VOLUME I OF II

24372

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

24372

Appeal from Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

RECEIVED
OCT 15 2018
SC Court of Appeals

DAVID DWIGHT SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000262

APPENDIX

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JORDAN COX
Assistant Attorney General
Rembert Dennis Building
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

ATTORNEYS FOR RESPONDENT

PAGES 1-500

TABLE OF CONTENTS

INDEX i

TRIAL TRANSCRIPT (Oct. 31, 2005) 1

FINAL BRIEF OF APPELLANT 322

FINAL BRIEF OF RESPONDENT 337

S.C. COURT OF APPEALS OPINION, State v. Smith, OP. NO. 2008-UP-194 (S.C. Ct. App. filed Mar. 20, 2008) 352

STATE'S PETITION FOR REHEARING 356

ORDER DENYING REHEARING 366

ORDER DENYING REHEARING *EN BANC* 368

STATE'S PETITION FOR WRIT OF CERTIORARI 370

RETURN TO PETITION FOR WRIT OF CERTIORARI 391

ORDER GRANTING CERTIORARI 404

BRIEF OF PETITIONER 405

BRIEF OF RESPONDENT 427

S.C. SUPREME COURT OPINION, State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011) 440

REMITTITUR 446

APPLICATION FOR POST-CONVICTION RELIEF 447

AMENDED APPLICATION FOR POST-CONVICTION RELIEF 454

STATE'S RETURN 462

SUPERSEDING AMENDED POST-CONVICTION RELIEF APPLICATION 471

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING (June 11, 2015) 480

POST-CONVICTION RELIEF HEARING EXHIBITS

APPLICANT'S EXHIBIT 1 (Affidavit of discovery) 596
APPLICANT'S EXHIBIT 2 (Statement of Angie Smith) 597
APPLICANT'S EXHIBIT 3 (Handwritten note) 605
APPLICANT'S EXHIBIT 4 (Statement of Otis Hyder) 606
APPLICANT'S EXHIBIT 5 (Autopsy report) 609
APPLICANT'S EXHIBIT 6 (Statement of Terry Bradley) 614
APPLICANT'S EXHIBIT 7 (Investigation report - Kitts) 617
APPLICANT'S EXHIBIT 8 (Crime scene log) 625
APPLICANT'S EXHIBIT 9 (Statement of Morgan Simmons) 629
APPLICANT'S EXHIBIT 10 (Toxicology report) 634
APPLICANT'S EXHIBIT 11 (Investigation report - Gregory) 635
APPLICANT'S EXHIBIT 12 (Arrest warrant) 639
APPLICANT'S EXHIBIT 13 (Transcript excerpt) 640

MEMORANDUM IN SUPPORT OF POST-CONVICTION RELIEF 660

ORDER OF DISMISSAL 697

RULE 59(e) MOTION TO ALTER OR AMEND 714

ORDER DENYING MOTION TO ALTER OR AMEND 724

INDICTMENT 725

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
PCR HEARING EXHIBITS - APPLICANT'S EXHBITS NOS. 2, 9, and 11[1]

---

[1] Pursuant to Rule 210(f), SCACR, transportation is being requested for designated exhibits nos. 2, 9, and 11 because they could not be accurately reproduced by copying into the Appendix.

1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
2 COUNTY OF SPARTANBURG)
3
4
5 STATE OF SOUTH CAROLINA,) TRANSCRIPT
6 PLAINTIFF,) OF
7 vs.) RECORD
8 DAVID DWIGHT SMITH,) 97-GS-42-1639
9 DEFENDANT.)
10
11 October 31st, 2005
Spartanburg, South Carolina
12
13 B E F O R E:
14 THE HONORABLE JACK EARLY, JUDGE; and a jury.
15
16 A P P E A R A N C E S:
17 ROBERT COLER and SARA GANSS
ASSISTANT SOLICITORS
Attorneys for the State
18
19
20 WILLIAM GODFREY
ESQ.
Attorney for the Defendant
21
22
23
24 PAMELA E. GREEN
Circuit Court Reporter
25 Seventh Judicial Circuit

Scanned

1 INDEX OF WITNESSES

2 WITNESSES	PAGE
3	
4 Jury Selection	8
5 Motions	23
6 Opening by The Court	27
7 Opening by Sol. Coler	34
8 Opening by Mr. Godfrey	41
9	
10 KEN CAMP	
11 Direct examination by Sol. Coler	45
12 Cross-examination by Mr. Godfrey	53
13 Redirect examination by Sol. Coler	57
14 ALLEN NEWMAN	
15 Direct examination by Sol. Ganss	58
16 Cross-examination by Mr. Godfrey	61
17 ANGIE SMITH	
18 Direct examination by Sol. Coler	62
19 Cross-examination by Mr. Godfrey	83
20 Redirect examination by Sol. Coler	92
21 Recross examination by Mr. Godfrey	96
22 CYNTHIA ROSEBURGH	
23 Direct examination by Sol. Coler	97
24 Cross-examination by Mr. Godfrey	103
25	

WITNESSES	PAGE
RODNEY SMITH	
Direct examination by Sol. Coler	104
Cross-examination by Mr Godfrey	117
Redirect examination by Sol. Coler	119
DEANNA BURGESS	
Direct examination by Sol. Coler	121
STEVE DENTON	
Direct examination by Sol. Coler	128
Cross-examination by Mr. Godfrey	163
DOCTOR DAVID WREN	
Direct examination by Sol. Coler	167
Cross-examination by Mr. Godfrey	174
Redirect examination by Sol. Coler	179
OTIS HYDER	
Publish deposition	183
JOSEPH POWELL	
Direct examination by Sol. Coler	183
Cross-examination by Mr. Godfrey	191
Motions	194

WITNESSES	PAGE
DAVID SMITH	
Direct examination by Mr. Godfrey	202
Cross-examination by Sol. Coler	218
DONALD GIRNDT	
Direct examination by Mr. Godfrey	247
Cross-examination by Sol. Ganss	254
Motions	262
Closing by Mr. Godfrey	275
Closing by Solicitor Coler	285
Charge by The Court	298
Question by the jury	312
Verdict	314
Motions	315
Sentencing	320
Certificate	321

E X H I B I T S

NO.	DESCRIPTION	ID	EV
	State's Exhibits		
S-1	Pre-interrogation Wavier Form	22	142
S-2	Affidavit	22	142
S-3	Statement	22	142
S-4	Photograph	48	49
S-5	Photograph	48	49
S-6	Photograph	48	49
S-7	Photograph	48	49
S-8	Shell Casing	123	193
S-9	SLED Report	184	
S-10	Photograph	258	259

NO	DESCRIPTION	ID	EV
	Defendant's Exhibits		
D-1	Photograph	165	166
D-2	Photograph	165	166
D-3	Photograph	165	166
D-4	Photograph	165	166

NO	DESCRIPTION	ID	EV
	Court's Exhibits		
C-1	Note	152	
C-2	Transcript	183	
C-3	Note from jury	312	

1 P R O C E E D I N G S
2
3 (Whereupon, the following takes place within the
4 presence of the jury.)
5 THE COURT: Mr. Solicitor, you may call your first
6 case.
7 SOLICITOR COLER: Thank you, Your Honor.
8 May it please the Court.
9 Judge, this is The State versus David Dwight Smith.
10 Indictment 97-GS-42-1639 charging him with one count of
11 murder and one count of possession of a gun during a crime
12 of violence.
13 THE COURT: Thank you.
14 State ready to proceed?
15 SOLICITOR COLER: Yes, sir, Your Honor.
16 THE COURT: Defense ready to proceed?
17 MR. GODFREY: Yes, Your Honor.
18 THE COURT: Okay. All right. Ladies and gentlemen of
19 the jury panel, as you heard, the State is called the case
20 of the State of South Carolina versus David Dwight Smith. I
21 remind you that you are still under oath from this morning.
22 I will have several questions to ask. And if the
23 cases, if the questions apply to you, please stand, identify
24 yourself, give me your jury number, if you remember it. If
25 you do not, give us a chance to find it, and then we'll go

1 over these questions.
2 It will take us about maybe a half an hour to draw this
3 jury. Once I get my jury drawn, the rest of you will be
4 excused to go back to the jury assembly room where I think
5 Judge Few, who is also holding court today, will draw a
6 second jury. And those who are not fortunate to get on the
7 first or second will be excused probably for the balance of
8 the day, and I'm sure they've explained to you we have a
9 call back system where you could call back in this
10 afternoon.
11 So, I'm gonna get the first shot at you. Judge Few
12 will get second shot, and then we'll see how we go from
13 there.
14 Again, if you have any questions as we go along, just
15 please raise your hand and we will accommodate you at that
16 point.
17 Has anyone ever been related by blood or marriage to
18 David Dwight Smith?
19 Mr. Smith, good morning.
20 How are you?
21 DEFENDANT: Morning.
22 THE COURT: Would you please stand and face the jury
23 panel?
24 DEFENDANT: Yes, sir.
25 (Defendant complies.)

1 THE COURT: Has anybody ever been related by blood or
2 marriage to the defendant, David Dwight Smith, if so, please
3 stand.
4 (No response.)
5 THE COURT: You may be seated, Mr. Smith.
6 Thank you.
7 Has anyone ever had any close personal or social
8 relationship with the defendant, David Dwight Smith, if so,
9 please stand.
10 (No response.)
11 THE COURT: The alleged victim's name is one Robert
12 Andrew Finley, F-I-N-L-E-Y.
13 Any member of the jury panel ever been related by blood
14 or marriage to Robert Andrew Finley, if so, please stand.
15 (No response.)
16 THE COURT: Has any member of the jury panel ever had a
17 close personal or social relationship with Robert Andrew
18 Finley, if so, please stand.
19 (No response.)
20 THE COURT: Listen carefully. I'm gonna give the names
21 of potential witnesses in the trial of the case, and I'll
22 ask you the same question after I read through these, this
23 witness list.
24 And if any of the witnesses are in the courtroom, will
25 they please stand when I raise, when I call their name?

1 Ken Camp with the Spartanburg County Sheriff's Office.
2 (Witness stands.)
3 THE COURT: Thank you, sir.
4 Deanna Burgess, Spartanburg County Sheriff's Office.
5 SOLICITOR COLER: She's not present, Your Honor.
6 THE COURT: Steve Denton, Spartanburg County Sheriff's
7 Office.
8 (Witness stands.)
9 THE COURT: Thank you, Mr. Denton.
10 Joseph Powell with SLED, South Carolina Law Enforcement
11 Division.
12 SOLICITOR COLER: He's not present.
13 THE COURT: Angie Smith.
14 (Witness stands.)
15 THE COURT: Thank you, Mrs. Smith.
16 Rodney Smith.
17 (Witness raises hand.)
18 THE COURT: Thank you, Mr. Smith.
19 Cynthia Roseburgh.
20 (Witness stands.)
21 THE COURT: Thank you, ma'am.
22 Allen Newman.
23 (Witness raises hand.)
24 THE COURT: Thank you.
25 Doctor David Wren, W-R-E-N.

1 SOLICITOR COLER: He's not present, Your Honor.
2 THE COURT: Otis Calvin Hyder, H-Y-D-E-R, Senior.
3 SOLICITOR COLER: He's not present. He's deceased.
4 THE COURT: Morgan Simmons Ortez, O-R-T-E-Z.
5 Mr. Coler
6 SOLICITOR COLER: She's not present, Your Honor.
7 THE COURT: Don Girndt, G-I-R-N-D-T.
8 Is any member of the jury panel ever been related by
9 blood or marriage to any of these witnesses or potential
10 witnesses, if so, please stand.
11 (No response.)
12 THE COURT: Has anyone ever had a close personal or
13 social relationship with any of the witnesses I have just
14 listed, if so, please stand.
15 (Jurors respond.)
16 THE COURT: Yes, ma'am, in the black and white check
17 dress.
18 Your name?
19 JUROR: Wendy Hardy.
20 THE COURT: Hardy?
21 JUROR: Yes, sir.
22 THE COURT: Spell that last name for me.
23 JUROR: H-A-R-D-Y.
24 THE COURT: You know your juror number?
25 JUROR: 170.

1 THE COURT: 170.
2 Mrs. Hardy, which one of these witnesses do you know?
3 JUROR: Angela Smith.
4 THE COURT: And the fact -- and you're related by blood
5 or marriage or just know them?
6 JUROR: I know them.
7 THE COURT: And the fact that you are acquainted with
8 that potential witness, would that, in any way, preclude or
9 keep you from being a fair and impartial juror in the trial
10 of this case?
11 In other words, I want a juror who can simply decide
12 the facts of the case based on the facts they hear from the
13 witness stand, apply those facts to the law that I give, and
14 not any outside considerations in the courtroom including
15 your friendship with that potential witness.
16 Can you---
17 JUROR: I known her all my life.
18 THE COURT: Well, can you or can you not be impartial?
19 JUROR: Probably. I don't know.
20 THE COURT: All right. I'm gonna excuse you from the
21 trial of this case.
22 JUROR: Thank you.
23 THE COURT: No, ma'am. Can't let you go.
24 Yes, sir, the burgundy short sleeve shirt.
25 JUROR: Charles Wharton, Number 140.

1 THE COURT: And who are you---
2 JUROR: I'm acquainted with Doctor David Wren.
3 THE COURT: And what is your relationship with Doctor
4 Wren?
5 JUROR: We secure his house with a security system.
6 THE COURT: Do what?
7 JUROR: Secure his house for, with a security system.
8 THE COURT: Oh, okay.
9 And the fact that he's a client or a customer of yours,
10 I assume, is that correct?
11 JUROR: Uh-huh. (Affirmative).
12 THE COURT: Would that, in any way, affect your ability
13 to be a fair and impartial juror in the trial of this case?
14 JUROR: No, sir.
15 THE COURT: Thank you. You may be seated.
16 The State, in this case, is represented by two
17 solicitors from the Solicitor's Office, Ms. Sara Ganss and
18 Mr. Bob Coler.
19 I'll ask y'all to please stand.
20 (Parties stand.)
21 THE COURT: Thank you. Be seated.
22 The defendant is represented by Mr. Bill Godfrey of the
23 Spartanburg County Bar.
24 MR. GODFREY: Greenville County Bar.
25 THE COURT: Greenville County Bar. I apologize.

1 Mr. Godfrey, would you give the names of the people in
2 your firm?
3 JUROR: My law partner is Mrs. Mary Alice Godfrey.
4 There's only two attorneys in the firm.
5 THE COURT: Thank you so very much.
6 Has any member of the jury panel ever been represented
7 by any of the attorneys involved in this case or by the law
8 firms, if so, please stand.
9 (No response.)
10 THE COURT: In other words, have they ever represented
11 you or, or are they representing you now, if so, please
12 stand.
13 (No response.)
14 THE COURT: Has anyone ever been related by blood or
15 marriage to or have you ever had a close personal or social
16 relationship with any of the lawyers involved in the case or
17 anyone in their firms, if so, please stand.
18 (No response.)
19 THE COURT: Ladies and gentlemen, the defendant, in
20 this case, was indicted by the Spartanburg County Grand
21 Jury. An indictment is simply the charges by which a case
22 is brought into this Court, and is, in no sense, evidence in
23 the case. It's simply the charging documents. The
24 defendant has pled not guilty to these charges. Therefore,
25 the burden is on The State of South Carolina to prove,

1 beyond a reasonable doubt, all of the elements of the
2 offense.
3 But I must tell you a little bit about what we're here
4 for cause I have to ask you if you know anything about the
5 case.
6 So, basically he's indicted or charged and he's pled
7 not guilty to an incident which occurred on, on or about
8 January 12th, 1997, here in Spartanburg County where he is
9 alleged that he feloniously, and with malice aforethought,
10 malice aforethought, did kill one Robert Andrew Finley by
11 shooting him with a gun, and he's also indicted or charged
12 with possession of a firearm during the commission of that
13 same alleged offense.
14 In other words, it's an incident which took place on
15 January 12, 1997, where he is being charged with the murder
16 of Robert Andrew Finley and also with possession of a
17 violent, possession of a weapon during the commission of a
18 violent crime.
19 Does any member of the jury panel know anything at all
20 about the facts of this case?
21 Have you read anything about it in the newspaper, heard
22 anything about it on the radio, seen anything about it on
23 the TV, or formed or expressed any opinion about any issues
24 or matter involved in this case, if so, please stand.
25 (No response.)

1 THE COURT: Is any member of the jury panel aware of
2 any bias or prejudice towards either The State of South
3 Carolina or the defendant in this case, if so, please stand.
4 (No response.)
5 THE COURT: Is any member of the jury panel -- were or
6 is any member of the jury panel or were you a member of the
7 Spartanburg County Grand Jury in April 3 of 1997 that issued
8 the true bill in this case, true bill of indictment, if so,
9 please stand.
10 (No response.)
11 THE COURT: Is there any member of the jury panel who
12 is a member of or a contributor to any group which has as
13 its primary concern the promotion of law enforcement or
14 victim's rights?
15 These groups would include, but certainly not be
16 limited to MADD, that's Mother's Against Drunk Drivers,
17 SADD, Students Against Drunk Drivers, or CAVE, Victims
18 Against Violent Crime, if so, please stand.
19 (No response.)
20 THE COURT: Is any member of the jury panel have such
21 strong feelings regarding the sale, use, or possession of
22 illegal drugs that you could not be fair and impartial in a
23 case involving the alleged sale, use, or possession of
24 illegal drugs, if so, please stand.
25 (No response.)

1 THE COURT: Has any member of the jury panel now, you
2 or your family, ever been the victim of a violent crime, if
3 so, please stand.
4 (Juror responds.)
5 THE COURT: Yes, ma'am, your name?
6 JUROR: Christina Thomason. It's 131.
7 THE COURT: And Mrs. Juror 131, the fact that you or a
8 member of your family had been a victim of a violent crime,
9 could you set that aside and be a fair and impartial juror
10 in the trial of this case?
11 JUROR: Yes.
12 THE COURT: And without divulging any personal
13 information, just tell me was it you or a member of your
14 family?
15 JUROR: A member of my family.
16 THE COURT: And just in general terms, what happened?
17 JUROR: My father was murdered in '87.
18 THE COURT: Okay. And the fact that your father was
19 murdered in 1987, could you set that aside and be a fair and
20 impartial juror in the trial of this case?
21 JUROR: Yes.
22 THE COURT: Thank you so very much. You may be seated.
23 Does any member of the jury panel know of any reason
24 whatsoever why he or she should not serve as a juror in this
25 case with particular emphasis being placed on your ability

1 to be fair and impartial to both the State of South Carolina
2 and the defendant, if so, please stand.
3 (No response.)
4 THE COURT: Mr. Coler, Ms. Ganss, any additional
5 questions?
6 SOLICITOR COLER: No, sir, Your Honor.
7 THE COURT: Mr. Godfrey, any additional questions?
8 MR. GODFREY: No, Your Honor.
9 THE COURT: Now, ladies and gentlemen of the jury
10 panel, this is what we call General Sessions Court, which is
11 Criminal Court as opposed to the other type of Court we have
12 is Common Pleas or Civil Court. Civil Court is where a, me
13 and Mr. Godfrey get into a car wreck and he claims I ran the
14 red light and he's suing me for damages or I'm his doctor
15 and I may of done something wrong in an operation. He sues
16 me for medical malpractice. Those are civil cases.
17 In a civil case, what we could do at this time is the
18 clerk would draw out 20 names and put on a piece of paper.
19 The plaintiff would have four strikes and the defendant
20 would have four strikes leaving us with, with 12 people to
21 serve on the jury panel.
22 In a criminal or a case tried in General Sessions
23 Court, we do it differently. So, what we do in this
24 situation, the clerk will pull out a name out of the, the
25 rolling box, anonymous name at random. And if they pull out

1 your name, you will come down here and stand right here and
2 face both the prosecutor and the defendant and they will
3 either say swear the juror or excuse the juror, and
4 basically they can do that for any reason or no reason at
5 all.
6 So, if they excuse you, don't be offended or if they
7 take you, you don't be offended. There's really no rhyme or
8 reason as to what they do.
9 And in a case such as this, the State has five strikes?
10 SOLICITOR COLER: Yes, sir.
11 THE COURT: And the defendant has ten strikes.
12 Ma'am, you need some water?
13 You okay?
14 Give her some water.
15 (Pause.)
16 THE COURT: So, as your name is called, if you would,
17 please come down and just stand where Mr. Humphries is and
18 he'll instruct you just to turn around and face both sides
19 and we'll be through with this in just a minute.
20 (Whereupon, a jury panel of twelve was selected at this
21 time.)
22 THE COURT: All right. Two alternates.
23 Two and one.
24 (Whereupon, two alternates were selected at this time.)
25 THE COURT: All right. Let me see the lawyers up here,

1 please.
2 (Whereupon, a bench conference was held out of the
3 hearing of the jury at this time.)
4 THE COURT: Y'all step up here for a, just a second.
5 (Whereupon, a bench conference was held out of the
6 hearing of the jury at this time.)
7 THE COURT: Ladies and gentlemen, would y'all like to
8 get started now or would you like to go ahead and let's take
9 a lunch break, be back at two o'clock, and get started after
10 lunch?
11 Makes no difference.
12 (Jurors respond as to making no difference.)
13 THE COURT: No difference.
14 Well, I try to please y'all ahead of everybody else.
15 Let me just tell you a little bit about what we'll do
16 and we'll go ahead and take our lunch break. And we'll
17 start right back at two o'clock. And I'm very punctual when
18 we start back. So, please be back in your jury room. The
19 bailiffs will show you where to come back and be back a
20 little bit before 2:00.
21 And I suspect we will go -- is 5:30 a problem with
22 anybody this afternoon?
23 Does that create a problem?
24 (No response.)
25 THE COURT: I'll stop somewhere between 5:00 and 5:30.

1 Unless we're right in the middle of somebody, I may stop a
2 little bit earlier or may just go a few minutes beyond that.
3 But I won't go very far.
4 We'll take an afternoon break, stretch your legs. I
5 suspect we'll be back in the morning. I suspect we'll
6 finish tomorrow. But you -- that's just a guess, a
7 guesstimate.
8 If y'all decide you want any snacks in the morning,
9 I'll have you donuts, coffee, those sorts of things, and
10 we'll be ready to go.
11 All right. At this time, I'm gonna let you go with the
12 bailiff to the jury room and be back and be ready to go at
13 two o'clock and we'll start then.
14 Thank you very much.
15 Everybody else please remain seated.
16 (Whereupon, the following takes place outside the
17 presence of the jury.)
18 (Whereupon, the pre-interrogation waiver form was
19 marked as State's Exhibit No. 1. An affidavit was marked as
20 State's Exhibit No. 2. A statement was marked as State's
21 Exhibit No. 3. All of the above were for identification
22 purposes only at this time.)
23 THE COURT: All right. Let the record reflect that
24 subsequent to the drawing of the jury, I inquired of both
25 the State and the defense counsel as to whether or not they

1 had any motions concerning the composition and or the
2 drawing of the jury, i.e. Batson motions, and they both
3 advised me that they did not.
4 Is that correct, Mr. Coler?
5 SOLICITOR COLER: Yes, sir, Your Honor.
6 THE COURT: Mr. Godfrey, is that correct?
7 MR. GODFREY: Yes, sir, it is.
8 THE COURT: Now, before I swear the jury in after
9 lunch, I'll appoint a foreperson.
10 Is there anything for the record on behalf of the
11 State?
12 SOLICITOR COLER: No, sir, Your Honor.
13 THE COURT: Mr. Godfrey?
14 MR. GODFREY: No, Your Honor.
15 THE COURT: Okay. We have anything that we need to
16 discuss outside the presence of the jury that would require
17 us being back before two o'clock?
18 SOLICITOR COLER: Unless you want to take up that, that
19 deceased witness issue, Your Honor. That's the only thing I
20 can think of.
21 THE COURT: All right. Let's do this. Let's be back,
22 just out of an abundance of caution, about quarter of 2:00
23 if there's anything we need to do outside the presence of
24 the jury. Be ready for opening statement at two o'clock,
25 and we'll go 5:00, 5:30 in the afternoon depending where we

1 are.
2 Hope your head feels better.
3 MR. GODFREY: Thank you, sir.
4 THE COURT: Let me just put on the record, I don't even
5 know who the lady is sitting right there with the black
6 leather jacket on, sparkly red colored, of red family
7 colored blouse, I noticed she was crying, and I asked the
8 bailiff to find out what was wrong.
9 She said that she was crying because she can't take her
10 baby trick-or-treating this afternoon and she normally goes
11 about 4:30. So, I'm gonna try to break no later than 5:00,
12 and it will probably be on this side of 5:00 so I can
13 accommodate her. I don't know who she is.
14 This case is not gonna last, but---
15 SOLICITOR COLER: No, sir, I think we can get through
16 most of our witnesses today by about 4:30, and maybe have
17 one or two in the morning. So---
18 THE COURT: All right. When she comes back in, I'm
19 gonna just sort of tell her that. I'm gonna make sure she
20 doesn't miss trick-or-treating with her child.
21 All right. Anything for the record -- is that -- any
22 problem with that situation on behalf of the defendant?
23 MR. GODFREY: No, sir.
24 THE COURT: State?
25 SOLICITOR COLER: No, sir, Your Honor.

1 THE COURT: Y'all -- I just asked the bailiff to find
2 out why she was crying.
3 Is this okay with everybody?
4 SOLICITOR COLER: Yes, sir.
5 MR. GODFREY: Yes, Your Honor.
6 THE COURT: All right. Defendant's in custody.
7 We'll break till quarter till.
8 Thank you.
9 (Whereupon, Court was in recess for the lunch hour.)
10 THE COURT: All right. Anything on behalf of The State
11 before I bring the jury?
12 SOLICITOR COLER: Just briefly, Your Honor, about that
13 the issue of the witness who testified at the last trial,
14 who's now deceased, Otis Hyder. We offer his testimony
15 through his, through the transcript of his testimony, and
16 we're offering that under Rule 804, one of the hearsay
17 exceptions. Specifically---
18 THE COURT: 804?
19 SOLICITOR COLER: Yes, sir, 804(a) Subsection 4. He's
20 a, he's an unavailable declarant because of his death.
21 THE COURT: 808?
22 SOLICITOR COLER: Its 804 Subsection A.
23 THE COURT: Little what?
24 SOLICITOR COLER: (a)(4).
25 THE COURT: All right. Well, let's do this. Let's get

1 started and try to stay away from that in opening statement
2 unless you have to.
3 SOLICITOR COLER: Yes, sir.
4 THE COURT: And I think I'll run till about 4:30 so I
5 can make sure that juror gets to spend some time with his
6 child, and we'll take full arguments on that at the
7 appropriate time.
8 SOLICITOR COLER: Yes, sir.
9 THE COURT: Anything else on behalf of the State?
10 SOLICITOR COLER: No, sir, Your Honor.
11 THE COURT: How about on behalf of the defendant?
12 MR. GODFREY: Nothing, Your Honor.
13 THE COURT: All right. Bring the jury in.
14 (Whereupon, the following takes place within the
15 presence of the jury.)
16 THE COURT: I hope y'all had a pleasant lunch.
17 We got everybody?
18 (Bailiff nods affirmatively.)
19 THE COURT: All right. Somebody had a little concern
20 about not being able to trick-or-treat tonight.
21 We're gonna stop at 4:30.
22 Will that be okay?
23 JUROR: Thank you.
24 THE COURT: All right. All right. At this time, what
25 I'd like to do, if you would, stand please and raise your

1 right hand, and the clerk will swear you in for this
2 particular case.
3 (Whereupon, the jury was placed under oath at this
4 time.)
5 THE COURT: Thank you. Be seated.
6 Is it Resch, R-E-S-C-H, Resch, Resch?
7 JUROR: Resch.
8 THE COURT: Mr. Resch and Mr. Wharton, I would ask you
9 two that you always take those seats. You're my alternates
10 in this case.
11 And Madam -- ladies and gentlemen of the jury, what I'm
12 gonna do, normally sometimes I will appoint a foreperson to
13 serve as the spokesman for the jury. But I think, if it's
14 okay with y'all, I'm gonna let y'all decide among yourselves
15 who you'd like to be the foreperson. So, when we take our
16 afternoon break, just talk among yourselves as to who would
17 be foreperson.
18 The foreperson is simply someone who acts as the
19 speaker or the moderator for the group. If you have any
20 questions, the foreperson would write it out and send it
21 back out here to me.
22 And at, of course, at the conclusion of all the
23 evidence and after all the instructions on the law and the
24 lawyers have argued, then you would be in charge of the
25 deliberations. But it's not a difficult task. And y'all

1 just choose among yourselves who you'd like to be the
2 spokesperson and let me know at the break.
3 And if you can't decide on somebody, then I'll just
4 ene, meni, mino, mo I guess because I don't know any of you
5 and I'll just pick one out.
6 What I'd like to do now is just give you a, a little
7 bit of general remarks about the trial, what we expect in
8 the trial. It's just sort of an introduction to the trial
9 of the case. It's not a charge on the law. When I say
10 charge, those are instructions on the law that would be
11 applicable to this case, and I'll give you those at the
12 conclusion of the, of all of the evidence.
13 As I told you in this case, the defendant has been
14 charged by an indictment, two counts. One is for murder and
15 the other is possession of a firearm during the commission
16 or attempt to commit a violent crime.
17 I will explain to you, at the close of all the
18 elements, the close of the trial, what the elements of each
19 of these crimes consist of. But as I told you when we drew
20 the jury, the indictments in this case is simply the
21 documents or the charging documents that bring the case
22 before the court. And it is not, in any sense, of any
23 evidence in the case. It's simply what he's charged with.
24 And to, to these indictments, the defendant has pled
25 not guilty. Therefore, the State has the burden of proving

1 each and every element of the indictments beyond a
2 reasonable doubt to you, and, of course, it will be your
3 responsibility and duties, ladies and gentlemen, to decide
4 whether or not the State has met that burden of proof after
5 all of the testimony and the evidence is in, and you've
6 heard me charge you on the law.
7 You and I have distinct obligations during the trial of
8 this case. As the judge, I am the judge of the law. Not
9 me. But my position. And you have to take the law as I
10 give it to you at the conclusion of the case.
11 And if you think that the law is something else other
12 than what I tell you it is or if you have some idea that the
13 law ought to be something else other than what I tell you it
14 is, tell you that it is, then you have to set that aside and
15 you've been sworn and you've sworn to say that I will accept
16 the law as the judge gives it to me as the law of the case.
17 So, I'm the judge of the law, and likewise, you 12 are
18 the judges of the facts. It will be up to you to determine
19 what the true facts are during the trial of this case. You
20 are to determine the facts from the testimony that you hear
21 from the witness stand and any other evidence may be, that
22 may be introduced during the trial of the case. It's up to
23 you to determine what inferences which you may feel may
24 properly, properly be drawn from the evidence.
25 Just some general caveats or instructions. I will tell

1 you every time you leave the courtroom do not commence your
2 deliberations. We are -- you, you've sworn yourself that
3 you would not commence deliberations until all the evidence
4 is in and I've instructed you on the law in the case and the
5 lawyers have made their final arguments and then you may
6 begin deliberations.
7 It may be that the last witness has something to
8 testify to that would sway your mind. So, it would be
9 unfair both to the State and particularly the defendant if
10 you go back in the jury room after the first witness and
11 start discussing the case.
12 So, I will tell you, each and every time, do not
13 commence deliberations until after all of the evidence is
14 in. You can talk about anything you want to in the jury
15 room, introduce yourselves to each other, eat the donuts,
16 whatever else I send back there. But do not, under any
17 circumstances, discuss the case until I tell you to do so.
18 And whoever I appoint as foreperson or y'all select as
19 foreperson, that will be one of your duties is to ensure
20 that no deliberations start before we finish. If anybody
21 wants to discuss the case or tries to discuss the case, Mr.
22 and Mrs. Foreman, then it'd be up to you, to you to say no,
23 the judge says we can not do so until everything is in.
24 So, y'all talk about anything you want to back there
25 except for the case until it is time to start your

1 deliberations.
2 I don't think that there will be any publicity
3 generated in this case. I hadn't seen any newspapers or TV
4 people here. But I would ask that, if anything does appear
5 on the news, that you not look at it.
6 We simply want to try this case based on what we hear
7 from this Court, testimony that comes from the witness
8 stand, and any exhibits that may be introduced, and not from
9 any outside sources. I will ask that you keep an open and,
10 open mind and not decide any issue until all the evidence
11 has been presented.
12 As I told you before, it is your solemn responsibility
13 to determine the guilt or innocence of the defendant, and
14 your verdict must be based solely on the evidence that is
15 presented during this trial and on the law that I tell you
16 at the close of the trial.
17 In just a few minutes the solicitor will make an
18 opening statement on behalf of the State, and that will be
19 followed by an opening statement on behalf of the defendant.
20 Opening statements are not evidence in the case.
21 They're simply what the lawyers feel they will be able to
22 prove. Sort of a road map that they're gonna show you. But
23 that is not evidence. That's their take on it. So, don't
24 accept that as evidence. As I said, the only evidence comes
25 from the witnesses and or the testimony by way of exhibits

1 that come into the trial of the case.
2 Now, as I said, you are the finders of the facts. A
3 couple of matters on that. If, at anytime during the trial
4 of this case I may say something about the facts, please
5 disregard it. I have absolutely no right to comment on the
6 facts. That is for the 12 of you collectively, collectively
7 to determine what the facts are.
8 So, if anytime I may comment on it, obviously I'll try
9 not to, but if I do, please disregard it because I have no
10 right to comment on the facts. That is simply your
11 responsibility.
12 Now, in determining what the facts are in the case, you
13 must decide whether or not the testimony of a witness is
14 believable. My judge, my job, as the judge, is to determine
15 whether or not that testimony is admitted under our rules of
16 evidence. Ninety-nine percent of the testimony you hear
17 will be admitted.
18 If one side has an objection and I say that is
19 improper, then I will tell you not to consider that
20 particular piece of evidence. But ninety-nine to a hundred
21 percent of it is gonna come in. And once I admit it into
22 evidence, then it's up to you to determine whether or not
23 you believe it. So, that's pretty simple. Once it's in,
24 then the 12 of you decide who you believe and what you
25 believe.

1 Now, in deciding whether to believe a witness, you have
2 the right to consider the interest of any witness, the bias
3 of any witness, the prejudice of any witness, and the
4 opportunity for the witness to have seen the matters and
5 things about which the witness may testify, and even the way
6 the witness acts on the stand.
7 You have a right to consider anything that is in the
8 record that will help you evaluate the credibility or
9 believability of the witnesses.
10 So, I ask that you pay close attention to that after
11 all the testimony is in, the exhibits are in, you've heard
12 the arguments of counsel, and I've given you the
13 instructions on the law, you will be in a position to render
14 a true and just verdict in the case, which is your
15 responsibility.
16 When you choose the foreperson, as I mentioned before,
17 he or she will be responsible for the deliberations, for
18 helping out the deliberations at that time, and will be
19 responsible for signing the verdict form, which I'll give
20 you. I'll explain all of that to you. It's not that much
21 responsibility associated with it. But someone has to take
22 that job.
23 Now, any objections, on behalf of the State, to my
24 opening remarks?
25 SOLICITOR COLER: No, sir, Your Honor.

1 THE COURT: From the defendant?
2 MR. GODFREY: No, Your Honor.
3 THE COURT: Okay. If y'all would please give the
4 lawyers, the State, your full undivided attention, followed
5 by the defendant. They'll make short opening statements.
6 And at the conclusion of the opening statement, then the
7 State goes first. They present their witnesses because they
8 have the burden of proof, and then we'll see where we go
9 after that.
10 Okay. Mr. Coler, Ms. Ganss.
11 SOLICITOR COLER: Thank you, Your Honor.
12 May it please the Court?
13 THE COURT: Yes, sir.
14 SOLICITOR COLER: I got to get rid of this gun. I got
15 to get rid of this dope. You ain't seen nothing. You don't
16 know nothing.
17 Those are the words spoken by the defendant, David
18 Dwight Smith, minutes after he shot and killed Robert
19 Finley. He shot him in the face, right in the eye to be
20 precise, with a .25 caliber handgun, semiautomatic handgun.
21 Those words were spoken to an eye witness to this
22 crime. Her name is Angie Smith and she is not in -- she's
23 in the back of the courtroom.
24 After shooting Robert Finley, David Dwight Smith fled
25 the scene and left Robert Finley lying on a concrete set of

1 porch steps to a mobile home with a gunshot wound to the eye
2 and left him laying there to die.
3 My name is Bob Coler and I'm assistant, I'm one of the
4 assistant solicitors here in Spartanburg County, and it will
5 be my job to present the evidence to you, the jurors, for
6 your determination.
7 The way I'll present that evidence is through
8 testimony. People will come and tell you what happened and
9 pictures and exhibits. You'll see items and you'll get to
10 take those back to your jury room.
11 Assisting me will be Sara Ganss. Ms. Ganss is also an
12 attorney in our office. She will be helping me throughout
13 the trial.
14 Over the next day and a half, two days maybe, you're
15 going to hear from witnesses who will piece together all the
16 events, the things that led up to the killing of Robert
17 Finley on January 12th, 1997, at about 2:30 in the
18 morning.
19 And basically what you'll hear is that Robert Finley
20 was 32 years old at the time, lived in a mobile home, and he
21 left that mobile home at about two o'clock in the morning
22 that Sunday morning. He was walking down to his neighbor's
23 mobile home, Otis Hyder. He was going down there because
24 Otis had a telephone and Robert did not have a phone in his,
25 his mobile home.

1 He was going down there to use that phone to make a
2 phone call to get some crack cocaine. He was a drug user,
3 probable a drug addict.
4 One of the things I want to impress upon you and ask
5 you not to do is we're not here to try the life-style of
6 Robert Finley. We admit he was a drug addict. He had a
7 drug problem. We're here because David Dwight Smith is on
8 trial for shooting him and killing him.
9 So, you're gonna hear stuff about drugs. You're gonna
10 hear stuff about crack cocaine and the money he owed. And
11 that's important to this trial. But I want you, to impress
12 upon you and ask you to focus on the reason we're here.
13 David Dwight Smith is charged with killing him.
14 Anyway, Robert goes down to Otis' house to use the
15 phone. And he gets there and he's using the phone and he
16 calls the home of Angie and Rodney Smith.
17 Rodney Smith had helped Robert get some drugs on, on a
18 previous occasion. He helped put him in touch with some
19 crack cocaine.
20 Well, in this particular date, 2:30 in the morning,
21 Rodney Smith didn't really want to be bothered, didn't want
22 to fool with Robert Finley. It was late. He was probably
23 tired. He didn't want to do it.
24 But Angie was willing to take the call for Robert.
25 Angie took Robert Finley's phone call, and what she did in

1 turn was she paged, used a pager to contact David Dwight
2 Smith. And the purpose of that page was to get David Dwight
3 Smith to bring some drugs and to deliver them to Robert
4 Finley.
5 Just minutes after Angie made that, that call to
6 Robert, to David Dwight Smith's pager, David Dwight Smith,
7 the defendant, showed up at Angie's house. He pulled up in
8 a burgundy vehicle. Angie came out of the house. She got
9 in the car. A neighbor from across the street saw her get
10 in the car, saw the car, the burgundy vehicle and even saw
11 David Dwight Smith driving the car.
12 One thing that's important to keep in mind, David
13 Dwight Smith, the defendant on trial, is not related to
14 Angie or Rodney Smith. Same last name. But that's it.
15 They're not related.
16 Angie and Rodney -- I mean Angie and David Smith drive
17 over to the home where Robert Finley is waiting. Robert
18 Finley is at Otis' house waiting to get some crack cocaine.
19 When they get there, they pull into the driveway and
20 David Dwight Smith, who's, who's here to deliver some drugs
21 to Robert Finley, demands or commands or orders Angie to go
22 inside, to get the money, and you come back out. I'll wait
23 in here. Doesn't give her the drugs. I'll stay here in the
24 car.
25 Well, Angie goes in and comes out a few minutes later.

1 When she comes out, she doesn't have the money. She tells
2 David Smith he doesn't have any money.
3 As you can imagine, David Smith has been paged or
4 called out at 2:30 in the morning to make this drug deal,
5 and now he's, he's faced with this situation. Got a guy
6 inside the trailer that doesn't have any money that wants
7 some of my drugs.
8 David Dwight Smith is not a happy individual. He is
9 not pleased with this at all.
10 In addition to that, there is a $40 debt that Robert
11 Finley, the drug addict and the victim in this case, owed
12 David Smith for a previous drug deal. So, you've got David
13 Dwight Smith in his car. It's a cold January morning, 2:30,
14 it's dark, he's been paged, he's been called. You can
15 imagine his, what's going through his mind. He's
16 displeased, displeasured with this situation.
17 The guy in there owed him $40. That guy in there is
18 paged me, wants more drugs, doesn't have any money. It's a
19 waste of my time. This is ridiculous. I'm tired of this.
20 What David Dwight Smith does then is orders Angie to
21 stay put, stay in the car. I'm going in.
22 He gets out of the car, takes with him a loaded .25
23 caliber pistol, and goes into the trailer, into the mobile
24 home where Robert Finley is.
25 A couple of minutes later, Angie Smith, who's sitting

1 in the car and driveway, looks up and sees the doorway, the
2 front doorway into the mobile home, she sees David Dwight
3 Smith, the defendant, and Robert Finley face-to-face in the
4 doorway, and she hears what she described as a pop or a
5 gunshot.
6 She sees Robert Finley drop to the ground and fall and
7 he's been shot. She sees David Smith kind of push him off.
8 He stumbles a little bit and he immediately just leaves
9 Finley there laying on the ground, gunshot wound to the
10 face, walks around, and gets in his car.
11 That's when he says to Angie Smith for the first time
12 you don't know nothing, you didn't see nothing.
13 They leave the scene and leave Robert Finley lying on
14 that kind of concrete porch step face down, his body kind of
15 twisted, legs still in the doorway, one gunshot wound right
16 to the left eye bleeding, and they leave him there that
17 faithful morning to die.
18 At the end of this trial, Judge Early is gonna tell you
19 a little bit about the law. I just want to mention it.
20 He's the expert on the law in, in this courtroom. But I
21 know the law and will mention it to you.
22 He's gonna tell you what the law of murder involves.
23 He's gonna tell you the elements of murder. He's gonna tell
24 you that murder is an unlawful killing of another human
25 being with malice aforethought.

