

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable William Jeffrey Young, Circuit Court Judge

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S.C. SUPREME COURT

ANTHONY RODRIEKUS CARTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001265

APPENDIX

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TESTIMONY OF ANN HORTON

1 crank it up at 9:15.

2 (The jury left the courtroom.)

3 THE COURT: Mr. Carter, we're a long way from the
4 State putting all of their evidence in but they will finish
5 some time tomorrow. At that point you're under no
6 obligation to prove that you're not guilty and you don't
7 have to put up any evidence at all if don't testify or not
8 testify. If you elect not to testify certainly I tell the
9 jury they can't even talk about that on whether you
10 committed the crime or not. But whether you testify or
11 don't testify is a serious decision, you might as well
12 start thinking about it tonight rather than time the State
13 rests and they say, "Y'all go ahead" and you say, "Wait a
14 minute, I don't know whether I am going to testify or not."
15 Just think about it. I'm sure you have already talked it
16 over with your attorney, you need to revisit it. And I'm
17 not even suggesting you make the decision now, it is just
18 that you will have to make the decision tomorrow or
19 Thursday morning and I will ask you again after the State
20 rests and we sent the jury out but just be thinking about
21 it. I mean, some people make good witnesses and some
22 don't. But anyway, that's an important decision to start
23 thinking about tonight. Okay.

24 (Court adjourned for the evening and resumed at 9:30
25 A.m. on Wednesday, November 9, 2011.)

TESTIMONY OF JEFF STEELE

1 THE COURT: State ready?

2 MR. BARFIELD: State is ready.

3 THE COURT: Defense ready?

4 MR. LIFSEY: Yes, sir.

5 (The jury returned to the courtroom.)

6 MR. BARFIELD: State recalls Jeff Steele briefly.

7 The witness, JEFF STEELE, remained under oath and
8 testified as follows, on:

9 DIRECT EXAMINATION

10 BY MR. BARFIELD:

11 Q Mr. Steele, I need to ask you another couple of
12 questions about some matters that relate to the car from
13 yesterday. During the processing of the car did you take
14 any swabs from the interior of the car?

15 A Yes, sir, I did.

16 Q Where did you take swabs from?

17 A The outside corner panel and the inside of the
18 vehicle behind the driver's seat, the back seat.

19 Q Okay.

20 A And the left side, the inside of the passenger door.

21 Q And I'm going to hand you an envelope in just a
22 second. Can you -- do you recognize the contents of that
23 envelope?

24 A Yes, sir, this will be the swabs.

25 Q Does that envelope actually -- this is State's Number

TESTIMONY OF CARL KENLEY

1 83 for identification from yesterday, but does it include
2 other swabs that were testified about yesterday?

3 A Yes, sir.

4 MR. BARFIELD: Thank you, that's all. Nothing else
5 from this witness.

6 MR. LIFSEY: I don't have any other questions from
7 this witness.

8 MR. BARFIELD: Call Carl Kenley.

9 The witness, CARL KENLEY, was first duly sworn and
10 testified as follows, on:

11 DIRECT EXAMINATION

12 BY MR. BARFIELD:

13 Q Tell us your name, please, sir.

14 A My name is Carl Kenley.

15 Q Mr. Kenley, by whom are you employed?

16 A The South Carolina State Law Enforcement Division
17 commonly known as SLED.

18 Q How long have you been employed by SLED?

19 A Five years.

20 Q What is your job at SLED?

21 A I'm a crime scene investigator.

22 Q Was SLED your first law enforcement job or have you
23 worked somewhere else in law enforcement before that?

24 A I worked somewhere else, I have 21 years of
25 experience.

TESTIMONY OF CARL KENLEY

1 Q As a crime scene investigator with SLED just
2 generally describe to the jury what your responsibilities
3 are and your duties are.

4 A The SLED lab is located in Columbia, South Carolina,
5 and local agencies like Chester department and police
6 departments submit evidence that they have collected to
7 the lab for us to do an analysis like fingerprints to shoe
8 tread and tire tread evidence, comparisons, blood stain
9 pattern analysis and crime scene reconstruction. And we
10 also when requested we respond to all of the 46 counties
11 in the State of South Carolina to process crime scenes.

12 Q Did you and I think two other agents on your crime
13 scene team get requested by the Lancaster County Sheriff's
14 Office to take a look at a car for them back in May of
15 2010?

16 A Yes, we did.

17 Q Did you come up here?

18 A Yes, we did.

19 Q Who else came up here with you from SLED?

20 A Agent Ricardo Prince and Agent Scott Hardy.

21 Q Are they also crime scene agents?

22 A Yes, they are.

23 Q Did you know the purpose of your coming up here when
24 you headed this way?

25 A Yes.

TESTIMONY OF CARL KENLEY

1 Q And what was the date that y'all came up here?

2 A We came up on May 5th of 2010.

3 Q Where did you report to?

4 A We reported initially to the Lancaster County
5 Sheriff's Department at the impound lot.

6 Q Did you deal with agents of the -- or officers with
7 the Lancaster County Sheriff's Office concerning your trip
8 up here?

9 A Yes, we did.

10 Q And specifically who did you deal with?

11 A Jeff Steele and Ken Taylor with the Lancaster County
12 Sheriff's Department Crime Scene Unit.

13 Q Were you briefed about the facts of the matter that
14 lead them to call you up here?

15 A Yes.

16 Q Have some idea about what had happened and why you
17 were asked to come up here and take a look at something?

18 A Yes, sir.

19 Q What is it that you were asked to take a look at?

20 A We were asked to take a look at a vehicle that was
21 involved in a shooting and that a child was shot and
22 killed, and we were asked to take a look at the vehicle to
23 analyze the blood.

24 Q Did you have experience in analyzing bullet holes in
25 the vehicle or other objects, basically gunshot

1 reconstruction?

2 A Yes. As a matter of crime scene reconstruction we
3 often do that.

4 Q When you were asked to take a look at the vehicle,
5 were you told -- did you know what Ken Taylor and Jeff
6 Steele's findings were concerning their analysis of the
7 vehicle and the gunshot reconstruction?

8 A No, we didn't. The only thing we knew is they
9 processed the original scene and also processed the car,
10 that's all we know.

11 Q Didn't tell you what they thought or what they found?

12 A That is correct.

13 Q Did you and your agents examine the car?

14 A Yes, we did.

15 Q Generally speaking just describe -- not detail yet --
16 but generally speaking any defects you found in the car?

17 A Yes. There were two defects in the hood and one in
18 the back windshield. We started the processing of this
19 scene like you would any other scene, photographing the
20 vehicle initially as it was in the condition that we found
21 it, that's how we started processing.

22 Q The first two defects were where?

23 A In the roof of the vehicle.

24 Q You said hood a minute ago, you scared me.

25 A I'm sorry. In the roof.

TESTIMONY OF CARL KENLEY

1 Q Was the car -- did the car appear to be secure when
2 you got there to it?

3 A Yes, it was secured.

4 Q And do you know what date the incident happened in
5 relation to May 4th when you were -- did you say May 4th
6 or 5th, what day?

7 A We responded May 5th, I think the incident was
8 May 3rd.

9 Q What kind of tools did you use to reconstruct the
10 gunshots in this car?

11 A After taking photographs of the entire vehicle then
12 we focused on the particular defects in the roof of the
13 vehicle and back windshield using wood dowel rods.

14 Q I think I showed you a smaller version of this but
15 I'm going to ask you to step down in a minute.

16 MR. BARFIELD: Permission for the witness to step
17 down, Your Honor?

18 THE COURT: Sure, step down.

19 Q Are you familiar with what is shown on this sketch
20 which is State's Exhibit Number 86?

21 A Yes.

22 Q Describe for the jury, not details again, but what is
23 that a sketch of?

24 A This is the sketch of a vehicle that the Lancaster
25 County Crime Scene Unit prepared.

TESTIMONY OF CARL KENLEY

1 Q And is it consistent with what the vehicle appeared
2 like that you examined on May 5th of 2010?

3 A Yes.

4 Q Did you examine the car and reach conclusions about
5 direct trajectories, connecting defects, things like that?

6 A Yes.

7 Q And explain to the jury what your conclusion was
8 about the gunshots in this car.

9 A The first two gunshots that we observed before we
10 placed dowel rods into the gun holes were in the roof of
11 the vehicle.

12 Q You're going to need to talk loud because we don't
13 have a mic. now.

14 A And in relation to it -- we're talking about a
15 vehicle and a substance that's hard, if it is penetrated
16 by a bullet that substance is going to give but it still
17 remains -- holds its shape. And just by looking at these
18 holes in the roof you can tell that they're entering or
19 existing because the steel was bent in as opposed to bent
20 out so we knew that those shots traveled from the front of
21 the vehicle to the back. We place wood dowel rods which
22 are wooden rods that you can get at Lowes or anything,
23 inside the holes to give a trajectory or a path that
24 appears that the bullet traveled. And we place those
25 dowel rods in both of those defects in the roof, they

TESTIMONY OF CARL KENLEY

1 appear to come from the front of the vehicle at a slightly
2 downward angle toward the back of the vehicle. There was
3 a bullet hole in the back windshield that we also looked
4 at and photographed and we placed dowel rods also in that
5 particular hole, and we realized that because there were
6 no defects on the back side of the car we could finally
7 determine that that windshield shot was an exit or an
8 entrance, meaning traveling from the front to the back or
9 back toward the front. Looking at the inside of the
10 vehicle on the inside, also understanding that no one else
11 was injured during the shooting it appeared that no
12 defects, if that shot came from the back impacted anything
13 in the front of the vehicle inside or outside. So that
14 lead us to believe that it had to be a shot that came from
15 the front of the vehicle toward the back.

16 Q Did you reach any conclusion about -- well, you
17 got -- your work on this car showed you how many shots
18 fire into the vehicle?

19 A At least three, possibly four.

20 Q Did you determine where entrance shots perhaps became
21 exits or created other defects?

22 A Yes. These two shots in the roof penetrated the roof
23 and entered the car and exited toward the back because
24 there were defects in the back windshield and also in the
25 back dash.

TESTIMONY OF CARL KENLEY

1 Q For sure the third shot into the car in your opinion
2 went into the car from where?

3 A Into the car from the front passenger side of the
4 vehicle outside.

5 Q And then specifically where, if you know?

6 A Possibly here.

7 Q All right. When you saw the car -- you can step back
8 up now. When you examined the car -- let me ask you a few
9 more questions about that. When you examined the car
10 other than the defect or hole in the back windshield of
11 the car, was there any other broken glass, any other
12 windows in the car have defects in them broken glass?

13 A No, sir.

14 Q Did you examine the outside of the car all of the way
15 around the front and side?

16 A Yes, sir, visually, and we do that with photographs
17 also.

18 Q Was there any defects -- other than the rear
19 windshield which we've talked about, were there any
20 defects on the back side of that car?

21 A No, sir.

22 Q Anything that you would say was a bullet hole into
23 the back of that car?

24 A No, sir.

25 Q Any defects on the driver's side of that car?

TESTIMONY OF CARL KENLEY

1 A No, sir.

2 Q Anything that you would say was a bullet hole into
3 the driver's side of the car?

4 A No, sir.

5 MR. BARFIELD: Thank you, sir. Answer anything
6 Mr. Lifsey has.

7 MR. LIFSEY: Just briefly.

8 CROSS EXAMINATION

9 BY MR. LIFSEY:

10 Q Sir, then your consensus and your conclusion, you and
11 your team, is that the Lancaster crime scene folks
12 basically got it right on their analysis of this vehicle;
13 is that correct?

14 A Yes, sir. Our conclusion was consistent with what
15 the Lancaster County Crime Scene Unit did.

16 Q Just to reiterate, it's your belief that the shots
17 fired came from the direction of these individual arrows
18 that are pointing in here?

19 A That is correct, someone standing at or near the
20 front passenger side of vehicle.

21 Q So clearly -- it sounds like a dumb question
22 anyway -- clearly someone standing mid-area here could not
23 have fired those shots.

24 A No.

25 Q And someone from the front could not have fired those

TESTIMONY OF CARL KENLEY

1 shots.

2 A No.

3 Q Okay. Thank you.

4 MR. LIFSEY: Judge, I don't have any further questions
5 for this witness.

6 MR. BARFIELD: Nothing else for Mr. Kenley, ask that
7 he be excused.

8 THE COURT: Okay.

9 MR. BARFIELD: Your Honor, at this time without a
10 witness from the immediate point I have two affidavits from
11 SLED personnel for chain of custody which Mr. Lifsey is
12 familiar with, one is from Salina Kinard and one is from
13 Doris Yarborough. And I also have what Mr. Mr. Lifsey has
14 received as a complete copy of the SLED chain of custody
15 and I would offer those as a State Exhibits.

16 MR. LIFSEY: And I don't have any objection to those.

17 THE COURT: Jurors, that's just saying that handed out
18 to me, I took it to the lab and they took it from me
19 without having them come and testify.

20 (The affidavits were received as State's 87 and 88.)

21 The witness, ILA SIMMONS, was first duly sworn and
22 testified as follows, on:

23 DIRECT EXAMINATION

24 BY MR. BARFIELD:

25 Q State your name, please, ma'am.

TESTIMONY OF ILA SIMMONS

1 A My name is Ila Simmons.

2 Q Ms. Simmons, by whom are you employed?

3 A The South Carolina Law Enforcement Division also
4 known as SLED in the forensics laboratory's trace evidence
5 department.

6 Q How long have you been employed at SLED?

7 A Almost 12 years.

8 Q What do you do in the trace evidence department at
9 SLED? Generally speaking what do you do?

10 A We analyze gunshot residue, gunpowder residue, we
11 perform glass comparisons, fiber comparisons, we also
12 perform paint comparisons and we analyze residues from
13 explosive debris and fire debris.

14 Q How did you learn to do what you do and what makes
15 you qualified to do what you do?

16 A I began by getting a Bachelors Degree in Science.
17 After I completed that I came to work at SLED, my first
18 three years at SLED I worked with court qualified, court
19 certified examiner who taught me how to collect and
20 analyze all types of trace evidence. During that time I
21 had to take written and practical examinations and
22 complete them with 100 percent efficiency. Each year I
23 have to take a proficiency test in every area that I
24 analyze to make sure I am still proficient in all of these
25 areas.

TESTIMONY OF ILA SIMMONS

1 Q Have you been called upon to testify in the courts of
2 South Carolina on previous occasions and qualified as an
3 expert witness in I guess trace evidence examination?

4 A Yes, sir, I have, over 200 times.

5 MR. BARFIELD: Your Honor, at this time I would offer
6 Ms. Simmons as an expert in trace evidence examination.

7 MR. LIFSEY: I don't have any objection.

8 THE COURT: Okay.

9 Q Did you ever come to Lancaster County in connection
10 with this case other than today?

11 A No, sir.

12 Q Okay. Do you go out to crime scenes?

13 A No, sir.

14 Q Did you get called upon to do some examinations of
15 some items that were submitted to SLED concerning this
16 case which SLED had assigned a lab number to?

17 A Yes, sir, I did.

18 Q What is the SLED lab number?

19 A It is L10-04902.

20 Q The ten stands for what?

21 A The year in which the case was submitted to our
22 laboratory.

23 Q I'm going to show you some stuff, and I don't think
24 there's going to be any need to open this box, if there is
25 we'll talk about it and if you need gloves we'll talk

TESTIMONY OF ILA SIMMONS

1 about it. But I am going to hand you an item and I'll
2 just ask you to examine the packaging and tell me if you
3 know what that item is and if you have ever seen at least
4 the labeling on that item before?

5 A Yes, sir, I have.

6 Q Assuming it's labeled properly, what is inside that
7 box?

8 A Inside this box is one white T-shirt described as
9 coming from Anthony Carter.

10 Q Has it been assigned a SLED lab number?

11 A Yes, sir, it has.

12 Q Let me ask you to explain a couple of things about
13 this before we get too far into it. You told us about a
14 SLED -- back up -- I said lab number a minute ago. You
15 told us about a SLED lab number which is L104902 I think.

16 A Yes, sir.

17 Q What does the 4902 mean?

18 A When cases come into SLED to be analyzed they're
19 assigned a unique identification number. In this case L10
20 would be the year, 2010, it was submitted, and then
21 depending upon when it came in the year, what number of
22 case it is it would be assigned a number like 4902, so
23 that is what that lab number would be.

24 Q And the 4902 number applies statewide for whatever
25 comes in from whatever agency, is that correct,

1 chronologically?

2 A Yes, sir, in accordance with this case.

3 Q Now, does SLED assign item numbers to individual
4 pieces of evidence that come in for that case under that
5 case number?

6 A Yes, sir.

7 Q And does that thing in that box there have a SLED
8 item number?

9 A Yes, sir, it does.

10 Q What's the SLED item number?

11 A It is item ten.

12 Q Let me show you another box which is SLED item
13 number -- State's Exhibit Number 1 for identification
14 purposes, and again, if you need anything to cover your
15 hands up or if you want me to manipulate it for you.

16 A This should be safe with the outside cover.

17 Q Do you recognize what is in that package?

18 A Yes, I do.

19 Q And assuming it's labeled correct, what's in that
20 package?

21 A It is one white T-shirt described as coming from
22 Marico Stevens.

23 Q Have you seen that before?

24 A Yes, sir, I have.

25 Q Let's talk a little bit about gunshot residue before

TESTIMONY OF IIA SIMMONS

1 we get into any details. What is gunshot residue?

2 A Gunshot residue is a mixture of microscopic chemicals
3 that come out of a gun when it's discharged. When a
4 cartridge is placed into a gun to be fired there are
5 several components of it; it has a primer, it has
6 gunpowder and it has a bullet or projectile that leaves
7 the gun and strikes the target. The primer is a mixture
8 of shock sensitive chemicals. When the firing pin hits
9 this primer it makes a small explosion inside the
10 cartridge setting the gunpowder on fire. The gunpowder
11 begins to burn and as it burns it builds up pressure, it's
12 held so tightly in the chamber of this gun that the only
13 area of release is by pushing the projectile out of the
14 end of the cartridge and out of the barrel and eventually
15 to strike a target. All of these chemicals, the shock
16 sensitive chemicals from the primer, the gunpowder, some
17 smoke and any debris that may be in the barrel come out of
18 the gun as well as the bullet and can get on things in
19 close proximity to the gun including the person's hands
20 that's shooting the gun and that's all considered gunshot
21 residue.

22 Q Can it get on somebody's clothing?

23 A Yes, it does.

24 Q Do you always find it?

25 A No, sir.

1 Q When you are testing -- what is a gunshot residue kit
2 that a local law enforcement agency would collect?

3 Describe for the jury what that is about.

4 A It is a standardized kit, it contains two components.
5 It contains sticky tabs, which basically is double-sided,
6 is on the handle so that the hands on the person
7 collecting the kit never touch the sticky tape, it's only
8 the hands of the person who is being sampled being someone
9 they believe may have fired a gun or been in the vicinity
10 of a gun. The second portion is cotton swabs. A few
11 drops of dilute acid is put on the swabs and then they're
12 swabbed on the hands. Clothing we only take the sticky
13 tabs because if you were to put liquid on clothing it's
14 going to permeate through the clothing, it's not going to
15 pick anything up and you will not be able to swab anything
16 off like you would with skin, that won't absorb.

17 Q All right. For hands from a gunshot residue
18 collection kit, what -- is there a standard procedure for
19 areas of the hands that are swabbed?

20 A Yes, sir. In our standardized kits you have a sample
21 to be collected from the palm of the right hand, a
22 separate sample from the back of the right hand, a sample
23 from the palm of the left hand and a sample from the back
24 of the left hand for the sticky tabs.

25 Q When you examined a kit, a GSR kit that had been

TESTIMONY OF IIA SIMMONS

1 collected, is it a chemical examination, a microscopic
2 examination, an instrumentation examination or some
3 combination of all of that?

4 A It's a combination of all of those. It's an
5 instrumental examination and the instruments help us
6 determine how much of each one of these shock sensitive
7 components is present on the particles.

8 Q Okay. Is there some -- is there a window of
9 opportunity for collection of this evidence off of a
10 person?

11 A Yes, sir. Gunshot residue has the consistency of
12 salt, it is very easily removed. If someone were to wash
13 their hands or wipe their hands it would be removed from
14 their hands, so as quickly as possible someone should try
15 and collect a GSR kit. But we have done test studies
16 where we've allowed someone to fire a gun, we know they've
17 fired a gun, we've taken samples from their hands and six
18 hours at the most is the longest time that we have found
19 that someone would have gunshot residue on their hands.
20 Generally it's much sooner. In fact, it is usually --
21 it's two to four hours that gunshot residue is completely
22 gone from someone's hands even if they don't wash their
23 hands or wipe their hands excessively.

24 Q If a local agency sends you a gunshot residue kit
25 that had been collected six hours after belief was that

1 the gun had been fired, what do y'all do with it?

2 A We will not analyze that.

3 Q Don't do anything with it.

4 A No, sir.

5 Q Will you always find gunshot residue on hands or
6 clothes of somebody who has, in fact, fired a gun?

7 A No, sir. Because being that it's such a light
8 material and will be so easily removed -- sometimes we
9 have agents shoot guns, we take GSR kits of them, we just
10 watched them shoot the gun, we know they did and within an
11 hour or so there's no gunshot residue simply because if
12 your gun gets wet, if you begin to sweat your skin absorbs
13 these materials and it disappears.

14 Q I'm going to show you something else. I'm going to
15 hand you another envelope which I will tell you has been
16 opened, and examine whatever you need to examine about
17 that, and then tell me if you know what that is.

18 A Yes, sir, I do.

19 Q Have you seen that before?

20 A Yes, sir, I have.

21 Q Have you done work with that?

22 A Yes, sir.

23 Q What is that?

24 A This is a standardized gunshot residue collection
25 kit.

TESTIMONY OF ILA SIMMONS

1 Q Is it associated with that subject, a person?

2 A Yes, sir, it is.

3 Q Who is the person that it is associated with?

4 A John Jerrod Hill.

5 Q Do you know exactly what was collected from looking
6 at that package?

7 A Yes, sir.

8 Q Tell the jury what was collected from John Jerrod
9 Hill. Do you need something to open something up?

10 A No, this is good. When it was returned the particles
11 weren't returned, the swabs and all were in here when I
12 received it but they were consumed during analysis.

13 Q From what parts of John Jerrod Hill were those
14 samples collected?

15 A The palm of his right hand, the back of his right
16 hand, the palm of his left hand and the back of his left
17 hand.

18 Q Do you ever get one hand test from people that got
19 two hands?

20 A Yes, sir, sometimes you do.

21 Q Is that a two-handed test?

22 A Yes, sir. There were samples from all of those
23 areas.

24 Q All right. Did you collect anything from the two
25 T-shirts that we talked about a minute ago which I think

1 were State's Exhibits 10 and 12 for identification
2 purposes?

3 A Yes, sir, I did.

4 Q I'm showing you -- well, let me backup, let me ask
5 you this: What is the main item number for the gunshot
6 residue kit for John Jerrod Hill?

7 A It is item nine.

8 Q Do you break it down and create subitems at some
9 point?

10 A Yes, I did.

11 Q Did you do that with John Jerrod Hill which is
12 State's Exhibit 3 for identification, did you create
13 subitems from SLED item nine?

14 A Yes, sir, I did.

15 Q And what were the subitems?

16 A It would be 9.1 that would be the right palm sample,
17 9.2 would be the right back, 9.3 would be the left palm
18 and 9.4 would be the back of the right (sic) hand.

19 MR. BARFIELD: At this time I would offer State's
20 Exhibit 3 for identification as State's Exhibit 3.

21 MR. LIFSEY: Without objection.

22 (State's 3 was received into evidence.)

23 Q Okay. Did you collect subitems from SLED items ten
24 and 12, the two T-shirts that you identified a minute ago?

25 A Yes, I did.

TESTIMONY OF ILA SIMMONS

1 Q I'm handing you this bag and ask you if you can
2 identify that?

3 A Yes, I can.

4 Q What is that.

5 A These are the particle lifts or sticky tabs that I
6 collected from the shirt described as coming from Anthony
7 Carter.

8 Q All right. And I'm showing you another envelope and
9 ask you if you can identify what is in that?

10 A Yes, sir. These are partial lifts that were
11 collected from the T-shirt described as coming from Marico
12 Stevens.

13 Q All right.

14 MR. BARFIELD: Your Honor, at this time I would offer
15 these two items as the next two State's Exhibits.

16 THE COURT: Okay.

17 Q Did you analyze State's Exhibits 3 and 90 and 91
18 which you identified as the GSR kit from Hill and the
19 lifts from the two T-shirts to determine if there was
20 gunshot residue on any of that stuff?

21 A Yes, I did.

22 Q I'm going to ask you the short question, was there
23 any?

24 A No, sir.

25 Q Not identified with any of those items?

TESTIMONY OF ILA SIMMONS

1 A No, sir.

2 Q Did you have some other items that you looked at?

3 A Yes, sir, I did.

4 Q And what were the other items that you looked at?

5 A I received a black shirt and pair of black pants
6 described as coming from victim as well as a brown
7 and white coat and a purple belt, and they wanted -- and
8 the agency wished to know if there was glass present.

9 Q Did you find any glass in any of that stuff?

10 A No, sir, I did not.

11 Q Did you prepare a written report of your findings?

12 A Yes, sir, I did.

13 Q Is this a copy of that report?

14 A Yes, sir, it is.

15 MR. BARFIELD: Your Honor, at this time I would offer
16 the report as the next State's Exhibit.

17 MR. LIFSEY: Without objection.

18 THE COURT: Okay.

19 (The report was received as State's 92.)

20 MR. BARFIELD: Answer anything Mr. Lifsey may have.

21 CROSS EXAMINATION

22 BY MR. LIFSEY:

23 Q Agent Simmons, just a couple of questions then. Does
24 this report that the solicitor just introduced as State's
25 Exhibit 92 reflect the full list of items you examined?

TESTIMONY OF IIA SIMMONS

1 A Yes, sir, it does.

2 Q So the bottom line is you examined a T-shirt taken
3 from Anthony Carter which I assume had blood on it as
4 well.

5 A I didn't make any notes to that.

6 Q Well, anyway, you took a T-shirt seized from Anthony
7 Carter and didn't find any gunshot residue on there.

8 A That is correct.

9 Q If this represents the entirety of your report and
10 your analysis then I assume that you never got an
11 opportunity to examine either any clothing or any palm
12 print, hand print lifts from a man named Beneco Ganson,
13 did you?

14 A No, sir, they were not submitted to me.

15 Q And I assume then that you also -- once again, if
16 this is the entirety of your report -- were not able to
17 examine any clothing or any palm print, hand print, any
18 lifts of potential residue from a man named James or J. D.
19 Hemphill; is that correct?

20 A No, sir.

21 MR. LIFSEY: Thank you. I don't have any further
22 questions.

23 MR. BARFIELD: Nothing else for Ms. Simmons, ask that
24 she be excused.

25 THE COURT: You are free to go.

TESTIMONY OF CATHERINE LEISY

1 The witness, CATHERINE LEISY, was first duly sworn and
2 testified as follows, on:

3 DIRECT EXAMINATION

4 BY MR. BARFIELD:

5 Q State your name, please, ma'am.

6 A Catherine Leisy.

7 Q Ms. Leisy, by whom are you employed?

8 A I work for the South Carolina Law Enforcement
9 Division also known as SLED.

10 Q How long have you worked for SLED?

11 A For approximately five and a half years.

12 Q What do you do for SLED?

13 A I'm a forensic scientist assigned to the DNA and
14 serology unit. My responsibilities include processing
15 forensic cases, generating reports based on the results
16 and the conclusions drawn and testify to those reports as
17 necessary.

18 Q Have you worked in this field prior to working for
19 SLED?

20 A Yes, I have.

21 Q Where and for how long?

22 A Prior to my employment with SLED I worked as a
23 forensic DNA analyst at a private testing facility in
24 Maryland known as Orchid Celmark. My responsibilities
25 were very similar, I ran the same types of testing

TESTIMONY OF CATHERINE LEISY

1 analysis that I do here at SLED.

2 Q Have you been called and qualified in the courts of
3 this state previously as an expert witness in forensic and
4 DNA analysis?

5 A Yes, sir, I have.

6 Q About how many times do you know that you have
7 testified in South Carolina?

8 A Approximately 20 times in South Carolina.

9 Q Have you testified in the courts of other states
10 after being qualified as an expert in forensic DNA
11 analysis?

12 A I have. I've also been qualified in California,
13 Massachusetts, New Jersey, Florida, District of Columbia
14 as well as federal court in Florence.

15 MR. BARFIELD: Your Honor, at this time I would offer
16 Ms. Leisy as an expert witness in DNA analysis?

17 MR. LIFSEY: Without objection.

18 THE COURT: Okay.

19 Q All right. Tell us what kind of stuff you can get to
20 see if you can find DNA. What type of materials from
21 humans will perhaps allow you to find DNA?

22 A Basically all of the body cells with the exception of
23 our red blood cells contains DNA. We can develop DNA
24 profiles from blood, saliva, semen or even just from skin
25 cells that may be left on an object that has been touched

1 or held for a certain period of time.

2 Q You said DNA profile, what is a DNA profile?

3 A In developing a DNA profile we test 15 specific
4 locations in the DNA known as STR's, and STR stands for
5 short tandem repeat. These are just locations where a
6 short ordinate of DNA repeats a certain number of times,
7 and the number of times that unit repeats varies from
8 person to person. The overall collection of the DNA types
9 at each of these 15 locations coordinate a visual for an
10 individual and gives us their profile. Once we've
11 developed a profile for a piece of evidence we can compare
12 that to a known profile from the individual to determine
13 whether or not that individual could have contributed to
14 the DNA found on the evidence.

15 Q Now, you've explained what a profile is, but at some
16 point way back in the back of your lab are you ever
17 looking at a profile? Are you looking at something that
18 is a profile?

19 A Yes. We generate profiles for evidence and then
20 compare it to the profiles developed for the individuals.

21 Q And what is it that you look at when you say you're
22 looking at a profile, a piece of paper with graphs and
23 numbers? What is it? What is the profile itself?

24 A The broad data that's generated when we perform the
25 testing, it looks sort of similar to an EKG, it has spikes

TESTIMONY OF CATHERINE LEISY

1 or peaks in it, each one signifying a different DNA type
2 at a location. We then convert the raw data into a table
3 that includes the items that we've tested, the STR
4 locations that we've tested as well as the DNA types found
5 at each of these locations so that we can compare the
6 evidence profile to a standard.

7 Q What is touch DNA?

8 A When we refer to touch DNA we just mean skin cells
9 that have been transferred to an object that has been held
10 or touched and it could just be as simple as touching an
11 item with your fingers, it can also be transferred by
12 sweat if an object is held for a long time, it's also
13 affected by how tightly you hold an object and the other
14 people have held the objects. There are quite a few
15 factors that go into whether or not we can develop
16 profiles from touch DNA.

17 Q Did you do some work in this case identified as SLED
18 lab number 10-04902 from Lancaster County?

19 A Yes, I did.

20 Q Did you have some submissions presented to you to see
21 if you could develop DNA profiles from?

22 A I did.

23 Q And again, I'll ask you the same question I asked
24 Ms. Simmons a minute ago, do you go out in the field and
25 work crime scenes and collect evidence yourself?

1 A No, I do not.

2 Q I'm going to hand you some stuff. Well, before I do
3 that, what is the most common way for you to -- what is
4 the most common sample you would receive to work with to
5 try to develop a DNA profile from a deceased person?

6 A Typically from a deceased individual we receive a
7 blood standard, it can either be a tube of liquid blood
8 collected at autopsy, sometimes it is dried for us on
9 filter paper and labeled with that individual's name.

10 Q Is there a way for law enforcement to collect
11 material that from which you could develop a DNA profile
12 from a living person?

13 A From living individuals, again, we can receive a
14 blood standard that has been drawn from that living
15 individual. It is more common for us to receive what we
16 call buccal swabs which are just oral swabs that are
17 collected from an individual's cheek that contain enough
18 cells for us to develop a DNA profile.

19 Q And is there a standard package for collection of
20 buccal swabs, something that sort of comes prepackaged and
21 a way to do it and preserve it?

22 A There are certain kits that are used for buccal
23 swabs, sometimes we receive kits, sometime we receive
24 Q-tips in an envelope, it just depends on the agency.

25 Q Are there methods for local law enforcement to

TESTIMONY OF CATHERINE LEISY

1 collect the evidence which could potentially lead to the
2 development of a DNA profile from an inanimate object?

3 A Yes, sir.

4 Q And how would that perhaps commonly occur?

5 A Depending on the type of sample being taken, if there
6 is liquid blood present they would just need to use a
7 sterile cotton swab, again very similar to the Q-tip, they
8 can then just swab any liquid to be present that they
9 believe would be bodily fluid. If they were trying to
10 touch for DNA I believe they will wet the swab with a
11 sterile water to collect more with the cells when the
12 items are swabbed.

13 Q I'm going to show you some stuff. Did you receive
14 some samples on this case to see if you could develop
15 profiles from?

16 A Yes, I did.

17 Q All right. I'm just going to start handing you some
18 envelopes one at a time. Can you -- are you familiar with
19 the contents of that envelope?

20 A Yes, I am.

21 Q And what's in that envelope?

22 A This envelope contains a blood sample that is
23 identified as belonging to victim .

24 Q All right. And I think I'm going to refer to it, I
25 think it has got an evidence sticker on it, State's Number

TESTIMONY OF CATHERINE LEISY

1 81 for identification. Now, what is the actual sample for
2 victim numbered by SLED item number?

3 A When the original sample was logged in it came in as
4 SLED item number one, it was a tube of blood and it was
5 identified for toxicology testing.

6 Q Do you break it down -- take part of it and give that
7 part the subject item number?

8 A It was requested that an analyst in toxicology
9 basically take a small portion of a sample submitted that
10 was then sub-itemized as SLED item 1.1 for me to be able
11 to use a profile for victim .

12 Q And is State's Exhibit 81 for identification that
13 item 1.1 that you worked with?

14 A Yes, sir, it is.

15 Q Tell me what is in that envelope. And if it's got
16 a -- I should have done this too -- State's Exhibit Number
17 82 for identification, can you tell me what is in that?

18 A This pouch contains buccal swabs to be used for a
19 standard for Anthony Carter.

20 Q Is this what you worked from?

21 A Yes, it is.

22 Q I show you State's Exhibit Number 78 for
23 identification. Can you tell me what that is?

24 A This pouch contains the buccal swabs from Marico
25 Stevens to be used to develop standards.

TESTIMONY OF CATHERINE LEISY

1 Q Did you work with that item?

2 A Yes, I did.

3 Q I show you State's Exhibit Number 84 for
4 identification. Can you tell me what is contained in
5 that?

6 A This pouch contains the buccal swabs from Emmy Coats
7 to be used for developing standard purposes.

8 Q Did you analyze that item?

9 A Yes, I did.

10 Q I'll show you State's Exhibit Number 83 for
11 identification. Can you tell me what that is?

12 A This pouch contains two sets of evidence swabs, one
13 set was labeled as swabs that came from the vehicle, the
14 other was a set of swabs from a Hi-point weapon.

15 Q Did you work with all of the numbered items in that
16 envelope?

17 A Yes, I did.

18 Q And I'm going to hand you finally -- and that was
19 State's Exhibit Number 83 for identification. I'm going
20 to hand you one that doesn't have a sticker on it yet.
21 Can you tell me what's in there?

22 A This pouch contains the buccal swab from Jacqueline
23 Sanders to be used to develop a standard on.

24 Q Did you work with that?

25 A Yes, sir.

TESTIMONY OF CATHERINE LEISY

1 MR. BARFIELD: Your Honor, at this time I would offer
2 all of these items as exhibits, and one of them doesn't yet
3 have a number on it so I need to get a sticker.

4 (The items were received as State's 78 and 81-84.)

5 Q Ms. Leisy, let me first ask you about SLED item
6 numbers 13, 14 and 15 which are contained within State's
7 Exhibit Number 83, 13, 14 and 15. What were 13, 14 and
8 15?

9 A They were identified as swabs from a vehicle, they
10 broke down -- SLED item 13 was a swab from the driver's
11 side quarter panel, SLED item 14 will be swabs from the
12 inside of the passenger door, and SLED item 15 is swabs
13 from the left side of the back seat.

14 Q Did you develop a DNA profile from one or more of
15 those swabs?

16 A I developed the same DNA profile from all three
17 swabs.

18 Q Did you develop a DNA profile from item 1.1 which is
19 State's Exhibit Number 81 which you previously said was a
20 blood standard from victim .?

21 A Yes, I did.

22 Q Did you compare the profiles of the blood standard
23 from victim and the swabs from the interior -- or
24 from the car which you developed profiles from?

25 A I did.

TESTIMONY OF CATHERINE LEISY

1 Q Did you reach any conclusions about -- in your
2 comparison of those four items?

3 A I did. The DNA profile developed from the three sets
4 of swabs taken from the vehicle matches the DNA profile of
5 victim .

6 Q What are specifically 18, 19 and 20, SLED numbers 18,
7 19 and 20 which are also contained within State's Exhibit
8 Number 83? What are 18, 19 and 20?

9 A Eighteen, 19 and 20 were the three swabs collected
10 from the Hi-point weapon. SLED 18 was the swab taken from
11 the trigger point of the Hi-point, swab 19 and SLED 20 was
12 taken from the back slide of the Hi-point.

13 Q Did you work on those swabs to determine if you could
14 develop a DNA profile from either one of those three swabs
15 off the Hi-point pistol?

16 A Yes. I was able to develop a profile from all three
17 swabs.

18 Q Did you develop DNA profiles from items -- let me
19 give you the numbers -- State's Exhibit 82 which I think
20 is SLED item 26, the buccal swabs from Anthony Carter, did
21 you develop a DNA profile from them?

22 A Yes, I did.

23 Q Did you develop a DNA profile from State's Exhibit
24 Number 78 which is SLED item number 27 which I think you
25 said was the buccal swabs from Marico Stevens?

1 A Yes, I did develop a profile from that item.

2 Q Did you develop a profile from State's Exhibit Number
3 84 which I think you've testified was SLED item 28, buccal
4 swabs from Emmie Amanda Coats?

5 A Yes, I did.

6 Q And did you develop a profile from State's Exhibit
7 Number 83 which is SLED item number -- well, actually we
8 talked about the profile. These are the swabs from the
9 car and from the gun, you've already testified about that.
10 Did you do comparison -- did you develop a profile from
11 State's Exhibit Number 93 which you said was SLED item
12 Number 29, buccal swabs from Jacqueline Sanders?

13 A Yes, I did.

14 Q Let me ask you this first, at some point during your
15 work on this case, did you get an initial submission of
16 items to work on?

17 A Yes, I did.

18 Q At a subsequent point did you get some additional
19 items to work on?

20 A I did.

21 Q After you got the first items did you reach
22 conclusions and prepare a report?

23 A Yes, I did.

24 Q What were the additional items that came to you to
25 work on in the DNA lab?

TESTIMONY OF CATHERINE LEISY

1 A The additional items received were the buccal swabs
2 from Emmie Coats and Jacqueline Sanders.

3 Q Did you go through it all again, test it again
4 including testing the new items?

5 A Correct. I compared the profiles developed from
6 these new items to all of the items that I had previously
7 tested and reported.

8 Q And after the submission of the new items and your
9 work with the new items and the comparisons again, did you
10 prepare a subsequent report?

11 A I did.

12 Q Does the subsequent report contain new stuff but all
13 of the findings that you made in the first report?

14 A Yes. The second report includes all of the tests and
15 findings.

16 Q Was there -- other than the addition of information
17 in the second report, was there any change in the findings
18 as to the items that you actually tested when you did the
19 first report?

20 A No, there was not.

21 Q Concerning the swabs taken from the Hi-point pistol,
22 you said a minute ago you developed DNA profiles from
23 those swabs. What kind of profile -- not whose but what
24 kind of profile did you develop from any or all of those
25 swabs?

TESTIMONY OF CATHERINE LEISY

1 A From each set of swabs I developed a mixture, just
2 meaning that there was DNA from more than one individual
3 on each swab.

4 Q All right. Did you determine -- let me just ask you
5 this kind of point blank, did you determine whether there
6 was any DNA from victim on that pistol?

7 A No. victim was excluded as a possible
8 contributor to all of the DNA obtained from the pistol.

9 Q Were you able to reach any conclusion about whether
10 there was any DNA from Ms. Coats from the swabs on the
11 pistol?

12 A Ms. Coats was also excluded as a possible contributor
13 to those items.

14 Q How about Ms. Sanders, same question?

15 A Ms. Sanders was also excluded as a possible
16 contributor.

17 Q How about Anthony Carter?

18 A Mr. Carter was excluded as a possible contributor.

19 Q How about Marico Stevens?

20 A Marico Stevens could not be excluded as a possible
21 minor contributor to the mixture that I developed from the
22 swab from the under-guard of the Hi-point.

23 Q Now, typically if you -- I don't know if it's
24 accurate to say you get a match, I don't know if y'all use
25 that terminology, but if you get results hypothetically in

TESTIMONY OF CATHERINE LEISY

1 a circumstance where you compare two DNA profiles and you
2 say they're a match, do you normally express that in some
3 terms or probability? And if you do I want you to explain
4 that to the jury.

5 A We do. When we use the term match it means a
6 situation where there is a single source profile developed
7 from an item meaning there's only an indication from one
8 contributor. In a case where we have a mixture and
9 there's more than one person present, if we have what we
10 call a major contributor, meaning one individual left more
11 DNA than the others, then we can use essentially using the
12 intensity of a signal to pull out their profile. If I
13 have a profile from a major contributor I can treat that
14 like a single source and compare it to an individual. If
15 we can match to a single source profile or a major
16 contributor, we then can do what we call a match statistic
17 giving a probabilities that that randomly selected person
18 would have that DNA profile.

19 Q Again, hypothetically if you're in here on some other
20 case, some other place and it's what you could consider a
21 match, what kind of number are you talking about on the
22 probability?

23 A It depends on the profile. Typically on a single
24 source profile on a match statement we would have
25 statistics in one in several trillion, one in several

1 quintillion.

2 Q How many people live on the earth?

3 A Our current population is approximately seven
4 billion.

5 Q Now, tell us what your conclusion was concerning
6 Marico Stevens when you compared the DNA profile developed
7 from his buccal swabs to the DNA profiles you developed
8 from the swabs off the pistol, tell the jury what you
9 concluded about that.

10 A In regards to the DNA profile developed from the swab
11 from the trigger guard there were at least three
12 individuals contributing to that item. The major
13 contributor to that item was an unidentified female
14 individual, Marico Stevens cannot be excluded as a
15 possible minor contributor to that mixture. The DNA
16 probability -- or excuse me, the probability of randomly
17 selecting an unrelated individual who could have
18 contributed to this mixture is approximately one in 65.

19 Q Sixty-five with no zeros.

20 A Correct, just 65.

21 Q If there were 65 people in this room right now, that
22 statistic means what in relation to those 65 people in
23 this room hypothetically?

24 A Typically it basically means that out of
25 approximately 65 people you would expect one person to be

TESTIMONY OF CATHERINE LEISY

1 a potential contributor to this mixture.

2 Q In your opinion as an expert in forensic DNA
3 analysis, is that statistic, one in 65 in this case
4 significant?

5 A We generate statistics like this just to give a
6 weight to the statement, so to say that someone cannot be
7 excluded would be something different with a stat of one
8 to 65 versus a stat of 65 million or billion. It just
9 means if you randomly selected a person and developed
10 their profile and compared it to the evidence the
11 probability that they would be included is approximately
12 one in 65, it just gives weight to that inclusion
13 statement.

14 Q Do you also find -- assuming that you know
15 somebody -- hypothetically again assuming that you know
16 somebody has handled the gun and assuming that you get
17 buccal swabs from that person and develop a DNA profile
18 from that person and you take swabs from the gun, are you
19 always going to find that person's DNA on the gun?

20 A You won't necessarily always develop that
21 individual's profile. Again, it would depend on how many
22 times they handled the weapon, exactly how they handled it
23 in relation to where it was swabbed and the other people
24 that handled it, had it been wiped down between when they
25 handled it and when it was tested. There are quite a few

1 things that go into it.

2 Q Is there any significance to the time the weapon was
3 fired in relation to the time the weapon was recovered?

4 A As far as developing DNA profiles it would depend
5 more on again how many people had handled it during that
6 time, had it been wiped down, washed clean, things like
7 that. A six day difference, that time frame wouldn't
8 necessarily have a big impact, it would be more on how the
9 gun was handled and how it was treated in that time.

10 Q You told us a minute ago about SLED item number 18
11 which was a swab from I think inside the trigger guard, is
12 that where that one was?

13 A Yes, sir.

14 Q Tell me about what you found on the other two swabs
15 on that gun.

16 A The DNA profiles that were developed from the swab
17 from the handgrips and the swab from the backside of the
18 Hi-point are mixtures of at least two individuals, and
19 Marico Stevens is excluded as a possible contributor to
20 those two sets of mixtures.

21 Q Well, were all of the other people that you had
22 profiles for also excluded?

23 A Yes, they were.

24 Q Tell me about the final swab, SLED item 20. Did you
25 refer to them together?

TESTIMONY OF CATHERINE LEISY

1 A I did. It's basically the same conclusion for the
2 two.

3 Q Did you generate a report? Again, we talked about
4 this a minute ago, did you generate a final report which
5 included all of the items that you worked with?

6 A Yes, sir, I did.

7 Q Was it the one dated August 24th of 2010?

8 A That's correct.

9 Q Is that a copy of your report?

10 A Yes, it is.

11 MR. BARFIELD: Your Honor, at this time I would offer
12 a copy of this report as the next Exhibit.

13 MR. LIFSEY: No objection.

14 THE COURT: Okay.

15 (The report was offered as State's 94.)

16 MR. BARFIELD: Thank you, ma'am. Answer anything
17 Mr. Lifsey has.

18 CROSS EXAMINATION

19 BY MR. LIFSEY:

20 Q So I guess the bottom line to all of this is you
21 examined two items significant to evidence, is that
22 correct, the blood and the gun?

23 A Correct, swabs collected from the car and collected
24 from the gun.

25 Q And of course as to the blood, the blood is from the

1 victim which certainly wouldn't be surprising at all if
2 somebody is hurt and shot that they would bleed and that
3 would be their blood, right?

4 A Based on the incident report it wasn't an unexpected
5 result, no, sir.

6 Q And as to the gun what we know definitively I guess
7 is that you raised and got enough material to develop a
8 DNA profile, correct?

9 A Correct.

10 Q And we know without any doubt that that DNA profile
11 could not have come from Anthony Carter.

12 A Correct. Mr. Carter is excluded as a possible
13 contributor to the swabs from the gun.

14 Q And we do not know that Mr. Stevens cannot be -- we
15 do not know that Mr. Stevens did not contribute to the
16 sample taken from the trigger guard, right?

17 A Correct. I did not exclude Mr. Stevens.

18 MR. LIFSEY: Thank you. I don't have any other
19 questions.

20 MR. BARFIELD: Nothing else from Ms. Leisy. I would
21 ask that she be excused.

22 THE COURT: You may be dismissed. Solicitor, it has
23 only been an hour but four witnesses is about all the
24 jurors can handle. Don't talk about the case, jurors.

25 (The jury left the courtroom and a recess was taken.)

TESTIMONY OF MICHELLE EICHENMILLER

1 THE COURT: Okay. Are we ready?

2 MR. BARFIELD: State is ready.

3 MR. LIFSEY: Yes, sir.

4 (The jury returned to the courtroom.)

5 MR. BARFIELD: State calls Michelle Eichenmiller.

6 The witness, MICHELLE EICHENMILLER, was first duly
7 sworn and testified as follows, on:

8 DIRECT EXAMINATION

9 BY MR. BARFIELD:

10 Q State your name, please ma'am.

11 A My name is Michelle Eichenmiller.

12 Q And Ms. Eichenmiller, by whom are you employed?

13 A The South Carolina Law Enforcement Division commonly
14 known as SLED in the forensic lab.

15 Q What department within the forensic lab are you
16 assigned to?

17 A I work in the firearms department.

18 Q How long have you been employed by SLED?

19 A It has been five and a half years.

20 Q What do you do in the firearms department for SLED?

21 A My primary duties are to evaluate fired evidence or
22 fired ammunition components and the firearms that could
23 have fired them, there is also other duties related to
24 that such as serial number restoration or weapons
25 destruction.

