever objections we needed to make, so  
2 I'm sure that I did. I just don't have a lot of memory  
3 of that.

4 Q. Okay. But if the record reflects you did not  
5 object to that instruction, that failure to object would  
6 have been after you had reviewed the potential  
7 instructions and additionally the instructions she  
8 actually gave at the time of trial; is that correct?

9 A. I think the record speaks for itself. I did not  
10 object, and I would have been listening and paying  
11 attention to anything that came my way on that front.

12 Q. And similar with respect to the instruction on  
13 voluntary intoxication is not a defense?

14 A. Yes, same, same answer.

15 Q. Okay. A general argument has been made and I  
16 presented here on a failure to cross-examine some of the  
17 witnesses that were presented during the trial?

18 A. Yes.

19 Q. Did you have the opportunity to review the return  
20 that I prepared?

21 A. I did.

22 Q. And in that return, I listed out nine witnesses  
23 who after they testified on direct there was a  
24 decision -- excuse me, there was an indication that you  
25 did not do cross-examination of those witnesses.

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1       A. Yes, sir.

2       Q. In your review of that document, do you have any  
3 reasons or are there any gaps in your mind that you  
4 thought was important to have brought out on  
5 cross-examination?

6       A. Of those witnesses?

7       Q. Yes.

8       A. No. I don't have any recollection that I missed  
9 something.

10      Q. Okay. Now, as I understand your direct testimony,  
11 essentially, it sounds like until we discussed this  
12 directly, you really didn't think about the fact that the  
13 presenting of your client's statement could have been  
14 seen as opening the door to allow you to recall Brian  
15 Rivers; is that correct?

16      A. Well, it refreshed me for sure. I want to say I  
17 read the appellate, so that would have been the first  
18 time I read the appellate opinion. I would have seen the  
19 opening the door issue, and I thought that was  
20 interesting, and then when you raised it again yesterday,  
21 that's where I recognized that I had not thought through  
22 the question of calling Brian Rivers.

23      Q. You mean the pleadings about opening the door, the  
24 appellate pleadings; is that correct?

25      A. I think it was the pleadings, yes. Not the

ASHLEY PENNINGTON - REDIRECT EXAMINATION

1 opinion itself, but the briefs that you guys sent.

2 MR. ZELENKA: I don't believe I have any  
3 further questions. Thank you, Your Honor.

4 THE COURT: Redirect?

5 MR. MURPHY: Very briefly, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. MURPHY:

8 Q. Mr. Pennington, it's been implied that the  
9 evidence of the Chopper shooting came in through the  
10 statement and thus there would be no need to  
11 cross-examine Brian Rivers on that. Do you have any  
12 opinion about the evidence coming in via the statement  
13 versus being able to cross-examine Mr. Rivers on those  
14 prior events?

15 A. When I prepared my post-trial memo to appellate  
16 defense, I noted that I felt that I actually said that I  
17 thought that the fact that that was in there was  
18 valueless because I -- my fear was that it was viewed  
19 by -- would be viewed by the jury as self-serving. In  
20 other words, this was a defendant's statement, so so  
21 what? So that's why it would carry such a great weight  
22 if there was a confession to the same conduct by  
23 Mr. Rivers through my cross-examination.

24 Q. So you felt the cross-examination was much more  
25 valuable than Mr. Deleston saying it was somebody else.

ASHLEY PENNINGTON - RECROSS-EXAMINATION

1 A. Yes.

2 MR. MURPHY: Thank you. That's all I have.

3 THE COURT: Recross?

4 MR. ZELENKA: Just follow up.

5 RECROSS-EXAMINATION

6 BY MR. ZELENKA:

7 Q. With respect to the Chopper shooting, the proffer  
8 indicated that your client shared in the proceeds of that  
9 robbery, correct?

10 A. Your memory -- or your knowledge is better than  
11 mine. I don't remember those specifics. I'm not saying  
12 that's not true, but my impression sitting here today is  
13 that Ryan was not involved in that, that that was  
14 external to Ryan Deleston and that Ryan would have only  
15 been involved that night.

16 Q. Okay.

17 A. The night of the Marley Lions killing.

18 Q. But at the prior incident, Deleston was aware that  
19 Brian Rivers said he shot Chopper, correct?

20 A. That's where my memory is just faulty. I cannot  
21 recall what he said to the city police. It's in the  
22 record. I just can't remember what he said to the city  
23 police.

24 MR. ZELENKA: Okay. No further questions.

25 THE COURT: You can step down. Thank you.

## RYAN DELESTON - DIRECT EXAMINATION

1 RYAN DELESTON,  
2 having been first duly sworn,  
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 THE WITNESS: Ryan Deleston, D-e-l-e-s-t-o-n.

6 BY MR. MURPHY:

7 Q. Mr. Deleston, you recall Mr. Pennington  
8 representing you on these charges that you're here today?

9 A. Yes, sir.

10 Q. And can you tell the Court how many times  
11 Mr. Pennington visited you, or how many times you  
12 discussed the case with him?

13 A. I can't recall. I know he been there a lot,  
14 though.

15 Q. You don't have any complaints about him keeping  
16 you informed about the case, do you?

17 A. No.

18 Q. And you also heard about trying to get a lesser  
19 deal, or something less than life. Do you recall that  
20 testimony?

21 A. Yeah. We were trying to get there.

22 Q. Did you ever get there?

23 A. No.

24 Q. And as far as you know, was the State offering you  
25 any deals at all?

RYAN DELESTON - DIRECT EXAMINATION

1 A. No.

2 Q. They wanted life, as far as you knew; is that  
3 correct?

4 A. Yeah, but Mr. Pennington had told me that -- I  
5 asked him, I said if you could get me something less, and  
6 he be like -- if I'm not mistaken, he say that something,  
7 65 years or something like that, and I'm, like, you know,  
8 but it ain't never came about.

9 Q. And you basically had no choice but to go to  
10 trial; is that a fair statement?

11 A. Yeah.

12 Q. Now, when you went to trial, did you understand --  
13 or why don't you tell us this: What was your defense  
14 going into trial?

15 A. I ain't had anything. I mean, my defense was -- I  
16 don't know.

17 Q. Was your defense I didn't do it?

18 A. Yeah.

19 Q. And if you didn't do it, who were you alleging  
20 that actually did the shooting at trial?

21 A. Brian Rivers.

22 Q. Now, did you know Brian Rivers prior to this  
23 evening?

24 A. You asked me if I had known him prior --

25 Q. Did you know him? Were you friends?



RYAN DELESTON - DIRECT EXAMINATION

1 A. Yeah, yeah. We were friends.

2 Q. And Mr. Rivers made a deal with the State; is that  
3 correct?

4 A. Correct.

5 Q. And Mr. Rivers testified against you; isn't that  
6 correct?

7 A. Correct.

8 Q. And do you recall discussing the Chopper shooting,  
9 or the previous armed robbery, with Ashley Pennington  
10 prior to going to trial?

11 A. Yeah. We did spoke about it, if I'm not mistaken.

12 Q. And tell the Court what you guys spoke about  
13 specifically.

14 A. I mean, we just spoke about -- not even relating,  
15 you know, on and on, and he ain't really -- nothing. It  
16 wasn't nothing.

17 Q. All right. Now, other than that piece of evidence  
18 about the Brian Rivers issue you wanted to talk about, do  
19 you have any other issues you wanted to present in your  
20 case?

21 A. Are you talking about the Marley Lions?

22 Q. Yes, Marley Lions. Did you have any witnesses  
23 that you wanted Mr. Pennington to call?

24 A. I didn't have no witness. I really wanted him to  
25 check -- they told him that I wore some white shoes, and

RYAN DELESTON - DIRECT EXAMINATION

1    which when Mr. Pennington going to check the shoes -- I  
2    wear a size ten-and-a-half. I really wanted him to do  
3    it, and when he go and check the shoes, like a nine, and  
4    I don't wear no nine, but they got that sitting on the  
5    stand, talking about I wore these shoes doing the  
6    killing, and they showed a videotape at the Chopper,  
7    that's me wearing the white shoes, and, oh, yeah, my  
8    co-defendant testified saying I was wearing them same  
9    exact shoes. I been trying to figure out how to run  
10   around with a size nine on when I wear a size  
11   ten-and-a-half.

12       Q. And did you talk to Mr. Pennington about that  
13   issue?

14       A. Yeah. He told me -- well, he went up there and  
15   checked, and I asked him, what size shoes? And he's,  
16   like, they're a size nine. He came back and told me, and  
17   I'm, like, you need to, you know, say something about  
18   that because Scarlett Wilson said -- he talking about I  
19   wore these shoes and I wore this and I wore that, and  
20   half the stuff that been up there, none of that stuff was  
21   mine. I don't know where they got them stuff from.

22       Q. So you never addressed the issue of the clothes at  
23   trial that were presented?

24       A. I mean, I spoke to Mr. Pennington about it, but I  
25   don't think it would have any type of impact on anything.

RYAN DELESTON - DIRECT EXAMINATION

1 Q. All right. And let's talk about you taking the  
2 stand. Your defense was I didn't do it, and you  
3 previously heard that Mr. Pennington was not allowed to  
4 cross-examine Brian on the previous crimes. Did you talk  
5 to him about taking the stand in your own defense?

6 A. I did. I asked him and he been, like, I don't  
7 think that will work.

8 Q. Why wouldn't that work?

9 A. He said I'm going to get hammered. I don't even  
10 know what that mean, but he said it wouldn't work.

11 Q. Did you have any prior convictions that would have  
12 come up?

13 A. No. I just had got out of -- of a YOA sentence.  
14 I just got done doing, like, ten months. I was straight  
15 for a whole year, but I ain't had no priors or nothing  
16 like that.

17 Q. And do you understand why he was recommending you  
18 not take the stand?

19 A. I figured that he guessed that I wasn't ready. I  
20 wasn't, but --

21 Q. And when you say you weren't ready, did you go  
22 over potential cross-examination or his direct  
23 examination?

24 A. No.

25 Q. And when I say that, did he practice with you like

RYAN DELESTON - DIRECT EXAMINATION

1 I'm talking to you right now?

2 A. No, he didn't.

3 Q. All right. You've also raised the issue that  
4 there was a failure to object based on the lying in wait  
5 charge, or the malice charge, correct?

6 A. Correct.

7 Q. And tell the Court why you are raising that issue.

8 A. I mean, I can't really recite to anything. I  
9 just -- I read it, and I tried, to the best of my  
10 knowledge, how to recite it, but I can't, so by me  
11 sitting here telling you, I know it won't make no sense,  
12 but I'll try the best I can.

13 Q. And after you were convicted, did you talk to  
14 Mr. Pennington about what your options were at that  
15 point?

16 A. He told me that he was going to put an appeal in,  
17 and we would go from there. And I guess he did that, and  
18 I got denied the whole way through, and then he told me  
19 that I be able to file a PCR on my behalf, and that's  
20 what I did.

21 Q. And you've also raised the issue of the voluntary  
22 intoxication charge as being improper; is that right?

23 A. Right.

24 Q. And other than what we've talked about today, are  
25 you alleging any other errors by Mr. Pennington?

RYAN DELESTON - CROSS-EXAMINATION

1       A. I can't think of them. It so long ago I can't  
2 even think of none.

3               MR. MURPHY: Thank you. That's all I have,  
4 sir.

5               THE COURT: Cross?

6               MS. OPPENHEIMER: May it please the Court,  
7 Your Honor?

8                               CROSS-EXAMINATION

9 BY MS. OPPENHEIMER:

10       Q. Do you recall discussing potential defenses with  
11 Mr. Pennington?

12       A. I don't know. What you talking about?

13       Q. Did you talk about the fact you were merely  
14 present at the scene?

15       A. What scene are you talking about?

16       Q. At Famous Joe's when the shooting occurred?

17       A. Yeah, correct.

18       Q. So you were there, correct?

19       A. Correct.

20       Q. And you, Julius Brown, and Brian Rivers had  
21 actually been there waiting for Famous Joe's to close,  
22 correct?

23       A. Correct.

24       Q. And you were planning on robbing the people at  
25 Famous Joe's, correct?

~~RYAN DELESTON - CROSS-EXAMINATION~~

1 A. Correct.

2 Q. And that's when this car driven by the victim came  
3 up and ruined your plan, right?

4 A. Correct.

5 Q. And you were there as part of that armed robbery  
6 plan, correct?

7 A. Correct.

8 Q. And so when this car pulled up, you then decided  
9 that you were going to try and rob the person in the  
10 vehicle, right?

11 A. Say that one more time?

12 Q. When this car pulled up and ruined your plan to  
13 rob Famous Joe's, then you decided to rob the person in  
14 the vehicle, correct?

15 A. You saying that's me, right?

16 Q. Yeah.

17 A. I mean, that was the plan. I mean, the plan was  
18 to rob Famous Joe's, and there was a plan to rob him too,  
19 but --

20 Q. So you approached the vehicle, correct?

21 A. Negative.

22 Q. I'm sorry?

23 A. Negative. You say I approached the vehicle?

24 Q. Multiple people testified that you did approach  
25 the vehicle, right?

RYAN DELESTON - CROSS-EXAMINATION

1       A. They also said I touched the vehicle too, and when  
2 they did the DNA analysis, my fingerprint was no where on  
3 the car.