1 There's no question in this case that there was a
2 killing, an unlawful killing. There's no question it was
3 another person. If you ask Robert Finley's family and
4 friends, they'll tell you he was a person. And there's no
5 question that it was done with malice aforethought.
6 You will probably or may or may not have heard the
7 words malice aforethought before. The judge will
8 essentially describe them for you. And I think he'll tell
9 you malice is doing something with an evil heart, with, with
10 a blackened wicked heart, a heart devoid of social
11 requirement or responsibility, a heart bent of doing harm.
12 And when David Smith shot Robert Finley in the eye and
13 left him to die there on those, that porch step that
14 morning, he did that with, with malice in his heart.
15 The judge also is gonna tell you that it requires
16 aforethought, and aforethought means you got to have, to
17 have the malice sometime before the killing. But it doesn't
18 mean you got to have a premeditated plan that you plan a
19 year in the advance and then take steps to execute it.
20 The aforethought means that the malice is got to exist
21 some time before the killing. It could exist a week before
22 the killing. It could exist one day before. It could exist
23 one hour before the killing. It could even exist one
24 minute, one second, or just as the fatal blow is being
25 struck.

1 David Dwight Smith formed that malice in his heart the
2 morning he got over there and, and realized that Robert
3 Finley was inside wanting more of his drugs, wasn't gonna
4 pay him the $40. That's when he formed that malice and
5 started when we -- that's when he acted on it and went
6 inside with a loaded .25 caliber.
7 The judge is also gonna tell you that the defendant is
8 charged with possession of a gun during a crime of violence
9 and that's just like it sounds. He possessed the gun during
10 a murder, which is a crime of violence. And for that, he's
11 also guilty.
12 At the end of this trial, at the end of this testimony,
13 I'm gonna ask you for verdicts on both of those charges.
14 I'm gonna ask you to find David Dwight Smith guilty of
15 murder, and I'm gonna ask you to find him guilty of
16 possession of a gun during a crime of violence.
17 I tell you now that I look forward to presenting our
18 case to you, and I want to thank each and every one of you
19 for your attention. I look forward to getting started on
20 this trial.
21 Thank you.
22 MR. GODFREY: May it please the Court?
23 THE COURT: Yes, sir.
24 MR. GODFREY: Solicitor.
25 Ladies and gentlemen, I'm Bill Godfrey and I represent

1 David Dwight Smith.
2 As the solicitor said, you're gonna hear a lot of talk
3 about drugs throughout the course of the trial. Drugs are
4 involved in the -- excuse me. Drugs are involved in the
5 facts of the case. But this is not a drug case.
6 This is a case where my client has been charged with
7 killing someone with malice aforethought.
8 Ladies and gentlemen, we believe the evidence will show
9 that, in the early morning hours of January 12, 1997, David
10 Smith was tired. He was ready to go home.
11 He received a page from the Smith residence where Angie
12 and Rodney Smith lived. He did not return the phone call.
13 He recognized the number. He went over there.
14 When he got there, Angie Smith came out and said that
15 she wanted to hook him up with somebody that wanted to get
16 some drugs. At that point in time, David Smith didn't know
17 who it was that he was gonna be hooked up with.
18 And Angie Smith got in the car. As they were driving
19 off, Mrs. Roseburgh was in her yard and she knew David
20 Smith, knew his car, and Angie Smith and David Smith, who
21 are not related, drove off.
22 Angie Smith told David where to go. When they got over
23 to this trailer, there was a trailer that David was not
24 really familiar with. It wasn't where Robert Finley lived
25 and David was tired.

1 He told Angie to go in. You get the money, come out,
2 I'll give you the drugs, you take the drugs back in.
3 Angie goes in and she comes back out and says basically
4 he wants to deal with you. David gets the drugs. He goes
5 inside the house. He sees that it's Robert Finley.
6 David lays the drugs down on the table. Robert Finley
7 looks at the drugs. He tests the drugs and he says I don't
8 have any money.
9 He said I'll pay you tomorrow. David says you can't
10 pay me tomorrow, I'm not gonna be here. I'm gonna be gone.
11 And Robert Finley tells David I'm gonna take those drugs.
12 At that point in time, David is trying to back out of
13 the trailer. He has his hands in his pocket because it's a
14 cold night. He did have a .25 semiautomatic pistol in his
15 right front pocket.
16 When he pulled his hands out, he had the gun in his
17 hand. Robert Finley says what you gonna do, shoot me, and
18 Robert Finley lunges forward and grabs David Smith.
19 David is by the door. He's trying to get out. He's
20 trying to get away. He hits him and tries to break the hold
21 on him.
22 It doesn't break the hold. Robert Finley has him.
23 They're both holding each other. They start to fall out the
24 door, and you'll hear testimony that they were very close
25 together falling out the door. As they were falling, there

1 was a pop. When they hit the ground, David gets up and runs
2 back to the car and he leaves.
3 David Finley, David Smith did not intend to kill
4 anybody. He will tell you that. He didn't even intend for
5 the gun to go off. He was just trying to get out of there.
6 Once you hear all of the evidence, you will understand
7 that there is no malice in this case. David was trying to
8 get away from somebody who was attacking him. And once you
9 understand that from the testimony that you're going to
10 hear, you will have no alternative but to find David Smith
11 not guilty of murder and possession of a weapon during
12 commission of a violent crime.
13 Thank you.
14 THE COURT: You may call your first witness.
15 SOLICITOR COLER: Thank you, Your Honor.
16 The State calls Ken Camp.
17 KEN CAMP, being first duly sworn,
18 testified as follows:
19 THE COURT: How about state your full name and spell it
20 for the record, please?
21 WITNESS: Kenneth Dwayne Camp.
22 THE COURT: Spell it.
23 WITNESS: K-E-N-N-E-T-H. D-W-A-Y-N-E. C-A-M-P.
24 SOLICITOR COLER: Thank you, Your Honor.
25 <u>DIRECT EXAMINATION</u>

1 BY SOLICITOR COLER:
2 Q Would you, officer, tell the jury where you work?
3 A Spartanburg County Sheriff's Office.
4 Q How long you been with the Sheriff's Office?
5 A I started in 1996.
6 Q Okay. What is your present title or assignment with
7 the Sheriff's Office?
8 A I'm a deputy three on third shift uniform patrol.
9 Q Okay. And briefly, what is a, a uniform patrol deputy
10 for the Sheriff's Office?
11 Do y'all respond to calls?
12 A Yes, we do.
13 Q Back in January of 1997, January 12th to be specific,
14 were you on duty that, I guess, early morning hours?
15 A I was.
16 Q Do you remember what shift you were working?
17 A Third shift.
18 Q Okay. What, what time does third shift start and when
19 do you work till, if you can recall that?
20 A I believe back then it started at 11:00 p.m. and went
21 to 7:00 p.m.
22 Q Okay. And you were dispatched to this call -- you got
23 this call about two o'clock in the morning, somewhere in
24 that area?
25 A I was dispatched at 2:33 a.m. and I arrived at 2:37

1 a.m.
2 Q All right. Tell us where you were dispatched to at
3 2:33 in the morning on, on that date.
4 A At 2:33 in the morning I was dispatched to Lebon
5 Drive, which is in the County of Spartanburg, South
6 Carolina.
7 Q And just to orient us, do you -- can, can you
8 relatively tell us where that is and what, what that
9 community is or what it's near?
10 Is it in the Saxon community?
11 A Yes, it is.
12 Q Okay. All right. From your memory or from your report
13 that you have, if you'll walk us through what you remember
14 seeing and doing when you got to the scene.
15 A When I arrived at the scene, I, I observed a white male
16 lying on the, on the steps as like he had fell out the door.
17 Half his body was on the steps, and his torso was on the
18 ground kind of twisted.
19 Q Okay. Did you encounter -- were you the first officer
20 on the scene?
21 A Yes, sir, I was.
22 Q Did you see any other people at the scene at that point
23 when you first pulled up, any civilians or any officers?
24 A When I first pulled up, I observed a white male laying
25 on the ground. I did check inside the residence. I saw an

1 older white male in the kitchen area on the telephone.
2 Q Okay. Do you know if that white male -- was that Otis
3 Hyder or do you know?
4 A Yes, it was.
5 Q Okay. What were your duties, what was your function,
6 what were you to perform when you got there on the scene
7 initially?
8 A When I first arrived, I checked the victim, and I
9 checked the area for weapons. I did secure the residence to
10 make sure there were no more weapons inside the house nor
11 was there anybody else inside the house. At this time, I
12 took Mr. Hyder outside and I notified dispatch to call EMS.
13 Q Did you find any weapons on the victim, Robert Finley?
14 A No, I didn't.
15 Q All right. Was he -- were you able to make a
16 determination about his health status at that point?
17 Was he deceased at that point or do you know?
18 A From what I could tell he was.
19 Q Okay. Do you begin to secure the scene?
20 A Yes, sir.
21 Q All right. What do you do to secure the scene?
22 What -- just describe what you were doing.
23 A As I said, I checked the area. I looked around the
24 residence to make sure nobody else was there. I took
25 Mr. Hyder from inside the house and put him out in my

1 vehicle, and I notified the supervisor and EMS to come in.
2 Q Okay. Are you responsible -- are you one of the
3 officers that starts to set up crime scene tape or does, do
4 other officers handle that?
5 A Yes, we handle it.
6 Q I'm sorry?
7 A Yes, we handle the crime scene tape.
8 Q Did you start doing that in this case or do you recall?
9 A I don't recall.
10 Q Okay. At any point while you were on the scene, did
11 you see David Dwight Smith there at the mobile home or, or
12 in the area?
13 A No, sir, I didn't.
14 Q And what did you do with Mr. Hyder that was inside the
15 trailer?
16 A I know I took him out the trailer. But I don't
17 remember exactly what I did with him.
18 (Whereupon, four photographs were marked as State's
19 Exhibit Nos. 4 through 7 for identification purposes only at
20 this time.)
21 Q Okay. I'm gonna show you a couple of pictures.
22 Officer, I'm gonna hand you four photographs.
23 And, Your Honor, for the record, I'm handing him what
24 has been premarked as State's Exhibit 4, 5, 6, and 7.
25 First of all, just take a look at those pictures, and

1 tell me one, do you recognize those photographs?
2 A Yes, I recognize them.
3 Q Are they photographs of the scene of this incident?
4 A Yes, sir, they are.
5 Q Do they appear to accurately portray the scene as it
6 existed on January 12 of 1997 at about 2:30 in the morning
7 when you arrived?
8 A They do.
9 SOLICITOR COLER: Your Honor, at this point, we move
10 State's No. 4, 5, 6, and 7 into evidence and offer to
11 publish to the jury.
12 MR. GODFREY: Without objection.
13 THE COURT: Admitted without objection.
14 SOLICITOR COLER: Thank you, Your Honor.
15 (Whereupon, State's Exhibit Nos. 4 through 7 were
16 received into evidence at this time.)
17 Q Officer, I'm just gonna put these on the overhead
18 briefly, and just ask, if you turn around from where you
19 are -- and Your Honor, I'm not sure if all of our jurors can
20 see.
21 THE COURT: Can everybody see?
22 Sir, hold you a second.
23 Sir, on the very back, can you see?
24 (Juror nods affirmatively.)
25 THE COURT: Let me know if it becomes difficult.

1 Q Just briefly, Officer Camp, describe for us what, what
2 we see in this picture and if this is the scene you saw when
3 you arrived.
4 A Yes, it's the scene I, I observed when I arrived.
5 Q All right. Use the pointer if you want to.
6 Obviously, if you'd point to Mr. Finley?
7 A (Witness complies.)
8 Q And where in this photograph is the front---
9 THE COURT: Hold on one second please. One second.
10 (Pause.)
11 THE COURT: All right. Mr. Bailiff, lock that door for
12 me.
13 SOLICITOR COLER: Thank you, Your Honor.
14 THE COURT: Nobody in or out.
15 BAILIFF: Yes, sir.
16 Q Where, in that photograph, is the front door to this
17 mobile home?
18 A This is the front door, and there's the driveway near
19 to the right. And that's -- it's like a road to the right
20 that leads down to the trailer park, and this is the
21 driveway right here.
22 Q Okay.
23 THE COURT: Mr. Coler, for the record, what, what is
24 that you just published?
25 SOLICITOR COLER: Your Honor, that's State's Exhibit

1 No. 7 that he---
2 THE COURT: Thank you.
3 SOLICITOR COLER: ---just published.
4 I'm also gonna put State's Exhibit No. 6 up briefly,
5 Your Honor.
6 (Witness comes down from the stand.)
7 Q The same thing, Officer Camp, does this one -- does
8 this give you a better view of where the driveway to this
9 mobile home is?
10 A Yes, it does.
11 Q All right. Show us where that is.
12 A It's the driveway and this area is my vehicle.
13 Q Okay. You went inside the mobile home, is that
14 correct---
15 A Yes.
16 Q ---officer?
17 All right. I'm gonna show you what's been now admitted
18 as State's Exhibit No. 5.
19 Does this appear to accurately portray the inside of
20 the mobile home?
21 A Yes, it does and Mr., the older white male was at this
22 table talking on the telephone when I arrived.
23 Q Okay. And in this photograph, can you see where the
24 front door to the mobile home is?
25 A It's right here.

1 Q And can you still see Mr. Finley's feet?
2 Is that his feet there?
3 A Yes, sir.
4 Q Okay. The same thing, this is just another photograph
5 of the inside?
6 And Your Honor, this is State's Exhibit No. 4.
7 Is this also another photograph of the inside of the
8 home?
9 A Yes, sir, that's the living room.
10 Q Let me ask you, officer, these photographs from inside
11 the home, do they essentially or accurately portray the
12 condition of the furniture, the way the furniture was when
13 you encountered it, or did you go in and straighten up or
14 tip anything up or correct anything?
15 A No, sir.
16 Q Okay. You can retake your seat.
17 A (Witness returns to the stand.)
18 Q Just so I'm clear, you were not part of the team that
19 investigated the crime scene or anything like that, is that
20 correct?
21 A No, sir.
22 Q Your job is just to arrive and secure the scene?
23 A I'm a first responder, yes, sir.
24 THE COURT: Mr. Coler, can you turn that off?
25 SOLICITOR COLER: Yes, sir.

1 Q That's all the questions I have for you, officer.
2 Please answer any that Mr. Godfrey has.
3 THE COURT: Cross.
4 MR. GODFREY: May it please the Court?
5 THE COURT: Yes, sir.
6 CROSS-EXAMINATION
7 BY MR. GODFREY:
8 Q Officer Camp, you say you were dispatched at 2:33 and
9 arrived at 2:37?
10 A Yes, sir.
11 Q Upon your arrival when you pulled up, did you see --
12 what did you see?
13 A When I pulled up -- well, at first when I pulled up,
14 all I saw was the body lying outside the, the door. As I
15 got out my vehicle and approached the, the trailer, I could
16 see an older white male standing in the kitchen area talking
17 on the telephone.
18 Q Did you see anybody else?
19 A No, sir.
20 Q Was there anybody else there?
21 A No, sir, there wasn't.
22 Q Wasn't there a second person there in the trailer with
23 Otis Hyder?
24 A Not that I can recall.
25 Q Now, you indicated that you checked the victim.

1 How did you check the victim in the case?
2 A When I first arrived, after I looked at the body, it
3 was cold outside, and the way the body was leaning, I, to
4 myself, I thought that there's no way probably this person
5 was living he could be laying in the position he was laying
6 in. And when I first got in, it was still like mist coming
7 out of his mouth and I could tell it was a gunshot. And
8 after I, after I secured the residence, I called for EMS.
9 Q All right. When you say you checked the victim, it was
10 a visual checking?
11 A Yes, sir.
12 Q So, you didn't actually touch Robert Finley?
13 A No, sir, I didn't.
14 Q Now, the solicitor asked you if you checked for
15 weapons, and if you checked for weapons on Robert Finley.
16 Did you check for weapons on Robert Finley?
17 A I checked the area. I didn't physically touch the body
18 because, as I said, I didn't think he was living.
19 Q The picture that is there, I think State's Exhibit 6
20 and 7, two pictures of Robert Finley, is that the position
21 of the body when you arrived?
22 A Yes, sir, it is.
23 Q Now, when you had -- you say you went inside the
24 trailer?
25 A Yes.

1 Q How did you get inside the trailer?
2 A Through the steps on the front door.
3 Q So, you went beside Robert Finley?
4 A Uh-huh. (Affirmative).
5 Q And is that the same way you got Otis Hyder out of the
6 trailer?
7 A Yes, sir.
8 Q And how long was it before other officers came on the
9 scene to assist?
10 A I don't recall.
11 Q But it's a fairly short time?
12 A Yes, sir, it was.
13 Q How soon did you take Otis Hyder out of the trailer?
14 A As soon as I got there and I checked the body, looked
15 at the body. I had to make sure there was no one else
16 inside the trailer. So, I went inside and got him out, and
17 then we checked, I checked the trailer.
18 Q Now, did any other people arrive on the scene before
19 the officers that came to assist you?
20 A No, sir.
21 Q So, the whole time that you were there, it was just you
22 and Otis Hyder, right?
23 A At first, yes, sir.
24 Q At first.
25 All right. What came next, officers to help on the

1 scene or did civilians come in?
2 A If I think -- I think the medics, EMS came first.
3 After I arrived, EMS came.
4 Q And then who came?
5 A My supervisor, which was Lieutenant Littleton.
6 Q Did any civilians ever show up on the scene while you
7 were there?
8 A There's a female that I documented in my report that
9 came shortly after I arrived.
10 Q Okay. So, a female came shortly after you arrived?
11 A Uh-huh. (Affirmative).
12 Yes, sir.
13 Q What did she do?
14 A Mrs. Morgan, her name was Mrs. Morgan Simmons, and in
15 my report I said she was the victim's girlfriend. And
16 because of her emotions, she was transported to Spartanburg
17 County Sheriff's Office as directed by my supervisor,
18 Lieutenant Littleton.
19 Q Well, where was she at the scene of the incident?
20 A I don't -- when I first got there, she wasn't there.
21 Q Well, when she got there, where was he?
22 A I don't recall where she was.
23 Q Okay.
24 A She didn't go inside the trailer.
25 Q Okay. You're sure of that?

1 A I'm positive of that.
2 Q And you don't recall if you started putting up the
3 crime scene tape or if someone else did?
4 A No, sir, I don't.
5 Q And of course, this happened a long time ago?
6 This is the best of your memory, isn't it?
7 A This happened in '97.
8 Q All right. Nothing further.
9 THE COURT: Redirect?
10 SOLICITOR COLER: Just briefly.
11 REDIRECT EXAMINATION
12 BY SOLICITOR COLER:
13 Q Officer Camp, you didn't -- aside from making a visual
14 examination of the victim, Robert Finley, you didn't touch
15 or move or poke or prod him, correct?
16 A When I arrived on scene, based on what I saw of that
17 body, I knew there was no way that person could be living
18 laying there on those steps. And with my training and
19 experience, I knew not to touch that body.
20 Q Okay. And what are you trained, as far as, as a crime
21 scene, to do once you determine that, that is a, possibly a
22 murder scene that you've arrived at?
23 A We're trained to, you know, locate any victims, secure
24 the area by checking for weapons or anybody else that may be
25 on scene, and remove everybody else from the crime scene

1 area.
2 Q Are you trained to contaminate the scene as little as
3 possible?
4 A Yes, sir.
5 Q Okay. That's all I have. Thank you.
6 THE COURT: All right. Step down.
7 Next witness.
8 SOLICITOR GANSS: Allen Newman.
9 SOLICITOR COLER: Judge, if there's no objection, we
10 also that Officer Camp be excused from his subpoena.
11 MR. GODFREY: Without objection.
12 THE COURT: You may be excused.
13 ALLEN NEWMAN, being first duly
14 sworn, testified as follows:
15 THE COURT: All right. Give me your full name and
16 spell it for me please.
17 WITNESS: Sir?
18 THE COURT: Full name and spell it.
19 WITNESS: It's John Allen Newman. J-O-H-N. A-L-L-E-N.
20 N-E-W-M-A-N.
21 THE COURT: Yes, ma'am.
22 SOLICITOR GANSS: Thank you, Your Honor.
23 <u>DIRECT EXAMINATION</u>
24 <u>BY SOLICITOR GANSS:</u>
25 Q Mr. Newman, could you please tell the, please tell the

1 Court where you work and live?
2 A I work at Martex Fibers in Camp Croft, and I live at
3 Messes Drive in Spartanburg on the outskirts of Saxon
4 community.
5 Q All right. And back in 1997, were you an EMS volunteer
6 for the Arcadia Rescue Squad?
7 A Yes, I was.
8 Q I'm just gonna take you to the day in question,
9 January 12th, 1997.
10 Did you respond to an incident at Lebon Street
11 around 2:30 in the morning that day?
12 A It was about 2:35 when I received the call, and I can't
13 remember if we was already at the hospital or we was going
14 back to the hospital, the station after a run. But yes, I
15 did.
16 Q And is Lebon Street, is that here in Spartanburg
17 County?
18 A Yes, it is.
19 Q All right. And what did you do or what did you see?
20 Can you describe that to the jury when you arrived
21 there?
22 A Well, when we pulled up on the scene, they was several
23 officers already there getting ready to put up the crime
24 scene tape. They was in front of the driveway facing the
25 mobile home we had to go to.

1 So, the driver of my ambulance was backing it up and I
2 walked down in there and seen a white male laying outside
3 the door of a trailer. He was twisted, laying on the
4 ground.
5 Q And at the time that you were, arrived, could you tell
6 if the victim was indeed deceased?
7 A When we got there, he wasn't moving and it's my duty to
8 check and see if he was alive. I done a pulse check on his
9 neck and he wasn't, he wasn't alive. He was dead.
10 Q Okay. What did or did you do anything else to the
11 body?
12 A No, ma'am, on a crime scene, all we can do is visualize
13 crime, make sure the patient is deceased, then we back out
14 and we have to call for a coroner to come and wait for the
15 coroner to come before we can move them.
16 Q Did you put some bags on his hands?
17 A After the coroner arrived, he checked the victim, done
18 what he had to do, then he said let's put bags on his hands
19 in case we have to check his hands for certain things, and
20 he lifted the arms up, I slid the bags over them, and taped
21 them up, and then I transported him to the hospital.
22 Q And so, again, when you arrived at the scene, was it
23 already secured?
24 A The scene was already secured. They was putting up the
25 crime scene tape when we arrived.

1 Q Right.
2 So, is it fair to say nobody could just walk in and
3 out?
4 A No, they -- it's, it's not like a, a house on the side
5 of the street. It's a little trailer park that had like
6 about four trailers down in it, and you had to go around
7 behind the building to get down into this driveway. It was
8 down off the street really, and if they was anybody there,
9 they would of came from the side where people lived and most
10 of those trailers over there was empty anyway.
11 Q That's all the questions I have. If you'll just answer
12 any questions that the defense counsel has, that would be
13 great.
14 A All right.
15 CROSS-EXAMINATION
16 BY MR. GODFREY:
17 Q Other than bagging the hands, you did nothing else,
18 right?
19 A No, sir, we just bagged the hands and transported, and
20 then I got documents to where we released him, released him
21 at the hospital, and I got the time when I bagged them.
22 Q Nothing further.
23 THE COURT: You may step down unless -- I assume
24 nothing on redirect?
25 May he be excused?

1 SOLICITOR GANSS: Yes, ask that he be excused.
2 THE COURT: Sure. Careful.
3 Next witness.
4 SOLICITOR COLER: State calls Angie Smith.
5 ANGIE SMITH, being first duly
6 sworn, testified as follows:
7 WITNESS: My name is Angela Denise Smith.
8 THE COURT: Smith, S-M-I-T-H?
9 WITNESS: Yes, sir.
10 THE COURT: Thank you.
11 DIRECT EXAMINATION
12 BY SOLICITOR COLER:
13 Q Okay. Mrs. Smith, start by telling us where you live.
14 A I live at Fisher Avenue, Pine View Hills,
15 Spartanburg, South Carolina.
16 Q How long have you lived at Fisher Avenue?
17 A Almost thirty -- forty-three years.
18 Q Okay. Who else -- 43?
19 A Forty-three years.
20 Q Who else lives there at Fisher Avenue with you?
21 A My mother, and my brother, and my son.
22 Q Okay. Tell us what your mother's name is.
23 A My mother's name is Betty Elmore. My son name is Tyvon
24 Smith, and my oldest son live in Charlotte. His name is
25 Daniel, and my brother, Rodney Smith.

1 Q Okay. And is Rodney here in the courtroom?
2 A Yes, sir.
3 Q Okay. And where is, where is he?
4 A Sitting right there in the blue jacket.
5 Q Okay. Do you know the defendant in this case, David
6 Dwight Smith?
7 A Yes, I do, sir.
8 Q Okay. And how long have you known David Dwight Smith?
9 A Over ten years, sir.
10 Q Okay. When this happened in January of 1997, how long
11 had you known him up until that point?
12 A I been knowing him a long time, sir.
13 Q Okay. Had you known him a couple of years before this
14 incident happened or do you remember?
15 A I just been knowing him a long time.
16 Q Okay. Did you know him pretty well on
17 January 12th of 1997?
18 A Yes, I knew him pretty well.
19 Q Okay. And did you know him for a year at least?
20 A Yes.
21 Q Maybe a couple of years?
22 A Yes.
23 Q Okay. But you can't remember exactly how much?
24 A Ten years.
25 Q Ten years previous to 1997?

1 A Okay. Okay. You got me confused right now.
2 Q Take your time. Let me just rephrase it.
3 A I ain't been knowing him since 1997. Yeah, I just --
4 from that previous---
5 Q The night this happened on January 12th, 1997---
6 A Uh-huh. (Affirmative).
7 Q ---you knew him pretty well before that, correct?
8 A Okay. Yes, sir.
9 Q Okay. Did you know Robert Finley?
10 A I knew of him because he was my brother's friend.
11 Q Okay. How, how many times, if you can estimate, had
12 you met with him or encountered with him before he got
13 killed on January 12th, '97?
14 A I met Robert Finley about a couple of times, but that
15 was my first time ever going over to there.
16 Q Okay. And did you know whether or not he used drugs,
17 illegal drugs?
18 A Yes, I did, sir.
19 Q Do you know what kind of drug he used?
20 A Crack cocaine.
21 Q Okay. I'm gonna ask you to think back to
22 January 12th, 1997.
23 Do you remember the events of that---
24 A Yes, sir, I do, sir.
25 Q ---early morning?

1 Okay. Describe for me starting with any phone calls
2 that came from Robert Finley to your house.
3 A You mean just can I describe the phone calls?
4 Q Yeah.
5 Did Robert call your house?
6 A Yes, he did, sir.
7 Q Okay. Did -- who, in your house, spoke to Robert on
8 the telephone when he called that morning?
9 A Well, he spoke with my brother. But my brother didn't
10 want to be bothered. So, I took the call.
11 Q Okay. And what was -- what did Robert Finley want?
12 What was he wanting to try to do that morning?
13 A He wanted some drugs.
14 Q Okay. And was it normal or usual for him to try to
15 call your brother and help him get, find some drugs?
16 A Well, he called other people. But I guess, at that
17 time of morning, he took that chance and called.
18 Q And this is early?
19 It's about 2:30 in the morning, two o'clock in the
20 morning?
21 A Something like that, sir.
22 Q All right. What was Rodney's decision or what did
23 Rodney do about it?
24 A Rodney didn't want to, you know, get up, you know. I
25 just---

1 Q Do you know why Rodney didn't want to get up?
2 A Cause he was tired.
3 Q Okay. All right. Did you eventually take the phone
4 calls from Robert?
5 A Yes, I did, sir.
6 Q Was it more than one call or just one call that got
7 passed between you and Rodney or do you recall?
8 A Well, at that time, it was just me. At that time, I
9 don't know how many times if he tried to call or not. But
10 at that time, I answered it.
11 Q So, you answered your phone from Robert?
12 A Yes.
13 Q All right. And what did, and what did Robert ask you
14 to do or what did you do in response to Robert's phone call?
15 A Well, he wanted some drugs. So, I called -- I, I
16 beeped David Smith.
17 Q Okay. How did you -- you beeped -- you said you called
18 him on his pager?
19 A Yes.
20 Q Did you have his pager number written down or did you
21 have it memorized?
22 A I just---
23 Q Or do you know it?
24 A I seen it on the ID box. You know, I seen it on the ID
25 box. You can---

1 Q But you knew it?
2 A Yeah.
3 Q All right. And why did you call David Dwight Smith
4 when Robert Finley called you looking for some crack
5 cocaine?
6 A Cause David usually take him crack or other people one,
7 you know.
8 Q And had you, had you, on previous occasions, do you
9 know of that David Dwight Smith got some crack cocaine for
10 Robert?
11 A My understanding.
12 Q Okay. And was that usually through your brother
13 Rodney?
14 A Yes, sir.
15 Q When Robert called you and was wanting crack cocaine,
16 did he ever mention to you that he wanted David Dwight Smith
17 to, to deliver that or to bring that?
18 MR. GODFREY: Objection. Leading.
19 THE COURT: Rephrase your question.
20 Q Did Robert ever mention any specific names about who he
21 wanted to get the crack cocaine from?
22 A No, he did not.
23 Q Did it matter to him?
24 A I guess it didn't, sir.
25 Q Did you ever tell Robert, on the phone, who you were

1 gonna call to get him some crack cocaine?
2 A I can't remember. But I, I called -- that's why I
3 paged David.
4 Q Well, up until the point that you hung up with
5 Robert -- I presume you had to hang up with Robert to
6 call---
7 A Yes.
8 Q ---David, correct?
9 A Yes, sir.
10 Q Do you remember or can you remember whether you told
11 Robert who you were going to call to get the drugs?
12 A Yes, I did. Yes, I did. Yes, I did.
13 Q Are you sure?
14 A I'm positive, yeah.
15 Q What happened after you paged David Smith?
16 A He came right over.
17 Q All right. Did he call you back first?
18 A No, he did not.
19 Q About how long did it take for him to come over?
20 A I don't even think it took five or ten minutes.
21 Q Okay. How did he know where to come?
22 A On the number on the box.
23 Q What, what number did you put in?
24 A I'm saying my phone number on that box.
25 Q On his pager?

1 A Yes, sir.
2 Q Okay. Did you put anything else in there to indicate
3 your address besides your telephone number?
4 A No, sir.
5 Q And he came right over?
6 A Yes, he did, sir.
7 Q Do you remember what Robert, I mean what David Smith
8 was driving when he showed up at your house?
9 A Burgundy -- I don't know the name of the car, but it's
10 burgundy.
11 Q Okay. Was it a sedan or a station wagon or do you?
12 A It's not a station wagon.
13 Q Just a regular kind of car?
14 A A regular burgundy car.
15 Q All right. What did you do when, when David Smith got
16 to your house?
17 A I went out the door, got in the car.
18 Q All right. Who else was in the car with David?
19 A Just David.
20 Q Did you see any of your neighbors or did any of your
21 neighbors see you?
22 A My neighbor, Cynthia Roseburgh, was coming out, and she
23 seen me get in the car with him.
24 Q Okay. Is Cynthia here in the courtroom?
25 A Yes, she is. She's sitting over beside my brother.

1 Q Okay. What, if anything, did you say to Robert, I mean
2 to David or did David say to you about the $40 that
3 Robert---
4 MR. GODFREY: Objection to leading.
5 THE COURT: Rephrase your question.
6 SOLICITOR COLER: I can rephrase it.
7 Q Did you say anything to David on the ride over there
8 about the $40 that Robert owed to David?
9 A No, I did not say anything to David about $40.
10 Q Did David say anything to you about it?
11 A Yes, he did, sir.
12 Q What, if anything, did he say about it?
13 A He just said that Robert owed him $40.
14 Q Okay. Did he say what it was for?
15 A Drugs.
16 Q Okay. Did you, did he say that or did you know that?
17 A I didn't know that until he said it.
18 Q Describe for me what happened when you got to the
19 mobile home where Robert Finley was.
20 A Can I get up and do this?
21 Q Sure.
22 A (Witness comes down from the stand.)
23 Q You need to make sure you speak up so the reporter can
24 hear you.
25 A Okay. We pulls up in the yard in the, in the trailer

1 yard.
2 Am I speaking loud enough?
3 THE COURT: Yes, ma'am, you're doing great.
4 A We pulls up in the, the trailer yard. David asked me
5 to get out the car to go in and see what Robert wanted. So,
6 I get out, I go knock on the door to see what Robert wanted.
7 I get, walk in---
8 THE COURT: Take a deep breath, ma'am.
9 Let her get her some water. If you need to take a
10 glass of water, there's some water here. Just take your
11 time.
12 A Anyway, I walked in there and Robert asked me and the
13 older man was sitting there. He was in a wheelchair. And
14 he -- and Robert said Angie, I owe David $40. I said cause
15 David didn't, David didn't give me no drugs to go in there
16 with. So, I come back out and I told David Robert didn't
17 give me any money. So, handle it on your own, you know,
18 cause there wasn't no drugs delivered from me till he didn't
19 give me any drugs and Robert didn't give me no money.
20 So, I got back in the car, and I, I sat in the car, and
21 I lift -- I started smoking a cigarette. The next thing I
22 know, I lifted my head up and they was coming out the door
23 and that's all.
24 Q You're doing fine. Take your time.
25 A And they was -- all I heard was a pop, and was it --

1 David fell down. David ran on the other side. He -- if I
2 was there, he could of killed me, but he went around to the
3 car, he got in, and he said you don't know nothing, you
4 ain't seen nothing, and we left.
5 THE COURT: Have a seat back for me, ma'am.
6 A (Witness returns to the stand.)
7 Q Mrs. Smith, I'm gonna ask you a couple questions. I
8 want to go back a little bit. Take your time and listen to
9 my question.
10 When you first pulled up to, to the trailer where
11 Robert Finley was, what were you to do when you went into
12 the trailer?
13 A I was suppose to go get the money.
14 Q For what?
15 A For drugs.
16 Q Okay. When you got in there, what did you tell Robert
17 you were, you were there to do?
18 A To pick up money from Robert to buy drugs from, from
19 David.
20 Q Okay. Did you see somebody else inside the mobile home
21 when you got there?
22 A The man in the wheelchair. I called him Pops.
23 Q Okay. Can you describe anything about him?
24 Was he a white man or a black man?
25 A White man.

1 Q Okay. Was he young or old?
2 A Older man.
3 Q Okay. Had you ever seen him or been to his house
4 before?
5 A I just, I don't---
6 Q Do you know -- let me ask you this.
7 Do you know if it was his mobile home?
8 A It's not his mobile home.
9 Q Do you know if he was living there?
10 A I think Robert lived up the street from the mobile
11 home. But he come and used the people's telephone.
12 Q Came and used Pops' telephone?
13 A. That's what's I call him, Pops
14 Q Okay. And that's in the mobile home that you went in
15 to to get the money?
16 A Yes, sir.
17 Q All right. When you got in there and discovered that
18 Robert didn't have any money for drugs---
19 A Yes.
20 Q ---what did you do?
21 A Come back outside and I told David.
22 Q Okay. What exactly did you tell David?
23 A I said David, Robert didn't have the money. So, David
24 reached over to the side. I don't know what he reached for.
25 But he got out the car and he went, I mean he went in the

1 trailer.
2 Q What, if anything, can you describe about his mood or
3 his demeanor when you told him Robert is in the trailer and
4 doesn't have any money for you?
5 A Uh-huh. (Affirmative).
6 What kind of mood he look like?
7 Q Yeah.
8 How did David take that?
9 A He just went in and he didn't look like he was gonna
10 be -- I mean I ain't know it's gonna be like that.
11 Q Did he stay pretty calm?
12 A Yeah, he was calm.
13 Q Collected?
14 A Yeah.
15 Q All right. Did he -- you said he reached for
16 something?
17 A He reached down, but I couldn't tell what he---
18 Q Where did he reach?
19 A On the side of the door. I don't know if he got one of
20 those side things on his door or what.
21 Q Okay.
22 A He could of reached down up under the seat. I'm just
23 saying he reached down.
24 Q After he reached down, what did he do?
25 A Opened the door up and got out.

1 Q Okay.
2 A And went in the trailer.
3 Q Okay. Did he say anything to you or tell you anything
4 when he left---
5 A No, he did not.
6 Q ---or when he got out of the car?
7 A No, he did not, sir.
8 Q What were you to do while he went in the trailer?
9 A What?
10 Excuse me?
11 Q What were you suppose to do while he went in the
12 trailer?
13 A I just sat in the car and waited on him to come out.
14 Q Okay. About how long did you sit in the car before you
15 noticed something going on at the doorway of the mobile
16 home?
17 A By the time I leaned my head down and I lit my
18 cigarette and came back up, they was fumbling out the door.
19 That wasn't no more than about---
20 Q Estimate.
21 Just a minute, two minutes?
22 A Maybe two minutes.
23 Q All right. Describe for me exactly what you saw when
24 you looked up at the doorway to the mobile home.
25 A The door came opened.

1 Can I get up again, sir?
2 THE COURT: You can.
3 A All I know is the door came open, and they was falling
4 out the door like this.
5 Q All right. Step this way just a little bit.
6 A (Witness complies.)
7 Q I'm sorry. Say that again.
8 A All I know, they was coming out the door and the
9 door -- this is the trailer door. This is them falling out
10 the door.
11 Q Okay. Who was inside the mobile home and who was
12 outside the mobile home?
13 A David was outside the mobile home and Robert was inside
14 the mobile home.
15 Q All right. Which way was David facing, into the mobile
16 home or out of the mobile home?
17 A This is, this is Robert. This is David. David was
18 outside.
19 Q Okay. And what -- was David facing into the mobile
20 home or facing out of the mobile home?
21 A He was facing in.
22 Q Okay. Which direction was Robert facing?
23 Was he---
24 A Out.
25 Q Out of the mobile?

1 A Coming out of the door.
2 Q All right. And then what can you describe, if
3 anything, about the two?
4 What were they doing?
5 A Scuffling. It's like it happened so quick.
6 Q Okay.
7 A They was so close together, that's all I know is I just
8 heard a pop.
9 Q Okay. After you heard the pop, what did you see
10 happen?
11 A David -- Robert fell and David come right around the
12 side and went from -- he ran from my side to the other side,
13 to the driver's side.
14 Q All right. What did David do with Robert's body, if
15 anything?
16 A Just laid there and I was---
17 Q All right. Did David fall down?
18 A I mean I can't remember that.
19 Q Okay.
20 A No.
21 Q Did you see where Robert's body fell to?
22 A On the ground.
23 Q Okay.
24 A I mean his feet, his body was laying on the steps
25 almost.

1 Q Okay. And David ran around the car.
2 What did he do next?
3 A Got in the car and say you don't know nothing, you
4 ain't seen nothing. That's all, that's all I hear, that's
5 all I hear, you don't know nothing, you don't see nothing.
6 Q What, if anything, can you describe about David's
7 demeanor then when he told you you don't know nothing, you
8 don't see nothing?
9 A What you mean?
10 Say that again?
11 Q What was his mood, what was his voice like when---
12 A He was, he was scared. He was -- I mean frightened.
13 I'd say frightened.
14 Q When he told you---
15 A I was frightened.
16 Q You were frightened?
17 A I was scared because it could of been me.
18 Q It could of been you what?
19 A He could of killed me, you know.
20 Q All right. And he got in the car, and then what did
21 y'all do?
22 A He, he dropped me off on Walker Street cause I was
23 scared to go home.
24 Q Okay. Why did you not want to go home?
25 A Because I was scared.

1 THE COURT: All right. Have a seat back now.
2 WITNESS: Okay. I'm sorry.
3 THE COURT: Okay.
4 (Witness returns to the stand.)
5 Q Mrs. Smith, I'm gonna show you what's been admitted as
6 State's Exhibit No. 7, and there's a little glare on this
7 picture. But I want you to use this pointer right here.
8 You push that button.
9 Point to where you saw David Smith and Robert Finley
10 just before you heard the gunshot or the pop.
11 A At the door right here.
12 Q Okay.
13 A That's the door. This is -- they was coming out the
14 door.
15 Q Okay.
16 A And right -- it's like -- they was right there and it
17 said pop.
18 Q All right.
19 A It's like they was scuffling like, scuffling.
20 Q All right.
21 A I heard a pop. And it was not no loud pop.
22 Q Did you see Robert Finley, Robert's hands or arms just
23 before the gunshot, before the pop?
24 A I just seen him scuffling.
25 Q Do you remember testifying, in a previous hearing, what

1 you saw about his hands just before the, the pop or the
2 gunshot?
3 A I seen the hand. They just scuffling, sir.
4 Q All right. Show us on here where, if you can, if it
5 shows, where David ran around to and got in the car.
6 A You're gonna have to go to the driveway.
7 Q Or perhaps this picture might be better.
8 This is State's No. 6, Your Honor.
9 Can you show us---
10 A This is, this is the driveway. I was on the
11 passenger's side. This is the driver's side. David ran on
12 my side and came around and got in his car.
13 Q Okay. After he dropped you off, what did you do that
14 night?
15 A Well, after he dropped me off---
16 Q Uh-huh. (Affirmative).
17 A I went down to my friend girl house named Regina and
18 sat there and was pacing and tried to call home and
19 everything but my phone was off the hook.
20 Q All right. At some point after this incident---
21 A Uh-huh. (Affirmative).
22 Q ---did the police speak to you?
23 Did you either get in contact with them or they
24 contacted you?
25 A They contacted -- they came to see my brother.

1 Q Okay.
2 A They came to see him.
3 Q Okay. When was that?
4 A The next day.
5 Q This happened on Sunday morning at about 2:30.
6 Was it later on Sunday or do you know?
7 A Monday. I think Sunday, Monday.
8 Q Okay. Some time after this?
9 A Yes.
10 Q And that's when you told them what happened?
11 A Yes.
12 SOLICITOR COLER: Just one moment, Your Honor, if I
13 could. One more question for her.
14 (Pause.)
15 THE COURT: Anything else, Mr. Coler?
16 SOLICITOR COLER: Just briefly, Your Honor.
17 (Pause.)
18 Q That's all the questions I have for you, Mrs. Smith.
19 Please answer any that---
20 THE COURT: All right. Let's do this. Before you
21 cross-examine -- turn the lights back on.
22 Let's take a quick recess. Y'all -- when you go back
23 in the jury room, don't discuss the case at all among
24 yourselves. But select a foreperson. We'll take about a
25 ten or fifteen minute break so you can stretch your legs.