TESTIMONY OF MICHELLE EICHENMILLER

1 Q Have you been called upon to testify in the courts of
2 the State of South Carolina previously as an expert
3 witness and qualified as such in firearms examination and
4 identification?

5 A Yes, I have.

6 MR. BARFIELD: Your Honor, at this time I would offer
7 Ms. Eichenmiller as an expert in firearms identification
8 and -- examination and identification.

9 MR. LIFSEY: Without objection.

10 THE COURT: Okay.

11 Q I'm going to show you some stuff in just a little
12 bit, but tell the jury what a semiautomatic pistol is.

13 A A semiautomatic pistol is a pistol that requires a
14 pull of the trigger for each bullet to be fired, it will
15 keep firing until there's nothing left in the magazine.
16 It has a magazine that you load with cartridges, put it
17 into the magazine rack and it will load the first round
18 into the chamber, at this point it's ready to fire. As
19 soon as you pull the trigger the bullet will exit the
20 barrel, the slide will slide back, the cartridge case gets
21 kicked out to the side and then the next cartridge in the
22 magazine will load. It uses the energy of recoil to do
23 all of that motion.

24 Q What is a cartridge, a complete cartridge? What's a
25 cartridge?

TESTIMONY OF MICHELLE EICHENMILLER

1 A A cartridge is a complete package of ammunition. It
2 has the case which holds the gunpowder and it has a primer
3 in it, then it has the bullet which is the part that comes
4 out it to go down the barrel.

5 Q What is the cartridge case?

6 A The case is basically the container that holds
7 everything together.

8 Q Is there something that is in some bullets, I guess,
9 in some cartridges, is there something called a jacket?

10 A Yes. Some bullets are jacketed, that means they have
11 a covering over their core which is more likely lead.
12 Lead is pretty soft, so they need something to hold the
13 lead in and to stay together better.

14 Q What is a common material that a jacket is
15 manufactured from?

16 A The most common is copper, some of brass, you could
17 also have steel jacketed bullets.

18 Q If you have a jacketed bullet, describe the
19 potentialities when that bullet is fired. What happens to
20 the stuff?

21 A Okay. When a bullet is fired if it contacts
22 something hard it is entirely possible that the bullet
23 could break apart, you could end up with two or more
24 pieces such as the core and the jacket. The jacket will
25 come off when it hits something hard, the core will keep

1 going because it still has momentum.

2 Q Okay. Typically describe the manufacture and
3 characteristics of a barrel of a semiautomatic pistol.

4 A Okay. A semiautomatic pistol is manufactured with
5 rifling, that rifling is just determined by the
6 manufacturer, it depends on how many, which is the number
7 of lands and grooves they would like to put in it and the
8 width of those lands and grooves and the direction of
9 twist. This helps the bullet, it gives it stability and
10 accuracy as it travels down the barrel and out the bore so
11 it will contact it's target.

12 Q And what are lands and grooves?

13 A The lands and grooves are cut in the barrel. It's
14 like a quarterback when he throws the football, you want
15 it to be a tight spiral so this rifling gives a tight
16 spiral.

17 Q Are there unique characteristics typically of the
18 interior of barrels of semiautomatic pistols other than
19 the lands and grooves that are intentionally manufactured
20 into them?

21 A No. Lands and grooves are basically the class
22 characteristics that could be particular to a large number
23 of items. The unique individual characteristics are put
24 there not intentionally but when the barrel is
25 manufactured, depends on the machining that's done, it

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1 could be that the metal wasn't as hard in certain areas so
2 little pieces were torn out. These little imperfections
3 in the barrel is what makes my job possible. I evaluate
4 these imperfections to show up on the bullet as scratches
5 and I see if they look the same as test specimens that I
6 fired out of the same firearm.

7 Q Bullet, again the piece that comes out, the ultimate
8 projectile, is it possible for the barrel to leave
9 markings on the bullet?

10 A Yes.

11 Q Is it possible for the barrel to leave markings on
12 the jacket?

13 A Yes.

14 Q Does the barrel leave -- does the barrel leave any
15 markings on the cartridge case?

16 A The barrel doesn't leave marks on the cartridge case,
17 that would be the rest of the firearm.

18 Q All right. Does the rest of the firearm leave marks
19 on a cartridge case?

20 A Yes. The slide and the breach space will actually
21 leave marks on the cartridge space as well.

22 Q When you have ballistics evidence -- assume you have
23 a firearm, assume you have bullets, assume you have
24 jackets or jacket fragments and assume you have cartridge
25 cases, are you able to examine those and perhaps reach

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1 some conclusion?

2 A Yes, we are in most cases.

3 Q I'm going to show you some stuff. State's Exhibit
4 Number 2 for identification at this point, it's in a box,
5 it has got some other packaging around it, it has been
6 cleared, you do whatever examination you need to do of the
7 item or the packaging and I will ask if you know what it
8 is. Before you do that let me ask you this: Did you get
9 called upon to make some examination of some evidence
10 submitted to the SLED lab from the Lancaster County
11 Sheriff's Office which SLED assigned lab number L-04902?

12 A Yes, 0104902.

13 Q L104902. Can you tell me what all of that stuff is?

14 A Normally when I get evidence I will take pictures of
15 it and I mark it with my item number, my initial and lab
16 number, so I'm making sure that that is what is in here
17 still. It is still in my heat-sealed bag so I know this
18 is the evidence that I looked at.

19 Q Is that evidence that you looked at in connection
20 with this case?

21 A Yes.

22 Q And generally how is that piece of evidence
23 described, what is it?

24 A It's a semiautomatic pistol, it's a Hi-point
25 manufacturer.

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1 Q And the caliber?

2 A .40 caliber.

3 Q All right. Put it back in the box and we will talk
4 more about that in a minute. I'm going to sequentially
5 hand you some other things and ask you the same question.
6 I'll hand you State's Exhibit 75 for identification. Can
7 you look at that and tell me if you know what it is?

8 A Yes. This was my item four, it's a fired --

9 Q How is that item four described?

10 A It's a fired bullet jacket fragment.

11 Q And is it any further described about recovery
12 location in any of the paperwork that you have with the
13 item or in your notes?

14 A I believe on the intake document it describes where
15 it was collected from.

16 Q And do you have that available to you or --

17 A I do. This is from the passenger's side floorboard.

18 Q All right. I'm handing you State's Exhibit Number 80
19 for identification purposes. Are you familiar with that?

20 A This is my SLED item number five which is listed on
21 the intake document as a copper fragment from the seat
22 cushion of headrest on the back of the seat.

23 Q And can you tell, is that item number actually two
24 different pieces?

25 A It is.

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1 Q I'm handing you State's Exhibit Number 74 for
2 identification. Can you tell us what that is?

3 A This was SLED item number seven which is also a fired
4 bullet jacket fragment describe on the intake document as
5 a bullet fragment from the driveway at Athena Road.

6 Q I'm showing you State's Exhibit Number 77 for
7 identification. Can you tell me if you know what that is?

8 A This is my item eight, which is a lead core fragment
9 described in our evidence intake document as a lead from
10 under the spare tire in the trunk.

11 Q And finally I'm showing you State's Exhibit Number 11
12 for identification purposes which has several things in
13 it. Can you tell me what that stuff is?

14 A This is actually my items number 22 through 24, it's
15 three fired .40 caliber cartridge cases. They were just
16 described as number one found at Athena, again number
17 one found at Athena Road, and number three found at
18 Athena Road.

19 Q Did you do work in the SLED lab concerning all of
20 these items?

21 A I did.

22 MR. BARFIELD: Your Honor, at this time I would offer
23 these numbered items for identification as State's
24 Exhibits.

25 (The items were received as State's 74, 75, 77, 80.)

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1 THE COURT: Okay. Except for one which we marked as a
2 Court's Exhibit because it's not going back.

3 MR. BARFIELD: Yes, sir. We have some pictures,
4 though, that's fine.

5 Q Ms. Eichenmiller, when you get a firearm -- we'll
6 just talk about this case -- when you got this pistol,
7 SLED item number 21 I believe it is, State's -- Court's
8 Exhibit Number 4, do you -- and you had stuff to work with
9 it against, do you immediately just start checking the
10 stuff against the pistol or do you do something with the
11 pistol?

12 A We do a lot of forensic documentation. I normally
13 take pictures of the outside container and the inside of
14 the container, what the gun looked like when I got it in
15 case I need to know that for later. I document on forms,
16 I take a lot of notes about it, I check it for safety then
17 I will go in and test fire it in our bullet recovery tank,
18 that way I know that the items that come out of it, the
19 ammunition components are actually of it and I will
20 evaluate those against any evidence that we received.

21 Q Are you concerned about whether the pistol works
22 safely, number one, and operates properly, number two,
23 before you start working with it?

24 A Absolutely. For my own safety and my coworkers' we
25 check it and make sure it works properly, if it doesn't

1 work properly we are capable of repairing it if necessary,
2 and then also for safety to see if the safeties worked at
3 the time when I got it.

4 Q When you got this pistol, Court's Exhibit Number 4,
5 did you check it out to make sure it was working safely
6 and operating properly?

7 A Yes, I did.

8 Q And was it?

9 A It was.

10 Q Did y'all have to do any repairs, make any -- did you
11 have to do any repairs, do any manipulations to get it to
12 be usable for you in testing?

13 A May I check my notes? I don't think so. Everything
14 functioned properly.

15 Q You test fire it. When you do comparisons, are you
16 doing comparisons -- what are you comparing to what when
17 you do comparisons?

18 A When I do comparisons I will take the fired cartridge
19 cases that I recovered, the test specimens and I will
20 compare them to any evidence that's submitted. My primary
21 instrument is a comparison microscope, it's basically two
22 microscopes with a binocular eye piece that I can see both
23 items that are on each stage at one time. I can
24 manipulate them separately, turn them, twist them, change
25 the lighting so I can see all of the marks and then I

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1 determine if the marks are consistent to both the test and
2 the evidence.

3 Q So are you comparing the submitted evidence, for
4 example the jacket fragment to a bullet that you actually
5 yourself fired through the gun to see if they have the
6 same markings?

7 A Yes.

8 Q Did you do that with the item submitted to you and
9 this firearm in this case?

10 A Yes, I did.

11 Q I'm going to ask you item by item about some things.
12 First of all, did you compare -- well, you said you test
13 fire a bullet into a water tank.

14 A Yes.

15 Q When you do that do you generate a fired cartridge
16 case?

17 A Yes.

18 Q Do you use the fired bullet that went into the water
19 tank for comparison?

20 A Yes.

21 Q Do you use the fired cartridge case that was left in
22 the gun when the bullet got fired into the water tank for
23 comparison?

24 A Yes, I did.

25 Q Did you examine State's Exhibit 11, which you

1 identified as the three .40 caliber fired cartridge cases,
2 did you examine them and compare them to fired test
3 specimen fired cartridge cases for State's Exhibit
4 Number -- Court's Exhibit Number 4, the .40 caliber
5 pistol?

6 A I did.

7 Q Did you reach any conclusion about whether those
8 cartridge cases were fired by that gun?

9 A Yes. All three of those cartridge casings were fired
10 by that pistol.

11 Q Any question about that at all?

12 A No.

13 Q Did you examine State's Exhibit 75 which you
14 identified as SLED item number four, jacket fragment from
15 the passenger floor, did you compare that item to test
16 specimen fired bullets that you generated out of shooting
17 this pistol?

18 A I did.

19 Q Did you reach any conclusions?

20 A I did. SLED item four, the fired bullet jacket
21 fragment, was fired by item 21 pistol.

22 Q Same question concerning item -- State's Exhibit 80,
23 which you I think testified was SLED item number five
24 which is actually two lead fragments, or two pieces of
25 fragment, did you compare those two items individually to

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1 your test fired specimens in this case?

2 A I did. SLED item five was actually two fired bullet
3 jacket fragments, one had no marks of value so we couldn't
4 determine anything about that one, but the other was fired
5 by that pistol.

6 Q No question about it?

7 A No question.

8 Q State's Exhibit Number 74, which I think you
9 identified as SLED item number seven, the jacket fragment
10 from Athena Road, did you compare that to your test
11 fired specimens from the Court's Exhibit 4 pistol?

12 A Yes, I did.

13 Q Did you reach any conclusion about that?

14 A Yes, I did. That fired bullet jacket fragment was
15 also fired by the item 21 pistol.

16 Q Any question about that?

17 A No.

18 Q State's Exhibit 77 I think you identified as SLED
19 item number eight, a lead fragment from the trunk, were
20 you able to do anything about that piece of metal?

21 A No, I wasn't. There weren't any marks of value so it
22 was unsuitable for identification.

23 Q Did you generate a report as a result of your
24 comparisons of these items?

25 A I did.

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1 Q Is it dated July 8th of 2010?

2 A Yes.

3 Q Is that a copy of your report?

4 A It appears it's a copy of my report.

5 MR. BARFIELD: At this time I offer the report as a
6 State's Exhibit.

7 MR. LIFSEY: No objection.

8 THE COURT: Okay.

9 (The report was received as State's 95.)

10 MR. BARFIELD: Thank you, ma'am, answer anything
11 Mr. Lifsey has.

12 CROSS EXAMINATION

13 BY MR. LIFSEY:

14 Q Just briefly. Just so I've got it straight, are
15 these the shell casings that you matched to the gun?

16 A Yes.

17 Q This is State's 11 which, of course, you haven't been
18 here but we've been talking about it a lot in this trial
19 is that item, and basically then all you're able to say is
20 that the shell casings from this came from this gun, were
21 fired from this gun; is that correct?

22 A That's correct.

23 Q And obviously this may sound crazy but you don't know
24 anything about where these were recovered particularly, do
25 you?

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1 A No, I don't.

2 Q And you don't know what conditions or anything they
3 were kept in prior to you getting them.

4 A Correct.

5 Q And you don't know the circumstances of the use of
6 this gun because you're not an investigator and you don't
7 go out there, right?

8 A Correct.

9 Q You haven't interviewed witnesses and talked to them
10 about whether the shooting was justified or not, do you?

11 A No, I haven't. We just receive the evidence.

12 Q You just make the decision based on your analysis
13 these were fired from this.

14 A Yes.

15 MR. LIFSEY: I don't have any further questions.

16 MR. BARFIELD: That's all for Ms. Eichenmiller.

17 THE COURT: You are free to go.

18 MR. BARFIELD: State calls Steven Marshal.

19 The witness, STEVEN MARSHALL, was first duly sworn and
20 testified as follows, on:

21 DIRECT EXAMINATION

22 BY MR. BARFIELD:

23 Q State your name, please, sir.

24 A Steven Marshall.

25 Q Mr. Marshall, were you back in May of 2010 an

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1 investigation with the Lancaster County Sheriff's Office?

2 A Yes, I was.

3 Q Are you working elsewhere now?

4 A Yes, I am.

5 Q Did you get involved on May 3rd of 2010 with the
6 investigation of the shooting death of victim .?

7 A Yes, I did.

8 Q Did you go out that night?

9 A I can't recall if I went out that night.

10 Q That's fine. Now, were you working on May 4th,
11 daytime May 4th of 2010?

12 A Yes.

13 Q Did you meet a young man by the name of Anthony
14 Rodriekus Carter on that date?

15 A Yes, I did.

16 Q Where did you and Mr. Carter meet?

17 A The drug task force on Highway 9 in Lancaster County.

18 Q Is that an office or sort of a satellite office of
19 the Lancaster County Sheriff's Office?

20 A Yes, it is.

21 Q Was Mr. Carter -- about what time of day or night was
22 it that you first met Anthony Carter?

23 A Ten or 10:30 --

24 Q That's fine.

25 A -- a.m.

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1 Q Well, let me just hand you a couple of things. I'm
2 going to hand you two pieces of paper, just look at them
3 for a minute, don't tell me anything about them. But do
4 you know what they are?

5 A Yes.

6 Q Do you see anything -- everything you need to see off
7 the first one first of all, dates and times and all that
8 kind of stuff? And then look at the second one, dates and
9 times.

10 A Okay.

11 Q All right. Do you know -- when you saw Mr. Carter
12 was he under arrest?

13 A No.

14 Q When you saw Mr. Carter was he in custody?

15 A No.

16 Q When you saw Mr. Carter was he being detained?

17 A No.

18 Q Do you know how Mr. Carter got to the drug task force
19 office?

20 A I think Officer Fred Thompson had picked Mr. Carter
21 up at his residence or just picked him up somewhere, but
22 he came voluntarily.

23 Q What was your purpose in being in Mr. Carter's
24 presence that morning? First of all, do you know about
25 what time it was on May 4th?

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1 A It was about 10:00 a.m.

2 Q What was your purpose in being in his presence?

3 A To conduct an interview as to what had happened on
4 Athena Road the night before.

5 Q At that time when this all started, was Mr. Carter
6 suspected of having done anything illegal in connection
7 with the death of victim ?

8 A No.

9 Q Did anybody participate with you in the interview
10 with Mr. Carter on May 4th of 2010?

11 A Yes. Officer Thompson and Officer McLemore, and I
12 had known Officer Crump was involved, I'm not sure if it
13 was the 4th or the next interview on the 6th.

14 Q Whether you say Thompson, you're talking about Fred
15 Thompson?

16 A Fred Thompson.

17 Q And McLemore was Ryan McLemore?

18 A Ryan McLemore.

19 Q Was there an interview that occurred for some period
20 of time before Miranda warnings?

21 A Yes.

22 Q During that period of time again was Carter under
23 arrest?

24 A No.

25 Q Was he being detained?

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1 A No.

2 Q Was he a suspect up until at some point later on?

3 A No. He was not a suspect at that time.

4 Q All right. Did y'all talk?

5 A Yes.

6 Q Before I forget this, what we're describing -- what

7 you're describing right now, was it audio and video

8 recorded?

9 A Yes, it was.

10 Q And did y'all preserve the audio and video recording

11 of the interview?

12 A Yes, we did.

13 Q I'm going to hand you something and ask you if you

14 can identify what that is?

15 A It looks like a copy of the interview from 5/4 of

16 2010.

17 Q For Anthony Carter?

18 A Anthony Carter, yes.

19 Q Have you had occasion or opportunity to look at this,

20 all of it, part of it, subsequent to it being made?

21 A Yes.

22 Q Does the audio/video essentially speak for itself?

23 A Yes.

24 Q Is there any cutoff of the tape where stuff was

25 happening and the tape wasn't running as far as you know?

- 1 A No.
- 2 Q Is it a continuous tape from May 4th?
- 3 A Yes.
- 4 Q And do you recall from the review of this thing how
- 5 long the May 4th tape is?
- 6 A Two and a half to three hours maybe.
- 7 Q At some point during your interview with Mr. Carter
- 8 did you read him his Miranda warnings?
- 9 A Yes.
- 10 Q I'm going to show you a piece of paper and ask you if
- 11 you can identify it. Do you know what that is?
- 12 A Yes. This is a copy of the Miranda warnings.
- 13 Q For what subject, for who?
- 14 A Anthony Carter.
- 15 Q From what date?
- 16 A 5/4 of 2010.
- 17 Q Is there writing on the form?
- 18 A Yes.
- 19 Q Whose hand is on the form, who has written on that
- 20 form?
- 21 A Anthony Carter, myself and I believe that's Fred
- 22 Thompson's signature.
- 23 Q Is that form dated?
- 24 A Yes.
- 25 Q Does it have a time -- what's the date?

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1 A 5/4/2010.

2 Q Does it have a time on it?

3 A Yes, it does.

4 Q What is the time?

5 A 10:30 a.m.

6 Q Was that some time after the interview had been going
7 on for a little while?

8 A Yes.

9 Q Did you read Mr. Carter the rights that are listed on
10 that form?

11 A Yes, I did.

12 Q And generally speaking what were you telling him? I
13 don't want you to read the whole form -- well, let me ask
14 you --

15 MR. BARFIELD: Your Honor, at this time I would offer
16 the Miranda warnings as a State's exhibit in lieu of being
17 a Court's exhibit.

18 MR. LIFSEY: No objection.

19 THE COURT: All right, sir.

20 (The Miranda form was received as State's 96.)

21 Q All right. Mr. Marshall, without reading the whole
22 thing, generally speaking what did this form tell
23 Mr. Carter his rights were generally speaking without
24 verbatim?

25 A Basically he had the right to remain silent, if he

1 did not wish to talk to us he didn't have to.

2 Q Did it talk to a right to have a lawyer?

3 A Yes, sir.

4 Q What does the form say?

5 A You have the right to have a lawyer and have him
6 present with him before being questioned. "If you cannot
7 afford to hire a lawyer one will be appointed for you
8 before questioning if you wish."

9 Q Did you read that form, all of that, to Mr. Carter on
10 the video during the interview?

11 A Yes, sir, I did.

12 Q Did you ask him when you read those rights whether he
13 understood those things?

14 A Yes, I did.

15 Q Did you do that right by right, check off by check
16 off?

17 A I don't recall -- if it wasn't right by right it was
18 at the end I asked him if he understood his rights.

19 Q Did he indicate to you that he understood what the
20 rights were that you read?

21 A Yes, he did.

22 Q Did he do something on the form to indicate that he
23 knew what the rights were that had been read to him?

24 A He initialed by each right and signed at the bottom.

25 Q Did you determine how old Mr. Carter was? I'm not

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1 asking you how old he was but did you get some sense about
2 how old he was?

3 A We determined he was an adult, yes.

4 Q Did you determine what his educational background
5 was?

6 A Yes, I did.

7 Q What was it?

8 A I think he said he finished the 10th grade and had a
9 GED.

10 Q Did you ask Mr. Carter if he understood all of those
11 rights that you read him?

12 A Yes, I did.

13 Q Did he tell you that he did or did not?

14 A He told me that he did.

15 Q Did you have any difficulty communicating with
16 Mr. Carter? Did the two of y'all have any difficulty
17 communicating with each other, meaning did he appear to
18 have any problems with the words or phrases and the
19 thoughts you were conveying?

20 A No.

21 Q Did you have any difficulty understanding the words
22 or thoughts that he appeared to be conveying?

23 A No.

24 Q Did he ask you any questions about his rights?

25 A No.

1 Q Did he say or do anything to indicate to you that he
2 did not understand what his rights were?

3 A No.

4 Q Did he after you read him those rights give up those
5 rights or waive those rights and continue to answer
6 questions and talk to y'all about this matter?

7 A Yes, he did.

8 Q Were any of the three of you officers wearing
9 uniforms or were y'all in plain clothes?

10 A We were in plain clothes.

11 Q Did y'all have badges or identification and firearms
12 on you?

13 A Yes, we did.

14 Q During all of the events of May 4th in this video
15 recorded interview, was Mr. Carter at any time restrained
16 in any manner?

17 A No, he wasn't.

18 Q Did Mr. Carter at any time during the May 4th
19 interview ask for anything, examples: Make a phone
20 call -- first of all, do you know if he had a phone with
21 him?

22 A He had a cellphone with him.

23 Q From watching the video and your memory, I guess,
24 were there any times when Mr. Carter was in that room on
25 May 4th when the tape was still running and no police

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1 officer was in there with him?

2 A Yes, I believe so.

3 Q Do you recall whether he used his telephone or
4 manipulated his phone at all during any of that process?

5 A He did use his phone, I don't remember if it was text
6 messaging or actual call but he did use his phone.

7 Q Again, did he ask for anything like -- do you
8 remember if he had anything to eat or drink with him on
9 May 4th?

10 A He did have a bottle of water which we provided for
11 him.

12 Q Did he ask for anything else to eat or drink?

13 A No.

14 Q Did he ask to go to the bathroom?

15 A No.

16 Q Did he ask to go smoke a cigarette or anything?

17 A No.

18 Q Did he ask for anything?

19 A No.

20 Q Did he at any time -- did anybody promise him
21 anything, anybody that participated in the May 4th
22 interview promise him anything to get him to talk to
23 y'all?

24 A No.

25 Q Did anybody threaten him or do anything that you take

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1 as coercion to get him to talk to y'all on the May 4th
2 interview?

3 A No.

4 Q At any time during the May 4th interview did he say
5 that he did not want to talk anymore?

6 A No.

7 Q Did he say that he wanted to have a lawyer present?

8 A No.

9 Q Did he say that he wanted to talk to a lawyer before
10 he talked to you anymore?

11 A No.

12 Q Did he ever on that day say -- get up and attempt to
13 leave?

14 A No.

15 Q Was he ever that day during this interview in
16 custody?

17 A No.

18 Q In your mind at any time that day was he not free to
19 leave during this interview process?

20 A No.

21 Q Go ahead and ask you this, what was Mr. Carter's
22 status with you when he walked in there and when y'all
23 first met on May 4th, what was his status with you?

24 A A witness, or possible witness.

25 Q At some point you read him his Miranda warnings.

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1 A Yes.

2 Q Why?

3 A I was called out to speak --

4 Q Don't tell me what anybody else said, but generally
5 speaking, don't quote anybody. And I'll stop you if I
6 need to.

7 A I was advised that Mr. Carter had a weapon during the
8 time of this incident on Athena Road.

9 Q Is that the point at which you read him his Miranda
10 warnings?

11 A Yes.

12 Q Did y'all make that clear to him at some point after
13 the Miranda warnings that you thought he'd had a weapon?

14 A Yes.

15 Q All right. Let's skip over to another day, another
16 time. I'm going to hand you another piece of paper marked
17 Court's Exhibit Number 2 right now. Tell me if you know
18 what that is.

19 A Yes, sir, it's a Miranda warnings rights.

20 Q Is it the same form?

21 A Yes.

22 Q I mean a different -- used again but is it the same
23 form that you would print off your computer at the
24 sheriff's office?

25 A Yes.

1 Q No difference in the print wording on the form?

2 A No difference.

3 Q And for whom does that form -- to whom does that form
4 apply?

5 A Anthony Carter.

6 Q And what is the date on that form?

7 A 5/6 of 2010.

8 Q What is the time on that form?

9 A 3:48 p.m.

10 Q Is there handwriting on that form?

11 A Yes.

12 Q Whose name is on that form?

13 A My signature, Anthony Carter's signature and also
14 Carl Crump's signature.

15 Q And Carl Crump is also with the sheriff's office?

16 A Yes.

17 MR. BARFIELD: Your Honor, at this time I would offer
18 Court's Exhibit Number 2 as a State's Exhibit.

19 MR. LIFSEY: Subject to the motions in limine, Judge.

20 THE COURT: All right.

21 (The Miranda form was received as State's 97.)

22 Q Mr. Marshall, same sort of series of questions about
23 this. Did you interview Anthony Carter again on May 6th
24 of 2010?

25 A Yes, I did.

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1 Q Did others participate in that interview with you?

2 A Officer Clark Crump.

3 Q And was Fred Thompson in and out or there part of the
4 time perhaps?

5 A Doug, I don't recall.

6 Q That's fine. Again, tell me what time that Miranda
7 warning was done on that?

8 A 3:48 p.m.

9 Q Was Mr. Carter's status different at 3:48 p.m. on
10 May 6th than it had been on May 4th?

11 A Yes, he was in custody at that time.

12 Q All right. We don't need to worry about what, but
13 had he been arrested.

14 A Yes.

15 Q Was there an audio/video recording made of the
16 interview on May 6th?

17 A Yes.

18 Q Have you had a chance to look at some or all of it
19 subject to its creation?

20 A Yes.

21 Q Is this disc it?

22 A Yes, it is.

23 Q When you met with Mr. Carter on May 6th did you read
24 him his Miranda warnings?

25 A Yes, I did.

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1 Q Is it that last exhibit I handed you, I don't
2 remember its number, 97 maybe?

3 A Ninety-seven.

4 Q Is that the Miranda warning form that you went over
5 with Mr. Carter that day?

6 A Yes, it is.

7 Q Again, did you read that verbatim to him?

8 A Yes, I did.

9 Q And did you ask him if he understood each of those
10 rights?

11 A Yes, I did.

12 Q Were they the same rights that you had read him two
13 days earlier?

14 A Yes.

15 Q Did he indicate that he did understand each of those
16 rights?

17 A Yes.

18 Q Had you again determined how old he was roughly?

19 A Yes.

20 Q Did you reaffirm what his educational background was?

21 A Yes, I did.

22 Q Did he tell that you he understood each of those
23 rights?

24 A Yes.

25 Q Did you and he have any difficulty communicating on

1 May 6th of 2010?

2 A No.

3 Q Did he ask you any questions about his rights?

4 A No.

5 Q Did he say or do anything to make you believe he did
6 not understand his rights?

7 A No.

8 Q Did he waive his rights both to remain silent and to
9 have a lawyer and agree to be interviewed and answer
10 questions?

11 A Yes, he did.

12 Q I might have asked you this a minute ago, was he
13 actually in the same room on May 6th that the video shows
14 him being in on May 4th?

15 A Yes, he was.

16 Q Probably sitting in the same chair?

17 A Probably.

18 Q About how long did that interview last?

19 A Approximately two hours.

20 Q Were there periods -- do you recall whether there
21 were any periods of time in that interview where officers
22 were out of the room and he was in the room by himself?

23 A I don't recall, I believe maybe on occasions
24 possibly.

25 Q Was he wearing his clothes or Lancaster County

TESTIMONY OF STEVEN MARSHALL

- 1 clothes?
- 2 A Lancaster County clothes.
- 3 Q And describe his clothing.
- 4 A Orange jump suit.
- 5 Q Was he restrained in some fashion?
- 6 A Yes, he was.
- 7 Q How was he restrained?
- 8 A Leg shackles and a belly chain.
- 9 Q Leg shackles meaning what, could he walk?
- 10 A Yes, he could walk but not very long strides.
- 11 Q And belly chain meaning what?
- 12 A Basically it's a belt around the waist that had
- 13 handcuffs on each side so his hands were kind of down to
- 14 his side.
- 15 Q Did he have the ability to move his hands some?
- 16 A Some, yes.
- 17 Q Enough to write his name and sign things?
- 18 A Yes.
- 19 Q And while I'm asking you about that, did he sign the
- 20 Miranda form from May 6th, State's Exhibit 97?
- 21 A Yes, he did.
- 22 Q Did you and I think Fred Thompson and again Clark
- 23 Crump sign that?
- 24 A Clark Crump signed it.
- 25 Q At any point during the interview on May 6th, was he

1 partially unrestrained?

2 A Yes.

3 Q And what part of him was unrestrained?

4 A One of his hands was unrestrained.

5 Q Was that because y'all wanted to do that?

6 A Yes.

7 Q Did he at any time during that interview on May 6th
8 asked to be unrestrained?

9 A No.

10 Q Did he ever say, "This is too tight on my wrist,
11 loosen it up," for example?

12 A No.

13 Q Did he ever ask you to take any of the restraints
14 off?

15 A No.

16 Q Was the clothing worn by the officers on the May 6th
17 interview similar to the clothing worn with y'all -- the
18 officers on May 4th?

19 A Yes.

20 Q Everybody had guns and badges?

21 A Yes.

22 Q Did Mr. Carter on May 6th ask for anything; something
23 to drink, something to eat, bathroom break, a nap, a B.C.
24 Powder for a headache, use the telephone? Did he make any
25 requests of y'all during the interview on May 6th that you

TESTIMONY OF STEVEN MARSHALL

1 recall?

2 A No.

3 Q Now, the tapes will speak for themselves obviously in
4 a little bit, but other than the conversation that is on
5 the tapes, were there any promises made to Carter to get
6 him to tell y'all stuff about the matter that we're all
7 here for this week?

8 A No.

9 Q Did anybody make any threats to Carter other than
10 whatever is on the tape that speaks for itself, but was
11 there any overt threat made to Carter to get him to talk
12 to y'all?

13 A No.

14 Q Coercion other than whatever the tape shows that
15 speaks for itself to get Carter to talk to y'all?

16 A No.

17 Q Was there ever -- in either interview was there ever
18 any violence during either of those interviews?

19 A No.

20 Q Was there any slamming of doors or tossing of chairs
21 or banging on tables or anything?

22 A No.

23 Q Do you recall whether voices got raised at some point
24 during one or both of these interviews?

25 A At some point I believe maybe voices got raised but

1 nothing yelling or anything, but maybe a little loud.

2 Q Did Mr. Carter talk to you for the duration of the
3 interview on May 6th or did he comply with your request to
4 interview him on May 6th?

5 A Yes.

6 Q Did he at any time during that interview say -- other
7 than whatever the tape shows did he say, "I don't want to
8 talk anymore?"

9 A No.

10 Q Did he ever say, "I want to call a lawyer?"

11 A No.

12 Q Did he ever say, "Get me up out of here and take me
13 back to the detention center?"

14 A No.

15 Q Well, let me do this, have you still got the other
16 copies?

17 A Yes.

18 Q With you or somewhere else?

19 A No, they're at my house.

20 Q That's fine.

21 MR. BARFIELD: Your Honor, at this time I would ask to
22 mark the two discs as State's exhibits for identification.
23 Well, I will go ahead and move them in, I guess.

24 MR. LIFSEY: Subject to my prior motion in limine,
25 Judge.

TESTIMONY OF STEVEN MARSHALL

1 THE COURT: All right.

2 (The two DVD's were received as State's 98 and 99.)

3 MR. BARFIELD: That's all, Mr. Marshall, please answer
4 anything Mr. Lifsey has.

5 CROSS EXAMINATION

6 BY MR. BARFIELD:

7 Q Mr. Marshall, you were a police officer a long time,
8 correct?

9 A Yes.

10 Q And interviewed a lot of people suspected of crimes
11 during that time; is that right?

12 A Yes.

13 Q It's not unusual for you to interview people and have
14 people be a little nervous to talk to you, not unusual at
15 all.

16 A I agree.

17 Q And not unusual that when you talk to people
18 sometimes you have to talk to them awhile; isn't that
19 right?

20 A It's not unusual.

21 Q It's not unusual that sometimes it takes awhile to
22 get out -- to get to the truth of what happened, that's
23 not unusual, is it?

24 A That's not unusual.

25 Q And sometimes it takes multiple interviews to get to

1 the truth of what happened, that's not unusual at all.

2 A That's not unusual.

3 MR. LIFSEY: I don't have any further questions.

4 MR. BARFIELD: Nothing else from this witness, I don't
5 want to excuse him just yet.

6 The witness, FREDERICK THOMPSON, was first duly sworn
7 and testified as follows, on:

8 DIRECT EXAMINATION

9 BY MR. BARFIELD:

10 Q State your name, please.

11 A My name is Frederick Thompson.

12 Q Mr. Thompson, by whom are you employed?

13 A The Lancaster County Sheriff's Office.

14 Q And what do you do for the sheriff's office?

15 A I'm an investigator.

16 Q How long have you been an investigator with the
17 sheriff's office?

18 A For ten years.

19 Q How long have you been employed by the sheriff's
20 office?

21 A Since December of 1999.

22 Q Did you get involved in the investigation of the
23 shooting death of victim which occurred on May 3rd
24 of 2010?

25 A Yes, sir, I did.

TESTIMONY OF FREDERICK THOMPSON

1 Q Did you start work on the case that night or the next
2 day?

3 A The next day.

4 Q Did you on May 4th of 2010 participate in an
5 interview of Anthony Rodriekus Carter?

6 A Yes, sir, I did.

7 Q Do you -- did you have any background -- had you been
8 briefed sort of on the case before you started working
9 directly on the investigation that morning?

10 A Yes, sir, we did.

11 Q And did you know that Anthony Carter was somebody who
12 had been around -- been involved in some way?

13 A Yes, sir.

14 Q Did you see Anthony Carter the night of May 3rd at
15 all?

16 A No, sir, I did not.

17 Q Did you see him on the morning of May 4th?

18 A Yes, sir, I did.

19 Q What was Anthony Carter's status with you as an
20 investigator when you first had contact with him on the
21 morning of May 4th? What was he to the sheriff's office
22 concerning this case?

23 A He was a witness.

24 Q Did you -- where did you first see Anthony Carter?

25 A I went to his residence on Lynwood Drive.

- 1 Q Did you talk to him there?
- 2 A Briefly.
- 3 Q Did you tell him why you were there?
- 4 A Yes, sir.
- 5 Q And what did you tell him?
- 6 A I asked him if he would come to the sheriff's office
- 7 and speak with us about his knowledge of the case.
- 8 Q Did he agree to?
- 9 A Yes, sir, he did.
- 10 Q Did you do anything, threaten him or coerce him in
- 11 any way to get him to come to the sheriff's office?
- 12 A No, sir.
- 13 Q Was there any reluctance on his part to come to the
- 14 sheriff's office?
- 15 A No, sir. I think he indicated that he knew we were
- 16 going to come out and speak with him.
- 17 Q Did you drive him to the sheriff's office in your
- 18 police car?
- 19 A Yes, sir.
- 20 Q Was it an unmarked car?
- 21 A Yes, sir.
- 22 Q I think you drive an Explorer.
- 23 A Yes, sir.
- 24 Q Where did you go -- specifically where did you go?
- 25 A I brought him back to our drug task force address,

TESTIMONY OF FREDERICK THOMPSON

1 the address is 1609 Pageland Highway.

2 Q And did you know that he was going to be interviewed?

3 A Yes, sir.

4 Q Did you know it was going to be audio/video recorded?

5 A Yes, sir.

6 Q Did y'all make an audio or video recording?

7 A Yes, sir, I did.

8 Q Have you watched some or all of that tape?

9 A Yes, sir, I have.

10 Q At any time during the proceedings of the making and
11 recording of the statement on May 4th, was Anthony Carter
12 under arrest?

13 A No, sir, he was not.

14 Q Was he detained?

15 A No, sir.

16 Q Was he ever during the interview not free to leave?

17 A No, sir.

18 Q Did you have any difficulty understanding
19 Mr. Carter's -- did you have any trouble communicating
20 with Mr. Carter?

21 A No, sir, I don't think so. Sometimes he would speak
22 low but we were all in the same room, we could still kind
23 of hear him.

24 Q Did he appear to have any trouble understanding your
25 words and phrases and thoughts?

- 1 A No, sir.
- 2 Q Did he ever ask you any questions about his Miranda
- 3 warnings?
- 4 A Right after he was read his Miranda warning he
- 5 immediately asked if he was under arrest.
- 6 Q And what did you tell him?
- 7 A We told him he was not.
- 8 Q Was that true?
- 9 A That was correct.
- 10 Q Did that remain true throughout that interview?
- 11 A Yes.
- 12 Q Any other questions he asked about his Miranda
- 13 warnings?
- 14 A None that I can remember.
- 15 Q Did he ever say or do anything that made you think he
- 16 did not understand what his Miranda warnings were?
- 17 A No, sir.
- 18 Q Did he appear to be during the May 4th interview in
- 19 any state of discomfort?
- 20 A No, sir.
- 21 Q Did he have any scars, marks, visible injuries or
- 22 appear to have any pain or discomfort?
- 23 A No, sir.
- 24 Q Did he ever -- do you recall whether he had his
- 25 telephone during this interview?

TESTIMONY OF FREDERICK THOMPSON

1 A He did, it was in his left pocket.

2 Q Do you recall from watching the tape whether he ever
3 used the telephone during the interview?

4 A He did, sent a few text messages and even spoke to
5 someone by phone.

6 Q Were there times when he was in the interview room
7 and y'all weren't in there?

8 A That is correct.

9 Q Did he ever ask for anything like -- well, do you
10 recall him having anything to eat or drink during the
11 interview?

12 A He was given a bottle of water.

13 Q Did he ever ask for anything else to drink or
14 anything to eat?

15 A Did not.

16 Q Cigarette?

17 A Did not.

18 Q Bathroom break?

19 A No, sir.

20 Q Smoke break or headache powder or anything?

21 A No, sir, he didn't ask for anything else.

22 Q Anybody promise him anything on May 4th to get him to
23 talk?

24 A No, sir.

25 Q Anybody threaten him or coerce him on May 4th to get

1 him to talk?

2 A No, sir.

3 Q I think it's May 4th, I'm going to go ahead and ask
4 you this: Are you aware on May 4th at some point he said,
5 "I've answered your questions, I'm ready to go," or
6 something like that?

7 A Yes, sir.

8 Q Have you seen that?

9 A Yes, sir, I did.

10 Q Was that when you were talking to him?

11 A Yes, sir.

12 Q Of course, you've seen the tape now, did you remember
13 that happening.

14 A Not at the time. After watching the video I do now
15 realize that he did say that.

16 Q Did he -- did y'all continue to talk after he said
17 that?

18 A Yes, sir.

19 Q Did he ever protest continuing to talk to you after
20 y'all said that?

21 A No, sir. I think right after he said that he
22 continued to talk.

23 Q And again when he said that was he under arrest?

24 A No, sir, he was not.

25 Q Was he in custody?

TESTIMONY OF FREDERICK THOMPSON

- 1 A No, sir.
- 2 Q Was he being detained?
- 3 A No, sir.
- 4 Q If he would have gotten up and said, "I'm breaking
5 camp, take me home," could he have left?
- 6 A Yes, sir, he could have.
- 7 Q Thank you. Well, let me backup. Were you present at
8 least during -- are you aware there was an interview with
9 Mr. Carter on May 6th, two days later?
- 10 A Yes, sir.
- 11 Q Were you present and did you participate in some
12 fashion in that interview?
- 13 A I didn't participate in that interview. I was there
14 at the office kind of in and out because they were working
15 on some other things, I was aware that he was there and
16 interviewed but I didn't initially interview him at that
17 time.
- 18 Q Do you recall whether you actually were in the room
19 during any of that?
- 20 A I walked by the room.
- 21 Q And I can't remember from watching the tapes, but did
22 you ever interact with Mr. Carter for the May 6th
23 interview?
- 24 A Maybe spoke to him in passing but we didn't hold a
25 conversation.

1 Q The same series of questions that I asked you about
2 May 4th apply to May 6th, but did he at any time reach out
3 to you and say, "I need something, I want something, I
4 want a lawyer," or anything like that?

5 A No, sir, not to me.

6 Q Was it your understanding on May 6th that he was in
7 jail arrested in custody?

8 A Yes, sir.

9 MR. BARFIELD: Thank you. Answer anything Mr. Lifsey
10 has.

11 MR. LIFSEY: I don't think I have anything for
12 Mr. Thompson.

13 THE COURT: You can step down.

14 The witness, RYAN MCLEMORE, was first duly sworn and
15 testified as follows, on:

16 DIRECT EXAMINATION

17 BY MR. BARFIELD:

18 Q State your name, please.

19 A Ryan McLemore.

20 Q Agent McLemore, by whom are you employed?

21 A Lancaster County Sheriff's Office.

22 Q What do you do for the sheriff's office?

23 A I'm a lieutenant, I supervise the narcotics division
24 at the sheriff's office.

25 Q How long have you been with the sheriff's office?

TESTIMONY OF RYAN MCLEMORE

1 A I have been with the sheriff's office fifteen years.

2 Q How long have you been supervisor for narcotics?

3 A Three years.

4 Q Did you participate, assist in the investigation of
5 the shooting death of victim which occurred on
6 May 3rd of 2010?

7 A Yes, I did.

8 Q Did you go out that night or did you start up the
9 next morning?

10 A I started up the next morning, I didn't go out there
11 that night.

12 Q Did you meet a fellow named Anthony Rodriekus Carter
13 the next morning?

14 A Yes, I did.

15 Q Were you present and did you participate in his
16 interview at the drug task force office on May 4th
17 starting some time I think maybe 9:30 or so in the
18 morning?

19 A Yes, sir, I did.

20 Q Did you directly engage in questions and answers with
21 Mr. Carter from time to time?

22 A I did.

23 Q Was Steven Marshall and Fred Thompson also
24 participating in the interview?

25 A Yes, they were.

1 Q Let me ask you just some general questions. Was
2 Carter in custody?

3 A No, sir, he was not.

4 Q Was he under arrest?

5 A No, sir, he was not.

6 Q Was he detained?

7 A No, sir.

8 Q Was he restrained?

9 A No, sir.

10 Q At any time during the interview process was he free
11 to leave?

12 A Yes, he was.

13 Q Did you become aware that he got his Miranda warnings
14 some time during that interview?

15 A I did.

16 Q Did his status in your mind change just because he
17 got Miranda warnings? Was he free, under arrest or
18 anything after that, do you know?

19 A I wasn't present at the time.

20 Q That's fine.

21 A I had left the interview by that time.

22 Q At any time when you were participating in the
23 interview, did Carter appear to be in any discomfort?

24 A No, sir.

25 Q Did he ever ask for anything?

TESTIMONY OF RYAN MCLEMORE

1 A No, sir.

2 Q Creature comforts?

3 A Right.

4 Q Didn't ask for anything?

5 A No, sir.

6 Q Did he ever in your presence say, "I don't want to
7 talk anymore?"

8 A No, sir.

9 Q Did he ever in your presence say, "I want a lawyer?"

10 A No, sir.

11 Q Did he ever invoke his Miranda -- his Miranda and
12 constitutional rights during your presence with him?

13 A No, sir, he didn't.

14 Q Anybody promise him anything to get him to talk on
15 May 4th?

16 A No, sir.

17 Q Anybody coerce him or threaten him to get him to talk
18 on May 4th?

19 A No, sir.

20 MR. BARFIELD: Thank you. Answer anything Mr. Lifsey
21 has.

22 MR. LIFSEY: I don't have anything for this witness.

23 THE COURT: Free to step down.

24 The witness, CLARK CRUMP, was first duly sworn and
25 testified as follows, on:

TESTIMONY OF CLARK CRUMP

1 DIRECT EXAMINATION

2 BY MR. BARFIELD:

3 Q State your name.

4 A Clark Crump.

5 Q Mr. Crump, by whom are you employed?

6 A Lancaster County Sheriff's Office.

7 Q How long have you been with the sheriff's office?

8 A Fourteen years.

9 Q What do you do with the sheriff's office?

10 A I'm a criminal investigator.

11 Q Is that what you were with the sheriff's office in
12 May of 2010?

13 A That's correct.

14 Q Did you participate in the investigation in the
15 shooting death of victim which occurred on May 3rd
16 of 2010?

17 A Yes, sir.

18 Q Did you start your investigation on the night of
19 May 3rd or morning of May 4th or some time later?

20 A Some time later.

21 Q Did you have anything to do with Anthony Rodriekus
22 Carter concerning this case prior to May 6th of 2010?

23 A No, sir.

24 Q Did you have any contact with him prior to May 6th?

25 A No, sir.

TESTIMONY OF CLARK CRUMP

1 Q Did you have any contact with Anthony Rodriekus
2 Carter on May 6th of 2010?

3 A Yes, I did.

4 Q Where did that contact occur?

5 A At our Lancaster County Drug Task Force on Number 9.

6 Q Was the purpose of that contact to conduct an
7 interview?

8 A Yes, sir.

9 Q Were you there?

10 A Yes, sir.

11 Q Was Steven Marshall there?

12 A Yes, sir.

13 Q Was Fred Thompson around or maybe in and out?

14 A I don't recall him being in the building.

15 Q That's fine. Was Carter under arrest?

16 A Yes.

17 Q Was he dressed out in detention center clothing?

18 A Yes, sir.

19 Q Was he restrained?

20 A Yes, sir.

21 Q At some point during the interview was there any
22 change in his restraint?

23 A I believe his right hand was taken lose from the
24 chair.

25 Q Did he ever ask -- was that because y'all initiated

1 that or he asked for it?

2 A We initiated it and allowed him to do it to
3 demonstrate something.

4 Q Did he at any other time -- how long was that
5 interview, May 6th, about how long, do you know?

6 A Approximately an hour and a half.

7 Q Is there dead air time when there isn't any
8 interviewing going on but the tape is still running?

9 A Yes.

10 Q So the interview is longer than an hour?

11 A Probably.

12 Q Is there any time during that interview that Carter
13 said, "Unchain me, free me, let my hands loose, unhook my
14 legs," or anything like that?

15 A No, sir.

16 Q Did he appear to be in any physical discomfort? Did
17 he have any injuries?

18 A No, sir.

19 Q Did he complain of any pain?

20 A No, sir.

21 Q Did he ever ask during that interview for any
22 creature comforts like a drink of water, something to eat,
23 bathroom break, something for a headache, anything?

24 A No, sir.

25 Q Did he at any time during that interview invoke his

TESTIMONY OF CLARK CRUMP

1 constitutional and Miranda rights; number one, did he ever
2 say, "I don't want to talk anymore?"