4       Q. Right. But there was also testimony that you  
5 approached the vehicle, correct? Multiple people said  
6 that that was you.

7       A. Multiple people said it, but I didn't approach no  
8 vehicle.

9       Q. And then the alarm went off, right?

10      A. Correct.

11      Q. And you kind of ran back to Brian and Julius and  
12 then started shooting at the vehicle, correct?

13      A. Negative.

14      Q. Now, you discussed the defense that Brian Rivers  
15 was the shooter, correct, with Mr. Pennington?

16      A. Correct, correct.

17      Q. And you had knowledge that Brian Rivers was known  
18 to commit armed robberies, correct?

19      A. Correct.

20      Q. And same with George Brown, he was known to also  
21 commit robberies?

22      A. He wasn't known to commit no armed robberies. He  
23 was known to sell drugs. That's about it, but no armed  
24 robberies.

25      Q. And Julius Brown was also known for committing

## RYAN DELESTON - CROSS-EXAMINATION

1 crimes, correct?

2 A. Who, Julius Brown?

3 Q. Yes.

4 A. I know him from selling drugs. I don't know about  
5 that.

6 Q. And you were hanging out with these people the day  
7 the victim was killed, correct?

8 A. Yeah, I was.

9 Q. And you knew that they, in fact, were criminals  
10 and you had gone with them to commit robberies before,  
11 right?

12 A. I don't want to answer your question.

13 Q. You knew that Brian Rivers was known to commit  
14 robberies, right?

15 A. Yeah.

16 Q. And you had gone with him on some of these prior  
17 robberies, correct?

18 A. Yeah.

19 Q. And you knew about the Chopper shooting, right?

20 A. I mean, I heard about it. I mean, they came back  
21 and talked about it.

22 Q. Were you in the car at the time of the shooting?

23 A. I mean, the truck was -- I was in the car. The  
24 truck was parked, like, a mile away from where -- I mean,  
25 where that was going on.



RYAN DELESTON - CROSS-EXAMINATION

1 Q. So you were there?

2 A. I wasn't there. I was in the truck, like, way  
3 down, like, by a store. I wasn't there at the Chopper  
4 scene. When they got shot at, I wasn't there.

5 Q. You knew about the plan?

6 A. Knew about the plan, not really.

7 Q. So why did you think you were going to that  
8 apartment complex?

9 A. To get some drugs, I guess, talk to them. I don't  
10 know.

11 Q. And you had been hanging out with Brian Rivers and  
12 George Brown and Julius Brown all day, the day of the  
13 victim's death, correct?

14 A. I wouldn't say I was hanging around with them all  
15 day. I see them.

16 Q. Were you drinking with them that day?

17 A. We were all drinking.

18 Q. And you were drunk at the time?

19 A. I wasn't drunk.

20 Q. Well, had you been drinking before y'all went  
21 downtown?

22 A. Yeah, a couple of beers.

23 Q. Okay. And had you been drinking before the  
24 shooting of the victim?

25 A. Yeah.

~~RYAN DELESTON - CROSS-EXAMINATION~~

1 Q. All right. Now, you never claimed that you shot  
2 in self defense, right?

3 A. No.

4 Q. So you never claimed this was a self-defense case?

5 A. Why would I say that for if I ain't never shoot  
6 the man? What would I do all that for? I don't  
7 understand.

8 Q. Now, do you recall Judge Harrington advising you  
9 of your constitutional rights?

10 A. I think so.

11 Q. And your right to testify?

12 A. Yes, ma'am.

13 Q. She told you that it was ultimately your decision  
14 if you wanted to testify? Is that a yes?

15 A. Yes, yes, yes.

16 Q. And she warned you if you decided to testify the  
17 State could use your prior convictions for impeachment,  
18 right?

19 A. Correct.

20 Q. And you had two prior drug convictions, right?

21 A. You said I had two prior convictions?

22 Q. Two prior drug convictions?

23 A. That's old, though. That wouldn't --

24 Q. But you were still convicted of drug charges,  
25 correct?

RYAN DELESTON - CROSS-EXAMINATION

1 A. Yeah.

2 Q. And you knew that those could be used against you  
3 if you decided to testify, right?

4 A. Correct.

5 Q. And you told Judge Harrington that you understood  
6 your right to testify?

7 A. Correct.

8 Q. And you told her that you understood that those  
9 convictions could be used against you, right?

10 A. Correct.

11 Q. And you said that you had discussed with  
12 Mr. Pennington if you wanted to testify, right?

13 A. Correct.

14 Q. And you decided that you did not want to testify?

15 A. Correct.

16 Q. And that was your decision?

17 A. Yeah. Based on what my lawyer told me, I mean,  
18 there wouldn't have been no need for me to get up there.

19 Q. But you also made that decision after Judge  
20 Harrington had told you that it was your decision?

21 A. I still had in my mind what my lawyer had told me.

22 MS. OPPENHEIMER: Beg the Court's indulgence.

23 BY MS. OPPENHEIMER:

24 Q. Did you ever have the gun that was used in this  
25 murder in your hand?

RYAN DELESTON - CROSS-EXAMINATION

1 A. When?

2 Q. At any point that night.

3 A. Yeah. I had it in my hand. Like, Brian was  
4 trying to pass it off to me. I gave it back to him.

5 Q. So you did pass the gun in between and you ended  
6 up with the gun, correct?

7 A. Negative. He ended up with the gun. I ain't end  
8 up with no gun in my hand.

9 Q. You had the gun in your hand?

10 A. I had the gun in my hand. I gave it back to him.

11 Q. And you were part of this plan to rob Joe's,  
12 correct?

13 A. Correct.

14 Q. And you were waiting there for some time, waiting  
15 for Joe's to close, correct?

16 A. That's negative. Joe's -- as we was walking out,  
17 Joe's was closing. We wasn't waiting there.

18 Q. At this time did you know that Rivers had shot the  
19 gun before?

20 A. Yeah.

21 Q. You did know that?

22 A. Uh-huh.

23 MS. OPPENHEIMER: Nothing further, Your  
24 Honor.

25 MR. MURPHY: Nothing, Your Honor.

ASHLEY PENNINGTON - DIRECT EXAMINATION

1 THE COURT: You can step down. Do you have  
2 any other witnesses?

3 MR. MURPHY: We have none, Your Honor, and we  
4 would rely on -- for the record, we would rely on the  
5 record as to the improper malice charge being improperly  
6 commenting on the facts by using the example lying in  
7 wait and also rest on the record for the improper charge  
8 of voluntary intoxication, argue that it shifted the  
9 State's burden with regard to intent, and then we would  
10 rest, Your Honor.

11 THE COURT: All right. Are you going to have  
12 any witnesses?

13 MR. ZELENKA: State will recall Ashley  
14 Pennington.

15 THE COURT: Go ahead. Bring Mr. Pennington  
16 back up.

17 ASHLEY PENNINGTON,  
18 having been previously duly sworn,  
19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 THE COURT: Go ahead. You're still under  
22 oath.

23 THE WITNESS: Yes, sir.

24 BY MR. ZELENKA:

25 Q. Mr. Pennington, what was the reason that you

ASHLEY PENNINGTON - DIRECT EXAMINATION

1   advised your client not to testify in this matter?

2       A.   It didn't seem to me that it would carry enough  
3   weight, and there had been the earlier -- because his  
4   statement had been put in evidence, we were able to argue  
5   essentially his denial of being the triggerman.

6       Q.   Had you taken steps to prepare your client to  
7   testify had that decision ultimately been made?

8       A.   The answer to that is yes and no. We certainly  
9   had been -- at the point where we abandoned any intent to  
10   have him be a witness, we would not have then gone and  
11   rehearsed as if we were going to, so if I had made the  
12   decision that we were likely to put him on, I would have  
13   done more to prep him in the manner that was asked about.

14           We never rehearsed, at least I don't recall any  
15   significant rehearsal of cross-examination, but you  
16   always do talk about that kind of a question and the pros  
17   and the cons of testimony, so I'm certain I did talk to  
18   him about what cross-examination would have entailed.

19       Q.   What were the cons of his testimony that you would  
20   have discussed?

21       A.   Basically, that he didn't have a lot of add and  
22   that there was his prior criminal history and also  
23   whether or not he had an affirmative desire to take on  
24   actual witness testimony and face cross-examination, and  
25   this was not a case where any of those answers were yes,

ASHLEY PENNINGTON - DIRECT EXAMINATION

1 that we felt he was going to add a lot or he was eager to  
2 do so.

3 Q. Okay. His testimony here today where he  
4 acknowledged he had the gun in his hand, was passing it  
5 back and forth with Brian Rivers, was that consistent  
6 with the information that had been given to you about his  
7 handling and passing the gun --

8 A. Yes.

9 Q. -- at the time? And that's not inconsistent with  
10 the testimony that occurred at the trial except for the  
11 fact that the trial testimony was that while the gun was  
12 passed back and forth, it ultimately was in your client's  
13 hand rather than Mr. Rivers's hand, correct?

14 A. Correct.

15 MR. ZELENKA: I have no further questions,  
16 Your Honor.

17 MR. MURPHY: Nothing, Your Honor.

18 THE COURT: You may step down. Let's just  
19 take five minutes and finish up.

20 (Recess taken.)

21 THE COURT: All right. We ready? All right.  
22 We're back. Applicant's back in the room. You got  
23 another witness?

24 MR. ZELENKA: Scarlett Wilson, solicitor  
25 Scarlett Wilson, please.

SCARLETT WILSON - DIRECT EXAMINATION

1                   SCARLETT WILSON,  
2                   having been first duly sworn,  
3                   was examined and testified as follows:

4                   DIRECT EXAMINATION

5                   THE WITNESS: Scarlett Wilson, W-i-l-s-o-n.

6 BY MR. ZELENKA:

7           Q. Solicitor Wilson, how long have you been  
8 practicing law in South Carolina?

9           A. Since 1992.

10          Q. Okay. And has most of your practice been as a  
11 trial prosecutor in this state?

12          A. All of it.

13          Q. And when were you elected solicitor of the ninth  
14 circuit?

15          A. In 2008.

16          Q. Okay. And as part of your duties as the  
17 solicitor, did you take it upon yourself to be the  
18 primary trial counsel in the case of State versus Ryan  
19 Deleston?

20          A. I did.

21          Q. Who assisted you in that matter?

22          A. Bruce DuRant, my chief deputy.

23          Q. And as part of that prosecution, did you make  
24 charging decisions in this case?

25          A. Yes.



~~SCARLETT WILSON - DIRECT EXAMINATION~~

1       Q. And as a result of those charging decisions, do  
2 you recall if there was any plea negotiations that  
3 occurred with Mr. Deleston's counsel, Ashley Pennington?

4       A. I recall that he attempted to negotiate and that  
5 my position was any plea from Mr. Deleston would have to  
6 be a straight-up plea, and I let him know that I would  
7 seek life regardless of whether it was a plea or a trial.

8       Q. Okay.

9       A. At least that was in the few months before trial.  
10 I don't recall anything being discussed in the year or so  
11 before trial, but in the few months before he was seeking  
12 a time range that I wasn't willing to give and he wanted  
13 to try to get that from the judge.

14      Q. All right. During the trial, there were -- let me  
15 back up one step. As a result of your discussions with  
16 Mr. Pennington, do you recall whether there was a plea  
17 negotiation meeting with Judge Harrington?

18      A. I believe that there was and there may have been  
19 one with Judge McDonald as well. I don't have a clear  
20 recollection of both of them. I know that, again, I made  
21 it clear to Mr. Pennington that any plea would have to be  
22 straight up, that I wasn't willing to negotiate a term of  
23 years, and I believe he was seeking to try to get a judge  
24 to give him some sort of assurance, maybe not a promise,  
25 but some sort of comfort level that in acknowledgement of

SCARLETT WILSON - DIRECT EXAMINATION

1 acceptance of responsibility that perhaps a judge would  
2 consider that and come off of a life sentence. He was  
3 looking for that.

4 Q. At the outset of the trial, you made a motion in  
5 limine to exclude certain information from coming in  
6 about the Chopper shooting, correct?

7 A. That's right.

8 Q. And that was by written motion?

9 A. I believe so.

10 Q. And the judge ultimately agreed on your motion in  
11 limine to exclude reference to the Chopper shooting from  
12 coming in at trial, correct?

13 A. Yes, sir.

14 Q. The record reflects during the trial you did put  
15 in the defendant's statement which also made reference to  
16 the Chopper shooting, correct?

17 A. That's right.

18 Q. Why was that done, that -- what appears to be a  
19 dramatic change in the strategic position of the  
20 solicitor's office?

21 A. I wouldn't call it a dramatic change. Initially  
22 we made the motion in limine and tried -- and were  
23 successful in keeping out the cross-examination or  
24 eliciting from Brian Rivers's testimony about the Chopper  
25 shooting, that it would unnecessarily complicate and make

—SCARLETT WILSON - DIRECT EXAMINATION—

1 the case messier and be basically a trial within a trial.

2 Beyond that, we had concerns based on  
3 Mr. Pennington's motion and our own research about the  
4 legal issues surrounding Mr. Deleston's statement, and,  
5 initially, we had not decided whether or not to introduce  
6 that statement. We were leaning towards not introducing  
7 that statement, and, in fact, we had conversations,  
8 lengthy conversations, amongst ourselves, with law  
9 enforcement, with the victim's family who were very  
10 involved, very astute people who could comprehend the  
11 legal issues that we had or were concerned with regarding  
12 the statement, so as the trial developed and the  
13 testimony developed and we had the pretrial hearing on  
14 the statement, we decided to introduce the statement and  
15 take our chances on an appeal, and that was something,  
16 again, that we wrestled with throughout.