1 Everybody else please remain seated.
2 (Whereupon, the following takes place outside the
3 presence of the jury.)
4 THE COURT: Okay. Mrs. Smith, you may step down. But
5 you're in the middle of your examination. So, do not
6 discuss your case with anybody, either the lawyers or
7 anybody.
8 Okay?
9 WITNESS: Thank you.
10 THE COURT: We'll start back in about ten minutes.
11 Stand at ease for ten minutes.
12 (Whereupon, a short recess was taken at this time.)
13 THE COURT: Anything for the record on behalf of the
14 State before we get started back?
15 SOLICITOR GANSS: No, Your Honor.
16 THE COURT: Defense?
17 MR. GODFREY: No, Your Honor.
18 THE COURT: All right. The jury has informed me they
19 have selected Jennifer L. Ayers, A-Y-E-R-S, Number 151, as
20 the foreperson.
21 Okay. Mrs. Smith, you can come back and have a seat,
22 please, ma'am.
23 (Witness returns to the stand.)
24 (Whereupon, the following takes place within the
25 presence of the jury.)

1 THE COURT: Okay. Who is Mrs. Jennifer L. Ayers?
2 (Juror Ayers raises her hand.)
3 THE COURT: The lady, the girl who's going
4 trick-or-treating this afternoon.
5 Mrs. Ayers, you're gonna serve as our foreperson?
6 (Juror Ayers nods affirmatively.)
7 THE COURT: Thank you so much for being, agreeing to do
8 that or being voted to do that.
9 JUROR AYERS: No, I agreed.
10 THE COURT: Good.
11 Okay. Cross-examine, please.
12 MR. GODFREY: May it please the Court?
13 THE COURT: Mrs. Smith, you're still under oath.
14 CROSS-EXAMINATION
15 BY MR. GODFREY:
16 Q Mrs. Smith, you say that you went over to the trailer
17 with David Smith?
18 A Yes, sir.
19 Q And you went in the trailer first?
20 A Yes, sir.
21 Q And then you went back out to the car?
22 A Yes, sir.
23 Q Then David Smith went into the trailer?
24 A Yes, sir.
25 Q And you say you were lighting a cigarette?

1 A I had lit, I had bent my head down to light a
2 cigarette. By the time, by the time I raised my head up,
3 they was coming out the door.
4 Q Okay. And I believe your direct testimony was they
5 were flying out the door?
6 A Flying?
7 Q Well, how did you say they were coming out the door?
8 A Well, in so many words -- if I said flying, I didn't
9 mean to say flying. They was coming -- scuffling. They was
10 scuffling coming out the door.
11 Q And David Smith's back was to you?
12 A David Smith's back was like this and Robert was in
13 front of him.
14 Q And were they falling at that point in time?
15 A Yes, sir.
16 Q And is that when you heard the pop?
17 A I heard the pop, yes, sir.
18 Q And that was when they were falling?
19 A Before, before they was falling, sir.
20 Q Before they were falling?
21 A They was scuffling.
22 Q They were what?
23 A Scuffling, coming out---
24 Q Scuffling?
25 A Scuffling though.

1 Q So, they were fighting?
2 A Well, yes, in so many words.
3 Q And then what happened next?
4 A I heard a pop and they fell. You know, Robert fell --
5 well, David moved back and Robert had fell.
6 Q Now, when you first went into the trailer, who was
7 there?
8 A The old man and the man I called Pops and Robert. I
9 mean -- yeah, Robert.
10 Q All right. Who's Robert?
11 A Robert Finley, the one that was killed.
12 Q Okay. Robert and Pops and was -- who was lying on the
13 couch?
14 A I, I don't know. It was covered up.
15 Q So, there was somebody else there?
16 A I didn't see no -- I just seen some covered up. I
17 don't know if it was a body or pillows or what.
18 Q Okay. So, it's completely covered?
19 A Yes, sir.
20 Q Now, let's take you back to the beginning a little bit.
21 A phone call was received at your residence from---
22 A Yes, sir.
23 Q ---Robert Finley?
24 A Yes, sir.
25 Q And Robert Finley asked to speak with Rodney?

1 A Yes, sir.
2 Q And Robert Finley wanted to get crack cocaine?
3 A Yes, sir.
4 Q And Rodney did not want to deal with him?
5 A Yes.
6 Q Because he was tired?
7 A Yes, sir.
8 Q And at some point, either during that phone call or
9 another one, you became involved, is that right?
10 A Yes, sir.
11 Q And you agreed to help Robert Finley get some crack?
12 A Yes, sir.
13 Q And you called or you paged David Smith?
14 A Yes, sir.
15 Q And you knew David very well, didn't you?
16 A Yes, I did.
17 Q Back in those days, you used crack cocaine too, didn't
18 you?
19 A Yes, I did, sir.
20 Q And you got your crack cocaine from David Smith?
21 A Yes, sir.
22 Q And on occasion, David Smith would allow you to have
23 crack cocaine even though you didn't have the money to pay
24 for it, didn't he?
25 A Yes, sir.

1 Q And he never threatened you to get his money, did he?
2 A No, he didn't, sir.
3 Q Now, when you agreed to help Robert Finley out to get
4 some crack cocaine, did you expect David to do something for
5 you because you helped him set up a---
6 A No, I did not.
7 Q ---drug sale?
8 You didn't expect to get a crack rock to smoke for
9 yourself?
10 A I wasn't expecting nothing like that, sir.
11 THE COURT: Hold on now. Let's make sure we understand
12 each other.
13 WITNESS: Okay.
14 THE COURT: You let him finish his question.
15 WITNESS: Okay. I'm sorry.
16 THE COURT: Then you answer and, and be polite.
17 WITNESS: All right.
18 Q Did you think that David Smith would give you a piece
19 of crack rock to smoke for setting up the drug deal?
20 A I wasn't expecting that, sir.
21 Q But you wouldn't have been surprised if it had
22 happened, right?
23 A No, I wouldn't of.
24 Q Now, when David Smith got over to your house, you were
25 waiting for him or looking out the window.

1 You, you saw him?
2 A I seen the car pull up, sir.
3 Q So, you were looking out the window waiting for him?
4 A I walked out the door when I seen the car coming.
5 Q Okay. So, you saw the car coming.
6 You were looking?
7 A I mean -- excuse me. I walked -- he pulled up, I seen
8 the car, and I went straight to the car.
9 Q Okay. And when you got in the car, you told him where
10 to go?
11 A Yes, sir.
12 Q And what did you tell him?
13 A I said Robert wanted, Robert wanted to buy some dope,
14 crack cocaine.
15 Q Well, what directions did you give him?
16 A We went up Williams Street off -- it's off -- I forgot
17 the name of the -- we went up Williams Street, and we made a
18 left, and it's off of Farley Avenue, and we went to a
19 trailer park.
20 Q Well, didn't you, in fact, tell David Smith where to
21 go?
22 A I showed him where to go, which I---
23 Q You showed him where to go?
24 A Uh-huh. (Affirmative).
25 Q And the trailer that you went to was not where Robert

1 Finley lived, right?
2 A No, it wasn't, sir.
3 Q Now, when you first went into the trailer, isn't it
4 true that Robert Finley said he didn't want to deal with
5 you, he wanted to deal with David?
6 A No, Robert -- no, the, Robert didn't.
7 Q He didn't?
8 A No, Robert didn't. He told me the -- he owed Robert --
9 Robert told me that he owed David some money. So, I came
10 back out the trailer and told David to go handle it on his
11 own.
12 Q All right. So, when you got back into the car, you
13 said you saw David fiddling around?
14 A Said David reached over and fiddling around in his car.
15 Q And that was to get his crack?
16 A Whatever he reached, the crack, a gun, or something.
17 Q Did you ever see a gun?
18 A No, I did not, sir. But I seen it -- I heard it when
19 the pop, when he shot him.
20 Q All right. So, he was fiddling to his left?
21 A He was fiddling to his left.
22 Q During previous sworn testimony, didn't you indicate
23 that he was fiddling to get crack cocaine?
24 A I said -- if I did, I might of made a mistake. He had
25 crack and cocaine, I mean crack, cocaine, and a gun from my

1 understanding.
2 Q I'm not talking about your understanding.
3 A I mean -- excuse me.
4 Q You never saw a gun, right?
5 A No, I did not see the gun.
6 Q Okay. We're not talking about your understanding.
7 We're talking about what you saw.
8 A Okay. Sorry.
9 Q Now, they were scuffling, they fell out the door.
10 A Yes.
11 Q Right?
12 And then David Smith ran around the car and got into
13 the driver's side to drive off, right?
14 A Yes.
15 Q And he let you off at Wofford Street?
16 A Yes, he did, sir.
17 Q And when he left you off at Wofford Street, he gave you
18 the rest of the crack cocaine that he had?
19 A He gave me something. And as soon as he gave it to me,
20 I took it and I gave it away.
21 Q But he gave you crack cocaine, right?
22 A Yes, he did, sir.
23 Q When he let you out at Wofford Street?
24 A Uh-huh. (Affirmative.)
25 He said, he kept saying you don't know nothing, you

1 ain't seen nothing.
2 Q All right. Well then is that why you kept calling him
3 later?
4 A I didn't keep calling him later.
5 Q You called him later that night, didn't you?
6 A I didn't?
7 Q You did, didn't you?
8 A Yeah, I called him.
9 Q You called him later that night?
10 A I sure did, sir.
11 Q And you wanted more crack?
12 A Okay. Go ahead, sir.
13 Q Isn't that right?
14 A Yes, sir.
15 Q And he didn't have any and you went to his house and
16 got $20?
17 A Yes, sir.
18 Q He gave you $20?
19 A To pay my, to pay, to pay the young lady for letting me
20 sit at her house cause I was scared.
21 Q Well, you weren't afraid of him, were you, cause you
22 went back to him?
23 A Well, I was wondering where his wife was. Excuse me.
24 I'm sorry.
25 Q You went to his house---

1 THE COURT: Listen to the question.
2 Hold on.
3 Repeat your question.
4 Q You weren't afraid of David, were you?
5 A No, I wasn't.
6 Q Nothing further.
7 THE COURT: Redirect?
8 REDIRECT EXAMINATION
9 BY SOLICITOR COLER:
10 Q When -- Mr. Godfrey just asked you if they, what they
11 were doing, they were scuffling or fighting, you don't have
12 any way of knowing what started that scuffle if indeed they
13 were scuffling, right?
14 A No, I didn't, sir.
15 Q You don't know what happened in that, inside that
16 mobile home before you saw David shoot Robert?
17 A No, I didn't, sir.
18 Q Okay. And you did see a gun on, on this night,
19 correct?
20 A Yes, I did.
21 Q You saw it when, after David shot Robert---
22 A Yes.
23 Q ---and he came around and got in the car?
24 A Yes, sir.
25 Q Okay. And you saw him fiddling -- if I understand

1 where -- did you see him fiddling in the car?
2 A On the left side.
3 Q All right. Is there -- do you know if there was a
4 pocket in the doorway of that car?
5 A Yeah, I believe so, sir.
6 Q Was that pocket large enough to, to hold the gun you
7 saw---
8 A Yes, sir.
9 Q ---in David Smith's hands?
10 A Yes, sir.
11 Q Okay. And the crack cocaine that David had on him that
12 night, do you know if that was already in his pocket?
13 A I don't know, sir.
14 Q On previous occasions, do you know where David Smith
15 carried his crack cocaine when he would furnish you with it
16 or you see him furnish somebody else with it?
17 A In his pocket.
18 Q Okay. He had it on him?
19 A Yes, sir.
20 Q Okay. And David Smith, on previous occasions, has
21 testified and told Mr. Godfrey that he's loaned or fronted
22 you drugs --
23 A Yes, sir.
24 Q -- when you didn't have the money?
25 A Yes, sir.

1 Q But you always paid him back?
2 A Yes, sir.
3 Q You never found out what happens if you don't pay him
4 back, did you?
5 A No, I did not, sir.
6 Q Okay. And you admit that you've had a drug problem?
7 A Yes, I have.
8 Q You've used drugs?
9 A Uh-huh. (Affirmative).
10 Q And you dealt with drug dealers in the community?
11 A Yes, sir.
12 Q What, what is your understanding of a drug dealer who
13 fronts people drugs and doesn't get paid for it?
14 A They'll hurt them some kind of way.
15 Q Well, they're gonna do something to get paid?
16 A Yes.
17 Q What about their reputation?
18 How does that affect their reputation as a, as a drug
19 dealer in the community they, if they just give out drugs
20 and don't get paid?
21 What do the drug users that may be in your situation
22 think of somebody like that?
23 Do y'all have a lot of respect for that person?
24 A No. Well --
25 Q Do y'all try to take advantage of that type of person?

1 A No, you shouldn't.
2 Okay. I know---
3 Q I know you shouldn't.
4 But I'm saying as a drug user---
5 A Right.
6 Q ---and addicted and desperate for drugs---
7 A Uh-huh. (Affirmative).
8 Q ---are you gonna try to take advantage of somebody
9 who's, who's got the reputation for giving drugs away and
10 not collecting?
11 A No.
12 Q You may not understand my question.
13 A I'm not---
14 Q That's okay. I'll move on.
15 When you went into the trailer to see Robert about
16 getting the money---
17 A Yes, sir.
18 Q ---at that point, did you know Robert owed David $40?
19 A I didn't know it till Robert told me, sir.
20 Q You found out when you got in there?
21 A Yes, sir.
22 Q Okay. If you had known it, would you have called David
23 Smith---
24 A No, I wouldn't.
25 Q ---to bring drugs to Robert?

1 A No, I wouldn't.
2 Q Would it have been your understanding that that would
3 endanger Robert Finley's physical being?
4 MR. GODFREY: Objection. Calls for speculation.
5 THE COURT: Sustained.
6 SOLICITOR COLER: I'll withdraw it.
7 Q That's all the questions I have, Mrs. Smith.
8 THE COURT: All right.
9 MR. GODFREY: May it please the Court?
10 THE COURT: That's discretionary. You know that of
11 recross. I'll allow it.
12 MR. GODFREY: Thank you, judge.
13 RECROSS EXAMINATION
14 BY MR. GODFREY:
15 Q Just a couple of questions.
16 According to your testimony, you did not know that
17 Robert Finley owed David Smith $40 for something till you
18 got to the trailer and talked to Robert Finley?
19 A Yes, sir.
20 Q That's correct?
21 A That's correct.
22 Q And the pocket in the door, do you actually know
23 whether there was a pocket in the door of the car or not?
24 A All cars have pockets, sir.
25 THE COURT: No, ma'am, answer the question as to this

car.

A I don't know, sir. I'm not sure, sir.

Q Thank you very much.

THE COURT: All right. You may step down.

Next witness.

SOLICITOR COLER: Cynthia Roseburgh.

THE COURT: May she be excused from her subpoena or released from her subpoena, Mr. Godfrey?

MR. GODFREY: Without objection, Judge.

SOLICITOR COLER: No objection from the State.

THE COURT: All right. Mrs. Smith, you're free to go.

CYNTHIA ROSEBURGH, being first duly sworn, testified as follows:

THE COURT: All right, ma'am. Spell your full name for us, please.

WITNESS: Cynthia, C-Y-N-T-H-I-A. Roseburgh, R-O-S-E-B-U-R-G-H.

SOLICITOR COLER: Thank you, Your Honor.

<u>DIRECT EXAMINATION</u>

<u>BY SOLICITOR COLER:</u>

Q Tell us where you live.

A Fisher Avenue.

Q Okay. Where is that in relation to Angie's and Rodney's house?

A The house sit directly in front of each other.

1 Q Across the street?
2 A Directly in front of each other, yeah.
3 Q Okay. How long have you lived there at Fisher?
4 A Been there 27 years.
5 Q All right. And you've known the Smith's for a while---
6 A Yes.
7 Q ---Rodney and Angie that is?
8 A Every neighbor around there since we've all been living
9 there, yes.
10 Q Okay. And do you know the defendant?
11 A I don't know him.
12 Q Do you know him by sight?
13 A I know him by sight and the car. That's about it.
14 Q Okay. Prior to this occasion, January 12th of 1997,
15 had you seen him before that?
16 A I had seen the car and him before, yeah, talking to
17 Rodney.
18 Q Over at Rodney's house?
19 A Uh-huh. (Affirmative).
20 Q Okay. Tell us then what happened at about two o'clock
21 in the morning on January 12th of 1997.
22 A Well, both of them got it wrong. That particular
23 night, my husband, he work out of town a lot, and I got a TV
24 that got an alarm on it that shut off. I'll get up and I'll
25 check my doors.

1 So, I had went, had went to the back and checked that
2 door, and then I had come to the front and opened it up and
3 locked my screen door because I got an outside lock. You
4 can unlock it from the outside.
5 And at the time, that burgundy car was over in front of
6 the door, the window was down. You know, it's all black
7 tinted windows. It was down. I seen Angie Smith out there
8 at the car getting in it.
9 And in the mean time, if a car don't pull in her
10 driveway, if it just pulls straight like going the opposite
11 end of Fisher, most of them make a U-turn. And in the mean
12 time, I had opened the door and I stood there like, Angie
13 going like this, you know. Not really being nosey.
14 Anyway, the car made a U-turn and the lights hit my
15 door cause I had a glass storm door, and it made a -- it --
16 the lights shined right on me. So, they kind of looked and
17 hit the brakes cause I was standing in the door like -- I
18 was saying maybe they think I want them, you know. Hit the
19 brakes. But it paused for like 20 seconds and just pulled
20 on off.
21 Q Okay. You saw them when the car was pulling away from
22 Fisher?
23 A Yeah, it made a U-turn.
24 Q Okay.
25 A Turned around, turned around to go out the other end.

1 Q How long was the car at Fisher before Angie got in
2 it?
3 A Looked like it, looked like it -- it wasn't turned off.
4 So, I imagine it just pulled up.
5 Q Okay.
6 A And she was coming out. She was out there in the yard
7 or middle ways in the yard, and getting in the car, you
8 know, and I'm pretty sure she seen me cause I keep a light
9 on, the hood of my stove all the time. I keep some kind of
10 light on, and it's on my door. With her, you know, with her
11 knowing me, she probably just looked over there and see if
12 that was me.
13 Q All right. And you just happened to be looking out or
14 did something draw your attention?
15 A No, I just happened to -- when my TV shuts off, it's
16 got an alarm on it, and if I'm -- I be, I be at home by
17 myself most of the time, and I keep the back-door bolted. I
18 always check my doors.
19 So, once I woke up and it was dark in my bedroom, I
20 said let me get up, go to the bathroom, go check my doors,
21 and I did that. And that's when the car was out there in
22 front of the door. You know, I'm like looking. And then
23 all this was like in a matter of like say three, four, three
24 minutes, something like that.
25 Q Okay. And when the car pulled away, you could see who

1 was driving?
2 A Yeah.
3 Q Who was driving the car?
4 A Him.
5 Q When you same him, do you mean---
6 A David.
7 Q ---David Dwight Smith?
8 A David Smith.
9 Q The man seated---
10 A Yeah.
11 Q ---next to Mr. Godfrey?
12 A Yeah.
13 Q Okay. And the -- describe what you -- tell me again
14 what you noticed about the window of the car.
15 A The window was like this.
16 Q Okay.
17 A Like this. And see, all the neighborhood, right there
18 where -- my next door neighbor and me and across the street,
19 the four houses right there intertwined in that circle and
20 right above, it's lit up real good. It's like -- in fact,
21 it's like daylight out there at nighttime.
22 Q All right. And you know approximately what time this
23 was because your alarm on your TV went, goes off?
24 A Yeah, that alarm had to go off about 2:00 or a little
25 after 2:00 or something like that cause I usually set it

1 between, before I go to sleep, I set it so the TV won't be
2 on all night. So, I might set it for like 1:00 or 2:00 or
3 something like that. I don't know.
4 Q All right.
5 A I can't remember at the time.
6 Q Okay. Did you say anything to, to Angie or---
7 A No, no.
8 Q ---David Smith?
9 A No, I didn't say nothing to nobody. It was cold. I
10 didn't even open that door. I just turned my thing to see
11 was it locked. I didn't say nothing to nobody, but I paused
12 a little bit when the -- the brake lights hit after it made
13 the U-turn. It, you know, I just paused and closed the door
14 up right then and there. But I didn't say nothing to nobody
15 cause number one, I don't know him and I had on my gown
16 anyway.
17 Q I'm sorry?
18 A I had on my gown.
19 Q Okay. I see.
20 A It was outdoors and I wasn't coming in the house.
21 Q That's all the questions I have for you.
22 A Okay.
23 Q Thank you for being here. Please answer any of
24 Mr. Godfrey's questions.
25 THE COURT: Cross, if any.

1 MR. GODFREY: May it please the Court?
2 CROSS-EXAMINATION
3 BY MR. GODFREY:
4 Q So, you don't know him?
5 A I don't know him personally. I don't know him.
6 Q Okay. But you know -- you knew who it was?
7 A Yeah, I know it was through the car from being over
8 there previous times and seeing him previous times.
9 Q Okay.
10 A And I think the light skinned lady that use to be over
11 there with the pretty hair was his wife. I knew him as far
12 as being over there.
13 Q But other than seeing Angie get into the car, you don't
14 know anything else about what happened?
15 A I don't know nothing else. I just seen that car make a
16 U-turn and go up the street.
17 Q Nothing further.
18 A That was it.
19 THE COURT: You may step down.
20 SOLICITOR COLER: Thank you, Your Honor.
21 THE COURT: Next witness.
22 SOLICITOR COLER: State calls Rodney Smith.
23 Your Honor, if there's no objection to Mrs. Roseburgh
24 being excused---
25 MR. GODFREY: No objection.

1 THE COURT: You're excused, Mrs. Roseburgh, Roseburgh.
2 RODNEY SMITH, being first duly
3 sworn, testified as follows:
4 WITNESS: My name is Rodney Smith. R-O-D-N-E-Y.
5 S-M-I-T-H.
6 DIRECT EXAMINATION
7 BY SOLICITOR COLER:
8 Q All right. Mr. Smith, tell us where you live.
9 A Fisher Avenue.
10 Q You live there with your sister, Angie?
11 A Yes, I do.
12 Q And your mother?
13 A And my mother and my nephew.
14 Q Those are Angie's two children?
15 A Yes.
16 Q All right. And just so I'm clear, you're not related
17 to David Dwight Smith?
18 A No, I'm not.
19 Q Nobody in your family is?
20 A No.
21 Q Okay. How -- and refresh our memory, how long have
22 y'all been at Fisher Avenue?
23 A I guess between 25, 27 years.
24 Q Okay. And do you know the defendant, David Dwight
25 Smith?

1 A Yes, I do.
2 Q All right. Describe for us how you know him, what your
3 relationship was with him.
4 A Well, I, I knew him -- well, I met him through his
5 wife---
6 Q Okay.
7 A ---Karen. And I been knowing David for -- we was
8 friends.
9 Q Okay. Prior to this incident, prior to January 12th,
10 1997, do you know how many years before that you knew him?
11 A Three, four, five years.
12 Q Okay. And on occasion, you would get drugs from David
13 Dwight Smith?
14 A Yes.
15 Q Crack cocaine to be exact?
16 A Yes.
17 Q And that -- would that be for your use or drugs for
18 other people?
19 A My use and for other people.
20 Q Okay. And you would distribute it to other, many other
21 people?
22 A Yes.
23 Q Okay. And what would you get out of it or what was --
24 what did you get out of help distributing drugs from him to
25 the other people?

1 A Drugs.
2 Q For yourself?
3 A Yes.
4 Q Okay. And you admit you have a -- you used drugs?
5 A I did then, yes.
6 Q And had a drug problem?
7 A Yes.
8 Q Okay. How about Robert Finley, did you know him?
9 A Yes.
10 Q Before this incident, before January 1997, how long did
11 you know him?
12 A Maybe two, two, three years.
13 Q Okay. And did he use drugs?
14 A Yes.
15 Q And did you supply him with drugs?
16 A Yes.
17 Q Where did you get the drugs that you supplied Robert
18 Finley with?
19 A Well, from David and other people.
20 Q Okay. But on a number of occasions, you supplied
21 Robert with drugs that came directly from David Smith?
22 A Yes.
23 Q Did you know anything about -- well, let me ask you
24 this.
25 Did you ever see David Smith himself directly give

1 drugs to Robert or was it always through somebody like you?
2 A I have seen David give it to Robert.
3 Q Okay. Did you make that introduction?
4 A Yes.
5 Q Do you know about how long before Robert was killed
6 that you made that introduction where you introduced David
7 Dwight Smith to Robert Finley so Robert could get drugs from
8 him?
9 A It might of been a month or so, a couple of months
10 before then, you know.
11 Q All right.
12 A I can't remember.
13 Q To your knowledge, did David Smith ever loan or front
14 drugs to Robert Finley without getting paid right then and,
15 and expecting to get paid later?
16 A Yes, from what David would, had told me.
17 Q Okay. Describe for us, if anybody doesn't know, how
18 that works when, when somebody fronts drugs to somebody
19 else.
20 How -- what, what happens?
21 A What you mean now?
22 If you, if you, you front it to someone---
23 Q Uh-huh. (Affirmative).
24 A ---and you expect them to pay you money back at a
25 certain time when they tell you they gonna pay you.

1 Q Okay. And did -- how -- well, I'll, I'll withdraw
2 that.
3 Do you know anything in particular about the $40 debt
4 that was owed by Robert to David?
5 A David told me that Robert owed him $40.
6 Q For what?
7 A Crack cocaine.
8 Q All right. What, if anything, did David say about
9 wanting to collect that?
10 A He told me he was gonna get his money. He wanted his
11 money from Robert.
12 Q What was his demeanor or what was his mood when he
13 talked about Robert owing him $40 for, for some drugs he
14 fronted him?
15 A He---
16 Q Was he happy about it?
17 A He wasn't happy.
18 Q Okay.
19 A But it wasn't also not a mad tone. But he was just
20 saying he wanted his money.
21 Q Did it seem to be just matter of fact?
22 A Yes.
23 Q Just part of the business?
24 A Yes.
25 Q And, and you just testified you said he, David said he

1 was gonna get his money?
2 A He said he wanted Robert to pay him his money.
3 Q Did he seem serious about it?
4 A Yes.
5 Q Okay. And $40 doesn't seem like a lot of money.
6 What is your understanding about the reputation of
7 someone who, who fronts drugs to people and doesn't get
8 paid?
9 Does that affect their reputation?
10 A If you take it to a certain point. You know, some,
11 some people, some, some drug dealers will let something like
12 that go if you, if you's a good customer to them, you been a
13 customer, loyal customer to them, you let that go, you know.
14 But some, but some drug dealers got to have they money.
15 Q Okay. Is it always about the money or is it sometimes
16 about the respect or the pride?
17 A About the money.
18 Q Okay. So, this -- your understanding, the $40 was, was
19 most important to David Smith?
20 A At the time, yes.
21 Q Okay. Even though it appeared he had other money?
22 A Yes, I guess. Yes.
23 Q Do you know or did you get any information about David
24 Smith trying to collect that $40 from Robert Finley, what he
25 did, if anything, to try to collect it or to look for Robert

1 to try to collect it?
2 A Well, I don't know as far as he was looking for Robert
3 as well. He knew where Robert stayed or whatever. I don't
4 know.
5 Q Okay.
6 A All I knowed is that he told me Robert owed him $40 and
7 he wanted his $40.
8 Q Did David Smith ever tell you he went looking for
9 Robert to ask for the money?
10 A I can't remember him telling me that.
11 Q Okay. What, if anything, do you know about David
12 Dwight Smith acquiring or purchasing a .25 caliber pistol?
13 A Well, David had come over to the house one Saturday and
14 told me, me he had purchased a little TV for a car and a .25
15 automatic from somebody.
16 Q Did he say where he got the TV and the automatic, .25
17 automatic?
18 A Somebody off the street.
19 Q Okay. Did he show you the gun or just tell you about
20 it?
21 A I don't remember if he showed me the gun or not. But
22 he told me about it.
23 Q But you remember it being a .25 automatic---
24 A Yes.
25 Q ---semiautomatic?

1 All right. Did he tell you where he got it?
2 A Someone off the street.
3 Q About how long before the killing of Robert Finley, if
4 you know, did that conversation between you and David occur
5 about the gun?
6 A I don't -- see, I don't know if it -- see, this was on
7 a Saturday. So, it could of been, it could of been that, a
8 week or it could of been that night. I just don't remember.
9 That's been so long ago.
10 Q But it was some time close to---
11 A Yeah.
12 Q ---close in time---
13 THE COURT: Hold on a second.
14 All right. Y'all are gonna either have to hush back
15 there or get out. One or the other.
16 Go ahead, Mr. Coler.
17 SOLICITOR COLER: Thank you, Your Honor.
18 Q All right. I'm gonna back up just a little bit.
19 You, you gave some information in, in a previous
20 hearing?
21 A Uh-huh. (Affirmative).
22 Q And you were asked a question had he, referring to
23 David Dwight Smith, ever mentioned to you that he had gone
24 to locate Robert?
25 A Correct.

1 Q And your answer, if you look at number eight---
2 A Yes.
3 Q ---what was your answer?
4 A Yes.
5 Q Okay. Does that help refresh your memory or do you
6 still not recall any conversation you had with David Dwight
7 Smith about David Dwight Smith going to look for Robert?
8 A Well, I believe David might of told me that he went
9 over by Robert's trailer to collect the money, but Robert
10 wasn't there or he didn't have the money or something.
11 But---
12 Q Okay.
13 A He would pay him later or some -- he suppose to pay him
14 at a certain time or something. But David just wanted his
15 $40. That was the whole issue.
16 Q Okay. But y'all had talked about it?
17 A Yes.
18 Q And it -- wasn't it clear to you that he was looking
19 for, wanted his money?
20 A Yes.
21 Q Tell us, if anything you recall, about the two o'clock
22 phone calls to yours and Angie's house on January 12th of
23 '97.
24 A Well, I was laying on my couch and I received a phone
25 call from Robert. He wanted to buy some crack cocaine,

1 and -- but the only person I knew at that time of morning
2 really was David, and I knew that David, Robert owed David
3 $40. So, I told Robert I didn't know nobody. I didn't feel
4 like being bothered with it. And I told him I would just
5 holler at him later.
6 Q Okay.
7 A And I went to sleep.
8 Q All right. Why would you not want to contact David
9 Dwight Smith to get some drugs for Robert Finley knowing
10 Robert Finley owed David $40?
11 A Because I didn't not want to get in-between that, that
12 drama since David had already told me he wanted his money.
13 Q Okay.
14 A So, I would -- I didn't even want to just get
15 in-between that period.
16 Q And when you say drama, that, that drama, what do you
17 mean?
18 A Anything could of happened.
19 Q Okay. So, you didn't take the phone, you didn't, you
20 didn't -- you told Robert you couldn't help him?
21 A Right.
22 Q And what did, what happened next?
23 A Well, the next thing I knowed, I laid down and went to
24 sleep, and the next morning when I woke up, I was getting a
25 call from the Sheriff's Department wanting to talk to me.

1 Q When was that?
2 A The next -- Sunday morning, that Sunday morning
3 about---
4 Q Later that morning?
5 A About six, or seven, eight o'clock in the morning.
6 Q All right.
7 A My phone rung.
8 Q Were you aware of the, of the telephone conversation
9 between Robert and Angie?
10 A No.
11 Q You went to sleep?
12 A No, I didn't even know Angie had left the house.
13 Q When the Sheriff's Department called you or contacted
14 you, how, how did they contact you?
15 Do you remember?
16 A By telephone.
17 Q Okay.
18 A They called me and asked to speak to Rodney Smith. I
19 said I'm Rodney Smith and he said I, I think we need to talk
20 to you.
21 Q You sure you didn't have a pager back then?
22 A I did not.
23 Q They just called you?
24 A Yeah.
25 Q And what did you do when they told you they needed to

1 talk to you?
2 A I said well, come on over, I'm at the house, you know.
3 Q Did you speak to the officers?
4 A Yes, I did.
5 Q All right. What, if anything, did you tell them about
6 what you might know about Robert Finley---
7 A Well, when, when they---
8 Q ---being shot?
9 A Well, when they told me that Robert Finley had been
10 shot, and some girl was with the person that did it, and I,
11 you know, I started putting one and one together, and I
12 figured well, the girl had to be my sister --
13 Q Okay.
14 A -- you know, and I didn't even know she had come back
15 to the house. And -- but she was laying back there in the
16 bed, and I finally told her that if you know anything about
17 this, tell them.
18 Q That's what you told Angie?
19 A Yes, sir.
20 Q What did she do in response to you telling her that?
21 A That's when she talked to Mr. Denton.
22 Q She come out of her bedroom?
23 A Yes.
24 Q And spoke to Officer Denton?
25 A Yes.

1 SOLICITOR COLER: Okay. Beg the Court's patience one
2 moment.
3 (Pause.)
4 SOLICITOR COLER: Beg the Court's patience just one
5 moment.
6 (Pause.)
7 Q Do you remember ever having a conversation with David
8 about, wherein David told you he contacted Robert's
9 girlfriend, Morgan, to try to collect the money?
10 A I believe he told me something about that. But I --.
11 Q You don't recall that?
12 A I don't recall it. But I---
13 Q Do you think---
14 A I believe we might of had a conversation like that, but
15 he had talked to Robert's girlfriend.
16 Q Well, does that ring a bell?
17 A It rings a bell.
18 Q Okay. And what was David Smith's demeanor again, once
19 again when he was telling you about that, how trying to go
20 find Robert Finley's girlfriend to try and collect the $40?
21 A He, he was serious about he wanted $40.
22 Q Okay. He was serious about it?
23 A Yes.
24 Q That's all the questions I have Mr. Smith. Thank you
25 for being here. Please answer any Mr. Godfrey has.

1 CROSS-EXAMINATION
2 BY MR. GODFREY:
3 Q Mr. Smith?
4 A Yes.
5 Q Did David ever front you any drugs?
6 A Yes.
7 Q Did you always pay him on time?
8 A No.
9 Q Did you ever---
10 A But I always did things to make it up for not paying
11 him.
12 Q Well, did you ever have a problem with, with David
13 Smith?
14 A No, I did not.
15 Q In fact, you use to deliver drugs for David sometimes,
16 didn't you?
17 A Yes.
18 Q And in this case, isn't it true that Robert Finley, the
19 drugs that he owed David for are the ones that you gave to
20 Robert Finley?
21 A No, no, that is not true.
22 Q And isn't it true that David Smith told you that he
23 didn't want to deal with Robert Finley anymore until he paid
24 the money?
25 A I don't remember David telling me that.

1 Q Now, you indicated that you were not related to David
2 Smith, which I guess is correct.
3 Aren't you related to David Smith's wife who died this
4 past year?
5 A I guess through my mother them might be related
6 somewhere down the line. But it's got to be around about
7 the, the 15th, the 20th cousins out of -- I don't know
8 whether you call that relations or not, related to them or
9 not.
10 Do you know what I'm saying?
11 Q Well, do you know David Smith's wife?
12 A Yes.
13 Q Did she come over to your house the night of this
14 incident?
15 A Yes.
16 Q And about what time did she get there?
17 A I don't -- that might of been around about 3:00, 4:00.
18 It's like---
19 Q And you were up at the time?
20 A Yes, I was up at the time.
21 Q But you don't know what happened at the trailer, do
22 you?
23 A No, I do not.
24 MR. GODFREY: Beg the Court's indulgence.
25 (Pause.)

1 Q And isn't it true that you never seen David Smith be
2 violent with anyone?
3 A No, I haven't.
4 Q Thank you very much.
5 THE COURT: All right. Redirect.
6 SOLICITOR COLER: Just briefly.
7 REDIRECT EXAMINATION
8 BY SOLICITOR COLER:
9 Q But you've never seen him go to collect a debt from
10 somebody that---
11 A No, I did not.
12 Q Okay. And when you would get yourself in a bind and
13 owe him money, you just testified that you would do other
14 things to try to work that debt off?
15 A Yes.
16 Q Because you wanted to take care of it?
17 A Yes.
18 Q Didn't want to be in debt, indebted to this man?
19 A To no drug dealer.
20 Q What's that?
21 A To no drug dealer period.
22 Q Okay. And David Smith, in fact, told you, on occasion,
23 I don't want to deal with Robert Finley?
24 A Say that again.
25 Q Did -- Mr. Godfrey asked you if David told you I, I

1 don't want to deal with Robert Finley until he pays me the
2 debt, the debt he owes me.
3 A I don't remember David telling me that.
4 Q Not at all?
5 A (Witness nods negatively.)
6 Q But you certainly didn't put him in touch with Robert
7 Finley on the night of January 12th?
8 A No, I did not.
9 Q Would you have advised Angie to put him---
10 A Yes, I would have.
11 Q ---to put David in touch with Robert Finley?
12 A No, I would of told my sister to don't, to leave that
13 alone period.
14 Q To stay out of it?
15 A Yes.
16 Q Don't put David in touch with Robert?
17 A Right.
18 Q Cause something bad might happen?
19 A Right.
20 SOLICITOR COLER: All right. Beg the Court's patience.
21 THE COURT: You got too many people pulling on you,
22 Mr. Coler.
23 (Pause.)
24 Q David told you about the .25 caliber that he purchased?
25 A Yes.

1 Q Did he tell you why?
2 A He -- no, he just say he purchased a .25 automatic just
3 to have it, I guess just to have it. But at the same time
4 we was also talking about the $40 that Robert owed him.
5 Q Okay. That's all I have.
6 THE COURT: All right. You may step down.
7 Next witness.
8 SOLICITOR COLER: State calls Deanna Burgess.
9 THE COURT: Come around, Mrs. Burgess.
10 SOLICITOR COLER: Your Honor, if there's no objection,
11 Mr. Rodney Smith would like to be excused.
12 MR. GODFREY: Without objection, Your Honor.
13 THE COURT: All right.
14 DEANNA BURGESS, being first duly
15 sworn, testified as follows:
16 DIRECT EXAMINATION
17 BY SOLICITOR COLER:
18 Q Would you state your name for the record?
19 A Deanna Arnold Burgess.
20 Q Okay. And tell us where you work.
21 A Spartanburg County Sheriff's Office.
22 Q How long have you been with the Sheriff's Department?
23 A Twenty years.
24 Q And what is your present title with the Sheriff's
25 Office?

1 A I'm the sergeant in the forensics division.
2 Q What is a sergeant in the forensics division at the
3 Sheriff's Office responsible for doing?
4 A Well, I'm responsible for making sure the officers that
5 work under me have the proper equipment they need to go out
6 and work forensics calls. On occasion I do have the
7 opportunity to go out on forensics calls myself collecting
8 evidence and preparing things for court.
9 Q How long have you been in the forensics department at
10 the Sheriff's Office?
11 A Twenty years.
12 Q Okay. Back on January 12th of 1997, were you the --
13 were you a team member of the forensics department or were
14 you a sergeant then?
15 A I was an ID tech back then.
16 Q Okay. Did you have an occasion to respond to this
17 scene?
18 A Yes, I did.
19 Q I'm gonna show you -- and let me, let me ask you this.
20 When an ID tech goes out to a crime scene, what, what
21 essentially are y'all doing or looking for when you, when
22 you get out there?
23 A We're looking for evidence, preserving the scene the
24 way it was for court, photographing it, collecting that
25 evidence, making sure it gets sent to the proper place for

1 testing.
2 (Whereupon, a shell casing was marked as State's
3 Exhibit No. 8 for identification purposes only at this
4 time.)
5 Q I'm gonna hand you what's been premarked as State's
6 Exhibit No. 8, and ask you if you'd take a look at the
7 envelope and the contents of the envelope.
8 Ask you if you recognize the item that, that's in the
9 envelope.
10 A Yes, I do.
11 Q What is it?
12 A It's a shell casing.
13 Q Okay. Do you -- have you noted on your report what
14 caliber it is?
15 A Yes, it says one .25 caliber, caliber auto RP casing.
16 Q One as in the quantity?
17 A One as in quantity.
18 Q Okay. A .25 caliber shell casing?
19 A Yes.
20 Q Is that a unfired piece of ammunition or a, or a spent
21 piece of ammunition?
22 A It is a spent round.
23 Q Okay. Did you take it into your possession on the, on
24 or about the date of January 12th of 1997?
25 A Yes.