3 A No, sir.

4 Q Did he ever say, "I want a lawyer before I decide to
5 continue talking?"

6 A No, sir.

7 Q Did he say, "I want a lawyer for any purpose?"

8 A No, sir.

9 Q Did he ever just flat out say, "I'm done, I'm not
10 going to talk anymore?"

11 A No, sir.

12 Q Did he talk?

13 A Yes, sir.

14 Q Did he carry on a conversation for several hours?

15 A Yes, sir.

16 Q Anybody promise him anything -- well, the tape is
17 going to speak for itself. Did you interview him, are you
18 doing a good bit of the interviewing yourself?

19 A Yes, sir.

20 Q Did you use techniques that you have been trained to
21 use while you are interviewing somebody?

22 A Yes, sir.

23 Q And we might at some point get into the difference
24 between an interview and interrogation.

25 A Yes, sir.

TESTIMONY OF CLARK CRUMP

1 Q Were you trying to get him to give you information?

2 A Yes, sir.

3 Q Is it clear on the tape?

4 A Yes, sir.

5 Q Did you promise him anything to get him to give you
6 information?

7 A No, sir.

8 Q Did you threaten him in any way to get him to give
9 you information?

10 A No, sir.

11 Q Did you do anything to coerce him in any way other
12 than your interview techniques to get him to give you
13 information?

14 A No, sir.

15 Q And I don't want you to say what he said, but did you
16 get information?

17 A Yes, sir.

18 MR. BARFIELD: Thank you. Answer anything Mr. Lifsey
19 has.

20 MR. LIFSEY: I don't have any questions for Officer
21 Crump.

22 THE COURT: You may step down. The next thing I
23 understand it is the tape which is three or four hours, I
24 don't know. But anyway, it is what it is it. So y'all be
25 back at 1:00 and we will start then.

1 (The jury left the courtroom and a lunch break was
2 Taken.)

3 THE COURT: Do you think you have got it under
4 control, Solicitor?

5 MR. BARFIELD: I hope so, Your Honor.

6 THE COURT: Are you ready to roll?

7 MR. BARFIELD: Yes, sir, just one second.

8 (The jury returned to the courtroom.)

9 THE COURT: Okay.

10 MR. BARFIELD: Your Honor, at this time the State is
11 prepared to publish portions of the videotape interviews
12 that I introduced into evidence as two State's exhibits, I
13 don't recall the numbers, they're segments and I'm going to
14 be stopping and starting. And I think the clerk is going
15 to tell the jurors something about the ear pieces.

16 (Break in proceedings.)

17 (At the time the DVD was played.)

18 THE COURT: Okay. Jurors, we're going to take a
19 little break.

20 (A recess was taken and the jury returned to the
21 Courtroom.)

22 THE COURT: Okay. Jurors, they have eight minutes
23 left on the first tape, about an hour and 20 minutes on the
24 second tape. I told them y'all are good for that much time
25 and we will finish for the day, but if somebody needs a

1 break raise your hand and we're talking an hour and 35
2 minutes max. Okay.

3 (The DVD resumed playing.)

4 MR. BARFIELD: We are done.

5 THE COURT: Y'all step up one second.

6 (A bench conference was held.)

7 THE COURT: All right. Jurors, that's it. As I
8 promised you today we will get it to you tomorrow, won't be
9 late, don't know whether it will -- probably be before
10 lunch though probably, so don't talk about the case. We're
11 going to start back at 9:30. We've got to go over a bunch
12 of things with the attorneys at 9:00 so we'll still finish
13 it tomorrow. Have a good night. 9:30.

14 (The jury left the courtroom.)

15 MR. BARFIELD: I'm informed by Mr. Lifsey as to
16 indictment number 2009-GS-29-1167 which is a direct
17 indictment true billed charging Anthony Rodriekus Carter
18 with possession of a pistol by a person convicted of a
19 crime of violence, that Mr. Carter desires to plead guilty
20 to that charge and --

21 THE COURT: No, that's not the one -- oh, okay,
22 previously convicted.

23 MR. BARFIELD: Yes, sir.

24 THE COURT: Okay. Mr. Carter, you doing all right?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: You've been in here all week and just
2 looked at a couple of hours of testimony on tape, toward
3 the end of that you admitted that you at least handled a
4 pistol, talked it over with Mr. Lifsey and you decided to
5 go ahead and plead guilty to that charge.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you understand that you are entitled
8 to go forward with the trial on that issue along with the
9 other charges?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: You've been exercising all of your trial
12 rights listed on this advisement of rights form. Only
13 thing you're taking is blood pressure medicine?

14 THE DEFENDANT: Yeah, that's it.

15 THE COURT: Blood pressure probably up pretty high
16 now. Anyway, you understand you do not have to plead
17 guilty to this.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And that you waive all of the trial rights
20 that you've been exercising by doing it, you understand
21 that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Of course, once the jury sees you on the
24 tape admitting you handled the gun then all the State has
25 to prove is you have a prior record which they could do. I

1 take it you acknowledge you have a prior crime of violence
2 on your record?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: If you plead guilty, of course, I will
5 tell the jury at some point since they understood there
6 were three charges but there are only two that they aren't
7 to consider your pleading on this, on the issue of your
8 guilt on those charges, do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you have any questions about anything?

11 THE DEFENDANT: No, sir.

12 THE COURT: Now, you understand the penalties are up
13 to five?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you also understand if you are on
16 probation and not already in violation this would
17 constitute a violation of any probationary sentence?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: While you're out there under oath I need
20 to explain to you again, I touched on it again yesterday,
21 it doesn't have anything to do with this particular plea,
22 but the State is either going to rest, that means they're
23 not going to put anymore evidence in, or they just have a
24 miniscule of evidence to put in, maybe some documents that
25 they haven't formerly introduced that's marked as

1 identification, or they may call somebody to connect the
2 dots or something like that. But the bottom line their
3 case is up except for formality which won't take long if
4 they go forward. At that point they will rest and then you
5 will have to make that decision as to whether to put up a
6 defense or not and if you have talked to Mr. Lifsey, you've
7 got all night to do that about whether you need to testify
8 or not. There are good reasons to testify and good reasons
9 not, the jury has already seen you for a couple of hours on
10 video, so if you don't put any evidence as Mr. Lifsey has
11 explained to you he gets to close which is a tactical
12 advantage, but I'm not suggesting you do that, you have the
13 absolute right to put up a defense. If you put up any
14 evidence then the State gets to open and close in
15 summation. That's one reason Mr. Lifsey did not put in the
16 sketch that he had and maybe he tricked the solicitor into
17 doing that, he put his option into arguing last. But do
18 you have any questions about that?

19 THE DEFENDANT: No, sir.

20 THE COURT: Are you freely and voluntarily entering
21 this plea to this charge that carries up to five years?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Anything about that?

24 MR. LIFSEY: No, sir. I think you've laid out that it
25 makes strategic sense.

1 THE COURT: I'll defer sentencing until the trial is
2 over on that charge. But I will tell them that he pled to
3 that without telling them how much time it carries or
4 anything like that.

5 MR. LIFSEY: Yes, sir.

6 THE COURT: Now, what forms of verdict do y'all
7 anticipate submitting?

8 MR. LIFSEY: Well, obviously he is indicted for
9 murder, I would ask the Court to submit voluntary
10 manslaughter, I would ask the Court to consider involuntary
11 manslaughter in addition to that, and I would like you to
12 charge self-defense and --

13 THE COURT: Well, I have been reading, it looks like
14 under his testimony he is entitled to an involuntary, that
15 the shots weren't trying to hit anybody which that's the
16 way it looks if he actually shot standing by the car, but
17 that's charging the elements of that.

18 MR. BARFIELD: Can I respond to that?

19 THE COURT: I will listen to you on that.

20 MR. BARFIELD: I think I understand you saying that he
21 tried to shoot -- that he shot into the ground and didn't
22 mean to shoot at anybody?

23 THE COURT: I'm saying in the light most favorable to
24 him it's not an accident, though, he's reckless to
25 disregard shooting is involuntary.

1 MR. BARFIELD: I'm going to argue with you just a
2 minute. As I recall the tape he wasn't successful in
3 firing the gun when he had it pointed at the ground, he
4 doesn't ever admit to firing the gun so I don't see how
5 there's accidental discharge of the gun because he doesn't
6 ever admit firing the gun.

7 THE COURT: Hold it. Unfortunately he can make
8 inconsistent statements and the jury can believe what they
9 want. At one point he said nobody intended to shoot
10 anybody, later he did tie him down. If that's said and you
11 can certainly argue that, that it couldn't possibly be
12 involuntary because he tried to shoot, that's what he said
13 at one point, at another time he said they were not trying
14 to shoot anybody. I mean, I heard that, I don't know that
15 he said that from somebody so that's the only reason I'm
16 charging that. But you are right, you can certainly argue
17 it can't possibly be involuntary because the only reason he
18 didn't shoot under his own testimony he did that. But
19 again, I have to charge him on inconsistent statements and
20 they can believe any portion of his testimony.

21 MR. BARFIELD: Are you saying you're going to charge
22 involuntary manslaughter?

23 THE COURT: Right. And I'm saying you can argue it
24 can't possibly be involuntary because he tried to -- he
25 intended to shoot and the only reason he didn't shoot under

1 his own testimony was the safety was on, that's what he
2 said one time. Another time he said they weren't trying to
3 hit anybody.

4 MR. BARFIELD: Are you charging voluntary
5 manslaughter?

6 THE COURT: I have to charge voluntary, returning
7 fire. Murder, voluntary, involuntary, self-defense,
8 transferred intent on both of them, transferred intent on
9 self-defense, transferred intent on murder and
10 manslaughter, involuntary.

11 MR. BARFIELD: And accomplice liability, hand of one
12 is the hand of all?

13 THE COURT: I'm going to listen to you tell me about
14 that, you know, tell me your theory on that.

15 MR. BARFIELD: Well, I don't want to do my closing
16 argument.

17 THE COURT: I know. But you don't want me
18 interrupting you when you argue.

19 MR. BARFIELD: No. Certainly there's testimony from
20 today that he provided the -- assuming the other guy shot
21 the gun, he provided the gun that the other guy shot and
22 killed the baby and that to me is as close and as clear as
23 you can get accomplice liability.

24 THE COURT: I'm not going to talk on the facts, I'm
25 going to charge hand of one, hand of all and that type

1 stuff, I'm not saying what you're saying.

2 MR. LIFSEY: I understand. I can't argue with your
3 reasoning on that.

4 THE COURT: That's right. Now, there is one thing
5 that's going to come up on self-defense maybe, I just need
6 to horse collar. That first thing about without fault on
7 bringing on the controversy, you're talking about that day.
8 The fact that he owed them money does not negate that, that
9 doesn't make it --

10 MR. LIFSEY: I certainly intend to argue without fault
11 difficulty applies with what is going on that night.

12 THE COURT: What was going on that day. I'm going to
13 tell the jury that he owed them money doesn't enter into
14 that equation.

15 MR. LIFSEY: And I think whether or not whatever
16 happened in the street is a fact question for the jury to
17 decide, whether that amounts to --

18 THE COURT: Well, it had to be -- who is the
19 aggressor, who started it and so forth. And I don't get
20 into this but you can argue that it -- which is what he
21 suggested in opening, it does not matter who fired the
22 first shot if he is walking there with a gun and they see
23 it they're entitled to -- because I am going to charge them
24 you don't have to wait until somebody gets the drop on you,
25 they don't have to wait either if they see a gun and

1 think -- so that's -- it goes both ways. But I'm not going
2 to tell the jury that, that's jury argument. All I'm going
3 to tell them if you have the right to shoot you don't have
4 to wait, you can shoot first in a self-defense scenario.

5 MR. BARFIELD: Yes, sir.

6 THE COURT: Other than that I don't know anything.
7 And, of course, I'm going to tell them on your accomplice
8 deal, I'm not going to talk about accomplice, I will say
9 hand of one, hand of all, that's just standard stuff that
10 I'm going tell them on that, nothing out of the ordinary.
11 And, of course, on self-defense I will tell them about
12 prior difficulties which is from his view point but not
13 fact specific, just run over that, that is basically it.
14 Of course if y'all want any specific charges you can hand
15 them up but the general charge probably will cover
16 everything.

17 MR. BARFIELD: If either one of us finds anything else
18 to briefly argue with you about in the morning concerning
19 what we have covered so far this afternoon --

20 MR. LIFSEY: And I assume -- you said this in your
21 opening, you're giving the current self-defense and they
22 have to disprove it beyond a reasonable doubt.

23 THE COURT: Yeah, reasonable doubt. I'm only going to
24 say hesitate to act and firmly convinced on reasonable
25 doubt, I'm not going into all of that stuff about you can

1 doubt the sun rising and all of that, I'm not going to get
2 into all of that.

3 MR. LIFSEY: I was just asking the current state. You
4 don't charge the old self-defense is an affirmative
5 defense.

6 THE COURT: No. I will say -- I'm only going to
7 tell -- I don't change what we used to say that the
8 defendant must show and I will say that the evidence must
9 demonstrate.

10 MR. BARFIELD: Beyond a reasonable doubt.

11 THE COURT: The State has to prove beyond a reasonable
12 doubt he did not act in self-defense. If evidence of
13 self-defense was present and here is what evidence must
14 convince you of before self-defense is applicable.

15 MR. LIFSEY: I think that's the law, I just wanted to
16 clarify that.

17 THE COURT: I think that's basically it. If y'all
18 come up with anything I will be happy to charge it, the
19 charge is long enough and the facts are convoluted enough.
20 Anything else?

21 MR. BARFIELD: No, sir.

22 (Court adjourned for the evening and resumed on
23 Thursday, November 10, 2011.)

24 THE COURT: Okay. I take it the State has to rest in
25 front of the jury, you don't have anything else to do.

1 MR. BARFIELD: I want to, if you will allow me to,
2 argue against your charging involuntary manslaughter.

3 THE COURT: You can do that all you want to.

4 MR. BARFIELD: I handed Mr. Davis a series of cases
5 which deal with involuntary manslaughter. The evidence in
6 the case -- I'm not absolutely certain of what the facts
7 are that the Court determines warrant the involuntary
8 manslaughter charge and I don't know if you want me to ask
9 you that.

10 THE COURT: Basically there is testimony that any
11 shooting from that side was aimed at anybody, that's all.

12 MR. BARFIELD: Can I argue that shots in the air, can
13 I argue --

14 THE COURT: You can. But let me explain. It's a
15 weakened involuntary obviously, I have tried so many of
16 these things. I tried one where a guy followed his wife
17 all of the way from a convenience store to a trailer and
18 3:00 in the morning he sneaks through the woods with a
19 loaded .45, a guy steps out, he shoots the potential lover
20 right between the eyes and he says I was just shooting to
21 frighten him, I didn't mean to hit him and they said I
22 should have charged involuntary. If you can overcome that,
23 fine, but that's what I'm looking at. If there is any
24 evidence that it was unintentional I'm supposed to charge
25 that. And the cases you've handed up they charged it --

1 they reversed for not charging involuntary. I know you
2 take language from that case and want to argue it but the
3 fact is they got reversed for not charging involuntary.

4 MR. BARFIELD: The ones I handed you the Court ruled
5 that involuntary should not have been charged. And the
6 Reece case -- one of the cases that I'm looking at but --
7 let me make two statements to you. One is it is my
8 recollection, Mr. Lifsey might disagree, but I listened to
9 the tapes again last night, it is my recollection -- it is
10 my interpretation from the clear language of Carter on the
11 tapes that when he says shots in the air he's talking about
12 the shots coming toward him, I think that's clear. I don't
13 think there's any evidence that the shots fired from the
14 Malibu where the child was killed were into the air. And I
15 can quote you -- I made a -- sort of did my own little
16 transcript. In the first interview he said he heard
17 about -- and this is pretty much --

18 THE COURT: All right. Well, just -- even assuming
19 that is true he still gets involuntary because he's
20 shooting into the car. If they shot they shot into the
21 car, not towards people over there. They're not shooting
22 at somebody, they're messing around pulling the trigger.
23 I'm not even considering charging accident but, of course,
24 that would be out there too, he just didn't request that
25 so --

1 MR. BARFIELD: Can I ask you about the Reece case?
2 I'm sure that you have looked at the Reece case?

3 THE COURT: You just handed it to me and I haven't
4 studied it, you know.

5 MR. BARFIELD: The Reece case basically says if you
6 are committing a crime which is not a felony you are
7 perhaps entitled to an involuntary charge, if you are
8 committing a crime which is a felony you're not. I believe
9 there is evidence in this case that Carter was committing
10 two felonies when this incident happened. One was he was
11 pointing and presenting a firearm which is pretty much on
12 point with the Reece case and that is a felony, he was also
13 in possession of a pistol by a person convicted of a crime
14 of violence. I think if you're going to charge involuntary
15 manslaughter I should be allowed to argue to the jury that
16 it is not because he was committing those two felonies. To
17 do that I've got to present evidence, number one, that he
18 has the prior conviction for the crime of violence which
19 would make him -- his admission on the tape would make him
20 guilty of possession of a pistol by a person convicted of a
21 crime of violence, and then I would need to establish also
22 that he's pled guilty to that charge and I would like to be
23 able to do that so that I could argue those facts to the
24 jury.

25 THE COURT: Right. And you could easily have done

1 that and been there had he not already pled guilty but now
2 you can't do that.

3 MR. BARFIELD: But he was committing those crimes when
4 this incident occurred, it's a fact in the case.

5 THE COURT: I'm not charging that. You can argue that
6 he was pointing and presenting, I'll say that pointing and
7 presenting is a crime, I'll read the statute to them.

8 MR. BARFIELD: Is there some way much like you are
9 going to deal with the absence of the pistol charge, is
10 there some way that I can use that also without referring
11 to it as a record of a crime of violence? I think that --

12 THE COURT: He's not convicted of that, but --

13 MR. BARFIELD: Well, he pled to it yesterday.

14 THE COURT: Wait a minute, pointing and presenting he
15 did not.

16 MR. BARFIELD: Yes, sir, I understand that.

17 THE COURT: You cannot get into that unless he
18 testifies. If he testifies, of course, you can get into
19 that.

20 MR. BARFIELD: But there's evidence in the case,
21 though, that he presented a firearm to J. D. Hemphill, he
22 said he showed it to him when he got out there in the
23 street with him.

24 THE COURT: I said I would read that statute to him.

25 MR. BARFIELD: I'm sorry, okay.

1 THE COURT: What else do you want me to say?

2 MR. BARFIELD: I misunderstood you, I thought you were
3 retracting that.

4 THE COURT: I said he's not convicted of that and he
5 has not been charged with that but there is a statute that
6 says pointing and presenting is a felony and I'll read them
7 the elements also.

8 MR. BARFIELD: The other thing that I was talking
9 about was the charge that he pled to yesterday.

10 THE COURT: I know, and that can't come in now unless
11 he testifies. It could have if we would have read it off
12 to start with but we didn't do that, we just said
13 possession of a pistol.

14 MR. BARFIELD: Yes, sir.

15 THE COURT: Anything else?

16 MR. BARFIELD: That's all.

17 MR. LIFSEY: I don't have anything, Judge. I will
18 tell you that my client tells me he has made a decision not
19 to testify if you want to do that now so we don't have to
20 send them back out.

21 THE COURT: Sure. Mr. Carter, you have had all night
22 and had all week to think about it, you understand again
23 there are good reasons for testifying and good reasons for
24 not. Now, you do understand that if you testify they will
25 bring out your prior record, of course, I would tell the

1 jury they couldn't consider that on the issue of guilt. It
2 would be something in front of the jury about your
3 character and so forth which they don't have at this point
4 in front of them, do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: So with all of that knowledge and
7 recognizing that if you don't testify your attorney gets to
8 put up the argument, is it your intent to go forward with
9 testimony or not to present any evidence?

10 THE DEFENDANT: Yes, sir, I understand.

11 MR. LIFSEY: He's asking you are we going to put up
12 any evidence?

13 THE DEFENDANT: Oh, no, sir.

14 THE COURT: Okay. With that said were y'all prepared
15 to proceed with jury argument after the State rests?

16 MR. LIFSEY: Yes, sir. I need to formerly -- can I
17 make my motions?

18 THE COURT: That's why I said nothing is going to
19 change, you can make your arguments now.

20 MR. LIFSEY: Solicitor, are you going to rest now?

21 MR. BARFIELD: I am.

22 MR. LIFSEY: All right. Judge, I would move for a
23 directed verdict. I could cite State versus Dickey and I
24 would leave that matter to your discretion which is the
25 self-defense defense for the jury.

1 THE COURT: In the light most favorable to the State
2 under the hand of one, hand of all situation he could be
3 guilty of various crimes. All right.

4 MR. LIFSEY: Thank you.

5 THE COURT: One small thing, I didn't look it up but
6 involuntary is not a crime of violence, is it?

7 MR. LIFSEY: No, sir.

8 THE COURT: So I have to tell them if they find him
9 guilty of that they can't find him guilty of the --

10 MR. BARFIELD: That's correct. Involuntary
11 manslaughter is not a violent crime.

12 THE COURT: Everybody about ready?

13 (The jury returned to the courtroom.)

14 THE COURT: Okay.

15 MR. BARFIELD: Your Honor, the State rests.

16 THE COURT: Defense?

17 MR. LIFSEY: The defense rests, Judge.

18 THE COURT: Okay. Jurors, here is what is going to
19 happen, you heard the State say we rest that doesn't mean
20 he's tired or anything, that just means he's not going to
21 put anymore evidence in. Okay. At that point the defense
22 is given an opportunity to present evidence, as you recall
23 the defense does not have to prove anything and the fact
24 that the defendant did not testify from the stand can't
25 even be considered by you on the issue of whether he

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1 committed a crime or not. Now, here is what is going to
2 happen, the State is going to make an argument -- if you
3 don't put up any evidence -- if you put up any evidence the
4 State gets to argue first and last so there is some
5 technical reason for not putting up evidence. Also what
6 you will consider now will be two indictments. At the
7 start of the trial there was an indictment that charged
8 Mr. Carter with possession of a weapon but at the
9 conclusion of the trial yesterday after y'all left he just
10 pled guilty to that charge, pled guilty to possessing. You
11 don't have to possess a weapon for any length of time, you
12 can just have it, you know, and he testified that he had it
13 at some point so he just removed that from your
14 consideration and pled guilty to that charge. The fact
15 that he pled guilty to that charge creates no inference of
16 guilt toward him on these other two charges as you just
17 forget that charge was ever there. Now, this indictment
18 charges him with possession -- he being Anthony Carter --
19 of a firearm or a knife during the commission of a violent
20 crime, that's an add-on charge for sentencing purposes if
21 you find a person guilty of committing a violent crime.
22 Okay. They'll instruct you in a little bit if you don't
23 find him guilty of committing a violent crime you're not
24 guilty of that and you wouldn't have to consider that. If
25 an individual is engaged in the commission of a violent

1 crime and has a weapon he is guilty, if it is not a violent
2 crime, not guilty. Now, this indictment charges Mr. Carter
3 with murder, on or around May 3rd of last year it alleges
4 that with malice aforethought killed and murdered victim
5 victim by shooting her with a handgun and she died as a
6 direct result of that shooting. After the attorneys sum up
7 for you I'm going to instruct you on the law in some
8 detail. Okay. But basically when this person is charged
9 with murder there are other things that the jury can
10 consider and I certainly am going to amplify the
11 instructions to you at the end that murder is the unlawful
12 killing of one human being by another human being with
13 malice aforethought expressed or inferred. The larger
14 crime includes all smaller crimes that the person -- of
15 lesser included offenses that the person could have been
16 charged with arising out of the same action, so included in
17 the charge of murder will be the charge of voluntary
18 manslaughter. Of course, you could find him guilty, but
19 I'm not suggesting you do, of murder, you don't get to
20 voluntary manslaughter and I will explain to you
21 presumption of innocence and burden of proof and all of
22 that, and at the end I told you at the start murder is
23 killing somebody with malice aforethought, express or
24 inferred. Voluntary manslaughter is one human being
25 killing another human being without malice and in a sudden

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1 heat of passion upon sufficient legal provocation. Murder
2 is killing a person with malice, express or inferred,
3 manslaughter is killing somebody without malice. And
4 intent to kill is present in both of those charges as a
5 third charge, a lesser charge involuntary manslaughter.
6 Involuntary manslaughter is where a defendant unlawfully
7 and unintentionally killed a victim and at the time of the
8 killing occurred the defendant's conduct was criminally
9 negligent, obviously it has no intent to kill. Criminal
10 negligence is basically engaging in reckless disregard of
11 the safety of others. Beyond that at this point I'm not
12 going to instruct you. Now, there are many factual
13 scenarios that have been presented to you, there were no
14 video cameras out there as you gathered, so the solicitor
15 is going to state the State's position to you in summation
16 in what we call closing argument, I just call it summation,
17 you don't get to talk back so summation is not really
18 argument. After the State does that, then the defense will
19 be able to make closing summation to you also. If you can
20 listen to both of them you will listen to both of them and
21 then take a break, I'm just talking time wise, I'm not
22 putting any restrictions on them. I don't think they're
23 going to argue on and on but there are a lot of facts and
24 various scenarios that we may need to address, there's
25 actually more law than the average case which they'll

1 probably address also. Okay. Solicitor?

2 MR. BARFIELD: If the Court please, Mr. Lifsey. I'm
3 just going to talk to you for a little while. You came
4 here Monday and you didn't know what to expect. You've
5 been here now into your fourth day and you probably
6 certainly didn't realize how difficult this is to be here
7 and to be in the position and the role that you're in.
8 Everybody involved in this case has a role and a
9 responsibility and a part to play in it and the lawyers are
10 fixin' to finish up our roles and in a little bit the Judge
11 is going to finish up his role and then we're going to drop
12 it on you. Nobody, nobody takes lightly the burden that
13 will be on you when you go back there in the jury room
14 later on and deliberate your verdict. Everybody
15 appreciates your attention during this trial and everybody
16 appreciates, although maybe not voluntarily, your being
17 away from your homes and your families and your jobs and
18 other things you would much rather be doing, but you're
19 here and you're close to the end and some important stuff
20 is coming up and I ask you just to stick with us until we
21 get this thing through. I'm going to talk to you about a
22 lot of things, and it's awful hard to stand up here and in
23 just a few minutes put in a nutshell what y'all have been
24 listening to for over three days now but that's what we are
25 supposed to be doing. What we say, what the lawyers say is

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1 not evidence in the case and our role at this point is to
2 just simply get up here and what we perceive the evidence
3 to be and point out things to you that we submit to you are
4 important, and certainly we try to convince you one way or
5 the other about things in this case and that's what I'm
6 going to do. The Judge has kind of as we've gone along
7 through this thing told you sort of what your options are
8 going to be and I want to talk about that for just a little
9 bit. One thing that I ask you to remember -- I'm going to
10 ask you to do a couple of things -- I'm going to ask you to
11 do a lot of things -- but one thing to remember I submit is
12 that the only conclusion you can reach at the end of this
13 thing whatever your verdict is, the only conclusion you can
14 reach is but for what Anthony Rodriekus Carter did on
15 May 3rd of 2010 victim would be alive. She is dead
16 because of him. However you get there -- and there are
17 choices -- however you get there the only conclusion you
18 are going to be able to reach is that but for what he did
19 victim wouldn't have gotten shot and killed.
20 You've heard a lot about victim and she is the
21 victim in this case, she's the victim of a murder charge.
22 This might be hard for you to do but I'm going to ask you
23 to do this for awhile, at the risk of being insensitive,
24 put victim out of your mind for part of this
25 process. Nobody, I will tell you straight-up, I'm

1 straight-up here, nobody involved in this case contends
2 that anybody meant to shoot and kill victim , that's
3 clear and I'm not going to argue otherwise. But somebody
4 did intend to kill somebody else, the guys across the
5 street. So don't get caught up from here on out in the
6 fact that nobody meant to kill victim , it doesn't matter
7 that nobody meant to kill victim . The question is did
8 somebody mean to kill somebody and that is, in fact, true
9 in this case I submit. So when I tell you to put victim
10 out of your mind that's the context I'm talking about. Let
11 me go ahead and talk about the legal concept that I'm
12 referring to and it's called transferred intent, and the
13 Judge has already told you a little bit about this and it's
14 real simple, if I intend to fire a gun at somebody and
15 do -- and we'll talk about intent to kill somebody in a
16 little bit -- but if I'm firing a gun at somebody and I'm a
17 bad shot or somebody walks in front of the gun and somebody
18 that was not who I was shooting at gets killed it doesn't
19 matter as to the guilt or innocence. It doesn't matter
20 that you shot and killed somebody you weren't shooting at.
21 That's what I mean when I say put victim aside for part of
22 what your thinking is on this case. Transferred intent.
23 The intent follows the bullet, think of it that way. If
24 you fire that gun and that bullet comes out the muzzle of
25 that gun and the intent follows that bullet wherever it

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1 strikes, and in this case that bullet struck victim
2 victim , it didn't get all of the way across the street to
3 hit J. D. Hemphill or Beneco Ganson. It matters not that
4 victim is the victim, it matters not that victim
5 victim was not the intended victim as to guilt or
6 innocence on murder and other charges that you'll consider.
7 I told you at the beginning -- I think I told you at the
8 beginning of this case we're going to tell you everything
9 we knew, the good, bad and ugly and you heard a lot of
10 ugly. Everything I put up here came from people who knew
11 something about it, law enforcement and civilian witnesses
12 and there ain't no doubt that I put up a parade of rogues,
13 and certainly the Judge is going to talk to you about
14 credibility and you can consider peoples' criminal records
15 when you decide whether you believe them and that's why I
16 asked them about their criminal records. You can consider
17 relationships between people when you decide whether you're
18 going to believe it. You can consider why or whether one
19 witness would have some reason to shade it or not tell it
20 all or to point the finger at somebody else and tell the
21 truth, you can consider all of that, we gave it to you like
22 we got it. What did we give you? We gave you this
23 documentary of a story, a true story that occurred on
24 Athena Road on May 3rd of 2010, and you heard from
25 witnesses what happened and you heard from witness'

1 background about the area. You heard basically a culture
2 of drinking and drugs and partying and guns and fighting,
3 that's what you heard because that's the culture that this
4 case arose out of, and I'm not trying to sugar coat that,
5 we've got what we've got. But think hard about all of that
6 when you're deliberating your verdict back there. Another
7 thing I ask you to do -- there is a lot of law in this
8 case, you've got a lot of choices, there are a lot of
9 charges to consider and some defenses to consider, and do
10 that, the Judge is going to tell you all about that. But
11 one thing the -- probably the biggest thing that the State
12 asks you to do as you sit here this morning and get ready
13 to go back there and decide this case is use your common
14 sense. Technicalities, legal terms, that's all to be
15 considered but use your common sense. What makes sense to
16 me about this case, that's what you ask yourself when
17 you're back there deciding what to do with it. Of course,
18 you always have the option -- one of your options is not
19 guilty of anything, clearly not guilty of anything is one
20 of your options. There's a firearms charge in this case
21 which is possession of a pistol during the commission of a
22 violent crime. If you find Carter guilty of something that
23 the Judge tells you is a violent crime then I submit to you
24 that he's guilty of possession of that pistol, and I need
25 not say anything really further about that. You heard

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1 yesterday Mr. Carter tell you he had a pistol, that's all I
2 need to say about that. But the primary charges in the
3 case, the indicted charge is murder. The Judge has told
4 you, "I'm going to let you consider voluntary
5 manslaughter," he's told you, "I'm going to let you
6 consider involuntary manslaughter," and he is going to
7 charge you on self-defense, so I want to talk about those a
8 little bit and plug some facts into them probably as I go.
9 What's murder? Murder is the unlawful killing of another
10 person with malice aforethought either expressed or
11 inferred, he will define those terms to you later, I'll
12 tell you a little bit about what is malice. It's hatred,
13 wickedness, ill will toward another person, intent to do
14 bodily harm toward another person. You can express it by
15 saying, "I'm going to shoot you," or you can express it by
16 saying I would submit as Anthony Carter did when he gets
17 out with that gun and walks across the street, "What you
18 gonna do now?" You can also infer it by using a weapon, a
19 pistol, a Hi-point .40 caliber semiautomatic pistol. You
20 can find malice in Carter's use of that pistol when he
21 hopped out of that car and walked across the street.
22 Malice aforethought. What does aforethought mean? That
23 means before. That malice, that wickedness, that intent to
24 do what is fixin' to happen has to come about some time
25 before it happens, but it doesn't have to be three weeks

1 before it happens, it doesn't have to be three days before
2 it happens, it can be immediately before it happens. It
3 can be when he is half way across the street, it can be
4 when he is opening the door to get out of the car. It can
5 be when he is halfway between his house and Emmie Coats'
6 house on the way to take her home, or it could have been
7 last week or the week that he got chased out of Athena Road
8 Countryside Mobile Homes or the day his brother got his
9 butt whipped if all of that happened. That's what
10 aforethought means. We have malice, clearly we have
11 malice. I would submit to you we have malice from arming
12 himself with that gun, we have malice from getting out of
13 the car and approaching his antagonists if you believe
14 that's what that's all about. Before even seeing if J. D.
15 Hemphill had a gun, all of this stuff, nobody knows, we
16 weren't there. Y'all decide, maybe it matters, maybe it
17 doesn't. But assume, give him the benefit of that, assume
18 that J. D. Hemphill had a gun, he didn't know that when he
19 pulled up in that yard, he didn't know that when he took
20 that gun from Marico Stevens, he didn't know that when he
21 got out of the car with that gun or walked across the
22 street by J. D. Hemphill, he initiated all of that by
23 arming himself. That's malice. He got out and he pointed
24 that gun, if you believe Beneco Ganson he pointed that gun
25 at J. D. Hemphill and he said, "What you gonna do now?"

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1 This is what Ganson said. Pointing a gun at Hemphill,
2 "What you gonna to do now? I ought to shoot you." That's
3 malice, ladies and gentlemen, he started it. Again,
4 remember throughout he started it. What's voluntary
5 manslaughter? The unlawful killing of another person
6 without malice in a sudden heat of passion upon sufficient
7 legal provocation. That's a mouthful. The Judge is going
8 to break all of that down for you in a little bit and tell
9 you about it. I submit to you this is not manslaughter,
10 not voluntary manslaughter, it is murder, not voluntary
11 manslaughter. Why? Provocation. What is provocation?
12 Provocation is if I'm provoked then somebody does something
13 to me to get me stirred up and in the context of
14 involuntary manslaughter it has got to be something big
15 enough and bad enough to get me so stirred up that I lose
16 my ability to stay calm and stay cool and keep my wits
17 about me and not do something stupid. Provocation. He --
18 based on the charge the options you're going to have Carter
19 is going to want you to say perhaps it wasn't murder, it
20 was voluntary manslaughter because I was provoked, little
21 old me got provoked. Who is the provocator in this case?
22 The fellow over there in the white shirt. He started it,
23 he provoked the guys across the street. If you believe all
24 of that happened and something happened, we know something
25 happened, he provoked it. He didn't get provoked. He

1 hopped out of a car with a .40 caliber pistol and went to
2 the guys that he had this peeing contest with over \$450 and
3 he started it, he provoked it, it's not voluntary
4 manslaughter. What other options are you going to have?
5 The Judge is going to charge you that involuntary
6 manslaughter is a lesser included offense of murder, and if
7 you find him not guilty of murder, if you find him not
8 guilty of voluntary manslaughter then the Judge says you're
9 going to be able to consider involuntary manslaughter. Let
10 me talk to you about intent for just a minute before I get
11 into the involuntary manslaughter stuff. I submit to you
12 that if you fire a gun at somebody whether you actually
13 intend that person to fall dead on the ground is not the
14 kind of intent that we're talking about, the intent is an
15 intentional firing of a gun at somebody which is likely to
16 produce that person's death or great bodily injury, that's
17 what we're talking about. You don't have a to get out of
18 the car -- Anthony Carter didn't have to get out of the car
19 with the gun and in his mind say, "I'm going to walk across
20 the street and I'm going to put a bullet in J. D. Hemphill
21 and my intention is that when I do that he fall dead on the
22 ground," that's not the kind of intent we're talking about.
23 The kind of intent we're talking about is intentionally
24 arming yourself and firing the gun at somebody and causing
25 whatever result you caused, the chips will fall where they

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1 do, that's the intent we're talking about. Involuntary
2 manslaughter is unintentional, meaning the initial act of
3 firing a gun is unintentional. The most common example I
4 guess of involuntary manslaughter would be -- and there are
5 all kinds of scenarios -- but if I'm in some sort of a
6 confrontation with another person -- and again this is not
7 to do with this case, just by way of an example -- if I'm
8 in some confrontation with another person and a firearm is
9 involved and we struggle over the firearm and during that
10 struggle the firearm goes off with nobody meaning to
11 squeeze the trigger, it just happens during a struggle and
12 somebody dies then that might be involuntary manslaughter,
13 that's the classic example of involuntary manslaughter in a
14 shooting death. The whole idea is that there was no
15 intention to fire the gun, it was almost like it was
16 accidental, it was criminal negligence, something that
17 wasn't supposed to happen at all. And I tell you, ladies
18 and gentlemen, this is not involuntary manslaughter, this
19 is not Anthony Carter fooling around with a gun and it
20 accidentally discharging and going through the top of that
21 car killing victim . The gun was being fired toward
22 the top of the car toward the rear at an angle in the
23 direction where the antagonists were. What does that mean?
24 He was shooting at them across the street. He didn't just
25 pop that gun up on the top of the car and it accidentally

1 went off; he squeezed the trigger, went into the roof and
2 it killed victim , it's not involuntary
3 manslaughter. And I tell you this, too, for it to be
4 involuntary manslaughter Carter could not have been out
5 there committing a felony, and I tell you that Carter was
6 out there committing a felony when all of this started and
7 when it happened. What was the felony? And the Judge will
8 tell you about this when he instructs you on the law, he
9 was committing the felony of pointing and presenting a
10 firearm. There's evidence, he admitted that he had a
11 firearm. He admitted that he showed that it was visible --
12 I'll talk more about that later -- he admitted it was
13 visible to people out there. He admitted that he showed J.
14 D. Hemphill that he had a gun, he told you that on the
15 tape, somebody that he had a dispute with he presents,
16 shows a firearm to. Like, "Look at me," he points it at
17 him and he presents it to him and he threatens him, and you
18 can't say it's involuntary -- he can't say it's involuntary
19 manslaughter under those circumstances when he is out there
20 committing that felony with that firearm so it is not
21 involuntary manslaughter. The Judge is going to talk to
22 you about self-defense. Let me back up. I'm going to go
23 back to involuntary manslaughter just a minute -- to
24 voluntary manslaughter. I'm going to tell you right now
25 that when you're thinking about voluntary manslaughter,

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1 sudden heat of passion on sufficient legal provocation,
2 when you're thinking about that and when you're thinking
3 about self-defense, which I'm fixin' to talk about in a
4 minute, you can flip it and I'm going to ask you to flip it
5 both ways. Voluntary manslaughter, again, don't mean to
6 beat a dead horse, but voluntary manslaughter you act on
7 sufficient -- in a sudden heat of passion on sufficient
8 legal provocation. What if J. D. Hemphill had shot Anthony
9 Carter, had hit him and killed him? J. D. Hemphill is the
10 person who would be able to claim voluntary manslaughter
11 because he was the one that was provoked. Let's talk about
12 self-defense. The Judge is going to tell you about four
13 elements of self-defense. One of them quite obviously I'm
14 going to argue to you and you'll catch it in a minute is
15 the big one, the big one in this case, I'm going to talk
16 about the other ones first, hit on them briefly. You've
17 got to be -- you've got to be in danger of death or serious
18 bodily harm or you've got to reasonably believe you are in
19 danger of death or serious bodily harm. For Anthony
20 Carter -- for me not to have proved that this was not
21 self-defense -- I've got to prove he committed murder, I've
22 got to prove he didn't commit -- that he did not act in
23 self-defense, we accept that burden. I've got to prove
24 what it was and what it wasn't. Okay. One of the elements
25 of self-defense is that he has either got to be in actual

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1 danger of death or serious bodily harm or have reason to
2 believe he was in danger of death or serious bodily harm.
3 Now, let's look at that for a minute. Before I get into
4 that, self-defense is not as simple as -- self-defense is
5 not as simple as if somebody shoots a slug at me I can
6 shoot back, it ain't that simple. Don't go back there and
7 say whoever shot first is wrong because it's not that
8 simple. But was Anthony Carter in fear of anybody on
9 May 3rd of 2010? No. He told you on the tape that Beneco
10 Ganson said, "Next time I see you you better have a gun."
11 Did that make him fearful -- did that make him fearful
12 enough that he wasn't going to go back into Countryside
13 Mobile Home Park, the place that testimony has shown us all
14 these people hung out in and do whatever they do out there?
15 He had no fear of these guys. He kept hanging out in the
16 trailer park despite all of these other difficulties that
17 you heard testimony about. What did he tell you on the
18 tape? He got out of the car when he saw them guys that he
19 had a beef with. If you drive up into a yard and you see
20 somebody that you think wants to whip your butt, if you
21 don't want to get your butt whipped what do you do? You
22 stay in the car. What did he do? He got out of the car
23 with a gun. He's not afraid of anybody or anything out
24 there. He told you again on the tape J. D. Hemphill never
25 pointed a gun at him when they were out there in the

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1 street. He didn't report this incident or any of the prior
2 problems that he had had with these guys to law
3 enforcement, and in fact, told Kayla Estes, "I'm going to
4 handle this myself, I'm going to take care of it myself."
5 He's not fearful of these guys. He told you on the tape,
6 "When I saw them I always said the same things to them.
7 When I see them -- I always talked to them when I see
8 them." When he is at his house with Emmie Coats or Emmie
9 Amanda Coats, whichever name you want to call her by, and
10 Marico Stevens comes over there, he knows these guys hang
11 out over there. What does he do? He tells Stevens, "Take
12 us back. Take us over there. Drive us into this hornets
13 nest." There's no hornets nest, he's not afraid of
14 anybody. He initiated the drive into Countryside Mobile
15 Home Park, asked Stevens to take them. He said this on the
16 tape, he wasn't going to let nobody stop him from going,
17 meaning to the trailer park, he wasn't going to let nobody
18 stop him from going. On the way over there there's
19 testimony that he and Marico Stevens in Amanda Coats'
20 presence talked about the problems that he had with the
21 guys in the trailer park and talked about the fact that
22 they would be down there. I think his quote on the tape
23 was the guys down there where we're fixin' to drop Coats
24 off, "They're beefing with me," and he knew ahead of time
25 they would be there. He's not afraid of them. He took

1 that pistol from Stevens from under the seat of Stevens'
2 car and he took it in the car on the way over there. He's
3 not afraid. If he's afraid he's not going over there. He
4 armed himself before he knew anybody over there had a gun.
5 He got out of the car with a gun and later saw Hemphill
6 with a gun, if Hemphill actually had a gun. He got out of
7 the car with the pistol where people could see it. He got
8 asked this question, on the second interview I think it was
9 let me just quote you what he said about the gun from the
10 second interview, my recollection, if you recall
11 differently that's for you. He eventually way into the
12 second interview says, "I had one," meaning a gun, he
13 eventually admitted that he had a gun. He said, "He put
14 the gun in my lap," meaning Stevens. He said, "I had put
15 it up," when he walked across the road. Up means what? I
16 don't know, maybe in his waistband but that's what he said.
17 He said he had it tucked. And I think it was Clark Crump
18 asked him, "Could people see it?" And if you recall his
19 answer, "Yeah." "Could people see it? Yeah." He's not
20 hiding that gun, he wants them to see the gun. He's a big
21 man, "What you gonna do now?" He's talking about J. D.
22 Hemphill, "When I seen his gun I showed him that I had one
23 too." That gun is out there the whole time. That's what
24 he told you about the gun. Was it like this or -- was it
25 like A or was it like B? A is Stevens and Carter are going

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1 to drop Emmie Coats back off and have no anticipation of
2 anything at all going to happen in Countryside. Or was it
3 like B, "They're over there, I've got a problem with them,
4 you've got a gun, let's go take care of it?" What did
5 Emmie Coats tell you? There's talk on the way over there
6 about the problem and the guys being there. What did Emmie
7 Coats tell you? She I think used the phrase on cross
8 examination -- let me find it -- a hyped situation, a hyped
9 situation. Hyped could mean excited I'm fixin' to get in a
10 rumble, or hyped could mean I'm scared something bad might
11 happen. If it was the ladder, I'm hyped because I'm scared
12 and something bad might happen then what do you do? You
13 don't go in there. This was hype like, "Let's go in there
14 and take care of this," and it concerned her enough that
15 she testified I believe on cross examination that when
16 Carter jumped out of the car and her knowing he had that
17 gun she hopped out of the back seat on the opposite side
18 and went around to the passenger's side front door that he
19 got out of to try to intervene, she told you that. This
20 was not some innocent encounter, she knew something was
21 going to happen and she tried to stop it but it wasn't to
22 be stopped. He had no fear of these guys. Another -- the
23 biggy on self-defense is this, and this is the biggy, for
24 me to -- and it's kind of backward logic, but again I've
25 got to prove it's not self-defense, and one of the ways

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1 it's not self-defense is if you are at fault in bringing on
2 the difficulty. That's why I say it's not as simple as if
3 somebody shoots at me I'm entitled to shoot back, that's
4 not the law. You've got to look at how it started, and if
5 I'm the defendant and I'm claiming self-defense or trying
6 to make the State prove it wasn't self-defense then I've
7 got to be able to -- then it has got to be shown that I
8 didn't start it, you've got to be without fault in bringing
9 on the difficulty which leads to the shooting death. There
10 is no way in the world the facts of this case show anything
11 but Anthony Carter was in fact at fault in bringing on the
12 difficulty. Again, remember what I said just a few minutes
13 ago, but for what that man over there did the shooting
14 death of victim would never have happened. And I'm
15 not going to go repeat all of the steps from riding over
16 there to getting out of the car with the gun and what
17 happened on the street, but clearly he started it. He was
18 at fault in bringing on the difficulty which led to gunfire
19 in Countryside Mobile Home Park. That's why I tell you,
20 ladies and gentlemen, I said this in my opening statement,
21 I said you might not conclude -- when you go home today and
22 this is all over for y'all you might not know in your mind
23 individually or collectively whether shots got fired from
24 across the street first or whether Anthony Carter fired
25 first, you might not know. And I told you -- and I don't

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1 mean this -- when I said it doesn't matter, but legally it
2 doesn't matter, because if shots did get fired across the
3 street first toward Carter he provoked it, he started it,
4 he brought on the difficulty which led to those shots.
5 Again, let's flip it. Assume that J. D. Hemphill had a
6 gun, shot a gun, or Beneco Ganson either one, and shot and
7 killed Anthony Carter, they have self-defense because he
8 came out there with the gun and pointed it at Hemphill and
9 threatened Hemphill, that's where the self-defense would
10 be, not with him as the aggressor initiating the contact
11 while armed with a .40 caliber pistol. All right. I told
12 you this too -- and again, I don't mean it gelidly, I don't
13 mean it's not important -- when I say it doesn't matter, I
14 don't mean it's not important for you to disregard it, but
15 legally I submit to you it doesn't matter whether you
16 conclude he shot victim or Marico Stevens shot
17 victim . And again, when you're home tonight you
18 may not know, you might not decide again collectively or
19 individually which one of them fellows shot victim .
20 It's important but legally I tell you it does not matter.
21 Why not? The Judge is going to charge you on something
22 that legally we call accomplice liability, the hand of one
23 is the hand of all, you've heard it. I don't know how long
24 that legal principle existed but longer than any of us have
25 been here, the hand of one is the hand of all. What does

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1 that mean? In lots of cases, murder cases, homicide cases,
2 death cases, murder cases one gun, one shot, one victim,
3 two or three people participating in the crime. And again,
4 not related to this case, got nothing to do with this case,
5 but an example would be two guys go into a convenient store
6 to rob it and they're both there to rob the convenience
7 store and one of them is carrying, strapped as some people
8 would say, got a gun, the other guy has got to -- and he is
9 going to hold the clerk at gunpoint and the other guy is
10 going to go around the counter, open the register and get
11 the money. One gun, they're both present and participating
12 and something goes haywire and the guy with the gun shoots
13 and the clerk gets shot and killed, the guy that is going
14 to take the money out of the register hadn't shot anybody
15 but he is just as guilty of that murder as the guy who
16 fired the gun. Why? Because they're both acting in
17 concert, both present, both participating acting together
18 in the furtherance of the crime. So I tell you whether he
19 shot or whether Marico Stevens shot legally doesn't matter.
20 Why? Some of the same stuff we've talked about, I've
21 talked about, he starts it, Anthony Carter started the
22 whole mess. The beef was between Anthony Carter and the
23 guys across the street over a \$450 fence jumping, over some
24 dope, Marico Stevens didn't have anything to do with that.
25 There's no evidence in this case to suggest to you that