17 At that point, because the information about the  
18 Chopper shooting was going to come in, we sort of felt  
19 like that was like, in many cases, a piece of information  
20 that cut both ways: One, Mr. Pennington wanted it in  
21 because it shows that Brian Rivers is not afraid to shoot  
22 someone and, in fact, did shoot someone; but, on the  
23 other hand, for us it showed that the defendant knew that  
24 Brian Rivers shot someone and wasn't afraid to shoot  
25 someone, and that gave us the foreseeability argument

~~SCARLETT WILSON - CROSS-EXAMINATION~~

1 that we would need if the jury focussed on the hand of  
2 one situation.

3 So, you know, that could have been argued either  
4 way by both sides, and we decided that it coming in with  
5 the defendant's statement was a wash, and we would use  
6 it, to the extent we could, to our advantage, and our  
7 view of the defense was that it was mainly a jury  
8 nullification type defense, that claiming that Brian  
9 Rivers was the shooter did not, under these facts, really  
10 help Ryan Deleston.

11 Q. And is it correct to say that you did, in fact,  
12 make a foreseeability argument in your closing argument  
13 in this case?

14 A. Yes.

15 MR. ZELENKA: No further questions. Thank  
16 you, solicitor.

17 THE COURT: Cross?

18 MR. MURPHY: Thank you. May it please the  
19 Court:

20 CROSS-EXAMINATION

21 BY MR. MURPHY:

22 Q. Ms. Wilson, you mentioned the hand of one is the  
23 hand of all. The cooperating defendants, Mr. Brown and  
24 Mr. Rivers, did they get a manslaughter deal?

25 A. I don't recall what their deals were. I'm sure

~~SCARLETT WILSON - CROSS-EXAMINATION~~

1 it's in the record, and there were filed plea agreements  
2 in their cases. I don't remember what they got or what  
3 their charges were.

4 Q. Do you recall whether they pled to something less  
5 than murder?

6 A. I really don't.

7 Q. And, obviously, like every trial attorney, when  
8 you went in to trial, you wanted to get this conviction,  
9 would that be a fair statement?

10 A. Well, I don't -- that's kind of -- I wouldn't put  
11 it that sloppily, no offense to you, but, I mean, what  
12 we're looking for is to hold people accountable, and, in  
13 this case, I believe this defendant needed to be held  
14 accountable for the murder in this case, and I believed  
15 that he was guilty so we wanted to do what we could to  
16 hold him accountable.

17 Q. And you obviously moved in limine to keep this  
18 statement about the Chopper shooting out of evidence?

19 A. Right.

20 Q. And I don't want to put words in your mouth, but I  
21 would assume you didn't want that to interfere with the  
22 jury's decision to seek a conviction against  
23 Mr. Deleston?

24 A. I didn't want at that point for the jury to be  
25 sidetracked by that information. On the other hand, it

~~SCARLETT WILSON - CROSS-EXAMINATION~~

1 gave us what we needed as far as the foreseeability part  
2 of hand of one, so at the end, it was a close call with  
3 Brian Rivers on whether to try to keep it out or not, but  
4 we ultimately decided to try to keep it out, and then, as  
5 I mentioned, when we ultimately decided later in the  
6 trial, after everything had played out, the way it played  
7 out, to introduce the statement, it was coming in.

8 Q. And let me ask you this, because I don't know the  
9 answer: When you introduced the statement, did you have  
10 an understanding that you were going to open the door for  
11 cross-examination of Brian Rivers about the Chopper  
12 shooting, or was that something that was just overlooked?

13 A. I don't know that it was overlooked because I  
14 don't know that it truly opened the door to recalling the  
15 witnesses. Maybe it did, but I certainly knew that when  
16 we decided to put the statement in, that information  
17 about it, about the Chopper shooting, was coming in. I  
18 knew that was going to come in, and I knew, and believe  
19 today, that that was something in favor of the defense  
20 because the defense had wanted it earlier.

21 So in my mind, as we're watching from the other  
22 side, not having any inside knowledge, they kind of were  
23 having the opportunity to have their cake and eat it too.

24 Q. And by -- and I just want to make sure, the  
25 strength that -- you said it cuts both ways, but by

SCARLETT WILSON - CROSS-EXAMINATION

1 introducing that statement, it helped you because it  
2 showed foreseeability by Mr. Deleston; is that fair?

3 A. That was the good part of it.

4 Q. That was the good part. And by Mr. Pennington not  
5 cross-examining or not recalling Mr. Rivers to the stand,  
6 that was -- you basically killed two birds with one  
7 stone, correct?

8 A. I don't think so, because, again, I thought -- and  
9 until I heard Mr. Pennington testify today, I didn't know  
10 that he felt differently, but this just shows how, you  
11 know, the prosecution and defense thinks differently. I  
12 thought from his perspective that he got what he wanted  
13 without having to deal with Brian Rivers because Brian  
14 Rivers was a really good witness for us and would have, I  
15 believe, handled that whole situation well, just like the  
16 conversation earlier about Mr. Deleston's involvement in  
17 the Chopper shooting, his involvement in knowing about  
18 the robbery, his ability to tell the story about what  
19 happened beforehand I think could have been very  
20 dangerous to Mr. Pennington if he had gone down that  
21 road.

22 So I didn't -- I never would have really thought  
23 about Mr. Pennington calling Brian Rivers later because  
24 that was just dangerous for him because all of the other  
25 stuff was going to come in and make the foreseeability

~~SCARLETT WILSON - CROSS-EXAMINATION~~

1 and hand of one argument even stronger because Brian  
2 Rivers would have closed the loop on we're a group that  
3 goes around looking for people to rob. We rob them, and  
4 sometimes we shoot them, and if Brian Rivers had  
5 testified, I think he would have laid it out very well,  
6 so the way Mr. Pennington had it was he had it sort of  
7 sanitized through the defendant's statement.

8 He got in that Mr. Rivers had done another  
9 shooting with the same gun, didn't have to deal with the  
10 rest of it, and we couldn't and didn't challenge the fact  
11 that Brian Rivers had done the Chopper shooting because  
12 we knew it was true. We knew he had.

13 Q. And that was going to be my next question: Was  
14 there any question, factually, that Brian Rivers was  
15 involved in the Chopper shooting?

16 A. No, and there also was no question that  
17 Mr. Deleston knew about the robbery, the intended robbery  
18 of Chopper, and that Brian Rivers had the gun and that  
19 Brian Rivers had shot him for no reason.

20 MR. MURPHY: That's all I have. Thank you.

21 THE COURT: Redirect?

22 MR. ZELENKA: Nothing on redirect.

23 THE COURT: You may step down. Thank you.

24 THE WITNESS: Thank you.

25 THE COURT: Do you have any other witnesses?



~~SCARLETT WILSON - CROSS-EXAMINATION~~

1 MR. ZELENKA: No further witnesses, Your  
2 Honor.

3 THE COURT: Do you have anything else?

4 MR. MURPHY: Nothing, Your Honor. The only  
5 thing I would ask, out of an abundance of caution, when I  
6 first talked to Mr. Deleston this morning, he wanted to  
7 move for a continuance.

8 I told him that I've reviewed the record,  
9 talked to all the attorneys, and told him the issues are  
10 not going to change no matter what if there's a  
11 continuance or not. I would ask that we at least have  
12 another 30 days to put anything else into the record that  
13 he finds -- I can't imagine that there's anything. I  
14 mean, I've been through this I don't know how many times,  
15 but he would like that. I told the Court that I would  
16 ask for that.

17 THE COURT: All right. Well, I'm going to  
18 read the trial transcript, so it will take me a little  
19 bit of time anyway. I'll give you the opportunity to at  
20 least ask if you can reopen the hearing.

21 MR. MURPHY: Thank you, Judge.

22 THE COURT: All right. Okay. Well, I'll let  
23 y'all know what I decide.

24 MR. MURPHY: Thank you, sir.

25 - - -

SCARLETT WILSON - CROSS-EXAMINATION

1 (Whereupon, at 11:40 a.m., the proceedings  
2 were concluded.)

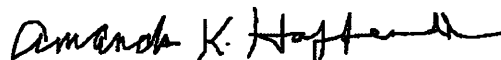
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—SCARLETT WILSON - CROSS-EXAMINATION—

I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth 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 Circuit Court for Charleston County, South Carolina, on the May 24, 2018.

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

December 4, 2018



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Circuit Court Reporter

B

attempted armed robbery, and possession of a weapon during the commission of a violent crime. Thereafter, during its December 2012 term, the Charleston County Grand Jury also indicted Applicant for possession of a handgun with an obliterated serial number. The charges stem from the shooting death of Marley Lion, a recent high school graduate, during an attempted armed robbery while he was asleep in his vehicle.

Applicant was represented by Ninth Circuit Public Defender D. Ashley Pennington and Assistant Public Defender John J. Kozelski. The prosecution was represented by Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Bruce DuRant. On October 7, 2013, the case was called before the Honorable Kristi Lea Harrington and a jury. On October 11, 2013, the jury found the Applicant guilty of all the charges. Judge Harrington sentenced Applicant to life without parole for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for possession of a handgun with an obliterated serial number. The trial court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Applicant was sentenced to life without parole.

Applicant filed a timely notice of appeal on October 14, 2013. He was represented on appeal by Chief Appellate Defender Robert M. Dudek and Appellate Defender Lara M. Caudy, both of the South Carolina Commission on Indigent Defense - Office of Appellate Defense. The State was represented by Deputy Attorney General Donald J. Zelenka. On appeal, Applicant argued the trial court erred in refusing to allow Applicant to cross-examine two witnesses regarding an armed robbery that occurred two weeks prior to the instant murder and the trial court erred in instructing the jury that the trial was "a search for the truth in an effort to make sure that justice is done." Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v.

Ryan P. Deleston, 2016-UP-055 (Ct. App. Filed February 10, 2016). Applicant petitioned for rehearing on February 25, 2016. The petition for rehearing was denied by the Court of Appeals on April 21, 2016.

Thereafter, Applicant petitioned for certiorari to the South Carolina Supreme Court, which granted certiorari on December 1, 2016. Following briefing and oral argument, the Supreme Court dismissed certiorari as improvidently granted. State v. Ryan M. Deleston, 217-MO-013 (filed July 19, 2017). The Remittitur was returned to the circuit court on Jul7 19, 2017.

### SUMMARY OF THE STATE'S TRIAL VERSION

This case involves a murder stemming from an attempted robbery. On the night of June 15, 2012, Marley Lion, a recent high school graduate, attended a house party with a friend. [R.p. 78, l. 7- p. 79, l. 1; p. 80, ll. 13-18, Tr. 274, l. 7- p. 275, l. 1; p. 276, ll. 13-18.] Marley had been drinking that night. He drove his friend Katherine Ridgeway home around 3:00 a.m. and then "said he was heading home." [R. p. 81, l. 7- p. 82, l. 7, Tr. 277, l. 7- p. 278, l. 7.] Before making it to his destination Marley decided he was too intoxicated to drive and pulled into the parking lot of Famous Joe's to get some sleep. [R. p. 101, ll. 12-18; see R. p. 108, ll. 3-14, Tr. 298, ll. 12-18; see Tr. 305, ll. 3-14.] While parked in the parking lot of Famous Joes, Marley was shot five times and killed.<sup>1</sup> The state's version was that Applicant shot Marley during an attempted robbery with Bryan Rivers and Julius Brown. The jury was instructed and the State argued his guilt under accomplice liability, although it also asserted that Deleston was the trigger person.

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<sup>1</sup> Marley Lion's death was ruled a homicide by the forensic pathologist and the cause of death was determined to be a gunshot wound to the chest with perforations or injuries of the abdominal aorta, the spleen, and the liver. [R. p. 683, ll. 3-6, Tr. 934, ll. 3-6.] Marley also suffered several gunshot wounds to the left thigh and groin region, and a gunshot wound to the right arm. [See R. p. 683, l. 11 – p. 696, l. 21, See Tr. 934, l. 11 – p. 947, l. 21.]

### ALLEGATIONS BEFORE THE COURT

In his *pro se* application for post-conviction relief, Applicant alleged:

In the *pro se* application Deleston raises the following grounds :

**A. Ineffective Assistance of Trial Counsel :**

1. Counsel was ineffective in failing to object to the following jury instruction on expressed malice:

"Expressed malice is shown when a person speaks words or which -- words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice."

Tr. 1132 lines 14-21. Counsel failed to take issue with the "lying in wait" example which was an improper comment on the facts.

2. Counsel was ineffective for failing to object to the trial court's instruction on voluntary intoxication:

"Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20.

In correspondence with his current PCR counsel Christopher Murphy, Applicant asserted the following additional grounds:

3. Counsel was ineffective in failing to request a lesser included offense or relay any deals or plea offers for lesser included offenses.
4. Counsel did not advise the Applicant on not taking the witness stand. (Court inquiry of Deleston on decision to not to testify) (Tr.p. 771- 776, p. 1040-1042, ROA 541 -544, 771-772).
5. Counsel did not cross-examine witnesses;



6. Counsel did not recall Bryan Rivers and cross-examine him on the Chopper shooting" when the State opened the door by presenting the Deleston statement.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges counsel was ineffective for failing to object to two different jury instructions given by the trial court.