1 Q And what did you do with it?
2 A I took it back to the officer and placed it into
3 evidence.
4 Q Okay. Does it appear to be in the same or
5 substantially the same condition today as when you recovered
6 it back in 1997?
7 A Yes.
8 Q All right. Can you just briefly describe for the jury
9 how we end up with a shell casing when, when a bullet is
10 loaded into a semiautomatic weapon, what happens to the
11 bullet, and how we end up with a shell casing on the ground?
12 A Sure. Once the firearm is loaded and it's fired, the
13 casing is ejected out of the side of the weapon.
14 Q And what happens to the other part of the bullet, the
15 projectile part?
16 A That's the end that comes out of the barrel.
17 Q As -- also as a part of your duties in this crime, did
18 you go to the morgue?
19 A Yes.
20 Q Okay. Did you have an occasion to photograph the body
21 of the, of the deceased, Robert Finley?
22 A Yes.
23 Q Did you also perform another test on his hands?
24 A Yes.
25 Q All right. What, what test did you perform on his

1 hands and what were you looking for?
2 A It's a gunshot residue collection kit, and I was
3 looking for gunshot residue.
4 Q All right. Describe what a gunshot residue kit is,
5 what you physically do to collect your sample, and what you
6 do with them.
7 A It's a prepackaged test that is purchased for law
8 enforcement officers. It has two different tests in it.
9 One test it has a sticky surface on it. You go over the
10 hands, and both part of the hands on the back, on the inside
11 of the palms. There's four separate containers for that.
12 One for the inside right, inside left, the outside right,
13 and the outside left.
14 You do that test first. It's in a separate cannister,
15 which can not be contaminated unless it's opened. So, you
16 blot the hands with the sticky surface, and put it back in
17 the container and seal that up.
18 The second test uses a five percent nitric acid on a
19 Q-tip. It's rubbed on over the hands also, on the outside,
20 and up the wrist, and on the inside of both hands. Then
21 each swab is put into a separate container. It's sealed.
22 The outside envelope is then sealed with the, some tape
23 that's resistant. If you -- if it's opened it, at all, you
24 can tell that it's been tampered with, my initial's are on
25 it, and then it's, it's sent to the evidence department, and

1 sent to SLED after that.
2 Q What is the purpose of taking those samples from the
3 back and the front of both hands of the deceased?
4 A You are looking for a, traces of gunshot residue.
5 Q All right. What do you do with your samples after you
6 collect them and put them back in the container and seal
7 them up in those envelopes you described?
8 A They go straight to the evidence department, and the
9 evidence department is responsible for transporting them to
10 SLED for testing.
11 Q All right. SLED has a laboratory in Columbia?
12 A Yes.
13 Q Okay. Do you do the test yourself here in Spartanburg
14 or anywhere?
15 A No.
16 Q And after SLED does it, do you get the results?
17 A The detective usually gets the results that's in charge
18 of the case.
19 Q Okay. The -- do you recall whether or not the hands of
20 the deceased were covered or backed when you made your
21 samples?
22 A Yes.
23 Q They were?
24 A They were.
25 Q Okay. And what is the purpose of covering or bagging

1 the hands of the, of the deceased before you take your
2 samples?
3 A It protects them from being contaminated.
4 SOLICITOR COLER: All right. Beg the Court's patience
5 one minute.
6 (Pause.)
7 Q That's all the questions I have. Sergeant, please
8 answer any that Mr. Godfrey has.
9 THE COURT: Cross?
10 MR. GODFREY: No questions.
11 THE COURT: You may step down.
12 Next witness.
13 MR. GODFREY: State calls Steve Denton.
14 THE COURT: Mr. Coler, please bear in mind I got to
15 have somebody trick-or-treating at 4:30.
16 SOLICITOR COLER: Yes, sir.
17 May we approach?
18 If there's no objection, Sergeant Burgess would ask to
19 be excused.
20 MR. GODFREY: Without objection.
21 (Whereupon, a bench conference was held out of the
22 hearing of the jury at this time.)
23 SOLICITOR COLER: State calls Detective Denton.
24 STEVE DENTON, being first duly
25 sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY SOLICITOR COLER:

3 Q Would you please state your name for the record?

4 A It's Steven L. Denton.

5 Q Tell us who you work for.

6 A Spartanburg County Sheriff's Office.

7 Q Tell us what your present title or assignment is with

8 the Sheriff's Department.

9 A I'm a captain with the CID division, which is criminal

10 investigative division. We house about between 55 and 65

11 investigators and other employees including civilians

12 employees as well as law enforcement employees.

13 Q And essentially as a captain of the detective division,

14 it's your job to oversee all the detectives at the Sheriff's

15 Office?

16 A Oversee all criminal investigations whether it be in

17 narcotics, burglaries, any type of crime in general and in

18 other internal matters.

19 Q How long have you been with the Sheriff's Department?

20 When did you start with the Sheriff's Department?

21 A 1986.

22 Q Been with them essentially ever since?

23 A Twenty years, yes.

24 Q Back on January 12th of 1997, did -- were you

25 dispatched or asked to investigate this case?

1 A I was.
2 Q Do you recall what you first did, where did you go, and
3 what you observed when you first became involved in the
4 case?
5 A I was on call the night of January 12th, 1997.
6 Received a call sometime after 2:00 or just before 2:00 a.m.
7 I responded to the scene. I believe I arrived somewhere
8 around 3:00, 3:15. I arrived along the same time as the
9 coroner investigator. His name is Dick Seay. He was an
10 investigator at that time with the Coroner's Office.
11 Upon arrival, my biggest concern was, was to get that
12 crime scene secured. That had been done. It was done by
13 the officer that testified earlier in the, in the afternoon.
14 And my observations immediately were drawn to the front door
15 of the mobile home.
16 Right at the front door I observed a white male wearing
17 blue jeans, quite a bit of blood, lying at the door, and it
18 was obvious that that, that person was deceased. It was
19 very cold that night. I remember blood had coagulated, had
20 started to even have ice effects on it. And because of
21 that, I immediately had ID come out to the scene to start
22 photographing it, I mean recording that scene.
23 Q What, if anything -- there's some photographs here
24 showing the, the steps---
25 THE COURT: Number please.

1 SOLICITOR COLER: I'm sorry, Your Honor.
2 Q Showing you State's No. 6, what, if anything, can you
3 describe about the texture or the material that those steps
4 are made of?
5 A The steps are concrete. If you, if you look real close
6 to them and I have, it's almost as if they were
7 outdoor/indoor carpet on top of it. And because of that, a
8 lot of times it leaves a rough edge, perforations along the
9 concrete. And it's readily seen on closer photographs. As
10 far as the steps go, they're concrete.
11 Q The way we see this photograph and Mr. Finley's body,
12 is that essentially how you observed it when you arrived?
13 A Not essentially. This is exactly.
14 Q Okay.
15 A Nothing was moved from the time that the first officer
16 arrived and that I arrived. And nothing was moved before
17 these photographs were taken.
18 Q And when you got there, there were other patrolman,
19 deputies that had, that had already arrived, correct?
20 A Absolutely.
21 Q Did they appear to have the scene -- did they have the
22 scene secured and were prohibiting the movement of people in
23 and out of the scene?
24 A Very much so. A crime scene log had been designated
25 already. I had viewed it. EMS had appeared. They had gone

1 in along with the responding officer. It was noted in the
2 officer's report about Mr. Hyder also being there. No other
3 people were there.
4 Q All right. You had the officers come out and start
5 making pictures and begin the process of collecting
6 evidence, is that correct?
7 A I did.
8 Q All right. Was there anything else essentially for you
9 to do at the scene that night or do you then move to the
10 next phase of your investigation?
11 A I was obviously interested in, because it appeared to
12 me, to be a gunshot. I was interested in the possible
13 casing or spent round that we could of exited. And again,
14 because it was so cold that night, it's fairly dark back
15 there, the reason it appears that, appears because they're
16 lights being used to photograph. It's not that way and it
17 wasn't that way out there that night.
18 I decided to wait till I had daylight to actually do a
19 little more crime scene searches, which I did. One thing I
20 did do, I noted that, which I would always do, I work the
21 inside of the mobile home to see if there was anything
22 specific that was interesting to me there.
23 Q Okay. Did you---
24 A Essentially that's all.
25 Q Did you note anything inside the mobile home of

1 particular interest at that point?
2 A Other than it was a, you know, it's a standard mobile
3 home with a door, as you see it, the steps. Pretty much all
4 the same in that area. But the home wasn't well kept.
5 But what I did note, what was important to me is that
6 there was no signs of any kind of struggle inside. That's
7 important. It was important to me to see what I have here
8 and, and to know it happened at the door, but not seeing the
9 sign of struggle inside with furniture being moved, thrown
10 over, things being moved around. That was important to me
11 that particular night.
12 Q All right. And you've been in the courtroom and have
13 been shown other pictures.
14 State's Exhibit No. 5, that's one of the photographs of
15 the inside.
16 Is that essentially how you observed the scene?
17 A Again, that is the way I observed the scene.
18 Q Okay. And, and that photograph appears to accurately
19 portray it, correct?
20 A It does.
21 Q All right. You made a decision to look for or have
22 your people look for the shell casing when it finally became
23 light?
24 A I had them do it that night.
25 Q Okay.

1 A They weren't able to find it. I kept the scene, I
2 kept -- in fact, I kept two officers at the scene that
3 night. Later went back at daylight. I took a metal
4 detector. I found the, the casing pretty much after being
5 there about five minutes. Given the description of where
6 the body was laying, knowing that it was probably .25 from
7 the autopsy I had just gotten back, and I pretty much knew
8 the ejection pattern of the casing and found it right around
9 the area that we thought it might be in.
10 Q Can you, can you generally show us, you got a laser
11 pointer there, where the, approximately where the shell
12 casing was located?
13 A Yes, sir, right in this area.
14 Q And describe for us -- you're familiar with the
15 semiautomatic firearms and how they eject shell casings?
16 A Yes.
17 Q All right. Describe for us how you would expect a
18 shell casing to be where you were in relation to where the
19 gun would of been fired according to your, according to the
20 witnesses in the case.
21 A Well, most ejection ports, if not all, eject to the
22 left, some out the top. But to the left. And as if David
23 Smith were facing the inside of the trailer and the gun
24 discharging towards the trailer, as was testified, the
25 ejection could come to the left. And with that .25 auto, I

1 pretty much knew that's where it would go, and that's,
2 that's where it ejected.
3 Q Okay. And that's not unusual then, for this jury's
4 information, that the shell casing would be a couple of feet
5 or perhaps yards away from where the gun was fired?
6 A Shell casings can end up, depending on what material is
7 on the ground, what it hits, and what later moves it around,
8 it could be obviously many feet. It could, it could be
9 fairly close if it hung in a piece of clothing. This
10 ejected -- the nice thing about this crime scene, there's a
11 lot of leaves, a lot of padding. It landed and it stayed.
12 Q Okay. At some point after arriving at the scene and,
13 and doing what you could there, did you then turn your
14 attention to try to develop or figure out who a suspect in
15 this case was?
16 A I did.
17 Q All right. Was one of the first things you did was
18 speak to Mr. Finley's girlfriend or fiancee, Morgan Simmons?
19 A I did.
20 Q Without saying what she told you, were you able to get
21 some information that led you in a direction to start
22 looking for a suspect?
23 A Yes, I got a pager number.
24 Q All right. What did you do with that pager number?
25 A I immediately used it.

1 Q Okay. And what happened as a result of using that
2 pager number?
3 A I got a return phone call from Rodney Smith.
4 Q Okay. And that was Mr. Smith who just testified?
5 A Absolutely.
6 Q All right. After you got his return phone call, did
7 you tell him you needed to speak with him?
8 A I did.
9 Q All right. And what happened?
10 A He immediately offered me and the, and the person I was
11 working with to come over and speak to him at his apartment
12 that night or early in the morning.
13 Q All right. What, if anything, did Rodney Smith -- what
14 information, if anything, did he give you that led you in
15 the direction to David Dwight Smith?
16 A He had specifically told me that, through his sister's
17 knowledge, that David Smith and Angie, who earlier
18 testified, had gone to that trailer that night and something
19 had happened, and that Angie could tell me about it.
20 Q Okay. Did Rodney Smith -- was he able to give you an
21 address for David Dwight Smith?
22 A He did.
23 Q All right. What did you, what did you do with that
24 information or where did you go based on that information
25 you got?

1 A I went to the address on Bee Street. I believe it's
2 maybe or---
3 Q Okay.
4 A ---Bee Street?
5 Q Bee Street.
6 A In the City of Spartanburg. I went to that address. I
7 ran two tag numbers. I ran one that was under a carport
8 awning. That would be the burgundy car that had been
9 described that night. That vehicle came back registered to
10 David Dwight Smith.
11 I noted the vehicle that had also been mentioned that
12 night, which is a green looking Taurus, Ford Taurus. There
13 was a Maxima across the street, which faced Farley Avenue.
14 I ran that, that tag also. It came back to David, David
15 Dwight Smith at the same address on Bee Street. So, I felt
16 comfortable that was the vehicles I was looking for and the
17 person I was looking for.
18 Q All right. At that point then when you were there and
19 ran that, those tag numbers, did you make contact with David
20 Dwight Smith?
21 A I made contact with his wife.
22 Q Okay. What did you do?
23 Did you go to her door and knock on the door?
24 A I went to David's house. I had run, run the first car
25 that was under the awning carport. His wife, Karen Faith

1 Smith, answered the door. I spoke with her briefly, advised
2 her that I'd like to talk with David, wanted to know where
3 he was. She advised me that he had been called out of town
4 to work specifically in Greensboro, North Carolina, and that
5 she would get in touch with him for me.
6 At that point, I allowed her to page him and she did.
7 Q What, if anything, did you observe about her condition
8 when, when she spoke to you that afternoon?
9 A When I went to the door to knock on the door, first of
10 all, I don't carry a weapon. Just a badge usually. And I
11 had that to show people when I ID who I am. Showed her
12 that. She was already very nervous, very shaky.
13 When I asked her about David, wanting to talk to him,
14 she was very very nervous, very shaken. Wanted to give very
15 short explanations on where he was.
16 Q And you asked her to page David for you?
17 A She -- I, I did. I asked if there was any way she
18 could get in touch with him. She mentioned he had a pager.
19 I asked her to go ahead, if she would, to use that pager and
20 she did.
21 Q Okay. Did he respond to that page to your knowledge?
22 A He did, several hours later.
23 Q All right. Did he call you?
24 A He did.
25 Q At the Sheriff's Office?

1 A He did.
2 Q All right. What did you tell him when he called you to
3 respond to that page?
4 A He told me that he was in North Carolina specifically
5 on his way to a job that had called him in Greensboro. That
6 he was just above Charlotte. I told him I needed to speak
7 with him about a pretty serious matter, and that it, it
8 wouldn't wait. Would he, would he come into the office to
9 talk to me and he did several hours later.
10 Q All right. During that conversation or at some point,
11 did he mention the, the term murder or talk to you---
12 MR. GODFREY: Objection. Leading.
13 Q What, what, if anything---
14 A During---
15 Q ---did he mention about murder?
16 A During that conversation that I had with him, he asked
17 what it was that I wanted to talk to him about. I told him
18 that it was pretty serious, I didn't want to discuss it on
19 the phone, and he had mentioned was it a case, in fact, that
20 happened in Spartanburg that was a murder. And again, I
21 wouldn't advise that to him.
22 Q Up until that point, had you said anything to anybody
23 about a murder when you were trying to contact him, either
24 Karen Smith, his wife, or him, or anybody else?
25 A No.

1 Q Did Mr. Smith -- did David Smith eventually arrive at
2 the Sheriff's Office?
3 A He did.
4 Q About how long did it take him to get there do you, if
5 you recall?
6 A It was a few hours.
7 Q Okay. And is that when you spoke to him and began the
8 interview process of questioning him about this?
9 A It is.
10 Q All right. When he got there, at some point did he
11 eventually give you a statement?
12 A He did.
13 THE COURT: Come up.
14 (Whereupon, a bench conference was held out of the
15 hearing of the jury at this time.)
16 Q Captain Denton, at some point during that, that
17 encounter or that conversation with him, did he give you a
18 written statement?
19 A He did.
20 Q And was it your intention or was it your questions to
21 get a statement about what he did and about what happened on
22 January 12th, 1997, involving Robert Finley and the, and
23 the killing of Robert Finley?
24 A Yes.
25 Q Prior to giving him, prior to giving you the statement,

1 did you advise him of his Miranda rights, of his rights that
2 he had?
3 A I did.
4 Q I'm gonna show you what's been premarked as State's No.
5 1.
6 Is that the pre-interrogation waiver form or a waiver
7 form you used to advise people of their rights before they
8 give you a statement?
9 A It is.
10 Q On that form, did you essentially advise him he has a
11 right to remain silent, right to an attorney, right to stop
12 your questioning at anytime at -- all those rights?
13 A Yes, sir.
14 Q Did you initial those as you or indicate somehow that
15 you advised him of what his rights were?
16 A I did. He initialed before he, each sentence. I
17 initialed the outside of each sentence after each period.
18 That indicates that he understands the rights and that I
19 read them to him.
20 Q And then is there a portion of that document that you
21 asked him if he wants to waive those rights and talk to you
22 and give you a statement about this incident?
23 A It simply says the above read rights were read to me by
24 Detective S.L. Denton. I've read the same and understand my
25 rights fully. It's witnessed by myself, signed by David,

1 and it says I waive, which means give up my rights, as
2 explained above and agree to talk to Officer Denton in
3 reference to a murder (homicide). And any statement I may,
4 make is of my own free will without fear, threat, promise,
5 or reward of any kind. I'm able to read and write the
6 English language and finish 15 years in school. I witnessed
7 it, he signed it, and it's notarized also.
8 THE COURT: What number is that?
9 SOLICITOR COLER: That's---
10 WITNESS: No. 1.
11 SOLICITOR COLER: ---premarked as State's Exhibit No.
12 1, Your Honor.
13 Q I'd also hand you what's been premarked as State's
14 Exhibit No. 3.
15 Is that the written statement that David Dwight Smith
16 gave you after being advised of his rights and after you
17 asking him to essentially tell you about this incident?
18 A It is.
19 Q Did he sign that statement?
20 A He did. It has his name at the beginning. It's signed
21 by David Smith. It's also witnessed by another officer, has
22 the date.
23 Q And is this -- I'll hand you what's been premarked as
24 State's No. 2 for ID.
25 Is that an affidavit form that you use that goes along

1 with the, the statement you took from Mr. Smith?
2 A It is. This is a sworn statement form that we use
3 after taking the statement from, whether it be a defendant,
4 whether it be a witness, or a victim swearing that what they
5 told us is the truth. It was signed by David Smith on
6 January 12th, 1997, and it was also notarized by Detective
7 Michael Kitts from the same day.
8 SOLICITOR COLER: Your Honor, at this point, the State
9 would move Exhibits 1, 2, and 3, premarked for ID, into
10 evidence and offer to publish to the jury.
11 MR. GODFREY: Without objection.
12 (Whereupon, State's Exhibit Nos. 1 through 3 were
13 received into evidence at this time.)
14 Q Detective Denton, what I want you to do is read the
15 statement that David Dwight Smith gave to you when you met
16 with him at the Sheriff's Office and were questioning him
17 about this incident for the jury. And if it's possible, I'd
18 like to put it on the overhead while you -- can you read
19 along?
20 A Yes, sir.
21 Q All right. If you can read that and just tell us what
22 that statement says.
23 A Yes, this statement was taken after Miranda was issued
24 to Mr. Smith. It simply says statement of David Smith, age
25 38, date 1/12/1997, Bee Street. It has a telephone

1 number.
2 It starts out as woke about 10:10 a.m. Got up and
3 cleaned myself up. Ate Stax's. Left home. Got gas.
4 Played poker machines at Li'L Cricket, Hayne Street. Played
5 at Rick's in Wellford. Came home, talked to my wife, and
6 brother, and girlfriend and went to liquor store for wife.
7 Played more poker machines, came home, shaved.
8 5:30 p.m. about brothers went to Church's Chicken, came
9 back, I ate chicken. Got in shower. Got out. Got dressed
10 and had conflict with wife.
11 Went to see my girlfriend about 8:00 p.m. Stayed there
12 until between 11:15 and 11:30 p.m. Came home, went with
13 brother and girlfriend to Hot Spot, played more poker
14 machines. Left about 12:15 a.m. to house. Wife and Eddie
15 Gilmore were still there drinking liquor and listening to
16 music.
17 I went to bedroom and watched fight, Mike McCullough,
18 which he lost. The next show I watched was Tails From The
19 Hood, and then it's, it's timed at 6:23 p.m. from the 12th
20 day of January. And it should be '97. But the year had
21 just changed and that's a, that's a typo. It's also
22 witnessed by another officer and signed by David Smith.
23 Q And this statement was essentially taken some 14,
24 approximately 14 hours after your officers first responded
25 to the, the mobile home?

1 A Yes.
2 Q There's nothing in that statement, detective, about him
3 picking up Angie Smith and going to Robert Finley's trailer
4 and, and having an encounter, some kind of encounter and
5 shooting Robert.
6 Did he ever tell you anything like that and that get
7 left out of his statement?
8 A Well, first of all, this is his written statement.
9 Q Okay.
10 A This is not my, my written statement.
11 Q All right.
12 A This is not a statement that I wrote for him. This is
13 a statement of the accounts, were his day-to-day as he, as
14 he accounts for it. So, no, there was, there was no
15 discussion about that date. He was allowed to write what he
16 did that day and did so and that's it.
17 Q But you were clear with him, when you were interviewing
18 him, that you wanted to know about the, the killing that,
19 the dead body that you got at Lebon Street, who is
20 Robert Finley?
21 A Absolutely.
22 Q And he never admitted being there at the scene?
23 A No, sir.
24 Q Never admitted to you to shooting Robert Finley?
25 A No, sir, in fact, the whole day and time are taken up,

1 and no where in there is any mention of that.
2 Q Okay. And -- but he did, at some point if I understand
3 correctly, did he ever mention anything about the $40
4 involving Robert Finley?
5 Do you recall?
6 A Yes, after, after this statement was taken and some
7 problems I had with it, yes.
8 Q Okay. What it -- what essentially did he tell you
9 about the $40 that was between him and Robert Finley if you
10 recall?
11 A He said it was a loan. He owed, that, that Robert owed
12 him $40. It was a loan.
13 Q Didn't say it was for drugs that he fronted to Robert
14 Finley?
15 A No, sir, he left that part out.
16 Q All right. Now, this Sunday afternoon at about six
17 o'clock, after this interview and this statement, was David
18 Finley arrested and charged with murder?
19 A David?
20 Q I mean -- I'm sorry. David Smith.
21 A No.
22 Q Okay. Am I -- do I understand correctly, essentially,
23 at this point, you don't have the information that Angie
24 Smith was able to give you later?
25 A First of all, during an investigation like this, law

1 enforcement is not gonna go out and make an arrest based on
2 some statement like this. We continue to investigate it,
3 which we did.
4 Obviously spoke with Angie Smith after this along with
5 some other folks. Other statements were taken, other
6 forensics were found, an arrest warrant was issued, and he
7 was arrested in Greensboro days later.
8 SOLICITOR COLER: Okay. All right. Beg the Court's
9 patience just one minute.
10 (Pause.)
11 Q That's all the questions I have for you, detective. If
12 you please answer any questions Mr. Godfrey has for you.
13 THE COURT: Let's hold on a minute. It's after 4:00.
14 Do you have a problem with me stopping right here?
15 (Mr. Godfrey nods negatively.)
16 THE COURT: Mr. Foreman, ladies and gentlemen of the
17 jury, we're gonna break for this afternoon.
18 Nine o'clock, 9:30, or ten o'clock, what suits you?
19 (Jurors answer nine o'clock.)
20 THE COURT: Nine o'clock a problem with anybody?
21 (Jurors nod negatively.)
22 THE COURT: Those with little children?
23 JUROR: Yeah.
24 THE COURT: That is a problem?
25 JUROR: No, it's not a problem. It's -- I have---

1 THE COURT: Okay. All right. I'll have you hot
2 donuts.
3 Will they -- Mr. Humphries, will they be hot?
4 BAILIFF: Yes, sir.
5 THE COURT: Coffee. So, y'all -- we'll get started at
6 9:00. But if you want to get some, fill up on some donuts,
7 be here a little before then.
8 Please do not discuss the case tonight. Do not
9 commence your deliberations. If anybody tries to discuss
10 the case with you, please advise that we will, I will handle
11 them accordingly.
12 Okay. You're free to leave. Everybody else please
13 remain seated. We'll see you back at nine o'clock in the
14 morning.
15 Good luck trick-or-treating.
16 JUROR: Thank you.
17 (Whereupon, the following takes place outside the
18 presence of the jury.)
19 THE COURT: Mr. Denton, you're right in the middle of
20 your examination. So, I would ask, tonight, do not discuss
21 the case with the Solicitor's Office or defense or anyone
22 else. Just don't, don't discuss it with anybody, and I'll
23 see you back at 9:00 in the morning where you'll remain
24 under oath. So, don't assist the prosecution with any type
25 of preparation or anything like that. I'm sorry.

1 WITNESS: Your Honor, I would not.
2 THE COURT: You got a free ride.
3 WITNESS: Thank you.
4 THE COURT: Thank you. You're excused.
5 Now, let the record reflect that when Mr. Coler went
6 into, started into the questioning concerning the statements
7 taken of the defendant, I called for a side bar to make sure
8 we had no issues concerning any Jackson v. Denno hearing
9 concerning Exhibits 1, 2, or 3.
10 Mr. Godfrey took a minute to reflect on that, and
11 advised the Court that there was no question as to the
12 voluntariness of these statements, and, in fact, they were
13 exculpatory and that he was not going to object nor request
14 a Jackson v. Denno hearing, and he discussed that with his
15 client. His client understood that. And they did not want
16 any type of Jackson v. Denno hearing in light of the fact
17 that the statements were, in fact, as they turned out to be
18 exculpatory.
19 Now, Mr. Godfrey, please, for the record, is that a
20 correct recitation of my inquiry and your response?
21 MR. GODFREY: Yes, Your Honor. It is.
22 THE COURT: And now that they're in, are you still of
23 the opinion that you do not need a Jackson v. Denno even
24 though we're behind that?
25 MR. GODFREY: Yes, Your Honor. It's still my opinion.

1 THE COURT: And have you discussed that with your
2 client?
3 MR. GODFREY: We have talked about it.
4 THE COURT: And is he understanding of that and agrees
5 with that?
6 MR. GODFREY: Yes, sir.
7 THE COURT: Anything else for the record as to Exhibits
8 1, 2, and 3 that you want to put on it?
9 MR. GODFREY: No, Your Honor.
10 THE COURT: All right. Let's take a short break and
11 then let's deal with the testimony of the deceased witness.
12 We'll start back in about 15 minutes or about ten till.
13 How about that?
14 Thank you.
15 (Whereupon, a short recess was taken at this time.)
16 THE COURT: Okay. Let's go back on the record.
17 And as I understand, you're trying to put in the
18 testimony that was previously taken at the prior trial of
19 Pops, whose name is Mr. Hyder, is that -- H-Y-D-E-R?
20 SOLICITOR COLER: Yes, sir, that's correct, Your Honor.
21 THE COURT: AKA Pops, is that what they call him?
22 SOLICITOR COLER: That's him.
23 THE COURT: And it's my understanding that he testified
24 at the last trial. Subsequent to the last trial, he is, he
25 is died and you wish to put it under Rule 804(a)(4), which

1 says that he is unavailable obviously because of his death,
2 and that it also comes under 804(b)(1), which is the former
3 testimony as a witness in another hearing, and it looks like
4 to me it sort of falls within the rule.
5 But Mr. Godfrey, I'll be glad to hear from you.
6 And let also the record reflect that the testimony
7 itself will be the same exact testimony that was used in the
8 previous trial, and you will just publish that testimony, is
9 that correct, Mr. Coler, or are you gonna do anything
10 addition, more or --?
11 SOLICITOR COLER: No, sir, just that. I'd, I'd offer
12 to just read the questions out of the transcript and have
13 some volunteer read the answers from the, from the witness
14 stand.
15 THE COURT: All right. Mr. Godfrey, how does that not
16 come within the 804(b)(1)?
17 MR. GODFREY: Well, may it please the Court?
18 THE COURT: Yes, sir.
19 MR. GODFREY: I think the threshold issue is whether or
20 not the, if, whether or not Otis Hyder is truly dead. At
21 this point in time, we believe he probably is. But there's
22 been no proof from the State showing that he has deceased.
23 THE COURT: All right. You want me to call him?
24 All right. What proof do you have that he's---
25 SOLICITOR COLER: We haven't been able to put our hands

1 on any death certificate. But Allen Newman, who was here
2 and testified earlier, tells me he knew Otis Hyder and Otis
3 Hyder is, in fact, dead. Thought he died---
4 THE COURT: I guess that's one little thing you and Ms.
5 Ganss can do tonight.
6 SOLICITOR COLER: Yes, sir.
7 THE COURT: You can go to the graveyard and take a
8 picture of his tombstone or get me an---
9 SOLICITOR COLER: We'll do that, judge.
10 THE COURT: ---his official death record.
11 Let's assume he's dead.
12 MR. GODFREY: Well---
13 THE COURT: I'll make them prove that before I allow
14 it.
15 MR. GODFREY: Bottom line, judge, when Otis Hyder
16 testified at the first trial, the defense attorney, Mr. Cox,
17 was not aware of a interview note which was taken by an
18 investigator for the Solicitor's Office.
19 THE COURT: How do you know he was not aware of that?
20 MR. GODFREY: Because Mr. Cox testified that he did not
21 know about that, and it was an internal note taking from the
22 Solicitor's Office. It was their work product, which is not
23 normally, which is never actually -- under Rule 5 discovery,
24 it was work product from the Solicitor's Office.
25 THE COURT: Well, if it's not discoverable, then how

1 could he have known about it?
2 MR. GODFREY: Well, he should of known about it because
3 it's Brady material. The Brady material involved in it was
4 where there was an indication that Otis Hyder told the
5 investigator for the Solicitor's Office that Robert Finley
6 was going to take the drugs. In other words, he was gonna
7 steal the drugs.
8 THE COURT: Mark as Court's Exhibit 1 please.
9 MR. GODFREY: And---
10 THE COURT: Hold on one second.
11 (Whereupon, a note was marked as Court's Exhibit No. 1
12 for identification purposes only at this time.)
13 THE COURT: All right. Mr. Godfrey, I've marked, as
14 Court's Exhibit No. 1, what was given to me, in a little
15 pretrial conference we had and I think I just showed it to
16 you while the court reporter was marking other exhibits,
17 does Court's Exhibit 1 appear to you to be the memo that you
18 just spoke about?
19 MR. GODFREY: Yes, sir, it is.
20 THE COURT: And Mr. Cox, who later testified in a
21 post-conviction relief hearing, you're telling me that he
22 testified that he did not know about Court's Exhibit 1?
23 MR. GODFREY: That is correct, sir.
24 THE COURT: And did he testify that his
25 cross-examination would of been different had he known about

1 Court's Exhibit 1?
2 MR. GODFREY: Judge, I would have to refer to the PCR
3 transcript. I can't answer that one off the top of my head,
4 sir.
5 THE COURT: Well, you would agree with me that if the
6 guy is unavailable, obviously -- and this testimony was
7 taken under oath in a former proceeding, it appears, at
8 first glance, that it would come within the rule. What
9 you're telling me is though had Cox known about Court's
10 Exhibit 1, then perhaps his cross-examination would have
11 been different, and now that you know about Court's Exhibit
12 1, and Mr. Hyder being dead, and if you had cross-examined
13 him back then with Court's Exhibit 1, your cross-examination
14 would also have been different?
15 MR. GODFREY: That is correct.
16 THE COURT: Sort of a violation of, sort of a violation
17 of, of what?
18 What's the name of the new case?
19 It's right on the tip of my tongue.
20 Confrontational testimonial---
21 MR. GODFREY: Crawford.
22 THE COURT: Crawford. I'm sorry. Crawford.
23 Sort of a hybrid Crawford question?
24 MR. GODFREY: Yes, Your Honor.
25 And also, it's a Brady issue I believe because, when

1 you look at that, it shows that Robert Finley was going to
2 take the drugs or steal the drugs, or to put it another way,
3 rob a drug dealer.
4 THE COURT: Well, it says Finley---
5 MR. GODFREY: And that goes---
6 THE COURT: It says Finley came to trailer late at
7 night and wanted to use the phone. Finley called someone,
8 didn't hear conversation. A few minutes, car pulls up,
9 black female voice. Robert said I don't want to see you, I,
10 I want to see him.
11 Black male voice was heard, figures standing about
12 arm's length apart, no fighting. "Go ahead and shoot me and
13 give me gun and I'll do it myself."
14 Smith backed off. Finley reached for him, heard pop.
15 Knew it was gunfire. Yelled at Terry Bradley, who was at,
16 who was asleep on couch, to call 9-1-1. That's when Finley
17 reached for Smith. He intended to take the drugs from him.
18 MR. GODFREY: And if it please the Court, there goes
19 two issues when you read the full thing. Obviously the
20 testimony that Otis Hyder would of had, pursuant to that
21 memo, about what was actually said in the trailer goes, is
22 in direct contradiction to what Angie Smith testified to.
23 So, you would have a contradiction of testimony. Plus you
24 have Otis Hyder indicating that Robert Finley intended to
25 take the drugs.

1 If you take those two things together, that Robert
2 Finley did not want to deal with Angie Smith, he only wanted
3 to deal with David Smith, and that he intended to take the
4 drugs, I think it goes a long way to blunting or perhaps
5 even taking away the malice element of murder.
6 THE COURT: Who took these notes, Exhibit 1?
7 SOLICITOR COLER: I've never been able to determine it,
8 judge. I think it was an investigator who's no longer with
9 our office. I think it might of been Charlie Henderson,
10 who's an investigator up until about 2002.
11 THE COURT: Well, why can't you ask the, Detective
12 Denton tomorrow on cross-examination aren't these part of
13 the investigative records and wasn't this said, bla, bla?
14 You can't do that?
15 MR. GODFREY: Well, I'm not sure that Steve Denton has
16 any knowledge of that because Charlie Henderson worked for
17 the Solicitor's Office. Not for the Sheriff's Office.
18 THE COURT: Yeah, but Denton has knowledge of this part
19 of the file, doesn't he?
20 MR. GODFREY: Judge, I don't know if Steve Denton would
21 of had knowledge of the work product from the solicitor's
22 file or not.
23 THE COURT: All right. What -- if I said that it
24 violated Crawford because Mr. Cox didn't have this at the
25 time he cross-examined him, therefore, the, it would be

1 testimonial and he didn't have an opportunity to
2 cross-examine him and it violates Crawford, what would you
3 say to that Mr. Coler?
4 SOLICITOR COLER: Judge, the first thing I point out is
5 I think, although we admit Mr. Cox, Louis Cox didn't have a
6 copy of this --
7 THE COURT: This being Court's Exhibit 1.
8 SOLICITOR COLER: -- Court's Exhibit 1, he certainly
9 had a copy of Otis Hyder's written statement given, given to
10 the police, and I've given the Court a copy of that. I
11 contend that the notes made by whoever this investigator
12 with our office back in 1997 was essentially mimic or mirror
13 the written voluntary statement given by Otis Hyder to the
14 police on January 12th of 1997. The only difference,
15 judge, where Charlie Henderson, or whoever the investigator
16 was, in his last statements he writes thinks when Finley
17 reached for Smith he intended to take drugs from him. The
18 only difference is in Otis, Otis Hyder's written statement
19 of the police, he wrote Robert grabbed something from the
20 man.
21 That's the same thing to me, judge. And, and regarding
22 that, Otis Hyder was vigorously cross, cross-examined by T.
23 Louis Cox about that. As a matter of fact, they went so
24 far, after asking questions about, about the grabbing, to
25 put the written statement of Otis Hyder in to evidence so

1 the jury heard that, saw that written statement, and you
2 know Otis Hyder's written statement he says Robert grabbed
3 something from the man.
4 I think that, being cross-examined on that sentence
5 would of been the same line of questioning that Louis Cox
6 would of questioned on the sentence that Charlie Henderson
7 wrote thinks when Finley reached for Smith he intended to
8 take drugs from him.
9 THE COURT: Well, Mr. Godfrey, it does look like the
10 statement of Otis Calvin Hyder, AKA Pop, pretty much does
11 mirror Court's Exhibit 1, and I reviewed the
12 cross-examination of Mr. Cox, and it does look like he
13 covered that rather extensively, and I don't know how you
14 distinguish what he would of done different had he had
15 Court's Exhibit 1 in addition to the statements of Otis C.
16 Hyder dated, what, 1/12/97.
17 But here's what I, I'm tend -- right now I think I'm
18 gonna let it in. But I will give you the evening hour to
19 come up with any additional cases or any additional argument
20 and present it to me in the morning before we start back.
21 MR. GODFREY: Thank you, Your Honor.
22 THE COURT: As part of this proffer or part of this
23 argument, I'm gonna go ahead and note for the record that I
24 marked, as Court's Exhibit 1, the actual, the notes in
25 question. I'm gonna mark as Court's Exhibit 2 the

1 examination of Mr. Hyder in the previous trial, which
2 includes a copy of the statement just so we'll have a record
3 for this afternoon.
4 THE COURT: Anything else?
5 And I'll give you a, whatever time you need in the
6 morning to revisit that. But unless we come up with
7 something different, it appears to me that it falls within
8 all four corners of the, of the, Rule 804(b)(1) provided
9 they satisfy me that the, Pops is dead.
10 Okay. And I admire all two of my lawyers for the
11 prosecutor's office and their investigator. But I may need
12 a little bit more than he's dead.
13 SOLICITOR COLER: Yes, sir, we'll, we'll get that
14 information.
15 THE COURT: Sound pretty confident.
16 SOLICITOR COLER: I believe he's dead.
17 THE COURT: Okay. Anything else for the record before
18 we break for the evening?
19 SOLICITOR GANSS: No, sir.
20 SOLICITOR COLER: No, sir, Your Honor.
21 MR. GODFREY: No, sir.
22 THE COURT: All right. We'll see you back here at a
23 little bit before 9:00 in the morning to address that.
24 The defendant is in custody, and have a pleasant
25 evening.

1 Thank you.

2

3 (Whereupon, Court was in recess for the evening.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Tuesday, October 31st, 2005

2

3 THE COURT: Okay. As I understand, the word of the day
4 is "he's alive."
5 SOLICITOR COLER: That's correct, Your Honor.
6 THE COURT: I'm not singing some hymn he's alive, he's
7 alive.
8 SOLICITOR COLER: That's correct, judge. Otis Hyder,
9 Senior is alive. We had some bad information. His son is
10 here.
11 THE COURT: I'll say real good information for him.
12 SOLICITOR COLER: Yes, sir.
13 His son is here, was gonna explain to the Court his
14 medical conditions. He is home bound and not well. But I
15 think both sides now have agreed to use, simply use his
16 previous testimony from the first trial and just read that
17 into the record. I'll find a volunteer to the, play Otis
18 Hyder, Senior and just read his responses into the record in
19 response to my questions from the transcript.
20 THE COURT: Well, you know, it just goes to show that
21 maybe before we make representations we need to investigate
22 it a little further. But I can certainly understand that.
23 I've been in your shoes before.
24 And we've resurrected your dad overnight and we had him
25 deceased in the courtroom yesterday. And---

1 MR. HYDER: Well, he's, he's living.
2 THE COURT: Well, tell Pops we said hello. That's what
3 we call him.
4 WITNESS: All right. I'll do it.
5 THE COURT: All right. Mr. Godfrey, as I understand,
6 with this latest development, you're going to withdraw your
7 motion, withdraw your objection and allow the testimony, the
8 testimony from the prior proceeding to be introduced into
9 the trial of this case?
10 MR. GODFREY: Yes, sir, that's correct.
11 THE COURT: And have you had an opportunity to discuss
12 that with Mr. Smith?
13 MR. GODFREY: Yes, I spoke with him briefly about that
14 this morning. Spoke to his family about it last night.
15 THE COURT: Okay. Mr. Smith, you have any questions
16 about that?
17 DEFENDANT: No, sir.
18 THE COURT: All right. Okay. Anything else for the
19 record before we start back?
20 SOLICITOR COLER: No, sir, the only other thing I ask
21 is I gave the Court my copy of the testimony of Otis Hyder,
22 the transcript. That was the copy that I was gonna let the
23 volunteer use.
24 THE COURT: Well, you know, I took mine home with me
25 last night to study it and I've left it.

1 SOLICITOR COLER: Yes, sir, I'll make two more copies,
2 one for you and one for---
3 THE COURT: I'm just kidding here. I put Court Exhibit
4 1 on it. I guess that's still okay.
5 SOLICITOR COLER: We're just gonna read it into the
6 record. I have that.
7 Okay. Detective Denton, if you would, come back and
8 take the stand please.
9 (Witness returns to the stand.)
10 THE COURT: Your co-counsel gonna join you?
11 SOLICITOR COLER: Yes, sir, she was, she's looking for
12 the volunteer to play Otis Hyder, Senior.
13 THE COURT: There's a good one right back there.
14 SOLICITOR COLER: If he's willing to do it.
15 THE COURT: No, no, I'm talking about that young---
16 SOLICITOR COLER: Yes, sir, if there's no objection.
17 MR. GODFREY: I won't object.
18 SOLICITOR WELLS: Your Honor, I have to be in court at
19 ten o'clock in front of Judge Few.
20 THE COURT: All right. Let's go.
21 Everybody ready?
22 SOLICITOR COLER: Yes, sir.
23 THE COURT: If Mr. Ganss comes to the door, let her in
24 obviously. No one else.
25 All right. Bring my jury in, please.

1 (Whereupon, the following takes place within the
2 presence of the jury.)
3 THE COURT: Good morning.
4 Hope y'all all had a pleasant evening, and those donuts
5 start working on you and your eyes start getting heavy, I'll
6 send you back for more coffee.
7 How about that?
8 Were they good?
9 (Jurors nod affirmatively.)
10 THE COURT: You can thank Mr. Humphries. He ordered
11 four dozen and the lady said he could get five dozen
12 cheaper.
13 So, y'all ate all five dozen?
14 (Jurors nod negatively.)
15 THE COURT: Okay. Well, I'm glad you had a pleasant
16 evening.
17 And Mr. Coler.
18 SOLICITOR COLER: Judge, I think we were at the point
19 of cross-examination.
20 THE COURT: You are.
21 SOLICITOR COLER: Thank you.
22 MR. GODFREY: May it please the Court.
23 THE COURT: Certainly.
24 CROSS-EXAMINATION
25 BY MR. GODFREY:

1 Q Detective Denton, I believe you said that, when you
2 went to David Smith's house to look for him, you talked with
3 David's wife?
4 A I did.
5 Q And she told you that David was in Greensboro, going up
6 to, to Greensboro for a job?
7 A He did. She did.
8 Q And you told her that you really wanted to talk to
9 David?
10 A I did.
11 Q And she contacted David for you?
12 A I believe she paged him.
13 Q And did David call you back?
14 A He called me back in my office some hours later, yes,
15 sir.
16 Q And then he voluntarily came to your office?
17 A He did.
18 Q And at that point in time you took a statement from
19 him?
20 A I did. I took the statement that he wrote. That's
21 correct.
22 Q And then subsequently, you had a statement from Angie
23 Smith and that's when you got a warrant for David's arrest,
24 is that correct?
25 A That's correct.