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1 Marico Stevens was in the middle of that. Of course,
2 Marico is there and this gun changed hands and he produced
3 the gun first but he had the gun, Anthony Carter had the
4 gun in the car before he got out. I submit to you that
5 there is evidence that Anthony Carter fired the shots from
6 that .40 caliber gun and we're gonna talk about the
7 forensics in a minute, but even if you conclude he
8 didn't -- I'm going to try to convince you he did in a
9 minute -- but even if you conclude that he didn't and
10 Marico Stevens did, how did that happen? It happened after
11 Anthony Carter produces the gun in an armed confrontation
12 in the street and does something maybe to provoke gunfire
13 and comes back around the car. Well, if Carter didn't
14 shoot the gun then how did Stevens get the gun? From
15 Carter. One way or the other Stevens -- if you believe
16 Stevens shot, Stevens ended up with the gun from Carter
17 during something that Carter started. They're both guilty
18 of it, we're only trying Carter today but they're both
19 guilty of the murder of victim based on all of the
20 facts and circumstances of what happened. What do we know
21 about forensics in this case? Of course I go first and
22 Mr. Lifsey goes last and I have to anticipate things he's
23 going to say and you can anticipate things he's going to
24 say from the progress of the trial. Gunshot residue.
25 We've got no gunshot residue that shows us that anybody had

1 gunpowder or gunshot residue on him or her. It would be
2 nice if I had somebody's hands that I could say shot a gun
3 but I don't. Is that unusual? You heard from I believe it
4 was Ms. Simmons, Ila Simmons with SLED, that no, all kinds
5 of things can cause gunshot residue if there to get gone.
6 She also told you this: If the local law enforcement
7 agency collects swabs from somebody's hands for a gunshot
8 residue kit and that collected evidence was taken more than
9 six hours after the person perhaps possessed it or fired a
10 pistol we ain't going to do anything with it because it's
11 not reliable, it's not reliable evidence, it's not reliable
12 science to analyze it. So we talked to who we -- we get it
13 from who we can get it from, the sheriff's office did that
14 night, and the only person that they could get it from from
15 hands was John John Hill, and Mr. Hill said they only take
16 it from one hand. Maybe he just doesn't remember that
17 right, the evidence clearly shows from Simmons we had swabs
18 from both hands. And, of course, John John Hill says they
19 didn't pat him down for weapon, Mike Miller said, "Yeah, we
20 did." John John Hill was out there -- nobody says John
21 John Hill was there when the shooting occurred, there's no
22 reason to suspect John John Hill had a pistol or would have
23 gunshot residue on his hands because nobody said he was out
24 there when the shooting occurred, but we got it from Hill,
25 that's the only person we get it from. And we didn't get

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1 it from Carter and Stevens, and this is one of those things
2 Mr. Lifsey is going to scream about, I'm sure. We were all
3 over Carter and Stevens at the hospital on May 3rd when
4 they showed up with victim , took their shirts,
5 nobody swabbed their hands. Well, why? Because of the
6 information that was provided to law enforcement
7 specifically by Carter. Carter and Stevens were witnesses,
8 maybe victims when this thing broke open. There was never
9 initially that night any knowledge or suggestion that they
10 had shot at anybody so nobody took GSR kits from them.
11 Took their shirts, no GSR on the shirts. Well, you know,
12 how do you explain that? Well, Ms. Simmons said it's not
13 always going to be there. We still know both of them
14 possessed that .40 caliber pistol though because Carter
15 told you they did. So I submit again it's important but it
16 doesn't matter. DNA. Science has come a long way. I hate
17 CSI because it creates this expectation that we're going to
18 have a video picture of what happened out there and it just
19 doesn't work that way in real life. But we've got science
20 and we've got a good crime unit with the sheriff's office
21 and they know what to do and they take that .40 caliber
22 pistol and they do swabs inside the trigger guard and on
23 the back slide and on the handles which are the most likely
24 places that somebody is going to leave touch DNA. They
25 swabbed it in there, they swabbed it up there which is

1 where you rack it back and they swabbed the handles. And
2 they took samples, buccal swabs from everybody that they
3 could establish potentially had possessed that pistol or
4 touched it. Emmie Coats, Jackie Sanders, gosh I can't
5 remember, of course, Carter and Stevens, I can't remember
6 who else. But the best that could be done by Ms. Leisy on
7 DNA is you've got a partial DNA profile, a mixture of three
8 people inside the trigger guard and everybody is excluded
9 except for Stevens, and the probability of randomly
10 selecting somebody who could have not been excluded was one
11 in 65. She told you that the normal statistic is one in
12 quadrillions or trillions and there aren't but -- I don't
13 know how many billion people she said were on the earth --
14 but one in 65 I submit is not statistically significant,
15 that there might be 65 people in this courtroom today. And
16 what she's basically saying is that somebody in this
17 courtroom is going to be in the same boat that Marico
18 Stevens was in on the DNA statistically speaking. It could
19 be me, it could be anybody, that is not statistically
20 significant. And again, does it matter? We know that both
21 of them possessed that gun. Anthony Carter told you
22 yesterday on the tape, "I had the gun." We don't need DNA
23 from Ms. Leisy to tell you he had the gun, we know he had
24 the gun. Firearms reconstruction, gunshot reconstruction,
25 the car. What do we know about the car? We know where the

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1 car was from Ms. Coats. It would have been awfully nice
2 for the car to have been sitting there in the driveway
3 where it happened when the sheriff's office rolled up. It
4 would have been awfully nice for Emmie Coats to have been
5 truthful and not gone out there the next morning and
6 started kicking stuff around to try to cover up the lies
7 she told before, but it didn't happen that way. So what
8 we've got is where the car was based on what Ms. Coats is
9 telling us and we've got the cartridge cases on the ground
10 from where Ms. Coats told us they were. And I submit that
11 maybe you've got problems believing her, maybe you don't.
12 She's telling you what she told, and I submit this is the
13 thing to think about with Emmie Coats; it's like a soap
14 opera: You talk about Beneco Ganson and Anthony Carter and
15 Emmie Coats and Jennifer Morris and Kayla Estes and -- my
16 God, so much mixing up and intimacy among those people, but
17 think about Emmie Coats. Emmie Coats is somebody who at
18 the time this happened, at the time this happened was
19 involved one way or another with Anthony Carter. Now, why
20 in the world would she rat him out so to speak if it's not
21 true? What happened between the time Anthony Carter got
22 out of that car with the gun and the next day when she told
23 the sheriff's office that he got out of that car with that
24 gun to make her turn against him? Nothing. She told the
25 truth about that. She didn't tell the truth at first, she

1 didn't want -- a baby had been shot in her driveway. I
2 wish she had told the truth that night but she didn't. But
3 why would she have made up Anthony Carter being the guy
4 that got out of the car with the gun? What else do we know
5 about the car? We know that the car was pulled into the
6 trailer. The car is not shown on the sketch, nobody drew
7 it in but people have testified about where it was, the car
8 is in there somewhere. Face of the car away from the road,
9 the front of the car is more that way, back of the car is
10 toward the middle. The car stopped. This car if you
11 believe Carter ends up becoming the cover from the fire
12 coming across the road. Carter and Stevens are over here
13 on the passenger side of the car. We've got cartridge
14 cases -- I said car, that's the trailer, on the passenger
15 side of the car. We've got cartridge cases according to
16 Ms. Coats, believe her or don't, but according to her
17 that's the best we've got -- right there .40 caliber
18 cartridge cases, one of them is out there more toward the
19 road, out here, the others are along the passenger side of
20 the car closer to where people were probably. What does
21 that tell us? What did Emmie Coats say? Emmie Coats is
22 the only person that affirmatively said there was any --
23 other than Carter -- that affirmatively said there was
24 anything -- any fire or anything coming from across the
25 street and she said, "I saw the one flash from across the

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1 street," presumably a muzzle flash. But she said when
2 that's going on that Carter is coming back toward the back
3 of the car and gets near the back of the car and she sees
4 him -- let me see what she says -- I think she said stop
5 and draw, I think that's what she said, where does he do
6 that? At the back of the car. And what ends up at the
7 back of the car is that .40 caliber cartridge case. He
8 moved from there along the passenger side of the car toward
9 the front, that makes sense. If somebody over here is
10 shooting at you and you're taking cover, you're going to
11 take cover at the best place you can away from where the
12 antagonists are, if that's what they are, which is as far
13 toward the front and is on that side of the car. What do
14 we know about the car? The gunshot reconstruction. Two
15 shots into the roof of the car from the front diagonally
16 across the car, two shots into the roof, one more toward
17 the front, one toward the back, one toward the passenger
18 side, one toward the middle, those penetrated the roof of
19 the car. No doubt from Lancaster County crime scene guys
20 and SLED crime scene guys, those shots got fired from the
21 front of the car which is the most consistent place for
22 Carter and Stevens to be hiding from whatever they are
23 hiding from. Other shot concluded through the front --
24 open front passenger side window into the car, another one
25 into the car. The shooting happens on this side and toward

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1 the front of the car, I submit that's conclusive. What
2 else do we know? I asked them all this. Any bullet hole
3 defects as they call them on the rear of the car? None.
4 People initially maybe would see that hole in the back
5 glass and say, "Well, somebody shot that car from the back
6 and that's what killed that baby," that's not what
7 happened. That shot came through the car out the window
8 from inside to out. No bullet holes, no defects in the
9 back of the car. Any defects, bullet holes on the
10 passenger side of the car in the direction of this alleged
11 fire from over here? None. None. I submit it's
12 conclusive that shots from here killed victim .
13 Mr. Lifsey is going to tell you all about these fired
14 cartridge cases. They picked them up, they're out there.
15 We've got three .40 caliber cartridge cases near the car,
16 we've got some 7.65-millimeter cartridge cases, fired
17 bullets, on the ground out across. We've got one
18 7.65-millimeter bullet unfired on the ground out there
19 somewhere, we've got a .380 and I think we've got a couple
20 of .22's. How many guns is that? That's four guns. Have
21 you heard anything in this trial that convinces you that
22 four guns were being shot out there that night? No. Why
23 do I tell you that? People testified people shoot out
24 there all of the time, there's cartridge cases probably
25 lying out there all of the time. There's nothing that says

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1 these cartridge cases came from the fire that was initiated
2 from the guys across the street and certainly not from four
3 guns. We know from Ms. Eichenmiller -- you ain't going to
4 have this in the back and I'm not going to hand it to you
5 but I'm going to pick it up -- we've got stuff. We've got
6 cartridge cases that Emmy Coats turned over, we have got
7 bullet jacket fragments from fired bullets, copper that
8 breaks off of the bullet when it gets fired found in the
9 car. We've got one found behind the car, back here behind
10 the car which again is consistent with it being fired
11 through the car, not something that came from shots from
12 across the street. And we've got this, that's what killed
13 that baby, and Ms. Eichenmiller tells you "I tested the gun
14 it was working fine," meaning it's ready to go. "I tested
15 the cartridge cases that Emmie Coats picked up and this gun
16 shot. I tested these pieces of bullet jacket that were
17 recovered from the back headrest on the driver's side
18 inside that car and that gun fired it, and I tested that
19 piece of jacket fragment found in the street back there
20 behind the car in the direction that Carter was shooting
21 and this gun fired it." We've got the gun, and it is the
22 gun that Carter had that he told you he had. How do we
23 know that? Where did we get the gun? We got it from
24 Stevens' people, some mysterious way this gun turns up from
25 Stevens' people, Carter's running buddy, we've got it

CLOSING ARGUMENTS

1 though. Why is Carter the shooter? He's the one again
2 that had the trouble with the guys across the street
3 because he ripped them off for 450 bucks. It wasn't
4 Stevens' fight, it was his fight, he had the problem. He
5 is getting questioned May 4th and May 6th, very evasive.
6 What did he tell them by Emmie Coats? "Skinny white girl,
7 I don't know her, Stevens must know her." Gosh. How
8 helpful was that? Of course, he doesn't know that they
9 know and that she's probably sitting in another office over
10 there spilling her beans right then. Every little bit of
11 information that came in started pinning Anthony Carter
12 down and they caught him in untruth after untruth and they
13 leaned on him, they leaned on him for hours, they leaned on
14 him and he told some things. He never went that final
15 three yards to the goal line and admitted shooting that
16 gun. But he's in a box because they know, they know more
17 than he thinks they know and they keep pushing and he keeps
18 giving little bits of information. This is his statement,
19 just some of it. Quoting again, your memory not mine, the
20 May 4th statement, wouldn't admit knowing Coats, said she
21 was a skinny white female, admitted he had the beef with
22 Hemphill and Ganson over drugs. Got out of the car because
23 he saw them. Didn't have a gun, didn't have a gun, didn't
24 have a gun, how many times did you hear that? It's not
25 true, we know he had a gun, after hours he told us he had a

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1 gun. He told you also in relation to the shooting we know
2 that he shot and the shots came from that car because he
3 told you Ganson and Hemphill never came across the street
4 into that yard where that car was. He finally after awhile
5 then -- I got "then" highlighted -- then Carter admits
6 knowing Coats and that she had been at his house and this
7 girl that he didn't know he was so close to when she hops
8 out of the car he says, "We hugged each other." How
9 helpful was that to deny that early on? Didn't see no gun,
10 no gun was in the car, ain't seen no gun. "Was there any
11 return fire from y'all's side of the street? Not that I
12 know of." Didn't shoot nothing, didn't see Stevens shoot,
13 no shots from the front side of the car that I know of,
14 that car, that front. That's all May 4th. May 6th, two
15 days later, "I know for sure I didn't have a gun. I didn't
16 have a gun. Hell no I didn't have a gun, didn't shoot no
17 gun, man." And another "then" that I have highlighted,
18 "then," finally he's in a box. They keep pushing him. "We
19 know, Bo, we know, we've talked to people." They probably
20 stretched it a little bit, but they said they probably had
21 people lined up out there to tell them about this case.
22 He's in a box. What's he going to do? "Well, you know,
23 either I'm going to say I shot the gun that killed victim
24 victim or I'm going to say Marico Stevens is the most
25 likely person that did it." So what does he do finally?

1 He passed it off to old Marico, said Stevens was shooting.
2 Still said, "Didn't have no gun, didn't have no gun." Even
3 when he's telling them Stevens is shooting he says, "I
4 didn't have no gun, didn't shoot the gun period, that's a
5 fact." And finally, again, another "then" that I
6 highlighted one, he finally tells them, "Yeah, I handled
7 that gun, I had that gun." Never admitted shooting it but
8 says, "I had it." I tell you again, ladies and gentlemen
9 it doesn't matter whether he shot it or whether Stevens
10 shot it, one of the two shot that gun and bullets from that
11 gun penetrated the top of that car and it killed victim
12 victim . You're going to have these pictures back there
13 with you but I want to let you look at a couple of them.
14 State's Exhibit Number 48. Do you see the car seat? Do
15 you see the back seat and you see the front seats and you
16 see rods through the roof of that car and one through the
17 open window over there? It shows you where those bullets
18 went into that car. And we know that child was in the back
19 seat and we know that child at some point might have been
20 in the car seat but was never buckled in the car seat and I
21 submit to you was just crawling around in the back of that
22 car. State's Exhibit Number 49, it shows a rod going into
23 a bullet hole on the back headrest in that car seat in the
24 seat of that car through the roof. State's Exhibit Number
25 50, it shows a rod going through the hole at the base of

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1 the windshield, there was a shot fired through that car.
2 State's Number 53, it shows all three of them. The child
3 didn't have a chance, didn't have a chance. It's not easy
4 but it's getting close for you. I'm going to sit down,
5 Mr. Lifsey is going to get up and the Judge is going to
6 talk and then it is going to be y'all. Doesn't matter that
7 it was victim instead of who Carter intended to kill, she
8 got shot and killed because of what he did, because of what
9 he started and I submit to you what he finished. He didn't
10 mean to kill her but he meant to kill somebody when he
11 fired a .40 caliber pistol across that car towards these
12 other guys. There should only be one verdict and I submit
13 to you ladies and gentlemen you know beyond a reasonable
14 doubt based on everything that you've heard that that
15 verdict should be guilty of murder; not voluntary
16 manslaughter, not involuntary manslaughter and it is
17 certainly not self-defense, I ask you to convict him of
18 murder. And when you find him guilty of murder I ask you
19 to find him guilty of the firearms charge which goes along
20 with it. Thank you.

21 THE COURT: Okay jurors, take a break. Don't talk
22 about the case.

23 (The jury left the courtroom and a recess was taken.)

24 THE COURT: You may proceed.

25 MR. LIFSEY: Please the Court, Your Honor? Ladies and

1 gentlemen. Ladies and gentlemen, I told you at the
2 beginning of this case this would be just a tragic, awful
3 series of events and it has been, but I also told you at
4 the beginning of the case that it's not murder and it's
5 not. How do we know it's not murder? Well, the Judge is
6 going to tell you in a minute that self-defense is a
7 complete defense to both as to murder and as to voluntary
8 manslaughter. Now, we've got four possible verdicts in
9 this case; guilty of murder, guilty of voluntary
10 manslaughter, guilty of involuntary manslaughter and not
11 guilty. I want to talk for a little bit about the first
12 two, guilty of voluntary and -- excuse me, murder and
13 voluntary. The involuntary case -- the involuntary verdict
14 is an interesting question and that's a closer call and I'm
15 going to argue to you they haven't proven that to you
16 either and I'll talk to you about that in a minute. I want
17 to talk to you about murder and voluntary. Why do we know
18 it's not murder and voluntary? We know it's not murder and
19 voluntary because self-defense is an absolute and complete
20 bar to that. Now, I argue to you it's clear it's
21 self-defense in this case, but I want to tell you the
22 intellectual position you have to take, visa vie, that
23 issue, and the Judge is going to tell you this: The State
24 has to prove beyond a reasonable doubt that it is not
25 self-defense, that's important as I said and I'll argue to

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1 you in a minute it's clear it's self-defense. But if there
2 is any reasonable doubt in your mind that he has proven it
3 is not self-defense you have to find him not guilty as to
4 murder and to voluntary, you are required to, that is the
5 law. So let's talk about why we know it is self-defense
6 and I'm going to kind of go through the facts of the case
7 as you heard it come out on the stand and as I remember it.
8 We know it's self-defense because let's talk about the
9 motivation of why this happened. The State's theory, and I
10 don't think it's contested at all and I've tried -- and let
11 me say this, I have not asked a million questions because I
12 don't ask questions that aren't important, so I am not
13 arguing with them that this is a debt. Let's think about
14 that a minute. Their theory is that my client stole \$450
15 from them, and by them I'm referring to the J. D. Hemphill,
16 Beneco Ganson, John John Hill gang, I'm referring to that
17 crowd. Okay. So their theory is that my client stole
18 money from them. Well, think about this a minute, if
19 somebody steals money from you it makes you angry. Okay.
20 It doesn't -- the person who steals from you doesn't get
21 angry at you, I mean -- I don't want to be flippant about
22 it but I've got a little brother and when we were kids he
23 couldn't keep up with money worth a darn, he went through
24 it like this. And I was tight -- I'm still tight -- I was
25 tight. He would come into my room and he would take money

1 that I had, my allowance money and he would say he was
2 borrowing it and he wouldn't pay me back and it made me mad
3 but he never got mad at me because he took my money. Think
4 about the history of confrontations the solicitor has told
5 you about. The Hemphill-Ganson-Hill gang is the one who is
6 always the aggressor. They beat up his little brother,
7 they ran him out of the trailer park, they told him he
8 better have a gun the next time they seen him. Now, ask
9 yourself this, have you heard -- up until the incident on
10 May 3rd, have you heard any testimony of anything my client
11 did aggressive toward them at all? And the answer is no,
12 you haven't. And it's not surprising because it is logical
13 that if someone steals money from you you are mad, and
14 these people with their criminal records including gun
15 convictions are the kind of people who take getting mad
16 seriously, so we know it's self-defense because of
17 motivation for what happened. May 3rd. We know it is
18 self-defense because of where the initial contact occurred.
19 I'm going to bring this over here a minute and let you look
20 at it. It's undisputed at least as best I can tell -- now,
21 let me say something, I want to say a word and I'll get
22 back to what I'm talking about. When I say undisputed,
23 there's a lot undisputed in this case but I find it
24 interesting that the solicitor -- there's basically three
25 or four people who testified about what happened out there

JURY CHARGE

1 that day that really know what happened; my client, Emmie
2 Coats and Beneco Ganson, they're really the only ones out
3 there that know what happened and they've all told little
4 different versions. And, of course, the solicitor has
5 picked the parts of each of their versions that most
6 support his theory even if they conflict with each other
7 which is fine, that's argument, that is fine, but it's not
8 proof beyond a reasonable doubt. But now, where did the
9 confrontation occur? The testimony is that my client gets
10 out of the car and walks to the middle of the street where
11 he has a confrontation with John Hemphill. Now, listen, if
12 he came there to kill him, why doesn't he kill him there?
13 If you come there with malice -- and the solicitor defined
14 malice for you; evilness, wickedness in your heart -- if
15 you come there with malice and you get out with your gun
16 not to protect yourself because you're scared of these
17 people who have beaten you up and done these bad things to
18 you but because you are evil and you have got malice in
19 your heart, why don't you shoot him dead right there in the
20 middle of the street when he is right up at them? We know
21 it's self-defense because if it wasn't he would have shot
22 him right there. Why else do we know it's self-defense?
23 We know it's self-defense because whatever happened in the
24 middle of the street was over. Everybody, my client, Emmie
25 Coats, lying Beneco Ganson, all say that my client turned

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1 and walked away, he walked away, the confrontation was
2 over. Whatever happens after that is on J. D. and Beneco,
3 whichever one of the two of them fired the gun. Why else
4 do we know it was self-defense? We know it was
5 self-defense because we know they were returning fire. The
6 solicitor wants to get up here and say, "Well, we don't
7 really know if they were --" of course we know they were
8 returning fire. Why do we know they're returning fire? To
9 begin with there were shell casings everywhere. In
10 addition to these whether or not you want to believe Emmie
11 Coats about where she found them, regardless of what the
12 .380 casings, the .40 caliber casings, regardless of those
13 we have one -- items one, two and three are two
14 7.65-millimeter casings and one 7.65 cartridge right here.
15 Why haven't we done any testing on those? We call up
16 witness after witness to describe and explain why we have
17 no evidence and we didn't hear a single person say we've
18 made any effort to test those. Where is that in all of
19 this? How about the shell casings -- the .22 caliber
20 casings back here? And I don't know if you picked this up
21 but let me emphasize, six and seven are .22 caliber
22 casings, eight is a Samsung cellphone. I don't know if you
23 noticed it but the crime scene officer said that's Beneco
24 Ganson's cellphone. Wouldn't it have been nice -- and they
25 get these the night it happens? Why didn't they run and do

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1 their fancy touch DNA testing on that? Wouldn't you have
2 liked to have known if Beneco Ganson handled those shell
3 casings? Wouldn't you have liked -- that that coincidentally
4 just happened to be found right with his cellphone? There
5 are bullet holes in Emmie Coats's trailer, where are the
6 pictures of those? We can introduce picture after picture
7 after picture but we can't take a picture of Emmie Coats'
8 trailer? There's a pattern of only showing you evidence
9 that helps them and not showing you any evidence that tends
10 to negate their theory. Look at all -- I mean, you know,
11 let's accept for a minute -- and I know the solicitor says
12 she didn't report it until later, but I argued a little bit
13 during the trial that they should have searched this whole
14 area from the beginning and I still argue that. But let's
15 assume for a minute that somehow they were justified in
16 only searching this side of the road the night it happened.
17 By the next day when they get the report of Emmie Coats
18 picking up shell cartridge cases they are at her house,
19 somewhere in this stack of pictures is a picture of Danny
20 Bennett and Emmie Coats standing right there. Why didn't
21 they look around her trailer then? Why didn't they take
22 pictures of bullet holes then? We know it was
23 self-defense. Look at the damages to the car. Okay.
24 Listen, these shots came from the back, they came at
25 angles. I asked officer -- let me make sure I got it

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1 right -- Jeff Steele on the stand aren't these injuries to
2 the car more consistent with defensive shots than they are
3 aggressive shots and he said yes. Okay. That's their own
4 witness admitting they were firing in defense based on the
5 physical science. I didn't argue with him and challenge
6 him on the way the rods were or anything because it doesn't
7 matter because I agree with that, but I did ask him is it
8 consistent with defense and it was. We know it was
9 self-defense. Why else do we know it was self-defense?
10 Well, of course, we know it was self-defense because
11 Marshall and Crump said it was. Listen, let me talk to you
12 about the interview. I understand that my client didn't
13 tell the truth initially. Okay. I argue to you he
14 basically told the same general story that is supported by
15 both Emmie and lying Beneco Ganson, that he gets out of the
16 car, he approaches, he has some sort of discussion,
17 confrontation, whatever you would call it, and he turns and
18 walks away and that's when he hears shots fired, that has
19 been consistent. Listen, I'll admit to you that he
20 didn't -- I can't deny he didn't tell the full story from
21 the beginning, I wish he had. But it's interesting in that
22 lengthy interview the police tell some of their side of the
23 story and I wrote it down because I thought it was
24 important and I'm glad you heard it. Marshal: "We
25 absolutely know there was more than one gun." Marshal:

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1 "We are 100 percent positive there was more than one gun."
2 Crump: "We can tell where shots came from, we can tell
3 shots came from both sides." Crump again: "We're certain
4 fire was returned." Crump again: "We've established in
5 all likelihood the other side fired first," that's the
6 police officers telling them. They know, they know they
7 were returning fire, they know they were returning fire.
8 And then to get up on the stand and then get up and argue
9 to you that it doesn't matter? Listen, I have been trying
10 murder cases a long time, the idea that the State can stand
11 in front of you and say we don't know who shot and we don't
12 know who shot first but therefore you still need to convict
13 him of murder and somehow that doesn't matter is crazy.
14 Listen, the only way you can convict him of voluntary or
15 murder, okay, is if you believe beyond any reasonable doubt
16 it is not self-defense, and to do that -- and like I say,
17 my argument is clear it's self-defense but you don't have
18 to accept my argument. If there is even a reasonable doubt
19 at all that it is self-defense you cannot consider those
20 two offenses and to get there you've got to ignore the
21 police officers' own words, all of the forensic evidence
22 and all of the testimony as best we can as to what happened
23 out there. Now, involuntary. Involuntary is a closer
24 call, okay, I'm not going to sugar coat it to you, it's a
25 closer call. Involuntary is the operating of a gun or

1 firearm in a negligent or unsafe manner. There is
2 certainly an argument from the State that the shots entered
3 this vehicle in an unsafe manner, but whose fault is that?
4 I don't know who shot the gun. I don't know if it was
5 Stevens or I don't know if it was Carter, my client argues
6 it was Stevens. But here is the thing, whoever shot it
7 shot it in response to what the Hemphill-Ganson-Hill gang
8 did. And the question is are you going to as a jury say
9 beyond a reasonable doubt that the negligence and the use
10 of that firearm is my client's fault? How can you say that
11 when you don't know who shot them, and when as best as you
12 can determine it the whole thing started because of them
13 and shots were fired first because of them? How can you do
14 that? There's just too many questions in this case. Now
15 listen, the Judge said -- I think it was the Judge, it may
16 have been the solicitor -- somebody said we don't have a
17 video camera out there, okay, and I know we don't and most
18 crimes -- once in a while you do, most crimes you don't
19 have video. But murder, voluntary manslaughter,
20 involuntary manslaughter, any case that involves a homicide
21 is serious business, and the Judge is going to tell you and
22 I told you at the beginning, my client is presumed
23 innocent, you have to view him as an innocent man, that the
24 State has the burden of proof, and that when you judge that
25 burden you can judge it both by the evidence they've called

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1 or the evidence they've chosen not to call, and that most
2 importantly they've got to prove their case beyond a
3 reasonable doubt to the end of this case. If there's any
4 reasonable doubt you've got to return a verdict of not
5 guilty, that's the law and it's not easy, and I'll talk to
6 you about that in a minute, I know it but you've got to do
7 it. There's too many questions in this case. They don't
8 even know who shot the gun. They call witness after
9 witness to say they've got no gunshot residue and they've
10 got no DNA, and of course they say that we didn't know to
11 take it from Carter. Bologna. They had Mr. Carter and
12 Mr. Stevens at the emergency room, they knew there was
13 evidence there to collect because they took their shirts
14 but they didn't bother to take the 90 seconds it might take
15 to take a Q-tip out and swab their hands. Now listen, I
16 don't know what would have been on it but the point is it's
17 not my job to prove anything, it's their job, they've got
18 the burden of proof. The solicitor said use your common
19 sense. I want you to use your common sense, but you have
20 to use your common sense in relation to the law the Judge
21 gives you and the law says that they've got the burden of
22 proof, not the defendant. Where is J. D. Hemphill? Think
23 about this a minute, one thing I agree with the solicitor
24 said is this case -- listen, it's awful. Okay. And I hate
25 to even -- I've tried not to mention the poor child that

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1 got killed in this case, but when the State proceeds on a
2 theory of transferred intent the case is between my client
3 and you've got to imagine as if J. D. or Beneco gets shot,
4 that's who the dispute is from. Okay. And, in fact, Mike
5 Adams testified on the stand that he went in front of a
6 magistrate and signed a warrant and swore that their theory
7 is that my client was trying to kill J. D. Hemphill. Where
8 is J. D. Hemphill? Oh, he's in Atlanta. What? Why
9 haven't we looked for J. D. Hemphill? Where is their -- I
10 asked the officer and he said, "I don't know, that's not my
11 department." Well, you know, that wasn't the last witness
12 they put up. They had witness after witness to call up
13 there to say, "Okay, here is what we've done to look for
14 Hemphill, we have called this" -- they haven't done any of
15 that. They drag people out here all the time. They drag a
16 man from Oklahoma on a murder charge four or five months
17 back but they're saying they can't find J. D. Hemphill in
18 Atlanta? Have they picked up a bit of evidence but yet
19 they want you to convict my client of murdering him in
20 essence because he's the transferred intent? You know, I'm
21 going to sit down in a minute because I know you get tired
22 of hearing me talk, but let me leave you with this: In a
23 lot of ways your job is both the easiest job in the system
24 and the hardest. Here is the easy part, the easy part is
25 you listen to what the Judge says about the law and you

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1 listen to what the Judge says about presumption of
2 innocence and you listen to what the Judge says about
3 burden of proof and you listen to what the Judge says about
4 proof beyond a reasonable doubt including the fact that
5 they've got to prove the absence of self-defense beyond any
6 reasonable doubt and that's the easy part clearly. Here is
7 the hard part. The hard part is you've got to write it
8 down and you've got to sign it and you've got to come back
9 out here. And listen, I understand I've tried not to talk
10 about the child in this case, but listen, it is awful.
11 Okay. And I know the family is out there, I know they're
12 upset, I heard them crying during the case and it is awful
13 and I -- my children aren't that young anymore but I can't
14 imagine what they're going through. But here is the deal,
15 it's not your job to right that wrong, it's not your job to
16 say whether or not somebody has to pay for this, it's your
17 job to say whether the State has met their burden of proof
18 beyond a reasonable doubt and they haven't, and you took an
19 oath to do it. Okay. I know you didn't ask for this job,
20 but when you came in here, I don't know if you remember,
21 the clerk stood you up and made you raise your hand and
22 agree to follow the law, the law that that man is going to
23 give you. And when you do that I don't expect you to enjoy
24 it, I don't expect you to like it, but I expect you to
25 follow it because you promised and do it and find him not

1 guilty. Thank you.

2 THE COURT: Okay. Jurors, we're going into the final
3 phase of the trial. Can y'all hear? I can't tell whether
4 the microphone projects or not, normally I don't have any
5 problem with people hearing but if you can't hear hold your
6 hand and I'll get down like this. We're into the final
7 phase of the trial, jurors. I'm going to instruct you on
8 the law, you'll go back, weigh all of the facts and return
9 verdicts on these two indictments. The indictments are not
10 evidence. The fact that the indictments have been issued
11 and that Anthony Rodriekus Carter has been charged with the
12 commission of crimes create no inference of guilt against
13 him at all. As I explained to you at the start he entered
14 the trial presumed innocent, a presumption of innocence is
15 a real substantial right that every defendant has
16 irrespective of the charge against the defendant. There is
17 absolutely no burden on a defendant to prove that he is not
18 guilty. In order to obtain a conviction of some charge
19 contained within these indictments it is incumbent on the
20 State to convince 12 jurors -- the original 12 --
21 unanimously beyond a reasonable doubt that he committed a
22 crime embraced within these indictments, or crimes embraced
23 within these indictments. Now, we've got two alternate
24 jurors, y'all pay attention. When I conclude these
25 instructions I'm going to ask the jury to step out assuming

JURY CHARGE

1 the original 12 are still with us if you would stay in the
2 courtroom at that point. Mr. Foreman, it takes a unanimous
3 verdict, your vote counts no more than any other juror but
4 somebody has to preside over the deliberations. If
5 questions occur during deliberations if you would write
6 them down with some specificity I will confer with the
7 attorneys and see if I can answer the questions. I'm going
8 to go over evidence in just a little bit but just to
9 forestall some questions. As I have briefly illuded to at
10 the start I'm giving you the law in the abstract. I'm
11 actually prevented from commenting on the facts other than
12 to tell you who the parties are and who the victim is and
13 things like that, so don't send back a question should we
14 believe so and so, that's going to be your function. While
15 you deliberate you will have with you everything that has
16 been formerly introduced into evidence as an exhibit. Now,
17 a few things were marked as Court's exhibits, one of those
18 I just marked the gun as a Court's exhibit, I think y'all
19 don't really need the gun back there but if y'all want to
20 see the gun you send me a note and I'll bring you back out
21 and we will check and make sure it's not loaded and we can
22 pass it around. I don't know what good that will do. It
23 has been introduced into evidence, I just blocked it from
24 going back to you. Y'all gathered that the things aren't
25 always initially introduced into evidence like photographs

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1 and reports, first they were marked for identification
2 because it has got to be connected that it came from point
3 A to point B to point C and then finally it was moved into
4 evidence. Couple of things were just left as Court's
5 exhibits, those won't go back but you can consider them if
6 you saw something during the trial. Couple of things that
7 you saw were not introduced into evidence, for instance
8 basically all of the officers pull out some notes they made
9 and look at them just to review time, date, something like
10 that. You can consider what they testified to from any of
11 those notes but the notes were not introduced into evidence
12 and we can't send them back. In addition, we can't add any
13 witnesses to the case, we can't ask anymore questions. It
14 may be that you really wanted to ask a particular witness
15 one additional question, sorry, can't ask any additional
16 questions. You have to decide the case based upon the
17 admitted evidence. Now, as I explained to you a couple of
18 times and I'm going to go over it, but remember I'm going
19 to try to keep it as brief as I can but we're talking
20 serious charges so I can't keep it really short. Y'all are
21 going to get instructed on more law than most people do and
22 I can't really tell you how you should apply it to the
23 facts other than to give you the law and tell you you have
24 to find the facts and apply them to the law, but I get it
25 now. I'm not going to send the indictment back, again it's

JURY CHARGE

1 not evidence. This indictment alleges that Anthony
2 Rodriekus Carter around May 3, 2010 feloniously, willfully
3 and of his malice aforethought killed and murdered victim
4 victim by shooting her with a handgun and she did die as a
5 direct result thereof. In order to obtain a conviction
6 under this indictment it's incumbent on the State to prove
7 beyond a reasonable doubt that it occurred in Lancaster
8 County among other things, the shooting, not necessarily
9 the death, but that she was shot. I explained to you
10 murder includes charges -- or lesser-included charges of
11 voluntary manslaughter, involuntary manslaughter. On this
12 particular indictment four forms of potential verdicts
13 would be submitted to you, the order in which they're
14 submitted has no bearing, you've got to do it one way or
15 another, generally it depends on who prepares it. If the
16 State prepared it, they put guilty first, if the defense
17 prepared it they would put not guilty first. But the
18 bottom line you would pass on that indictment that I just
19 went over with you, weigh all of facts in the case and
20 decide whether the State has met its burden of proof on the
21 issue of first murder, either guilty or not guilty in your
22 mind. If you find him guilty you would stop there, if you find
23 him not guilty you would stop there. If you found -- I'll
24 instruct you on voluntary manslaughter -- you pass and
25 discuss those elements. If you find him guilty you stop

1 there, if you find him not guilty you stop there. If you
2 found him not guilty -- and I'm not saying you should find
3 him guilty of anything, I think you understand that -- if
4 you find him not guilty of murder, not guilty of
5 manslaughter you may consider involuntary manslaughter, and
6 I'll instruct you that in just a little bit. If you find
7 he's not guilty of that he's not guilty of anything and
8 your verdict would be just not guilty. But again, I'm not
9 suggesting that you find him guilty but you can find him
10 not guilty of murder, that does not mean he's not guilty of
11 one of the other charges, you would have to decide straight
12 on down as I explained them to you. You could find him not
13 guilty of any of these three charges; murder, voluntary
14 manslaughter, involuntary manslaughter before you could
15 decide not guilty. You don't have a form not guilty by
16 murder, not guilty by manslaughter and so forth, just one
17 not guilty form, and if you find him not guilty you have to
18 find him not guilty of the three charges embraced within
19 the murder indictment. The second indictment is for
20 possession of a weapon of a handgun while committing a
21 violent crime. In order to return a verdict of guilty on
22 that charge you would have to find that he was guilty of
23 committing a violent crime, and I instruct you that murder
24 and manslaughter are crimes of violence, or violent crimes,
25 involuntary manslaughter is not. So in order to find him

JURY CHARGE

1 guilty of possession of a weapon while committing a violent
2 crime you must first find him guilty of either murder or
3 voluntary manslaughter. If you find him not guilty or
4 guilty of involuntary manslaughter, you can't find him
5 guilty of possessing a weapon while committing a violent
6 crime. Of course, the State has to prove he possessed the
7 weapon, you know, the crime of violence was committed
8 beyond a reasonable doubt along with that. Now, how do you
9 reach your verdict? You weigh all of the evidence in the
10 case; that includes testimony, that includes photographs,
11 that includes reports put in, everything that has been
12 admitted. The attorneys worked pretty hard. We could have
13 been here two weeks admitting all of those documents and
14 pictures that came in if we hadn't done that outside of
15 your presence and got everything marked so it came in
16 pretty smooth. There was just a couple of objections
17 during the trial. To the extent that I sustained the
18 objection you don't speculate as to what the answer would
19 have been to a question denied, but anything that came in;
20 testimony, exhibits, photographs, you can consider and give
21 it such weight as you feel it's entitled to because you
22 jurors are the fact finders. All I do is preside over the
23 trial, make evidentiary rulings and then instruct you on
24 the law again, in the abstract, not fact specific which
25 makes it harder for you. If I could I could tell you if

JURY CHARGE

1 you find A and B then you could find C but I can't do any
2 of that, so something that is not evidence that you could
3 consider obviously would be summations and opening
4 statements by the State and the defense. They are entitled
5 for you to consider that position, the fact that either of
6 them suggests something to you does not bind you to draw
7 that same conclusion, but that is up to you. Evidence
8 generally speaking is of two types, direct evidence and
9 circumstantial evidence. Circumstantial evidence, it sits
10 on the same footing as direct evidence as far as you're
11 concerned, one is not preferred over the other. Direct
12 evidence is where somebody testifies to something he or she
13 has observed through the senses, as I explained it to start
14 with it might not be true but that's testimony on that
15 issue. Circumstantial evidence is where you take a fact or
16 proven fact and from that you infer the existence of
17 another fact. Of course, your inferences have to be
18 reasonable based upon all of the surrounding circumstances.
19 Now, you jurors are going to pass on the credibility of all
20 of the witnesses that testified. I'm going to give you a
21 few rules, I'm not directing it to a particular witness,
22 they apply to all of the witnesses. Among the things that
23 you would consider certainly would be the appearance or the
24 demeanor of a witness. Obviously you would consider
25 whether a witness was hesitant or forthright in answering

JURY CHARGE

1 questions. You would consider any interest or bias that a
2 witness had in the outcome of the proceedings, the
3 opportunity that the witness has to see, hear or observe
4 what the witness testified to, that's certainly a factor
5 you could take into account, whether testimony from a
6 particular witness in your mind becomes stronger or is made
7 weaker by testimony or other evidence in the case is
8 entirely up to you. We don't count witnesses, jurors, in
9 court proceedings. In other words the side with the most
10 witnesses doesn't mean anything because you jurors are
11 entitled to pick and choose portions of testimony that you
12 believe believable. In other words, you can believe one
13 witness versus many or the other way around and you are not
14 bound to accept in its entirety the testimony of any
15 particular witness as I just illuded to. You can believe
16 any portion of the witness' testimony but then you could
17 give that believable testimony such weight as you feel it's
18 entitled to. During the trial, jurors, several people
19 testified who had previously had run-ins with the law.
20 Generally speaking if a person has a criminal record there
21 are exceptions that you are interested in, but if a person
22 generally has a criminal record it can be brought out when
23 they testify if they have a criminal record. The fact that
24 you have a criminal record certainly does not prevent
25 anyone from testifying but it's for you jurors to decide to

JURY CHARGE

1 give it such weight as the prior record of a person if you
2 feel it would impact on that credibility, again that's up
3 to. In addition, jurors, during the trial certain people
4 were qualified as an expert. The fact that we qualified as
5 an individual as an expert does not bind you to accept
6 their testimony either, they are subject to the same
7 credibility test as any other witness on demeanor,
8 consistency, inconsistency, so forth. What they are
9 allowed to do, though, once qualified as an expert is they
10 have to establish that through education, training, work
11 experience or a combination of those factors that they have
12 required more knowledge in a particular field than you or I
13 have then they can give opinions within that field of
14 expertise. Before you can accept any opinion given by an
15 expert the opinion has to be given to a reasonable degree
16 of certainty within the field in which the expert was
17 qualified. Now, the expert does not have to say that every
18 time they say something, y'all understand, they don't have
19 to say I was born in Bamberg, South Carolina to a
20 reasonable degree of certainty, and then they say I have
21 got this and I presented my opinions after that it is such
22 and such, if it's not to a reasonable degree of certainty
23 they can't be questioned about it further. But even though
24 they testified as experts to things to a reasonable degree
25 of certainty you are not bound to it, that is up to you.