#### 1. Express Malice and Lying in Wait.

Applicant initially contends counsel was ineffective for failing to object to the following jury instruction on express malice:

**Expressed malice is shown when a person speaks words or which - words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice.**

Tr. 1132 lines 14-21. A review of the trial record reveals that there was a charge conference on October 11, 2013. Tr. p. 1025-1031. The record shows that no initial objection to the expressed malice charge. After the instructions were given, no objection was raised concerning the expressed malice instruction. Tr.p. 1140.

The Applicant presently asserts that the "lying in wait" instruction within the expressed malice instruction was a "charge on the facts." He asserts that the charge on express malice which includes: "[F]or example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice" is improper under the South Carolina Constitution. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). However, the law of malice is that "lying in wait" is expressed malice as the charge stated.

#### Standards for Review of Ineffective Assistance of Counsel Claims



To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, *supra*, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, *supra*, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

Although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (*per curiam*). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not

counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, \_\_ U.S. \_\_ ( Jan. 19, 2011).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. See Harrington v. Richter, \_\_ U.S. \_\_ ( Jan. 19, 2011).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms,"

not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. \_\_\_, \_\_\_ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693. Harrington, *supra*.

#### *Conclusion*

The record reveals reasonable performance on the part of counsel Pennington. This Court has not been presented with any opinion by the South Carolina appellate court or South Carolina Supreme Court which concluded that the instruction on expressed malice or lying in wait violated the State Constitution. During the PCR proceeding the Applicant failed to show that counsel was deficient in failing to object to the instruction. Counsel Pennington testified that he recalled the Judge Harrington discussed the charges with counsel. He did not object after review, listening to the charge and paying attention.

This Court must conclude that counsel was not deficient under the standards required of criminal defense counsel in 2013 when the matter was tried. Then and now, there is no binding caselaw that suggest that the lying in wait instruction was improper. To the contrary, the Supreme Court implicitly has approved a similar instruction of lying in wait and malice.



See State v. Kelsey, 331 S.C. 50, 78, 502 S.E.2d 63, 77 (1998) ("Proof of malice may be express or direct, such as, where there is evidence of previous threats or evidence of lying in wait. In other words, circumstances which show directly that an intent to kill existed). Cf. State v. Hardin, 114 S.C. 280, 103 S.E. 557, 558 (1920), overruled by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) ("Express malice is manifested by some outward act--lying in wait, making threat to take his life, or something of that kind").

Counsel Pennington was not deficient in failing to object to the instruction as it related to express malice and lying in wait and assert that it was a charge on the facts under the South Carolina Constitution. This Court noted that in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) the Court expressly did not address the implied malice by use of a deadly weapon instruction as a violation of the state constitution "charge on the facts," but limited its holding to a common law determination based upon its original jurisprudence. Here, the Applicant, in a collateral setting seeks for the first time for this court to declare the instruction defining express malice is a charge on the facts and that counsel was deficient in 2013 in failing to challenge it. Counsel cannot be deficient in failing to object to an instruction which has been used and no opinion of a court has concluded it was a violation of the State Constitution. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law"). See United States v. McNamara, 74 F.3d 514, 516-17 (4th Cir. 1996) (holding trial counsel cannot be found deficient under Strickland where counsel failed to anticipate a subsequent change in the law) (collecting cases); see also Honeycutt v. Mahoney, 698 F.3d 213, 217 (4th Cir. 1983) (finding trial counsel was not deficient for not objecting to a malice charge that was correct



under state law at the time it was given, despite persuasive authority from other jurisdictions calling the validity of the charge into question). This ground is dismissed.

## 2. Voluntary Intoxication Instruction

Applicant similarly asserts trial counsel was ineffective for failing to object to the trial court's instruction on voluntary intoxication:

Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20. As above, no objection was made to this instruction. Tr.p. 1140.

This Court must conclude for similar reasons as ground one that counsel was not deficient in failing to object. At the outset, this Court must conclude that the instruction was a correct statement of law and properly supported by the testimony and evidence presented during trial. The general rule in South Carolina is that voluntary intoxication or use of drugs does not constitute a defense to a crime. It has been recognized, however, that insanity caused by the use of drugs or intoxication may be a defense where the insanity is permanent and destroys the defendant's ability to know right from wrong. 22 C.J.S. Criminal Law §§ 112 and 113 (1989). In State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328, 330 (1977), the Supreme Court adopted the rule that "voluntary intoxication, *where it has not produced permanent insanity*, is never an excuse for or a defense to crime...." (*emphasis added*). Accord State v. Hartfield, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813. Here, like in ground one, he has failed to prove that counsel was under a duty to object to the intoxication charge based upon existing precedent. Since counsel cannot be deemed deficient in failing to object to a valid charge and create a change in the law, the Applicant failed in his burden of proof. See Teamer v. State, supra, (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law").

**3. Assertions that counsel should have sought a lesser offense or negotiated a lesser plea deal.**

In his third ground, the Applicant contends that trial counsel failed to pursue a lesser offense. If this allegation concerns a failure to reveal a plea offer for a lesser included offense, the Applicant has not shown in his allegation the existence of any plea offer that was not revealed to the Applicant. If the allegation is that counsel should have vigorously sought a plea offer, the Applicant has failed to show that the Applicant's counsel failed to seek or negotiate a plea offer with the approval of the Applicant.

During the PCR hearing, counsel Pennington testified that they had negotiations with the Solicitor's office but that they were unsuccessful with having the Solicitor offer any sentence less than "life without parole." Counsel stated that he sought this after meeting with his client and evaluated their case. Counsel stated that he attempted discussions on a number of occasions with the Solicitor's Office through telephone calls and even arranged a meeting with a judge to try to get a favorable negotiation without success. The only agreement offered



was a straight up plea, Pennington stated that a trial was the only option in this case. He stated that this case involved the shooting of an innocent victim and had high public concern. Pennington recognized that any negotiations had to be within the range for murder, because any manslaughter suggestion would be a "bridge too far." He offered to the State a plea to murder straight up and a range of 30 to 45 years that was rejected by the State. Pennington, who had an extensive history of handling several hundred murder cases in his practice considered their offer the best he could do and based it on the Applicant's age and life expectancy which he suggested would be in reality a life without parole sentence. He used this same argument in the sentencing proceeding after the jury verdict.

Solicitor Wilson at the PCR hearing confirmed the extent of counsel Pennington's vigorous attempts at negotiating a lesser sentence. She stated that it was her intent after counsel approached her about a plea that it would have to be a straight up plea and that she would seek a life (without parole) sentence whether it was a guilty plea or trial. She stated that the negotiations began months before trial and the State consistently was not willing to suggest a sentencing range of a term of years. Solicitor Wilson confirmed that there was joint meeting with a judge trying to get the State to offer a plea and recommendation less than a life sentence. Solicitor Wilson confirmed that this was unsuccessful for the Applicant.

At the PCR hearing, the Applicant testified and acknowledged that his counsel attempted to get a lesser sentence, but that the State was unwilling to accept any offer.

This Court must find that counsel Pennington was not deficient. As his testimony credibly shows, counsel approached the State numerous times seeking to lessen the sentencing culpability of his client. However, the State was unwilling to accept anything less than a life sentence in its discussions.

A handwritten signature in black ink, appearing to be a stylized 'P' followed by a flourish.

It is clear that "a defendant has no right to be offered a plea[.]" Missouri v. Frye, 566 U.S. 134, 148 (2012) (citing Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ); see also Lafler v. Cooper, 566 U.S. 156, 168 (2012). It is axiomatic that criminal defendants have "no constitutional right to plea bargain , the prosecutor need not do so if he prefers to go to trial." so Petitioner cannot possibly establish that he was entitled to a plea agreement on his own terms or that his counsel was ineffective for not requesting same. See Weatherford v. Bursey, 429 U.S. 545, 561 (1977). State another way, a prosecutor is under no legal obligation to consider or negotiate a plea with a defendant; the decision to offer a plea bargain is a matter of prosecutorial discretion. "It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." Id.

Counsel Pennington took the next available step on behave of his client by seeking to bring a judge into the matter of negotiations to break what he perceived to be a logjam. This is authorized under South Carolina procedures. "A trial judge may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion." Medlin v. State, 280 S.E.2d 648, 648 (S.C. 1981). See also Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (S.C.1981). However, despite the effort of his counsel this did not result in a favorable bargain. Counsel did all that he was authorized to do on behalf of his client related to negotiating for a lesser sentence.

Accordingly, counsel cannot be deemed deficient for not having obtained a plea bargain when there is no evidence the government was amenable to negotiate or that a plea deal ever was offered. To the contrary, the government has indicated that the Solicitor never proffered a plea agreement.





If this ground concerns that the counsel should have sought an instruction for a lesser included offense, he has failed to show any evidence that would support any instruction for a lesser offense. This alternative ground must be dismissed.

**4. Advice of Right to Testify. Counsel did not advise the Applicant on not taking the witness stand. (Court inquiry of Deleston on decision to not to testify (Tr.p. 771- 776, p. 1040-1042, ROA 541 -544, 771-772).**

This Court must find that that ground 4 is conclusively refuted by the record which reveals when the critical decision was made on whether the Applicant would waive his right to testify, Deleston was fully advised by his counsel concerning that matter. The Applicant contends that trial counsel did not adequately advise the Applicant of his right to testify. Respondent submits that the record of the trial conclusively disputes this allegation. Pertinent to this ground, the trial court made two specific inquiries of the Applicant relevant to this assertion.

Prior to the state's case, Judge Harrington made the preliminary inquiry of the Applicant:

THE COURT: Mr. Deleston, at this time I'm going to explain to you certain of your rights. We typically do this at the close of the State's case, but there's been a lot of testimony over the past two days, and I anticipate that there may be a point tomorrow that the State will rest. And so I wanted you to have as much time to go over these rights with your attorney. Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: If at any time you do not understand anything that I explain to you or you need me to explain anything in further detail, please let me know. Do you understand?

THE DEFENDANT: Yes, ma'am.



THE COURT:

At some -- when I ask you these questions, and it will not be tonight, but we will have reached the stage in the trial where you're going to need to make the decision what type of defense you're going to present. You have a right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States. This Amendment states, in part, that no person shall be compelled in any criminal case to be a witness against himself. That means that you cannot be required to testify in this case. You have the right to testify on your own behalf; however, no one can make you testify. This is a personal right, and no one can waive this right except for you. If you decide to testify, you will be subject to the same rules that govern the other witnesses and you may be examined and cross-examined on any relevant issue in this case. In addition, if you have convictions involving dishonesty or false statements or for crimes punishable by imprisonment for more than one year, and I determine that the probative value of admitting that evidence outweighs its prejudicial affect to you, the Solicitor will be able to introduce your record to attack your credibility.

Mr. Pennington, we've already addressed which convictions would be appropriate for impeachment; is that correct?

MR. PENNINGTON: Yes, ma'am.

THE COURT: And, Solicitor Wilson, you agree with that?

MS. WILSON: Yes, ma'am.

THE COURT: If you decide to testify, this decision on your part must be freely, voluntarily, and intelligently made, with the knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever, and I will instruct them there's to be absolutely no prejudice to you because you did not testify. As a matter of fact, I instruct the jurors that they are not to discuss the fact that you did not testify in the jury room whatsoever. It is left entirely up to you whether or not you testify. You have the opportunity over this evening hour and throughout tomorrow to discuss with your attorney, either together or separately, your family, your friends, or anyone else, but the final decision is left entirely up to you.

Do you understand what I have explained to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need for me to explain any of these issues in further detail to you?

THE DEFENDANT: No, ma'am.

THE COURT: Do you understand what convictions could be used against you if you decide to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: You understand the instructions that I will give to the jurors if you decide not to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you had discussions with your attorney regarding these issues?

THE DEFENDANT: Not yet.

THE COURT: Not yet? All right. Thank you.

Mr. Pennington, do you need for me to explain anything further to your client regarding his right to testify?

MR. PENNINGTON: I don't believe so, your Honor. I believe that was a great -- a very thorough explanation. Obviously, in the run up to trial, there's been discussions about the subject. Because he's in custody, because we've been working very long hours, I would ask for an opportunity to have -- we can start at 9:30 tomorrow. That way I'll have -- he will get here at 8:30. They'll bring him up here, and I would have a chance to talk with him before we commence in the morning, if that's all right.

THE COURT: Counsel, I could have him here earlier than that if I instruct them to have him here; correct?

MR. PENNINGTON: I think it would only be like a 15-minute conversation. So I think we could work it in by 9:30 easily.

THE COURT: So if he is here no later than 8:30, you will have sufficient time in the morning; is that correct?

MR. PENNINGTON: Yes, ma'am.

Trial Tr. (Vol. 3) p. 772, l. 3- p. 777, l. 5.

Later in the trial prior to the close of the case, Judge Harrington made the following additional inquiry of the Applicant and defense counsel.

COURT : All right. Mr. Pennington, do you have witnesses besides your client that will testify?

MR. PENNINGTON: The Defense will rest.

THE COURT: All right. Just out of an abundance of caution, I want to inquire of your client.

Mr. Deleston, would you please stand? And let's go ahead and re-swear

Mr. Deleston at this time.