1 Q Let me show you some pictures I received in the
2 discovery package.
3 (Whereupon, four photographs were marked as Defendant's
4 Exhibit Nos. 1 through 4 for identification purposes only at
5 this time.)
6 Q This picture is marked for identification as No. 1.
7 THE COURT: Defendant 1 for ID?
8 MR. GODFREY: Defendant 1 for ID.
9 A Yes, sir.
10 Q And do you recognize that?
11 A It looks like a door jam to the trailer.
12 Q And I'm gonna show you what's been marked as, for
13 identification, as Defendant's No. 2.
14 A Yes, that looks like a piece of molding from that door
15 jam.
16 Q And marked for identification No. 3.
17 A Yes, that's the open door of the trailer with the
18 deceased body.
19 Q And identification No. 4.
20 A This is a different view of the same photograph,
21 deceased body at the door as it fell out.
22 Q Do those pictures appear to be an accurate reflection
23 of what you saw when you arrived on the scene?
24 A They do.
25 Q And they appear to be accurate in all details?

1 A They do.
2 MR. GODFREY: Judge, at this time, I would move---
3 THE COURT: Hold on a second. Let me see both of you
4 up here, all three of you up here.
5 (Whereupon, a bench conference was held out of the
6 hearing of the jury at this time.)
7 MR. GODFREY: Judge, I would---
8 THE COURT: All right. Without objection, 1, 2, 3, and
9 4, photos.
10 (Whereupon, Defendant's Exhibit Nos. 1 through 4 were
11 received into evidence at this time.)
12 Q Now, you indicated, during your direct testimony, that
13 you did not see any evidence of a struggle, is that correct?
14 A I indicated that I did not see any evidence of a
15 struggle inside the mobile home, that's correct.
16 Q You didn't see any evidence inside the mobile home?
17 A No, sir.
18 Q If the struggle occurred at the door, there wasn't much
19 that could be disturbed, was there?
20 A If the, if the struggle itself occurred at the door,
21 started at the door, that would be a correct statement.
22 Q And when you looked at Defense No. 1 --
23 A Uh-huh. (Affirmative).
24 Q -- and you say that's a door jam?
25 A That's what it appears to be.

1 Q And it appears that there is a piece of wood missing
2 from the bottom of the door jam?
3 A There is.
4 Q If you look at Defense No. 2, what do you see?
5 A A piece of the molding on the floor.
6 Q And doesn't it look like it belongs on the door jam?
7 A It does.
8 Q So, there is a good possibility that there was a
9 struggle there at the door, isn't there?
10 A At the door where people are falling out, I would
11 expect to see possibly what I'm seeing in those photographs,
12 and I've seen those photographs before. But again, I
13 testified there was no struggle that I could see inside the
14 trailer.
15 Q All right, sir. Nothing further.
16 THE COURT: Redirect?
17 SOLICITOR COLER: No further questions.
18 THE COURT: Thank you. You may step down.
19 Call your next witness.
20 SOLICITOR COLER: State calls Doctor David Wren.
21 DAVID WREN, being first duly sworn,
22 testified as follows:
23 <u>DIRECT EXAMINATION</u>
24 <u>BY SOLICITOR COLER:</u>
25 Q Doctor, would you please state your full name for the

1 record?
2 A John David Wren.
3 Q And tell the jury what you do for a living.
4 A I'm a pathologist.
5 Q Okay. And you perform autopsies, autopsies as a
6 pathologist for the, for Spartanburg County?
7 A Yes, I perform autopsies for the Spartanburg County
8 Coroner's Office and other---
9 Q Okay.
10 A ---and other coroners over the region.
11 Q And can you estimate how many autopsies you perform in
12 a given month or a given year?
13 Just ball park for us.
14 A For about the last ten years, ten to 15 years, I do
15 around 180 a year.
16 SOLICITOR COLER: Judge, I think both sides have
17 stipulated that Doctor Wren is an expert in the field of
18 forensic pathology.
19 MR. GODFREY: That's correct, Your Honor.
20 THE COURT: All right. Ladies and gentlemen of the
21 jury, what that means is that Doctor Wren will be qualified
22 as an expert in the field of pathology. Normally people,
23 people witnesses can not give an opinion. They must testify
24 as to what they see, heard, smelled, so forth.
25 However, someone who is, by reason of experience,

1 education, and training in a certain field, may render an
2 opinion in a case as opposed to just testifying as to what
3 they see or saw.
4 So, the doctor will be qualified as an expert in
5 pathology, and, and if asked, may render an opinion. You
6 treat that opinion evidence just like you would any other
7 evidence and give it whatever weight you deem necessary, if
8 any at all.
9 Mr. Coler.
10 SOLICITOR COLER: Thank you, Your Honor.
11 Q Doctor, if you just briefly tell the jury what forensic
12 pathology is.
13 A Well, forensic pathology is a subspecialty of general
14 pathology. General pathology is that branch of pathology, I
15 mean of medicine that deals with diseased processes.
16 Whether they be natural or non-natural.
17 Pathology is, itself is divided into two general parts,
18 anatomic pathology and clinical pathology. Clinical
19 pathology is that part, portion of pathology that actually
20 deals with various laboratory tests and things that are done
21 in the laboratory whereas anatomic pathology deals with
22 tissues mainly. Whether it be Pap Smears as, as a cytology
23 specimen, or surgical pathology specimen where certain, a
24 biopsy may be done or tissue removed at, during surgery that
25 a surgical pathology examines that tissue and tells whether

1 it's benign, malignant, and tries to determine the
2 underlying ideology or cause of the abnormality to direct
3 the physician in how to treat the patient.
4 Forensic pathology is a subspecialty of anatomic
5 pathology generally dealing with medical/legal cases. And
6 as such, a forensic pathologist either performs autopsies or
7 investigates medical legal cases being an expert in that
8 area to try to determine not only the manner of death, but
9 the cause of death and circumstances associated with death
10 after a complete investigation is done.
11 Q Thank you, doctor.
12 As part of your duties, were you asked to perform an
13 autopsy on the victim in this case, Robert Finley, back on
14 January 12th of 1997?
15 A Yes, I performed an autopsy on Robert A. Finley in the
16 Spartanburg Regional Medical Center autopsy room on
17 January 12th, 1997, beginning at approximately 9:10 a.m.
18 Q As a result of your autopsy, were you able to make a
19 determination as to the cause of death of Mr. Finley?
20 A Yes.
21 Q What, what was the cause of death of Mr. Finley within
22 a reasonable bounds of medical certainty?
23 A I simply assigned the cause of death as gunshot wound
24 to the left eye and head.
25 Q What, if anything, can you describe for us about the

1 gunshot wound that you observed on Mr. Finley?
2 A Well, the gunshot wound was directly in the left eye.
3 It was a gunshot wound that was rather close, close range
4 rather than being a distant or intermediate gunshot wound
5 basically because there appeared to be tattooing in a 1-inch
6 diameter area about the entrance, which was directly, of
7 course, in the eye. The eye collapsed from the gunshot
8 wound, and there were -- the stippling or tattooing that I
9 am referring to is actually burning particles of, of powder
10 as they leave the barrel of the gun, follow the path of the
11 bullet out for a, a short distance. Usually no more than 12
12 to 15 inches if it's a high velocity rifle. But in
13 handguns, it's usually less that 8 to 10 inches.
14 And if there is an intervening object in the way, it
15 will actually hit that object, and in this case, it hit the
16 skin around his eye, and left a pattern of tattooing it's
17 called from the burning powders.
18 There was no soot there meaning that the soot that --
19 actually the smoke that comes from the barrel did not hit
20 the, hit the body. So, it was a little bit further away
21 than, than soot deposition. But it was close enough to
22 where there were burning powder there.
23 Q And doctor, when you say a relative close range shot,
24 can you approximate for us how far the barrel was from
25 Mr. Finley's eye.

1 If you can make an estimate based on what you found.
2 A Well, I can make an estimate. But it takes actual
3 firing of the weapon itself with the ammunition that is used
4 or comparable ammunition where a ballistics expert will take
5 the weapon and fire it into a white paper usually. It
6 varies distances as he moves back from the, from the, from
7 contact with it, and it will leave the soot, as I talked,
8 real closely, will leave the soot. As it goes further back,
9 no soot will be there, but the particles will still deposit
10 on there until there's none seen.
11 That will give a more accurate estimate. But generally
12 speaking, in handguns, it's 2 to 6-inches, and I figured
13 maybe 4-inches from his face.
14 Q And that would be the barrel of the gun from his face?
15 A Yes.
16 Q Approximately 4-inches?
17 A That's correct.
18 Q All right. As part of your autopsy, did you also note
19 other, what you characterized as superficial wounds on
20 Mr. Finley's body?
21 A Yes, he had some stippled abrasions with some
22 lacerations that were minor.
23 Q You've had an opportunity to look at some of the
24 photographs in this case that were taken at the crime scene,
25 how Mr. Finley's body was found.

1 Did you find or do you find the superficial injuries
2 you found on him, the stipples, the cuts and scrapes,
3 consistent with his fall after he was shot and the way he
4 was found?
5 A I felt like they were more consistent with a fall on to
6 a rough surface such as concrete because, as everyone knows,
7 if you fall onto a rough surface like concrete, the little
8 ridges and raised areas in the concrete will actually
9 contact the skin first and make more indentations into it,
10 and it was that type of pattern that I noticed in the
11 majority of the, of the injuries.
12 Q And when you say rough concrete, would a -- I believe
13 you've seen these.
14 The -- I'm showing the witness, State's Exhibit No. 6,
15 Your Honor.
16 The support steps leading up to the mobile home, is
17 that the type of rough, rough surface you would find
18 consistent with his, with his injuries?
19 A There appear to be two concrete steps with a slight
20 rise from the upper step into the trailer. His feet are
21 actually in the trailer, and his body is -- well, the upper
22 portion of his body is on the ground and he's actually
23 inclined over the steps. And it looks like there's some
24 rough surface of possible gravel right directly beneath his
25 body there.

1 Q Okay. And, and that would -- you would find his
2 injuries consistent with falling on that type of a surface?
3 A More consistent with that than actually someone hitting
4 him or him hitting---
5 Q Okay.
6 A ---hitting someone.
7 Q That's all the questions I have for you, doctor. Thank
8 you for being here. Please answer any that Mr. Godfrey has.
9 THE COURT: Cross.
10 MR. GODFREY: May it please the Court.
11 THE COURT: Yes, sir.
12 CROSS-EXAMINATION
13 BY MR. GODFREY:
14 Q Doctor Wren, you say your best estimate is the gun
15 would be about 4-inches from the barrel to the impact on the
16 body?
17 A Two to six inches, and yeah, I just took an average.
18 Like I said, it has to be fired by the ballistics expert
19 with correlation.
20 Q Now, you looked at this picture. Let's see. Let me
21 show you a picture which is been marked as Defense Exhibit
22 No. 4, and ask you to take a look at this picture.
23 Given the position of Robert Finley's arm, does it
24 appear that his body has been moved?
25 A Yes.

1 Q And what brings you to that conclusion?
2 A Well, when someone dies and rigor mortis sets in, the
3 rigor mortis, until it disappears -- usually rigor mortis
4 starts -- it can start as early as 40 minutes. But
5 certainly by four hours after death, rigor mortis starts and
6 it's actually stiffening of the body.
7 If a person dies and is in a certain position, whatever
8 it is, gravity will cause the extremities or, or the -- and,
9 and the position the body is lying in, whether it's against
10 an object or something, will cause the body to stiffen in a
11 natural position due to gravity. Once rigor mortis has set
12 in, which, or becomes fully fixed, which is about 12 hours
13 after death, then if you move the body, let's say my arm
14 were across my chest, and I moved the body to where it moved
15 like that, then the arm would stay here until the, the rigor
16 mortis started to disappear, and one could tell that the
17 person had been moved because it's not natural to die with
18 your arm up in the air. It will usually just fall over
19 anyway.
20 But if you -- and if you move the body, you can tell.
21 For instance, if a person were sitting on a, on a seat, and
22 they happened to die sitting on the seat, then their legs
23 will be probably bent. If you take a, took that person and
24 laid them on the ground, their feet would be up in the air,
25 and you could tell the person probably had been moved.

1 In this case, his arm is in an unnatural position. So,
2 I would surmise that he'd been rolled over probably to take
3 this other picture.
4 Q Now, what injuries did Robert Finley have about his
5 face and neck?
6 A Well, he had a, in the mid-forehead, there's
7 mid-forehead, he had a, a irregular deep superficial
8 abrasion much like a deep scratch mark if you were, if it
9 were really severe, and he had a laceration within that
10 abraided area. It was more directed to the right side and
11 inferior, and it measured about -- well, I measure things in
12 centimeters usually unless it's gunshots. Nine, nine by
13 five and a half centimeters. And a rule of thumb is
14 2.5 centimeters per inch.
15 So, dividing two and a half into nine, it's not quite
16 four. So, it's a little over 3-inches long and
17 5.5 centimeters wide, which is a little over 2-inches. That
18 size, with the laceration measuring an inch by about a third
19 of an inch lateral to his eye, I'm sorry, within that
20 abrasion.
21 He also had a vertically oriented, meaning that the
22 abrasion, you could tell it was moving in a vertical
23 direction along the right upper face lateral to the eye, it
24 covered a little over 2-inches by 1-inch on the side of his
25 face. He had a half a centimeter, which is about a

1 two-tenths of an inch long, very small area of abrasion in
2 the right ear itself within the ear.
3 His left eye contained a periorbital hematoma meaning
4 there was a, a, blood about his eye that could be seen. It
5 was actually from the gunshot wound, and he had some
6 stippling in that area, which I referred to as a tattooing.
7 He had a laceration about the bridge of the nose
8 measuring about six-tenths, or a little over half an inch
9 long, and it extended all the way, with abrasion there, it
10 extending all the way to the tip of the nose, and that
11 covered an area of two by a little over 1-inch altogether.
12 He didn't have a fracture of the nose. It was just an
13 abrasion with the laceration along the bridge itself.
14 He had a laceration along the mid-upper lip just
15 inferior to the nose with the frenulum, which is the little
16 piece of skin or tissue that is between the, the fold of the
17 lip and the gum was torn meaning that it had been pushed
18 some way. That hemorrhage was 2-inches, 2-centimeters, just
19 about an inch in diameter.
20 He had an abrasion, a very mild horizontal abrasion
21 along the mid-left mandible that measured about a half inch
22 by a very, very thin two-tenths of a centimeter, which is a
23 tenth of an inch or less abrasion there.
24 He had an abrasion over his left shoulder, I'm sorry,
25 his left collar bone, clavicle, near the joint there which

1 joins the chest plate.
2 And he had some scars. He had a little abrasion along
3 his dorsal right wrist that measured about four,
4 eight-tenths, eight-tenths of an inch long by a little less
5 than a half inch wide, and it had a stippled surface too
6 meaning that it was from a, from hitting a rough surface
7 rather than a smooth flat surface.
8 He had two very small abrasions, which I called
9 punctate, meaning they were extremely small, overlying the
10 right knuckle of the mid-finger each measuring approximately
11 a tenth of an inch in diameter and closely approximated
12 meaning he had some scratch marks that I thought were
13 probably healing along his right upper forearm on the dorsal
14 surface, the back surface.
15 And he had a contusion or bruise along his right dorsal
16 hand between the middle and ring fingers covering about a
17 half a, a, less than a half an inch with some abrasion and
18 contusion to the right leg or bruise to the right leg
19 superior to the patella meaning just above the knee. It
20 measured about 2 by 1.6 inches in overall dimensions, and he
21 had an abrasion overlying the patella or the knee cap itself
22 about a tenth, I mean, I'm sorry, about two-tenths of an
23 inch in diameter.
24 Then he had some abrasions and contusions to his tibia
25 regions, the bone that's in front of the lower leg, that

1 measured about 2-inches and one and, one and three-quarter
2 inch in maximum diameter on the, on the right side and then
3 on the left side.
4 That was all the, all the injuries I found.
5 Q So, it appears that, from that list that you just gave,
6 that he had some what I would call superficial abrasions and
7 lacerations to his face and body, and---
8 A He had, he had one laceration and the rest were
9 abrasions, yes, sir.
10 Q All right, sir. Isn't it true that some of these
11 injuries could of occurred from a scuffle where, whereas
12 others were probably more associated with falling?
13 A Well, of course, any of them could of, could of, could
14 have been associated with a scuffle, if, if, during the
15 scuffle, he fell on to a, on to a rough hard object. None
16 of them by themselves could be to someone hitting him or him
17 hitting someone themselves unless they had on a concrete
18 vest or something similar.
19 Q All right, sir. Nothing further.
20 THE COURT: Redirect?
21 SOLICITOR COLER: Just briefly.
22 REDIRECT EXAMINATION
23 BY SOLICITOR COLER:
24 Q Just so I understand, doctor, the body essentially gets
25 different injuries when it's injured in different ways. A

1 fist or some kind of object punching a body, punching a
2 human being, is gonna leave a different injury than the body
3 being scraped along concrete, right?
4 A Yeah, basically that's true.
5 Q Okay.
6 A For instance, if someone took a two-by-four and, with
7 the thinner edge, hit you, hit someone on the side with a
8 two-by-four, it would usually leave two and, two horizontal
9 impressions about the width of the two-by-four that the
10 surface it hit it if it were flat, if the, if the edge of
11 the two-by-four. Now, if the sharp edge of the two-by-four
12 hit, it would only be one. But most likely be a laceration
13 and -- but it would not be rough. It would be, it would be
14 smooth in there and it would be blanched out because the
15 blood is forced out to the side and the blood is actually
16 around both edges of it.
17 If someone punches someone themselves and they don't
18 hit something sharp, they'll just get a bruise on their hand
19 unless they've hit some rough clothing or something like
20 that that may get, one may get an abrasion there.
21 If someone hits a person with their fist, if there's a
22 underlying bone under it, sometimes you'll get a, a
23 laceration. But most often you'll just get a big bruise and
24 it will be smooth. It won't be rough like the majority of
25 these were. Well, all of these were.

1 Q Mr. Finley's injuries were all rough abrasion type
2 consistent with hitting concrete or hitting some rough
3 surface?
4 A Rough object. It would have to be a rough object.
5 Most likely wouldn't be a smooth one.
6 Q And no injuries consistent with getting say punched
7 with, with someone's fist?
8 A No, not that I saw.
9 Q Okay. And of course, the photographs you were shown
10 where his arm appeared to be in a different position, you
11 don't know, doctor, if those pictures were taken after
12 someone like EMS may have rolled the body or moved the body
13 of tried to treat it, correct?
14 A No, I don't know the -- all it gives on here is a date.
15 Doesn't give a time. So, so, I have no idea. It's just a
16 point in time here.
17 Q Okay. And again, of course, you don't know if that
18 picture was taken after an ID officer may of rolled the body
19 to take a picture of the face or something like that?
20 A And no, no one has, has given me that information.
21 Q Okay.
22 A I just, I just know that the one he asked me about, it
23 looked like he, he didn't obviously die in that position.
24 Q That's all the questions I have, doctor. Thank you for
25 being here.

1 THE COURT: Thank you. You may step down and be
2 excused.
3 Any objection to him being excused from his subpoena?
4 MR. GODFREY: Without objection.
5 SOLICITOR COLER: Thank you, Your Honor.
6 THE COURT: Next witness.
7 SOLICITOR COLER: May we approach briefly, Your Honor?
8 THE COURT: You may.
9 (Whereupon, a bench conference was held out of the
10 hearing of the jury at this time.)
11 THE COURT: Call your next witness.
12 Call your next witness.
13 SOLICITOR GANSS: The State calls Kenny Hasty to the
14 stand, Your Honor.
15 THE COURT: Okay. Ladies and gentlemen of the jury, as
16 I understand, Mr. Hasty is not available for testimony this
17 morning. He is testified in a previous proceeding, and we
18 will simply read his testimony from that previous
19 proceeding.
20 This gentleman here is a lawyer within the Solicitor's
21 Office?
22 WITNESS: Yes, sir.
23 THE COURT: Your name?
24 WITNESS: My name is Kenny Hasty. I'm reading the
25 testimony of Mr. Hyder.

1 THE COURT: And Mr. Hasty is gonna read the testimony.
2 It's just -- so take it just as if this were a live witness
3 here in the courtroom. He was unable to be here this
4 morning, and this is permissible, under our rules, and it's
5 being done without objection from the defense.
6 So, we often times do this. So take him for the
7 witness Mr.---
8 SOLICITOR COLER: Otis Hyder, Senior.
9 THE COURT: ---Hyder.
10 (Whereupon, the transcript of the testimony of Otis
11 Hyder was marked as Court's Exhibit No. 2, and published for
12 the jury at this time.)
13 THE COURT: Next witness, Mr. Solicitor.
14 SOLICITOR COLER: Joe Powell.
15 Joseph Powell.
16 JOSEPH POWELL, being first duly
17 sworn, testified as follows:
18 DIRECT EXAMINATION
19 BY SOLICITOR COLER:
20 Q State your name for the record if you will.
21 A My name is Joseph D. Powell. P-O-W-E-L-L.
22 Q And tell us where you work.
23 A I'm currently employed as a supervisor in the trace
24 evidence section at the South Carolina Law Enforcement
25 Division commonly known as SLED.

1 Q Okay. And where is your SLED office located?
2 A It's located in Columbia, South Carolina.
3 Q All right. And what is -- how long have you been in
4 your position as a supervisor of trace evidence?
5 A I've been in the trace department a little over 23
6 years. As supervisor, 13 years.
7 Q And is one of your duties now to oversee the
8 examination of gunshot residue kits?
9 A Well, yes, sir. Not only do I train others on how to
10 be able to examine the kits called gunshot residue, but I
11 also take cases and I still run actual case work and come
12 testify about it.
13 Q Back in 1997, when you worked on this case, was, was it
14 one of your primary duties to analyze or process gunshot
15 residue kits?
16 A Yes, sir, at that time I was supervisor and I still
17 carried a case load, which I use as part of my training on
18 all the applicants that come into my department.
19 (Whereupon, the SLED report was marked as State's
20 Exhibit No. 9 for identification purposes only at this
21 time.)
22 Q And we have a copy of your report here. I'm handing
23 you what's been premarked as State's Exhibit No. 9.
24 Is that the report you generated after analyzing or
25 processing the gunshot residue kit for this case?

1 A Yes, sir, what's listed as State's Exhibit No. 9 is a
2 photocopy of my report, which bears my signature and the
3 date that I signed it.
4 SOLICITOR COLER: Your Honor, at this point, I also
5 believe we have a stipulation between the State and the
6 defense that Agent Powell is an expert in the analysis of
7 gunshot residue kits.
8 THE COURT: Is that correct?
9 MR. GODFREY: That's correct, Your Honor.
10 THE COURT: All right. He will also be qualified as an
11 expert in this particular area, and will be allowed to give
12 opinions, and you can give that whatever weight you wish.
13 Q If you will -- thank you, Your Honor.
14 If you will, Agent Powell, just describe for us what a
15 gunshot residue kit is, what its purpose is, and what your
16 role is in analyzing or testing the samples.
17 A Yes, sir, any weapon that is discharged, that is using
18 the principle of exploding gun powder, will give off
19 residue. We have devised a kit which is designed to capture
20 or collect that material from someone's hands or clothing or
21 some area around the weapon to see if that weapon has been
22 fired, discharged, anywhere near it.
23 The kit is composed primarily of two components. One
24 of which is a flattened piece of aluminum with a sticky
25 adhesive somewhat like adhesive tape, and it's actually used

1 to be able to pick up particles, I'm actually demonstrating
2 here on the back of my left-hand, for particles that may be
3 on the surface and it's used to pick those particles up.
4 After completing this region of the hands, we divide
5 the hands up into four regions. Left palm, left back, right
6 palm, right back. After collecting that using the particle,
7 I will then follow-up with cotton swabs, which have been
8 wetted with a weak acid solution. The idea is that while
9 the particle will pick up the large particles which may be
10 on the surface, they're many more tiny particles which can
11 be trapped within the pours or down in the creases of the
12 hands, and this is used to mop up any material which may be
13 there.
14 What we apply is one cotton swab to the back of the
15 hands, rubbing it across that area until the cotton swab is
16 filled, is dry. And then we'll take a second cotton swab
17 and do the same area, same test. We'll continue this
18 process on each area of the hands until the, both hands have
19 been completely analyzed giving us four different regions
20 that we collect the samples for.
21 The kit is then sealed, sent to our laboratory. We'll
22 then open up the kit, run an analysis on the swab to see
23 what kind of materials may be there. This -- the swabs are
24 actually much more sensitive test as it will pick up a lot
25 of debris material that the lifts will not.

1 If we find materials on the swabs, which tells us there
2 may be an indication of gunshot residue, we will then take
3 the particle list and place them into a microscope which
4 allows me to actually see the smoke particles from a gun.
5 If I'm able to find those smoke particles, someone has fired
6 or been around a weapon to be able to get this material on
7 their hands.
8 Now, this test is, has several issues. One of them is
9 that if you are alive after discharging a weapon, and you go
10 wash your hands, the material is gone. Just normal activity
11 without even washing your hands after six hours it is gone.
12 However, someone who is deceased, once the heart stops, the
13 material will stay on the hands indefinitely until someone
14 physically removes that material.
15 Q Okay. Time is crucial obviously to the collection of
16 the samples from the hands you're looking at?
17 A That is correct, until someone has deceased. One that
18 occurs, time is no longer relevant.
19 Q Okay. What, what, what do you instruct your lab
20 personnel and officers who collect the samples, what do you
21 tell them about time frames as far as collecting samples
22 from a living person or a dead person?
23 A We insist upon having this collection within a six hour
24 window. If the kit is collected outside of that six hour
25 window, we will not run that kit because it -- if someone's

1 alive, then that material is gone after six hours. Even if
2 we did run that kit, if there's, something was found that
3 was not from that crime scene, it was from some other
4 source, and it is not, it has no value to us. So, we have a
5 six hour window on someone who's alive.
6 Again though, someone is deceased, let's say they're at
7 the scene, that material stays there and we collect it the
8 next day with no problem.
9 Q If an officer encountered a, a suspect or someone who
10 may of fired a gun more than six hours after the shooting
11 occurred, and collected samples and submitted it to you,
12 what would you do with that sample?
13 A We would return it, return it back to them with no
14 analysis because, after six hours, there is nothing that is
15 probative on those samples.
16 Q Okay. And describe for us the importance of the
17 preservation of the hands of, in this case, a deceased
18 individual.
19 What's important about the preservation of, what do you
20 suggest the officers do to preserve these samples on a, on a
21 deceased person's hand?
22 A One of the suggestions that we have made is to take the
23 hands of someone who's deceased and place them within a bag
24 and tape it around their wrist. The reason being is that
25 this material can be dissolved in blood. It can be removed

1 by water. And so, if we put a plastic or, excuse me, a
2 paper bag around it, that will give it a, a way of or a
3 mechanism of preventing something from happening to it
4 unless someone physically washes the hands off.
5 Q And just so I'm clear, when you're performing your
6 analysis, you're trying to make a determination whether
7 someone fired a gun or whether those hands were in the
8 vicinity of a fired gun, correct?
9 A Yes, sir.
10 Q Okay.
11 A Based upon where we find residue at, they're times that
12 we're able to actually determine if someone is fired a
13 weapon or handled a weapon. For example, if I just pick up
14 a weapon, there will be a transfer of that weapon of residue
15 from the gun on to my palms. And so, when I run the test, I
16 will find levels on the palms only. That, that, to me,
17 indicates someone who's just handled the weapon.
18 However, if someone fires a weapon, we may find it on
19 the palms as well as on the back. And being on the back of
20 the hand tells me more that someone may have fired a weapon.
21 Again, it depends upon the levels that may be there.
22 There are times we can not make the distinction. But there
23 are times that we can.
24 In the case of a defensive posture, this is one where
25 someone puts their hands up or a way to block their being

1 shot at. We can tell that usually by the levels of
2 extreme -- they're very high. Usually you get a lot of
3 material on your hands. Especially, very close, you'll
4 actually get a blackening or darkening on the hands, which
5 is absolutely indicative of someone being shot at.
6 Q Okay. And you did perform an analysis on the gunshot
7 residue kit from the victim, Robert Finley, in this case,
8 correct?
9 A Yes, sir, I did.
10 Q What, what are your findings?
11 What was the results of your analysis that you
12 performed?
13 A The quantity of the metals detected on the hand regions
14 do not indicate the presence of gunshot residue. So, there
15 was nothing on the hands which indicated that he had fired a
16 weapon. There was no indication that he had been close
17 enough to a weapon to be in a defensive posture, which means
18 that if someone shot him, they would be far enough away that
19 the materials will not deposit on the hands or the hands
20 were down by his side or covered in a, such a way that no
21 materials would of gotten on those hands.
22 Q That's all the questions I have for you, Agent Powell.
23 THE COURT: Don't you want to introduce 9?
24 Is it 9?
25 SOLICITOR COLER: Yes, sir. I'm sorry.

1 THE COURT: Any objection?
2 MR. GODFREY: Without objection.
3 THE COURT: Nine is in evidence without objection.
4 Cross.
5 MR. GODFREY: May it please the Court?
6 CROSS-EXAMINATION
7 BY MR. GODFREY:
8 Q Of course, his hands, you say, could be down by his
9 side and it would not show any gunshot residue particles,
10 right?
11 A Yes, sir, that is correct. When a weapon is
12 discharged, it's a cone of debris that will come out from
13 it. Your hands need to be somewhere within that cone of
14 debris that's coming out. If they're dropped down by your
15 side, that, they're not in the range of that cone as far as
16 someone being shot straight up. So, thus they would not be
17 contaminated.
18 Q Well, if somebody's hands were about the neck of
19 someone and then that person fires a shot, his hands would
20 not have gunshot residue on them either, would it?
21 A Depending upon where you place the weapon at. If
22 someone, if I'm grabbing somebody, and they are, have the
23 weapon near my hands when it's discharging, shooting towards
24 me, I can get materials on my hands, on my hands. If,
25 however, when they shoot the weapon, they shoot it away from

1 my hands, shoot it downward, then it would be like I would
2 not get the materials or if they place the weapon into my
3 body where they would be a contact shot, where it would be
4 contained within my body, they would not get residue on
5 their hand, on my hands either.
6 Q Well, as I understand it, the most logical reason that
7 there's no gunshot residue is that Finley's hands were
8 behind the gun, is that correct?
9 A Well, his hands could have been behind the weapons away
10 from the material. They could have been situated that
11 nothing could of gotten on his hands or the person could of
12 been far enough away they could not deposit on his hands.
13 Any of those possibilities -- I know nothing about this case
14 as far as any particulars.
15 Q Nothing further.
16 THE COURT: Redirect?
17 SOLICITOR COLER: No, sir, Your Honor.
18 THE COURT: You may step down --
19 WITNESS: Thank you, sir.
20 THE COURT: -- Officer Powell.
21 SOLICITOR COLER: Judge, may we---
22 THE COURT: May he be excused?
23 SOLICITOR COLER: Yes, sir, if there's no objection.
24 MR. GODFREY: No objection.
25 SOLICITOR COLER: May we approach just briefly?

1 (Whereupon, a bench conference was held out of the
2 hearing of the jury at this time.)
3 THE COURT: All right. Mr. Coler, I understand you,
4 without objection, you need to place one more piece of
5 evidence---
6 SOLICITOR COLER: Yes, sir, we're offering State's
7 Exhibit No. 8, the shell casing, into evidence.
8 MR. GODFREY: Without objection.
9 THE COURT: All right. Shell casing.
10 (Whereupon, State's Exhibit No. 8 was received into
11 evidence at this time.)
12 SOLICITOR COLER: Beg the Court's patience just one
13 moment?
14 (Pause.)
15 THE COURT: Next witness.
16 SOLICITOR COLER: Your Honor, that's the State's case.
17 We rest our case.
18 THE COURT: All right. Thank you.
19 Madam Forelady, ladies and gentlemen of the jury, that
20 concludes the presentation by the State. I have a few
21 matters I need to take up outside of your presence. I'll
22 just go ahead and give you a morning break. I'm sure
23 they're donuts left. But if you want something besides
24 donuts, Mr. Humphries will be glad to try to accommodate you
25 unless it's hamburgers, fried chicken.

1 Anyway, y'all take your break. Do not commence your
2 deliberation, and I'll have you back in just about, probably
3 about 15 minutes if that's okay.
4 Thank you.
5 Everybody else please remain seated.
6 (Whereupon, the following takes place outside the
7 presence of the jury.)
8 THE COURT: All right. Motions.
9 MR. GODFREY: May it please the Court.
10 The defendant would move for a directed verdict. If
11 you take the evidence in the light most favorable to the
12 State, you can see that there is no malice in this case.
13 From the testimony of Otis Hyder, it was clear that David
14 Smith was being robbed. From the testimony of Angie Smith,
15 we know that David Smith was backing out of the trailer.
16 THE COURT: It's clear that David Smith was being
17 robbed?
18 MR. GODFREY: That he grabbed the, he grabbed --
19 according to Otis Hyder, he grabbed the drugs. He wasn't
20 paying for the drugs. He grabbed the drugs.
21 THE COURT: Oh.
22 Go ahead.
23 MR. GODFREY: And we know, from the testimony of Angie
24 Smith, that David, David Smith was backing out of the
25 trailer. According to Angie Smith, there was a scuffle, the

1 gun did go off, and David left.
2 But Your Honor, we would submit that that would be more
3 akin to self-defense in that David was being attacked by
4 Robert Finley at the time of the incident. We point out
5 that the fact that someone may hold a gun illegally, even
6 though a gun is unlawful, it can be used lawfully in a
7 self-defense situation.
8 We would submit that's what we have here. We would
9 move for an acquittal.
10 THE COURT: Well, I've obviously listened to all the
11 evidence, and, to me, there is ample evidence in the record
12 for the jury, for it to be a jury's decision as to whether
13 or not he actually had malice aforethought. And I
14 respectfully deny your motion for directed verdict.
15 THE COURT: Anything else?
16 MR. GODFREY: Nothing, Your Honor.
17 THE COURT: All right. While we're at the break, let
18 me -- have you had an opportunity to talk to your client
19 about whether or not he's gonna testify?
20 MR. GODFREY: Yes, Your Honor, I have. I've gone over
21 his constitutional rights with him, and he is ready to be
22 questioned by the Court.
23 THE COURT: All right. Mr. Smith, would you mind
24 standing please?
25 DEFENDANT: Yes, sir.

1 THE COURT: Would you raise your right-hand and be
2 sworn?
3 (Whereupon, the defendant was placed under oath at this
4 time.)
5 THE COURT: You can put your hand down.
6 How are you this morning?
7 DEFENDANT: Doing okay.
8 Yourself?
9 THE COURT: Sir, just remain standing for me if you
10 don't mind.
11 DEFENDANT: Okay.
12 THE COURT: Mr. Smith, we've now reached the stage of
13 the trial where obviously you can present your defense. And
14 during that defense, you have a right to testify if you want
15 to do so. But you also have the right to claim the
16 protections given to you by the Fifth Amendment to the
17 Constitution of the United States.
18 And that amendment, Fifth Amendment states, in part,
19 "no person shall be compelled, in any criminal case, to be a
20 witness against himself.
21 And you understand that?
22 DEFENDANT: Yes, sir.
23 THE COURT: What that means is that you can not be
24 required, in other words, Mr. Coler, Ms. Ganss, can not
25 require you to testify. You do have, however, have the

1 right to testify on your own behalf. But nobody could make
2 you do that. If you wish to testify, it's a personal right
3 and no one can waive it except you.
4 Does he have a prior record?
5 SOLICITOR COLER: Judge, I don't think he has any
6 impeach, impeachable offenses.
7 THE COURT: Okay. If you decide to testify, you will
8 be subject to the same rules that govern other witnesses,
9 and you may be examined and cross-examined on any relevant
10 issue in the case.
11 I have been told that you have no prior convictions.
12 So, obviously that will not be an issue in the, in the trial
13 of this case. But you would be subject to cross-examination
14 fully on the matter.
15 If you decide to testify, this decision must be freely,
16 voluntarily, and intelligently made with the knowledge of
17 the protections given to you under the Fifth Amendment of
18 the Constitution and the consequences of your decision to
19 testify. If you decide not to testify, I will instruct the
20 jurors that they can not consider the fact that you did not
21 testify when they deliberate your guilt or innocence, and,
22 in fact, I will tell them that they can't even discuss that
23 fact in the jury room, and that absolutely no prejudice be
24 taken because you did not testify.
25 In other words, I'm gonna tell them the fact that this

1 guy didn't testify can't even be discussed. Y'all can't
2 talk about it. It's not to be considered. He has the right
3 not to testify. I'll put all that on the record.
4 It's left entirely up to you as to whether or not you
5 testify. Obviously you can talk with your lawyer. You have
6 your family here. They've been here with you all yesterday
7 and today. But in the end, the final decision will be
8 yours.
9 First of all, do you understand what I've explained to
10 you?
11 DEFENDANT: Yes, sir.
12 THE COURT: You have any questions whatsoever about
13 your Fifth Amendment rights to self-incrimination or the
14 right to testify or any other questions concerning this
15 discussion?
16 DEFENDANT: No, sir.
17 THE COURT: Do you need any additional time with your
18 lawyer?
19 DEFENDANT: I would like to have just a couple
20 minutes---
21 THE COURT: Certainly. You may.
22 DEFENDANT: ---before I---
23 THE COURT: Well, why don't we do this. We're gonna
24 take a break right now. Over the break, discuss it with
25 your lawyer. We'll come back out before we start up. I'll

1 decide and find out whether or not you're gonna testify and
2 make that decision.
3 Is that fair?
4 DEFENDANT: Yes, sir.
5 THE COURT: Anything else you need from me?
6 DEFENDANT: No, sir.
7 THE COURT: All right, sir. You may sit down.
8 All right. Mr. Godfrey, as I understand, you got at
9 least one witness, Mr. Girndt.
10 MR. GODFREY: That is correct, Your Honor.
11 THE COURT: You may have two. You may call your
12 defendant. Is -- that depends on his---
13 MR. GODFREY: That's correct, sir.
14 THE COURT: Anything other than that?
15 MR. GODFREY: No, sir.
16 THE COURT: So, we should conclude testimony by 11:00?
17 MR. GODFREY: Probably.
18 THE COURT: All right. Let me ask you this.
19 Do y'all have any proposed jury charges?
20 SOLICITOR COLER: No, sir, judge, we just ask for your
21 standard charge on, on murder. If it becomes relevant, I
22 presume you use the standard four element self-defense
23 charge. But I think that's premature at this point.
24 THE COURT: I do too.
25 Are you gonna request a lesser included offense of

1 voluntary manslaughter?
2 MR. GODFREY: We would request voluntary manslaughter.
3 We would also, and maybe premature for this, request
4 involuntary manslaughter.
5 THE COURT: Well, I may give you voluntary. But I'm
6 not so sure on involuntary. But we'll put all that on the
7 record at the appropriate time. I'll try to have a rough
8 draft of the jury charge by the time you finish your
9 testimony and we can look at those.
10 MR. GODFREY: May it please the Court?
11 THE COURT: Yes, sir.
12 MR. GODFREY: Since you're going ahead and starting to
13 prepare a jury charge at this time---
14 THE COURT: Well, I just like to try to have them done,
15 speed things up, and be glad to hear you on anything of
16 that. But my clerk is pretty good at getting these done.
17 MR. GODFREY: Well, the only thing---
18 THE COURT: Rough draft.
19 MR. GODFREY: I apologize.
20 THE COURT: No, sir, I said, just said it's a rough
21 draft.
22 MR. GODFREY: Well, would you like me to go ahead and
23 hand up cases I would be handing up after the defense case
24 so you can go ahead and start looking at them---
25 THE COURT: That's for your self-defense?

1 MR. GODFREY: ---and give a copy to the State.
2 THE COURT: What is that for?
3 MR. GODFREY: It is request, request for involuntary
4 cases, and also accident, which was charged in the first
5 case as well.
6 THE COURT: Yes, sir, I'll be glad to look at all of
7 that.
8 Okay. We'll stand at ease. I told them 15 minutes.
9 That's about six more minutes.
10 Y'all need longer than that?
11 SOLICITOR COLER: No, sir.
12 THE COURT: Mr. Godfrey, you need a few more extra
13 minutes?
14 MR. GODFREY: I would appreciate it.
15 THE COURT: All right. Let's go till about 25 after.
16 Mr. Humphries, tell the jury that it looks like I'm not
17 gonna make 10:15 cause we're just getting out of here now.
18 I'm gonna extend it till 25 after.
19 Okay. We'll stand at ease until 25 after.
20 (Whereupon, a short recess was taken at this time.)
21 THE COURT: Ready to proceed?
22 MR. GODFREY: Yes, Your Honor.
23 THE COURT: Mr. Coler, you ready?
24 SOLICITOR COLER: Yes, sir.
25 THE COURT: All right. Bring the jury in.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Okay. Order please.

Call your first witness.

MR. GODFREY: May it please the Court.

Defense would call David Smith.

THE COURT: Come around, Mr. Smith.

DAVID SMITH, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GODFREY:

Q What is your name?

A David Dwight Smith.

Q How old are you, David?

A I am 46 years old.

Q And where are you from?

A I am originally from Kennedy, Texas. Well San Antonio, Texas.

Q And is this your family back here on the front row?

A Yes, it is.

Q They're here from Texas?

A Yes, sir.

Q How long have you lived in South Carolina?

A Since 1987.

Q And how have you been employed?