JURY CHARGE

1 You can consider underlying facts under which an expert
2 bases his or her opinion. Now, the defendant in this case
3 did not testify. He has absolutely no obligation on his
4 part to testify. You did see a couple of hours of
5 videotape, you can view that just like he was testifying in
6 person, you saw it. So the fact that he actually did not
7 take the stand creates no inference of guilt against him at
8 all. You can consider what you saw from the video, and I
9 have a video up here, a couple of times of just a little
10 blur, we didn't prepare -- they had cut down a few
11 things -- I know you don't think they sped it up, but they
12 limited it a little bit and they just ran over some things,
13 don't send back a question saying, "We want to see when it
14 was run over." You can consider anything that you saw from
15 the video and that you heard from the video, but to just --
16 that's just like me sustaining an objection, although I
17 didn't edit it, the attorneys got together and agreed on
18 what they were going to present from the video of the
19 defendant to you. Now, that's basically all of the
20 preliminary things on how you reach your decisions. I've
21 mentioned it one other time as you recall, one previous
22 time, that the defendant was also charged with possession
23 of a weapon, that's no longer in front of you. He pled
24 guilty to that. I'm authorized to tell you that that was a
25 separate charge other than possession while committing a

JURY CHARGE

1 crime, that was just adding. He pled guilty to that,
2 that's removed from your consideration, and the fact that
3 he pled guilty to that charge creates no inference of guilt
4 on these other charges which he's facing. Okay. You are
5 not to discuss that, that is out of your way. Now, here
6 comes the difficult part. I need you to listen carefully
7 because understand, I have to instruct you on the law in
8 the abstract. I don't think I'm going to even go over
9 other than the State has got to convince you beyond a
10 reasonable doubt on the weapons charge, the elements of
11 that, you understand what a weapon is, it was either
12 possessed during the commission of a violent crime or not.
13 If you need more instruction on that you can send back a
14 note and I can give it, I think y'all understand that. You
15 have to decide the case, jurors, based upon the admitted
16 evidence which you jurors are going to pass on. You're
17 going to weigh all of the evidence in the case, obviously
18 certain witnesses testified and made inconsistent
19 statements. The fact that they made inconsistent
20 statements does not mean you should object to everything
21 that any particular witness says, it's just as I told you
22 earlier you can pick and choose portions of the statements
23 that you feel are believable. Inconsistent statements that
24 a person makes certainly can be considered by you in
25 evaluating the believability of the entire statement, but

JURY CHARGE

1 again, that's up to you. The fact that they made
2 inconsistent statements is just another factor that you can
3 pass on on credibility. So you weigh all of the evidence
4 in the case, direct evidence and circumstantial evidence;
5 photographs, reports, believable testimony, then you decide
6 whether the State has convinced you beyond a reasonable
7 doubt that the defendant is guilty of murder, manslaughter
8 or involuntary manslaughter. Now, jurors, I've been over
9 it a couple of times with you about beyond a reasonable
10 doubt. In the simplest definition, reasonable doubt is the
11 kind of doubt that would cause an ordinary person to
12 hesitate to act in conducting his or her daily things.
13 Going just a little further, beyond a reasonable doubt
14 means the evidence must be presented that leaves you firmly
15 convinced of the guilt of the accused, if you're not firmly
16 convinced of the guilt of the accused after weighing all of
17 the evidence in the case you must find the defendant not
18 guilty. Murder. Jurors, murder is the unlawful killing of
19 one human being by another human being with malice
20 aforethought expressed or inferred. Now, malice, jurors,
21 denotes wickedness, evilness. Expressed malice is where a
22 person indicates through verbal or overt action that he or
23 she bears ill will toward another person; "I hate you," if
24 somebody says that that indicates that they may have malice
25 there. Malice is a term of legal art actually and it

JURY CHARGE

1 denotes wickedness and excuses just cause, there is no just
2 cause. So malice can be inferred, jurors, if it is proved
3 beyond a reasonable doubt that there was a willful,
4 deliberate and intentional doing of an unlawful act without
5 just cause or excuse. When malice is not expressed, where
6 it is inferred you take into account all of the surrounding
7 circumstances that ended up in someone dying. You take
8 everything that bears on that issue and, of course, then
9 you're in the area of circumstantial evidence, and any
10 circumstantial evidence is just evidence in the case and
11 you give it such weight as you feel it is entitled to. The
12 State has to convince you beyond a reasonable doubt that
13 malice existed before you can find an individual guilty of
14 murder even though you find that the defendant killed
15 someone. Both murder and voluntary manslaughter, which I
16 will come to in just a minute, involve criminal intent.
17 Okay. If you don't intend to kill someone it can't be
18 murder, it's got to be something else, of course, you have
19 to understand. And voluntary manslaughter is the same
20 situation, you have to have a fixed intent to kill someone.
21 You recognize the action you take might result in the death
22 of another before you could find a person guilty of murder
23 or the second illustration of voluntary manslaughter. When
24 I get to involuntary manslaughter it does not require any
25 proof of criminal intent because that's not part of it,

JURY CHARGE

1 it's the unintentional killing of another person.
2 Manslaughter is the unlawful killing of one human being by
3 another human without malice in the sudden heat of passion
4 upon a sufficient legal provocation. The difference, of
5 course, between murder and manslaughter is that malice
6 exists in murder, malice does not exist in manslaughter. I
7 can't really give you any further instruction on what
8 constitutes malice other than I did, it's just legal
9 terminology. I have to give it to you in the abstract. I
10 can't go over any factors that might or might not bear on
11 the presence of the absence of malice in this particular
12 case so don't send back a question on that. And
13 involuntary manslaughter is where a defendant did
14 unlawfully unintentionally kill a victim, and that the
15 defendant's conduct was criminally negligent which is
16 defined in the section of the code of laws as reckless
17 disregard of the safety of others. Of course, weapons is a
18 dangerous instrumentality and if you don't use them
19 properly bad results, of course, occur. Criminal
20 negligence is more than just simple negligence, it's a
21 conscious awareness that you knew or should have known that
22 a bad result could result in the cause of the action that
23 you took; firing in a house, firing in the woods. Now, I'm
24 coming back to all of these in just a little bit. But in
25 the involuntary manslaughter situation, which is the last

JURY CHARGE

1 one, a party cannot avail himself or herself of involuntary
2 manslaughter as a possible result if they're engaged in the
3 commission of a felony at the time that somebody
4 unintentionally gets killed, and while the defendant is not
5 charged there's evidence in the case that he could have
6 been guilty of a felony, not saying that he was but that is
7 up to you, which is called presenting and pointing a
8 firearm. It's just a simple statute that says it is
9 against the law to present or point a firearm at another
10 person whether the gun is loaded or unloaded. You can
11 understand, if somebody points a gun at you you don't say,
12 "Man, is that thing loaded?" That's just against the law.
13 But if you have the right for instance in self-defense to
14 defend yourself you are not guilty of pointing and
15 presenting which brings us to self-defense down the whole
16 gamut. Self-defense, jurors -- well, before I get to
17 self-defense since I don't have things written down I try
18 to do things in a logical manner. Obviously there's no
19 evidence in the case -- I told you I couldn't talk to all
20 of the facts but I will tell you that there was not any
21 intent on anybody's part to kill the three year old child,
22 I think you know that, what we're talking about is
23 transferred intent. So if a person is trying to commit
24 murder they would have been guilty of murder if they would
25 have shot A and they shot B inadvertently, they're guilty

JURY CHARGE

1 of murder if the other elements of murder were proved
2 beyond a reasonable doubt. The same thing with the other
3 charges. Okay. Transferred intent applies to the three
4 charges; manslaughter, voluntary and involuntary and murder
5 and also on the issue of self-defense if you're justified
6 in the self-defense somebody else you're standing in the
7 position of, other party and so forth. But the defendant,
8 of course, does not have to prove he is not guilty of
9 anything as I have explained to you. If there is evidence
10 in the case that a person acted in self-defense it's
11 incumbent on the State to prove beyond a reasonable doubt
12 that the person did not act in self-defense. In this case
13 the State relies in part on the theory of the hand of one
14 is the hand of all, and that basically says if two or more
15 people -- in the area called accomplice liability, two or
16 more people are jointly committing an unlawful act if one
17 is guilty of the unlawful act everyone participating on the
18 unlawful act is guilty. You have to be aware that the unlawful
19 act -- unlawful act is going on or you should have known an
20 unlawful act would have dire consequences then if you're
21 participating in it. The simplest example is if one person
22 or two people rob a store, both people are guilty of armed
23 robbery, not one guilty of armed robbery and one of strong
24 armed robbery which is just not required of a weapon. If
25 two people and only one has a gun are engaged in an act in

1 which somebody is killed, if they're both aiding and
2 abetting each other, participating in the situation
3 together, hand of one is the hand of all. If one is guilty
4 of murder, both are guilty of murder, if one is guilty of
5 manslaughter and so forth. The hand of one is the hand of
6 all. But you have to find that the person who did not
7 shoot, for instance was aiding and abetting the person who
8 did shoot, so the hand of one is the hand of all. Now,
9 self-defense. Four things have to be established by the
10 evidence, and when I say that I mean convince you jurors.
11 The first is that a person who acted in self-defense, shot
12 in self-defense was not at fault in bringing about the
13 immediate difficulties or the necessity of taking a human
14 life. Now, immediate difficulties, we're talking about at
15 the time of a confrontation, we're not talking about
16 anything in this case that predates on the issue of at
17 fault in bringing on the controversy. We're not talking
18 about anything that predates the date that the shooting
19 occurred, you can consider anything that happened before
20 other issues but not on that particular issue. At the time
21 that the fatal shot was fired the person making the fatal
22 shot believed in good faith that he was in imminent danger
23 of sustaining serious bodily injury or losing his life.
24 And third, that if he felt that he was in imminent danger
25 of sustaining a great bodily injury or losing his life that

JURY CHARGE

1 an ordinary reasonable person faced with the same
2 circumstances would have also entertained the same belief,
3 in other words, you can't just say, "I believe he's going
4 to shoot me, bang, he's dead." It has to be the same
5 situation. If you put any reasonable person in a situation
6 that the shooter -- that the evidence indicates might have
7 acted in self-defense there has to be a reasonable
8 assumption on the part of the person that did the shooting
9 before self-defense applies. Now, self-defense, if
10 established by the evidence, the defendant doesn't have to
11 prove it, the State has to prove that the person didn't act
12 in self-defense, is an absolute defense to any crime
13 embraced within the particular indictment. If a
14 defendant -- and we're talking transferred intent here,
15 y'all understand that -- if the defendant is someone that
16 he was shooting or attempting to shoot at was on common
17 ground, the evidence must establish that the defendant had
18 no ability to retreat, in other words, he had to act before
19 he retreated, he had to fire before he retreated to not
20 have -- or he might have lost his life if he hadn't taken
21 evasive action at the time of the shooting back is a normal
22 thing to do. Now, if a person is entitled to shoot they're
23 entitled to keep shooting until the danger has passed.
24 Again, I can't tell you about the facts specifically, but I
25 can tell you that a person never has to wait until somebody

JURY CHARGE

1 else has the drop on them to shoot. In other words, if
2 you're coming down on me I don't have to wait until you
3 pull the trigger and hope you miss and shoot back. So who
4 shot first is an issue in the case but it is not
5 dispositive of the case. You jurors on the issue of
6 self-defense have to weigh all of availing circumstances.
7 Now, when you're deciding whether the defendant acted
8 reasonable you take into account any prior confrontations
9 or prior difficulties between the parties, that can be
10 considered by you. Any prior difficulties between parties
11 can affect the person's belief to what kind of situation
12 they're in so that's just another factor in the case. You
13 weigh all of the factors in the case, weigh them, give them
14 such weight as they're entitled to, you decide whether the
15 State has met its burden of proof on any of the indictments
16 and the charges embraced within the indictment. In order
17 to obtain a verdict on anything the State has got to
18 convince you that the defendant, Mr. Carter, is guilty
19 beyond a reasonable doubt of that charge. The weapons
20 charge is pretty self explanatory, you can't find him
21 guilty of that unless you find him guilty of either murder
22 or voluntary manslaughter. If you find him not guilty or
23 guilty of involuntary manslaughter he's not guilty of
24 possession of a weapon while engaged in a violent crime.
25 On murder, in order to obtain a conviction you first

JURY CHARGE

1 evaluate all of the evidence presented, you weigh it, you
2 find that if the State has convinced you beyond a
3 reasonable doubt murder was committed, after weighing the
4 evidence presented on the issue of self-defense and the
5 State's burden of proving the person didn't act in
6 self-defense, if you reach a unanimous verdict of guilty
7 you would stop at that point. In order to do that you
8 would have to find that the State has convinced you beyond
9 a reasonable doubt that the defendant committed murder
10 either directly or through transferred intent, hand of one,
11 hand of all. Now, if you decided that the defendant is not
12 guilty of murder, you don't stop at that point, then you
13 would consider voluntary manslaughter which is the next
14 most serious charge embraced within the charge of murder.
15 And on that charge you would consider whether the State has
16 convinced you considering the evidence of self-defense that
17 the State must again prove beyond a reasonable doubt that
18 the defendant did not act in it, you would find whether if
19 murder -- if a homicide did occur you would have to decide
20 whether the defendant in the hand of one, hand of all acted
21 under sudden heat and passion upon sufficient legal
22 provocation. In order for the State to convince you beyond
23 a reasonable doubt the defendant is guilty of voluntary
24 manslaughter you take and weigh all of the evidence and
25 apply it to the law that I have given you, and if you find

1 they have you would find him guilty of voluntary
2 manslaughter, if not you would consider involuntary
3 manslaughter. I think I've explained that to you that
4 involuntary manslaughter is the unlawful killing of one
5 human being by another unintentionally through criminal
6 negligence while not engaged in the commission of a felony.
7 You weigh self-defense on that charge also. If you find
8 that the State has not found him -- proved to you beyond a
9 reasonable doubt that he is guilty of any charge embraced
10 within this indictment of murder you would just find him
11 not guilty. And again, I don't know that I told you, the
12 order in which things are typed has no bearing, you have to
13 type them some way. You could have started out at the top,
14 guilty of murder or guilty of involuntary, guilty of
15 voluntary or so forth but that looked like a logical way to
16 present it to you, it has no bearing at all on your
17 decision, the order in which they're typed. I think you do
18 understand that it takes a unanimous decision of 12 jurors
19 to reach a verdict. I do not require 12 signatures,
20 though, only the foreperson signs it. I do not need for
21 you to sign except one time on the four charges; not
22 guilty, guilty of murder; guilty of voluntary manslaughter,
23 guilty of involuntary manslaughter, you check off which
24 ones of the verdicts you form, you jurors agree. On the
25 weapons charge he was found not guilty or guilty, you can

JURY CHARGE

1 circle or you can check it does not matter, or you can
2 underline as long as we know it, you don't check, circle or
3 underline one so we will know the verdict you have reached.
4 I told you earlier you could take notes, somebody is taking
5 notes, you need to just leave them in the courtroom. You
6 can take them back after the trial is over, again just
7 don't take them back to the jury room. While you
8 deliberate you will have with you all of the documents that
9 have been introduced, it might take awhile to gather them
10 up and bring them back. Jurors, it has been a long week,
11 serious charges. You have to decide the case based on
12 evidence presented you, don't decide it based on sympathy
13 or anything like that, just evaluate the case and it's
14 going to take you awhile to go over all of the testimony.
15 Don't talk about it yet, I might have left something out or
16 might have misspoke, it won't be the first time. But if
17 y'all wood ease out.

18 (The jury left the courtroom.)

19 THE COURT: Historically I don't keep the alternate
20 jurors around, if y'all want to keep them we --

21 MR. LIFSEY: I don't have a preference on that. I do
22 have one issue regarding charge.

23 THE COURT: I'll cover that with you, I first want to
24 cover this.

25 MR. BARFIELD: I don't have any particular need for

1 them to stay as long as -- you didn't ask but I assume all
2 12 back are okay, nobody is feeling bad or anything?

3 THE COURT: They all looked pretty good. I have never
4 had to use an alternate but -- we get reversed if you use
5 alternates. Yes, sir?

6 MR. LIFSEY: My concern is, Judge, I didn't hear you
7 advise them that if there's a reasonable doubt as to the
8 greater offense versus a lesser offense they resolve it in
9 my client's favor.

10 THE COURT: Yeah, I didn't tell them that. I will be
11 happy to do that.

12 MR. LIFSEY: That's all I want.

13 THE COURT: Solicitor, you don't have anything?

14 MR. BARFIELD: No, sir.

15 (The jury returned to the courtroom.)

16 THE COURT: Okay. Jurors, after I've given
17 instructions they're entitled to make objections and ask
18 for other things, too, they only had one and they're
19 correct on it, I didn't tell you something I should have
20 told you about reasonable doubt. When we were talking
21 about the murder charge if you -- going over all of the
22 evidence and testimony and everything on the murder charge
23 if you don't think he is not guilty but you don't know
24 whether he's guilty of murder or manslaughter he gets the
25 benefit of the doubt, you would have to find him guilty of

JURY CHARGE

1 the lesser charge of voluntary manslaughter because the
2 State hadn't convinced you beyond a reasonable doubt that
3 he was guilty of murder. I'm not suggesting you find him
4 guilty of anything. The second thing, if you find the
5 State hadn't convinced you beyond a reasonable doubt that
6 he was guilty of murder and they haven't really convinced
7 you that he's guilty of voluntary manslaughter if you think
8 he is guilty of involuntary manslaughter, voluntary or
9 involuntary, he's entitled the benefit of the doubt and you
10 would find him guilty of involuntary. I'm not suggesting
11 you find him guilty of anything, it's just he gets the
12 benefit of the doubt if you're not firmly convinced he is
13 guilty of a higher offense, he gets the benefit of the
14 lesser offense if you find the State has convinced you
15 beyond a reasonable doubt that he's guilty of some charge
16 in the indictment. Okay.

17 (The jury left the courtroom.)

18 THE COURT: State ready to receive the verdict?

19 MR. BARFIELD: State is ready.

20 THE COURT: Defense?

21 MR. LIFSEY: Yes, sir.

22 THE COURT: We've got victims and victim's family in
23 the courtroom, they've shown great restraint so far, we
24 don't know what the verdict is going to be so try to hold
25 it down whatever it is when they come back with a verdict.

JURY VERDICT

1 You can bring them in.

2 (The jury returned to the courtroom.)

3 THE COURT: Mr. Foreman, has the jury reached verdicts
4 and have you signed the verdict form on the matter
5 submitted to you?

6 THE JUROR: Yes, sir, I have.

7 THE COURT: If you would, then, hand it to the bailiff
8 and the clerk. I know you've been back there practicing
9 like you see it on TV but that's not the way we do it.

10 THE CLERK: We, the jury, as to indictment number
11 2010-GS-29-1000, murder, unanimously find the defendant,
12 Anthony Rodriekus Carter, guilty of murder. We, the jury,
13 as to indictment number 2010-GS-29-1001, possession of a
14 firearm during the commission of a violent crime,
15 unanimously find the defendant, Anthony Rodriekus Carter,
16 guilty. Signed, Darrell Carnes, foreperson, dated
17 November 10, 2011. Ladies and gentlemen of the jury, if
18 this be your verdict so say you all by the raising of your
19 right hands. Let the record reflect all jurors raised
20 their right hands.

21 THE COURT: Anything else required of the jury from
22 the State?

23 MR. BARFIELD: Nothing from the State.

24 THE COURT: Defense?

25 MR. LIFSEY: Requesting to poll the jury.

JURY VERDICT

1 THE COURT: All right. Jurors, your clerk is going to
2 ask you two questions, was that your verdict and is that
3 your verdict, he's not talking about when you went back
4 there to start deliberating, he's talking about after it
5 was written. Okay.

6 THE CLERK: Thank you, Your Honor. Darrell Carnes,
7 foreperson, is this your verdict and is this still your
8 verdict?

9 THE JUROR: Yes.

10 THE CLERK: Pamela Massey, is this your verdict and is
11 this still your verdict?

12 THE JUROR: Yes.

13 THE CLERK: Shelly Young, is this your verdict and is
14 this still your verdict?

15 THE JUROR: Yes.

16 THE CLERK: Kelvin Deese, is this your verdict and is
17 this still your verdict?

18 THE JUROR: Yes.

19 THE CLERK: Henry Beckham, is this your verdict and is
20 this still your verdict?

21 THE JUROR: Yeah.

22 THE CLERK: Cheryl Long, is this your verdict and is
23 this still your verdict?

24 THE JUROR: Yes.

25 THE CLERK: Tanya Eller, is this your verdict and is

JURY VERDICT

1 this still your verdict?

2 THE JUROR: Yes.

3 THE CLERK: Jeff Hinson, is this your verdict and is
4 this still your verdict?

5 THE JUROR: Yes, sir.

6 THE CLERK: Barbara Haire, is this your verdict and is
7 this still your verdict?

8 THE JUROR: Yes, sir.

9 THE CLERK: Anthony Sane, is this your verdict and is
10 this still your verdict?

11 THE JUROR: Yes.

12 THE CLERK: Victoria Langley, is this your verdict and
13 is this still your verdict?

14 THE JUROR: Yes.

15 THE CLERK: Lana Cook, is this your verdict and is
16 this still your verdict?

17 THE JUROR: Yes, sir.

18 THE CLERK: Thank you.

19 THE COURT: Okay. Solicitor, I think we are will just
20 defer sentencing --

21 MR. BARFIELD: I was going to request that, yes, sir.

22 THE COURT: -- since we have another case pending.

23 MR. BARFIELD: Yes, sir, thank you.

24 (The jury was dismissed.)

25 MR. LIFSEY: Judge, I would make a motion for a new

SENTENCING HEARING

1 trial based on the same motions and grounds that I stated
2 for motions for a directed verdict.

3 THE COURT: Okay. And I will deny them today but I
4 will give you a few more days to come up with some more if
5 you can make them before the end of next week. We will
6 crank it up again Monday.

7 (END OF TRIAL PROCEEDINGS.)

8 (SENTENCING HEARING ON NOVEMBER 17, 2011.)

9 MR. BARFIELD: Your Honor, we are obviously here on
10 sentencing of Mr. Carter. He plead guilty to possession of
11 a pistol by a person convicted of a crime of violence and
12 the jury found him guilty of murder and possession of a
13 firearm, probably don't need to tell you anything else
14 about the facts of the case. I will tell you his record
15 when we are ready and Rodriana Cunningham, the mother of
16 the victim, is present and I am sure would like to speak
17 when you are ready to hear from her.

18 THE COURT: Well, she can come up and speak and you
19 can tell me the record.

20 MR. BARFIELD: All right. I will tell you the record
21 first and then she will step up to the microphone when I
22 finish that. '99 had a city level resisting arrest,
23 possession alcohol by a minor and a general sessions
24 resisting arrest in '99. He also had a magistrate court
25 level malicious injury to property and general sessions

SENTENCING HEARING

1 disturbing schools. In 2000 he had either distribution or
2 PWID crack cocaine, got six months on that in 2000. 2001
3 had a shoplifting, two counts of shoplifting, another city
4 level resisting arrest, giving false information and a
5 third count of shoplifting. 2001 he had -- it looks like
6 he got a 91 day sentence on that 2002 city or magistrate
7 level resisting arrest and simple assault and battery, 2002
8 possession of marijuana and third or subsequent property
9 crime and attempted burglary second degree. It looks like
10 he got attempted burglary second degree and a burglary
11 third degree second offense, it looks like he got an active
12 two year sentence on those. 2008 he had a possession of
13 crack and possession of cocaine, got active time on them
14 again. I believe that's it. Rodriana Lanisha Cunningham,
15 the victim's mom, you heard from her twice last week and
16 this week and she will step up to the microphone and
17 address the Court.

18 THE WITNESS: Basically May 3rd they took my world
19 away by what they did to my daughter. victim was three
20 years old, left defenseless in a car. My daughter was --
21 got killed, was hit for a bullet that was meant for him and
22 that was totally unfair. victim had her whole life ahead
23 of her, she could have been anything. She was going to be
24 something. He wasn't doing anything with his life but
25 she's not here no more because of what they did. My baby

1 had to die like that and that was so unfair and all I'm
2 left with is memories and I can't hold her, I won't see her
3 no more. My baby won't get no more birthdays. He should
4 pay for what he did because what he did was ignorant, it
5 was dumb and it could have been avoided. Like I say,
6 victim was a baby, she had no business where they had her
7 and all I ask is that you don't be lenient. And he is not
8 the victim, the only victim out there that night was victim
9 That's it.

10 MR. BARFIELD: Couple of real quick comments from me,
11 Your Honor. And I don't need to yell and scream, you know
12 all about the case, I'm sure you probably have a good idea
13 what you're going to do, I would simply say that this young
14 man has got a pretty significant record. It's not the
15 worst kind of stuff necessarily but it's just a continuing
16 repeated course of conduct, getting himself in trouble. He
17 had a record that prohibited him from having a gun, whether
18 it was his gun or not he gave a statement saying he
19 possessed that gun, he gave a statement saying he was out
20 there buying and selling dope from people. It's tragic.
21 There is no way to fix it but it is what it is and I ask
22 you to sentence him accordingly.

23 MR. LIFSEY: Please the Court? Judge, my client is 29
24 years old. I will tell you to begin with his mother, aunt
25 and uncle are not here at the moment but they were here all

SENTENCING HEARING

1 last week, they sat out here, they were just unable in this
2 sort of short notice to get up here so I would ask you to
3 recognize he does have some family support. Your Honor, he
4 has a GED, he has a child himself who is four years old
5 that he pays child support for and all. Of course, he has
6 been locked up for I guess going on 18 months or so now
7 since this happened. His work history is such he worked
8 mostly warehouse work, he has worked at Tyson up at Monroe,
9 he has worked at the Grace Plant here in Lancaster. Your
10 Honor, like the solicitor said, you heard the whole trial
11 and I don't think I need to add much about the facts. It's
12 obviously a terrible, terrible tragedy. I will tell you
13 that as awful as it is what I do think is fairly undisputed
14 is that nobody intentionally killed the child in this case.
15 As you know any sentence -- you're bound by law to give him
16 a certain sentence and any sentence you impose by law he
17 will have to do every day for. I would ask the Court to
18 consider a 30 year sentence in this, I think considering
19 the facts that would put him in jail really until he is
20 almost 60 years old. And I certainly -- there is no way to
21 repay or no way to make up for the damage to the child but
22 I do think that's a significant sentence and I would ask
23 the Court to consider it in this matter.

24 THE COURT: Okay. Mr. Carter, you have the right to
25 state whatever.

SENTENCING HEARING

1 THE DEFENDANT: I would like to say once again that
2 I'm sorry for what happened that night, but this whole two
3 years I've been coming up here, I've been apologizing for
4 mostly what happened. I ain't apologizing because I killed
5 no one, I never had a chance to shoot a gun. It wasn't my
6 fault that the gun got shot. I understand it was my beef
7 that night but when I went down there nothing was
8 intentionally planned when I went out there. I never
9 pointed a gun at nobody and said I was going to do
10 anything. I just tried to squash the beef and yet I walked
11 away from it like I always did when we had confrontations.
12 The whole 18 months I've been out there I've done
13 everything in my power to prove my innocence, anything I
14 could do I tried my best but I can't make nobody believe me
15 but me and him. I told the truth and I would like to say
16 I'm sorry to the family again but that's all I can say. I
17 wish I could bring her back but I can't.

18 MR. LIFSEY: And I'll tell you what he just said,
19 Judge -- and I will hush -- is consistent about with what
20 he has always told me. I'll tell you he has been
21 remorseful for the fact that the child lost her life from
22 the very beginning in this case.

23 THE COURT: What have you told him I could sentence
24 him to?

25 MR. LIFSEY: Up to life in prison, Judge, minimum 30

SENTENCING HEARING

1 years, I believe that to be the statute, plus I guess the
2 other charges sort of run in with them.

3 THE COURT: Okay. Mr. Carter, I've been a judge a
4 long time so I sentenced -- I don't know how many I
5 sentenced, 80 something homicides one year in Richland when
6 I was chief administrative judge. They weren't all
7 murders; felony DUI's, hunting accident, whatever, anyway.
8 And I've seen one homicide after another, I recognize you
9 didn't intend even if you shot, which is not for me to
10 decide, you didn't intend to hit the child but nothing I
11 can do brings back the child. When I started I would give
12 people life and they would be out after 20 years, that was
13 just how it was. Now on a murder charge they've changed it
14 so that whatever sentence I impose on you you have to serve
15 day for day. While you never really did any serious crimes
16 in the past you've got a string of crimes, as I heard third
17 and above shoplifting, so forth and so forth on and on,
18 involvement in the drug trade. So on the murder charge I
19 sentence you to 32 years, give you credit for the time you
20 have been incarcerated. I sentence you to time served on
21 the possession of a pistol by a person convicted of a
22 crime, and five years concurrent on the possession of the
23 weapon while committing a violent crime.

24 (End of trial proceedings.)

25

1 I, the undersigned, Michael C. Watkins, Official
2 Court Reporter for the Sixth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete transcript of record of the
5 proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Lancaster County, South Carolina, on
8 the 7th-10th days of November, 2011.

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

11

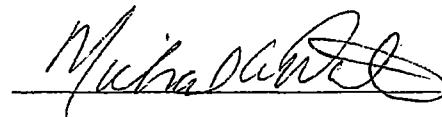
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April 13, 2012.

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Michael C. Watkins
Court Reporter

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY RODRICKUS CARTER,

APPELLANT

APPELLATE CASE NO. 2011-203566

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose?

STATEMENT OF THE CASE

In August of 2010, the Lancaster County Grand Jury indicted Anthony Rodrikus Carter for murder, possession of a firearm during the commission of a violent crime, indictments #10-GS-29-1000, 1001. Earlier, in 2009, the Lancaster County Grand Jury indicted Carter for possession of a pistol by a person convicted of a violent crime, indictment #2009-GS-29-1167. On November 7, 2011, Carter proceeded to jury trial before the Honorable Ernest J. Kinard. At the close of the State's case on November 9, 2011, Carter pled guilty to possession of a pistol by a person convicted of a violent crime. Sentencing was deferred. On November 10, 2011, the jury found Carter guilty of murder and possession of a firearm during the commission of a violent crime. On November 17, 2011, Judge Kinard sentenced Carter to 32 years for murder, 5 years concurrent for possession of a firearm during the commission of a violent crime and time served for possession of a pistol by a person convicted of a violent crime. A timely notice of intent to appeal was served on November 18, 2011. This appeal follows.

STATEMENT OF FACTS

On May 3, 2010, gunfire erupted at the Countryside Mobile Home Park in Lancaster. Three year old Jaylen J. was fatally shot as she sat in her car seat in a car parked at the mobile home park. On that evening of May 3, 2010, Marico Stevens and Anthony Carter drove Emmie Amanda Coats to her home in the mobile home park. Stevens was the driver, Carter was in the passenger seat, Coats and Jaylen J. were in the backseat. (R. p. 191, lines 1- p. 192, lines 1-5). Carter and Coats were romantically involved. (R. p. 178, lines 4-20). Stevens was the boyfriend of Jaylen J.'s mother, Rodriana Nisha Cunningham. (R. pp. 126-127).

Coats testified that she was aware of an earlier dispute between Carter "Ant" and Beneco "Neco" Ganson, J.D. Hemphill and John Jarrod Hill, "John John." (R. p. 192, lines 19-23). Hill testified that he gave Carter \$450 to buy drugs and Carter "jumped the fence." (R. p. 251, lines 2-23). Coats testified that on the way to the mobile home park Carter told Stevens about an earlier incident where Ganson, Hemphill and Hill had chased Carter out of the mobile home park. (R. p. 194, lines 1-16). Coats told police that Ganson told Carter that if he ever came to the mobile home park again, he better have a gun. (R. p. 223, lines 2-9). Ganson testified at trial and admitted that he, Hill and Hemphill tried to "get" Carter after he took the money from Hill. (R. p. 299, lines 5 – p. 303, lines 1-7). Ganson also admitted that a group of them beat up Carter's brother. (R. p. 303, lines 14 – p. 304, lines 1-12).

According to Coats, Stevens handed a gun to Carter on their way to the mobile home park. When Stevens pulled into the mobile home park to drop Coats off, Coats saw

Hemphill and Ganson. (R. p. 199, lines 12- 24). They parked in front of Coats' trailer and Carter got out of the car, with the gun, and met J.D. Hemphill in the middle of the road. (R. p. 204, lines 1- p. 205, lines 1-25). An argument ensued and then Carter turned around and returned to the back passenger side of the car. (R. p. 206, lines 1-12). Stevens was standing by the front passenger side of the car near the front of the car. (R. p. 206, lines 18-22). When Carter got back to the car, Coats heard gunshots and saw a flash from across the street. (R. p. 207, lines 6-11). According to Coats, Carter "Ant" turned like he was going to shoot back but then Coats went inside her trailer and heard shooting back and forth. (R. p. 207, lines 17-22). Kayla Estes, Carter's girlfriend, testified that he told her that he met Hemphill in the middle of the road, the "whole thing was quashed." (R. p. 320, lines 17-22). Carter turned and walked away and heard Ganson say, "Fuck that, I'll get him." (R. p. 320, lines 23 – p. 321, lines 1-2). Carter told Estes that he then heard shots, co-defendant Stevens ended up with the gun and started shooting. (R. p. 321, lines 1-10).

Investigator Jeff Steele with the Lancaster County Sheriff's Department testified that casings recovered from the scene included 7.65 millimeter casings, a .380 caliber cartridge casing, and .22 caliber casings. (R. pp. 395-416). Additionally, three .40 caliber casings were obtained from Coats the morning after the shooting. (R. p. 369, lines 18-24; pp. 211 – 214; pp. 236 - 26240). The only gun recovered was a .40 caliber Hi-Point semi-automatic pistol. (R. p. 522, lines 22 – p. 523, lines 1-2).

During the course of the investigation, investigators spoke with Eric and Jackie Sanders, the co defendant's father and step mother, about recovering the gun. Jackie Sanders testified that her husband called someone named Derrick about recovering the gun. (R. p. 360, lines 5-15). As a result of that phone conversation, Jackie met Derrick at a Stop

and Go and he gave her a gun. (R. p. 361, lines 10 – p. 362, 363, lines 1-25). Jackie then turned the gun over to Mike Howell of the Lancaster County Sheriff's Department. (R. pp. 373-375). DNA analysis was performed on the gun and co-defendant Sanders could not be excluded as a possible contributor. (R. p. 510, lines 20-22). Appellant, Carter was excluded as a possible contributor. (R. p. 510, lines 17-18).

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats, a bullet jacket fragment found in the passenger side floor board of the car, a copper fragment from the headrest in the backseat of the car and a bullet jacket fragment found in the driveway were all fired by the recovered .40 caliber pistol. (R. pp. 523-530). Ken Taylor, a crime scene investigator with the Lancaster County Sheriff's Department, testified that the bullets that entered the car came from the front of the car towards the back of the car. (R. p. 436, lines 3-7).

After the shooting, appellant and co-defendant Stevens left the mobile home park and went to Lawrence Alexander's apartment. (R. pp. 329-333). They did not realize that the child had been shot until Alexander asked about the child. (R. p. 331, lines 22 – p. 332, lines 1-19). Once they realized the child had been shot, they rushed to the hospital. (R. pp. 96 – 102). The child was airlifted to Carolina Medical Center where she was later pronounced dead. (R. p. 120 line 18 – p. 121 lines 1-21). The child died from a gunshot wound to the head. (R. p. 345, lines 19-23).

ARGUMENT

The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose.

In closing argument the State argued to the jury, "Nobody, I will tell you straight – up, I'm straight-up here, nobody involved in this case contends that anybody meant to shoot and kill Jaylen [J.], that's clear and I'm not going to argue otherwise." (R. p. 591, line 25-p.592, lines 1-3). Instead, the State relied on a theory of transferred intent, arguing that both the co-defendant Stevens and Appellant, under a theory of the hand of one is the hand of all, intended to kill Ganson and Hemphill and mistakenly struck Jaylen J.. (R. p. 592, lines 3 – p. 593, lines 1-3). The State was unable to prove who fired the fatal shot that killed Jaylen J. The State argued, "I submit to you it doesn't matter whether you conclude he [Appellant] shot Jaylen [J.] or Marico Stevens shot Jaylen [J.]." (R. p. 607, lines 15-17). The State, however, failed to offer evidence that co-defendant Stevens and the Appellant joined to accomplish an illegal purpose required under the theory of the hand of one is the hand of all. Stevens' act of handing the gun to Appellant, after learning of the prior threats made to Appellant, without more, does not constitute an illegal purpose. Instead, the act of Stevens' handing the gun to Appellant, demonstrates that Appellant was lawfully arming himself in self-defense. As the State failed to prove that Appellant fired the fatal shot, and, at the time shots were fired, the co-defendant had the right to act in self-defense, the State failed to prove the element of malice required for murder, even under a theory of transferred intent.

At the close of the State's case, Appellant moved for a directed verdict of acquittal. (R. p. 585, lines 22-25). The judge denied the motion for directed verdict stating, "In the light most favorable to the State, under the hand of one, hand of all situation he could be guilty of various crimes." The judge erred in refusing to direct a verdict of acquittal for murder.

First, the State offered no evidence that Appellant and co-defendant Stevens joined to accomplish an illegal purpose. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584. The State failed to establish liability under the hand of one is the hand of all¹. The State presented evidence that after learning that Appellant had been threatened in the mobile home park and warned that if he returned he should be armed, co-defendant provided a gun to Appellant. The State did not present evidence that Appellant and co-defendant Stevens went to the mobile home park to seek retaliation. Instead, the evidence shows that Appellant and Steven were simply taking Emmie Coats home. Appellant did not join co-defendant Stevens to accomplish an illegal purpose but merely legally armed himself in self-defense.

Second, the State argues that Appellant was not entitled to self defense because he was not without fault in bringing on the difficulty. (R. p. 606, lines 2-19). The question of whether Appellant was entitled to have shot in self-defense after he turned his back and walked away and Ganson and Hemphill fired the first shots, would have been a

¹ The judge charged the jury, without objection, on the theory of the hand of one is the hand of all. (R. p. 649, lines 12-21). This error may need to be raised in post conviction relief.

question for the jury if the State established that Appellant fired the fatal shot. The State, however, can not prove that Appellant fired the fatal shot. Co-defendant Stevens was clearly without fault in bringing on the difficulty and was entitled to have fired back at Ganson and Hemphill in self-defense. If Stevens had been on trial, based the evidence presented by the State at Appellant's trial, the judge would have erred in refusing to direct a verdict of acquittal. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). As the State proceeded under the hand of one is the hand of all, the judge erred in refusing to direct a verdict of acquittal for murder as to Appellant.

In closing the State argued, "Well, if Carter didn't shoot the gun then how did Stevens get the gun? From Carter. One way or the other Stevens – if you believe Stevens shot, Stevens ended up with the gun from Carter during something that Carter started. They're both guilty of it, we're only trying Carter today but they're both guilty of the murder of Jaylen [J.] based on all of the facts and circumstances of what happened." (R. p. 609, lines 13-20). The State's theory ignores the absence of any evidence that Appellant and co-defendant Stevens joined to accomplish an illegal purpose. The evidence shows that co-defendant Stevens handed the gun to Appellant and Appellant legally armed himself in self-defense before taking Coats home to the mobile home park where Appellant had been threatened. Additionally, the State's theory ignores co-defendant Stevens' right to act in self-defense once Ganson and Hemphill started shooting.

In State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct.App. 2005) the South Carolina Court of Appeals wrote:

Where two or more acting with a common plan or intent
[are] present at the commission of a crime, it does not

matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present means to be sufficiently near to aid and abet and assist in the commission of the crime. Intent is also a necessary element, for there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant to that plan, with the person aiding and abetting by some overt act.

The only common intent between Appellant and co-defendant Stevens was the intent to defend themselves from earlier threats and then when the parties made good on the threat, defending themselves from the shots being fired from across the street.

The State's theory of transferred intent fails because the State failed to establish that Appellant fired the fatal shot. If Appellant did not fire the fatal shot, no intent existed and no intent could be transferred. Additionally, the State's theory of transferred intent fails because the State failed to establish that Appellant and co-defendant Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory argued by the State and ruled upon by the judge as the reason for denying the directed verdict motion.

In State v. Fennell, 340 S.C. 266, 272-273, 531 S.E.2d 512, 516-517 (2000) the South Carolina Supreme Court, in addressing the theory of transferred intent, wrote:

In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an

assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds by* State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, Substantive Criminal Law, § 3.12(d) (1986) (discussing transferred intent); McAninch & Faurey, at 17-19 (same).

The theory of transferred intent does not apply in the present case. The State can not prove that co-defendant Steven acted with malice when he shot in self defense and the bullet mistakenly hit Jaylen J. The State failed to prove that Appellant fired the fatal shot and failed to prove that Appellant and co-defendant Stevens joined to accomplish an illegal purpose under a theory of the hand of one is the hand of all. The judge erred in refusing to direct a verdict of acquittal. Because the State relied upon the theory of the hand of one is the hand of all, this Court should remand the case and order the trial court to direct a verdict of acquittal for the murder charge.

CONCLUSION

Based on the above argument, this court should reverse the sentence and conviction and remand to the trial court to direct a verdict of acquittal.

Respectfully submitted,

Kathrine H. Hudgins
by [Signature] permissa
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5TH day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY RODRICKUS CARTER,

APPELLANT

APPELLATE CASE NO. 2011-203566

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of August, 2013.

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SUBSCRIBED AND SWORN TO before me
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 My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
J. Ernest Kinard Jr., Circuit Court Judge
Appellate Case No. 2011-203566

STATE OF SOUTH CAROLINA,

RESPONDENT,

vs.

ANTHONY RODRIEKUS CARTER,

APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether Appellant (Carter)'s argument on direct appeal is properly before this Court because he failed to present the same argument to the trial judge?

II. Whether the trial judge did not abuse his discretion by denying Appellant (Carter)'s motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or, if the fatal shot was fired by his co-defendant, Maurico Stevens, that Carter was guilty under a theory of accomplice liability?

STATEMENT OF THE CASE

Appellant, Anthony Rodrickus Carter (Carter), is currently incarcerated in the Lee Correctional Institution, of the South Carolina Department of Corrections, as the result of his Lancaster County murder conviction. The Lancaster County Grand Jury indicted Carter in 2009 for possession of a pistol by a person convicted of a violent crime (2009-GS-29-1167). The Grand Jury indicted him in August 2010 for murder (10-GS-29-1000) and possession of a firearm during the commission of a violent crime (10-GS-29-1001.). **R. pp. 669-74.** The latter two charges stemmed from the May 3, 2010 shooting death of three year old J.J. (the victim). Sixth Circuit Public Defender Michael H. Lifsey represented Carter in the trial court, and Sixth Circuit Solicitor Douglas A. Barfield, Jr., prosecuted the case.

On November 7-10, 2011, Carter received a jury trial before the Honorable Ernest J. Kinard. At the close of the State's case on November 9, 2011, Carter pled guilty to possession of a pistol by a person convicted of a violent crime and Judge Kinard deferred sentencing. **R. p. 572, line 14 - p. 574, line 5.** Judge Kinard charged the jury on the lesser included offenses of voluntary and involuntary manslaughter; self-defense; transferred intent and accomplice liability. The jury convicted him of murder and possession of a firearm during the commission of a violent crime. **R. p. 639, line 2 - p. 641, line 24.** On November 17, 2011, Judge Kinard sentenced Carter to thirty-two years imprisonment for murder and to five years, concurrent, for possession of a firearm during the commission of a violent crime. Judge Kinard imposed a sentence of time served for possession of a pistol by a person convicted of a violent crime. **R. p. 662, line 8 - p. 667, line 23.**

Carter timely served and filed a notice of appeal.

ARGUMENTS

I. Carter's argument is not properly before this Court on direct appeal because he failed to present the same argument to the trial judge.

Carter moved for a directed verdict at the close of the State's case. In its entirety, he argued that:

MR. LIFSEY: All right. Judge, I would move for a directed verdict. I could cite *State versus Dickey* and I would leave that matter to your discretion which is the self-defense defense for the jury.

R. p. 58, lines 22-25. The trial judge denied his motion, finding that Carter could be guilty of various crimes under a theory of accomplice liability. **R. p. 586, lines 1-3.**

The case to which Carter was apparently referring is *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011). In *Dickey*, the Supreme Court held that the defendant, who had been convicted of voluntary manslaughter, was entitled to a directed verdict in his homicide trial because the prosecution had failed to disprove self-defense. *Id* at 499-503, 716 S.E.2d at 101-03. The case does not deal in any fashion with questions of transferred intent and accomplice liability, as now being argued. Further, Carter did not object to the trial judge's decision to charge accomplice liability (**R. pp. 576-77**) or the subsequent jury instruction on this legal theory. **R. pp. 649-50.** Instead, he reasonably conceded that this charge was supported by the evidence, stating, "I understand. I can't argue with your reasoning on that." **R. p. 577, lines 2-3.**

It is a well settled rule of appellate practice that a party cannot argue one theory at trial and a different theory on appeal. *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same). It is equally well settled that "[t]o be preserved for appellate review, an issue must be both presented

to and passed upon by the trial court.” *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996). *See also State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler’s concurrence in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) (“Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled”). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Here, Carter not only did not advance the same argument at trial, he affirmatively conceded the existence of evidence supporting a jury charge on accomplice liability. *Cf. State v. Nathari*, 303 S.C. 188, 200, 399 S.E.2d 597, 605 (Ct.App. 1990) (even assuming that recklessness was an element of felony D.U.I. and should have been charged to the jury, defense counsel conceded appellant’s “recklessness in his closing argument and thereby has waived any objection to the trial court’s charge in this regard”); *State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) (“One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered”). Thus, his present argument is not properly before this Court on appeal.

II. The trial judge did not abuse his discretion by denying Carter's motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or that, if the fatal shot was fired by his co-defendant, Marico Stevens, Carter was guilty under a theory of accomplice liability.

Assuming *arguendo* that the Court finds his procedurally barred argument nevertheless preserved for appellate review, Carter contends that the trial judge erred by denying his motion for a directed verdict because the State did not prove the identity of the shooter and it failed to present any evidence that Carter and his co-defendant, Marico Stevens, joined to accomplish an illegal purpose, so as to make both men culpable under a theory of accomplice liability. The State disagrees and submits that the trial judge did not abuse his discretion by denying Carter's motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or that, if the fatal shot was fired by Stevens, Carter was nevertheless guilty under a theory of accomplice liability. Further, Carter affirmatively conceded below that there was sufficient evidence of accomplice liability to warrant a jury charge on that theory. **R. p. 577, lines 2-3.**

A. The prosecution's evidence.

This case was prosecuted under a theory of accomplice liability. As can be reasonably expected in a homicide case with eyewitnesses, there were varying accounts offered as to what occurred. The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the prosecution, was as follows.

Rondriana Lanisha "Nisha" Cunningham testified that she was the victim's mother and that her daughter was three years old on May 3, 2010. She and the victim shared an apartment along with Nisha's boyfriend of over a year, Marico Stevens. Nisha

had met Green, who worked with Stevens, on one occasion and she told Stevens that she did not like him. R. pp. 125-28.

On Monday, May 3, 2010, Stevens picked Nisha up from York Tech, where she was going to school, around 6:15 p.m. He was driving their only vehicle, Nisha's blue, 1998 Chevrolet Malibu, and the victim was with him.¹ They got home at 6:30 and Nisha remained there. However, Stevens and the victim left the apartment later that evening, with Stevens telling Nisha that he was going to his father's house to get some money. Nisha got a phone call from Stevens at approximately 9:49 p.m., and she immediately went to the emergency room of Springs Memorial Hospital, in Lancaster. R. pp. 128-32. Nisha identified a gun for the Sheriff's Department as one that Stevens kept. R. pp. 133-61.

The victim was treated for a gunshot wound to her head at the hospital. Eventually, she was airlifted to Carolinas Medical Center, in Charlotte, North Carolina, that same night or early in the morning of May 4, 2010. Doctors treated her there, but Dr. Thomas D. Owens, medical examiner from Mecklenburg County, North Carolina, pronounced her dead at 6:15 a.m. R. pp. 132-33; 340-41.

The forensic pathologist who performed the autopsy of the victim, Dr. Janice Ross, opined that the cause of death was "[a]noxic encephalopathy," meaning that the victim's "brain was damaged enough to be actually dead due to laceration of the brain due to the gunshot wound of the head." Dr. Ross explained that "the bullet entered the right side of the head towards the back and it went forward and to the left slightly

¹ He had picked her up from daycare.

upward, and it came out of the head, the left side of the head just above the left ear." Otherwise, the victim had been a healthy little girl. **R. pp. 342-45.**

Emmie Amanda Coats testified that she lived in a Lancaster County mobile home park in May of 2010. Although they were not "boyfriend and girlfriend," she and Carter - who was known by the nickname of "Ant" - were romantically involved. Before May 3, 2010, Coats had never met or heard of either Stevens or the victim. Sometime after the shooting, Coats became romantically involved with Beneco "Neco" Ganson. **R. pp. 176-81.**

At the time of the murder, Coates worked as a nursing assistant from 11:00 p.m. until 7:00 a.m. each day. Coats described the trailer park in which she lived as a place where "[l]arge groups of people just hang[] out in the road or at someone's house" almost daily. Stevens, Ganson, J.D. Hemphill and John Jerrod "John John" Hill, routinely hung out there. Also, Coats regularly heard gunfire in the trailer park. **R. pp. 181-84; 187.**

On the night of May 3, 2010, Coates walked over to Carter's residence, after they had corresponded by text messages. Several minutes later, Stevens arrive at Carter's residence. The victim was with him and he was driving the Malibu. Then, "[t]hey told me they were going to take me home." So, they all piled into the car. Stevens was driving, Carter was in the passenger seat, the victim was sitting in a car seat behind him and Coates was on the rear, passenger side. **R. pp. 187-92.**

Following a brief stop at a convenience store, they headed to Coates' trailer. Carter had previously told Coates about a dispute that he had with Ganson, Hemphill, and Hill over something he had stolen from them. However, he did not tell her any details.

Along the way to her residence, Carter told Stevens "about an incident that had happened between them earlier in the trailer park a few days before that came from the dispute that they had," in which the group had chased Carter out of the trailer park.² R. pp. 192-22; 221; 223.

She described their conversation as a "hyped up situation" and she explained that Carter was not talking like he was worried or he did not want to go to the trailer park. To the contrary, Coates got the impression that "he wanted to see them on the way over there, like it kind of excited him that he was going into the trailer park." Although there was no discussion about whether anyone from the other group was at the trailer park, Stevens "reach[ed] down ... under his seat and he passed Ant the gun." Carter laid the gun in his lap. R. pp. 192-95; 221; 224; 231-32.

As they approached her trailer, Coates saw Ganson, Hemphill and some other people crowded around an older model, light colored car that was parked near the roadway.³ This group was across the street and some distance from Coates' trailer. Carter also saw the group and said, "There they go." When they reached Coates' residence, Stevens parked the Malibu close to the trailer and not completely in the driveway, so that the front of the vehicle was closest to the trailer. R. pp. 197-203; 217-18; State's Exhibits 9-10.

As soon as the car stopped, Carter jumped out of it and began walking toward the roadway. He had the weapon at his side, covered by his shirt. Coates did not want any

² On cross-examination, she testified that she was only aware of one incident. On that occasion, Ganson ran Carter out of the trailer park and told Carter, if he ever saw Carter again, Carter "better have a gun." Carter was reluctant to come to the trailer park for about a week after this incident. R. p. 223.

³ Hill was not present. R. pp. 199-200.

trouble at her residence. So, she got out of the driver's side rear door and ran to the passenger side, pleading with Carter "Don't do this, don't do this near my house." Carter and Hemphill⁴ met "in the middle like they were facing off." (Sic). R. pp. 203-205.

Stevens was standing by the front passenger side of the car and near the front of the car, while the victim remained in the unbuckled child seat. Although Carter and Hemphill spoke, Coates could not hear what was said. By then, she was on the steps to her residence. After other members of Hemphill's group joined in the argument, Carter "turned and walked ... back towards the car on the passenger side." R. pp. 205-06.

By the time "[h]e got between the end of the car and probably the back passenger side door," Coates heard a shot and she "saw a flash from across the street." When Carter turned as if he was going to fire back at the group and Stevens was yelling for him to "squeeze," Coates ran into her trailer and heard "eight or nine" more gunshots. As soon as the shooting stopped, she looked out of a window, and she saw the Malibu backing out of her driveway and "people running" into nearby woods. R. pp. 206-09; 228.

Coates did not know that anyone had been shot until Carter telephoned her from the hospital and told her that his "baby cousin" had been shot.⁵ Coates went to work that night. She spoke to police on the night of May 3rd and again the following morning. Even though she was aware that the victim had been shot by that time, she was not completely honest about what she had seen until she gave a second written statement on the 4th,

⁴ Coates did not see Hemphill, Ganson or anyone, other than Carter, with a weapon. R. pp. 204-05.

⁵ It was her understanding that Stevens was the victim's father and that Stevens and Carter were cousins. Also, she and Carter later exchanged text messages that night. R. p. 210.

because she did not want to be involved. She found three .40 caliber shell casings in the yard, close to her residence on the morning of the 4th (State's Exhibit 11), which she gave to Inv. Danny Bennett, of the Lancaster Sheriff's Department, when he came to her residence looking for them. R. pp. 184-86; 209-14; 219-20; 236-39; 396.

Beneco Ganson testified that he knew Carter, or Ant, from school, and that he was good friends with both J.D. Hemphill and John Jerrod Hill. He also confirmed that he and Coates had been romantically involved. However, he denied knowing Stevens. R. pp. 276-78; 305.

Ganson and many of his friends hang out in the trailer park where Coates lived and he agreed that it was "a hangout place." A dispute arose between Hill and Carter roughly two months before the murder. While Ganson was not present when the transaction leading to the dispute occurred, he was told that Carter owed Hill money. On the night of May 3, 2010, he was with the mother of his child, Jennifer Morris, at the home of Morris' mother where he also lived. Eventually, he went to the trailer park in question "around 7:30 or 8:00." R. pp. 278-81; 307.