THE DEPUTY CLERK OF COURT: Please raise your right hand. (The oath is administered by the Deputy Clerk of Court, and the Defendant answers as follows:)

THE DEFENDANT: Yes.

THE DEPUTY CLERK OF COURT: Thank you, sir.

THE COURT: Mr. Deleston, please remain standing. Do you remember when I advised you of your right to -- that you could testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need me to go over any of those things with you?

THE DEFENDANT: No, ma'am.

THE COURT: Have you had an opportunity to meet with your attorneys, either separately or together, to discuss the benefits and the consequence of your right to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need any additional time to meet with your attorneys?

THE DEFENDANT: No, ma'am.

THE COURT: Have you made a decision whether or not you will testify?

**THE DEFENDANT: I will not testify.**

**THE COURT:** All right. And thank you, Mr. Deleston. You may have a seat.  
Mr. Pennington, do you need, based upon what has been presented today, to meet with your client is there as well -- we haven't had a break -- but to meet your client concerning that decision?

**MR. PENNINGTON:** I will, during the lunch hour, touch base with him just to confirm. But everything that I have -- all communications and understandings we've had up to this point would lead me to believe that that is a firm decision, and it's based on a thorough understanding of his circumstances.

**THE COURT:** I just wanted to make sure that you've had adequate opportunity to meet with him and to go over all of those consequences of his decision. So with that, the Defense rests. All right. So then that leaves us just charging and closing; is that correct?

Trial Tr. (Vol. 5), p. 1041-1041.

This Court finds that the Applicant's sworn statements in open court that he had consulted with counsel carry a presumption of verity. "[s]olemn declarations in open court carry a strong presumption of verity". forming a "formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). A criminal defendant has a fundamental constitutional right to testify on his own behalf at trial, a right that cannot be waived by defense counsel. United States v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc). "A claim that a defendant's right to testify was violated by defense counsel is analyzed as a claim of ineffective assistance of counsel." Teague, 953 F.2d at 1534). "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the

strategic implications of each choice, and that it is ultimately for the defendant himself to decide....Counsel may advise the client in the strongest possible terms not to testify, but the choice whether to testify lies with the defendant....Counsel has the responsibility of ensuring that any waiver of the right to testify is knowing and voluntary." Id. (internal citations omitted).

The Applicant has not presented a cogent reason as to why he should not be held to the truth of his statements at trial. The Applicant confirmed that he discussed testifying with Pennington. He stated that counsel told the Applicant that he was going to get hammered because at the time of the incident, he had just come off a YOA (Youthful Offender) sentence. However, the Applicant stated that he thought he was not prepared to testify at that time.

Counsel Pennington credibly testified that he advised Deleston that it was his recommendation that he not testify at this trial because Applicant's testimony would not carry much weight. Counsel based this upon the fact that the Applicant's statement was already in evidence by the State after the change in the State's strategy and that he was then able to argue his denial within the statement. Pennington did not consider that Applicant would be a good witness. Counsel stated that if the Applicant would have testified after the intent to testify had been abandoned, Pennington would have rehearsed the matter with the Applicant. However, Pennington opined that the Applicant did not have a lot to add to the version of the crime. He recalled that the Applicant did not want to take on testifying, particularly where the evidence at trial already revealed that the gun at the incident was being passed between Applicant and Rivers. This Court adopts this portion of Pennington testimony as a finding of fact.

Even more interesting and probative at the PCR hearing, the Applicant acknowledged that he was aware of Rivers use of the weapon at the Chopper shooting which would have



negated any suggestion in an accomplice liability case that he would have been unaware of Rivers use of lethal force previously. In fact, Deleston admitted during the hearing that he was a participant in the Chopper robbery although he stayed in the vehicle knowing that the intended robbery was taking place. While the Applicant may have testified that Bryan Rivers did the fatal shooting under his theory at the PCR proceeding, he would have also testified that he knew that he was involved and agreed to commit a robbery that night, aware that Rivers had used the weapon to rob previously. His testimony would have supported a charge of murder under "accomplice liability" if it was consistent with the testimony he gave at the PCR proceeding.

The Applicant has failed to show deficient performance on the part of his counsel concerning his advice concerning the Applicant's right to testify at trial. It is disingenuous for Applicant to claim that counsel deprived him of his right to testify. Counsel made the Applicant aware of his rights and recommended a course to take to improve their chances at this difficult trial which the Applicant accepted. As the trial transcript shows, Deleston declared under oath that he understood his right to testify, that he discussed the decision whether or not to testify with counsel, that it was his own decision not to testify, and that his decision in this regard was of his own free will. "Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74 (1977) "[I]f an accused desires to exercise [his] constitutional right to testify the accused must act affirmatively and express to the court [his] desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred." United States v. Kamerud, 326 F.3d 1008, 1017 (8th Cir.2003) (citation omitted).



Further, he fails to demonstrate prejudice by showing a reasonable possibility that the results of the proceeding would have been different had he testified. See Fishbone v. Sec'y for Dep't. of Corrs., 165 Fed.Appx. 800, 801-02 (11th Cir.2006) (defendant not prejudiced by trial counsel's alleged ineffective assistance in failing to inform him he had the right to testify when, even in light of defendant's proposed testimony, there was no reasonable possibility that result of proceedings would have differed had defendant testified). To the contrary, he has shown that had he testified, it is more likely he would have been convicted because his testimony supported the State's alternative theory of guilt. For this additional reason, he has failed in his burden of proof.

#### **5. Counsel Failed to Cross-examine witnesses.**

In his allegation, Applicant makes a conclusory allegation that counsel failed to cross-examine witnesses. The record reflects that the Applicant did not cross-examine the following state witnesses at trial:

1. Elizabeth Page - Tr. 256 (Marley lived with them and she was unable to get in touch with him after midnight when he failed to return home.)
2. Katherine Ridgway - Tr. 272 (Friend of Marley and went to party that night after he picked her up and dropped her off that night at her apartment after 3 am and told her he was going home).
3. Lauren Mulkey - Tr. 279 (Investigator with Charleston Police Department and reviewed the surveillance video of d.d. Packers which revealed the victim's vehicle at 4:08 lights blinking after seeing a black male in a white shirt going towards the direction of victim's vehicle at 3:55).



4. Christopher Singleton - Tr. 789 ("Little Chris" was Bobby Warthaw's cousin and assisted in purchasing the gun from Applicant which he turned over to the police in return for reward money)
5. Jeffrey Robertson - Tr. 816 (Charleston Police investigator conducted surveillance on the controlled purchase of the weapon from the Applicant)
6. George Bradley - Tr. 830 (Charleston Police sergeant also conducted surveillance on the controlled purchase of the weapon from the Applicant)
7. Mary Phillips - Tr. 838 (Crime scene investigator described contact with six shell casings and did not recover fingerprints, collected a gun out of vehicle and introduced photos).
8. Michael J. Kaplan - MD - Tr. 927 (pathologist who performed autopsy)
9. S. Lamart Williams - Tr. p 997 (described man named Gee who gave him the gun to sell and asserted in the picture shown he was making a transaction for weed and not the gun).

At the PCR hearing, the Applicant has failed to allege any particular deficiency as to any of these witnesses. He has failed to allege any line of inquiry that was constitutionally necessary under the Sixth Amendment. Counsel Pennington generally testified he did not cross-examine the witnesses, but in hindsight has no recollection that he missed anything. During the hearing, the Applicant did not assert that the defense failed to bring out any particular evidence from any of these witnesses by failing to further question them.

Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). But see



Berryman v. Morton, 100 F.3d 1089, 1097-1099 (3rd Cir. 1996). The Second Circuit expands by stating that whether to engage in cross-examination, its extent and its manner, is a strategic decision of counsel. (U.S. v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). See also U.S. v. Corcoran, 855 F.Supp. 1359, 1369 (E.D.N.Y. 1994).) The Ninth Circuit has also said that allegedly inadequate cross-examination was not shown by the record and the petitioner failed to show prejudice from the alleged deficiency. Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990). The Ninth Circuit also said that the defendant had failed to show that the result would be different with further cross-examination (U.S. v. Claiborne, 870 F.2d 1463, 1469 (9th Cir. 1989).) Hunt v. Smith, 856 F.Supp. 251, 258 (D. Md. 1994) found no defective cross or prejudice even if the cross had been more to the liking of defense attorney experts on habeas. See also Routly v. Singletary, 33 F.3d 1279, 1288-1289 (11th Cir. 1994); U.S. v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995) (failure to show what further cross-examination would produce and how it would affect the result); Pickens v. Gibson, 206 F.3d 988, 1002 (10th Cir. 2000) (no prejudice where failed to show how cross-examination could have been better); Carroll v. Schriro, 243 F.3d 1079, 1099-1100 (8th Cir. 2001) (state disposition of ineffective cross-examination claim was reasonable application of Strickland under the AEDPA).

Other circuits have also recognized the strategic and tactical nature of cross-examination. Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) (choice of emphasis in cross-examination is prototypical example of strategy); Henderson v. Norris, 118 F.3d 1283 (8th Cir. 1997) (a delicate task entrusted to the professional discretion of counsel); Battle v. Delo, 19 F.3d 1547, 1556 (8th Cir. 1994) (limited cross of state serology expert to avoid highlighting); U.S. v. Garcia-Rosa, 876 F.2d 209, 232 (1st Cir. 1989); Barnes v. U.S., 859 F.2d 607, 608 (8th Cir. 1988); Williams-Bey v. Trickey, 894 F.2d 314, 316 (8th Cir. 1990) (tactical decision not to

cross-examine assault victim about prior incident so as not to create greater sympathy). To the same effect is Bergman v. McCaughtry, 65 F.3d 1372, 1379-1380 (7th Cir. 1995) (decision not to cross-examine sympathetic prosecution witness). So-called "dainty" cross-examination was not found wanting in U.S. v. Reveron-Martinez, 836 F.2d 684, 688 (1st Cir. 1988). More extensive cross may have been perceived by the jury as unfair badgering said Hogue v. Scott, 874 F.Supp. 1486, 1541 (N.D. Tex. 1994).

Although cross-examination may not have been as effective as hoped, flawless cross-examination is rare, said the court in Sherron v. Norris, 69 F.3d 285, 290-291 (8th Cir. 1995). The question is not whether the prosecution witness was attacked on every conceivable point but whether the testimony was subjected to adversarial testing. Johnson v. Nagle, 58 F.Supp.2d 1303, 1355, n. 42 (N.D. Ala. 1999). Failure of defense counsel to cross-examine a prosecution expert about a subject was not prejudicial in Middleton v. Evatt, 855 F.Supp. 837 (S.C. 1994) where the subject had been raised by the prosecution cross-examination of defendant's expert. No ineffectiveness in cross was found in Gomez v. Ahitow, 29 F.3d 1128, 1136 (7th Cir. 1994) and U.S. v. Fish, 34 F.3d 488, 494 (7th Cir. 1994). The latter noted a possible strategic reason and the lack of prejudice in any event considering the cross-examination that was conducted. Defense experts who criticized cross-examination gave only "a grading of the quality of counsel's cross-examination" which was not of the magnitude to place counsel's cross outside prevailing professional norms. Hunt v. Nuth, 57 F.3d 1327, 1333 (4th Cir. 1995). An attorney does not have to ask every cross-examination question suggested by the client. U.S. v. Smith, 62 F.3d 1073, 1078 (8th Cir. 1995).

This Court must find that although it concludes that there was no cross-examination of the identified witnesses, the Applicant has failed to prove either deficient performance or

prejudice. He has not identified one item of evidence that counsel should have presented through any of the witnesses. He has failed to identify one item that could be used to impeach any of the identified witnesses. Simply put, he has wholly failed in his burden of proof that rest upon him in these proceedings.

**6. Failure to Recall Bryan Rivers concerning the "Chopper Shooting" after door opened by admission of the statement.**

In his final amended allegation by PCR counsel, Applicant contends that counsel erred in failing to seek to recall Bryan Rivers after the State opened the door in presenting Deleston's statement. This issue derives from the presentation of the similar issue in the direct appeal. However, in the direct appeal, the issue raised was whether the Applicant was initially entitled to present the issue on cross-examination at an earlier point of the trial.

An understanding of the course of the direct appeal is useful in resolving this ground. In the appeal, Applicant contended he was allegedly deprived of his constitutional right to present a defense. He asserted the trial court precluded the presentation of evidence during the cross-examination of accomplices Bryan Rivers and Julius Brown that two weeks prior to the murder of Marley Lion, Rivers and not Petitioner was the actual triggerperson in a separate shooting of Leroy "Chopper" Townsend with the same weapon that shot Lion. Deleston contended that the evidence was admissible under S.C. Rule of Evidence 404(b), as evidence of "third party guilt" under the precedent of State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), and as his constitutional right to present a meaningful defense under Holmes v. South Carolina, 547 U.S. 319 (2006). The Petitioner contended that this evidence of the other crime was relevant to his defense because he claimed that Rivers was the triggerperson in Lion's death and that the excluded evidence would support that he was merely present at Lion's death, even

though he was also present at the Chopper Townsend shooting.<sup>2</sup>

In denying relief, the trial judge initially rejected the proffer under Rule 404(b), South Carolina Rules of Evidence, concluding that there was not a close degree of similarity between the crimes and therefore did not demonstrate a common scheme or plan to establish Rivers as the shooter of Lion. The trial court further rejected the claim that there was a due process violation.