1 A I am a licensed aircraft mechanic, and that's how I
2 ended up here. I got a job at Lockhead over in Greenville,
3 Lockhead Arrowmont.
4 Q And, at some point, did you begin selling drugs?
5 A Yes, sir.
6 Q And why did you do that?
7 A Well, my, my brother was living with me. Also my wife
8 used drugs. And I was in-between jobs at the particular
9 time. My brother was bringing drugs into my home. So, I
10 came back home around December 2nd, 1996, and he came to
11 live with me shortly thereafter.
12 Q All right.
13 A That's when I got involved with the drugs.
14 Q When you say you came back in 1996, where had you come
15 back from?
16 A I was in Macon Georgia working for McDonald Douglas
17 Technical Services.
18 Q Now, there's been testimony about you having a job in
19 Charlotte in January.
20 What was that job involving?
21 A Basically more of the same work for -- the job was in
22 Greensboro, North Carolina for the same company, McDonald
23 Douglas Technical Services. I'm a licensed mechanic in the
24 airlines and several other carriers needed additional people
25 to keep their maintenance records up or qualified people to

1 do the job. And that's why I did travel, and get paid, you
2 know, a little more than the average pay because you're
3 traveling.
4 Q And at that time, where was your permanent residence?
5 A I lived here in Spartanburg, South Carolina. I was
6 buying a home. My home was at Bee Street.
7 Q David, how is your health?
8 A Well, I've -- a year ago today I had bypass surgery,
9 heart bypass surgery. I had five.
10 Q Five bypasses?
11 A Yes, sir, times five. That's how many vessels.
12 Q And are you on medication now from the doctor?
13 A Yes, sir.
14 Q David, do you remember the early morning hours of
15 January 12th, 1997?
16 A Yes, sir.
17 Q At the time, did you receive a page from the Smith
18 residence?
19 A I did receive a page from the Smith residence. And
20 before receiving the page, I had been dealing with Angie
21 Smith and another person, Mike, for about the last three or
22 four hours that evening, and I had, I was on Herbert Street
23 right off of Wofford Street, which is two or three minutes
24 from the Smith house.
25 Q Well, when you say you were, had been dealing with

1 Angie Smith for three or four hours before the page, what
2 are you talking about?
3 A They were calling me back and forth to deliver drugs to
4 them at, at that location, her and Mike and whoever else
5 were over there, and I was bringing them back and forth.
6 Q So, what did you do when you got the page?
7 A Well, I had just pulled off from the residence on
8 Herbert Street where Mike was at, and I saw that it was
9 Angie Smith and Rodney Smith's home number. So, it was
10 right around the corner. Instead of trying to go to a phone
11 or whatever, I drove straight there.
12 Q Well, what happened as you approached Angie's house?
13 A As I was approaching Angie's house, I noticed Cynthia
14 Roseburgh come out of her house, and Angie Smith came out of
15 the house running. And immediately, as I was pulling to a
16 stop, she was running and ran around and jumped in the car.
17 Q And what happened next?
18 A Well, I told her that Cynthia was trying to stop me,
19 and I, I wanted to stop and see what she wanted, and Cynthia
20 Roseburgh also used crack cocaine. So, therefore, I knew
21 that that's what she wanted and Angie told me fuck her, just
22 drive, you know, we'll, you'll be back.
23 Q Well, did you know where you were going?
24 A No, sir.
25 Q How did you find out where you were going?

1 A Well, she started giving me directions as she, you
2 know, was talking, telling me which way to go, and, and
3 where I should be going. She told me that she was going,
4 she, she was going to someone who wanted drugs, and that she
5 was gonna give me the directions to get there. So, she's
6 directing me where I need to go.
7 Q Well, when you got to the trailer, did you know whose
8 trailer it was?
9 A No, sir, I had never been there before.
10 Q Did Angie tell you whose trailer it was?
11 A No, she didn't. She said that the person she wanted to
12 deal with was in there.
13 Q Did she tell you who it was that she wanted you to deal
14 with?
15 A No, sir, as a matter fact, when she pulled up, when we
16 pulled up to the trailer, which I didn't, I didn't know
17 whose trailer it was, I pulled the drugs out and tried to
18 give them to her, and she told me just wait until she went
19 in and see what was going on.
20 Q So, how long do, was she in the trailer?
21 A Maybe about three, four minutes.
22 Q What did she do when she left the trailer?
23 A She came back and got in the car, and I asked her well,
24 what do you need or whatever, and she started telling me
25 well, they didn't want to deal with me. He wants to deal

1 with you.
2 Now, I asked well, who are you talking about. She said
3 Robert. I said well, I don't really deal with that guy.
4 This -- her brother, you know, dealt with Robert, and I knew
5 who he was, Robert Finley, I knew who he was.
6 Q Well, was Rodney Smith delivering drugs for you?
7 A Yes, he was. I would --
8 Q And---
9 A I would, I would drive him sometime to where he would
10 deliver. He didn't have a car.
11 Q So, what did you do after you found out that he wanted
12 to deal with you?
13 A Well, my first instinct was to pull off because I'm at
14 a strange trailer, and, you know, Rodney had told me that
15 he -- Rodney owed me some money for drugs, and he had told
16 me that the reason he was short is because he had fronted
17 some drugs to Robert, and I told him myself well, you can
18 work it off, but I won't give you any extra until then.
19 So, I told her I just didn't really prefer to deal with
20 Robert. But she said he's got the money, go ahead in there.
21 And being though it was that time of night, which was
22 2:30 in the morning, I had already left Mike's house and I
23 brought her over here, I agreed and went ahead in.
24 Q Well, what happened when you got to the trailer?
25 A When Angie came out, he had closed the door. When I

1 went up to the door and knocked, he opened the door and left
2 it wide open. So, I walked in the trailer after he opened
3 the door.
4 Q Then what happened?
5 A Robert was -- when, when I, when he opened the door, he
6 turned around and walked toward the kitchen area over there,
7 the sink, and there was a table right next to it over there.
8 So, he told me that he wanted $50 worth. I told him, I
9 said, well, okay, no problem. I said from what I know,
10 Rodney is telling me he dealt with you, and I understand
11 you, you supposedly had the money. So, I put the drugs down
12 on the table.
13 Q Where was Otis Hyder?
14 A Otis Hyder was sitting about from here to the table, to
15 the Solicitor's table, which is inside of the trailer and
16 the television was right next to him right there.
17 Q Well, what happened when you put the drugs on the
18 table?
19 A Well, when I put them down on the table, Robert was
20 looking at them, but he said, you know, like he wanted to
21 check them out. I said go ahead and check them out, because
22 the people that normally use drugs, they want to make sure
23 that they're not, you're not selling them something that's
24 not authentic or whatever. So, I told him to go ahead and
25 check it out.

1 Q Well, how does one check out drugs?
2 A Put it in their mouth or, you know, if he, if he wanted
3 to, he would of, he could of took it and put something on
4 something and smoked some of it right there.
5 Q Well, then what happened?
6 A While he was doing that, I walked over to -- there was
7 a heater, a kerosene heater sitting over along the wall of
8 the trailer where the door is that you come in, and it was
9 over closer to the couch and the television. So, I walked
10 there because he left the door open, and I stood by the
11 heater and was warming my hands. This was January. It was,
12 was pretty cold.
13 Q Well, did he have the money to pay you?
14 A No, he -- what he indicated to me next was -- he
15 started talking, while he was over by the trailer, and I'm
16 standing there with him, and Mr. Hyder is sitting there, and
17 he's got a show on I was watching. So, I'm standing there
18 looking at it. He said hey, listen, I don't have any money
19 today, I'll pay you tomorrow.
20 Q Well, what did you say?
21 A I told him that I wouldn't be there.
22 Q And what did you mean by that?
23 A Well, my job is already scheduled in Greensboro, North
24 Carolina, and I -- of course, I need to make a living. I'm
25 buying a home, and I was the only one working at the time,

1 and all of my other bills. I have children that I have to
2 support. So, I had the job scheduled and I needed to go to
3 work.
4 Q Well, when you told him that you wouldn't be here
5 tomorrow, what happened next?
6 A He looked at me and said well, I'm taking this.
7 Q And he said what?
8 A He said I'm taking this.
9 Q And what did he do?
10 A I don't know what he did with the drugs, but he started
11 coming towards me.
12 Q Now, where were you at this time?
13 A Along the wall where the heater was.
14 Q And where was the door in relation to that, the outside
15 door?
16 A It was to my left.
17 Q What was he doing as he was coming towards you?
18 A Well, when he was coming toward me, the expression on
19 his face and everything was a real serious demeanor, and I,
20 you know, I didn't know what to expect from him next.
21 Q Well, what did you do?
22 A Well, I, I had my hands in my pocket. Like I said, I
23 was warming them, sticking them in my pocket, and I'm
24 standing there, and I had a gun in my pocket. So, I pulled
25 my hands out alongside me, and I had the gun in my hand when

1 I pulled my hands out.
2 Q Now, were your hands in your pants pocket or your coat
3 pocket?
4 A Coat pocket. I had a leather jacket on. I had a sweat
5 suit underneath and a leather jacket on with a belt around
6 it, and it's like a smoking jacket or whatever. And I had
7 my hands in my pocket like that. So, it was in my coat
8 pocket, outer coat.
9 Q And what happened when you pulled your hands out of
10 your pocket and you had the gun in your hand?
11 A He recognized -- he saw the gun, and, and that was,
12 that was my intention. Maybe if he saw the gun, whatever
13 was going through his mind, he, he, you know, he would, you
14 know, back up off of it, and, you know, not, not do what he
15 did next.
16 Q Well, what happened next?
17 A Once he got within about arm's reach, he's talking to
18 me and telling me oh, you got a gun, what are you gonna do,
19 shoot me, give me the gun, I'll shoot myself. I'm like no,
20 that's not what I'm trying to do. Just give me my stuff
21 back and let me leave.
22 Q And what were you doing at the time?
23 Were you standing still?
24 A Yes, sir, I'm still along that same, you know, at the
25 heater at that time. He hadn't got all the way up to me.

1 So, it was still time for him to, like I said, rethink or
2 stop, you know, what he was doing. But that's what he said
3 at that point.
4 Q Well, what did you do next?
5 A Well, I went to put my hands back in my pocket because
6 I saw that the situation was gonna, was gonna go beyond
7 that. And when I went to put them in my pocket, he's
8 already on, almost towards me, and he tries to knock the gun
9 out my hand. He hit me with the left, with the left arm and
10 grabbed me in my collar of the jacket.
11 Q Now, are you right-handed?
12 A Yes, sir.
13 Q Was the gun in your right hand?
14 A Yes, sir, he, he had hit it. I thought I was gonna
15 lose the gun. He had hit it and I got the grip on the gun
16 and he's got me.
17 Q And where are you in relation to the door now?
18 A Well, as I said, I had started to turn to go to the
19 door. I'm not at the door. I'm maybe a couple steps from
20 that heater cause I'm trying to move on now.
21 Q Well, what happened next?
22 A Well, when he grabbed me, I went to defend myself. I
23 threw my left arm over his, over his arm that he had me
24 grab, and I hit him with the butt of the gun.
25 Q Where did you hit him with the butt of the gun?

1 A Somewhere in the, in the face area.
2 Q Well, how is it that you ended up at the door?
3 A Well, when I hit him the first time, he didn't -- his
4 grip -- he didn't lose his grip on me. He still had a grip
5 on me. And we, we were still headed that direction. My --
6 I'm trying to get out. I'm -- you know, that's which way I
7 was headed. I was trying to get out of there.
8 So, when I hit him, the momentum from me hitting him,
9 we're still moving that way.
10 Q Well, what happened when you got to the door?
11 A Well, when we got to the door, I had hit him maybe two
12 times, three times then, and I'm still trying to get him off
13 of me. But he's pushing at me like he's trying to run me
14 into the wall or something and he's pushing at me.
15 And then, at this time, we're about at the door and I'm
16 swinging at him. So, I don't know -- you know, I'm hitting
17 him each time I hit him. I'm hitting him. And by this
18 time, we're both falling out of the trailer.
19 Q What happened next?
20 A The gun went off.
21 Q Did you pull the trigger?
22 A No, sir.
23 Q Do you know why the gun went off?
24 A No, sir, I don't. I do know that I had loaded the gun
25 because I had just gotten it maybe a week or two before and

1 I had loaded the gun. But I never had a chance to fire it
2 and I had the gun with me.
3 Q So, when did the gun fire?
4 A As we were coming out of the trailer door.
5 Q And you didn't intentionally pull the trigger?
6 A No, sir.
7 Q What was your intention?
8 A To get him off of me. To simply hit him with the gun,
9 get him off of me. He tried to knock it out my hand. If he
10 would of succeeded, I, I -- if he would of succeeded, I
11 probably could of, it could of been me.
12 Q So, you were just trying to leave?
13 A Yes, sir.
14 Q And were you in fear of him?
15 A Yes, sir, Robert, and I don't know if that played a
16 big, how big a part that played, but he's made, he was maybe
17 about 6'2" or whatever. Even, even though he didn't -- he
18 was wider in the shoulders or whatever, and when he was
19 coming up on me, I was afraid.
20 Also, the way he looked. He, he looked like he was on
21 something.
22 Q You were just trying to leave?
23 A Yes, sir.
24 Q Did you intend to kill Robert Finley?
25 A No, sir.

1 Q Did you intend to fire a gun at Robert Finley?
2 A No, sir, I, I was brought there by Angie Smith to
3 supposedly sell some drugs.
4 Q When you fell out of the door, what happened?
5 A When I came down out of the trailer, I heard the gun go
6 off, and I couldn't tell whether he was hit or whatever and
7 I'm stumbling myself. The next thing I knew was -- cause
8 I'm, I'm looking around, and I'm just lying stuck. I'm, I'm
9 in shock. Angie Smith started hollering out the car window
10 get in the car, let's go, let's go.
11 Q So, what did you do?
12 A I snapped then because I heard her, and I turned around
13 and, to go get in the car. I didn't even go get in on the
14 driver's side. I went to where the sound was.
15 When I turned this way, it was a passenger side and I
16 went around the car. And when I got in, I'm, I'm just
17 sitting there, and she's hollering come on, let's go, let's
18 go, drive.
19 Q Now, did -- what did you say about the gun and drugs
20 when you were in the car?
21 A I told her, I said, I've got these drugs, I've got this
22 gun. I -- you know, I didn't intend to do any of this. I
23 don't, I don't even need this, I need to get rid of it. She
24 said drive. That's, that's the only thing she said.
25 Q Well, where did you go?

1 A She wanted to go to my house and Angie Smith knows my
2 wife. She wanted to go to my house. But I told her, I
3 said, you know, you can't go to my house because, to me,
4 something wasn't right about this whole picture. You know,
5 she paged me, wouldn't tell me who it was, took me over
6 here, and told me that the guy had the money, just go ahead
7 in there. And when I went in there, I ended up getting
8 attacked.
9 Q Well, where did Angie Smith get out of the car?
10 A She got off on Wofford Street and Herbert Street, which
11 Mike lives up the street from there on Herbert Street, and
12 she got out of there.
13 Q Did you give her anything?
14 A I gave her the rest of the drugs.
15 Q And then where did you go?
16 A I drove straight up Wofford Street up by Hub City
17 Apartments.
18 Q What did you do with the gun?
19 A Well, after this altercation that he had been running
20 in the car, I had let down out, all of the windows and the
21 sun roof back on the car, and I had the gun still in my
22 pocket. And I mean, you know, like I said, I had just got
23 it. So, I threw the, threw the gun out over into the train
24 trestle over there.
25 Q And where is that?

1 A On Wofford and about Austin Street right here.
2 Q And where did you go after you threw the gun away?
3 A I went ahead to my house.
4 Q Now, let me drop back for just a second.
5 You said the gun was in your right coat pocket?
6 A Yes, sir.
7 Q Where had the gun been on the ride over to the trailer?
8 A In my right coat pocket.
9 Q When you were fidgeting to your left, to the side of
10 the car door, what were you doing?
11 A Probably just getting out because Angie Smith when, as
12 I said, when she got out to go into the trailer, I had
13 pulled the drugs out. I had them in one of my pockets. I
14 pulled the drugs out, and tried to give them to her. She
15 wouldn't take them. So, I put them back in my pocket and
16 just sit there.
17 Q And all you wanted to do was go home?
18 A Yes, sir, they, they had called me, like I said, for
19 the last three or four hours. I, I was had -- already had
20 that job scheduled in Greensboro, North Carolina. What
21 happens when I get there after, I have to set up, in other
22 words, or spend the night there, and go ahead and go to
23 work, get the coordinator there.
24 So, it was already after two o'clock in the morning,
25 and regardless of me telling, asking them, you know, listen

1 I've been over there all night, I've got somewhere to be
2 tomorrow, they continued to call me.
3 Q Well, on this evening, did you intend to hurt anyone?
4 A No, sir.
5 Q Did you intend to shoot anyone?
6 A No, sir.
7 Q Nothing further.
8 THE COURT: Cross.
9 SOLICITOR COLER: Thank you, Your Honor.
10 CROSS-EXAMINATION
11 BY SOLICITOR COLER:
12 Q So, you're an airline mechanic?
13 A And aircraft -- a licensed aircraft mechanic.
14 Q And they make pretty good money?
15 A Yes, sir.
16 Q And why in the world then would you get involved in
17 dealing drugs?
18 A Well, so, as I said, my wife was a drug user. Also my
19 brother. I had a drug problem at one time myself, which
20 I've managed to get off of drugs. I went to North
21 Greenville. My wife was in there and I ended up talking to
22 the counselor and that was enough for me to get off.
23 She was actually in the hospital there in 1992. So, I
24 was able to get off of the drugs, and it was better for me
25 because I couldn't be employed as an aircraft mechanic.

1 Q The bottom line, Mr. Smith, you got involved in dealing
2 drugs because of the money?
3 You were greedy and you got involved and you wanted to
4 make money dealing drugs?
5 That's the bottom line?
6 A Well, the bottom line, that's the bottom line---
7 Q Yes or no.
8 A ---to you.
9 No, it wasn't the bottom line.
10 Q You had a good job making good money and you wanted to
11 make more money selling drugs?
12 A Well, I wasn't working when I, when I did this, and
13 dealing the drugs. And as I said, my family was living
14 there and my brother and my wife. They were using drugs.
15 THE COURT: Hold on one second.
16 Everybody with me over there on the jury?
17 (Jurors nod affirmatively.)
18 Q And you wanted to make money.
19 You admit that?
20 You're not denying the reason you were doing is---
21 A I'm not denying that. I'm just saying---
22 THE COURT: All right. Hold on a second.
23 Let him finish his question before you answer.
24 Let him---
25 WITNESS: Yes, sir.

1 THE COURT: ---answer fully before you question.
2 Q Why would---
3 WITNESS: No problem.
4 SOLICITOR COLER: Thank you, Your Honor.
5 Q You wanted to make money?
6 A I wanted to make money.
7 Q And the money you made dealing drugs was important to
8 you?
9 A It wasn't everything. But yes, it was.
10 Q Yeah.
11 Obviously you wouldn't break the law to deal drugs to,
12 to the community if the money you got wasn't important to
13 you.
14 A Well, it's how you look at it.
15 Q Well, every dollar you made was important to you.
16 Even the $40 that Robert Finley owed, owed that
17 wouldn't, wouldn't pay you, that was important to you?
18 A Robert Finley didn't owe me money. He owed Rodney
19 Smith.
20 Q Well, we'll get to that in a minute.
21 Now, you certainly aren't blaming your brother and your
22 wife for, for coming to your house and getting you involved
23 in drugs?
24 You did that on your own?
25 You got involved in dealing it on your own?

1 A Well, I had a choice to be responsible and listen, this
2 what -- that's what's I chose. I chose to, you know, which
3 I'm not -- enabling them, assisting them, and that's what
4 you call it in Narcotics Anonymous. I enabled them. I
5 helped them to use their drugs without taking money from my
6 household, and also to give them what they were, would be
7 spending money on, drugs.
8 Q You also enabled your own bank account by dealing drugs
9 to the community?
10 A Well --.
11 Q Yes or no.
12 A That's your take on it, yes.
13 THE COURT: No, sir, answer him yes or no and then you
14 explain.
15 WITNESS: Okay.
16 Yes.
17 Q Okay. And you did deal in the community because you
18 knew who was using it. You just testified Cynthia Roseburgh
19 was using drugs, Angie Smith was using drugs, Rodney Smith,
20 David, Robert Finley.
21 You know who you were dealing to in the community?
22 A If I could explain, I would simply say this.
23 Q Yes.
24 A My wife used drugs and all of those people she knew.
25 Everybody, except for Robert Finley, she knew and used drugs

1 with and that's how I knew them.
2 Q And you just testified that you did the responsible
3 thing.
4 You're certainly not telling me that the responsible
5 thing to do, as an adult to support your family and your
6 household, is to go out and deal drugs?
7 You're not telling me that, are you?
8 A I'm not telling you that dealing drugs is right.
9 Q But you chose to do it.
10 Let me ask you this.
11 While you were a traveling airline mechanic, were you
12 dealing, were you using the drugs too or just dealing?
13 A Well, if you were listening to my testimony---
14 THE COURT: No, sir. No, sir, don't argue with him.
15 Answer yes or no---
16 WITNESS: Thank you.
17 THE COURT: ---and then explain.
18 A No, I was drug free since 1992.
19 Q So you---
20 A And I was not dealing drugs while I was traveling as an
21 aircraft mechanic. And if you want an even longer
22 chronological, I was not traveling for about three months
23 before that because I owned my own business in Spartanburg,
24 which was a medical staffing service. When that started to
25 go downhill, I went back to working in aviation.

1 Q So, you came here from Texas and only dealt drugs in
2 Spartanburg, to our community in Spartanburg County?
3 A For those three weeks, yes, sir.
4 Q Okay. And the night this happened, you told Mr.
5 Godfrey you were dealing with Angie and Mike all night.
6 The fact of the matter is you were out dealing drugs
7 all that night?
8 A The last three---
9 Q You were out in your car making deliveries?
10 A The last three or four hours in -- yes, to that one, to
11 that one place.
12 Q Well, the last three or four hours, that takes you
13 starting at about ten o'clock at night till about 2:00 in
14 the morning, you're, you're dealing drugs.
15 You're not---
16 A No, probably eight o'clock.
17 Q And you claim that you didn't know that Robert Finley
18 was on the other end of this last drug deal you were gonna
19 make that night, that Angie didn't tell you who you were
20 going to see?
21 A She did not.
22 Q But you certainly don't deny that Robert Finley got
23 your drugs in the past?
24 A Oh, he didn't get them from me.
25 Q He got them through your network of deliveries.

1 What they call them, drug mules or drug delivery
2 people?
3 A Well, the few people in the circle that I mentioned,
4 those are people that I dealt with, yes.
5 Q Those were -- that was your network of people. You'd
6 give the drugs to them, mostly drug addicts themselves, and
7 they'd make the hand to hand deliveries to other drug users.
8 A Well, actually, they would call their dealing with my
9 wife and they wanted drugs for themselves to use. So,
10 that's, that's how I dealt with Rodney.
11 Q So, one of the people on the receiving end of your
12 drugs was Robert Finley, who got it through one of your drug
13 delivery mules, Rodney Smith?
14 A From what I was told, yes.
15 Q It didn't matter to you where your drugs went, as long
16 as Rodney Smith took them from you, and you got the money
17 from Rodney?
18 A He would come back and give me the money.
19 Q And that's how it works. The person you gave them to
20 is responsible for paying you, and the person on down the
21 end of the line is responsible only up, up the chain to the
22 people higher up.
23 A I only have to deal with Rodney. I mean the rest of
24 the people, that was his, his, what he was doing.
25 Q And that makes good business sense, as a drug dealer,

1 not to get involved in the hand to hand delivery of the
2 drugs. You just use your, your drug addict mules to deliver
3 it to the people on down the line.
4 A Like I said, I dealt with Rodney. If he dealt with
5 other people, that was fine. If he comes and asks for a
6 couple hundred dollars worth, he's got it. I, you know,
7 when he, when he comes back to me, if he brings me $125, I'm
8 fine.
9 Q No big deal about where he delivers it to?
10 A No, I, I---
11 Q You don't care?
12 A I don't have to have anything to do with it. I have
13 taken him places because he didn't have a car. He went and
14 dealt with the people.
15 Q You wouldn't care if he'd go to a high school or a
16 middle school, his neighbor?
17 You don't care where your drugs end up as long as you
18 get paid your money?
19 That's important to you as a drug dealer?
20 A It wasn't about -- long as I get paid the money, it was
21 about Rodney Smith and I never took him to a school or
22 whatever. But he dealt though, with those drugs after I
23 gave them to him.
24 Q You almost said it wasn't about the money.
25 You're not telling me it's not about the money, are

1 you?
2 A You're, you're asking me what I'm expecting out of the
3 deal or what I'm suppose to do about Rodney Smith delivering
4 to a school or whatever. That's what you said, and I said
5 that I give them to him. He does what he does with them.
6 Q As long as you get the---
7 A He would come back to me with the money.
8 Q As long as you get the money?
9 A That's your take on it. I'm saying he would deal with
10 that. He -- $200 for a $125, I think the guy, you know, was
11 doing better than me actually.
12 Q You're his supplier?
13 A And -- I mean he's doing better. I'm not trying to
14 argue with you. What I'm trying to do is explain. You're
15 trying to make an analysis of---
16 THE COURT: Answer the question, sir, please.
17 All right. Let's move on to another subject. Get off
18 the drugs. That's been asked and answered a number of
19 times.
20 SOLICITOR COLER: Yes, sir.
21 Q Now, I find it interesting that when you testified to
22 Mr. Godfrey that when you finally went into the trailer,
23 Robert Finley was waiting at the door for you, and you two
24 went in and you, and he left the door wide open.
25 That's, that was your testimony and that's still your

1 testimony, right?
2 A That is my testimony.
3 Q He left the door wide open?
4 A Yes.
5 Q Didn't close the door?
6 A No, he didn't.
7 Q Okay. Then you testified -- you said that you spoke to
8 Robert Finley, who you knew at this point?
9 Did you know Robert Finley?
10 A I had seen him.
11 Q From previous drug deals?
12 A No, from dropping Rodney off.
13 Q Okay. But you're not saying you took your drugs out of
14 your pocket for some stranger you don't know, from a trailer
15 you've never been in, and with Otis Hyder in the trailer?
16 You, you knew who this was?
17 A When, when he opened the door I knew who he was at that
18 point.
19 Q And then you said you took your drugs out and put them
20 on the table?
21 A Uh-huh. (Affirmative).
22 Q You agree with me it makes absolutely no sense for you
23 to take your drugs out to make a new drug deal with somebody
24 who already owes you $40 from a previous incident?
25 A Cause, as I said, he didn't owe me. I was there and I

1 went ahead to handle the business since I was suppose to
2 been there to bring some drugs. I went ahead and put the
3 drugs on the table.
4 Q You deny that, that Finley owed you $40 from, from a
5 previous fronting of drugs?
6 A As I said, what I was told, Rodney told me because he
7 came up short with his money that Rodney owed him.
8 Q If it didn't matter to you or are you saying he didn't
9 owe you the money, why did you just tell Mr. Godfrey in your
10 testimony that you didn't, you wouldn't deal with this guy,
11 you wouldn't deal with him?
12 A Well, I mean if he didn't, if he didn't pay, if he
13 didn't pay Rodney, well, I figured well, why deal with the
14 guy?
15 Q You didn't deal with him because he was a bad customer
16 who wouldn't pay for his drugs.
17 A This is what I was told by Rodney, that when Rodney
18 came up short, he told me that's who he gave the drugs to.
19 Q So, you clearly knew that he owed you, the, the
20 beginning supplier, $40?
21 A He didn't owe me. Rodney is responsible for his own.
22 Q All right. And then you said well, if he wanted to,
23 when I took the drugs out and laid them on the table, he
24 could of tested them.
25 A No, I didn't say if he wanted to. What I said is he

1 did test them. I told him to go ahead, check them out,
2 because, you know, that's what they do. They want to make
3 sure they're not getting shorted, beat, or whatever, you
4 know, and I gave them, put them on the table so that he
5 could do just that.
6 Q All right. And you admit that you just told Mr.
7 Godfrey that, if he wanted to, he could of smoked some, and
8 that, that'd be the method he would test some of the drugs?
9 A What I said is that if he chose to test it that way, it
10 wouldn't of, it would of been the same thing. As long as he
11 tested it, that's what he wanted to do, make sure it was
12 authentic.
13 Q You're certainly not telling me that you are going to
14 let somebody smoke a rock of crack, test, to test it, and
15 it's gone after he smokes it, and this guy already owes you
16 $40 from a previous drug deal, and you know that, at this
17 point, he doesn't have any money?
18 A Yeah, I mean I didn't know that he didn't have any
19 money. Yeah, I would let you test it because you're gonna
20 want to make sure that it's, it's authentic. So, the money
21 part came later that he didn't have any.
22 Q And obviously, when he tested it by smoking it, it's
23 gone?
24 A And that's one rock. I gave him five.
25 Q So, so, it didn't matter, you were gonna get your money

1 one way or the other, whether he smoked it or didn't have
2 any money to pay you now or later?
3 A Well, somebody else was gonna buy the rest of it. All
4 they had to do was give it back to me. Somebody else would
5 of bought it.
6 Q Then you said he chose to steal the drugs from you, to
7 grab them from the, the table you laid them on and take
8 them?
9 A He snatched the drugs up and said I'm taking them.
10 Q Okay. And then you---
11 A I'm taking this.
12 Q ---you agree with me that your statement makes
13 absolutely no logical sense, he took them from you, and then
14 attacked you, or came at you?
15 A Well, if, if you recall, after I put those five rocks
16 on the table, I put the other drugs back in my pocket, which
17 he saw that as well. I had over $1,800, almost $1,900 in my
18 pocket, which I didn't advertise that. But that's what he
19 did.
20 After he saw me give him those five rocks, he saw me
21 put the other ones in my pocket, and I walked over by the
22 door to the heater. He left the door open. So, it was cold
23 in there.
24 Q And then your testimony was your hands were in and out
25 of your pockets, you took them out to warm them on the

1 heater?
2 A I would hold them out, put them back in my pocket. I'm
3 standing there watching the television.
4 Q Why wouldn't you just leave your hands out?
5 You agree with me it makes more sense just to leave
6 your hands out of your pockets by the heater cause that's
7 the warmest source in the trailer?
8 A I don't know, with the door opened, I mean they would
9 get warmer. But, if I put them in my pocket, they got even
10 warmer.
11 Q Okay. Warmer than holding them by the heater?
12 A Yeah.
13 Q Okay. And---
14 A It's a kerosene heater.
15 Q So, the gun you're saying just happened to come out of
16 your pockets on one of those occasions when you're taking
17 your hands in and out of your pockets to warm them by the
18 heater, which is the warmest place in the trailer, and then
19 putting them back?
20 A No, it didn't just happen to come out of. After he
21 said I'm taking this, he started coming toward me. And as I
22 said, he had this look about him, and he was approaching me.
23 So, I took the gun out of my pocket hoping that if he saw
24 it, that maybe he would cease.
25 Q You intended to use that gun?

1 A No, I didn't intend to use it.
2 Q You pulled a loaded gun out of your pocket and pointed
3 it at somebody's head and intended, if, at some ultimate
4 situation, to pull the trigger and use that gun?
5 A No, I didn't intend to use it, and I never pointed it
6 at him.
7 Q Why didn't you---
8 A If you recall my testimony, my hands were by my side.
9 Q Why did you load it then?
10 A Why did I load it?
11 Q Uh-huh. (Affirmative).
12 A Because I had never -- I had intended on probably, at
13 some time, firing the gun. But I had bought the gun and it
14 didn't have any shells and I loaded it. It had been loaded.
15 I had it about a week or two.
16 Q You intended to, to use it because that's why you
17 loaded the gun?
18 If you have to shoot somebody -- if you're just gonna
19 use it to scare somebody, you don't need a loaded a gun.
20 A What do you mean if you're just gonna use it to scare
21 someone?
22 I had no intentions of using a gun on anyone. I had
23 bought a gun. I hadn't used it. I didn't know, you know,
24 how it would operate or whatever. I loaded it and this was
25 like a couple weeks before then.

1 Q All right.
2 A A week before then.
3 Q Did you intentionally pull the gun out of your pocket?
4 A Yes, I pulled it out intentionally.
5 Q And intentionally pointed it at Robert Finley's face?
6 A I never pointed the gun at him.
7 Q And what did you do with it?
8 Did you just hold it?
9 A No, I had the gun along my side so that he could see
10 that I had a gun in my hand. If I saw, if I saw a gun
11 anywhere, I would, you know, woa, you know, not want to deal
12 with that.
13 Q And, of course, you'd agree with me that if you did
14 that, if you pulled a gun out, and, and showed it, displayed
15 it to somebody that I've got a loaded gun, and I'm not
16 afraid to use it, they would be certainly justified in
17 trying to stop you from any further actions by perhaps
18 grabbing you, by perhaps pushing you against a wall, by
19 perhaps stopping you in anyway before they get shot
20 themselves because you've produced a loaded gun into this
21 situation?
22 A No, I wouldn't agree with you.
23 Q You would not agree with that?
24 A No, I wouldn't.
25 Q You don't think that's a reasonable thing for a human

1 being to do when presented with a loaded gun by a drug
2 dealer and in a trailer.
3 A No.
4 Q All right. And then you said, of course, the gun just
5 went off?
6 A Yes.
7 Q You didn't -- you don't know how it went off?
8 A No, it went off in the---
9 Q You said---
10 A ---in the struggle, in the fight.
11 Q Okay. You didn't -- you deny that your finger was on
12 the trigger?
13 A No, I didn't deny my finger was on the trigger. I said
14 I had the gun in my hand.
15 Q Well, were you holding it like you hold it when you
16 shoot somebody?
17 A I was holding the gun as you hold a gun.
18 Q On the -- by the, the grips?
19 A I'm holding the gun as you hold a gun.
20 Q And you put your finger on the trigger?
21 A If that's the way you hold a gun.
22 Q And you hold a gun like that when you intend to shoot a
23 gun?
24 A No, you hold a gun like that if you're gonna, if you're
25 holding it in your hand. You don't have to intend to shoot

1 it.
2 Q Well, it's a lot more convenient, you admit to me or
3 you agree with me, that if you're holding your finger on the
4 trigger to shoot it, then you're holding it by the barrel or
5 holding it backwards?
6 A Why would you do that?
7 THE COURT: Sir, answer the question and then explain.
8 Don't let me tell you again.
9 WITNESS: I really don't understand what he's, what
10 he's asking me.
11 THE COURT: Well, tell him you don't understand.
12 A Would you, would you ask me again?
13 Q You're holding the gun---
14 THE COURT: Hold on a second.
15 When he asks a question, answer it directly and then
16 explain.
17 WITNESS: Yes, sir.
18 THE COURT: Thank you.
19 SOLICITOR COLER: Thank you, Your Honor.
20 Q You were holding the gun -- the way you were holding a
21 gun is a whole lot more convenient to fire it than any other
22 way to hold the gun?
23 A The way I was holding the gun was better for me to have
24 control of the gun then for me to be holding it as you
25 suggested, holding it by the barrel, holding it any other

1 kind of way. Because if you have this gun in your hand, and
2 if you dealt with any weapon, you wouldn't just hold it that
3 way.
4 Q And you further admit to me that if your story is it
5 just went off, it's a pretty lucky shot you got him once
6 right in the head?
7 A Well, I can tell you this, if I'm hitting this man,
8 which I was, in that area, all I know is I was trying to get
9 him off of me. Now, as far as when it went off, how it went
10 off to hit him where I hit him, I didn't intentionally pull
11 the trigger. When he pushed me out, I was coming back
12 towards this way.
13 Q If, in fact, you were pistol whipping him with the butt
14 of the gun, then there's no way that the barrel of the gun
15 was pointed at his head?
16 A If I'm stumbling backwards?
17 Q No, when you say you were pistol whipping him.
18 A I -- and I was.
19 Q Now, his head is probably an average size head, and of
20 all of the million of things that that bullet could of hit
21 in that trailer, it happened to just go right through his
22 left eye?
23 Pretty lucky shot, you admit to me, if it's, if it's,
24 if your version is it just went off and it is just a fluke
25 accident, hit him in the face?

1 A Fluke accident. I was hitting him with the gun and it
2 went off and hit him in the face.
3 Q And did you say or were you -- is it your testimony
4 that you were afraid?
5 A Yes.
6 Q You were a drug dealer with a loaded gun who was going
7 around dealing drugs, and you were afraid in that situation
8 when it escalated to what it did?
9 A Yes.
10 Q And are you, are you also telling us that Angie Smith,
11 the woman who testified yesterday, who is a, an, an admitted
12 drug user and probably a drug addict, was in charge of the
13 situation out there after you shot and killed Robert Finley?
14 A Yes.
15 Q She was telling you, David Smith, what to do?
16 A Yes.
17 Q She was saying get in the car, let's go, let's get out
18 of here, and you, the one with the gun, the one with the,
19 went over there with drugs, to deal drugs, was following the
20 commands of Angie Smith?
21 A Yes, I was in shock. She told me to get in the car.
22 Otherwise I probably would of still been standing there.
23 Q And again, why would she care whether you got in the
24 car and then got out of there?
25 She didn't do anything.

1 A. That's what, that's, that's what you may perceive. But
2 she's the one that took me there. So, I don't know what,
3 you know, the actual intentions were. She took me there and
4 this happened.
5 So, I, I didn't -- you know what I mean, know who to
6 trust. I didn't know what was going on
7 Q But you'd admit to me that you, if you had stayed
8 around, were the one that was in trouble because you were
9 the one that just shot Robert Finley in the face and killed
10 him?
11 A No, sir, I don't believe I'd of been one in trouble
12 knowing that this man attacked me. Now, the thing of it is,
13 is that it, it's not nothing that you do. But you, you have
14 a right to defend yourself.
15 Q Then if you didn't think you were in trouble and
16 didn't, didn't think you had just done something wrong, why
17 did you flee?
18 A Why did I flee?
19 Q Uh-huh. (Affirmative).
20 A As I told you, she told me to get in the car and drive.
21 I was in shock. If she wouldn't of told me to get in the
22 car, and that's what I did, I got in the car. I went to my
23 home and my wife left there because I asked her, I needed
24 some time to think about what just happened to me.
25 How did I even get into this?

1 Q And you said to Mr. Godfrey, in your testimony, your
2 thoughts on this were I don't need this, I just don't need
3 this?
4 A No, I didn't need that type of thing to happen to me.
5 Q Right.
6 You don't need this kind of a problem -- you don't need
7 to go to jail for some crack addict who owed you $40?
8 That, that was just a problem for you?
9 A Well, sir, as I said, you don't have any mens rea. I
10 have no state of mind to do anything to anybody. This,
11 this, this man put his hands on me, tried to knock the gun
12 out my hand.
13 Q You knew enough to---
14 A It's a tragedy. It's a tragedy that it happened, and I
15 could of been him. And I'm sorry that it happened. But
16 Robert Finley, if he wouldn't of put his hands on me, I
17 wouldn't of, I wouldn't even been -- I would of left there
18 cause I was trying to get out of there.
19 Q But it's a tragedy you admit that you have created and
20 you have caused?
21 A We both created it, and that's a fact.
22 Q You were the one that was, was dealing in drugs and
23 brought the loaded gun into the trailer?
24 A And he was the one trying to rob me for drugs.
25 Q And you say you had no mens rea, you didn't, you

1 weren't thinking.
2 You were thinking enough to tell Angie I've got to get
3 rid of this gun, I've got to get rid of this dope, and you
4 were thinking enough to go and get rid of the gun, hide the
5 gun, throw it away, and then go home, and sleep, and then
6 get up and get out of town the next day?
7 I mean all that was clear to you. You didn't miss
8 work. You didn't oversleep. You didn't not make it to work
9 the next day.
10 All that -- you were clear minded to do all that?
11 A I didn't stop living, sir, if that's what you mean.
12 Q Right.
13 Cause, cause this---
14 A I mean the job was already scheduled. I mean this,
15 this has happened to me. I don't know, you know, how to,
16 how to deal with this. I really don't know what's going on
17 with it. But I know I'm gonna, I'm gonna deal with it. I
18 live in Spartanburg -- at that time, I lived in Spartanburg
19 South Carolina, Bee Street. I hadn't moved anywhere. I
20 have a wife. I have a family, and I lived here.
21 Q You were not gonna let this dead crack head interfere
22 with your life?
23 You were, you were willing to keep living and just
24 doing what David Smith does?
25 A No, at some point, sir, I knew that, as I said, it was

1 gonna be something that had to be dealt with.
2 Q And you dealt with it by ditching the gun, and fleeing
3 to North Carolina, and lying to the police about your
4 involvement at first, and that's how you dealt with it?
5 A I didn't lie to the police, and I didn't flee to North
6 Carolina. If my job was already scheduled, that is where I
7 worked at.
8 Q You didn't lie to the police?
9 A No, I didn't.
10 Q You were asked by Detective Denton to give a statement
11 about the events of January 12th, 1997, and nowhere in
12 that statement did you mention that you went over to Robert
13 Finley's house to sell him drugs and shot him in the face
14 and left him on the porch to die?
15 A This is my statement. I called an attorney. The
16 attorney advised me that you have the right not to answer
17 any questions that the police want to ask you. Detective
18 Denton, Rodney Smith, and two other detectives had been to
19 my home. My wife was terrified.
20 When I came back, my mother-in-law called me to her
21 house. So, from there is where I called the attorney. He
22 told me that the police would either arrest me or they would
23 let me go. When I went there, he told me you do not have to
24 answer any questions. I am unavailable to be with you there
25 with the police or Sheriff's Department.

1 He said the only thing that you need to do is give them
2 basic information, where you live, what is your name, this
3 type of thing, if you want to. Whatever they are coming
4 there about, you do not discuss it until I have a chance to
5 talk with you or an attorney has a chance to talk with you,
6 and what Detective Denton did, at that time, was told me he
7 would cross every T and every I, et cetera, to make sure
8 that he convicted me.
9 So, he asked me well, I tell you what, if you don't
10 want to answer any more questions, you tell me what you were
11 doing from 7:00 a.m. till about midnight that night. And
12 that's what I did. I gave him a statement of what I was
13 doing from that, those times.
14 Q Till about midnight?
15 A Correct.
16 Q He knew that the body was found at 2:30 in the morning.
17 He knew that the incident happened just a minute, few
18 minutes before that.
19 You're not telling us that he, he wanted to leave out
20 the two and a half hours from midnight till 2:30, that, that
21 he wanted to talk to you about?
22 A I don't know what he wanted. That's what he told me,
23 and that's what I signed a statement to.
24 Q Okay. So, your -- so, your -- in your opinion, if you
25 leave out stuff, that's not a lie?