Subsequent to the initial dispute but before the shooting, Ganson, Hemphill and Hill accosted Carter as he was leaving Coates' trailer. Also, they beat up Carter's brother on another occasion. R. pp. 299-306.

Ganson had planned to meet Hemphill and did not know if anyone else would be there. Ganson was unarmed. He saw Hemphill, who was likewise unarmed at the time, but he did not see Hill. Carter was not there when he first arrived. He and Hemphill were talking as they stood near the Honda owned by Hemphill's girlfriend, across the street

and two or three trailers from Coates' trailer. An unfamiliar car pulled into Coates driveway and three people got out of it. At first, Ganson could not see the faces of these people, but he soon saw Carter walking across the street and headed in the direction of Ganson and Hemphill. R. pp. 281; 285-89.

As Carter got close to them, Hemphill walked toward Carter in the road. Carter had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill. The two men continued to argue with one another. Ganson heard Carter tell Hemphill, "I ought to shoot you but I ain't want [(sic)] to do the time." He also asked, "What you gone do now?" Then, Carter turned and walked back into Coates' driveway. The last time Ganson saw Carter, he was "a good little ways" from the car, while he and Hemphill were on opposite sides of the Honda. R. pp. 289-94.

According to Ganson,

When he turned around and walked back to his direction, the girl we was talking to, she had my phone in her car so we walked to the car and I was trying to get my stuff from her and everything, she had moved my phone and everything and the next thing I know I heard the gunshots. When I heard the gunshots I took off running behind this trailer and I hid under the trailer until the gunshots stopped. When the gunshots stopped I laid right there for about an hour or two and ... me and J. D. ran through the woods and met up at Crimson Drive, and when we met up on Crimson Drive I think [Hemphill] walked up toward the store, I went in the woods and hid in the woods because the police and stuff was around.

R. p. 292, lines 3-16.⁶ See also R. pp. 294-95. Also, Hemphill had a gun by the time the shooting occurred but Ganson was still unarmed and he did not see anyone else with a

⁶ He did not know if the police were looking for him, but he was on probation and had not reported. R. p. 292. He explained that the girl left in her Honda after the shooting. R. p. 296. Further, he had not said anything to Carter during the incident. R. pp. 298-99. Also, he learned the following day that law enforcement had found his cell phone. R. pp. 293-94.

gun. R. p. 294.⁷

At some point late that night or early the following morning, Morris picked up Ganson and ultimately took him to Hill's residence where he stayed until later on the morning of the 4th. After receiving a phone call from Hemphill, on the 4th, he had Morris take him to the Lancaster County Sheriff's Department and he gave a statement. He was immediately arrested as the result of a detainer from York County for unrelated charges. R. pp. 282-84. Morris corroborated his account with respect to the times he claimed that he had been with her. R. pp. 264-71.

Although there had just been a shooting, there was a hole in the rear window and the Malibu had two bullet holes in it, apparently neither Stevens nor Carter bothered to check on the well-being of the three year old victim. This is readily inferable from evidence that, instead of driving to the hospital immediately, Stevens drove to the apartment of his father's friend, Lawrence Alexander, where his father, Eric Sanders, was playing cards. Stevens excitedly told those present that his car had been shot up. Only when someone inquired about the victim's well-being did he go to the car and Carter handed her to him. Then, he only took her to the hospital after the others who had seen the condition of the car and saw blood coming from her head ordered him to do so. R. pp. 327-34; 337; 346-51.

Kayla Estes was Carter's girlfriend on May 3, 2010. Estes knew Ganson, Hemphill and Hill. However, she did not know Stevens. Carter told her that he had a beef

⁷ Ken Benson lives across the street and some distance down the street from Coates, in the same trailer park. He was inside his home when he heard the shooting. He immediately told his daughter to go to the back end of the trailer and he ducked when the shooting began. He went outside after the shooting was over and saw the Honda drive away from the area. In all, he heard between five and ten shots. R. pp. 137-45.

with the other men she knew "[o]ver money," and he had told her that "he would handle it." Between 9:00 and 10:00 p.m., Carter called her from his residence and told her about what had occurred at the trailer park. **R. pp. 315-20.**

On cross-examination, Carter elicited that Carter had told her that "there was a problem;" that he and Hemphill had met in the roadway; and that both men agreed that the matter was "quashed." Carter also told her that after he had turned and walked away from Hemphill, Ganson said, "F--- that, I'll get him." At that point, Carter heard shots. Stevens wound up with the gun and began shooting. Afterwards, they drove to the hospital. **R. pp. 320-21.**

At 9:53 p.m. on May 3, 2010, Craig Greenlee, then in the patrol division of the City of Lancaster Police Department, was parked in the parking lot of a Main St. restaurant when a late model Malibu passed. The vehicle had its emergency flashers on and was traveling at a high rate of speed. Officer Greenlee pulled in behind the vehicle, which did not stop even after he turned on both his blue lights and siren. As they were driving, he noticed that the car's rear window "had been shot out" and he reported this to dispatch. **R. pp. 93-98.**

Officer Greenlee ultimately followed the Malibu to the emergency room driveway at Springs Memorial Hospital, where it stopped. Carter and Stevens got out of the vehicle and Carter carried a smaller person into the emergency room. Both men were yelling and both had blood on their clothing. Officer Greenlee had to force both men out of the emergency room, so that the medical personnel could treat the victim. Both men told him

that Ganson was responsible for the victim's condition and that the incident had occurred on Mcilwaine Rd. **R. pp. 98-102.**

Because Mcilwaine Rd. is not in the City of Lancaster, he reported this information to dispatch and asked for assistance from the Lancaster County Sheriff's Department. He then helped secure the vehicle until members of the Sheriff's Department arrived. While there, he not only saw the damage to the rear window, he also saw two bullet holes in the roof of the car. **R. pp. 103-04.**

A few minutes after Officer Greenlee arrived at the hospital, then-Deputy Joseph Catalano, with the Lancaster County Sheriff's Department, also got there. He had been informed of a report of "shots fired" on Athena Rd., where the trailer park is located, and he was asked to go to the hospital to determine if that incident was connected to the reported shooting. At the hospital, Deputy Catalano spoke to both Stevens and Carter, as the men sat on the curb outside of the emergency room. Both men had blood on their shirts and Catalano learned that Stevens was the victim's father. When Carter was asked about what had occurred, he said that they had been driving down Athena Road when "someone started shooting into the vehicle." **R. pp. 106-10.**

Carter, however, denied knowing who had shot at the car. Deputy Catalano observed the same defects to the car that Officer Greenlee had described. Both Stevens and Carter were allowed to leave the hospital that night because the Sheriff's Department did not have any information that either had committed a crime. **R. pp. 110-12.**

Inv. Mike Adams, of the Lancaster County Sheriff's Department, also went to Springs Memorial Hospital on the night of May 3, 2010. After being briefed about the

matter and learning about a shooting on Athena Rd., Inv. Adams saw the Malibu with the cracked rear window and the bullet holes in the roof. He then spoke to Carter and Stevens, who were not then suspects. When Inv. Adams questioned Carter in the parking lot about what had happened, all Carter told him was that Beneco Ganson had shot at them on Athena Rd. and Carter did not elaborate. Because Carter's shirt was bloody, Inv. Adams obtained it from him even though Carter was reluctant to give it to him. **R. pp. 113-18; 123.**

After that conversation, Inv. Adams went into the emergency room and spoke to Stevens. He also obtained Stevens' bloody t-shirt.⁸ The Sheriff's Department was, at the time, unaware of any reason to arrest Carter or Stevens. **R. pp. 118-19; 122.**

Sgt. Mike Miller and Deputy Caleb Graffam were dispatched to the "shots fired" call, and they arrived at 9:54 p.m. Along their way to that location, they heard the transmissions from Officer Greenlee and the City of Lancaster Police Department. However, there was not yet any known connection between the cases. When they reached the Athena Rd. area, they drove slowly through the area with their windows down. **R. pp. 147-49; 159-63.**

The officers came across a black male walking in the roadway, alone, and they stopped him. They patted him down and he was unarmed. The officers then obtained his identification. The man was John Jarrod Hill. As soon as they had confirmed that Hill did not have any outstanding warrants, a woman "came out into the yard close to where we [were] ... screaming that a child had been shot." **R. pp. 152-56; 164.**

⁸ Expert testing of the t-shirts by a member of SLED's trace evidence department did not reveal the presence of gunshot residue. **R. pp. 485-91.**

Hill left at this point. The officers learned that this woman was Coates and this was the first suggestion that the victim's injury may be connected to this shooting. The officers began looking around in the area and they soon discovered some spent shell casings between her trailer and the trailer across the street. Immediately, they blocked off the roadway, secured the area and waited on other officers to arrive. The other officers came shortly. **R. pp. 155-59; 164-65.**⁹

John Jarrod "John John" Hill was not living in the same trailer park as Coates on May 3, 2010, although he frequently went there. He spent the whole day at the home of his girlfriend's grandmother. Unlike the other witnesses, he knew all of the participants, including Stevens. He had seen Ganson and Hemphill during the day of May 3rd. However, he did not see them that night and he did not see Stevens anytime that day or night. **R. pp. 241-44; 246-48; 256.**

Hill's dispute with Carter arose about a month and a half before the murder. It started when he gave Carter \$450.00 with which to buy him some cocaine. Instead of getting him the cocaine or returning the money, Carter "jumped the fence" or robbed him. Following that date, the men had two confrontations. About a week later, Hill approached Carter as Carter was visiting a man in the trailer park. Carter claimed that he had been in a wreck and that he would pay Hill after he got a check from that. **R. pp. 251-54.**

⁹ Hill corroborated the officers' testimony about the stop. The only discrepancy in his account was that he was not patted down. **R. pp. 244-46.** Hill gave the Sheriff's Department a statement on May 3rd or on the morning of the 4th, and he voluntarily submitted to gunshot residue testing that later was determined to be negative. **R. pp. 167-69; 172; 248-49; 486; 491-93.**

Then, about two weeks before the murder, they ran into each other on the road on which Coates lived. The men were about twenty feet from one another. Hill "told him to pay me and stuff like that when I seen him and he just took off running." Hill claimed that neither Ganson nor Hemphill were there and that no one had chased Carter on the second occasion. No guns were involved in either confrontation. **R. pp. 254-56.**

Lancaster County Sheriff's Department crime scene Inv. Jeff Steele processed the trailer park crime scene on May 3, 2010, where he was later joined by crime scene Inv. Ken Taylor.¹⁰ They found a fired bullet jacket fragment at the edge of the driveway of the residence across the roadway from Coates' residence (**State's Exhibit Number 74**). On the side of the roadway, they found a .380 caliber cartridge casing; two .22 caliber cartridge casings; Ganson's Samsung cell phone; and a tan hat. In the roadway, they found two 7.65 millimeter casings and an unfired 7.65 millimeter bullet. **R. pp. 390-92; 394-99; 407-08; 416-21.**

Investigators Steele and Taylor processed the Malibu on May 4th. When they did so, they discovered a fired bullet jacket fragment on the passenger's side floorboard (**State's Exhibit 75**); two pieces of a copper fragment from the seat cushion of the headrest on the back of the seat (**State's Exhibit Number 80**); and a lead core fragment under the spare tire in the trunk (**State's Exhibit Number 77**). From their review of the items seized, they determined that the would have been parked so that the front of it was closest to Coates' trailer and the rear of the car was closest to the roadway, which was consistent with eyewitness descriptions. Also, there were no defects in the car on the

¹⁰Both were qualified as experts in crime scene investigations and shooting reconstruction, without objection. **R. pp. 385-89; 415-18.**

driver's side or rear that would have been consistent shots hitting the car from those directions. R. pp. 379-402; 393-95; 401-02; 422-28.

Investigators Steele and Taylor also attempted to determine what they could conclude from examination of the bullet holes in the car's roof and the bullet hole in the car's rear window. R. pp. 402-03; 423; 427. As Inv. Taylor explained,

Typically when I get to the scene I want to try to if possible reconstruct it to the point of determining where the shots came from, and if possible, how many were actually fired that would have affected that target near the car, house or whatever. In this particular case after finding out that the car had been moved from the initial scene other than just determine the directionality of how things impacted the car it really didn't have any relevance to anything at the hospital parking lot, so that again was another reason that we felt impressed to go ahead and get it to a secure area so we can go ahead and process the car. But typically again we're going to look at the bullet holes that we find, the defects as we referred to and we're going to try to match those up if any of them are corresponding. If a bullet entered on one spot and created a second or third or whatever we are going to try to match those up. And again, at the same time one of the key things is determine directionality and possibly an angle of impact to show whether it came from a downward angle or at an upward angle.

R. p. 426, line 24 - p. 427, line 18. He explained that he usually uses dowel rods to make these determinations. R. pp. 427-28.

In this case, there were two defects on the roof of the car. The first defect was toward the front and passenger side of the car's roof, while the second defect was "[a] little more toward the mid-section." Inside the car, he found that the defect to the rear window corresponded to the second defect in the roof. Because the larger hole was to the outside of the tempered glass (or, as he described it, "outward [cratering]"), he opined that the shot was not fired from the outside of the rear window. Further, both defects in the roof and the defect to the rear window "came from the front of the car toward the

back of car at the passenger side moving toward the [mid-section] of the car at a downward angle." R. pp. 428-36; 440-41; 459.¹¹

He explained that the front window on the passenger side was completely down, but the driver's window was rolled up completely. On the other hand, the two rear windows were down several inches. None of these windows had defects in them. "The hole that I referred to as defect number one [in the roof] that was toward the front of the car, closest one up toward the front, we tracked it ... into the back seat cushion." This was represented by a photograph, State's Exhibit 69. R. pp. 436-39; 456-58.

SLED Agent Carl Kenley, a crime scene investigator, also processed the Malibu to determine the angles at which the shots had been fired into the roof of the vehicle. He was assisted by Agents Ricardo Prince and Scott Hardy. He corroborated Inv. Taylor's findings. R. pp. 475-83.

When Stevens returned to Mr. Alexander's apartment and talked to his father after the shooting, Mr. Alexander did not see a gun. Later that night, however, Mr. Alexander saw Mr. Sanders "had a gun on the hood of his truck." There were some angry "young guys" present and they were talking about trying to get some .40 caliber bullets. Mr. Sanders thereafter put that weapon in his truck. R. pp. 336-37.

With the assistance of the Sanders, law enforcement found the weapon. Ms. Sanders retrieved this weapon (Court's Exhibit 4) from a man named Derrick, and she turned it over to Inv. Mike Howell. R. pp. 352-55; 360-65; 369-75; 383-84. SLED tested this Hi-point .40 caliber weapon for "touch DNA" and compared swabs from it to known

¹¹ A copper-jacketed fragment found at the scene was consistent with having passed through the window. R. pp. 441-42.

standards from the victim, Carter, Stevens, and Coates. Testing revealed a mixture of DNA from more than one person. Everyone was excluded as a possible contributor to the DNA mixture, except for Stevens, and he could not be excluded. "[T]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 65." R. pp. 498-05; 509-12; 514-15.

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats (State's Exhibit 11), the bullet jacket fragment found in the passenger side floor board of the car (State's Exhibit 75), the copper fragment from the headrest in the backseat of the car (State's Exhibit 80) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (State's Exhibit 74) were all fired by Court's Exhibit 4, the recovered .40 caliber weapon. R. pp. 523-530.

Carter gave law enforcement two statements in this case. He gave the first statement on May 4, 2010, before he was arrested and he gave the second statement on May 6th, after he was under arrest. Each statement was long and was videotaped. A DVD of each statement was introduced and published to Carter's jury as State's Exhibits 98 and 99, respectively. See R. pp. 531-72.

In the first statement, he initially denied knowing Coates; he inaccurately described Coates as a "skinny white girl" when she is a larger woman, and he claimed that Stevens must have known her. He admitted getting out of the vehicle at Coates' residence after seeing the people with whom he had a dispute, but he claimed that he had been unarmed. By the end of this interview, however, he admitted knowing Coates; he

admitted that she had been to his residence; and he stated that Coates had hugged him when he got out of the car. He likewise finally admitted that he had handled the weapon that day, but he denied that there had been any return fire from his side of the road.

State's Exhibits 98.

In the second interview, he first repeatedly denied having a weapon on May 3rd, but eventually changed his story. He indicated that he knew the people with whom he had the dispute would be at the trailer park before he went there and that he placed the gun that he had gotten from Stevens in his lap. **State's Exhibit 99.**

He also admitted that he had gotten out of the car with the weapon after he saw the persons with whom he had the dispute, and that he had displayed the weapon to Hemphill. Further, he claimed that Hemphill was likewise armed. Yet, he did not say that Hemphill had pointed a weapon at him, and he ultimately claimed that Stevens had been the shooter. **State's Exhibit 99.**

B. Discussion.

There was no error. South Carolina has defined the crime of murder as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

"[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another." *State v. Fennell*, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000). This doctrine has been consistently recognized in South Carolina cases. *See State v. Gandy*, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds*, *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993); *State v. Horne*, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that the State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); *State v. Williams*, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him).

The applicable law on review of motions for a directed verdict is set forth in *State v. Bostick*, 392 S.C. 134, 139-40, 708 S.E.2d 774, 776-77 (2011):

A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); *see also State v. Williams*, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d at 452 (citing *State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270 S.C.

539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

See also *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006).¹²

Here, the State's evidence, as discussed above, reasonably tended to establish that Carter fired the fatal shots that struck the victim in the head and killed her. Specifically, the record shows that:

- Carter created the dispute with Hill, Ganson and Hemphill, by robbing Hill of \$ 450.00;
- Carter had at least one, if not two run-ins with these men following the robbery and before the murder;
- Carter had told his girlfriend at the time, Kayla Estes, about a beef with the other men "[o]ver money," and he had told her that "he would handle it,"
- Carter was aware that there may be a difficulty with these men if he encountered them at the trailer park, but he and Sanders agreed to take Coates home on the night of May 3rd;
- following a "hyped up" conversation with Sanders on the way to Coates' residence, in which he apparently was looking forward to seeing his rivals at the trailer park, Sanders gave him the .40 caliber semi-automatic pistol (Court's Exhibit 4) and he kept it in his lap;
- he saw Hemphill and Ganson as they approached Coates' trailer, and he said, "There they go;"
- Carter jumped out of the car as soon as it stopped, and he began walking toward the roadway, with the weapon at his side, covered by his shirt;

¹² This standard is consistent with *Jackson v. Virginia*, 443 U.S. 307 (1979) (evidence is sufficient to send a case to the jury if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). See *State v. Stokes*, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989).

- he then met Hemphill in the roadway, and the men argued;¹³
- Ganson testified that Carter had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill;
- Carter and Hemphill continued to argue and Ganson heard Carter tell Hemphill, "I ought to shoot you but I ain't want [(sic)] to do the time." He also asked, "What you gone do now?"
- Carter walked back toward the passenger side of the Malibu after this confrontation, but when a shot was fired from the other side of the road, he turned as if to shoot, with Stevens repeatedly encouraging him to "squeeze;"
- then, a number of shots were fired, inferably by him;
- following the crime, neither Carter nor Stevens checked on the three year old victim, until Stevens spoke to family and friends shortly after the shooting and they inquired about her;
- all of the shots that hit the car, including the shot that took the life of the innocent three year old victim, were fired from the passenger side of the vehicle and none could have been fired from the other side of the roadway; and
- ballistics testing confirmed that the three .40 caliber cartridges collected by Coats (State's Exhibit 11), the bullet jacket fragment found in the passenger side floor board of the car (State's Exhibit 75), the copper fragment from the headrest in the backseat of the car (State's Exhibit 80) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (State's Exhibit 74) were all fired by Court's Exhibit 4, the recovered .40 caliber weapon.

Standing alone, this evidence - based upon the two eyewitness accounts - was sufficient to submit the charge of murder to his jury, separate and apart from potential guilt under a theory of accomplice liability.

Carter's contention that he lawfully armed himself ignores that he could not lawfully arm himself because he was a previously convicted felon, and that he pled guilty at the close of the State's case to the offense of possession of a pistol by a person

¹³ From Ganson's testimony, it does not appear that Hemphill was armed, yet. However, Hemphill was armed after the shooting began.

convicted of a violent crime. R. p. 572, line 14 - p. 574, line 5. More importantly, his unlawful possession of the weapon was the proximate cause of the homicide because he knowingly brought it to a confrontation with Hemphill, which he instigated. Thus, he was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty. *Accord State v. Slater*, 373 S.C. 66, 70-71, 644 S.E.2d 50, 52 (2007) (“the instant case, Slater fails to meet the first requirement for the self-defense charge: specifically, Slater was not without fault in bringing on the difficulty. ... Slater’s actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim”). Instead, Carter went looking for trouble and, unsurprisingly, he found it. *Id.*

Alternatively, the trial judge properly submitted the case to the jury because there was evidence, albeit emanating from Carter’s self-serving statements to Estes and law enforcement, that Stevens shot the victim. Because this point was conceded in the lower court, the State will not argue it in detail. However, the State would note that Stevens’ act in shooting the weapon that he had just reacquired from Carter, after Carter had initiated the confrontation with the other group, clearly occurred while both men were present at the scene and “intentionally, or through a common design, aid[ing], abet[ting], or assist[ing] in the commission of [the murder] through some overt act.” *See State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010).

As the Court explained in *Gibson*,

Under the “hand of one is the hand of all” theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment

charging him only with the principal offense. [However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).

“Under an accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.’ ” See *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, “[a] formally expressed agreement is not necessary to establish the conspiracy” which brings the accomplice to the scene of the crime).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769–70. Because of the discrepancy as to who fired the shots that killed the victim, the matter was properly submitted to the jury. *Id.*; See also *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438–39 (2011) (“Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted”).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

Respectfully submitted,

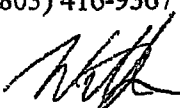
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ATTORNEYS FOR RESPONDENT

August 5, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge
Appellate Case No. 2011-203566

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 5th day of August, 2013.



WILLIAM E. SALTER, III
Senior Assistant Attorney General
ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge
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THE STATE OF SOUTH CAROLINA,

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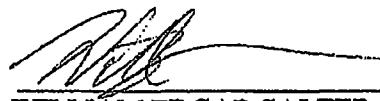
APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served three (3) copies of the within Final Brief of Respondent and Certificate of Compliance on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Kathrine H. Hudgins, Esq.
SCCID - Division of Appellate Defense
1330 Lady St., Ste #401
Columbia, SC 29201

This 5th day of August, 2013.


WILLIAM EDGAR SALTER, III
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Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

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

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

The State, Respondent,

v.

Anthony Rodriekus Carter, Appellant.

Appellate Case No. 2011-203566

Appeal From Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-178
Submitted February 1, 2014 – Filed April 30, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and Senior
Assistant Attorney General W. Edgar Salter, III, all of
Lancaster, for Respondent.

PER CURIAM: We find any issue regarding the sufficiency of evidence that Anthony Rodriekus Carter fired the fatal shot or could be guilty under an accomplice liability theory is not preserved because he only presented a self-defense argument to the trial judge in support of his directed verdict motion. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *id.* at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."); *id.* ("A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below.").

AFFIRMED.¹

FEW, C.J., and WILLIAMS and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

APPELLANT

RECEIVED

MAY 15 2014

SC OFFICE OF
APPELLATE COUNSEL

Appeal from Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 2014-UP-178

PETITION FOR REHEARING

RECEIVED
MAY 15 2014
SC Court of Appeals

On April 30, 2014, this Court, in an unpublished opinion, affirmed Appellant's convictions for murder and possession of a firearm during the commission of a violent crime: State v. Carter, Op. No. 2014-UP-178 (S.C. Ct.App. filed April 30, 2014). Appellant challenged the trial judge's refusal to direct a verdict of acquittal because the State failed to prove who fired, either Appellant or the co-defendant, the fatal shot and failed to present evidence that Appellant and co-defendant joined to accomplish an illegal purpose under a theory of the hand of one is the hand of all. This Court found the issue procedurally barred writing, "We find any issue regarding the sufficiency of evidence that Anthony Rodriekus Carter fired the fatal shot or could be guilty under an accomplice

liability theory is not preserved because he only presented a self-defense argument to the trial judge in support of his directed verdict motion.” Counsel respectfully submits that the Court overlooked the fact that in denying the directed verdict motion the judge ruled on the hand of one is the hand of all theory stating, “In the light most favorable to the State under the hand of one, hand of all situation he could be guilty of various crimes.” (R. p. 586, lines 1-3). Pursuant to Rule 221(a), SCACR, counsel for Anthony Rodriekus Carter petitions the Court for rehearing.

Rule 19(a) SCRCrP provides, “On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant’s favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment.” (emphasis added). Although trial counsel referenced self defense in the directed verdict motion, the trial judge considered the other evidence presented by the State, specifically the hand of one is the hand of all evidence. The issue is properly before this Court because the trial judge ruled, in denying the motion for directed verdict, that the State introduced sufficient evidence under the hand of one is the hand of all. Appellant challenged the trial judge’s finding that the State presented sufficient evidence. Appellant respectfully submits that this Court erred in finding the issue unpreserved for appellate review. Upon considering the merits of the issue, this Court should reverse as the State failed to present sufficient evidence, either directly or under a theory of the hand of one is the hand of all, to survive the directed verdict stage.

On the evening of May 3, 2010, Marico Stevens and Anthony Carter drove Emmie Amanda Coats to her home in the Countryside Mobile Home Park in Lancaster. Stevens was the driver, Carter was in the passenger seat, Coats and Jaylen J. were in the backseat. (R. p. 191, lines 1- p. 192, lines 1-5). Carter and Coats were romantically involved. (R. p. 178, lines 4-20). Stevens was the boyfriend of Jaylen J.’s mother, Rodriana Nisha Cunningham. (R. pp. 126-127).

Coats testified that she was aware of an earlier dispute between Carter "Ant" and Beneco "Neco" Ganson, J.D. Hemphill and John Jarrod Hill, "John John." (R. p. 192, lines 19-23). Hill testified that he gave Carter \$450 to buy drugs and Carter "jumped the fence." (R. p. 251, lines 2-23). Coats testified that on the way to the mobile home park Carter told Stevens about an earlier incident where Ganson, Hemphill and Hill had chased Carter out of the mobile home park. (R. p. 194, lines 1-16). Coats told police that Ganson told Carter that if he ever came to the mobile home park again, he better have a gun. (R. p. 223, lines 2-9). Ganson testified at trial and admitted that he, Hill and Hemphill tried to "get" Carter after he took the money from Hill. (R. p. 299, lines 5 – p. 303, lines 1-7). Ganson also admitted that a group of them beat up Carter's brother. (R. p. 303, lines 14 – p. 304, lines 1-12).

According to Coats, Stevens handed a gun to Carter on their way to the mobile home park. When Stevens pulled into the mobile home park to drop Coats off, Coats saw Hemphill and Ganson. (R. p. 199, lines 12- 24). They parked in front of Coats' trailer and Carter got out of the car, with the gun, and met J.D. Hemphill in the middle of the road. (R. p. 204, lines 1- p. 205, lines 1-25). An argument ensued and then Carter turned around and returned to the back passenger side of the car. (R. p. 206, lines 1-12). Stevens was standing by the front passenger side of the car near the front of the car. (R. p. 206, lines 18-22). When Carter got back to the car, Coats heard gunshots and saw a flash from across the street. (R. p. 207, lines 6-11). According to Coats, Carter "Ant" turned like he was going to shoot back but then Coats went inside her trailer and heard shooting back and forth. (R. p. 207, lines 17-22). Kayla Estes, Carter's girlfriend, testified that he told her that he met Hemphill in the middle of the road, the "whole thing was quashed." (R. p. 320, lines 17-22). Carter turned and walked away and heard Ganson say, "Fuck that, I'll get him." (R. p.

320, lines 23 – p. 321, lines 1-2). Carter told Estes that he then heard shots, co-defendant Stevens ended up with the gun and started shooting. (R. p. 321, lines 1-10).

Investigator Jeff Steele with the Lancaster County Sheriff's Department testified that casings recovered from the scene included 7.65 millimeter casings, a .380 caliber cartridge casing, and .22 caliber casings. (R. pp. 395-416). Additionally, three .40 caliber casings were obtained from Coats the morning after the shooting. (R. p. 369, lines 18-24; pp. 211 – 214; pp. 236 - 26240). The only gun recovered was a .40 caliber Hi-Point semi-automatic pistol. (R. p. 522, lines 22 – p. 523, lines 1-2).

During the course of the investigation, investigators spoke with Eric and Jackie Sanders, the co defendant's father and step mother, about recovering the gun. Jackie Sanders testified that her husband called someone named Derrick about recovering the gun. (R. p. 360, lines 5-15). As a result of that phone conversation, Jackie met Derrick at a Stop and Go and he gave her a gun. (R. p. 361, lines 10 – p. 362, 363, lines 1-25). Jackie then turned the gun over to Mike Howell of the Lancaster County Sheriff's Department. (R. pp. 373-375). DNA analysis was performed on the gun and co-defendant Sanders could not be excluded as a possible contributor. (R. p. 510, lines 20-22). Appellant, Carter was excluded as a possible contributor. (R. p. 510, lines 17-18).

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats, a bullet jacket fragment found in the passenger side floor board of the car, a copper fragment from the headrest in the backseat of the car and a bullet jacket fragment found in the driveway were all fired by the recovered .40 caliber pistol. (R. pp. 523-530). Ken Taylor, a crime scene investigator with the Lancaster County Sheriff's Department, testified that the bullets that entered the car came from the front of the car towards the back of the car. (R. p. 436, lines 3-7).

After the shooting, appellant and co-defendant Stevens left the mobile home park and went to Lawrence Alexander's apartment. (R. pp. 329-333). They did not realize that the child had been shot until Alexander asked about the child. (R. p. 331, lines 22 – p. 332, lines 1-19). Once they realized the child had been shot, they rushed to the hospital. (R. pp. 96 – 102). The child was airlifted to Carolina Medical Center where she was later pronounced dead. (R. p. 120 line 18 – p. 121, lines 1-21). The child died from a gunshot wound to the head. (R. p. 345, lines 19-23).

At trial the State relied on a theory of transferred intent, arguing that both the co-defendant Stevens and Appellant, under a theory of the hand of one is the hand of all, intended to kill Ganson and Hemphill and mistakenly struck Jaylen J.. (R. p. 592, lines 3 – p. 593, lines 1-3). In closing argument the State argued to the jury, "Nobody, I will tell you straight –up, I'm straight-up here, nobody involved in this case contends that anybody meant to shoot and kill Jaylen [J.], that's clear and I'm not going to argue otherwise." (R. p. 591, line 25- p.592, lines 1-3). The State was unable to prove who fired the fatal shot that killed Jaylen J. The State argued, "I submit to you it doesn't matter whether you conclude he [Appellant] shot Jaylen [J.] or Marico Stevens shot Jaylen [J.]" (R. p. 607, lines 15-17).

The State failed to establish that Appellant and co-defendant Stevens joined to accomplish an illegal purpose. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584. The State failed to establish liability under the hand of one is the hand of all¹. The State presented evidence that after learning that Appellant had been threatened in the mobile home park and warned that if he returned he should be armed, co-defendant provided a

¹ The judge charged the jury, without objection, on the theory of the hand of one is the hand of all. (R. p. 649, lines 12-21). This error may need to be raised in post conviction relief.

gun to Appellant. The State did not present evidence that Appellant and co-defendant Stevens went to the mobile home park to seek retaliation. Instead, the evidence shows that Appellant and Steven were simply taking Emmie Coats home. Appellant did not join co-defendant Stevens to accomplish an illegal purpose but merely legally armed himself in self-defense.

In closing argument the State argued that Appellant was not entitled to self defense because he was not without fault in bringing on the difficulty. (R. p. 606, lines 2-19). The question of whether Appellant was entitled to have shot in self-defense after he turned his back and walked away and Ganson and Hemphill fired the first shots, would have been a question for the jury if the State established that Appellant fired the fatal shot. The State, however, did not prove that Appellant fired the fatal shot and instead proceeded under a hand of one hand of all transferred intent theory. Co-defendant Stevens was clearly without fault in bringing on the difficulty and was entitled to have fired back at Ganson and Hemphill in self-defense. If Stevens had been on trial, based the evidence presented by the State at Appellant's trial, the judge would have erred in refusing to direct a verdict of acquittal. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011).

The State failed to offer evidence that co-defendant Stevens and the Appellant joined to accomplish an illegal purpose required under the theory of the hand of one is the hand of all. Stevens' act of handing the gun to Appellant, after learning of the prior threats made to Appellant, without more, does not constitute an illegal purpose. Instead, the act of Stevens' handing the gun to Appellant, demonstrates that Appellant was lawfully arming himself in self-defense. As the State failed to prove that Appellant fired the fatal shot, and, at the time shots were fired, the co-defendant had the right to act in self-defense, the State failed to prove the element of malice required for murder, even under a theory of hand of one is the hand of all/transferred intent.

In closing the State argued, "Well, if Carter didn't shoot the gun then how did Stevens get the gun? From Carter. One way or the other Stevens – if you believe Stevens shot, Stevens ended up with the gun from Carter during something that Carter started. They're both guilty of it, we're only trying Carter today but they're both guilty of the murder of Jaylen [J.] based on all of the facts and circumstances of what happened." (R. p. 609, lines 13-20). The State's theory ignores the absence of any evidence that Appellant and co-defendant Stevens joined to accomplish an illegal purpose. The evidence shows that co-defendant Stevens handed the gun to Appellant and Appellant legally armed himself in self-defense before taking Coats home to the mobile home park where Appellant had been threatened. Additionally, the State's theory ignores co-defendant Stevens' right to act in self-defense once Ganson and Hemphill started shooting.

In State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct.App. 2005) the South Carolina Court of Appeals wrote:

Where two or more acting with a common plan or intent [are] present at the commission of a crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present means to be sufficiently near to aid and abet and assist in the commission of the crime. Intent is also a necessary element, for there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant to that plan, with the person aiding and abetting by some overt act.

The only common intent between Appellant and co-defendant Stevens was the intent to defend themselves from earlier threats and then when the parties made good on the threat, defending themselves from the shots being fired from across the street.

The State's theory of transferred intent fails because the State failed to establish that Appellant fired the fatal shot. If Appellant did not fire the fatal shot, no intent existed and no intent could be transferred. Additionally, the State's theory of transferred intent fails because the

State failed to establish that Appellant and co-defendant Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory argued by the State and ruled upon by the judge as the reason for denying the directed verdict motion.

In State v. Fennell, 340 S.C. 266, 272-273, 531 S.E.2d 512, 516-517 (2000) the South Carolina Supreme Court, in addressing the theory of transferred intent, wrote:

In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds by State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, Substantive Criminal Law, § 3.12(d) (1986) (discussing transferred intent); McAninch & Fahey, at 17-19 (same).

The theory of transferred intent does not apply in the present case. The State can not prove that co-defendant Steven acted with malice when he shot in self defense and the bullet mistakenly hit Jaylen J. The State failed to prove that Appellant fired the fatal shot and failed to prove that Appellant and co-defendant Stevens joined to accomplish an illegal purpose under a

theory of the hand of one is the hand of all. The judge erred in refusing to direct a verdict of acquittal.

Counsel respectfully seeks rehearing on this Court's finding that the issue presented is procedurally barred. Additionally, counsel asks this Court to review the merits of the issue presented and reverse the conviction.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

This 15th day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

APPELLANT

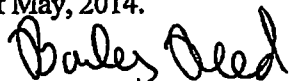
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 Esquire, this 15th day of May, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day
of May, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The South Carolina Court of Appeals

The State, Respondent,

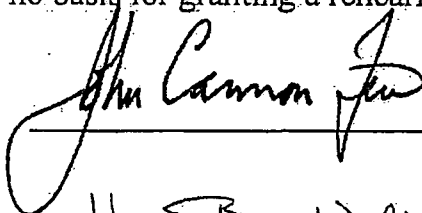
v.

Anthony Rodriekus Carter, Appellant.

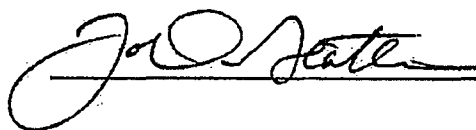
Appellate Case No. 2011-203566

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Kathrine Haggard Hudgins, Esquire
Donald J. Zelenka, Esquire
Alan McCrory Wilson, Esquire
W. Edgar Salter, III, Esquire
John W. McIntosh, Esquire

JUN 25 2014

OFFICE OF
APPELLATE CLERK

FILED

June 25, 2014

Douglas A. Barfield, Jr., Esquire
The Honorable J. Ernest Kinard, Jr.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 2014-UP-178 (S.C. Ct. App. filed 4/30/2014)

10-GS-29-01000, 01001

THE STATE,

RESPONDENT,

V.

ANTHONY RODRICKUS CARTER,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 6/25/2014.

QUESTION PRESENTED

Did the Court of Appeals err in finding the issue procedurally barred and refusing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose?

STATEMENT OF THE CASE

In August of 2010, the Lancaster County Grand Jury indicted Anthony Rodrikus Carter for murder, possession of a firearm during the commission of a violent crime, indictments #10-GS-29-1000, 1001. Earlier, in 2009, the Lancaster County Grand Jury indicted Carter for possession of a pistol by a person convicted of a violent crime, indictment #2009-GS-29-1167. On November 7, 2011, Carter proceeded to jury trial before the Honorable Ernest J. Kinard. Michael Lifsey represented Carter at trial. Doug Barfield prosecuted the case. At the close of the State's case on November 9, 2011, Carter pled guilty to possession of a pistol by a person convicted of a violent crime. Sentencing was deferred. On November 10, 2011, the jury found Carter guilty of murder and possession of a firearm during the commission of a violent crime. On November 17, 2011, Judge Kinard sentenced Carter to 32 years for murder, 5 years concurrent for possession of a firearm during the commission of a violent crime and time served for possession of a pistol by a person convicted of a violent crime. A timely notice of intent to appeal was served on November 18, 2011, and the direct appeal perfected. On April 30, 2014, the Court of Appeals, in an unpublished opinion, affirmed Appellant's convictions for murder and possession of a firearm during the commission of a violent crime. State v. Carter, Op. No. 2014-UP-178 (S.C. Ct.App. filed April 30, 2014). A petition for rehearing was filed and denied on June 25, 2014. This petition for writ of certiorari follows.

STATEMENT OF FACTS

On May 3, 2010, gunfire erupted at the Countryside Mobile Home Park in Lancaster. Three year old Jaylen J. was fatally shot as she sat in her car seat in a car parked at the mobile home park. On that evening of May 3, 2010, Marico Stevens and Anthony Carter drove Emmie Amanda Coats to her home in the mobile home park. Stevens was the driver, Carter was in the passenger seat, Coats and Jaylen J. were in the backseat. (R. p. 191, lines 1- p. 192, lines 1-5). Carter and Coats were romantically involved. (R. p. 178, lines 4-20). Stevens was the boyfriend of Jaylen J.'s mother, Rodriana Nisha Cunningham. (R. pp. 126-127).

Coats testified that she was aware of an earlier dispute between Carter "Ant" and Beneco "Neco" Ganson, J.D. Hemphill and John Jarrod Hill, "John John." (R. p. 192, lines 19-23). Hill testified that he gave Carter \$450 to buy drugs and Carter "jumped the fence." (R. p. 251, lines 2-23). Coats testified that on the way to the mobile home park Carter told Stevens about an earlier incident where Ganson, Hemphill and Hill had chased Carter out of the mobile home park. (R. p. 194, lines 1-16). Coats told police that Ganson told Carter that if he ever came to the mobile home park again, he better have a gun. (R. p. 223, lines 2-9). Ganson testified at trial and admitted that he, Hill and Hemphill tried to "get" Carter after he took the money from Hill. (R. p. 299, lines 5 – p. 303, lines 1-7). Ganson also admitted that a group of them beat up Carter's brother. (R. p. 303, lines 14 – p. 304, lines 1-12).

According to Coats, Stevens handed a gun to Carter on their way to the mobile home park. When Stevens pulled into the mobile home park to drop Coats off, Coats saw Hemphill and Ganson. (R. p. 199, lines 12- 24). They parked in front of Coats' trailer and Carter got out of the car, with the gun, and met J.D. Hemphill in the middle of the road. (R. p. 204, lines 1- p. 205, lines 1-25). An argument ensued and then Carter turned around and returned to the back passenger side

of the car. (R. p. 206, lines 1-12). Stevens was standing by the front passenger side of the car near the front of the car. (R. p. 206, lines 18-22). When Carter got back to the car, Coats heard gunshots and saw a flash from across the street. (R. p. 207, lines 6-11). According to Coats, Carter "Ant" turned like he was going to shoot back but then Coats went inside her trailer and heard shooting back and forth. (R. p. 207, lines 17-22). Kayla Estes, Carter's girlfriend, testified that he told her that he met Hemphill in the middle of the road, the "whole thing was quashed." (R. p. 320, lines 17-22). Carter turned and walked away and heard Ganson say, "Fuck that, I'll get him." (R. p. 320, lines 23 – p. 321, lines 1-2). Carter told Estes that he then heard shots, co-defendant Stevens ended up with the gun and started shooting. (R. p. 321, lines 1-10).

Investigator Jeff Steele with the Lancaster County Sheriff's Department testified that casings recovered from the scene included 7.65 millimeter casings, a .380 caliber cartridge casing, and .22 caliber casings. (R. pp. 395-416). Additionally, three .40 caliber casings were obtained from Coats the morning after the shooting. (R. p. 369, lines 18-24; pp. 211 – 214; pp. 236 - 26240). The only gun recovered was a .40 caliber Hi-Point semi-automatic pistol. (R. p. 522, lines 22 – p. 523, lines 1-2).

During the course of the investigation, investigators spoke with Eric and Jackie Sanders, the co defendant's father and step mother, about recovering the gun. Jackie Sanders testified that her husband called someone named Derrick about recovering the gun. (R. p. 360, lines 5-15). As a result of that phone conversation, Jackie met Derrick at a Stop and Go and he gave her a gun. (R. p. 361, lines 10 – p. 362, 363, lines 1-25). Jackie then turned the gun over to Mike Howell of the Lancaster County Sheriff's Department. (R. pp. 373-375). DNA analysis was performed on the gun and co-defendant Sanders could not be excluded as a possible contributor. (R. p. 510, lines 20-22). Appellant, Carter was excluded as a possible contributor. (R. p. 510, lines 17-18).

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats, a bullet jacket fragment found in the passenger side floor board of the car, a copper fragment from the headrest in the backseat of the car and a bullet jacket fragment found in the driveway were all fired by the recovered .40 caliber pistol. (R. pp. 523-530). Ken Taylor, a crime scene investigator with the Lancaster County Sheriff's Department, testified that the bullets that entered the car came from the front of the car towards the back of the car. (R. p. 436, lines 3-7).

After the shooting, appellant and co-defendant Stevens left the mobile home park and went to Lawrence Alexander's apartment. (R. pp. 329-333). They did not realize that the child had been shot until Alexander asked about the child. (R. p. 331, lines 22 – p. 332, lines 1-19). Once they realized the child had been shot, they rushed to the hospital. (R. pp. 96 – 102). The child was airlifted to Carolina Medical Center where she was later pronounced dead. (R. p. 120 line 18 – p. 121 lines 1-21). The child died from a gunshot wound to the head. (R. p. 345, lines 19-23).

ARGUMENT

The Court of Appeals erred in finding the issue procedurally barred and refusing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose.

In closing argument the State argued to the jury, "Nobody, I will tell you straight -up, I'm straight-up here, nobody involved in this case contends that anybody meant to shoot and kill Jaylen [J.], that's clear and I'm not going to argue otherwise." (R. p. 591, line 25- p.592, lines 1-3). Instead, the State relied on a theory of transferred intent, arguing that both the co-defendant Stevens and Appellant, under a theory of the hand of one is the hand of all, intended to kill Ganson and Hemphill and mistakenly struck Jaylen J.. (R. p. 592, lines 3 – p. 593, lines 1-3). The State was unable to prove who fired the fatal shot that killed Jaylen J. The State argued, "I submit to you it doesn't matter whether you conclude he [Appellant]shot Jaylen [J.] or Marico Stevens shot Jaylen [J.]." (R. p. 607, lines 15-17). The State, however, failed to offer evidence that co-defendant Stevens and Petitioner joined to accomplish an illegal purpose required under the theory of the hand of one is the hand of all. Stevens' act of handing the gun to Petitioner, after learning of the prior threats made to Petitioner, without more, does not constitute an illegal purpose. Instead, the act of Stevens' handing the gun to Petitioner, demonstrates that Petitioner was lawfully arming himself in self-defense. As the State failed to prove that Petitioner fired the fatal shot, and, at the time shots were fired, the co-defendant had the right to act in self-defense, the State failed to prove the element of malice required for murder, even under a theory of transferred intent.

At the close of the State's case, Petitioner moved for a directed verdict of acquittal. (R. p. 585, lines 22-25). The judge denied the motion for directed verdict stating, "In the light most

favorable to the State, under the hand of one, hand of all situation he could be guilty of various crimes." The judge erred in refusing to direct a verdict of acquittal for murder.

First, the State offered no evidence that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584. The State failed to establish liability under the hand of one is the hand of all¹. The State presented evidence that after learning that Petitioner had been threatened in the mobile home park and warned that if he returned he should be armed, co-defendant provided a gun to Petitioner. The State did not present evidence that Petitioner and co-defendant Stevens went to the mobile home park to seek retaliation. Instead, the evidence shows that Petitioner and Steven were simply taking Emmie Coats home. Petitioner did not join co-defendant Stevens to accomplish an illegal purpose but merely legally armed himself in self-defense.

Second, the State argues that Petitioner was not entitled to self defense because he was not without fault in bringing on the difficulty. (R. p. 606, lines 2-19). The question of whether Petitioner was entitled to have shot in self-defense after he turned his back and walked away and Ganson and Hemphill fired the first shots, would have been a question for the jury if the State established that Appellant fired the fatal shot. The State, however, can not prove that Petitioner fired the fatal shot. Co-defendant Stevens was clearly without fault in bringing on the difficulty and was entitled to have fired back at Ganson and Hemphill in self-defense. If Stevens had been on trial, based the evidence presented by the State at Petitioner's trial, the judge would have

erred in refusing to direct a verdict of acquittal. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). As the State proceeded under the hand of one is the hand of all, the judge erred in refusing to direct a verdict of acquittal for murder as to Petitioner.

In closing the State argued, “Well, if Carter didn’t shoot the gun then how did Stevens get the gun? From Carter. One way or the other Stevens – if you believe Stevens shot, Stevens ended up with the gun from Carter during something that Carter started. They’re both guilty of it, we’re only trying Carter today but they’re both guilty of the murder of Jaylen [J.] based on all of the facts and circumstances of what happened.” (R. p. 609, lines 13-20). The State’s theory ignores the absence of any evidence that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose. The evidence shows that co-defendant Stevens handed the gun to Petitioner and Petitioner legally armed himself in self-defense before taking Coats home to the mobile home park where Petitioner had been threatened. Additionally, the State’s theory ignores co-defendant Stevens’ right to act in self-defense once Ganson and Hemphill started shooting.

In State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct.App. 2005) the South Carolina Court of Appeals wrote:

Where two or more acting with a common plan or intent [are] present at the commission of a crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present means to be sufficiently near to aid and abet and assist in the commission of the crime. Intent is also a necessary element, for there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant to that plan, with the person aiding and abetting by some overt act.

¹ The judge charged the jury, without objection, on the theory of the hand of one is the hand of all. (R. p. 649, lines 12-21). This error may need to be raised in post conviction relief.

The only common intent between Petitioner and co-defendant Stevens was the intent to defend themselves from earlier threats and then when the parties made good on the threat, defending themselves from the shots being fired from across the street.

The State's theory of transferred intent fails because the State failed to establish that Petitioner fired the fatal shot. If Petitioner did not fire the fatal shot, no intent existed and no intent could be transferred. Additionally, the State's theory of transferred intent through the hand of one is the hand of all fails because the State failed to establish that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory argued by the State and ruled upon by the judge as the reason for denying the directed verdict motion.

In State v. Fennell, 340 S.C. 266, 272-273, 531 S.E.2d 512, 516-517 (2000) the South Carolina Supreme Court, in addressing the theory of transferred intent, wrote:

In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds by* State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v.

Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, Substantive Criminal Law, § 3.12(d) (1986) (discussing transferred intent); McAninch & Faurey, at 17-19 (same).

The theory of transferred intent does not apply in the present case. The State can not prove that co-defendant Steven acted with malice when he shot in self defense and the bullet mistakenly hit Jaylen J. The State failed to prove that Petitioner fired the fatal shot and failed to prove that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose under a theory of the hand of one is the hand of all. The judge erred in refusing to direct a verdict of acquittal. Because the State relied upon the theory of the hand of one is the hand of all, this Court should remand the case and order the trial court to direct a verdict of acquittal for the murder charge.

The Court of Appeals found the issue procedurally barred writing, "We find any issue regarding the sufficiency of evidence that Anthony Rodriekus Carter fired the fatal shot or could be guilty under an accomplice liability theory is not preserved because he only presented a self-defense argument to the trial judge in support of his directed verdict motion." (App. p. 2). The Court of Appeal erred. In denying the directed verdict motion the judge ruled on the hand of one is the hand of all theory stating, "In the light most favorable to the State under the hand of one, hand of all situation he could be guilty of various crimes." (R. p. 586, lines 1-3).

Rule 19(a) SCRCrP provides, "On motion of the defendant **or on its own motion**, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." (emphasis added). Although trial counsel referenced self defense in the

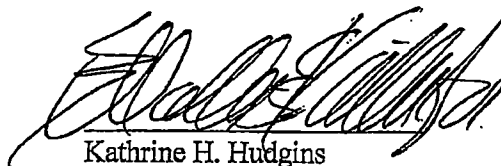
directed verdict motion, the trial judge considered the other evidence presented by the State, specifically the hand of one is the hand of all evidence. The issue was properly before this Court because the trial judge ruled, in denying the motion for directed verdict, that the State introduced sufficient evidence under the hand of one is the hand of all.

In ruling on the directed verdict motion the judge found that the State presented sufficient evidence under the hand of one is the hand of all theory. The State could not prove who fired the fatal shot but argued that Petitioner was guilty even if the co-defendant shot under the hand of one is the hand of all theory. The State, however, failed to produce sufficient evidence that Appellant and co-defendant Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory argued by the State. Petitioner challenged the trial judge's finding that the State presented sufficient evidence. The Court of Appeals erred in finding the issue unpreserved for appellate review. Upon considering the merits of the issue, this Court should reverse as the State failed to present sufficient evidence, either directly or under a theory of the hand of one is the hand of all, to survive the directed verdict stage.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathrine H. Hudgins', written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 24th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 2014-UP-178 (S.C. Ct. App. filed 4/30/2014)
10-GS-29-01000, 01001

THE STATE,

RESPONDENT,

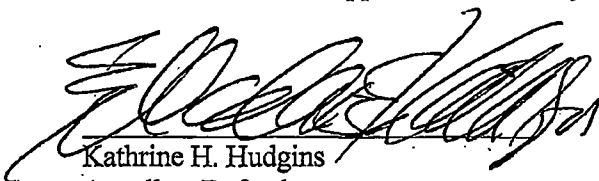
V.

ANTHONY RODRICKUS CARTER,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 24th day of July, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of July, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

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

**Appeal from Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge
Appellate Case No. 2011-203566**

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

PETITIONER.

**RETURN TO PETITION FOR WRIT OF CERTIORARI TO COURT OF
APPEALS**

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err in finding the issue procedurally barred and refusing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose?

COUNTER STATEMENT QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly found that Petitioner (Carter)'s argument on direct appeal is not properly before this Court because he failed to present the same argument to the trial judge?

II. Whether the trial judge did not abuse his discretion by denying Petitioner (Carter)'s motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or, if the fatal shot was fired by his co-defendant, Maurico Stevens, that Carter was guilty under a theory of accomplice liability?

STATEMENT OF THE CASE

Petitioner, Anthony Rodriekus Carter (Carter), is currently incarcerated in the Lee Correctional Institution, of the South Carolina Department of Corrections, as the result of his Lancaster County convictions and sentence for murder and possession of a firearm during the commission of a violent crime. The Lancaster County Grand Jury indicted Carter in 2009 for possession of a pistol by a person convicted of a violent crime (2009-GS-29-1167). The Grand Jury indicted him in August 2010 for murder (10-GS-29-1000) and possession of a firearm during the commission of a violent crime (10-GS-29-1001.). **R. pp. 669-74.** The latter two charges stemmed from the May 3, 2010 shooting death of three year old J.J. (the victim). Sixth Circuit Public Defender Michael H. Lifsey represented Carter in the trial court, and Sixth Circuit Solicitor Douglas A. Barfield, Jr., prosecuted the case.

On November 7-10, 2011, Carter received a jury trial before the Honorable Ernest J. Kinard. At the close of the State's case on November 9, 2011, Carter pled guilty to possession of a pistol by a person convicted of a violent crime and Judge Kinard deferred sentencing. **R. p. 572, line 14 - p. 574, line 5.** Judge Kinard charged the jury on the lesser included offenses of voluntary and involuntary manslaughter; self-defense; transferred intent and accomplice liability. The jury convicted him of murder and possession of a firearm during the commission of a violent crime. **R. p. 639, line 2 - p. 641, line 24.**

On November 17, 2011, Judge Kinard sentenced Carter to thirty-two years imprisonment for murder and to five years, concurrent, for possession of a firearm during the commission of a violent crime. Judge Kinard imposed a sentence of time served for

possession of a pistol by a person convicted of a violent crime. **R. p. 662, line 8 - p. 667, line 23.**

Carter timely served and filed a notice of appeal. After briefing by the parties, the Court of Appeals affirmed Carter's convictions and sentence in an unpublished, *per curiam* Opinion. *State v. Anthony Rodrickus Carter*, 2014-UP-178 (S.C. Ct.App., Apr. 30, 2014). **App. pp. 1-2.** Carter filed a timely Petition for Rehearing. **App. pp. 3-12.** The Court of Appeals denied rehearing in an Order filed on June 25, 2014. **App. pp. 13-14.** Carter filed his Petition for Writ of Certiorari in this Court on July 24, 2014. Respondent now makes Return to his Petition.

ARGUMENTS

I. The Court of Appeals properly found that was Carter's argument is not preserved for review on direct appeal because he failed to present the same argument to the trial judge.

Carter moved for a directed verdict at the close of the State's case. In its entirety, he argued that:

MR. LIFSEY: All right. Judge, I would move for a directed verdict. I could cite *State versus Dickey* and I would leave that matter to your discretion which is the self-defense defense for the jury.

R. p. 58, lines 22-25. The trial judge denied his motion, finding that Carter could be guilty of various crimes under a theory of accomplice liability. **R. p. 586, lines 1-3.**

The case to which Carter was apparently referring is *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011). In *Dickey*, this Court held that the defendant, who had been convicted of voluntary manslaughter, was entitled to a directed verdict in his homicide trial because the prosecution had failed to disprove self-defense. *Id* at 499-503, 716 S.E.2d at 101-03. The case does not deal in any fashion with questions of transferred

intent or accomplice liability, as now being argued. Further, Carter did not object to the trial judge's decision to charge accomplice liability (**R. pp. 576-77**) or the subsequent jury instruction on this legal theory. **R. pp. 649-50**. Instead, his trial counsel reasonably conceded that this charge was supported by the evidence, stating, "I understand. I can't argue with your reasoning on that." **R. p. 577, lines 2-3**.

On appeal, the Court of Appeals rejected Carter's argument as follows:

PER CURIAM: We find any issue regarding the sufficiency of evidence that Anthony Rodriekus Carter fired the fatal shot or could be guilty under an accomplice liability theory is not preserved because he only presented a self-defense argument to the trial judge in support of his directed verdict motion. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *id.* at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."); *id.* ("A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below.").

State v. Carter, p. 2. **App. p. 2**. Respondent submits that the Court of Appeals correctly disposed of Carter's argument.¹

Here, Carter not only did not advance the same argument at trial, he affirmatively conceded the existence of evidence supporting a jury charge on accomplice

¹ In addition to the authorities cited by the Court of Appeals, Respondent would cite the following cases. *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one in support of directed verdict motion at trial and a different theory on appeal); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (party may not assert different argument in support of objection on appeal from that raised at trial); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). See also *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

liability. *Cf. State v. Nathari*, 303 S.C. 188, 200, 399 S.E.2d 597, 605 (Ct.App. 1990) (even assuming that recklessness was an element of felony D.U.I. and should have been charged to the jury, defense counsel conceded appellant's "recklessness in his closing argument and thereby has waived any objection to the trial court's charge in this regard"); *State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) ("One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered"). Thus, the Court of Appeals correctly found that his present argument is not properly before this Court on appeal.

II. Alternatively, the trial judge did not abuse his discretion by denying Carter's motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or that, if the fatal shot was fired by his co-defendant, Maurico Stevens, Carter was guilty under a theory of accomplice liability.

Assuming *arguendo* that the Court finds his procedurally barred argument nevertheless preserved for appellate review, Carter contends that the trial judge erred by denying his motion for a directed verdict because the State did not prove the identity of the shooter and it failed to present any evidence that Carter and his co-defendant, Marico Stevens, joined to accomplish an illegal purpose, so as to make both men culpable under a theory of accomplice liability. Respondent disagrees and submits that the trial judge did not abuse his discretion by denying Carter's motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or that, if the fatal shot was fired by Stevens, Carter was nevertheless guilty under a theory of accomplice liability. Further, Carter affirmatively conceded below that there was sufficient evidence of accomplice liability to warrant a jury charge on that theory. **R. p. 577, lines 2-3.**

A. The prosecution's evidence.

This case was prosecuted under a theory of accomplice liability. As can be reasonably expected in a homicide case with eyewitnesses, there were varying accounts offered as to what occurred. The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the prosecution, was as follows. Rondriana Lanisha "Nisha" Cunningham testified that she was the victim's mother and that her daughter was three years old on May 3, 2010. She and the victim shared an apartment along with Nisha's boyfriend of over a year, Marico Stevens. Nisha had met Green, who worked with Stevens, on one occasion and she told Stevens that she did not like him. **R. pp. 125-28.** On Monday, May 3, 2010, Stevens picked Nisha up from York Tech, where she was going to school, around 6:15 p.m. He was driving their only vehicle, Nisha's blue, 1998 Chevrolet Malibu, and the victim was with him.² They got home at 6:30 and Nisha remained there. However, Stevens and the victim left the apartment later that evening, with Stevens telling Nisha that he was going to his father's house to get some money. Nisha got a phone call from Stevens at approximately 9:49 p.m., and she immediately went to the emergency room of Springs Memorial Hospital, in Lancaster. **R. pp. 128-32.** Nisha identified a gun for the Sheriff's Department as one that Stevens kept. **R. pp. 133-61.**

The victim was treated for a gunshot wound to her head at the hospital. Eventually, she was airlifted to Carolinas Medical Center, in Charlotte, North Carolina, that same night or early in the morning of May 4, 2010. Doctors treated her there, but Dr.

² He had picked her up from daycare.

Thomas D. Owens, medical examiner from Mecklenburg County, North Carolina, pronounced her dead at 6:15 a.m. **R. pp. 132-33; 340-41.**

Dr. Janice Ross, the forensic pathologist who performed the autopsy of the victim, opined that the cause of death was “[a]noxic encephalopathy,” meaning that the victim’s “brain was damaged enough to be actually dead due to laceration of the brain due to the gunshot wound of the head.” Dr. Ross explained that “the bullet entered the right side of the head towards the back and it went forward and to the left slightly upward, and it came out of the head, the left side of the head just above the left ear.” Otherwise, the victim had been a healthy little girl. **R. pp. 342-45.**

Emmie Amanda Coats testified that she lived in a Lancaster County mobile home park in May of 2010. Although she and Carter - who was known by the nickname of “Ant” - were not “boyfriend and girlfriend,” they were romantically involved. Coats had never met or heard of either Stevens or the victim before May 3, 2010. Sometime after the shooting, Coats became romantically involved with Beneco “Neco” Ganson. **R. pp. 176-81.** At the time of the murder, Coates worked as a nursing assistant from 11:00 p.m. until 7:00 a.m. each day. Coats described the trailer park in which she lived as a place where “[l]arge groups of people just hang[] out in the road or at someone's house” almost daily. Stevens, Ganson, J.D. Hemphill and John Jerrod “John John” Hill, routinely hung out there. Also, Coats regularly heard gunfire in the trailer park. **R. pp. 181-84; 187.**

On the night of May 3, 2010, Coates walked over to Carter’s residence, after they had corresponded by text messages. Several minutes later, Stevens arrive at Carter’s residence. The victim was with him and he was driving the Malibu. Then, “[t]hey told

me they were going to take me home." So, they all piled into the car. Stevens was driving, Carter was in the passenger seat, the victim was sitting in a car seat behind him and Coates was on the rear, passenger side. **R. pp. 187-92.** Following a brief stop at a convenience store, they headed to Coates' trailer. Carter had previously told Coates about a dispute that he had with Ganson, Hemphill, and Hill over something he had stolen from them. However, he did not tell her any details. Along the way to her residence, Carter told Stevens "about an incident that had happened between them earlier in the trailer park a few days before that came from the dispute that they had," in which the group had chased Carter out of the trailer park.² **R. pp. 192-22; 221; 223.** She described their conversation as a "hyped up situation" and she explained that Carter was not talking like he was worried or he did not want to go to the trailer park. To the contrary, Coates got the impression that "he wanted to see them on the way over there, like it kind of excited him that he was going into the trailer park." Although there was no discussion about whether anyone from the other group was at the trailer park, Stevens "reach[ed] down ... under his seat and he passed Ant the gun." Carter laid the gun in his lap. **R. pp. 192-95; 221; 224; 231-32.**

As they approached her trailer, Coates saw Ganson, Hemphill and some other people (but not Hill) crowded around an older model, light colored car that was parked near the roadway. This group was across the street and some distance from Coates' trailer. Carter also saw the group and said, "There they go." When they reached Coates' residence, Stevens parked the Malibu close to the trailer and not completely in the

² On cross-examination, she testified that she was only aware of one incident. On that occasion, Ganson ran Carter out of the trailer park and told Carter, if he ever saw Carter again, Carter "better have a gun." Carter was reluctant to come to the trailer park for about a week after this incident. **R. p. 223.**

driveway, so that the front of the vehicle was closest to the trailer. **R. pp. 197-203; 217-18; State's Exhibits 9-10.** As soon as the car stopped, Carter jumped out of it and began walking toward the roadway. He had his weapon at his side, covered by his shirt. Coates did not want any trouble at her residence. So, she got out of the driver's side rear door and ran to the passenger side, pleading with Carter "Don't do this, don't do this near my house." Carter and Hemphill⁴ met "in the middle like they were facing off." (Sic). **R. pp. 203-205.** Stevens was standing by the front passenger side of the car and near the front of the car, while the victim remained in the unbuckled child seat. Although Carter and Hemphill spoke, Coates could not hear what was said. By then, she was on the steps to her residence. After other members of Hemphill's group joined in the argument, Carter "turned and walked ... back towards the car on the passenger side." **R. pp. 205-06.**

By the time "[h]e got between the end of the car and probably the back passenger side door," Coates heard a shot and she "saw a flash from across the street." When Carter turned as if he was going to fire back at the group and Stevens was yelling for him to "squeeze," Coates ran into her trailer and heard "eight or nine" more gunshots. She looked out of a window after the shooting stopped, and she saw the Malibu backing out of her driveway. She also saw "people running" into nearby woods. **R. pp. 206-09; 228.** Coates went to work that night. She did not know that anyone had been shot until Carter telephoned her from the hospital and told her that his "baby cousin" had been shot.⁵ She spoke to police on the night of May 3rd and again the following morning. Although she

⁴ Coates did not see Hemphill, Ganson or anyone, other than Carter, with a weapon. **R. pp. 204-05.**

⁵ It was her understanding that Stevens was the victim's father and that Stevens and Carter were cousins. Also, she and Carter later exchanged text messages that night. **R. p. 210.**

knew that the victim had been shot by that time, she was not completely honest about what she had seen until she gave a second written statement on the 4th, because she did not want to be involved. She found three .40 caliber shell casings in the yard, close to her residence on the morning of the 4th (State's Exhibit 11), which she gave to Inv. Danny Bennett, of the Lancaster Sheriff's Department, when he came to her residence looking for them. **R. pp. 184-86; 209-14; 219-20; 236-39; 396.**

Beneco Ganson testified that he knew Carter, or Ant, from school, and that he was good friends with both J.D. Hemphill and John Jerrod Hill. He also confirmed that he and Coates had been romantically involved. However, he denied knowing Stevens. **R. pp. 276-78; 305.** Ganson and many of his friends hang out in the trailer park where Coates lived and he agreed that it was "a hangout place." A dispute arose between Hill and Carter roughly two months before the murder. While Ganson was not present when the transaction leading to the dispute occurred, he was told that Carter owed Hill money. On the night of May 3, 2010, he was with the mother of his child, Jennifer Morris, at the home of Morris' mother where he also lived. Eventually, he went to the trailer park in question "around 7:30 or 8:00." **R. pp. 278-81; 307.**

Subsequent to the initial dispute but before the shooting, Ganson, Hemphill and Hill accosted Carter as he was leaving Coates' trailer. Also, they beat up Carter's brother on another occasion. **R. pp. 299-306.** Ganson had planned to meet Hemphill and did not know if anyone else would be there. Ganson was unarmed. He saw Hemphill, who was likewise unarmed at the time, but he did not see Hill. Carter was not there when he first arrived. He and Hemphill were talking as they stood near the Honda owned by

Hemphill's girlfriend, across the street and two or three trailers from Coates' trailer. An unfamiliar car pulled into Coates driveway and three people got out of it. At first, Ganson could not see the faces of these people, but he soon saw Carter walking across the street and headed in the direction of Ganson and Hemphill. **R. pp. 281; 285-89.** As Carter got close to them, Hemphill walked toward Carter in the road. Carter had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill. The two men continued to argue with one another. Ganson heard Carter tell Hemphill, " 'I ought to shoot you but I ain't want [(sic)] to do the time.' " He also asked, " 'What you gone do now?' " Then, Carter turned and walked back into Coates' driveway. The last time Ganson saw Carter, he was "a good little ways" from the car, while he and Hemphill were on opposite sides of the Honda. **R. pp. 289-94.**

According to Ganson,

When he turned around and walked back to his direction, the girl we was talking to, she had my phone in her car so we walked to the car and I was trying to get my stuff from her and everything, she had moved my phone and everything and the next thing I know I heard the gunshots. When I heard the gunshots I took off running behind this trailer and I hid under the trailer until the gunshots stopped. When the gunshots stopped I laid right there for about an hour or two and ... me and J. D. ran through the woods and met up at Crimson Drive, and when we met up on Crimson Drive I think [Hemphill] walked up toward the store, I went in the woods and hid in the woods because the police and stuff was around.

R. p. 292, lines 3-16.⁶ See also **R. pp. 294-95.** Also, Hemphill had a gun by the time the shooting occurred but Ganson was still unarmed and he did not see anyone else with a gun. **R. p. 294.**⁷

⁶ He did not know if the police were looking for him, but he was on probation and had not reported. **R. p. 292.** He explained that the girl left in her Honda after the shooting. **R. p. 296.** Further, he had not said anything to Carter during the incident. **R. pp. 298-99.** Also, he learned the following day that law enforcement had found his cell phone. **R. pp. 293-94.**

At some point late that night or early the following morning, Morris picked up Ganson and ultimately took him to Hill's residence where he stayed until later on the morning of the 4th. After receiving a phone call from Hemphill, on the 4th, he had Morris take him to the Lancaster County Sheriff's Department and he gave a statement. He was immediately arrested as the result of a detainer from York County for unrelated charges. **R. pp. 282-84.** Morris corroborated his account with respect to the times he claimed that he had been with her. **R. pp. 264-71.** Although there had just been a shooting, there was a hole in the rear window and the Malibu had two bullet holes in it, apparently neither Stevens nor Carter bothered to check on the well-being of the three year old victim. This is readily inferrable from evidence that, instead of driving to the hospital immediately, Stevens drove to the apartment of his father's friend, Lawrence Alexander, where his father, Eric Sanders, was playing cards. Stevens excitedly told those present that his car had been shot up. Only when someone inquired about the victim's well-being did he go to the car and Carter handed her to him. Then, he only took her to the hospital after the others who had seen the condition of the car and saw blood coming from her head ordered him to do so. **R. pp. 327-34; 337; 346-51.**

Kayla Estes was Carter's girlfriend on May 3, 2010. Estes knew Ganson, Hemphill and Hill. However, she did not know Stevens. Carter told her that he had a beef with the other men she knew "[o]ver money," and he had told her that "he would handle it." Between 9:00 and 10:00 p.m., Carter called her from his residence and told her about

⁷ Ken Benson lives across the street and some distance down the street from Coates, in the same trailer park. He was inside his home when he heard the shooting. He immediately told his daughter to go to the back end of the trailer and he ducked when the shooting began. He went outside after the shooting was over and saw the Honda drive away from the area. In all, he heard between five and ten shots. **R. pp. 137-45.**

what had occurred at the trailer park. **R. pp. 315-20.** On cross-examination, Carter elicited that Carter had told her that "there was a problem;" that he and Hemphill had met in the roadway; and that both men agreed that the matter was "quashed." Carter also told her that after he had turned and walked away from Hemphill, Ganson said, "F--- that, I'll get him." At that point, Carter heard shots. Stevens wound up with the gun and began shooting. Afterwards, they drove to the hospital. **R. pp. 320-21.**

At 9:53 p.m. on May 3, 2010, Craig Greenlee, then in the patrol division of the City of Lancaster Police Department, was parked in the parking lot of a Main St. restaurant when a late model Malibu passed. The vehicle had its emergency flashers on and was traveling at a high rate of speed. Officer Greenlee pulled in behind the vehicle, which did not stop even after he turned on both his blue lights and siren. As they were driving, he noticed that the car's rear window "had been shot out" and he reported this to dispatch. **R. pp. 93-98.** Officer Greenlee ultimately followed the Malibu to the emergency room driveway at Springs Memorial Hospital, where it stopped. Carter and Stevens got out of the vehicle and Carter carried a smaller person into the emergency room. Both men were yelling and both had blood on their clothing. Officer Greenlee had to force both men out of the emergency room, so that the medical personnel could treat the victim. Both men told him that Ganson was responsible for the victim's condition and that the incident had occurred on Mcilwaine Rd. **R. pp. 98-102.**

Because Mcilwaine Rd. is not in the City of Lancaster, he reported this information to dispatch and asked for assistance from the Lancaster County Sheriff's Department. He then helped secure the vehicle until members of the Sheriff's Department

arrived. While there, he not only saw the damage to the rear window, he also saw two bullet holes in the roof of the car. **R. pp. 103-04.** A few minutes after Officer Greenlee arrived at the hospital, then-Deputy Joseph Catalano, with the Lancaster County Sheriff's Department, also got there. He had been informed of a report of "shots fired" on Athena Rd., where the trailer park is located, and he was asked to go to the hospital to determine if that incident was connected to the reported shooting. At the hospital, Deputy Catalano spoke to both Stevens and Carter, as the men sat on the curb outside of the emergency room. Both men had blood on their shirts and Catalano learned that Stevens was the victim's father. When Carter was asked about what had occurred, he said that they had been driving down Athena Road when "someone started shooting into the vehicle." **R. pp. 106-10.**

Carter, however, denied knowing who had shot at the car. Deputy Catalano observed the same defects to the car that Officer Greenlee had described. Both Stevens and Carter were allowed to leave the hospital that night because the Sheriff's Department did not have any information that either had committed a crime. **R. pp. 110-12.**

Inv. Mike Adams, of the Lancaster County Sheriff's Department, also went to Springs Memorial Hospital on the night of May 3, 2010. After being briefed about the matter and learning about a shooting on Athena Rd., Inv. Adams saw the Malibu with the cracked rear window and the bullet holes in the roof. He then spoke to Carter and Stevens, who were not then suspects. When Inv. Adams questioned Carter in the parking lot about what had happened, all Carter told him was that Beneco Ganson had shot at them on Athena Rd. and Carter did not elaborate. Because Carter's shirt was bloody, Inv.

Adams obtained it from him even though Carter was reluctant to give it to him. **R. pp. 113-18; 123.** After that conversation, Inv. Adams went into the emergency room and spoke to Stevens. He also obtained Stevens' bloody t-shirt.⁸ The Sheriff's Department was, at the time, unaware of any reason to arrest Carter or Stevens. **R. pp. 118-19; 122.**

Sgt. Mike Miller and Deputy Caleb Graffam were dispatched to the "shots fired" call, and they arrived at 9:54 p.m. Along their way to that location, they heard the transmissions from Officer Greenlee and the City of Lancaster Police Department. However, there was not yet any known connection between the cases. When they reached the Athena Rd. area, they drove slowly through the area with their windows down. **R. pp. 147-49; 159-63.** The officers came across a black male walking in the roadway, alone, and they stopped him. They patted him down and he was unarmed. The officers then obtained his identification. The man was John Jarrod Hill. As soon as they had confirmed that Hill did not have any outstanding warrants, a woman "came out into the yard close to where we [were] ... screaming that a child had been shot." **R. pp. 152-56; 164.**

Hill left at this point. The officers learned that this woman was Coates and this was the first suggestion that the victim's injury may be connected to this shooting. The officers began looking around in the area and they soon discovered some spent shell casings between her trailer and the trailer across the street. Immediately, they blocked off the roadway, secured the area and waited on other officers to arrive. The other officers came shortly. **R. pp. 155-59; 164-65.**⁹

⁸ Expert testing of the t-shirts by a member of SLED's trace evidence department did not reveal the presence of gunshot residue. **R. pp. 485-91.**

⁹ Hill corroborated the officers' testimony about the stop. The only discrepancy in his account was that he was not patted down. **R. pp. 244-46.** Hill gave the Sheriff's Department a statement on May 3rd or on the

John Jarrod "John John" Hill was not living in the same trailer park as Coates on May 3, 2010, although he frequently went there. He spent the whole day at the home of his girlfriend's grandmother. Unlike the other witnesses, he knew all of the participants, including Stevens. He had seen Ganson and Hemphill during the day of May 3rd. However, he did not see them that night and he did not see Stevens anytime that day or night. **R. pp. 241-44; 246-48; 256.** Hill's dispute with Carter arose about a month and a half before the murder. It started when he gave Carter \$450.00 with which to buy him some cocaine. Instead of getting him the cocaine or returning the money, Carter "jumped the fence" or robbed him. Following that date, the men had two confrontations. About a week later, Hill approached Carter as Carter was visiting a man in the trailer park. Carter claimed that he had been in a wreck and that he would pay Hill after he got a check from that. **R. pp. 251-54.**

Then, about two weeks before the murder, they ran into each other on the road on which Coates lived. The men were about twenty feet from one another. Hill "told him to pay me and stuff like that when I seen him and he just took off running." Hill claimed that neither Ganson nor Hemphill were there and that no one had chased Carter on the second occasion. No guns were involved in either confrontation. **R. pp. 254-56.**

Lancaster County Sheriff's Department crime scene Inv. Jeff Steele processed the trailer park crime scene on May 3, 2010, where he was later joined by crime scene Inv. Ken Taylor.¹⁰ They found a fired bullet jacket fragment at the edge of the driveway of the

morning of the 4th, and he voluntarily submitted to gunshot residue testing that later was determined to be negative. **R. pp. 167-69; 172; 248-49; 486; 491-93.**

¹⁰Both were qualified as experts in crime scene investigations and shooting reconstruction, without objection. **R. pp. 385-89; 415-18.**

residence across the roadway from Coates' residence (**State's Exhibit Number 74**). On the side of the roadway, they found a .380 caliber cartridge casing; two .22 caliber cartridge casings; Ganson's Samsung cell phone; and a tan hat. In the roadway, they found two 7.65 millimeter casings and an unfired 7.65 millimeter bullet. **R. pp. 390-92; 394-99; 407-08; 416-21**. Investigators Steele and Taylor processed the Malibu on May 4th. When they did so, they discovered a fired bullet jacket fragment on the passenger's side floorboard (**State's Exhibit 75**); two pieces of a copper fragment from the seat cushion of the headrest on the back of the seat (**State's Exhibit Number 80**); and a lead core fragment under the spare tire in the trunk (**State's Exhibit Number 77**). From their review of the items seized, they determined that the car would have been parked so that the front of it was closest to Coates' trailer and the rear of the car was closest to the roadway, which was consistent with eyewitness descriptions. Also, there were no defects in the car on the driver's side or rear that would have been consistent shots hitting the car from those directions. **R. pp. 379-402; 393-95; 401-02; 422-28**.

Investigators Steele and Taylor also attempted to determine what they could conclude from examination of the bullet holes in the car's roof and the bullet hole in the car's rear window. **R. pp. 402-03; 423; 427**. As Inv. Taylor explained,

Typically when I get to the scene I want to try to if possible reconstruct it to the point of determining where the shots came from, and if possible, how many were actually fired that would have affected that target near the car, house or whatever. In this particular case after finding out that the car had been moved from the initial scene other than just determine the directionality of how things impacted the car it really didn't have any relevance to anything at the hospital parking lot, so that again was another reason that we felt impressed to go ahead and get it to a secure area so we can go ahead and process the car. But typically again we're going to look at the bullet holes that we find, the defects as we referred to and we're going to try to match those up if any of them are corresponding. If a bullet

entered on one spot and created a second or third or whatever we are going to try to match those up. And again, at the same time one of the key things is determine directionality and possibly an angle of impact to show whether it came from a downward angle or at an upward angle.

R. p. 426, line 24 - p. 427, line 18. He explained that he usually uses dowel rods to make these determinations. **R. pp. 427-28.**

In this case, there were two defects on the roof of the car. The first defect was toward the front and passenger side of the car's roof, while the second defect was "[a] little more toward the mid-section." Inside the car, he found that the defect to the rear window corresponded to the second defect in the roof. Because the larger hole was to the outside of the tempered glass (or, as he described it, "outward [cratering]"), he opined that the shot was not fired from the outside of the rear window. Further, both defects in the roof and the defect to the rear window "came from the front of the car toward the back of car at the passenger side moving toward the [mid-section] of the car at a downward angle." **R. pp. 428-36; 440-41; 459.**¹¹ He explained that the front window on the passenger side was completely down, but the driver's window was rolled up completely. On the other hand, the two rear windows were down several inches. None of these windows had defects in them. "The hole that I referred to as defect number one [in the roof] that was toward the front of the car, closest one up toward the front, we tracked it ... into the back seat cushion." This was represented by a photograph, **State's Exhibit 69. R. pp. 436-39; 456-58.**

SLED Agent Carl Kenley, a crime scene investigator, also processed the Malibu to determine the angles at which the shots had been fired into the roof of the vehicle. He

¹¹ A copper-jacketed fragment found at the scene was consistent with having passed through the window. **R. pp. 441-42.**

was assisted by Agents Ricardo Prince and Scott Hardy. He corroborated Inv. Taylor's findings. **R. pp. 475-83.** When Stevens returned to Mr. Alexander's apartment and talked to his father after the shooting, Mr. Alexander did not see a gun. Later that night, however, Mr. Alexander saw Mr. Sanders "had a gun on the hood of his truck." There were some angry "young guys" present and they were talking about trying to get some .40 caliber bullets. Mr. Sanders thereafter put that weapon in his truck. **R. pp. 336-37.**

With the assistance of the Sanders, law enforcement found the weapon. Ms. Sanders retrieved this weapon (**Court's Exhibit 4**) from a man named Derrick, and she turned it over to Inv. Mike Howell. **R. pp. 352-55; 360-65; 369-75; 383-84.** SLED tested this Hi-point .40 caliber weapon for "touch DNA" and compared swabs from it to known standards from the victim, Carter, Stevens, and Coates. Testing revealed a mixture of DNA from more than one person. Everyone was excluded as a possible contributor to the DNA mixture, except for Stevens, and he could not be excluded. "[T]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 65." **R. pp. 498-05; 509-12; 514-15.**

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats (**State's Exhibit 11**), the bullet jacket fragment found in the passenger side floor board of the car (**State's Exhibit 75**), the copper fragment from the headrest in the backseat of the car (**State's Exhibit 80**) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (**State's Exhibit 74**) were all fired by **Court's Exhibit 4**, the recovered .40 caliber weapon. **R. pp. 523-530.**

Carter gave law enforcement two statements in this case. He gave the first statement on May 4, 2010, before he was arrested and he gave the second statement on May 6th, after he was under arrest. Each statement was long and was videotaped. A DVD of each statement was introduced and published to Carter's jury as **State's Exhibits 98** and **99**, respectively. *See R. pp. 531-72*. In the first statement, he initially denied knowing Coates, he inaccurately described Coates as a "skinny white girl" when she is a larger woman, and he claimed that Stevens must have known her. He admitted getting out of the vehicle at Coates' residence after seeing the people with whom he had a dispute, but he claimed that he had been unarmed. By the end of this interview, however, he admitted knowing Coates; he admitted that she had been to his residence; and he stated that Coates had hugged him when he got out of the car. He likewise finally admitted that he had handled the weapon that day, but he denied that there had been any return fire from his side of the road. **State's Exhibits 98**. In the second interview, he first repeatedly denied having a weapon on May 3rd, but eventually changed his story. He indicated that he knew the people with whom he had the dispute would be at the trailer park before he went there and that he placed the gun that he had gotten from Stevens in his lap. **State's Exhibit 99**.

He also admitted that he had gotten out of the car with the weapon after he saw the persons with whom he had the dispute, and that he had displayed the weapon to Hemphill. Further, he claimed that Hemphill was likewise armed. Yet, he did not say that Hemphill had pointed a weapon at him, and he ultimately claimed that Stevens had been the shooter. **State's Exhibit 99**.

B. Discussion.

There was no error. South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

"[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another." *State v. Fennell*, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000).³ This Court set forth the applicable law on review of motions for a directed verdict in *State v. Bostick*, 392 S.C. 134, 139-40, 708 S.E.2d 774, 776-77 (2011):

A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); *see also State v. Williams*, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d at 452 (citing *State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total

³ This doctrine has been consistently recognized in South Carolina cases. *See State v. Gandy*, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds, State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993); *State v. Horne*, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that the State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); *State v. Williams*, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him).

failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

See also *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). This standard is consistent with *Jackson v. Virginia*, 443 U.S. 307 (1979) (evidence is sufficient to send a case to the jury if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). See *State v. Stokes*, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989).

Here, the State’s evidence, as discussed above, reasonably tended to establish that Carter fired the fatal shots that struck the victim in the head and killed her. Specifically, the record shows that:

- Carter created the dispute with Hill, Ganson and Hemphill, by robbing Hill of \$ 450.00;
- Carter had at least one, if not two run-ins with these men following the robbery and before the murder;
- Carter had told his girlfriend at the time, Kayla Estes, about a beef with the other men “[o]ver money,” and he had told her that “he would handle it;”
- Carter was aware that there may be a difficulty with these men if he encountered them at the trailer park, but he and Sanders agreed to take Coates home on the night of May 3rd;
- following a “hyped up” conversation with Sanders on the way to Coates’ residence, in which he apparently was looking forward to seeing his rivals at the trailer park, Sanders gave him the .40 caliber semi-automatic pistol (Court’s Exhibit 4) and he kept it in his lap;
- he saw Hemphill and Ganson as they approached Coates’ trailer, and he said, “There they go;”

- Carter jumped out of the car as soon as it stopped, and he began walking toward the roadway, with the weapon at his side, covered by his shirt;
- he then met Hemphill in the roadway, and the men argued;¹³
- Ganson testified that Carter had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill;
- Carter and Hemphill continued to argue and Ganson heard Carter tell Hemphill, "I ought to shoot you but I ain't want [(sic)] to do the time." He also asked, "What you gone do now?"
- Carter walked back toward the passenger side of the Malibu after this confrontation, but when a shot was fired from the other side of the road, he turned as if to shoot, with Stevens repeatedly encouraging him to "squeeze;"
- then, a number of shots were fired, inferably by him;
- following the crime, neither Carter nor Stevens checked on the three year old victim, until Stevens spoke to family and friends shortly after the shooting and they inquired about her;
- all of the shots that hit the car, including the shot that took the life of the innocent three year old victim, were fired from the passenger side of the vehicle and none could have been fired from the other side of the roadway; and
- ballistics testing confirmed that the three .40 caliber cartridges collected by Coats (State's Exhibit 11), the bullet jacket fragment found in the passenger side floor board of the car (State's Exhibit 75), the copper fragment from the headrest in the backseat of the car (State's Exhibit 80) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (State's Exhibit 74) were all fired by Court's Exhibit 4, the recovered .40 caliber weapon.

Standing alone, this evidence - based upon the two eyewitness accounts - was sufficient to submit the charge of murder to his jury, separate and apart from potential guilt under a theory of accomplice liability.

Carter's contention that he lawfully armed himself ignores that he could not lawfully arm himself because he was a previously convicted felon, and that he pled guilty

¹³ From Ganson's testimony, it does not appear that Hemphill was armed, yet. However, Hemphill was armed after the shooting began.

at the close of the State's case to the offense of possession of a pistol by a person convicted of a violent crime. R. p. 572, line 14 - p. 574, line 5. More importantly, his unlawful possession of the weapon was the proximate cause of the homicide because he knowingly brought it to a confrontation with Hemphill, which he instigated. Thus, he was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty. *Accord State v. Slater*, 373 S.C. 66, 70-71, 644 S.E.2d 50, 52 (2007) (“the instant case, Slater fails to meet the first requirement for the self-defense charge: specifically, Slater was not without fault in bringing on the difficulty. ... Slater's actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim”). Instead, Carter went looking for trouble and, unsurprisingly, he found it. *Id.*

Alternatively, the trial judge properly submitted the case to the jury because there was evidence that Stevens shot the victim, albeit emanating from Carter's self-serving statements to Estes and law enforcement. Because this point was conceded in the lower court, the State will not argue it in detail. However, the State would note that Stevens' act in shooting the weapon that he had just reacquired from Carter, after Carter had initiated the confrontation with the other group, clearly occurred while both men were present at the scene and “intentionally, or through a common design, aid[ing], abet[ting], or assist[ing] in the commission of [the murder] through some overt act.” *See State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010).

As the Court explained in *Gibson*,

Under the “hand of one is the hand of all” theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the

execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).

“Under an accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.’” See *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, “[a] formally expressed agreement is not necessary to establish the conspiracy” which brings the accomplice to the scene of the crime).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769–70. Because of the discrepancy as to who fired the shots that killed the victim, the matter was properly submitted to the jury. *Id.*; See also *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438–39 (2011) (“Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted”). As a result, Carter’s argument lacks merit.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this Court should deny certiorari.

Respectfully submitted,

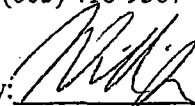
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August 19, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge
Appellate Case No. 2011-203566

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

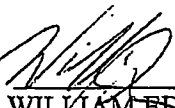
PETITIONER.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Return to Petition for Writ of Certiorari on counsel for the Petitioner by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Kathrine H. Hudgins, Esq.
SCCID - Division of Appellate Defense
1330 Lady St., Ste #401
Columbia, SC 29201

This 19th day of August, 2014.



WILLIAM EDGAR SALTER, III

S.C. Bar # 4806

Office of Attorney General

P. O. Box 11549

Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

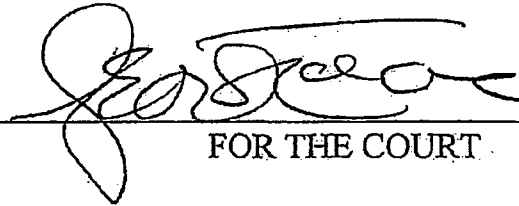
Anthony Rodrickus Carter, Petitioner.

Appellate Case No. 2014-001601

Lower Court Case Nos. 2010-GS-2901001, 2010-GS-2901000

ORDER

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals in *State v. Carter*, Op. No. 2014-UP-178 (S.C. Ct. App. filed April 30, 2014). The petition is denied.

 C.J.
FOR THE COURT

Columbia, South Carolina

December 4, 2014

cc:

The Honorable Jenny Abbott Kitchings

~~Kathrine Haggard Hudgins, Esquire~~

Donald J. Zelenka, Esquire

Alan McCrory Wilson, Esquire

W. Edgar Salter, III, Esquire

John W. McIntosh, Esquire

Douglas A. Barfield, Jr., Esquire

The Honorable Jeff L. Hammond

DEC 4 2014

SC OFFICE OF
APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF LancasterAnthony Carter # 292039
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2015 CP 29 00075

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institution, 990 Wiscoky Hwy., Bishopville S.C. 29010
2. Name and location of Court which imposed sentence Lancaster County General Sessions
3. Name(s) of co-defendant(s) (if any) Marice Stevens
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-29-01000 Murder
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 17, 2011 / 32 years mandatory with 5 years concurrent on
 - (b) the possession of the weapon while committing a violent crime

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals _____
- ii. South Carolina Court of Appeals Rehearing _____
- iii. South Carolina State Supreme Court _____
- (b) the result in each such Court to which you appealed:
- i. Denied _____
- ii. Denied _____
- iii. Denied _____
- (c) the date of each such result:
- i. April 30th, 2014 _____
- ii. June 25th, 2014 _____
- iii. December 4th, 2014 _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) N/A _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel - Failure to investigate
 (b) Ineffective Assistance of Counsel - Failure to make objections
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) Counsel failed to review the facts and law of case
 (b) Counsel failed to make objections during and before trial
 (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. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. N/A
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. _____
 ii. N/A
 iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____ *N/A*
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____ *N/A*
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- _____ *N/A*
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____ *N/A*
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____ *N/A*
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____ *N/A*
- (c) _____
17. Were you represented by an attorney at any time during the course of:

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

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. Lancaster County Public Defender's Office - Michael Lifsey
- ii. South Carolina Appellate Defense - Katherine Hudgens
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial and Sentencing
- ii. Direct Appeal
- iii. _____

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

Vacate Conviction or Reverse and Remand for new trial

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

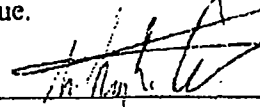
No

STATE OF SOUTH CAROLINA)

County of Lancaster)

VERIFICATION)

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



SWORN to and subscribed before me this 8
day of Jan, 2015.

Dolma Series (L.S.)
Notary Public

My Commission Expires: 11-4-2015

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

Anthony Carter
I, Anthony Carter, 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.

Anthony Carter
Applicant

SWORN or affirmed to and subscribed before me this
8 day of Jan, 2015.
Dolma Sines
Notary Public

My Commission Expires: 11-4-2015

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

Anthony Carter, #292039,

2015-CP-29-0075

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on January 13, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. The Applicant was indicted at the August 2010 term of the Lancaster County Grand Jury for murder (2010-GS-29-1000). Michael Lifsey, Esquire, represented him. Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. On November 14, 2011, the Honorable J. Ernest Kinard, Jr., sentenced the Applicant to thirty-two years imprisonment.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Carter, 2014-UP-178 (filed April 30, 2014). The Remittitur was issued on December 12, 2014.

II.

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to investigate.
 - b. Failure to properly object.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, and the Record on Appeal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d

733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

IV.

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

V.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

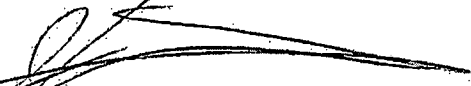
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CROOM HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 7th, 2015.

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS

ANTHONY CARTER, #292039

2015-CP-29-0075

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

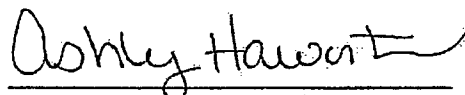
STATE OF SOUTH CAROLINA,

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** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Nathan James Sheldon, Esquire
Shaw Law Firm
PO Box 36250
Rock Hill, SC 29732

DATED this 7TH day of July, 2015.



Ashley Haworth, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2015-CP-29-00075

5 Anthony Rodriekus Carter

6 vs.

7 State of South Carolina

8

9 Lancaster, South Carolina

10 January 10, 2017

11 Before the Honorable William Jeffrey Young

12

13 APPEARANCES

14 For the State: Patrick Schmeckpeper

15 For the Applicant: Nathan Sheldon

16

17 Reported by: Michael C. Watkins

18 Official Court Reporter

19

20

21

22

23

24

25

1 INDEX

2 Michael Lifsey: 3

3 Anthony Carter: 25

4 Michael Lifsey: 33

5 Certificate: 40

6

7 NO EXHIBITS

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1 MR. SCHMECKPEPER: May it please the Court, Your
2 Honor? This is Anthony Carter versus State of South
3 Carolina, 2015-CP-29-0075. The applicant was indicted in
4 2010 in Lancaster County for murder, he was represented by
5 Mike Lifsey. The applicant proceeded to trial and was
6 found guilty on November 14th of 2011, Judge Kinard
7 sentenced him to 32 years imprisonment. Following an
8 unsuccessful appeal this application was filed on January
9 13th of 2015. At this point I'll turn matters over to
10 opposing counsel.

11 THE COURT: Yes, sir, Mr. Sheldon?

12 MR. SHELDON: Thank you, Your Honor. May it please
13 the Court? We are ready to proceed.

14 THE COURT: You may call your first witness.

15 MR. SHELDON: We call Michael Lifsey to the stand.

16 The witness, MICHAEL LIFSEY, was first duly sworn and
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. SHELDON:

20 Q Mr. Lifsey, please state your name for the record.

21 A My name is Michael Lifsey.

22 Q Were you trial counsel for Mr. Carter?

23 A I was.

24 Q And Mr. Carter was originally charged with murder; is
25 that right?

MICHAEL LIFSEY - DIRECT

1 A That's correct.

2 Q Along with possession of a weapon during a violent
3 crime?

4 A Yes, sir.

5 Q And then a possession of a pistol.

6 A That seems to be my memory, yes, sir.

7 Q Ultimately Mr. Carter was convicted of murder,
8 possession of a weapon during a violent crime, and while
9 we'll get to it later, pleads to that pistol charge; is
10 that right?

11 A Yes, sir.

12 Q I want to begin with just kind of -- if you could just
13 give a generic rundown for the Judge of the actual facts in
14 this case.

15 A The facts of the case are a three year old girl gets
16 shot in a -- we maintain by accident. Basically Mr.
17 Carter and his codefendant get in a dispute with a rival
18 group of young men, they arrive at the location of the
19 dispute with a three year old child in the car, the three
20 year old child is Mr. Carter's co-defendant's girlfriend's
21 child. The child is ultimately struck and killed by a
22 bullet in the head. Forensic information indicates that
23 the fatal shots that pierced the automobile and struck the
24 young child in the head were fired from the side of the
25 vehicle where Mr. Carter and his codefendant were. I

MICHAEL LIFSEY - DIRECT

1 guess that is the facts. We alleged -- our defense was
2 carter and his codefendant were defending themselves
3 against the young men on the other side of this dispute.

4 Q And just the theory of the State's case is some sort
5 of transferred intent; is that right?

6 A Yes, sir. The State proceeded under -- yes, sir.
7 Nobody contended that anybody shot the young child on
8 purpose, the State's theory was, though, a transferred
9 intent theory and hand of one being the hand of all.
10 There was much dispute, which I am sure you may ask me
11 about who fired the fatal shot, whether my client or the
12 codefendant, but the State's theory was the hand of one is
13 the hand of all and it really didn't matter.

14 Q At trial the co-defendants are not tried together; is
15 that correct?

16 A That is correct.

17 Q And ultimately Mr. Carter was convicted, the other
18 codefendant is not.

19 A Yes, sir, Mr. Carter went to trial first. They had
20 Bruton problems I think was the State's basis because they
21 had given statements -- or at least my client -- they had
22 Bruton issues. So the State opted rather than try to
23 redact the statement to try them separately -- and we had
24 a two week term of court, I can't remember if it was the
25 same judge or not both weeks, but they tried Mr. Carter

MICHAEL LIFSEY - DIRECT

1 first and then Mr. Stevens, the codefendant, the next
2 week. Mr. Stevens was found not guilty.

3 Q So because of these Bruton issues they are tried
4 separately.

5 A That's correct.

6 Q However they were going under the theory of the hand
7 of one is the hand of all.

8 A Yes, sir.

9 Q And would it be fair to say that the solicitor's
10 office at trial took the position it doesn't matter who
11 fired the shots?