However, the record subsequently revealed after the testimony of Rivers and Brown, Solicitor Wilson revised her prosecution strategy<sup>3</sup> prior to the conclusion of the state's case and introduced similar of Thompson shooting to the jury through the introduction of a partially self-serving statement of Ryan Deleston, without objection. This statement included information about Rivers shooting Townsend earlier with the same murder weapon. A new trial therefore was

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<sup>2</sup> As noted above, the Applicant's PCR testimony eviscerates this "merely present" concept because he was an accomplice in the Chopper shooting by his presence with knowledge in the vehicle awaiting and aware of the robbery and shooting by Rivers prior to the Lion killing at as an accessory before the fact and a principal where he shared the proceeds.

<sup>3</sup> At the outset of the opening argument, Solicitor Wilson stated, although the State would show "that it was Deleston that pulled that trigger" that night (R.p. 42, ll. 1-4, Tr.p. 238, ll. 1-4), it was relying on the principle of the hand of one is the hand of all" liability and that "when we prove to you that Julius, 'Little B' [Rivers] and Ryan Deleston were acting together, who pulled the trigger will not be of importance to you." R.p. 42-43, Tr.p. 238-239. Importantly, throughout the opening statement by Solicitor Wilson, no mention is made of her intent to introduce the taped statements of Deleston of July 30, 2012. R.p. 41-51, Tr.p. 237-247. No mention is made of the Petitioner's statement.

However, counsel Pennington does present his defense theory that Bryan Rivers "used the weapon at 2:45 am, one hour before this murder downtown on Rutledge Avenue, to rob that couple that you heard about downtown. And at 4:07 am, he used it again to murder Marley Lion." R.p. 57, ll. 16-20. Also R.p. 59. Tr.p. 253, ll. 16-20. Also Tr.p. 255. ("It is whether or not the State has truly removed all reasonable doubt to show that ---in this instance, that Ryan Deleston would have seen the crazy, irrational act of Bryan Rivers coming."). Counsel Pennington made no mention of Deleston's statement in his opening either. During the testimony of Detective Williams of the Charleston Police Department, the State introduced evidence that Deleston in the evening statement had indicated, among other things that Bryan Rivers had the firearm and went up to the vehicle and shot into the (Lion's) vehicle. R.p. 758, ll. 7-15, Tr.p. 1012, ll. 7-15.

inappropriate where no reversible error occurred.

The summary order by the Court of Appeals suggested in its citations that the Court of Appeals opined that the evidence of the other criminal act by Rivers was not relevant because it was not sufficiently similar to be admissible and lacked a sufficient degree of similarity, citing State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). Respondent submitted that the conclusion is correct, but there are also additional reasons why a new trial would not have been warranted in the appeal.<sup>4</sup>

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<sup>4</sup> In its opinion, the Court of Appeals concluded as follows:

1. As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts ... may ... be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), cert. denied, 135 S.Ct. 400 (2014) ("Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan."); id. ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." (quoting State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); id. at 338 n. 4, 748 S.E.2d at 205 n. 4 (noting we must look at the commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); id. at 341, 748 S.E.2d at 206 ("The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)."); Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534 ("[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." (emphasis added)); Cope, 405 S.C. at 339, 748 S.E.2d at 205-06 (addressing a similar due process argument in which the appellant relied on Holmes v. South Carolina, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from Holmes; holding "[i]t was not the strength of the State's case that led to exclusion of evidence of [the alleged guilty third party's] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible").

***A. The Admission of Separate Evidence of the Earlier Shooting of Chopper Townsend by Rivers with the Murder Weapon through the Petitioner's Own Statement (State Exhibit 30) and the Solicitor's Subsequent Comment Concerning the Evidence of the Shooting in Closing Argument Renders the Prior Limitation on Cross-examination Harmless Error and Failure to Present Rivers after As Non-prejudicial under Strickland.***

Any exclusion of the proffered evidence through cross-examination of Rivers and Brown that Rivers was the triggerperson in the shooting and attempted armed robbery of "Chopper" Townsend was not prejudicial under the Sixth Amendment because similar evidence was actually admitted within the admitted statement of the Petitioner in the State's case. This evidence from the Deleston statement (State Exhibit 30) was directly commented upon by the Solicitor in her closing statement to the jury.

At the conclusion of the case, Defense counsel Pennington did not make this specific request at trial after the evidence was introduced through their client's statement based upon the state opening the door under Rule 611, instead merely restating the motion. R.p. 769-770. In the State's Return in this proceeding, the Respondent theorized that the evolving defense strategy in not recalling Rivers or Brown may be evident because it would have only further emphasized Deleston's involvement and knowledge of the earlier violent crime and the foreseeability of the Lion shooting potential, where Rivers's earlier weapon possession was now before the jury based upon Deleston's own interpretation of that incident through his statement.]. Respondent speculated that it may be suggested that the defense abandoned the request to cross-examine Rivers and Brown about the Chopper incident after the evidence was presented which opened the door to the glaring evidence within the statement. No specific defense objection or request was made concerning the earlier denial throughout the remainder of

the trial.

However, before this Court, counsel Pennington testified that he did not think of recalling Rivers or Brown at the time after the Applicant's statement was introduced including information about the Chopper shooting. However, even if this Court were to find this action in failing to recall Rivers deficient, which the Court does not, for the reasons below Sixth Amendment prejudice is not shown because there is no reasonable probability that the result of the proceeding would have been different because the sought for information was presented without necessitating Rivers testifying as well as the evident risk that he would have brought additional evidence about Deleston's earlier knowledge and involvement in the armed robbery.

Counsel Pennington stated that it was his initial intent if he could have presented the Chopper evidence to cross-examine Rivers about it that he had made a deal with the State and to suggest that he had a propensity to commit violent crimes. He claimed that because Rivers had admitted in a statement his involvement in the Chopper shooting, that fact would have been uncontested. He admitted that in hindsight he could have forced another ruling by the trial court after he opened the door and pointed that out to the court, but he did not think of it at the time.

#### **1. Deleston's Admitted Statement About the "Chopper" Shooting by Rivers**

Prior to the conclusion of the state's case in chief, the State introduced **State Exhibit 30**, a videotape of the July 30, 2012 evening session of the interrogation of Ryan Deleston. At the 9:33:40 portion of Exhibit 30, Deleston brings up about another robbery they did, but he claimed he did not participate in where they shot a drug dealer named Chopper. At the 9:45 PM portion of the tape, it reflects that Detective Osborne asks Deleston what he knows about the Chopper shooting. Deleston then tells Detective Osborne that Chopper was a big drug dealer and that he





had stopped selling to them so they got someone else to call him. According to Deleston, Julius Brown, Bryan Rivers, George Brown and Valentino "Tino" Heyward jumped in the truck to go do the "lick." Deleston stated that they returned with money, dope and Chopper's cell phone. Deleston stated he heard that Rivers (Lil B) had shot Chopper. He said they had two guns with them that they put out beside the house. Deleston says that Tino and Lil B actually did lick while Julius and George stayed in car. Deleston says one of the guns was the murder weapon and other was a 45. Deleston stated that they got about 5 grand and 2 cookies in robbery. R.p. 766- p. 767, Tr.p. 1036- p. 1037. State Exhibit 30 (9:30 - 9:50).

**2. Solicitor Wilson's Closing Comments Concerning Rivers Shooting of Chopper.**

Solicitor Wilson commented upon the "Chopper" shooting in her closing argument. In particular, Solicitor Wilson stated:

Foreseeability? Y'all might not have caught this, or -- or thought about why it was so important to this case when you were watching those three and four hours of the Defendant's statement. Towards the end, just this morning, when Detective Osborne comes in, he tells Deleston, I want to talk to you about some other things, some other crimes. And he starts going through and asking him about other instances. And some of them Deleston said, I don't know anything about. You might remember the one he did know something about or he claimed to. The shooting of a guy named Chopper. Remember that? He says Bryan Rivers shot a guy named Chopper with the murder weapon. Okay.

So Bryan Rivers is now alleged to have shot someone with a murder weapon. He knows about it, and he goes to an armed robbery with it? He buys into robbing Joe's, he helps out in attempting to rob Marley, and he's going to say it's an accident, it wasn't foreseeable?

R.p. 781, l. 3-21, Tr.p. 1064, l. 3-21. (emphasis added). See State Exhibits 29 and 30. (Statements of Deleston); R.p. 766-767, Tr.p. 1036-1037.

**3. Sixth Amendment Prejudice not shown when similar evidence is admitted.**

The Court finds that Sixth Amendment has not been proven. In order for this Court to

grant post-conviction relief, prejudice must be shown. Strickland v. Washington, supra. The Court finds that had counsel Pennington introduced further cross-examined Rivers that there is no reasonable probability that the result of the proceeding would have been different. Because the admitted State Exhibit 30 (Petitioner's statement) included his sought after assertion that Rivers shot Chopper with the murder weapon - the information he sought to develop through the cross-examination of Rivers and Brown -- any exclusion or limitation on the cross-examination is harmless and without Sixth Amendment prejudice. Its earlier exclusion was not prejudicial because it would be cumulative to other evidence that was ultimately admitted. The earlier limitation on cross-examination does not warrant a new trial.<sup>5</sup>

#### HOW THE ISSUE WAS INITIALLY RAISED AT TRIAL

Prior to the trial, on October 7, 2013, the State made a written motion *in limine* regarding excluding from the record evidence that Bryan Rivers shot Leroy 'Chopper' Townsend two weeks earlier the same weapon used in the Marley Lion killing as inadmissible under Rule 404(b) and third party guilt. R.p. 3, Tr.p. 124. See *Motion In Limine Re: Reverse 404(B) Evidence by State*. R. p. 866-873. The defense had made a companion "Motion to Reveal" Rule 404(b) Evidence to determine what information about Applicant's past criminal acts the state intended to use on October 1, 2013. R. p. 3, Tr. p. 124. *Motion to Reveal*. R. p. 874-876. On October 7, 2013, the defense filed a "*Defense's Response to the State's Motion in Limine Re: Reverse 404(B), SCRE Evidence*." R. p. 877-890.

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<sup>5</sup> Rather than seek to re-open the state's case based upon the statement, immediately after State Exhibit 30 is played and the state closes its case, counsel Pennington merely renewed his motion about the inability to cross-examine witnesses in relation to the prior shooting by Bryan Rivers of Chopper without even mentioning or arguing that the similar evidence was presented in Petitioner's statement. R.p. 768, l. 24- p. 769, l. 6, Tr.p. 1038, l. 24- p. 1039, l. 6. Judge Harrington denied the motion. R.p. 770, l. 1-25, Tr.p. 1040, l. 1-25. At that point the defense rested its case without further presentation of any witnesses.

In the state's motion in *limine*, the State initially sought to prohibit the Appellant from offering remote and irrelevant testimony regarding Bryan Rivers's use of a murder weapon during an armed robbery two weeks before the murder of Marley Lion. The motion urged that Applicant would not be prejudiced by the exclusion because it anticipated that Bryan Rivers would admit that he used and possessed the weapon within hours of the shooting of Lion's.<sup>6</sup>

In the pretrial motion, the State declared that the anticipated facts of the case as follow:

During the early morning hours of July 16, 2012, Bryan Rivers, Julius Brown, Appellant Ryan Deleston and others left Defendant's house in the Ardmore area to find someone to rob. They made their way downtown where George Brown's gun was used by Rivers and Defendant to rob a couple walking near Rutledge Avenue. The two stole the woman's purse but did not get any cash. The crew left downtown and discussed robbing the Famous Joe's bar in the West Ashley area of Charleston County. As they approached Ardmore, they pulled through the Famous Joe's and continued to discuss the Famous Joe's robbery.

Shortly before 4 AM, Defendant, Rivers and Julius Brown walked down the street with plans to rob Famous Joe's employees as they left the bar with money. They were staking-out the area as Marley Lion pulled into the parking lot of Famous Joe's. Lion was concerned that he had too much to drink so he parked his white Nissan Pathfinder and climbed into the backseat to "sleep it off."

Within 10 minutes of Marley's climbing in the backseat, a surveillance video shows Julius Brown walking at a fast pace by Marley's car in the parking lot. The video shows that approximately 12 minutes later, Defendant approached the car and appeared to attempt to open the door to the backseat. When Marley's car alarm sounded, Defendant backed out of camera view for several seconds then re-approached the car and began shooting. In all, he struck Marley 5 of the 6 times he shot at Marley.

An investigation ensued and Defendant, Rivers and Julius Brown were developed as suspects. An undercover operation secured the purchase of the murder weapon from the Defendant. As a result of the undercover operation, George Brown gave information that Julius Brown, Rivers and Appellant were involved in Marley's murder. Upon his arrest, Defendant gave a statement implicating Julius Brown, Rivers and himself-- though he claimed Rivers was the trigger man. Since their own guilty pleas, Julius Brown and Rivers have confirmed their own involvement in the attempted armed robbery of Marley Lion after the Joe's plan fell through. They confirm that the Defendant shot Marley Lion using George Brown's firearm. Julius Brown and Rivers also admitted their

<sup>6</sup> At trial, Rivers did in fact testify and he confirmed that he had the murder weapon earlier that night when they robbed the couple. R.p. 259, l. 6- p. 262, l. 18, Tr.p. 479, l. 6- p. 482, l. 18. ("I had the gun").

involvement in the robbery of the couple downtown. According to both of them, Rivers used the same George Brown firearm that later was used to kill Lion.