1 A In my opinion, if you ask me from 7:00 a.m. and I've
2 been advised by an attorney to midnight, if I'm gonna answer
3 any questions or give you any statement, that's all I'm
4 gonna talk to you about. I'm sitting here today because of
5 those reasons, the fact that you have someone who decide
6 they gonna cross every T and dot every I, someone who's
7 forgetting the fact that I was brought there to bring drugs
8 there, somebody, somebody who's forgetting the fact that
9 four of their investigators or these people in their office
10 told them that this guy tried to rob me.
11 Mr., Mr. Hyder said it. His investigator said it. All
12 of them said it.
13 Q The money and the drugs that you gave Angie later that
14 night after you shot and killed Robert Finley, that, that
15 was to keep her quiet, right, to keep her satisfied?
16 A After the gun went off, I gave her those drugs, and to
17 keep -- the gun went off---
18 Q To keep her quiet?
19 A I didn't shoot, no, no, not to keep her quiet. To keep
20 her from calling---
21 THE COURT: No, sir. Sit back down.
22 Q And at -- and that's what it did. I mean it kept her
23 quiet for a little while, and she, she took your drugs and
24 probably went off and smoking them or whatever, and that was
25 your way of minimizing her because she was the only eye

1 witness to this?
2 A No, Otis Hyder was there. But I didn't know whether
3 Otis could see. Also Terry, Terry Bradley or whatever was
4 laying on the couch. These people were witnesses to it that
5 I, you know, I came in and the man attacked me.
6 Q Did you really mean to call this an altercation when
7 you testified and you told your story to Mr. Godfrey?
8 A What do you mean?
9 Q Did you really mean to say that the situation escalated
10 to your shooting and killing Robert Finley was just an
11 altercation that, that happened and you were just gonna go
12 about your life?
13 A The altercation was when he put his hands on me to
14 fight, and I did, I didn't shoot Robert Finley. The gun
15 went off.
16 Q Okay. And that's, that's interesting.
17 If the gun went off, without you pulling the trigger,
18 why did you throw it in -- did you -- you threw it over the
19 railroad tracks?
20 A Yeah, where, where I'm talking about is, is like a
21 bridge over and there's a railroad track that runs
22 underneath.
23 Q You didn't think that was important information to
24 share with the detectives when they were investigating the
25 case?

1 A I'm, I'm not a detective.
2 Q Okay. You're claiming that a gun just accidentally
3 went off, and you got rid of it.
4 You didn't think that there was ways to test it, for
5 the police to look at it, to determine maybe if it did go
6 off or not by accident?
7 You chose instead to just throw away the gun that you
8 shot Finley with?
9 A I didn't even think about any of that. I'm not a
10 detective. All I do know is the gun went off.
11 Q You thought about, you thought enough---
12 A I knew that Angie Smith -- I knew that Angie Smith knew
13 who I was. I knew that Terry Lebron, whatever the guy's
14 name on the couch, they all knew who I was. That wasn't the
15 question of anybody knowing who I was.
16 So, I mean as far as the drugs or whatever, you know,
17 the, the gun, if I had it or not, they knew who I was. It
18 wasn't a question of that.
19 Q Okay. So, you knew eventually you'd get caught, and,
20 the police would eventually found out who the person was
21 that shot Finley?
22 A I knew eventually that we would have to, that I would
23 have to deal with this situation.
24 Q And you didn't think it was better to come forward and
25 tell what had happened if, in fact, your story then matches

1 your story now that it was just an accident?
2 A I know for a fact that the attorney told me do not
3 discuss this. The, the Sheriff's Department didn't, is not
4 here representing me. The attorney told me that whoever I
5 got would be here representing me.
6 Q And, and the bottom line is you had somewhere to be the
7 next day, and you didn't want this little problem, this
8 little altercation to interfere with that?
9 You wanted to be able to go to work and go about your
10 life?
11 A My answer to your question is once I found out that
12 they had been to my home, I went there. After, after
13 calling the attorney, I went to the Sheriff's Office, and
14 the Sheriff's Office told me well, you can go ahead to your
15 job. We don't have anything to charge you with at this
16 time.
17 Q Did you know he was dead when you shot him?
18 A No, I didn't.
19 Q Okay. Did you think to place an anonymous call to
20 9-1-1 and send an ambulance out there to perhaps maybe save
21 his life?
22 A As I said, there were two other people in the trailer.
23 I didn't just haul off and leave there. As I said, I was in
24 shock. Angie Smith, as I said, was hollering get in the
25 car, get in the car.

1 SOLICITOR COLER: Beg the Court's patience just one
2 moment.
3 (Pause.)
4 SOLICITOR COLER: Your Honor, I believe that's, that's
5 all the questions I have for Mr. Smith.
6 THE COURT: Thank you.
7 Redirect, if any?
8 MR. GODFREY: None.
9 THE COURT: You may step down.
10 Next witness.
11 MR. GODFREY: Defense would call---
12 THE COURT: Hold on one second.
13 Everybody okay?
14 (Jurors nod affirmatively.)
15 Next witness.
16 MR. GODFREY: May it please the Court.
17 Defense would call Donald Girndt.
18 THE COURT: Come around, sir.
19 DONALD GIRNDT, being first duly
20 sworn, testified as follows:
21 DIRECT EXAMINATION
22 BY MR. GODFREY:
23 Q What is your name?
24 A Donald C. Girndt. The last name is spelled
25 G-I-R-N-D-T.

1 Q How are you presently employed?
2 A I'm a forensic consultant, and I specialize in the
3 areas of crime scene analysis, blood stain pattern
4 interpretation, fingerprint identification, and footwear
5 identification.
6 Q Before being in private practice, how were you
7 employed?
8 A I was an agent with the State Law Enforcement Division.
9 I was assigned to the crime scene unit, latent print unit.
10 That unit assists other agencies around the State in
11 processing crime scenes and collecting the evidence and
12 presenting it in court.
13 Q Have you been previously qualified as an expert in
14 Circuit Court and Federal District Court?
15 A I have, in one or more of those areas, approximately
16 130 times in North Carolina, South Carolina, Maryland, and
17 Georgia.
18 MR. GODFREY: Judge, at this time I would move to have
19 Donald Girndt declared an expert in crime scene analysis,
20 and I believe the solicitor will stipulate to that fact.
21 SOLICITOR GANSS: Without objection.
22 THE COURT: Okay. Please accept Mr. Girndt as an
23 expert in crime scene analysis. He may render an opinion
24 and you may accept that opinion for whatever, give it
25 whatever weight you wish, if any at all.

1 Q Mr. Girndt, have you had an opportunity to listen to
2 David Smith's testimony?
3 A Yes, I have.
4 Q And have you had an opportunity to talk with David
5 Smith apart, apart from court?
6 A Yes, I have.
7 Q Have you also had the opportunity to review previously
8 sworn testimony in this case?
9 A Yes, sir.
10 Q Are those the type of things that you use when you go
11 about your crime scene analysis?
12 A Yes, I would use -- well, usually it's before we get to
13 this stage, but review photographs of crime scenes,
14 statements, incident report, laboratory reports that are
15 generated, autopsy reports, that type of thing. And what I
16 tried to do is look at the photographs, look at the
17 evidence, and look at the statements, and see if these
18 things are corroborated or basically does the physical
19 evidence support what happened at the crime scene.
20 In this particular instance, there were several
21 different questions that I was asked, and I know that
22 basically the scenario is, where I pick up the scenario is
23 where the confrontation occurred at the trailer between
24 Mr. Smith and the deceased.
25 And as you've heard, and as I've heard and I've read

1 also previously, that Mr. Smith was backing out of the door
2 at the time this occurred, and there's also some previous
3 testimony I read that said they actually fell out the door
4 simultaneously, that was together with the scuffle at the
5 door there, and I think the scuffle at the door is basically
6 supported by the fact that the, the molding around the door
7 at one point is broken and lying on the floor. I mean there
8 wasn't anything else around the door to break.
9 It's also supported by the fact that the deceased fell
10 forward. And from reading the autopsy and listening to
11 Doctor Wren, that he was rendered unconscious immediately.
12 So, he didn't do anything but fall forward out of the
13 trailer on to the ground on to his face.
14 Also supported, I spoke, you know, with Mr. Smith. And
15 prior to them falling out, Mr. Smith swung at him striking
16 him a few times, and which I think is attributed or why the
17 deceased's hat, as you look at the photographs, the deceased
18 fell out of the trailer, but his hat proceeded him out the
19 trailer. So, his hat is fallen off to the side, and I think
20 that may be a result of the hitting.
21 And then once he's fallen on to the ground, I think it
22 was -- actually I pointed out to Mr. Godfrey about the fact
23 that apparently the deceased had been turned over at some
24 point, and that's where Doctor Wren agreed, I believe, that
25 the arm was in a stiff position. I mean I think originally

1 he was face down and then at some point he was rolled. I
2 don't know if that was for EMS purposes or for crime scene
3 purposes or whatever that was.
4 So, I take those kind of things into account. I don't
5 see anything -- I haven't read anything or seen anything
6 that would give me a different scenario than, other than
7 he's been shot and has fallen out, out the door on to his
8 face.
9 One of the other factors I saw was that the cartridge
10 case itself from the pistol was collected on the ground
11 outside, and this semi-automatic pistol would eject the
12 cartridge case. So, it was -- this didn't happen inside the
13 case. So, the cartridge case was found out in the yard.
14 So, all those things support the crime scene and the
15 crime scene analysis. That doesn't have anything to do with
16 the peripheral issues. I don't have anything to do with
17 that at all.
18 Q All right.
19 A This is just an analysis by looking at the crime scene,
20 and also there, when you look at the photograph of the body,
21 what else supports the fact that he was face down is that
22 there's pooling of the blood under his head, and then when
23 he turns to the side, the blood runs down his face and to
24 the side.
25 So, those are the types of things that I look at.

1 Q Mr. Girndt, let me ask you to -- you say there was
2 evidence supporting a scuffle.
3 A Yes.
4 Q I'm gonna show you pictures which have been marked as
5 Defense Exhibit No. 1 and No. 2.
6 Please look at No. 1 and tell me what you see.
7 A One is the molding on the, looks like on the exterior
8 door, and it seems to be separated. There's a piece of it
9 missing.
10 Q Show you what's been marked as Exhibit No. 2.
11 A Two is a, is a piece of molding and this molding
12 actually is, is, dove tails together. And the -- I think
13 it's readily apparent that the piece that's on floor inside
14 the trailer will probably go back together with the piece,
15 the piece that's still left on the door.
16 Q And from that, you believe that that shows evidence of
17 a scuffle?
18 A Well, that was my understanding there was a scuffle.
19 So, what I do is I look and see is there any evidence of a
20 scuffle. So -- and that photograph was taken by -- you
21 know, I didn't produce any of these photographs. These are
22 photographs, evidentiary photographs that were taken by the
23 police. And so, they, at some point, the photographer felt
24 that was a focal point in the crime scene. So, he took that
25 photograph, and so, I'm sure there's a purpose behind that.

1 So --.
2 Q And let me show you what's been marked as Defense
3 Exhibit No. 3.
4 What is that?
5 A It's a photograph of the deceased. It's taken from the
6 side and his hat is lying on the ground to the side. It
7 would be to his right side if he were facing coming out of
8 the, out of the trailer.
9 Q And what significance is there to the fact that his cap
10 is off to the side?
11 A Well, I believe, had his cap stayed on and he fell
12 straight out of the trailer, then it would of been, you
13 know, just fallen straight off his head on the ground, which
14 would of been in front of him. By being off to the side,
15 if -- as Mr. Smith backs out of the trailer, if he's
16 striking with his right hand, if he hits the hat, it's gonna
17 knock it off to the left, which is where it is. It would be
18 to the deceased's right. It would be to Mr. Smith's left.
19 That would be a, the proximate area I would expect to find
20 it in.
21 I don't believe it stayed on his head, you know, cause
22 it would of been out here in front of him another
23 approximate three or four feet I would think.
24 Q The gunshot went through Robert Finley's left eye.
25 Do you have any opinion about how that could of

1 occurred?
2 A Well, it, it wasn't a contact shot, and I believe
3 Doctor Wren said approximately 4-inches, which would of put
4 the, the weapon up in the, in that, in that vicinity.
5 So, if he were, if Mr. Smith were striking at him, I
6 suppose the weapon could of been, if he's blocking with his
7 arm, might of, you know, enabled him to fire the weapon that
8 way. I think the, the major problem though, as it's been
9 brought out, that we actually need the weapon in order to
10 have it tested to see if it was malfunctioned or functioning
11 properly, that type of thing.
12 So, it would just be conjecture at this point.
13 Q Nothing further.
14 THE COURT: Cross, if any.
15 SOLICITOR GANSS: Just briefly, Your Honor.
16 THE COURT: Take all the time you need.
17 SOLICITOR GANSS: Thank you.
18 CROSS-EXAMINATION
19 BY SOLICITOR GANSS:
20 Q So, Mr. Girndt, is it?
21 A Girndt.
22 Q Thank you.
23 If I understand what you do, you take what the
24 defendant, an admitted drug dealer who sells drugs in this
25 community, tells you, and then you find evidence to

1 corroborate that?
2 A No.
3 Q That's sort of how I understood your testimony.
4 Can I, can I ask you---
5 A No, let me explain. I'm doing the same thing now that
6 I did for the State, which I was a crime scene analyst for
7 the State. And so, what I do now is review cases for the
8 defense cause they don't have anyone primarily. I mean
9 there are a few of us scattered around. Firearms expert,
10 for example, in Georgia. There's a handwriting person in
11 here -- well, over here in Spartanburg, as a matter of fact,
12 retired SLED officer. And a trace analyst in Greenville.
13 And we, we all work, primarily work for either Georgia
14 Bureau of Investigation or State Law Enforcement Division,
15 and now we're all retired and so what we do is consult with
16 these people.
17 I don't take his scenario and make it fit. I do about
18 40 cases a year. I may get to testify once or twice a year,
19 two or three times a year. I mean that's all.
20 The rest of the time it's either we're, you know, have
21 discovered evidence that that's not what happened or that's
22 not exactly what happened or you know -- so, no, I don't
23 take the information from the person and try to make it fit.
24 Q Okay. All right. Do you have any personal knowledge
25 then, if you're not taking what the defendant told you that

1 there was a confrontation, do you have any personal
2 knowledge that there was a struggle inside that trailer on
3 January 12th, 1997?
4 A No, I don't.
5 Q Have you ever been to that trailer?
6 A No, I haven't.
7 Q You have any idea what condition that trailer was in,
8 whether it was old, beaten, brand new, any idea?
9 You been in it and lived in it?
10 A No, I don't.
11 Q Okay. Any idea if it had been beaten up or someone had
12 gotten in a drunken brawl the night before and maybe touched
13 that molding then along the door?
14 A No, I don't.
15 Q Okay. So, I guess you just have the defendant's story.
16 THE COURT: Is that a question, ma'am?
17 SOLICITOR GANSS: No, I withdraw that statement.
18 THE COURT: Thank you.
19 SOLICITOR GANSS: Apologies, Your Honor.
20 Q Let's see. Everything then, if you haven't been there,
21 you haven't seen it, haven't gone to the trailer, this is
22 all speculation would be fair to call your testimony?
23 Just pure speculation?
24 A No, these facts are provided by the State. I haven't
25 produced anything. The State's produced firearm's report,

1 photographs, the autopsy, the bullet, the cartridge case,
2 the statements, everything. I haven't produced anything.
3 This is not conjecture.
4 Q But your interpretation of those facts is paid for by
5 the defendant, yes?
6 A No, I have the, the same opinion no matter what. I
7 mean he didn't have to choose to use me. I don't know how
8 that's gonna work out.
9 Q But you are being paid by the defense?
10 A Of course.
11 Q Your testimony here today, you said this might of
12 happened or might of been broken that way or something like
13 that.
14 Can you eliminate any other way that molding might have
15 broken?
16 A I can not. But I'm just telling you that the
17 photographs provided by the State, it's obviously a focal
18 point for the police photographer. So --.
19 Q Okay. Can I take a look at those pictures that he
20 showed you?
21 Let's see.
22 If I may beg the Court's indulgence, Your Honor.
23 THE COURT: Sure.
24 (Pause.)
25 SOLICITOR GANSS: Your Honor, if I may, I'd like to get

this marked.

THE COURT: Yes, ma'am.

(Whereupon, a photograph was marked as State's Exhibit No. 10 for identification purposes only at this time.)

Q I'd like to just show you this one picture that's been marked for identification purposes only as State's Exhibit 10.

Do you recognize that photo or --?

A Well, the, the defense wasn't provided with color photos. So --.

Q I'm sorry about that.

A I'm sure.

Yes.

Q Can you tell us what it is?

A Looks like it's a photo taken from inside the trailer looking to the outside showing the body on the steps there.

Q Okay. Does it look like a -- it's similar to the other photographs you looked at?

A Yes.

THE COURT: Ms. Ganss, what number was that?

SOLICITOR GANSS: No. 10.

THE COURT: Thank you.

A It's similar.

Q Okay. Can you describe for the jury -- just one moment if I may.

1 (Pause.)
2 SOLICITOR GANSS: Your Honor, at this time we'd like to
3 move State's Exhibit No. 10 into evidence.
4 MR. GODFREY: Without objection.
5 SOLICITOR GANSS: Thank you.
6 THE COURT: Without objection, 10, a photograph.
7 (Whereupon, State's Exhibit No. 10 was received into
8 evidence at this time.)
9 Q Can you please describe what's in the photograph for
10 the jury again?
11 I'm sorry.
12 A It's just a photograph taken from inside the trailer
13 looking out showing the body lying down the steps.
14 Q And is there something on the inside of the trailer
15 that you, to the right there?
16 What is that?
17 A A broom.
18 Q It's a broom.
19 And is that broom, is it upright or is it down?
20 A It's upright.
21 Q So, it looks like it hasn't even been moved?
22 A Well, I don't know what your point is. The molding is
23 off the other side of the door.
24 Q Okay.
25 All right. At this time, Your Honor, just like to

1 publish this to the jury if I may.
2 THE COURT: You may.
3 SOLICITOR GANSS: Thank you.
4 Q So, it's your testimony that there was a struggle, some
5 molding came off, but during that struggle this broom
6 happens to remain standing?
7 A It's on the opposite side of the doorway.
8 Q Okay. And this is in a trailer, small exit area?
9 A Yes.
10 Q Okay. Thank you.
11 SOLICITOR GANSS: Nothing further, Your Honor.
12 THE COURT: Redirect?
13 MR. GODFREY: None.
14 THE COURT: You may step down.
15 May he be excused?
16 SOLICITOR COLER: No objection from the State, Your
17 Honor.
18 MR. GODFREY: No objection.
19 THE COURT: Thank you, Mr. Girndt.
20 Next witness.
21 MR. GODFREY: Your Honor, defense rests.
22 THE COURT: All right. Anything in reply?
23 And I will allow any motions to be done nunc pro tunc.
24 SOLICITOR COLER: Just briefly, Your Honor, if I could
25 confer with my counsel?

1 THE COURT: All right.
2 (Pause.)
3 SOLICITOR COLER: And judge, we don't have any reply.
4 THE COURT: Okay. Madam Forelady, ladies and gentlemen
5 of the jury, how about let's -- I need to discuss some
6 things with the lawyers. It's gonna take about 20 minutes.
7 Y'all rather go to lunch now or would you rather start
8 back at about 12:00 and I'll order you, some lunch for you?
9 Rather do lunch now or 20 minute break and we'll do the
10 arguments and all, which would probably take about 45
11 minutes, and then I'll have your lunch ordered in, and you
12 can start deliberating while you're eating lunch?
13 I tell you what, y'all go back in your jury room and
14 discuss that, and just give a note to the bailiff, and we'll
15 do -- I'll do it however y'all want to do it.
16 Is that fair?
17 (Jurors nod affirmatively.)
18 THE COURT: Hold on one second. Let that exhibit
19 continue to pass.
20 Madam Foreperson, just let me know, soon as you get
21 back there, whether you continue going or whether you take a
22 lunch break now.
23 Y'all will get all the exhibits when you start your
24 deliberations. They'll go to the jury room with you. So,
25 you'll have a chance to look at them all again.

1 Okay. Everybody please remain seated.
2 Y'all go back to your jury room and let me know which
3 way you want to go.
4 (Whereupon, the following takes place outside the
5 presence of the jury.)
6 THE COURT: All right. Mr. Godfrey, anything?
7 MR. GODFREY: Judge, I renew the motion for directed
8 verdict. That taking the evidence in a light most favorable
9 to the State, and I do not believe they have made a case of
10 murder against my client.
11 Also, judge, it would appear, from the testimony that
12 we have heard throughout the trial, the testimony we've
13 heard today from my client, that he was attacked, he was
14 defending himself, and that the gun discharged accidentally.
15 We believe there's not enough evidence to go forward. We
16 would ask for an acquittal.
17 THE COURT: Okay. That is respectfully denied. I
18 think the evidence is -- there's ample evidence. I'll not
19 use the word I was going to use. There's ample evidence to
20 make this a question of fact for the jury to determine.
21 Anything else?
22 SOLICITOR COLER: Judge, I don't know if you want to be
23 heard on the charges.
24 THE COURT: I do.
25 SOLICITOR COLER: I'd submit to the, to the Court at

1 this point---
2 THE COURT: Let me, let me do -- y'all ready to do
3 charges?
4 MR. GODFREY: Yes, sir.
5 THE COURT: All right. Let me just go through this.
6 I'm gonna charge, obviously, multiple charges,
7 presumption of innocence, reasonable doubt, duties of the
8 judge and the jury, credibility of witnesses, expert
9 witness. I'm gonna charge my regular murder charge. I'm
10 gonna charge possession of a weapon during the commission of
11 a violent crime or attempt to commit a violent crime.
12 And then I've got the question of whether to charge
13 manslaughter, whether to charge involuntary manslaughter,
14 whether to charge self-defense, and whether to charge
15 accident.
16 And here's my thoughts on that, and I'll let y'all
17 argue it. I probably will charge the lesser included
18 offense of manslaughter. I probably will not charge the
19 involuntary manslaughter.
20 As I understand involuntary manslaughter, a person must
21 be acting lawfully even if he is in unlawful possession of a
22 pistol. Involuntary manslaughter -- strike what I just said
23 about involuntary.
24 The Court's have defined that as, either one, the
25 killing of another without malice and unintentionally, but

1 while one is engaged in the commission of some unlawful act
2 not amounting to a felony, but not naturally intending to
3 cause death or great bodily harm or the killing of another
4 without malice and intentionally, but while one is acting
5 lawfully.
6 Well, my analysis of this whole situation is, taking
7 the evidence in a light most favorable to the defendant on
8 all the grounds, I don't see how in the world anybody can
9 argue that he was acting lawfully in this case. He goes
10 into an apartment, and there's a knowledge drug dealer to
11 sell drugs, and tries to carry out the drug transaction.
12 So, there's no way in the world that he could possibly be
13 acting lawfully in this whole factual scenario, and that's
14 the reason I don't think voluntary manslaughter, involuntary
15 manslaughter is applicable.
16 I also don't think self-defense is applicable.
17 Self-defense says that you're entitled to a self-defense
18 charge where the evidence shows one, that he was without
19 fault in bringing on the difficulty. Well, by his own
20 testimony, he says that, you know, when the guy approached
21 him, he had this look in his eye that he pulled the gun out
22 to see if he would back off, and then he starts beating the
23 guy in the head with the gun, and then the gun goes off.
24 I just don't see how in the world that the evidence can
25 be construed that he was without fault in bringing on the

1 difficulty, and how he was in imminent danger of losing his
2 life or sustaining serious bodily injury. I mean the, the
3 victim was not armed in any manner whatsoever. And last, on
4 the, on the question of accident, for homicide to be
5 excusable on the ground of accident, it must be shown that
6 the killing was unintentional, the defendant was acting
7 lawfully, and due care was exercised in the handling of the
8 weapon.
9 Well, if you believe him that it was unintentional, but
10 the evidence is certainly that he was not acting lawfully,
11 and the evidence is overwhelming that he was not exercising
12 any type of due care in handling the weapon. So, I just
13 don't see how in the world I can charge self-defense,
14 accident, or involuntary manslaughter.
15 But Mr. Godfrey, I'll be glad to hear from you.
16 MR. GODFREY: May it please the Court.
17 THE COURT: Yes, sir.
18 MR. GODFREY: In the case of State v. Burris, on Page 5
19 of 11 of the last paragraph, in that case, they found the
20 evidence would support a finding if felon was lawfully armed
21 in self-defense.
22 THE COURT: Okay. But if I find self-defense is not
23 applicable because he -- you have to show that he was
24 without fault in bringing on the difficulty, and the
25 evidence is overwhelming, and none to the contrary that he

1 was not without fault in bringing on the difficulty, then
2 self-defense does not come into play. You'd have to get a
3 self-defense for your argument to fly.
4 Go ahead.
5 MR. GODFREY: We believe that self-defense does come
6 into play because the law says if there's any evidence in
7 the record which would support a self-defense charge, he
8 should have a self-defense charge. His testimony was yes,
9 he was over there in an unlawful purpose.
10 THE COURT: All right. You agree with that?
11 MR. GODFREY: I agree with that.
12 But that's not the end all and the be all. Robert
13 Finley came towards him and put David Smith in fear of being
14 robbed, in fear of his life, fear of being injured, and then
15 that's when he pulled out the gun. He was trying to get
16 Finley to back off. Finley didn't back off. He tried to
17 knock the gun out of David Smith's hand.
18 THE COURT: Well, the first, the first part of deciding
19 whether or not self-defense is a proper charge is one, that
20 the defendant was without fault in bringing on the
21 difficulty.
22 How can you say he was without fault when he's over
23 there master minding the drug deal and -- go ahead. I'm
24 listening.
25 MR. GODFREY: Well, the majority of drug deals go down

1 everyday and nobody has any problem with them. I mean
2 multiple drug deals are done every day.
3 THE COURT: Well, I don't---
4 MR. GODFREY: The fact that someone is selling drugs
5 does not mean that you're gonna bring on some difficulty,
6 difficulty.
7 THE COURT: Well, there are, there are a lot of cases
8 that say that you're not without fault, that you're without
9 fault in bringing on the difficulty when you're simply an,
10 armed with a, unlawfully armed with a, with a pistol. But
11 you can't use that as the fact of bringing it on. You can't
12 use the fact that you were armed with a pistol to show that
13 that's without fault.
14 But I don't know of any cases that say that when you're
15 in the middle of a drug deal, well, it goes bad or good,
16 that, that you aren't without fault there.
17 Do you have any cases of that cause the cases---
18 MR. GODFREY: No, sir.
19 THE COURT: ---the cases you've given me were unlawful,
20 were the carrying of an unlawful weapon, and I'd be
21 interested in knowing if either one of you have got any
22 cases where, you know, that fact that you're involved in a
23 unlawful drug deal, and it goes south, does that mean that
24 you were without fault in bringing on the difficulty.
25 That's an interesting question.

1 MR. GODFREY: Judge, I have researched that. I can
2 find no South Carolina case on point.
3 THE COURT: How about cases from elsewhere?
4 MR. GODFREY: I did not check the federal circuit.
5 THE COURT: All right. Mr. Coler, are you gonna
6 acquiesce and let them -- do you agree or disagree that
7 self-defense ought to be charged and or accident?
8 SOLICITOR COLER: Well, Your Honor, that, that kind of
9 depends on my---
10 THE COURT: Let me just say this now.
11 SOLICITOR COLER: Well, what---
12 THE COURT: I know -- I practiced criminal law for 30
13 years. I've been a judge now for a year and a half, a long
14 time. And you may not want to create any appealable issues.
15 I don't know what your take on it is.
16 SOLICITOR COLER: Yes, sir, what I respectfully submit
17 to the Court, Your Honor, is this case, voluntary
18 manslaughter doesn't apply. I think it's murder or nothing
19 because I don't, I don't, I don't believe that there's any
20 in the record, Your Honor, any evidence of a, of sufficient
21 legal provocation to any heat of passion killing. The only
22 evidence about the struggle came from the defendant himself
23 and he, he claims self-defense.
24 I frankly submit to the Court that I think this is
25 murder. And if the Court's inclined to charge the

1 self-defense, it's either up or down with murder, and either
2 the jury finds the four elements of self-defense are
3 applicable or they're not. But I don't, I don't think
4 there's---
5 THE COURT: So, the State's position is that there is
6 no evidence that the defendant took the life of the victim
7 in this case in the sudden heat of passion based on
8 sufficient legal provocation.
9 SOLICITOR COLER: Yes, sir, I don't see any sufficient
10 legal provocation. If they're, they're trying to bootstrap
11 if -- if they're trying to say that legal provocation was
12 the attack of Mr. David Smith by Robert Finley, then that
13 goes to a self-defense charge. So, I think it's murder or
14 nothing.
15 But frankly---
16 THE COURT: But you wouldn't have any real strong
17 opposition to murder or nothing plus a voluntary -- strike
18 that. Plus a self-defense and a accident charge?
19 SOLICITOR COLER: I'd, I'd object to the accident
20 charge, but I wouldn't have any -- I think, in that
21 scenario, under our theory, then, then self-defense is an
22 appropriate charge. But voluntary manslaughter is not.
23 They can't use the sufficient legal provocation as their
24 self-defense element, and to make it voluntary manslaughter.
25 THE COURT: Time out.

1 (Pause.)
2 THE COURT: Ladies and gentlemen, the jury would like
3 to continue and deliberate over lunch.
4 Anybody have any objection to that?
5 MR. GODFREY: No, Your Honor.
6 THE COURT: All right. Let's go back to now a more
7 serious situation.
8 Mr. Godfrey.
9 MR. GODFREY: Well---
10 THE COURT: I sort of like, I sort of like their
11 approach, that it is murder or nothing and go ahead and do
12 the self-defense.
13 MR. GODFREY: Well, the solicitor said that they
14 either, was no evidence of any struggle from anybody other
15 than David Smith, and frankly that's just not right. I mean
16 Angie Smith herself talked about a scuffle and the people
17 being very close together or locked together.
18 THE COURT: Okay. Well, then that brings up the
19 self-defense and he's not objecting to that.
20 MR. GODFREY: All right, sir.
21 THE COURT: But I don't think it brings up evidence
22 sufficient enough to show sudden heat of passion because he
23 deliberately took the gun out to try to make him back off is
24 what I wrote down. He was -- I thought he would back off if
25 he saw the gun.

1 So, here's what I, and y'all can take whatever
2 exceptions you want to it, I'm gonna do, what I've said,
3 murder and self-defense, commission of a violent crime,
4 possession of a weapon during the commission of a violent
5 crime.
6 Any objection by the State?
7 SOLICITOR COLER: No, sir, Your Honor.
8 THE COURT: Any objection by the defendant?
9 MR. GODFREY: I would object because I believe we
10 should have the same charges that were present at the first
11 time, which were voluntary manslaughter, involuntary
12 manslaughter, and accident. And the Court has given us
13 today murder and self-defense only. I don't -- we believe
14 that there is sufficient evidence in the record that would
15 support all of those charges, and we think that, regardless
16 of how strong the Court believes the evidence may be, as
17 long as the evidence is in the record, we'd have a right to
18 the charge.
19 THE COURT: Well, Mr. Godfrey, you admitted to me that
20 he was acting unlawfully, and if he was acting unlawfully,
21 that takes care of, of homicide excused on the grounds of
22 accident, because it must be shown the killing was
23 unintentional, the defendant was acting lawfully, and due
24 care was exercised in the handling of the weapon, and you
25 and I admitted earlier that it was not acting lawfully. He

1 was in the middle of the drug deal. So, I don't know how we
2 can use accident.
3 Do you still feel strong about that?
4 MR. GODFREY: Beg the Court's indulgence?
5 THE COURT: I'm reading from the case you provided me,
6 State versus Burris. That also goes to involuntary
7 manslaughter in State versus Burris, which says it's defined
8 as the killing of another without malice, an unintentional,
9 but while one is engaged in the commission of some unlawful
10 act not amounting to a felony. Well, this is not the case
11 here. He's either involved in the selling of crack cocaine,
12 which would be distribution of crack, which is a felony.
13 I'm gonna let you make whatever record you'd like. But
14 I'm gonna, I'm gonna rule that I am not gonna charge
15 accident, I am not gonna charge voluntary manslaughter, for
16 the reasons earlier stated, and you are protected. But I'll
17 be more than welcome to hear any additional grounds that you
18 may want to put on the record to protect.
19 (Pause.)
20 THE COURT: Anything else, Mr. Godfrey?
21 MR. GODFREY: Nothing, Your Honor.
22 SOLICITOR COLER: No, sir, Your Honor, not from the
23 State.
24 THE COURT: All right. Y'all ready to argue?
25 SOLICITOR COLER: Judge, if I could have about one

1 minute?
2 I plan to use two power points.
3 THE COURT: You can have more than one minute.
4 Obviously you can go to the bathroom and stretch your legs.
5 How about go tell the jury that we have pretty much
6 concluded all of our housekeeping matters in here, and it
7 will be 12:15 by the time Madam Clerk can get all the orders
8 in and everybody get stretched. We'll start at 12:15.
9 Is that okay, Mr. Coler?
10 SOLICITOR COLER: I'm sorry, Your Honor?
11 THE COURT: 12:15?
12 SOLICITOR COLER: Yes, sir.
13 THE COURT: Fifteen minutes fine?
14 MR. GODFREY: 12:15 is fine.
15 THE COURT: All right. We'll stand at ease until
16 12:15.
17 (Whereupon, a short recess was taken at this time.)
18 THE COURT: Anything on behalf of the State?
19 Anything for the record before I bring the jury?
20 SOLICITOR COLER: No, sir, Your Honor.
21 MR. GODFREY: No, Your Honor.
22 THE COURT: Open in full.
23 Not -- you require him to open in full, go first?
24 MR. GODFREY: No.
25 SOLICITOR COLER: We'll waive and just close at the

1 end.
2 THE COURT: That's fine.
3 Anything from the defense before we start?
4 MR. GODFREY: No, Your Honor.
5 THE COURT: Thank you.
6 You ready?
7 SOLICITOR COLER: We just have two power point slides,
8 judge. One I'm gonna argue the elements of murder. That's
9 on a slide, and the elements of self-defense, that's on a
10 slide. We'll soon get them up here. We'll let Mr. Godfrey
11 take an opportunity to look at them.
12 THE COURT: Well, it's 12:15.
13 Mr. Coler, you and Mr. Godfrey and Ms. Ganss, come up.
14 (Whereupon, a bench conference was held at this time.)
15 THE COURT: Mr. Humphries, bring the jury.
16 Lock that door.
17 BAILIFF: Yes, sir.
18 THE COURT: No one in and out.
19 (Whereupon, the following takes place within the
20 presence of the jury.)
21 THE COURT: Okay. We did that -- we're what, three
22 minutes late?
23 That's not too bad, is it?
24 What we're gonna do now is all the testimony is in.
25 And as I explained to you in my opening remarks, we will

1 hear the closing arguments of the lawyers. The -- Mr.
2 Godfrey will go first followed by Mr. Coler and Ms. Ganss.
3 At that conclusion, then I will charge you or instruct you
4 on what the law is in the case. And once I do that, you
5 will then return to the jury room and I'll send all the
6 exhibits back and you can start your deliberations when I
7 give you that heads up.
8 So, without further ado, Mr. Godfrey.
9 MR. GODFREY: May it please the Court?
10 THE COURT: Yes, sir.
11 MR. GODFREY: Solicitor.
12 Ladies and gentlemen, this is been a strange trial
13 inasmuch as we're here about a shooting and a death caused
14 by a shooting, and I think probably 60, 70 percent of the
15 trial we were talking about drugs. What I'm gonna ask
16 you-all to do is to take your prejudice about drugs and put
17 it aside.
18 We're not here talking about the life-style of
19 Mr. Finley, the deceased, in this case. And we're not here
20 talking about the life-style of David Smith.
21 David Smith is charged with murder to which he has pled
22 not guilty, and has offered a defense of self-defense.
23 That's what's important.
24 Obviously nobody likes drugs, and we've heard about
25 drugs all through this case.

1 But the bottom line, for the charge that we have, is
2 how did Mr. Finley get shot?
3 How was Robert Finley shot?
4 What was going on?
5 That's what we're really here about.
6 So, put your prejudice and hatred about drugs to the
7 side and just think about the actual facts of this case.
8 Now, you heard Angie Smith testify. Angie Smith
9 testified that she paged David Smith, and that she was gonna
10 hook him up so he could sell some drugs.
11 Now, her testimony varies a little bit from David
12 Smith's testimony about when he found out Robert Finley was
13 the one who was in the trailer. She says that she told him
14 on the way over there, and David Smith says he learned when
15 she came back from the trailer.
16 One thing that Angie Smith testified to, David Smith
17 testified to, there was a scuffle there at the door. You
18 heard Angie Smith talk about the fact that she started to
19 light a cigarette, and the air was blowing through the vent
20 of the car, and she looks up and she sees David Smith and
21 Robert Finley come falling out of the trailer and she heard
22 a pop. At that point in time, David Smith got up. He says
23 she yelled at him, he ran around the car, got into the
24 driver's side, and drove off.
25 Then Angie Smith said something that was really

1 interesting. She got up here and she said that she was
2 afraid of David Smith.
3 Well, when she left the scene with David Smith, David
4 dropped her off at Wofford Street and gave her the rest of
5 the crack cocaine that he had in his pocket.
6 Okay. Now, David says she wanted to go back to his
7 house. Now, she didn't say that. But David says she wanted
8 to come back to his house.
9 But if you're afraid of somebody and you want to get
10 away from them, would you end up calling them later that
11 same evening and asking if you could get more crack cocaine?
12 And when David said I don't have any, but you can come
13 over and I'll give you $20, she went over to his house. She
14 admitted she went over to his house and picked up the money.
15 Now, was she afraid of David?
16 Of course not. Of course not.
17 Now, there was some problems with the testimony in the
18 trailer. She said that -- Angie Smith testified that Robert
19 Finley didn't say I don't want to deal with you, I want to
20 deal with him. She said that never happened.
21 However, you heard the testimony of Otis Hyder today,
22 the man who was not here. His testimony was read into the
23 record. It was his trailer. He was there. And his
24 testimony was that -- excuse me. His testimony was that
25 Robert Finley told Angie Smith that he didn't want to deal

1 with her. He wanted to deal with him.
2 Now, Angie goes back out to the car. David gets out of
3 the car, and he goes into the trailer. Now David's
4 testimony and Otis Hyder's testimony, in large part, is the
5 same about the initial things that happened inside that
6 trailer.
7 There was discussions about drugs, and Otis Hyder, in
8 his statement to the police, put down that Robert Finley
9 grabbed the drugs. And he said that they were moving
10 towards the door. David Smith went to the door.
11 Now, Otis Hyder says that David Smith walked out the
12 door. David Smith testified and Angie Smith testified that
13 his back was to the door.
14 From the position of Otis Hyder, he could not see what
15 was actually going on and because what was happening was
16 outside the trailer. I think you-all remember that comment.
17 He was outside the trailer. The TV was on. He didn't hear
18 the words that were being said. He did hear Robert Finley
19 say, you know, you got a gun, shoot me, or give it to me,
20 I'll shoot myself.
21 Now, what really happened in that trailer at the tail
22 end is what this case is all about. It was when the drugs
23 were placed on the counter, the drugs were snatched. From
24 that point until they fall out the door is what this case is
25 all about.

1 What happened there and who did what and why is the
2 crux of this case because that's when everything started
3 that caused the downhill slide to the gun being drawn and to
4 the bullet being fired.
5 So, what do we know?
6 Otis Hyder says that Robert Finley grabbed the drugs.
7 What does that mean?
8 He was gonna take them. He was basically robbing David
9 Smith. He knew David Smith had more drugs on him because he
10 saw David put the pack back in his pocket.
11 David told you the man looked wild. He was walking
12 towards him. He said he's about 6'2 and over 200 pounds.
13 He knew something bad was gonna happen.
14 David said he pulled his hands out and he had the .25
15 semiautomatic pistol in his hand. He held down to his side.
16 He did that, David said, because he wanted to stop anything
17 else from happening, but instead Robert Finley came forward,
18 and he swatted at the gun, almost knocked it out of David's
19 hand, and David knew that this guy was for real, that he was
20 coming after him.
21 At that point in time, they were locked up, as David
22 said, one holding the other, and you know that's, that's
23 true. SLED Agent, Agent Powell, the expert in gun powder
24 residue analysis, there was no gun powder residue on the
25 hands of Robert Finley.

1 How do you explain that?
2 Because his hands were behind where the gun was. If I
3 grabbed somebody about the face or neck or shoulders, and
4 the person's trying to hit me to knock him off, I've got the
5 gun in this hand and I'm hitting him, if that gun goes off,
6 the hands that are on me are not gonna have any gunshot
7 residue on them. It's behind where the blow back is on the
8 gun.
9 Now, the other thing about this case which is very
10 interesting, the State wants you to believe -- they have a
11 theory of their case. Their theory of the case, obviously,
12 is that Finley was killed because of a $40 drug deal. And
13 that's what they've been trying to pound in all along.
14 If that's the case, if David Smith was going to, if
15 David Smith was gonna kill somebody over $40, when he pulled
16 the gun out of his jacket, and he had it down to his side,
17 and Robert Finley says go ahead, shoot me, or give it to me,
18 I'll shoot myself, why didn't David just shoot him right
19 then?
20 Because David had no intention of hurting the man. He
21 just wanted to get out of the trailer. That's why he didn't
22 hurt him.
23 Other thing that's interesting about the shot, if
24 somebody is going to shoot someone else, and you're at close
25 range, the doctor said 2 to 6-inches, probably four, if

1 you're at close range and you're gonna shoot somebody, do
2 you shoot them in the head or do you shoot them in the body?
3 What's the more natural thing to do?
4 I would submit to you that the natural thing to do, if
5 you've got a gun in your hand and somebody's directly in
6 front of you, you shoot them in the chest or gut area.
7 That's where everybody else gets shot. This is an unusual
8 shot. The shot went through the left eye.
9 Now, how did that happen?
10 That happened because Robert Finley had his hands on
11 David Smith and David was hitting him trying to get him off,
12 and one of the times when he hit him, obviously the gun
13 discharged. That's how the gun ended up at head level.
14 Nobody's gonna try to shoot somebody else in the head when
15 they're moving. You're likely gonna miss.
16 The other thing that was very interesting about this
17 case, Angie Smith said that she had known David Smith for
18 about ten years. Well, she said several things, but I
19 think, in the end, it was about ten years.
20 Angie Smith and Rodney Smith lived together in the same
21 house. Obviously Rodney Smith knows David Smith just as
22 well as Angie does. Maybe better. Rodney was delivering
23 drugs for David.
24 I asked David on cross -- excuse me. I asked Rodney
25 Smith on cross-examination, I said have you ever known David

1 Smith to be violent. Rodney Smith says no. Rodney Smith is
2 here as the State's witness telling what he knew, which
3 wasn't a whole lot, because he wasn't at the trailer. But
4 he was here as their witness and he says that David Smith,
5 as long as he's known him, and presumably at least ten
6 years, has never been violent.
7 What happened in this case?
8 You got Robert Finley, who was probably on crack
9 cocaine at the time or coming down off his crack, wanted to
10 get more crack, calls Angie Smith, Angie goes in. He
11 doesn't want to deal with Angie. Otis Hyder told us that.
12 David told us that. David goes in and Finley wants to grab
13 the drugs and he was going after David to get more drugs or
14 maybe he thought David had money. One or the other.
15 What happened to David is that he was attacked. The
16 guy was taking his drugs and he was going after more drugs.
17 And when David showed him a gun to try to get him to back
18 off, he comes forward even more. He swats at the gun.
19 David knows this guy is for real. He knows the fight's on.
20 David just wants to leave. David is not a violent person.
21 Ladies and gentlemen, this is a case of self-defense.
22 David went there to sell drugs. He didn't go there to get
23 into an argument with anybody. He brought the drugs in.
24 There was no loud boisterous argument in the trailer. Otis
25 Hyder told you that.