-- 12 A Well, they certainly said that to the jury, they said
13 that to the jury, they said it didn't matter who fired the
14 fatal shot, that is correct. I think -- I can't tell you
15 what they thought about -- I know that the individual
16 officers thought that. I think the solicitor in his
17 opening statement and throughout the trial took the
18 position it really didn't matter.

19 Q At the close of the State's case in this case you make
20 a general directed verdict motion, don't you?

21 A That's correct.

22 Q What was that directed verdict motion based on that
23 you remember?

24 A You know, to be honest with you I don't remember the
25 specifics of it. I don't remember there being any real

MICHAEL LIFSEY - DIRECT

1 factual dispute in the case that I thought -- and I think
2 I made a direct verdict motion because I always make a
3 directed verdict motion on the general sufficiency of the
4 evidence. I don't remember anything particular about it,
5 I mean, I haven't looked at the transcript.

6 Q But just a generic general directed verdict to kind of
7 preserve that issue for later.

8 A Yes, sir.

9 Q Did you make any specific argument as to the State's
10 theory of the case and not being able to prove their theory
11 of the case?

12 A No, sir, I did not.

13 Q Would you agree that after the State presented its
14 evidence there was no testimony -- well, let me back up.
15 Did self-defense end up getting charged in this case?

16 A I believe so.

17 Q And essentially would it be fair to say you were
18 arguing self-defense throughout the trial?

19 A Yes, sir, that's fair.

20 Q Was there any argument prior to that directed verdict
21 motion or during that direct verdict motion that the State
22 had failed to prove that the codefendant and the defendant
23 themselves acted in some sort of concert?

24 A I can't remember the specifics of my argument, I
25 don't remember that being any issue. Because my memory of

MICHAEL LIFSEY - DIRECT

1 the facts are that they went there together and there was
2 testimony, I think, that both of them had handled the gun,
3 so I don't remember that being an issue and I certainly
4 didn't raise it. I don't remember raising it.

5 Q Would you agree that in order to have the hand of one,
6 hand of all the defendants have to be found kind of acting
7 in concert with each other? It can't simply be merely
8 present at the scene.

9 A Yes, sir. You've got to show that they acted
10 jointly, yes, sir, that's correct.

11 Q And did you contend -- was there any concession on
12 your behalf at trial that Mr. Carter was, in fact, the
13 shooter in this case?

14 A Our theory was a self-defense theory. My memory
15 is -- Mr. Carter gave a lengthy, lengthy recorded
16 statement. He never admitted that he fired -- that he was
17 the one who fired the fatal shot to the child, but he
18 ultimately admitted having the gun and he -- and the
19 statement didn't help him at all. I'm not sure I'm
20 answering your question, and I apologize, I'm sort of
21 rambling a little bit. Could you repeat your question?

22 Q Would it be fair to say that there was no concession
23 on your part at the trial that Mr. Carter fired the shots
24 in general.

25 A That is correct, we did not agree that he fired the

MICHAEL LIFSEY - DIRECT

1 fatal shot.

2 Q But there wasn't any dispute that someone, him or the
3 codefendant, fired the shots across the bow essentially
4 that ends up striking this child.

5 A They had to -- based on the physical evidence of
6 where the shots came from they had to have come from that
7 side of the vehicle.

8 Q So Mr. Carter is alleging self-defense.

9 A Correct.

10 Q While at the same time saying he is not the shooter to
11 begin with.

12 A Correct.

13 Q Which would then in turn, and correct me if I'm wrong,
14 essentially make the codefendant the shooter; is that
15 right?

16 A Well, that was his contention throughout the
17 statement. He never testified is my memory, my memory is
18 he didn't testify.

19 Q And so would you agree that the State would then --
20 that the theory of self-defense that Mr. Carter is raising
21 would also transfer to the codefendant even though he's not
22 on trial?

23 A Well, yes, sir. I think they were acting -- the
24 State's theory was it was the hand of one is the hand of
25 all, and I think there was plenty of evidence to support

MICHAEL LIFSEY - DIRECT

1 that. And I think -- so either they were both acting in
2 self-defense or they were not acting in self-defense.

3 Q That the State would have to prove that -- if the
4 codefendant were the shooter that he also was not acting in
5 self-defense?

6 A The State has to prove the absence of self-defense,
7 and I think the Judge charged that correctly my memory is,
8 and I'm sure I probably argued it without reviewing my
9 notes. I don't think I -- I think the State has to prove
10 the absence of self-defense beyond a reasonable doubt.

11 I'm not sure -- I certainly didn't view it as -- I did not
12 argue that the State did not prove self-defense as to the
13 other defendant, I think I viewed them jointly in the
14 self-defense argument and I think that's what it applies,
15 I think it applies to them jointly.

16 Q And there was no -- there was no preservation of any
17 sort of directed verdict motion other than the general
18 directed verdict; is that correct?

19 A Yes, sir. I mean, I know there was an appeal and my
20 understanding is that there was some statement about some
21 issue maybe not being preserved, but I haven't looked at
22 the appeal to see what was preserved or not.

23 Q And I want to move a little bit forward into this
24 trial. So as we mentioned he was charged with this murder
25 and this possession of a weapon during the violent crime,

MICHAEL LIFSEY - DIRECT

1 but he was also charged with this other gun charge; is that
2 right?

3 A Yes, sir.

4 Q And at some point in trial he ends up pleading to that
5 gun charge.

6 A Yes, sir.

7 Q But this is in the middle of trial, right?

8 A Yes, sir. I can't remember at what point, I want to
9 think right there at the very end.

10 Q Yeah. And when I say middle, I'm sorry, in the heat
11 of trial, it's not prior to trial or anything like that.

12 A Yes, sir. I can't remember exactly but during the
13 trial he did plead to -- I'm sorry, go ahead.

14 Q Explain for the Court how that comes about.

15 A Well, I mean, you know, his statement ultimately gets
16 admitted over my objections, I think I made Denno
17 objections at various points in the statement. We had a
18 Denno hearing, I objected to some of the statement coming
19 in, the statement comes in over my objections, but frankly
20 I think it was probably the proper ruling even though I
21 argued, I guess, otherwise, that's what we do sometimes.
22 And so the jury -- and it wasn't even just a written
23 statement, my memory is it was a recorded statement. The
24 jury heard him on the recorded statement admitting
25 possessing the pistol at one point so he ended pleading to

MICHAEL LIFSEY - DIRECT

1 that. He was either going to have to plead to it or -- I
2 think we would have had to have conceded at the trial. He
3 didn't plead to the possession during a violent crime, he
4 pled to just having the pistol which he had admitted in
5 the statement.

6 Q So did you have a conversation about -- with him about
7 this plea and his different options?

8 A Yes, sir, I remember talking to him about it. It was
9 so less important -- he'd been in jail a good little
10 while, and he admitted having the gun and so I don't
11 remember -- we did discuss it certainly. To answer your
12 question we discussed it, yes, sir.

13 Q What was your understanding -- what is your general
14 understanding in your 20 plus years of practice as to how
15 the trial judge should treat that guilty plea in the middle
16 of trial, or at the end of trial during trial? And maybe
17 if I could back up and just say, the indictments at the
18 beginning of trial were obviously read to the jury, right?

19 A Yes, sir.

20 Q And so one of these indictments disappears obviously
21 because of the guilty plea that they are going to hear, so
22 in your experience how would you expect the trial judge to
23 handle that?

24 A Well, I think it factually -- it depends on the facts
25 of the case. I think in some cases if a client pled to

MICHAEL LIFSEY - DIRECT

1 certain charges you might be able to exclude those because
2 they were too prejudicial or not relevant to the remaining
3 charges. The problem in this case, the judge informed --
4 I'm assuming this is what you're getting at -- the judge
5 informed the jury that he had pled to it, and in this case
6 I think they come in either way because the State would
7 have, I believe, been able to show that he possessed the
8 gun and they would have argued that he possessed the gun
9 and he'd already admitted it. So the only question in my
10 mind was do you plead to it and have the judge tell them,
11 "Hey look, he stood up" -- and I think I probably argued
12 this -- "and pled to what he was guilty of," or do I just
13 stand in front of the jury and say, "Convict him of this
14 one but not the rest of them." And I don't think
15 ultimately that probably makes that big of a difference
16 either way. So to answer your question I think it's
17 probably dependent on the facts of the individual case if
18 they were to plead to other charges, but in this case I
19 think it comes in either way. So I guess I didn't have a
20 huge problem with the Judge telling it to him that way.

21 Q And the judge, in fact, does tell the jury that, is
22 that your recollection?

23 A That's my memory, yes, sir, without reviewing the
24 transcript.

25 MR. SHELTON: And Your Honor, if I may just --

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1 Q Do you have a copy of the transcript?

2 A I do, yes, sir.

3 MR. SHELDON: And Your Honor, I'm going to page 607.

4 A Yes, sir, I have that.

5 Q If you could, Mr. Lifsey, just read along with me
6 starting at the very end of line six. "At the start of
7 trial there was an indictment that charged Mr. Carter with
8 possession of a weapon, but at the conclusion of the trial
9 yesterday after y'all left he just pled guilty to that
10 charge, pled guilty to possessing. You don't have to
11 possess a weapon for any length of time, you could just
12 have it, you know, and he testified that he had it at some
13 point so he just removed that from your consideration and
14 pled guilty to that charge." And then goes on to say that
15 it certainly creates no inference of guilt on the other two
16 charges.

17 A Yes, sir.

18 Q And that statement is made by the trial judge, and
19 would you agree that you don't object to that statement?

20 A Yes, sir I do not object to that statement.

21 Q And it's your contention today that that statement
22 gets made whether you ask the Judge not to reference it or
23 not.

24 A Well, I think the fact that he pled to it comes in
25 whether I ask him to reference it or not. The only thing

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1 that the Judge did say incorrectly was he said that --
2 excuse me, he testified he had it at some point -- well,
3 he didn't testify at the trial, okay? So clearly he
4 didn't -- I don't know whether Judge Kinard was referring
5 to his recorded statement that came in where he admitted
6 he had it or was referring to his testimony during the
7 guilty plea colloquy that he had it, I'm unclear as to
8 that. That's a little weird language. I mean --

9 Q And I was going to get to that kind of next.

10 A I'm sorry, I didn't mean to jump ahead of you.

11 Q The trial judge states that he testified; is that
12 right?

13 A Yes, sir.

14 Q But, in fact, he obviously did not testify.

15 A He did not testify during the course of the trial in
16 front of the jury.

17 Q And the jury wasn't -- and I'm sure this is a stupid
18 question, but the jury obviously wasn't present for the
19 guilty plea.

20 A Yes, sir.

21 Q So based on your experience, is it fair to say you
22 don't find that statement to be an improper statement of
23 facts or confusing to the jury in any way in this
24 particular case?

25 A I just didn't think it mattered, and the reason I say

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1 I don't think it mattered is that they had seen him on
2 video admitting to having that gun. So the mechanics of
3 how that -- how that fact gets to the jury that he is
4 obviously guilty of possession of a weapon not during a
5 violent crime but having the weapon really wasn't -- I
6 didn't view that as hugely significant. It was -- in fact
7 I viewed it, and I'm sure this is why we ultimately
8 decided to plead guilty, was that I found -- I think he
9 had a little better credibility with the jury telling the
10 jury that he had already pled guilty to what he was guilty
11 of versus -- I guess the other alternative is me standing
12 up there and not contesting the charge at all, or just
13 saying, "Go ahead and convict him of it." And I think
14 that's the basis of why he entered the plea and why I did
15 not object to the judge telling the jury that we had
16 entered the plea. And like I said, I think it would have
17 come in anyway.

18 MR. SHELDON: Beg the Court's indulgence for just one
19 second, Your Honor.

20 (Break in proceedings.)

21 Q Let's talk about the general investigation in this
22 case that you did. Did you have ample time to meet with
23 Mr. Carter and discuss all of the options?

24 A Yes. I met with him very, very frequently.

25 Q Was there a plea offer extended in this case?

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1 A I apologize to you, I can't remember, I think there
2 was. This is my memory, this was a very high profile case
3 in this community and there was a lot of public outrage
4 about the facts of this case. Solicitor Barfield, who had
5 the case, was very reluctant to make any plea offer at all
6 and it took forever to get a plea offer. My memory is he
7 finally made some plea offer of some sort or -- and I just
8 can't remember what exactly it was. I will tell you that
9 the problem was Mr. Carter wouldn't plead to anything. I
10 kept talking to him -- obviously we argued for involuntary
11 and I was pleasantly surprised that the Judge charged
12 involuntary to the jury. I couldn't even -- I kept
13 telling him I remembered many discussions, "If they ever
14 offered involuntary you need to plead to that," and I
15 couldn't even get him 100 percent settled on pleading to
16 involuntary, which only carried five. He was just adamant
17 that because he maintained that he was not the shooter in
18 this case that he didn't want to plead to anything. And
19 so I tried to explain to him repeatedly the whole hand of
20 one is the hand of all theory and he just never wanted to
21 plead to anything. I believe there was a plea offer, and
22 I apologize, I should have read the file prior to coming
23 out here, I just can't remember off the top of my head
24 what it was. I think it was murder for 30 or 35 or
25 something like that, but I defer to whatever he remembers

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1 in that regard.

2 Q As you mentioned earlier there was essentially two
3 sets of groups of individuals in this case; the codefendant
4 and Mr. Carter, and then another set of individuals that
5 basically kind of a shootout going on.

6 A Well, we certainly maintained there was a shootout,
7 now I don't think the State conceded that.

8 Q But there were guns being fired into another group of
9 people so there's two groups of people.

10 A Yeah. I think what is indisputable were shots were
11 fired from our side of the car. We maintained that shots
12 were fired from the other group as well but I think there
13 is some factual dispute over whether that happened or not,
14 they didn't concede that.

15 Q Were you able to interview all of the potential
16 witnesses in this case?

17 A I certainly interviewed witnesses. We had -- I can't
18 remember who worked -- I had a private investigator in the
19 case, I can't remember now specifically which PI worked in
20 this case.

21 Q Do you recall an individual named -- that goes by the
22 name of J. D. Hemphill and his involvement in this case?

23 A I do. If you'll give me a minute I have his -- yes,
24 sir, I do.

25 Q And Mr. Hemphill would be on the non-Mr. Carter side

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1 of this dispute; is that correct?

2 A Yeah. The only two people were -- when the shots
3 broke out or when the shooting broke out the child got
4 killed on our side of the vehicle were my client, Anthony
5 Carter, and Marico Stevens, the codefendant.

6 Q And so Mr. Hemphill would have been in the other
7 group?

8 A Yes, sir, or a bystander, depends on who you believe.
9 Some of them made themselves part of that group, some of
10 the folks made themselves bystanders, but I can't remember
11 which camp he fell into.

12 Q What exactly that you recall was Mr. Hemphill's
13 involvement in this case?

14 A I can read you what he says. Basically it said -- he
15 gave a statement.

16 MR. SCHMECKPEPER: Your Honor, I object to reading the
17 statement into the record on the grounds of hearsay.

18 THE COURT: It's sworn testimony, it's not hearsay.

19 THE WITNESS: Well, he didn't testify.

20 THE COURT: Oh, he didn't, okay.

21 THE WITNESS: He did not testify at trial.

22 THE COURT: I'm going to let it in, overruled.

23 A In his written statement to law enforcement he
24 said -- and he said a bunch of things but I'm getting to
25 the crux of the matter. "A female got out of the car and

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1 went in the trailer and a dude got out and started walking
2 toward the crowd. I saw that the guy had a gun in his
3 hand, I heard him say, 'What's up now? What's up now?'
4 And he raised up the gun and pointed it toward the crowd.
5 I took off running in the woods. I heard six to nine
6 shots," I think is what he said, I'm having trouble
7 reading his handwriting. "What happened then, I ran home,
8 I left the girl in the car." And then they basically
9 identified him. So that's what happened.

10 Q Mr. Hemphill does not testify at trial; is that
11 correct?

12 A That's correct. I think he's the one everyone said
13 was gone to Atlanta or something.

14 Q Did you have a conversation with Mr. Carter about Mr.
15 Hemphill and who he is and where he is or things like that?

16 A I'm sure we did. We went over this case ad nauseam.
17 Like I say, I have a pretty big file, I talked to him
18 about it. I do remember -- Mr. Carter I remember
19 discussing it with, I never did obviously discuss the
20 matter with Mr. Hemphill because he could not be located.

21 Q What efforts did you make to locate Mr. Hemphill? And
22 I'm sorry, let me just back up. After Mr. Hemphill gives
23 the statement he just kind of vanishes. Is it fair to say
24 that he's not around in Lancaster County after this
25 shooting?

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1 A He was to the wind, yes, sir. Like the word -- I
2 can't remember the word on the street, I believe he's the
3 one that the word on the street was he was in Atlanta
4 somewhere.

5 Q And you indicated you hired an investigator. Did you
6 make an effort to track Mr. Hemphill down?

7 A No, not really. Because to be honest with you I
8 didn't think Hemphill's statement helped us at all. He
9 has us -- and I say us, there's a whole dispute over
10 Stevens versus Carter on which of the one is the one, but
11 he basically has us sort of starting the dispute, which
12 obviously doesn't help the self-defense claim when you've
13 got to be without fault in bringing the difficulty. So my
14 thought process was that it was better to be able to argue
15 his absence than to try to find him and have him testify
16 consistently with his statement, or even I guess if he
17 testified inconsistently we could have tried to impeach
18 him with it under 613 or whatever the rule is. So no, I
19 didn't make any efforts to find Mr. Hemphill. I thought
20 it was strategically better for us for him not to be
21 present.

22 MR. SHELDON: Thank you. Beg the Court's indulgence.

23 THE COURT: Yes, sir.

24 (Break in proceedings.)

25 MR. SHELDON: Your Honor, at this time I don't have

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1 anymore questions for Mr. Lifsey.

2 THE COURT: All right, thank you. Mr. Solicitor?

3 MR. SCHMECKPEPER: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. SCHMECKPEPER:

6 Q Good afternoon, Mr. Lifsey. I am going to just kind
7 of try and go in order here. And start off with the
8 allegation concerning, I think, the directed verdict, and I
9 guess the first question I have for you is whether or not
10 there was evidence that the applicant was the shooter in
11 this case, from what the jury could infer that the
12 applicant was the shooter?

13 A I think it factually was undisputed that either
14 Carter or Stevens fired the fatal shot. I ultimately
15 thought it really didn't matter which of them fired the
16 fatal shot for the purposes of directed verdict or
17 anything else in this case. I mean, the jury could have
18 viewed Mr. Carter as the one who fired the shot because he
19 did ultimately give a statement and admitted handling the
20 gun after he had -- I can't remember how long, it was a
21 lengthy recorded statement, which throughout the course of
22 it he begins by denying -- he basically goes from never
23 having touched the gun to maybe touching the gun to at
24 some point holding the gun, so, I mean, they could have, I
25 guess. I never really thought that issue really mattered

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1 a whole lot because I thought it was fairly undisputed
2 that they came there together and were acting together in
3 some fashion, I mean, it didn't make sense otherwise. I
4 think he'd given a statement saying he went over there to
5 squash the beef, so he went over there with the intention
6 of talking to the people on the other side of the dispute
7 for one reason or the other.

8 Q And just to kind of back up. There was evidence that
9 there was some sort of beef or dispute between these
10 groups.

11 A Clearly. There had been a prior dispute between
12 them.

13 Q And the applicant was going over there to squash it?

14 A Somebody I remember squashed the beef because that
15 was just an usual term or phrase, but it was said
16 repeatedly by everybody involved in this case including, I
17 think, my client during his statement.

18 Q And he was on his way over there with the codefendant.

19 A Yes.

20 Q And how did the applicant become armed prior to
21 meeting with the other group?

22 A Well, you know, I can't remember. I think there was
23 some dispute about who got the gun and where the gun came
24 from and all of that.

25 Q Is it fair to say that the witnesses who testified

MICHAEL LIFSEY - CROSS

1 testified that the codefendant placed the gun in the
2 applicant' lap prior to this dispute?

3 A That sounds familiar to me, I mean, my client didn't
4 agree to that and never agreed to it. Of course, he
5 didn't testify at trial, but he didn't agree to that in
6 his discussing it with me. And, of course, he never
7 agreed to that during his long written -- long recorded
8 statement. But, yeah, that seems to be my memory is that
9 maybe it was the girl that said he -- I can't remember.
10 Somebody asked -- there's a question of who passed the gun
11 to who, but my memory is the girl says that it ended up
12 that he had it and put it there is my memory.

13 Q And I understand this wasn't y'all's theory of the
14 case, but from the perspective of deciding a directed
15 verdict motion, that would have been evidence for which a
16 jury can consider in finding conspiracy, or the hand of one
17 is the hand of all.

18 A Sure. I didn't think there was really much of a
19 directed verdict grounds, I mean -- I don't know. I felt
20 like I needed to make a directed motion but sometimes -- I
21 just didn't think there was much factual dispute in this
22 case.

23 Q I understand. Just to kind of build a record I think
24 you testified earlier, that there was expert evidence
25 presented at trial that the shots came from the applicant

MICHAEL LIFSEY - CROSS

1 and codefendant's side.

2 A Yes, sir.

3 Q And that the shot that killed the victim particularly
4 came from that side.

5 A Yes, sir.

6 MR. SCHMECKPEPER: Beg the Court's indulgence.

7 THE COURT: Yes, sir.

8 (Break in proceedings.)

9 MR. SCHMECKPEPER: Your Honor, I have no further
10 questions.

11 THE COURT: Any redirect?

12 MR. SHELDON: Not of this witness, Your Honor.

13 THE COURT: Thank you.

14 MR. SCHMECKPEPER: Your Honor, I would just ask for
15 the ability to call this witness again after the applicant
16 has testified in my case in chief.

17 MR. SHELDON: Your Honor, we would call Anthony Carter
18 to the stand.

19 The witness, ANTHONY CARTER, was first duly sworn and
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. SHELDON:

23 Q Mr. Carter, please state your name for the record.

24 A Anthony Carter.

25 Q And are you currently incarcerated in SCDC?

ANTHONY CARTER - DIRECT

- 1 A Yes, sir, I am.
- 2 Q Are you serving a 30 year sentence for murder?
- 3 A Yes, sir.
- 4 Q Mr. Carter, you brought this action for post
5 conviction relief; is that correct?
- 6 A Yes, sir.
- 7 Q As you and I have talked in the past, you understand
8 that all the Court can do today is vacate these convictions
9 and remand this case back for trial.
- 10 A Yes, sir.
- 11 Q At trial you understand that you could be found not
12 guilty, you could be found guilty of a lesser included
13 offense, or you could be found guilty of murder and face a
14 punishment up to life.
- 15 A Yes, sir, I do.
- 16 Q Substantially more than the 30 you got.
- 17 A Yes, sir.
- 18 Q And you still want to go forward with this action.
- 19 A Yes, sir.
- 20 Q Getting into this trial, what kind of relationship did
21 you and Mr. Lifsey have prior to this case going to trial?
- 22 A It was a pretty understanding relationship, as far as
23 the things I needed him to do he carried out.
- 24 Q And I'm sorry, I don't know about the court reporter
25 but I am having a hard time hearing you, if you could speak

ANTHONY CARTER - DIRECT

1 just a up little bit into that mic.

2 THE COURT: A little closer.

3 A I mean, up to the conviction we had a pretty good
4 relationship as far as him coming to see me and certain
5 things. There's a lot of things that he didn't do, but I
6 mean, the relationship between me and him seeing eye to
7 eye was okay, though.

8 Q And you've heard some of the things that have been
9 discussed here today; is that right?

10 A Yes, sir.

11 Q So I want to -- do you have any -- are there -- do you
12 have any concerns about anything Mr. Lifsey did prior to
13 trial in terms of not visiting you enough or anything like
14 that?

15 A Not on the visiting position like that, but as far as
16 carrying out certain actions I do.

17 Q What action would you have liked to have seen him do
18 that didn't get done in this case?

19 A I mean, as far getting the witness there, the main
20 witness was the Mr. Hemphill and Mr. Hemphill was the
21 person that was supposed to be getting killed, I feel like
22 he should have been there as the main witness.

23 Q And did you and Mr. Lifsey talk about Mr. Hemphill?

24 A I asked about him. I wrote a list down of the people
25 that I wanted there and he wasn't there, he was supposed

ANTHONY CARTER - DIRECT

1 to have been the main person there.

2 Q But let's kind of jump into the trial a little bit. I
3 want to talk -- I want to talk a little bit about this
4 guilty plea that you entered in to during trial. At what
5 point in trial did that come about if you can remember?

6 A About midway through the trial.

7 Q And did you and Mr. Lifsey have an opportunity to talk
8 about that during trial?

9 A Yes. He gave me advice that it would have been good
10 for me to plead guilty to it being that I possessed the
11 gun, and I was having a hard time wanting to accept that
12 but I went along with his advice because he advised me.

13 Q I'm sorry, you said you did want to accept that or you
14 did not?

15 A At first I didn't, but being that me and him was
16 talking I took his advice and did it. Because I was
17 asking him why would you plead guilty to it right now,
18 wouldn't that made me look guilty of the murder being that
19 I said it on the statement or not, but after lengthy
20 conversations with him I went ahead on with it.

21 Q And so you were concerned that that guilty plea would
22 make you look guilty?

23 A Yes, sir.

24 Q Were you -- what was your understanding of the way
25 that would be treated in trial?

ANTHONY CARTER - DIRECT

1 A My understanding was when I pled guilty to the gun,
2 possession of the gun that it would be no longer in front
3 of me or for the jury, and then as soon as the jury came
4 back out Judge Kinard informed them that I pleaded guilty
5 to it, which I didn't have no understanding at all because
6 I didn't think that was going to happen.

7 Q Back up to the pretrial. You remember a Jackson v.
8 Denno hearing being had in this case, right?

9 A Yes, sir, I do.

10 Q And so ultimately as Mr. Lifsey testified that
11 statement comes in, right, that you gave?

12 A That's correct.

13 Q Would you agree that in that statement the gun -- that
14 you do kind of say "I possessed a gun?"

15 A In that situation I did. But Miranda versus Arizona
16 says when a person or a --

17 Q Hold on, let me stop you, we're all familiar with
18 Miranda. But the Judge allows the statement in pretrial
19 after the Denno hearing; is that right?

20 A Yes, sir.

21 Q So at trial that statement -- everybody is of the
22 understanding that that statement is coming in, right?

23 A Yes, sir.

24 Q So did you and Mr. Lifsey -- did you have any
25 understanding that the gun charge that you pled to would be

ANTHONY CARTER - DIRECT

1 able to be brought up by the solicitor or anything else
2 when you pled to it?

3 A Not after, because I was -- my understanding was that
4 it wouldn't no longer be in front of me once I pleaded
5 guilty to it, that it was an issue.

6 Q Are you asking the Court for a new trial today?

7 A Yes, sir. I want to be able to get my story out this
8 time.

9 Q Let's talk about that. Did you and Mr. Lifsey have a
10 conversation about testifying at trial?

11 A Yes. To his advice it was not good for me to get on
12 the stand.

13 Q And did you take that advice?

14 A After struggling and lengthy conversations I wish I
15 would have because I never had a chance to get my story
16 out.

17 Q Were there any other concerns that you had with Mr.
18 Lifsey during trial?

19 A No, sir.

20 MR. SHELDON: Thank you.

21 THE COURT: Mr. Schmeckpeper?

22 CROSS EXAMINATION

23 BY MR. SCHMECKPEPER:

24 Q Do you have a transcript in front of you?

25 A No, sir.

ANTHONY CARTER - DIRECT

1 (Break in proceedings.)

2 Q And you don't have to specifically look at it. Do you
3 remember at one point in the trial the judge asking you
4 whether or not you wanted to testify?

5 A No, sir, I can't recall that.

6 Q You don't recall that? Can you turn your attention to
7 page 492 of the transcript?

8 A All right.

9 Q Do you remember the judge telling you it was important
10 to start thinking about testifying?

11 A I do now.

12 MR. SCHMECKPEPER: I beg the Court's indulgence.

13 (Break in proceedings.)

14 MR. SCHMECKPEPER: I apologize, Your Honor, I didn't
15 know this allegation was going to be an allegation at trial
16 because I'm trying to find a specific portion of the
17 transcript where he was advised of his rights.

18 (Break in proceedings.)

19 Q You're saying you don't specifically remember the
20 judge saying you have a right to testify and it's your
21 choice to testify?

22 A Just what I read right there, he had said it.
23 Anyway, when it got to the point when Mr. Lifsey asked me
24 did I want to testify I just took his advice that it was
25 not a good thing for me to do that.

ANTHONY CARTER - CROSS

1 Q Did Mr. Lifsey explain to you that it was your choice
2 whether or not to testify?

3 A It was my choice, but at the same time he also
4 informed me that it wasn't a good idea to do that, and
5 being that he is my lawyer I took his advice.

6 MR. SCHMECKPEPER: Your Honor, I would request to just
7 provide Your Honor after the hearing with a page number.

8 THE COURT: Is it around 492?

9 MR. SCHMECKPEPER: I think there's something on 492.

10 THE COURT: That's when he initially brings it up to
11 him as to whether he wants to testify, and he says that's
12 an important decision to start thinking about tonight, so
13 it would have been the next day when he asked him the
14 ultimate question.

15 MR. SHELDON: Judge, there is a further colloquy at
16 the end of the State's case, I don't have it in front of me
17 either but I don't have any problem with him getting you
18 those page numbers.

19 THE COURT: All right, very good.

20 MR. SCHMECKPEPER: Your Honor, I have no further
21 questions.

22 THE COURT: Any redirect?

23 MR. SHELDON: No, sir, Your Honor.

24 THE COURT: All right, thank you, you may step down.
25 Anything further?

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1 MR. SHELDON: No further witnesses, Your Honor.

2 THE COURT: All right. I'll wait until you get me the
3 page numbers on that then --

4 MR. SCHMECKPEPER: Your Honor, we can clean it up
5 right now, I was going to recall Mr. Lifsey as to that
6 specific allegation.

7 The witness, MICHAEL LIFSEY, remained sworn and
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. SCHMECKPEPER:

11 Q Mr. Lifsey, I just have a couple of questions
12 concerning the advice of your client and his right to
13 testify. Did you explain to him that he had a right to
14 testify?

15 A Yes, sir.

16 Q Did you explain to him that it was his decision
17 whether or not to testify?

18 A I did.

19 Q Did you have any advice for him whether or not to
20 testify?

21 A It was a tough call because obviously, you know --
22 the problem with him testifying was he had just -- they
23 had gotten in to evidence this lengthy recorded statement.

24 Q Let me --

25 THE COURT: It's on page 604. The Court says, "Sure,

MICHAEL LIFSEY - DIRECT

1 Mr. Carter, you have been here all night and had all week
2 to think about it, do you understand again there's good
3 reasons to testify," and that's where the colloquy comes
4 in.

5 A The problem with him testifying was they had gotten
6 into evidence a lengthy recorded statement where he
7 already told several different -- or at least a couple of
8 different versions of what happened. Had he testified at
9 trial I believe he would have told yet another version of
10 what happened, because his -- he insisted throughout this
11 case that he didn't have a -- that he had not fired the
12 shots. His version of what happened was different than
13 what he told I believe it was Detective Crump in the
14 statement, plus, of course, he is subject to being
15 cross-examined about this. Ultimately, you know, it's a
16 tough call, because obviously if he'd testified he could
17 have explained in detail his feelings at the time and it
18 could have helped on the self-defense issue, but since he
19 was going to maintain if he had testified that Marico
20 Stevens was doing the shooting I don't think he would have
21 been that great for us on the self-defense issue. So
22 basically you have him get up to tell a story contradicted
23 by the recorded confession that wasn't overwhelmingly
24 helpful on the self-defense end and would make himself
25 subject to cross examination. So I'm pretty sure I told

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1 him I didn't think testifying would help us very much.
2 Having said that it is 100 percent his decision and I make
3 that clear to everybody. There are lawyer decisions and
4 client decisions. Most of the stuff during the trial are
5 lawyer decisions frankly, but testifying or not
6 testifying, just like pleading or not pleading, or taking
7 a plea offer or not a plea offer is 100 percent a client
8 decision, and I would have made that very clear to him. I
9 don't have a transcript in front of me but I am sure Judge
10 Kinard did, too. I certainly told him it wasn't my call.
11 I don't dispute I probably told him it wouldn't be real
12 helpful to us, but certainly it was his decision, not
13 mine.

14 Q And it sounds like you just went through a
15 risk/benefit analysis. Did you convey that to him prior to
16 him making the decision?

17 A Yes, sir. We had talked -- it wasn't just like it
18 was just a subject we discussed during the trial, we had
19 been meeting extensively about this case. We met -- this
20 was a pretty high profile matter in this community and we
21 met all the time before trial and we discussed different
22 theories and discussed all aspects of it, and we had been
23 discussing whether or not he would testify for a long,
24 long time. So it wasn't a surprise, this issue of should
25 testify or not. But yes, the problem with -- the thing

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1 about the risk/benefit analysis, though, a client can't
2 make that ultimate call until you have heard all the
3 evidence. We had discussed the idea of perhaps testifying
4 or not, and I'm sure I told him, as I have told every
5 client for years and years, you need to think about this
6 issue now and be thinking about it but you can't make that
7 final decision until you see how the State's case goes and
8 you see how the trial goes.

9 MR. SCHMECKPEPER: Thank you, Mr. Lifsey. I have no
10 further questions, Your Honor.

11 THE COURT: Yes, sir?

12 MR. SHELDON: Just very briefly.

13 CROSS EXAMINATION

14 BY MR. SHELDON:

15 Q Mr. Lifsey, by the time we get to the point where
16 we're having this conversation, you said that you maybe
17 encouraged him that it wouldn't be a good idea, did you
18 specifically say don't testify or --

19 A I don't recall --

20 Q Typically how would that be?

21 A Yeah, I don't recall the specifics. I will tell you
22 every client of mine that I have ever had I make it
23 abundantly clear to them that that is a client decision to
24 testify or not. I do tell them whether I think their
25 testimony would be helpful or not, and I tell them what I

MICHAEL LIFSEY - CROSS

1 think are the pluses and its minuses of testifying. I
2 have never told a client, "Hey, don't testify." I have
3 told plenty of clients "I don't think your testimony is
4 going to help us a whole lot," and I may have said that,
5 and frankly I don't dispute his testimony in that regard
6 that I probably told him that. I would not have used the
7 language "don't testify," I would have told him at most I
8 didn't think his testimony would be particularly helpful.

9 MR. SHELTON: Thank you, Your Honor.

10 THE COURT: You may step down. Arguments?

11 MR. SHELTON: Very briefly, Your Honor. You have this
12 massive 680 and some odd page transcript in front of you,
13 obviously this was a lengthy trial. Your Honor,
14 essentially we focused on four issues today, the first
15 being the lack of being able to get an eye witness at the
16 scene to court, Mr. Hemphill. The second being the issue
17 over not making --

18 THE COURT: What was he supposed to do, go to Atlanta
19 go drag him back here?

20 MR. SHELTON: I think he had an investigator, I think
21 he could have done something more. The issue of -- the
22 directed verdict issue, just making a general directed
23 verdict, hence having that -- having a specific issue on
24 directed verdict not preserved for appeal, the third being
25 the failure to object to the trial judge's instruction

1 about the guilty plea, and the fourth being the issue over
2 testifying versus not testifying. The Court has heard the
3 testimony and we would just ask that the Court find that it
4 was ineffective and that the case should be vacated back to
5 the lower court.

6 THE COURT: Thank you. Yes, sir?

7 MR. SCHMECKPEPER: And Your Honor, just also briefly,
8 assuming the eye witness -- counsel's testimony is
9 credible, I don't think counsel was deficient for failing
10 to bring that witness in giving what he testified to as his
11 strategy and his analysis. Also that witness isn't here so
12 I don't think the applicant can show prejudice pursuant to
13 Strickland. Regarding the directed verdict issue, the
14 Court of Appeals did say a specific argument wasn't
15 preserved, counsel testified credibly that wasn't his
16 argument, that wasn't his theory of the case. In any event
17 the specific issues on directed verdict that maybe the
18 applicant has raised wouldn't have survived a directed
19 verdict challenge even if counsel would have made those
20 specific arguments. I think there is evidence reflected in
21 the transcript that the applicant was actually the shooter
22 in which the jury could make that inference. There's also
23 evidence from which a jury could reasonably infer that
24 there was the hand of one, hand of all and that that would
25 have been appropriate. Concerning the guilty plea

1 instruction and the right to testify, I think counsel's
2 testimony is credible and his strategy seems reasonable
3 under the circumstances. In any event the judge said as
4 opposing counsel pointed out following his comment on the
5 guilty plea that the jury could in no way consider that in
6 determining guilt. The judge also said that the jury
7 couldn't consider the applicant's failure to testify in
8 determining guilt. So I rest on Strickland and the record,
9 Your Honor.

10 THE COURT: Thank you. I'll take this one under
11 advisement and I will notify y'all of my decision in both
12 cases tomorrow morning.

13 (End of the hearing)

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1 I, the undersigned, Michael C. Watkins,
2 Official Court Reporter for the Sixth Judicial
3 Circuit of the State of South Carolina, do hereby
4 certify that the foregoing is a true, accurate and
5 complete transcript of the proceedings had and
6 evidence introduced in the trial of the captioned
7 case relative to appeal in the Court of Common Pleas
8 for Lancaster County, South Carolina, on the 13th
9 days of August, 2017.

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

12

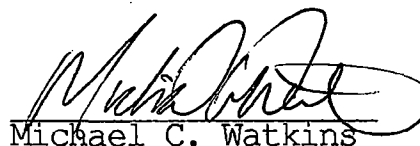
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August 13, 2017

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Michael C. Watkins

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Court Reporter

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	SIXTH JUDICIAL CIRCUIT
Anthony Carter,	)	
S.C.D.C. No. 292039	)	C.A. No. 2015-CP-29-0075
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	(with prejudice)
State of South Carolina,	)	
	)	
Respondent.	)	

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LANCASTER, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 13, 2015. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on January 10, 2017, at the Lancaster County Courthouse. The Applicant was present and testified in his defense. The Applicant's trial counsel, Michael H. Lifsey, Esquire, also testified. The Applicant was represented by Nathan J. Sheldon, Esquire. Respondent was represented by Patrick Schneckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. The Applicant was indicted at the August 2010 term of the Lancaster County Grand Jury for murder (2010-GS-29-1000). Michael Lifsey, Esquire, represented him. Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. On November 14, 2011, the Honorable J. Ernest Kinard, Jr., sentenced the Applicant to thirty-two years imprisonment.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by

Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Carter, 2014-UP-178 (filed April 30, 2014). The Remittitur was issued on December 12, 2014.

Allegations

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to investigate.
 - b. Failure to properly object.

At the evidentiary hearing, the Applicant proceeded on allegation that counsel was ineffective in failing to object to statements by the judge; failing to call witnesses; and failing to properly preserve his directed verdict motion for appellate review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court has made the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong,

attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Failure to Object to Judge's Remarks to the Jury

Informing the Jury of Guilty plea

The Applicant alleged counsel was ineffective for allowing the jury to hear that he had pled guilty to possession of a weapon. After the case was called – and after the judge informed the jury that the Applicant was indicted for “possession of a pistol”¹ – the Applicant chose to plead guilty to that offense. The trial judge subsequently informed the jury that the Applicant

¹ Tr. p. 6.

pled guilty to possession of a pistol, and that they were not to consider that charge in their deliberations. Tr. p. 607. The judge further emphasized that the fact that the Applicant pled guilty to that charge created no inference of guilt on the other charges he was facing. Tr. p. 607, l. 8-17; l. 663, l. 20 - p. 664, l. 5. A jury is presumed to follow instructions. Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999). Having failed to present any evidence to refute this presumption, the Applicant has not met his burden to prove prejudice.

Given counsel's credible testimony at the evidentiary hearing, the Applicant has also failed to show deficiency. Counsel testified that he did not think the judge's instruction mattered, and believed it gave the Applicant better credibility in saying that he already pled to what he was guilty of, and was not contesting that charge at all. Having failed to meet his burden with respect to either prong of the Strickland test, this allegation is denied and dismissed.

Telling the Jury the Applicant testified

The Applicant further alleged counsel was ineffective in failing to object where the trial judge told the jury that the Applicant testified. After reviewing the record, this Court finds the allegation to be without merit. In addressing the fact that the Applicant previously pled guilty to possession of a pistol, the trial judge told the jury that the Applicant "testified that he had [a weapon] at some point so he just removed that from your consideration and pled guilty to that charge. The fact that he pled guilty to that charge creates no inference of guilt toward him on these other two charges as you just forget that charge was ever there." Tr. p. 607, l. 10-17.

Clearly the trial judge misspoke, as evidenced by the fact that the Applicant did not testify at the trial. In any event, the judge clearly cured any misstatement by correctly informing the jury they were not to consider the fact that the Applicant did not testify during their deliberations. Immediately after the defense rested, it told the jury that "the fact that the

defendant did not testify from the stand can't even be considered by you on the issue of whether he committed a crime or not." Tr. p. 606, l. 22 - p. 607, l. 1. During its jury charge, the trial judge further emphasized that the Applicant had "absolutely no obligation on his part to testify," and that "the fact that he actually did not take the stand creates no inference of guilt against him at all." Tr. p. 663, l. 3-8. Having failed to meet his burden to show deficient performance or prejudice, this allegation is denied and dismissed.

Failure to call witness

The Applicant also alleged counsel was ineffective in failing to locate and call JD Hemphill as a witness. Counsel testified that he did not make an effort to track Mr. Hemphill down because he did not think his statement would have helped him at trial. Counsel testified that his thought process was that it would have been better to argue Mr. Hemphill's absence than to have him testify consistent with his statement. Clarifying, counsel said he thought it was strategically better for Mr. Hemphill to be absent. Given that counsel has articulated a reasonable strategic basis for his actions, the Applicant has failed to show he was deficient in failing to call Mr. Hemphill. This Court would also note that Mr. Hemphill was not present to testify during the evidentiary hearing, nor was his testimony offered in accordance with the rules of evidence.² See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Having failed to show deficiency or prejudice, this allegation is denied and dismissed.

Failure to Preserve Argument for Appellate Review

² Mr. Hemphill's handwritten statement was admitted for the limited purpose of showing that counsel was, in fact, aware of what he would have testified to at trial. The statement itself, however, would have been inadmissible at trial and does not assist the Applicant in satisfying the prejudice prong in the present proceedings. This Court will not speculate what Mr. Hemphill would have actually said at trial or at the evidentiary hearing.

Finally, the Applicant has alleged counsel was ineffective in failing to adequately preserve for appellate review whether he was entitled to directed verdict. This Court would first note that counsel did, in fact, move for directed verdict. Tr. p. 605. However, the Court of Appeals found that the motion did not adequately preserve the issue of whether there was sufficient evidence to submit the charge of murder to the jury. Regardless, this Court finds the Applicant has failed to show actual deficiency. The fact that counsel did not make an argument he did not believe was meritorious does not constitute ineffective assistance of counsel. This Court also finds that the Applicant has failed to meet his burden to show prejudice, or a reasonable likelihood that had counsel preserved the issue to the Court of Appeals' satisfaction, the outcome of the proceeding would have been different. For the following reasons, the Applicant would not have been entitled to directed verdict on the issues raised.

Principal Liability

A reasonable jury could have clearly found that the Applicant shot and killed the minor child while meaning to kill the intended victims with malice. The evidence established that there was some prior dispute between the Applicant and intended victims, in which he had stolen 450 dollars. Tr. p. 277; 304. There was also testimony that the group had recently "chased [the Applicant] out" of a trailer park. Tr. p. 221. In discussing the altercations to others, the Applicant had merely stated he would "handle it." Tr. p. 341-42.

In this context, the Applicant and his co-defendant gave a friend – [Coats] – a ride home to the same trailer park. Tr. p. 218. On the way there, the Applicant told his co-defendant about

the prior altercations, who then handed him a gun.³ The Applicant laid the gun in his lap. Tr. p. 222.

Testimony was presented at trial that upon arriving, the Applicant got out of the car and approached the intended victims with his gun pointed at one of them.⁴ Tr. p. 314-16. After saying he "ought to shoot you but I ain't want to do the time," and asking "[w]hat you gone do now," the Applicant turned around and started walking back. Tr. p. 316-17.

While at this point the testimony diverged to some extent as to where the first shot came from, the expert testimony clearly established that the bullet that ultimately killed the minor child came from the side of the street the Applicant and his co-defendant were on.⁵ Clearly it was reasonably inferable that the Applicant walked into an already heated situation armed, was pointing a gun at people – thereby bringing on the difficulty – and ultimately fired the shot that killed the victim.

Accomplice Liability

Alternatively, even if the Applicant's co-defendant fired the fatal shot, a reasonable jury could still have found him guilty. It was clearly inferable from the testimony and evidence presented at trial that if the co-defendant shot the victim, then the Applicant was guilty under a "hand of one, hand of all" theory of liability.

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langly, 334 S.C. 643,

³ According to a witness to the exchange, the gun looked like the one admitted into evidence as State's Exhibit 2. Tr. p. 221-22.

⁴ Another witness, Ms. Coats, testified that the gun was either in his pocket or tucked under his shirt as he approached them. Tr. p. 230.

⁵ The Applicant's trial counsel agreed, noting that this was not an issue at trial.

515 S.E.2d 98 (1999). Under an accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *Id.* at 648-49, 515 S.E.2d at 101. A formally expressed agreement is not necessary to establish the conspiracy. State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980).

The evidence presented at trial was that the Applicant and his co-defendant went to the location of the intended victims. They talked about the dispute prior to arriving. Under these circumstances, the jury could have clearly interpreted that the gun changing hands signified a common design, from which the victim's death resulted.⁶ In any event, whether the Applicant or the co-defendant fired the shot that ultimately killed the victim, a motion for directed verdict would have been appropriately denied. As a result, the Applicant has failed to meet his burden to prove prejudice. This allegation is therefore denied and dismissed.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

⁶ In fact, it appears that counsel conceded, during trial, that the trial judge's decision to charge "hand of one, hand of all" was appropriate. Tr. p. 596-97. Counsel testified at the evidentiary hearing that he did not believe there was any issue as to whether the "hand of one, hand of all" charge was appropriate, noting that the Applicant and his co-defendant went to the scene together, and were both holding the gun at different points. Given the evidence in the record, this Court finds such a concession was inherently reasonable.

CONCLUSION

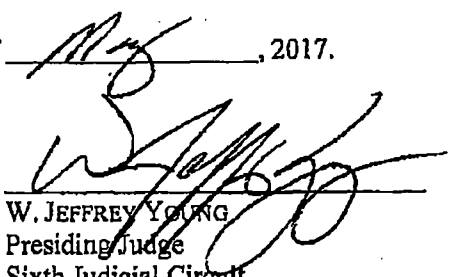
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 10 day of May, 2017.


W. JEFFREY YOUNG
Presiding Judge
Sixth Judicial Circuit

Sumter, South Carolina

WITNESSES

Adams - LCSO #12783

ARREST WARRANT NUMBER/DOA

M164308 (DOA-5-6-10)

ACTION OF GRAND JURY

John P. M. [Signature]
Foreperson of Grand Jury
Date: **AUG 19 2010**

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

Litsey
DOCKET NO. 2010-GS-29-1000

The State of South Carolina
County of Lancaster

COURT OF GENERAL SESSIONS

AUGUST TERM 2010

THE STATE
vs.

Anthony Rodriekus Carter *1001*

Marico Stevens 1st

Indictment for
Murder

SC Code: §16-3-10
CDR Code: 0116
Class: Felony, EXM

FILED
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LANCASTER, SC

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

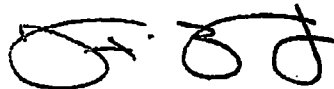
INDICTMENT

At a Court of General Sessions, convened on August 19, 2010, the Grand Jurors of Lancaster County present upon their oath:

MURDER

That Anthony Rodriekus Carter did at Athena Road, in Lancaster County on or about May 3, 2010, feloniously, willfully, and of his malice aforethought kill and murder minor by shooting her with a handgun and the victim did die as the proximate cause thereof at Carolinas Medical Center in Charlotte, North Carolina, on May 4, 2010, in violation of Section 16-3-10 of the *Code of Laws of South Carolina*.

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



Douglas A. Barfield, Jr., SOLICITOR