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 1-3. R. p. 866-868.

Pertinent to this question, the prosecution pointed to the "Chopper" shooting evidence that they initially sought to exclude:

Julius Brown, George Brown and Rivers also revealed that the Marley Lion murder weapon was used on June 1, 2012, by Rivers and another man (Valentino Heyward) when they robbed and shot Leroy "Chopper" Townsend. Chopper survived. According to all of them, Chopper is a drug dealer who they knew would have cash. Furthermore, Rivers had disliked Chopper for years. They rode with George Brown in his SUV to an area where they had created a ruse in which Chopper believed he was meeting someone to buy drugs at an apartment. When Chopper came out of the apartment, Rivers and Heyward robbed him of \$1300 and Rivers shot Chopper with George Brown's gun.

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 1-3. R. p. 866-868.

In the motion, the prosecution relied up the recent decision in *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) in which the defense attempted to put in evidence other crimes committed by James Sanders to support an assertion the Sanders had acted alone in the instant case without Cope. The Court concluded the trial judge was correct in excluding the evidence because they were not similar enough to the charged crime. As noted in *Cope*, "a close degree of similarity is required."

In their initial analysis as to why the "Chopper" shooting should be excluded, the prosecution's motion asserted that the Chopper robbery did not fall within the *State v. Lyle* exceptions of motive, identity, common scheme, the absence of mistake or accident or intent. The state asserted that the defense had no need to show these items because "[P]roving that Bryan Rivers used the murder weapon a full two-weeks prior does not prove his identity as the shooter, and the facts of the two cases are so wildly different that there is no common scheme or plan and it does not establish identity (it is not a "signature" crime)." *State's Motion in Limine*

*Re Reverse 404(B) Evidence*, p. 5. R. p. 870. Although it conceded that the evidence of the Chopper shooting was clear and convincing, its probative value was outweighed by the prejudicial effect. As the State asserted (and showed), the defense was able to show that Bryan Rivers used the murder weapon in an armed robbery downtown Charleston within hours of Lion's murder which was part of the *res gestae* of the Lion killing. In their motion the State asserted that the temporal proximity of the various crimes was critical:

The State's and Defendant's evidence will also show that the murder weapon actually belonged to George Brown. Others' access to the murder weapon will be obvious throughout the trial. The real and obvious reason that the Defendant seeks to introduce the robbery and shooting of Chopper is an attempt to prove that Rivers' acted in "conformity therewith" and, therefore, must have killed Marley Lion. This use of other bad acts is strictly prohibited by the Rule, even if offered in exculpation by a Defendant. The admission of this evidence is highly prejudicial to the state and the victim in this case and under Rule 403, SCRE, the evidence should be excluded.

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 6. R. p. 871. The prosecution asserted that the evidence was remote in time and would only cast clumsy aspersions that Rivers was the triggerperson. As stated therein, Deleston was not prejudiced by the exclusion of the Chopper shooting because there will be ample testimony that the gun did not belong to Applicant and others had ample access to the gun, including by Rivers during the robbery hours earlier.

In the motion, consistent with Cope, the State attached a summary of the similarities and differences between the crimes. *State's Motion in Limine Re Reverse 404(B) Evidence*, p. 8. R. p. 873.

| DATE: June 1                           | Chopper Shooting | Marley Lion's murder |
|----------------------------------------|------------------|----------------------|
| Targeted victim                        | X                |                      |
| Victim Known to Assailants             | X                |                      |
| "Bad Blood" with victim                | X                |                      |
| Victim b/m 30 yoa                      | X                |                      |
| Victim shot once creating minor injury | X                |                      |
| Victim forced to strip                 | X                |                      |

|                                                      |   |   |
|------------------------------------------------------|---|---|
| Victim robbed of \$1300                              | X |   |
| Assailants Driven to Crime scene                     | X |   |
| Partner in Robbery. Valentino Heyward                | X |   |
| Shooting at Apartment complex                        | X |   |
| Shooting not in Ardmore                              | X |   |
| Shooting early-mid evening approx. 9:30 pm           | X |   |
| George Brown's gun used                              | X | X |
| DATE : JUNE 16                                       |   | X |
| Victim of Circumstance                               |   | X |
| Victim unknown to assailants                         |   | X |
| No bad blood with victim                             |   | X |
| Victim W/M 17 yoa                                    |   | X |
| Victim shot 5 times fatally                          |   | X |
| Victim not actually robbed                           |   | X |
| Assailants walked to Crime Scene                     |   | X |
| Partners in Att. Robbery : Deleston and Julius Brown |   | X |
| Shooting in Parking lot businesses                   |   | X |
| Shooting in Ardmore                                  |   | X |
| Shooting in early morning hours                      |   | X |

*State's Motion in Limine Re Reverse 404(B) Evidence*, p. 8. R.p. 873.<sup>7</sup>

<sup>7</sup> The defense responded to the motion on October 7, 2013. He contended that the evidence was admissible as "third party guilt" as well as Rule 404(b). He contends that the admission of the Chopper shooting showed facts "inconsistent with [the defendant's] own guilt . . . and raises a reasonable inference or presumption as to . . . a defendant's own innocence", citing *State v. Gregory, supra. Defense Response to State Motion*, p. 3. R.p. 879. He contends that other crime standard for third party guilt should be a lower standard for admissibility. *Defense Response to State Motion*, p. 3. R.p. 879. The defense asserted that it must be reversible error to exclude evidence that Bryan Rivers was serially committing similar crimes at the time of the offense at issue in participated in the offense. *Defense Response to State Motion*, p. 6-7. R. p. 882-883. The defense further asserted that there was a sufficient similarity between the Chopper shooting and the liens shooting where he contends that the crimes were plan by the same individuals that

### The Motion Hearing

During the preliminary motions before Judge Harrington, the State made its argument as to why the potential evidence should be excluded consistent with their motion. R.p. 3- 6, Tr.p. 124-127. Solicitor Wilson noted the argument was undercut by the fact that Rivers used the gun an hour before the Lions shooting. R.p. 4, Tr.p. 125. The solicitor argued that if there is a need to show that someone else had used the murder weapon other than Deleston, the Defense has an armed robbery that occurred about one hour prior to the shooting using the same weapon. The solicitor claimed the two shootings were nothing alike. She stated that Chopper was someone who was known by Bryan Rivers and the other codefendants. She asserted that they had set out to rob Chopper whereas "Marley Lion just happened to be in the wrong place and the wrong time" and were not the "intended target." She contend that George Brown drove the men to the Chopper shooting while the men walked to Famous Joe's the night of the Marley Lion shooting. [R.p. 5, ll 1-20, Tr. 126, 11. 1-20.]. Additionally, the solicitor claims that the evidence is more prejudicial than it is probative. She opined that was not probative because it was nothing like the shooting of Marley Lion. [R.p. 5, l. 21 - p. 6, l. 1., Tr. 126, l. 21 - p. 127, l. 1.].

The defense contended that this does not reach the *Lyle* analysis because it is evidence of 3<sup>rd</sup> party guilt. They asserted that the evidence of the Chopper shooting was evidence that somebody else use this weapon in the very same manner as it was used in the lions shooting and that it showed that somebody else was the shooter in the Lion murder as third party guilt

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there was a common plan to rob an individual which was executed under their theory by Bryan Rivers in the same manner to rob an individual at gunpoint and with the same weapon during the nighttime. The appellant further asserted in the motion that the two-week time difference does not preclude admission of other act evidence under *Lyle*. He contends that the admission of evidence of Rivers' other crimes is relevant evidence of intent and the identity of the person who really shot Lion's. He asserts that they passage of a mere 2 weeks did not make the June 1 shooting so remote to preclude them from being a common plan or scheme. Finally he contends that unlike *Cope*, the evidence was not being offered against a codefendant's rights on trial were trying to be protected. *Defense Response to State Motion*, p. 6-7. R.p. 882-883.

evidence. Ignoring "the hand of one hand of all" theory of the State, the defense urged that he should be entitled to present a defense because he did not do this and that somebody else was the triggerman. R.p. 6, Tr.p. 127. The defense opined that the evidence was probative that somebody else committed the murder, did not prejudice anyone and was only probative of Deleston's innocence. He additionally contended that due process should allow him to present a defense saying that he was not the shooter and that it is more likely than not that Bryan was the shooter due to the earlier incident.

Solicitor Wilson responded that you have to look at the relevance of their request and that just because another armed robbery took place 2 weeks before does not automatically make it probative in this particular case. She pointed out that in the June 1 shooting the evidence would be that Chopper was called on the telephone told to be at a certain place under the ruse of buying drugs and there he was ambushed, robbed, and shot. She noted this is nothing like the shooting of Marley. It was her contention that under the defense analysis every armed robbery would involve a plan to hold someone at gunpoint, which is what armed robbery is, and that is not a sufficient similarity to allow the admission. However, the defendant cannot be prejudiced when there will evidence that the crimes that night began with a gun in Bryan Rivers' hand committing an armed robbery before Marley Lion attempted robbery. R.p. 11, Tr.p. 132. See also, R.p. 12-16, Tr.p. 133-137.

#### **The Trial Court's Rulings.**

Judge Harrington ruled to exclude the admission of the Chopper shooting by the defense. In its pertinent part, she stated in denying the admission under Rule 404(b):

Rivers' armed robbery and the shooting of Leroy "Chopper" Townsend and the Marley Lion attempted armed robbery and shooting are not sufficiently



similar, based upon the testimony that has been presented, to prove a common scheme or plan. The Chopper shooting involved a victim that was known and targeted by the assailants. The assailants created a ruse to lure him out of his apartment.

The Marley Lion shooting involved a victim of circumstance who was unknown to the assailants. While there was bad blood, according to testimony, of the chart that was given, between the victim and the assailants, there was no bad blood between the victim and the assailants in the Marley Lion murder.

The victim in the Chopper shooting was a 30-year-old African male, while Marley Lion was a 17-year-old white male. In the Chopper shooting, the victim was shot once, was forced to strip and received a minor injury. Marley Lion was shot five times fatally. In the Chopper shooting, they were driven to the crime scene.

In the current case, the assailants walked to the crime scene. And Rivers' partner in Rodney Chopper was Valentino Hayward. Other partners in the attempted robbery of Marley Lion's were Rivers, Deleston, and Brown. Finally, the Chopper shooting occurred at 9:30 at an apartment complex. Marley Lion was killed at approximately 4:00 a.m. in the parking lot of a business.

The similarities between the two shootings and the fact that the gun used belonged to George Brown, and that Rivers was present at that crime scene, accordingly, Rivers' prior bad act of shooting Chopper is not sufficiently similar to the shooting of Marley Lion to qualify for the common scheme or plan under Rule 404(b).

R.p. 21, l. 15- p. 22, l. 24, Tr.p. 211, l. 15- p. 212, l. 24.<sup>8</sup>

Judge Harrington next addressed the issue concerning excluding the evidence under third party guilt.

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\* Solicitor Wilson clarified that George Brown drove Deleston, Julius Brown and Rivers to the apartment complex where the Chopper shooting took place, along with Valentino Heyward. She stated that Tino and Rivers were the ones that actually did the robbery of Chopper and Rivers is actually the man who shot Chopper. R.p. 24, l. 1-10, Tr.p. 214, l. 1-10. Further, Solicitor Wilson clarified that in the Lion case, an hour before the (Lion) robbery, an attempted robbery, George Brown drove the perpetrators through a parking lot and they went home. Brown's truck stayed at the location. At some point after that the Appellant, Bryan Rivers, and Julius Brown discussed looking for people to rob and then walked the third of a mile down to Joe's where Marley interrupted the employees leaving. Solicitor Wilson clarifies that this meant George Brown did not drive anyone to the Lion robbery, unlike the Chopper case when he did drive them to the apartment. R.p. 24, l. 1-24, Tr.p. 214, l. 1-24.

As to the issue involving third-party guilt, the rule governing the admissibility of the evidence under third-party guilt doctrine provides that evidence offered by the accused as to the commission of the crime by another person must be limited to such facts that are inconsistent with his own guilt and to such facts as raise a reasonable inference of presumption as to his own innocence. Evidence that has no other fact other than to cast a suspicion upon another or to raise a conjectural inference as to the commission of the crime is not admissible. The evidence of third-party guilt may include facts that are inconsistent with the Defendant's guilt and evidence raising a reasonable inference as to the accused innocent.

The evidence, again, to be sought by the Defendant's Motion to -- to Include Third-Party Guilt Evidence does not pass the same for admissibility. The evidence in question exceeds the scope of the facts that are inconsistent with his own guilt. It does not pertain to the commission of the crime currently before this Court or the Defendants involved in it whatsoever.

Despite his contention that -- despite Deleston's contention that Bryan Rivers was the shooter and that Bryan Rivers used the same weapon used in the submission of the crime currently before this Court, I do not find that the Defendant states a sufficient factual basis to cast more than a mere suspicion upon a third party. I find that the introduction of this evidence would also amount to solely a conjectural inference as to commission of a crime by third party.

And I find that the evidence sought to be admitted is inadmissible as it pertains to the third-party guilt of Bryan Rivers. Again, noting your exception to my ruling.

R.p. 26, l. 7 - p. 27, l. 16, Tr.p. 216, l. 7 - p. 217, l. 16.

The next morning, the defense pursued a ruling on the exclusion of the Chopper evidence under their due process argument. Counsel Pennington noted that in their response to the State's motion, they had also included a chart purporting to show similarities in the two crimes. R.p. 28-29, Tr.p. 224-225. Counsel Pennington noted that Rivers would testify that he was the shooter in the June 1 incident and that it is the same gun that was used by him later on the night of this incident against two victims. He contended that this supports identity and intent and is consistent with targeting individuals in the nighttime at gunpoint.

Judge Harrington opined that the Applicant's due process arguments were addressed in her earlier orders. R.p. 30-31, Tr.p. 226-227.

### **The Trial Evidence Concerning "Chopper" Townsend's Shooting**

During the trial, further discussion occurred about the Chopper incident prior to the testimony of Julius Brown. The State made a court exhibit the full incident report about the Chopper shooting. Court Exhibit 5. The State called Julius Brown in camera who testified concerning the Chopper shooting. R.p. 125-143, Tr.p. 329-347. In direct, he testified that Julius Brown, Rayshawn Milligan, Ryan Deleston, George Brown and Valentino went to where Chopper was. R.p. 125-126, Tr.p. 329-330. He stated that Chopper was a drug dealer known by Rivers and the witness and had bought drugs from him before. R.p. 126, Tr.p. 330. Julius recalled that George Brown drove them to Andrews Garden Apartments. He was aware that they decided they were going to rob Chopper that day. Valentino in Bryan Rivers was supposed to do the robbery. Julius Brown stated that George, Rayshawn and Deleston stayed in the truck and could not see the robbery take place. After they had let out Tino and Bryan Rivers, he next saw them running from the apartment and got in the car with them. Julius Brown testified that around \$1300 was taken from Chopper and the six of them split it up between them. R.p. 129-130, Tr.p. 333-334. Julius Brown testified that he did not see who shot Chopper. R.p. 130, Tr.p. 334.

During the *in camera* cross-examination, Julius Brown testified that he had not been charged with the robbery of LeRoy Townsend. He stated that it was something that was planned and agreed that Deleston actually knew there were going over the Saint Andrews Garden Apartments to commit a robbery. R.p. 138, l. 17-19, Tr.p. 342, l. 17-19. He stated that when Rivers and Tino got out they were carrying the same pistol that was later used to shoot Marley



Lion. R.p. 139, Tr.p. 343. He also stated that it was in the nighttime and that they had approached Mr. Townsend on foot with the plan to rob him at gunpoint. He described Bryan and Tino returning to the Shires where they had parked and initially ran past the truck because the police had come through. R.p. 141, Tr.p. 345. He stated the plan was always that they would provide the transportation, which they did. R.p. 143, Tr.p. 347.<sup>9</sup>

During Julius Brown's trial testimony before the jury, he confirmed that that they had agreed to "hit a lick" and drove in George's car with Bryan Rivers and Ryan Deleston in the backseat (on the night of Marley's shooting). R.p. 173, Tr. 378. He stated that they had George Brown's gun to use which they carried around often. R.p. 173, Tr.p. 378. He stated that they spotted a boy and girl who were walking. He stated that Rivers and Deleston got out and Bryan had the gun. R.p. 175, Tr.p. 380. He saw Bryan Rivers point the gun and get the pocketbook

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<sup>9</sup> Solicitor Wilson stated that she did not have anything further to add to the arguments other than if the court were to reconsider its position, this witness does not have enough facts about the shooting itself independently about who shot. R.p. 143, l. 17-23, Tr.p. 347, l. 17-23.

Counsel Pennington stated that he understood Bryan Rivers would be called that afternoon. He stated that he desired to cross-examine Rivers about an interview with Detective Osborne when Rivers was asked about his involvement in the robbery at St. Andrews Garden Apartments with Tino. Pennington stated that Rivers denied involvement, which was not truthful. Counsel Pennington stated he sought to use that to show when Rivers needed to rely he knew how to lie. He also stated that with regards to a follow-up conversation that Rivers had on July 30 and 31, he admitted that on June 1 he rode along with a preplanned robbery of Mr. Townsend, that he got \$1300 in cash and drugs, that he used the Marley Lion murder weapon to rob Townsend, that he shot Townsend in the leg, that it was George Brown's gun, that is not been charged with this arm robbery pursuant to his proffer agreement, and that he is also not been charged with attempted armed robbery pursuant to the agreement. R.p. 145, l. 1-11, Tr.p. 349, l. 1-11.

Solicitor Wilson stated that she took issue with the assertion that Rivers not being charged with the Chopper shooting was not pursuant to any agreement with the Solicitor's office. She stated that their agreement was only that they could not use Rivers words against him and that they could make a case from other folks against them and that he does not have immunity from that prosecution. R.p. 145, Tr.p. 349. See also, R.p. 243-244, Tr.p. 451-452. Solicitor Wilson reaffirmed that even the limited testimony of Julius Brown shows the stark difference between the Chopper shooting and the Lion shooting. R.p. 146, Tr.p. 350. Counsel Pennington renewed his objection concerning the Chopper shooting proffer. R.p. 146-147, Tr.p. 350-351.

from the couple. R.p. 175-176, Tr.p. 380-381. At that time he said while Bryan ran back to the car, Deleston walked the other way and they met Deleston at McDonalds after he called George to pick him up there. R.p. 176, Tr.p. 381.<sup>10</sup>

He stated that next plan was to rob Famous Joe's, which the Applicant had discussed robbing before. Julius testified that they drove through the parking area and then Julius told Ryan he did not think it was a good idea. R.p. 179, Tr.p. 384. Julius Brown said the gun was under the driver's side mat after Bryan gave it to George. Julius testified that when they got back to Cashew, Deleston wanted to go back and check out Famous Joe's again. Julius stated that he was to be the lookout in the wonder robbed them was going to be the Applicant. R.p.181, Tr. p. 386. Julius recalled the George gave the list and the gun before they left and he put it inside his pants on his hip. R.p. 181, l. 12-13, Tr.p. 386, l. 12-13. He stated that he walked down to Famous Joe's with Rivers and the Applicant. The plan was to wait for the people inside Joe's to come out with the moneybag. He stated that Rivers role was also to be a lookout. R.p.182, Tr.p. 387.

Julius testified there was a discussion and a decision was made to change the plan after Marley Lion pulled up into the area. He said Deleston was going to try to see what Marley had. R.p. 183-184, Tr.p. 388-389. He stated that he later then saw Deleston and Bryan discussing who was going to do what and passing the gun back and forth. R.p. 187-188, Tr.p. 392-393. Julius

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<sup>10</sup> Chris McLandish testified about the initial robbery on Rutledge Avenue. R.p. 700-712, Tr.p. 953-965. He described walking with his girlfriend on June 16 between 2:45 AM and 3:00 AM. He stated that they heard a man behind them and then the person came in front of them with a gun. He testified he pointed the gun at him and that they only saw one man. He stated that after his girlfriend gave the purse to him the man ran off to the right and he heard a car door but did not see anything. R.p.702-704, Tr. 955-957. See also R.p. 707, Tr. 960. He confirmed that he only saw one person attempting to rob him. R.p. 711, Tr. 964.



testified that he then saw Deleston approach Marley's truck and tell him to open the door and Marley set off the alarm, which caused him to run back. At that time Julius testified he told the Applicant to "bust the window" and Deleston turned back around and started shooting. R.p. 188, Tr.p. 393. He stated after the Applicant shot five times he took off running. R.p. 189, Tr.p. 394. When they got back to Cashew Street, both Julius and Rivers cursed at Deleston for shooting for nothing. Deleston stated that he thought Julius had told him to shot. R.p.192, Tr.p. 397. Julius confirmed that Exhibit 23 was the gun used to kill Marley Lion owned by George Brown and that Deleston had it and that it was used by Bryan Rivers that date to rob the couple. R.p. 212, Tr.p. 417. Julius confirms that on the video he is telling Deleston with the white shoes and striped shirt to bust the window. R.p. 213-214, Tr.p. 418-419.

On cross-examination, Julius confirms that Rivers got out with the gun to rob the couple and that Ryan had gone away from the robbery. R.p. 223, Tr.p. 440.

At the conclusion of the cross-examination, counsel Pennington renewed his request to go further, implicitly concerning the Chopper case. The court denied the motion. R.p. 240, Tr.p. 447. There was a further discussion about no further need to proffer Rivers testimony concerning the Chopper incident. R.p. 243-244, Tr.p. 451-452.

Bryan Rivers testified about his involvement in the couple's robbery and the Marley Lion incident. He stated he was involved in the shooting of Marley Lion with Julius Brown, George Brown and Ryan Deleston. R.p. 246-247, Tr.p. 466-467. He testified that he pled guilty to voluntary manslaughter for the killing of Marley Lion because the hand of one is a hand of all. R.p. 255, Tr.p. 475. He testifies on that night that he went downtown with Deleston, Julius, George, and Rayshawn looking for robberies to be done with George Brown's gun. He stated

that he had seen a couple that looked like they had been drinking which would be a good target. He thought George spotted them first and they pulled over in part. He stated that George gave him the gun and that he and Deleston got out. Although the Applicant was supposed to help him, Rivers thought he did not help him and that he walked the other way. Rivers stated that he approach the couple and held them at gunpoint and the female victim gave her purse to him. R.p. 260-261, Tr.p. 480-481.

He stated that he later picked up the Applicant when they ran into him at McDonalds. R.p. 263, Tr.p. 483. Then, they drove around and scoped out the scene at Famous Joe's parking lot. Rivers stated that everybody was planning to rob the people coming out of Joe's. R.p. 264, l. 9-11, Tr.p. 484, l. 9-11. He stated in on this planning was himself, Deleston, Julius and George. Because they did not see anybody in the parking lot, Rivers thought that gave them the idea to continue with the robbery. R.p. 265, Tr.p. 485. They returned to Cashew Street and then Rivers left with Deleston and Julius. R.p. 265, Tr.p. 485. Rivers stated that they walked and that Deleston had the gun he had gotten from George Brown. R.p. 266, Tr.p. 486. Rivers stated that after the earlier robbery, he had given the gun back to George Brown. He saw that Deleston had the gun before they left for Famous Joe's because he tucked it under waistline. R.p. 267, Tr.p. 487. Deleston had on a striped shirt. R.p. 267, l. 2-22, Tr.p. 487, l. 2-22.

Rivers stated he saw Marley Lion pull up while the employees were leaving. R.p. 269, Tr.p. 489. The big fish money was leaving according to Rivers. He stated that Julius check out the scene while Deleston had the gun. Rivers stated that Deleston tried to pass the gun to him, but he pushed it back. R.p. 270-271, Tr.p. 490-491. Also R.p. 309-310, Tr.p. 529-530. He said his attention was not to rob the boy, but to get the person with the bag coming out of Joe's. R.p. 270-271, Tr.p. 490-491. He told Deleston to go ahead. R.p. 271; R.p. 310, Tr.p. 491; Tr.p. 530.



("to rob Marley Lion"). He described Deleston walking up to the window and knocking on it and the alarm went off. R.p. 271, Tr.p. 491. Deleston then initially ran back towards them and Rivers heard Julius say "get him" to continue with the robbery, but not as to shot the man. R.p. 272, Tr.p. 492. However, instead of robbing the man, the Applicant started shooting the man about 5 times. Rivers stated he knew that the Applicant hit him because the way the victim was yelling and screaming. At that point he turned and started running. He also thought the Applicant turned and start running also and caught up with them. On the way back Deleston hid the gun under a pool. R.p. 274, Tr.p. 494. Rivers confirmed to this on the video of the crime scene. R.p. 282-283, Tr. 502-503. Rivers admitted that he was wearing all black and testified that Applicant was wearing a striped shirt and white sneakers called Willie Dee's. [R.p. 261, ll. 9-12; Tr. 267, ll. 1-17, Tr. 481, ll. 9-12; Tr. 487, ll. 1-17.]

On cross-examination, Rivers confirmed he had the weapon earlier that night and robbed the woman of her purse. R.p. 293, Tr. 513. As to the second robbery, Rivers testified that he did not know the Applicant was going to do something like that. R.p. 297, Tr. 517.

At the conclusion of Rivers's examination, counsel Pennington renewed his motion pursuant to the motion *in limine*. R.p. 308-309, Tr. 528-529.<sup>11</sup>

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<sup>11</sup> George Brown, the gun owner, testified consistently with Julius and Rivers. He testified that during the first robbery that he had the gun in his vehicle and gave it to Rivers. R.p.457, Tr.p. 686. After the robbery of the couple, Rivers returned with the purse. He stated that Deleston had gotten out with Rivers, but they had split up. He said Deleston called him on his cellphone and they picked him up at the McDonald's. R.p.458-459, Tr.p. 687-688. After they returned to Cashew Street after casing out Famous Joe's, George stated he did not want to be part of robbing Joe's. However, he stated that Rivers had returned the gun to him after the first robbery, but gave it to Deleston who put it in his waistband when he left. R.p. 462-463, Tr.p. 691-692. He saw Deleston, Rivers and Julius leave. When they returned, they were made with Deleston. R.p.463-464, Tr.p. 692-693. George stated he did not know what happened but gleaned that Ryan had shot someone because he came back and washed his hands. R.p. 465,



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