1 David did not go there to create a problem. He went
2 there to deliver drugs like he had delivered before. He was
3 not the reason that there was a fight. He's not the reason
4 that he had to pull his gun.
5 The reason those things happened is Robert Finley.
6 Finley was greedy. Finley was high. Finley wanted crack.
7 Finley didn't care where he got it. Finley was gonna take
8 it from David Smith.
9 David shows the gun. Finley swats at the gun. You've
10 seen David Smith's size. He's not that big of a man.
11 Finley stands about 6'2, over 200 pounds. He knows there's
12 a fight coming on. The man seen a gun. He won't stop.
13 He's still coming towards him.
14 What's he gonna do?
15 He hits -- he's trying to get out of his grasp. And
16 one of the times he hits, obviously the gun discharged and
17 went through the eye of Robert Finley.
18 It's a terrible thing. But it's a case of
19 self-defense. It began to build and build and build. Just
20 like a snowball going down a hill.
21 He went to deliver drugs. He wasn't expecting
22 problems. Finley stole the drugs. Finley came towards him.
23 He saw that he, David Smith had a gun. He swatted at him,
24 he came at him.
25 What could David think except his life was in danger or

1 he was gonna get beat up?
2 The man wouldn't stop when he saw a gun. It's a case
3 of self-defense. It's a terrible situation, a situation
4 caused by drugs.
5 But drugs are not what's driving the charge in this
6 case. What's driving the charge in this case is how and why
7 Robert Finley ended up being shot. That's what's driving
8 this case.
9 David Smith, as Rodney Smith testified, is not a
10 violent man. Not a violent man.
11 What happened is a case of self-defense. The State can
12 not prove, beyond a reasonable doubt, that this is murder.
13 Not based on the facts that we have before us. Not based on
14 what Otis Hyder had to say from the testimony that we read
15 today. Not based upon what Angie Smith had to say about
16 them coming out of the trailer, falling out together, locked
17 up, and been scuffling.
18 There was a fight. It wasn't David's fault. He was
19 just trying to get away.
20 When you think of everything that you have heard in
21 this trial and have a chance to deliberate, we're certain
22 that you will find him not guilty by self-defense.
23 THE COURT: Mr. Coler, Ms. Ganss.
24 SOLICITOR COLER: Thank you, Your Honor.
25 May it please the Court?

1 THE COURT: Yes, sir.
2 SOLICITOR COLER: One of the first things, first things
3 I want to do before we get started is thank you, each and
4 every one of you for your attention in this case. As a, as
5 an attorney, as a prosecutor, all I can ever ask of jurors
6 is that they pay attention, pay close attention to the
7 evidence that we present.
8 And every time I looked over here, every one of you was
9 focused on the witness that was testifying or whatever we
10 had on the overhead. Y'all -- some of y'all couldn't even
11 see. You were leaning forward and everything.
12 And we really appreciate that. That's all we really
13 ask of you in a case and do that. And when you do that, and
14 when you do it so commendably, I think you should be
15 recognized for that. So, thank you very much.
16 The judge is gonna tell you, in a few minutes, that
17 your job is to be the finder of the facts. Nobody else in
18 this entire courtroom, in this entire courthouse, in this
19 world at this point gets to tell you what the facts are.
20 That's your job. You've sat here and you've watched
21 everybody.
22 The judge, he's the expert on the law. But you and you
23 alone judge the facts.
24 One of the things you get to do is examine or look at
25 or, or review the demeanor of the witnesses, and you, and

1 you can do that to determine the credibility, their
2 believability.
3 When they came in, did they answer forthright and
4 straightforward?
5 Were they shifty?
6 Did they try to avoid questions?
7 Did they not answer straightforward?
8 And you make a decision and you get to go back into the
9 jury room and decide what do we find happened.
10 And I submit to you that when you heard from the
11 State's witnesses, Angie Smith, she was straightforward.
12 She, she was so nervous she had to stand up and tell you her
13 story. But you could tell she looked at me, listened to my
14 question, and as soon as I asked the question, she answered
15 it. There wasn't any kind of delay or thinking about it.
16 She was just straightforward.
17 Same with Rodney Smith. Same with the other witnesses
18 you saw.
19 You can compare and contrast that to David Smith. When
20 he took the stand, not only did he spend most of his time
21 avoiding my question and not answering them, but sometimes
22 he would repeat my question cause he was trying to think of
23 what to say, and then he would ask me a question in response
24 instead of simply answering the questions about what
25 happened.

1 So, you get decide that. I could stand up here this
2 morning or this afternoon and go through each and every one
3 of the pieces of evidence, each and every one of the
4 sentences that each witness came and told you. But that's
5 not my job. That's not the judge's job. That's not
6 anybody's job but yours to go back and examine that and make
7 that determination.
8 So, that's what I'm gonna ask you to do is remember,
9 talk about it, think about it, and, and examine, as you get
10 back there, each of the witnesses, and then you get to
11 decide what happened. And I submit to you that you'll find
12 that the people that we put up were straightforward,
13 answered the questions, told you what happened, didn't beat
14 around the bush, and responded. The defendant, on, on
15 contrast, beat around the bush and didn't really respond.
16 What I really want to talk to you about is the law in
17 this case, and Judge Early is the expert on the law and he's
18 gonna tell you what the law is regarding two very important
19 things. One is murder and the other is self-defense because
20 that's essentially what the defendant is claiming. He's
21 claiming self-defense. He had no other choice but to defend
22 himself and kill somebody.
23 And what I want to do is put an overhead up for you.
24 The judge is gonna talk about the elements of self-defense,
25 and this is, I think, what he's gonna instruct you

1 essentially. He's gonna tell you that these four things
2 must be true. These four things must be accurate for
3 self-defense to apply. If they don't, self-defense simply
4 does not apply. So, I'm gonna -- let's go through them.
5 First, he's gonna tell you the person who's claiming
6 it, David Dwight Smith, must be without fault in bringing on
7 this difficulty.
8 How in the world does David Dwight Smith, can he, can
9 anybody in the world argue to you that he is totally without
10 fault in bringing this on?
11 He's the one, remember, who took the drugs over to her
12 house, to Robert Finley's trailer he was at, and took the
13 loaded gun in there, went inside. He's the one that had the
14 relationship with Robert Finley earlier and the $40 debt.
15 He can't possibly tell you he's without, totally without
16 fault in bringing on this difficulty.
17 So, once one of these elements fails, self-defense is
18 out. We'll continue on and I'll point out the other ones
19 that fail.
20 You've also got to find the person must actually
21 believed that he was in immanent danger of losing his life
22 or serious, sustaining serious bodily injury or he actually
23 was in such immanent danger, which means he's got to be so
24 fearful that he decides, instead of doing anything else in
25 the world, to take another human life.

1 And I submit to you, ladies and gentlemen, there are
2 situations in this world where that happens. But this isn't
3 even close. This isn't even in the same ball park.
4 He could have done many things and should have done
5 many things if, in fact, the story goes the way he was
6 before he chooses to end the life of another human being.
7 The third element says that if his defense is based
8 upon his belief of immanent danger, a reasonably prudent
9 person of ordinary firmness and courage would of entertained
10 the same belief. If the person was in actual immanent
11 danger, the circumstances were such as would warrant a
12 person of ordinary prudence, firmness, and courage to strike
13 the fatal blow, shoot the fatal shot, in order to save
14 himself from serious bodily injury.
15 But basically says is okay, if you claim, if you say
16 you were in immanent danger, you were in such a threat of
17 danger of losing your life, it's got to be reasonable. So
18 another -- if we were to replace another reasonable person
19 and put him in your shoes in that situation, that person
20 would have believed the same thing.
21 Again, how can somebody who has taken a loaded gun into
22 a trailer to make a drug deal, knows the person he's dealing
23 with, claim that he's a reasonable person who would have had
24 to act his way as opposed to any other way in the world?
25 He simply can't argue that to you. There's no way that

1 that element survives this from the, the examination.
2 Now, at this point, all three of the first elements
3 have failed. If any one of them fails, self-defense is out.
4 The last element, the fourth element says that before
5 you get to take a life, before you get to kill another human
6 being, the person had no other reasonable means of avoiding
7 the danger of losing his life or sustaining serious bodily,
8 serious and bodily, serious bodily injury than to act as he
9 did in this particular instance. And I remind you that a
10 person, on his own premise, has no duty to retreat before
11 acting in self-defense.
12 If David Smith were in his own house, perhaps this is a
13 different analysis. But remember, he went to the house or
14 to the home where Robert Finley was. He certainly had other
15 reasonable means, other probable means of avoiding this
16 situation.
17 One, don't go there. Don't go to sell drugs.
18 Two, don't bring a loaded gun there.
19 Three, if you do go in and see that the drug deal is
20 gone bad, leave. You've got a duty to retreat before you
21 can kill somebody else.
22 Like I said, the law, in some instances, recognizes the
23 ability of one human, one citizen to kill another. But this
24 isn't even close. And there's a duty, there's a
25 responsibility you got to take before you kill somebody

1 else, and it essentially means you got to retreat.
2 You can back out that door, go away, forget about the
3 drugs, leave them there, forget about the $40, and just go
4 about, about your business.
5 He chose instead to use a gun and to end a human life.
6 He chose not to act as a reasonable person would. He chose
7 not to avoid that ultimate final fatal blow that, that he
8 struck on Robert Finley.
9 Because each and every one of those elements must be
10 present, as I said, must be true for you to find
11 self-defense, and because they're not, because I submit to
12 you all four of them, but several of them fail, you can not
13 find, you're not entitled to find self-defense and the
14 defendant's not entitled to claim self-defense for killing,
15 for shooting and killing Robert Finley.
16 The other thing the judge is gonna talk to you about is
17 murder, and you may of seen police shows, and you may of
18 seen movies, and you might think well, murder -- well, the
19 State's got prove, to prove a motive and there's got to be
20 premeditation and somebody's got to be lying in wait
21 waiting. Put all that out of your mind.
22 Murder, in South Carolina, requires three elements, and
23 the judge is gonna tell you what those elements are and at
24 the end of my, my presentation, but essentially he's gonna
25 tell you, that one, there must be a killing. And there, in

1 this case, was certainly a killing. There's no question
2 about it.
3 Two, it must be another human being, another person.
4 As I told you in my opening statement, if you were to ask
5 the family and friends of Robert Finley was he a person,
6 certainly they'd tell you, of course, he was.
7 And finally, the killing must be done with malice
8 aforethought either express or implied.
9 Express or implied just means how the malice is found
10 by you. If express, if you, express malice were present,
11 that kind of means somebody raising a gun up saying I want
12 to kill you, I want you dead, saying those words, and then
13 pulling the trigger. That's express malice. We -- I admit
14 we don't have that in this case. What we have is implied
15 malice.
16 The law doesn't let us cut a human being open. Science
17 doesn't allow us to cut a human being open and look inside
18 their heart and determine is there malice, is, did they have
19 malice in their heart and in their brain when they committed
20 this crime. Of course, we can't do that.
21 So, what does the law tell us to do?
22 It tells us to look at all the facts and circumstances
23 that surround the incident. And then -- and that's what I'm
24 asking you to do, and make your determination as to whether
25 you find malice.

1 Let's talk about aforethought quickly. The malice must
2 exist some time prior to the fatal blow, some time prior to
3 the, the shooting. But as I told you, as Judge Early is
4 gonna tell you, it could exist a week before. It could be
5 this festering brewing anger. It could exist a day, an
6 hour, a minute. It could even exist a second or just an
7 instance before the fatal blow was struck. There doesn't
8 have to be this prolonged period before the killing where
9 there's a planned out attempt to murder somebody. It just
10 means aforethought. The malice has to exist some time
11 before or at the same time as the fatal blow.
12 I submit to you the malice started forming, in David
13 Smith's mind, when he got over there on that cold January
14 morning, was called out to make a drug deal, wanted to make
15 money, we know money was important to him, found out that,
16 that this Robert Finley was in there, this guy already owes
17 me $40, he's called me out in the middle of the night, I'm
18 not gonna make a drug deal, you know, I can be doing these
19 other things.
20 That's when the malice started to form in David Smith's
21 mind, and he carried that in when he took a loaded gun
22 inside the trailer. That malice kept, kept working it's way
23 up and ultimately he carried it out by shooting and killing
24 Robert Finley.
25 But how do we know or what have you seen about David

1 Smith that suggests, that proves, that shows that he has
2 malice in his heart?
3 Well, first of all, we know he's greedy. He had a
4 pretty good job, was an airline mechanic. Presumably made
5 decent money. But when that wasn't enough, when that
6 required a little bit of a struggle on his part, he chose,
7 instead, to sell drugs. He chose to be guided by his desire
8 for money over anything else.
9 And then the way he chose to do it is very indicative
10 of what's in his heart. It didn't matter to him where his
11 drugs ended up. All he really cared about was getting them
12 to Rodney and Angie and his other minions. And as long as
13 they delivered it, and brought him back the money, it didn't
14 make a difference to him.
15 And I asked him, I said, didn't you care if it went to
16 other people in the neighborhood, went to a high school, a
17 junior high. No, as long as I got money, it doesn't matter.
18 We know he carried a gun. We know he carried a loaded
19 gun because of the, of the, of the business he was in, and
20 we know that he wasn't afraid to use that gun because he
21 told you. Said I, I took it out, I was gonna show him, I
22 was gonna use this to scare somebody. That's just more
23 indication of what's in his, this man's heart, what's in his
24 brain.
25 We know, immediately after he shot and killed Robert

1 Finley, he fled the scene. I asked him was there any
2 reason, was there anything to prevent you from, from just
3 calling this in. I mean you say it was an accident, and,
4 and you didn't mean for to, it to happen.
5 MR. GODFREY: Objection. That goes to remorse.
6 THE COURT: Move along.
7 Disregard the last statement.
8 SOLICITOR COLER: He didn't -- he chose not to call in
9 the incident. And then we know he did more.
10 He chose then to attempt to silence Angie Smith. You
11 don't know nothing, you didn't see nothing. I submit to you
12 he was calling the shots that night.
13 Angie Smith, the woman you saw, was directing David
14 Smith what to do after that shooting. David Smith was
15 telling her. So, he tried to silence her. Then he, he
16 decided to, chose to throw away, to dispose of the gun, the
17 murder weapon. Again, this is all more indication of what
18 was in his heart when he did it. And because we can't look
19 inside his heart, we look at what he did after it.
20 Then he decided well, I want to go home, get some
21 sleep, and go to work the next day because, in his own words
22 I submit to you, were I didn't want this to interfere with
23 my life. I didn't want the fact that I had just killed
24 somebody, just shot somebody in the face, to interfere with
25 the, with my life.

1 That's somebody who has a blackened heart. That's
2 somebody who has a heart that is void of social
3 responsibility.
4 Then when the police eventually got to him, which I
5 think he knew they would, and everybody knew eventually they
6 would, he chose to lie to the police. He didn't, he didn't
7 tell them this is what happened, this is just a, this is
8 just a tragic accident, this is just a tragic mistake. He
9 chose to lie.
10 And his version was well, it wasn't a lie. Detective
11 Denton asked me what happened, and I told him, up till
12 midnight, and then I stopped.
13 Well, you don't think that Detective Denton called him
14 from Charlotte and asked him to come down here and wanted to
15 talk to him about what he did until midnight?
16 The police were trying to solve this crime, and they
17 wanted to know everything they could about it. But he chose
18 to lie to them. He says it's not a lie because he just left
19 out some stuff.
20 Well, he left out the most important things, that he
21 was there, and he shot him, and what happened. I submit to
22 you he didn't admit to that until he knew he had to, until
23 the police got to Angie Smith, found her, she told them what
24 happened, and then he's got to.
25 And then other things we can look at, ultimately the,

1 probably the textbook version of malice, he shot and killed
2 somebody and left them where they fell on to their face on
3 to rough concrete. Remember there's no smooth marks on
4 this, this victim's face. Doctor Wren told you that
5 everything was all rough abrasions from falling. Fell on to
6 his face, was shot in the eye, was bleeding profusely.
7 Their own expert talked about the, the massive amount
8 of blood. And his body was kind of twisted up. It was
9 dark. It was certainly cold out. It was the middle of the
10 night. Left him there to die, and was mostly concerned
11 about getting on with the rest of his life.
12 That is textbook malice. And for that, I'm asking you
13 to convict him on both counts. Convict him of murder as
14 he's charged, and convict him of possession of a gun during
15 that murder.
16 Thanks.
17 THE COURT: Mr. Coler, you want to turn that off
18 please?
19 SOLICITOR COLER: Yes, sir.
20 THE COURT: Mr. Foreman, ladies and gentlemen of the
21 jury, my charge takes about 15 minutes, maybe 20 at the
22 most.
23 Everybody okay?
24 You need a bathroom break before I start?
25 (Jurors nod negatively.)

1 THE COURT: Everybody comfortable?
2 (Jurors nod negatively.)
3 THE COURT: Let me tell you, I'm gonna charge you or
4 instruct you on the law in the case, of this case. And what
5 I normally do is I sort of break it down into a couple of
6 areas.
7 The first is sort of general information, but it's the
8 law in this State. You have to take that. And then I will
9 specifically charge you on murder, self-defense, and some
10 other aspects in the case.
11 First of all, it's very important, in this case, the
12 indictment charges the defendant with murder and possession
13 of a firearm during the commission of a violent crime. I,
14 once again, remind you, as I did at the beginning of the
15 case, the fact that the defendant was arrested, charged, and
16 indicted in the case is not evidence in the case and can not
17 be considered by you as evidence of guilt in the case nor
18 does it create any presumption or inference of guilt.
19 The indictment is simply a written formal instrument
20 which contains the charges made against the defendant. It
21 is the formal document by which this defendant is brought
22 into this courtroom.
23 The indictment, in this particular case, alleges two
24 different offenses against the defendant. The charges are
25 murder, one, and secondly, possession of a firearm during

1 the commission of a violent crime.
2 The one indictment charges two separate and distinct
3 offenses. You must decide each offense separately on the
4 evidence and the law applicable to it uninfluenced by your
5 decision as to any other offense. The defendant may be
6 convicted or acquitted on one, and then you will be asked to
7 write a separate verdict as to each charge of guilty or not
8 guilty.
9 As to the indictment, the defendant has pled not
10 guilty, and that plea of not guilty puts the burden on the
11 State of South Carolina to prove the defendant guilty.
12 A person charged with committing a criminal offense in
13 South Carolina is never, never required to prove himself
14 innocent. It is a very important rule of law that a
15 defendant, in a criminal trial, no matter what the
16 seriousness of the charge may be will always be presumed
17 innocent of the crime for which the indictment was issued
18 unless guilt has been proven by evidence satisfying you of
19 that guilt beyond a reasonable doubt.
20 This presumption of innocence does not end when you
21 begin your deliberations. But it stays with the defendant
22 throughout the trial until you reach a verdict of guilt
23 based on evidence satisfying you of that guilt beyond a
24 reasonable doubt.
25 The presumption of innocence is not a mere legal

1 theory. It's just not a legal phrase. It is a very
2 substantial constitutional right to which every defendant is
3 entitled unless you, the jury, are satisfied, from the
4 evidence, that the defendant is guilty beyond a reasonable
5 doubt.
6 What is a reasonable doubt in the law?
7 Very simple.
8 A reasonable doubt is the kind of doubt that would
9 cause a reasonable person to hesitate to act. I'll repeat
10 it. A reasonable doubt is the kind of doubt that would
11 cause a reasonable person to hesitate to act.
12 Let me again remind you that, during the trial, that
13 you and I have had certain duties to perform. As my, as my
14 duty of presiding over the trial, I've had the duty to rule
15 on the admissibility of, of the evidence. As I told you
16 earlier, I didn't think there would be very many objections
17 and they were not. But you're to consider only the evidence
18 which has been presented from the witness stand, and any
19 exhibits which have been made a part of the record.
20 I also have the additional duty to charge you the law.
21 As presiding judge, I am the sole judge of the law of the
22 case, and it is your duty, as jurors, to accept and apply
23 the law as I now state it to you. If you have some ideas as
24 to what the law is or what the law ought to be and it does
25 not agree with what, with what I now tell you the law is, I

1 ask that you abandon that idea because you are sworn to
2 accept the law and apply the law as I state it to you.
3 In every case tried in this Court, you, the jury,
4 become the sole and exclusive judges of the facts. As the
5 trial judge, I can't state, comment on, or make any
6 statement as to the, as to the facts. So, if I have
7 commented or maybe frowned or smiled or anything during the
8 trial of the case, please disregard that. I have absolutely
9 no right to tell you what the facts are. That is your sole
10 province and that is up to you. The law doesn't allow me to
11 have any opinion about the facts.
12 So, it is your duty to determine the effect, the value,
13 the weight, and the truth of the evidence presented during
14 this trial.
15 In order to do that, you necessarily must determine the
16 credibility of the witnesses who have testified in this
17 case. Credibility simply means believability, who do you
18 believe. It becomes your duty, as jurors, to analyze and to
19 evaluate the evidence and determine which evidence convinces
20 you if it is true.
21 In determining the credibility or believability of the
22 witnesses who have testified in the case, you have the right
23 to believe one witness over several witnesses, or several
24 witnesses over one witness. You may believe a part of the
25 testimony of a witness and reject the remaining part of the

1 testimony of that same witness. You may believe the
2 testimony of a witnesses, of a witness in its entirety or
3 you may reject the testimony of a witness in its entirety.
4 You may consider whether any witness has exhibited to
5 you any interest, bias, prejudice, or other motive in the
6 case. You may also consider the appearance and manner of a
7 witness while on the witness stand.
8 We have had a number of witnesses who testified in the
9 case as experts, and I told you, at that time, they were
10 allowed to give opinions. You should consider any expert
11 opinion received in evidence in this case like any other
12 evidence, give it the weight you think it deserves. If you
13 decide that the opinion of an expert witness is not -- give
14 it the weight you think it deserves. If you think or decide
15 that the opinion is not based on sufficient education and
16 experience or if you conclude that the reasons given in
17 support of the opinion are not sound or that the opinion is
18 outweighed by other evidence, you may disregard the opinion
19 entirely.
20 An expert's testimony is to be given no greater weight
21 than that of any other witness simply because the witness is
22 an expert. Further, you are not required to accept an
23 expert's opinion even though it may be uncontradicted.
24 Now, Madam Forelady, ladies and gentlemen of the jury,
25 those are sort of the general propositions of law that I

1 charge or instruct in every criminal case that we try, and
2 then I go to the specific elements of the indictments.
3 So, in this case, the defendant is charged with murder
4 in one count of the indictment. The State must prove -- the
5 burden of proof is on the State to prove, beyond a
6 reasonable doubt, that the defendant killed another person
7 with malice aforethought.
8 Malice is defined as hatred, ill will, or hostility
9 towards another person. It is the intentional doing of a
10 wrongful act without just cause or excuse and with an intent
11 to inflict an injury or under circumstances that the law
12 will infer an evil intent.
13 Malice aforethought does not require that malice exist
14 for any particular time before the act is committed. But
15 malice must exist in the mind of the defendant just before
16 and at the time of the act is committed. Therefore, there
17 must be a combination of the malice or previous evil intent
18 and the act.
19 Malice aforethought may be express or inferred. The
20 terms expressed and inferred do not mean different kinds of
21 malice, but merely the manner in which malice may be shown
22 to exist. That is by either direct evidence or by inference
23 from the facts and circumstances which are proved.
24 Express malice is when a person speaks words which
25 express hatred or ill will for another or when the person

1 prepared beforehand to do the act which was later
2 accomplished. For example, lying in wait for a person or
3 any other acts of preparation going to show that the deed
4 was within the defendant's minds would be express malice.
5 Malice also may be inferred from conduct showing a
6 total disregard for human life. Inferred malice may also
7 arise when the deed is done with a deadly weapon. A deadly
8 weapon is any article, instrument, or substance which is
9 likely to cause death or great bodily harm. Whether an
10 instrument has been used as a deadly weapon depends on the
11 facts and circumstances of each case, and the law recognizes
12 certain examples of instruments which may be deadly weapons
13 including the pistol.
14 In Count Two of the indictment, the defendant is
15 charged with possession of a weapon during the commission of
16 or attempt to commit a violent crime. The State must prove,
17 beyond a reasonable doubt, that the defendant was in
18 possession of a firearm or visibly displayed what appeared
19 to be a firearm during the commission of a violent crime. A
20 firearm is described as any machine gun, automatic rifle,
21 revolver, pistol, or other weapon which is designed to or
22 may be readily converted to expel a projectile.
23 In order to find the defendant guilty of possession of
24 a weapon during the commission of a violent crime, you must
25 first find the defendant guilty of either committing a

1 violent crime or attempting to commit a violent crime and
2 murder is a violent crime.
3 Now, in this case, the defendant has raised the defense
4 of self-defense. Self-defense is a complete defense. And
5 if it is established, you must find the defendant not
6 guilty.
7 The State has the burden of disproving self-defense by
8 proof beyond a reasonable doubt. If you have a reasonable
9 doubt of the defendant's guilt, after considering all the
10 evidence, including the evidence of self-defense, then you
11 must find the defendant not guilty. On the other hand, if
12 you have no reasonable doubt of the defendant's guilt after
13 considering all of the evidence, including the evidence of
14 self-defense, then you must find the defendant guilty.
15 The following elements are required to establish
16 self-defense.
17 One, without fault. First, the defendant must be
18 without fault in bringing on the difficulty. If the
19 defendant's conduct was the type which was reasonably
20 calculated to and did provoke a deadly assault, the
21 defendant would be at fault in bringing on the difficulty
22 and would not be entitled to a not guilty verdict based on
23 self-defense.
24 If the defendant voluntarily participated in mutual
25 combat for purposes other than protection, the killing cf

1 the victim would not be self-defense. This is true even if,
2 during the combat, the defendant feared death or serious
3 bodily injury. However, if, before the killing is
4 committed, the defendant withdraws and tried, in good faith,
5 to avoid further conflict, and either by word or act makes
6 that fact known to the victim, he would be without fault in
7 bringing on the difficulty.
8 For mutual combat, there must be mutual intent and
9 willingness to fight. This intent may be shown by the acts
10 and conduct of the parties and the circumstances surrounding
11 the combat. In addition, it must be shown that both parties
12 were armed with a deadly, with a deadly weapon.
13 Now, the second and third element, which are sort of
14 hand in hand of self-defense, is that the defendant was
15 actually in immanent danger of death or serious bodily
16 injury or that the defendant actually believed he was in
17 immanent danger of death or serious bodily injury.
18 If the defendant was actually in immanent danger, it
19 must be shown that the circumstances would have warranted a
20 person of ordinary firmness and courage to strike the fatal
21 blow to prevent death or serious bodily injury. If the
22 defendant believed he was in immanent danger of death or
23 serious bodily injury, it must be shown that a reasonably
24 prudent person of ordinary firmness and courage would have
25 had the same belief.

1 In deciding whether the defendant actually was or
2 believed he was in immanent danger of death or serious
3 bodily injury, you should consider all the facts and
4 circumstances surrounding the situation, including the
5 physical condition and characteristics of the defendant and
6 the victim.
7 The defendant does not have to show that he was
8 actually in danger. It is enough if the defendant believed
9 he was in imminent danger, and a reasonably prudent person
10 of ordinary firmness and courage would have had the same
11 belief.
12 The defendant has the right to act on appearances even
13 though the defendant's beliefs may have been mistaken. It
14 is for you to decide whether the defendant's fear of
15 immediate danger of death or serious boldly injury was
16 reasonable and would have been felt by an ordinary person of
17 the same size in the same situation.
18 And then the final element of self-defense is that the
19 defendant had no other probable way to avoid the danger of
20 death or serious bodily injury than to act as the defendant
21 did in this particular instance.
22 Now, you have to make those assessments. You're the
23 finders of the fact. Y'all determine who you believe. You
24 apply those facts to the law as I've just given it to you.
25 And if you believe the State has proven the case beyond a

1 reasonable doubt, then consider everything, and you render
2 one decision. If you feel that the State has not met the
3 burden, then, of course, your verdict would be different.
4 All right. They're two possible verdicts in the case.
5 Obviously, not guilty or guilty, and don't put any
6 significance on the order in which I gave them to you.
7 Obviously I've got to put one before the other.
8 Madam Forelady, ladies and gentlemen of the jury, your
9 verdict must be unanimous. In other words, all 12 of you
10 must agree on the verdict. When you reach the verdict, you
11 will simply sign your name as the forelady and knock on the
12 door and tell the bailiff that we have a verdict.
13 If you have any questions during your deliberation, you
14 need to write it out on a piece of paper.
15 Madam Forelady, you sign it as the foreperson, and
16 knock on the door and give it to the bailiff and they'll
17 send it out to me and I will attempt to answer it as the law
18 allows or may not be able to answer it as the law allows.
19 But I will send you back my response or perhaps bring you
20 back out to, to address you with it.
21 The verdict form is right here and it's very simple.
22 The first is to Count One of the indictment on murder. It
23 simply says we, the jury, find the defendant in this case,
24 David Dwight Smith, to be either one, not guilty, or two,
25 guilty of murder.

1 MR. GODFREY: Nothing further.
2 THE COURT: Thank you so very much.
3 Now, Ms. Ganss, Mr. Coler, Mr. Godfrey, would y'all
4 please come forward and check your exhibits and make sure
5 everybody is in agreement so I can send it back.
6 (Pause.)
7 SOLICITOR COLER: Yes, sir.
8 THE COURT: Everything there?
9 SOLICITOR COLER: Yes.
10 MR. GODFREY: Yes, sir.
11 THE COURT: All right. Let the record reflect counsel
12 for both sides have examined, hold on one second, have
13 examined the exhibits and all of them are there and the
14 verdict form is proper. So, I'm gonna send it back, but
15 with the bailiff -- let him go smoke and then when he gets
16 through smoking, you come back and take it back.
17 Tell them to go ahead and start their lunch and we'll
18 get back there as soon as the smoker gets back.
19 BAILIFF: Yes, sir.
20 THE COURT: Any objection from both sides?
21 SOLICITOR COLER: No, sir.
22 MR. GODFREY: No.
23 THE COURT: All right. We'll stand at ease.
24 (Whereupon, the jury began deliberations at 1:15 and
25 sent out a question at 2:45.)

1 Okay. If you find him not guilty, that would be the
2 end because obviously, if he's not guilty, then he would not
3 have committed any crime with the, with the use of a weapon.
4 However, if you find him to be guilty, then you must decide
5 whether or not he was guilty or not guilty of possession of
6 a firearm during the commission of a violent crime.
7 Just follow the instructions. It's very simple. Once
8 you've done that and y'all have reached a unanimous verdict,
9 you can sign your name and date it and knock on the open
10 door and the bailiff will come back out.
11 In just a few minutes the bailiff will bring to you the
12 verdict form. He will also bring to you all the evidence
13 that has, that has been introduced during the trial of the
14 case. And once you receive all of that, you can start your
15 deliberations.
16 I'm gonna ask you to return to your jury room now. But
17 do not, do not start the deliberations. I have to ask the
18 lawyers one more time if I have left anything out of the
19 charge or if they have any complaints about the charge, and
20 they have to put that on the record to protect everybody.
21 That process won't last but just a few minutes, and then,
22 once I go through that, I will send the verdict form, along
23 with all of the exhibits back there, and the bailiff will
24 tell you to start your deliberations.
25 I suspect somewhere we're gonna get you some lunch.

1 So, here's what I would suggest, you know, once I say -- you
2 start deliberations. Go ahead and, and start your
3 deliberations. When lunch comes, you can talk through lunch
4 or you can say we don't want to talk over lunch. Y'all do
5 it however you want to do it. And then once you have
6 reached that decision, then you let us know.
7 So, at this time, I'm gonna ask all of you to return to
8 your jury room except my two alternates.
9 I'll ask that y'all stay there one second please.
10 Everybody else please remain seated.
11 Mr. Bailiff, if you will take the alternates and put
12 them in a separate room.
13 I'm going to let y'all stay with us through lunch. At
14 least get your lunch. And then we'll go from there.
15 Normally I would release you after you eat your lunch. So,
16 bear with us.
17 Put them in a separate room please.
18 BAILIFF: Yes, sir.
19 (Whereupon, the following takes place outside the
20 presence of the jury.)
21 THE COURT: Any exceptions to the charge, any
22 additional request on behalf of the State?
23 SOLICITOR COLER: No, sir, Your Honor.
24 THE COURT: On behalf of the defendant other than what
25 you're already protected on your earlier objections?

1 THE COURT: All right. Gentlemen, ma'am.
2 (Whereupon, a bench conference was held out of the
3 hearing of the jury at this time.)
4 THE COURT: All right. Let the record reflect, at
5 about 2:45 I received a note from the jury. Be marked as
6 Court's Exhibit 3.
7 (Whereupon, the note from the jury was marked as
8 Court's Exhibit No. 3 for identification purposes only at
9 this time.)
10 THE COURT: Question one. If there is no self-defense,
11 can he still be guilty of a lesser crime?
12 The answer is no.
13 Was any drugs from David put on the table ever found in
14 the trailer?
15 Answer, the Court can not comment on the facts.
16 THE COURT: Any opposition to that on behalf of the
17 State?
18 SOLICITOR COLER: No, sir, Your Honor.
19 THE COURT: Defendant?
20 MR. GODFREY: No, sir.
21 THE COURT: Carry it back and I need to have that for
22 the record. So --
23 BAILIFF: Okay.
24 THE COURT: Okay. We'll stand at ease.
25 (Whereupon, the jury returned with a verdict at 3:16.)

1 THE COURT: All right. Mr. Bailiff, I understand we
2 have a verdict.
3 BAILIFF: Yes, sir.
4 THE COURT: All right. Anything from the State before
5 we receive the verdict?
6 SOLICITOR COLER: No, sir, Your Honor.
7 THE COURT: Defendant?
8 MR. GODFREY: No, sir.
9 THE COURT: All right. I -- looks like we got some
10 family here of the victim and the defendant's family. I
11 don't know what the verdict is gonna be. I will not
12 tolerate any outburst. If you can not control your
13 emotions, I'll ask you to leave now. If there are any
14 outburst, I'm gonna hold you in contempt and find you or
15 jail you accordingly.
16 So, I suggest you leave now if you can not control
17 yourself.
18 Fair enough?
19 SOLICITOR COLER: Yes, sir.
20 THE COURT: Fair enough?
21 MR. GODFREY: Yes, sir.
22 THE COURT: All right. Bring the verdict, bring the
23 jury please.
24 (Whereupon, the following takes place within the
25 presence of the jury.)

1 THE COURT: Madam Forelady, have y'all reached a
2 verdict?
3 FORELADY: Yes, sir.
4 THE COURT: Madam Clerk, would you pass it to the
5 bailiff, please?
6 (Forelady complies.)
7 THE COURT: All right. Madam Clerk, would you please
8 publish the verdict?
9 CLERK: Court of General Sessions, the County of
10 Spartanburg, Case Number 1997-GS-42-1639, State of South
11 Carolina versus David Dwight Smith, we, the jury, find the
12 defendant in this case, David Dwight Smith, to be guilty of
13 murder.
14 We, the jury, find the defendant in this case, David
15 Dwight Smith, to be guilty of possession of a firearm or a
16 knife during the commission or attempt to commit a violent
17 crime. It is signed by the foreperson, and dated today's
18 date.
19 Ladies and gentlemen of the jury, if this is your
20 verdict and still your verdict, please raise your right
21 hand.
22 (All jurors raise their hands at this time.)
23 CLERK: So say you-all.
24 THE COURT: All right. Anything on behalf of the
25 defendant before I release the jury?

1 MR. GODFREY: No, Your Honor.
2 THE COURT: Thank you.
3 (Whereupon, the jury was dismissed at this time.)
4 THE COURT: Okay. You ready for sentencing?
5 SOLICITOR COLER: Yes, sir, I've got the sentencing
6 sheets. Mr. Godfrey and his client may want to just look at
7 those.
8 SOLICITOR COLER: May I approach, Your Honor?
9 THE COURT: You may.
10 All right. Mr. Godfrey, you and your client come
11 forward, please.
12 Mr. Coler, you and Ms. Ganss.
13 MR. GODFREY: May it please the Court?
14 THE COURT: Yes, sir.
15 MR. GODFREY: We would respectfully move to have the
16 verdict set aside, make a motion for a new trial based on
17 the fact that the evidence does not support the verdict, and
18 based on my objections and motions so far.
19 THE COURT: Thank you.
20 I think, in my view of the evidence, it was
21 overwhelming against your client. I found that his, from my
22 observation, looking at the credibility, et cetera, I just
23 found his testimony was highly unbelievable and not credible
24 at all, and I think the jury, I've watched them. They were
25 very careful in observing all the witnesses, and obviously

1 it was for them to determine who they believed, and I
2 certainly concur in their verdict if I were sitting in
3 nonjury, and I find that there was ample evidence in the
4 record, overwhelming evidence in the record to support the
5 verdict, and I respectfully deny your motion.
6 And obviously you have a right to an appeal, Mr. Smith,
7 and your lawyer will be able to discuss that matter with
8 you.
9 All right. Any prior record, from the State?
10 SOLICITOR COLER: No, sir, no convictions that I can
11 show the Court.
12 THE COURT: As I understand, the range of sentence, on
13 the murder case, is anywhere from 30 to life without parole.
14 Is that your understanding, Mr. Godfrey?
15 MR. GODFREY: That is correct, judge.
16 THE COURT: Your understanding, Mr. Coler, Mr. Ganss?
17 SOLICITOR COLER: That's correct, Your Honor.
18 THE COURT: And on the possession of a weapon during a
19 violent crime, that is a felony, class F also, carries five
20 years.
21 SOLICITOR COLER: Yes, sir.
22 THE COURT: That can be given concurrent or it has to
23 be consecutive?
24 SOLICITOR COLER: I believe it's consecutive.
25 MR. GODFREY: I think it---

1 THE COURT: I was under the impression it had to be
2 consecutive too, but my little book doesn't say that.
3 MR. GODFREY: It can be either concurrent or
4 consecutive at least is the defense's position.
5 THE COURT: Somebody hand me the statute. 23-3-620.
6 I'm sorry. That's not correct. 490. 16-23-490.
7 SOLICITOR COLER: Judge, I believe Mr. Godfrey is, is
8 correct. That can be consecutive or concurrent. I'll hand
9 up the statute if you want to look at it.
10 THE COURT: Mr. Godfrey, you are correct.
11 Mr. Coler, anything else?
12 Ms. Ganss, anything else other than what we've already
13 heard?
14 SOLICITOR COLER: No, sir, not from the State.
15 Judge, just for the record, I asked the victim's family
16 if they had anything to add, and they indicate they did not
17 have anything additional.
18 THE COURT: Okay. Is that correct, family?
19 (Family members respond in the affirmative.)
20 THE COURT: Thank you.
21 Mr. Godfrey.
22 MR. GODFREY: May it please the Court?
23 THE COURT: Certainly.
24 MR. GODFREY: David, as you, as you told from his
25 direct testimony, has a very significant health condition.

1 He's had five bypasses. He's on medication constantly, will
2 be for the rest of his life.
3 THE COURT: How old is he?
4 MR. GODFREY: He is 46 years old, Your Honor.
5 We would respectfully request that the Court consider
6 the low end of the range as opposed to a life sentence.
7 David has been in jail or in prison since 1997. Obviously,
8 he'll get credit for that time, and his health is gone
9 remarkably downhill since he's been in prison.
10 And his family and he are afraid that he's never gonna
11 make it out of prison. This is a case, I think, that does
12 have some extenuating circumstances. It wasn't just one
13 person. There was two.
14 He understands the jury verdict and he accepts the jury
15 verdict. And we would respectfully request the Court's
16 mercy.
17 THE COURT: And I apologize, give me his age once
18 again.
19 MR. GODFREY: Forty-six, Your Honor.
20 THE COURT: Mr. Godfrey, this is just a prime example
21 of what drugs do to people like this. Here you got a man
22 who has a good job, good trade, able to make a decent
23 living, who's lured into the drug business because of his
24 family and their problems, and he claims financial problems,
25 which is absolutely no excuse to be dealing in drugs. Lured

1 into by another family here in town.
2 And then another man who wants to buy drugs and needs
3 them so bad that he calls somebody up at two o'clock in the
4 morning. And what we have left is obviously someone dead, a
5 man, your client, who had the ability to lead a productive
6 life, who is now killed someone, and his life is all but
7 for -- just be the rest of it in prison, which is not
8 productive at all.
9 And it's just a, an example of what drugs are doing to
10 our society, and obviously if you choose to live in that
11 world, you sort of have to -- you know, you live by the
12 sword, you die by the sword. And society can not tolerate,
13 shouldn't tolerate the drugs, but certainly shouldn't
14 tolerate the consequences that flow from these types of
15 activities.
16 And he certainly didn't seem very sorry or anything
17 else when he took the stand today. It was sort of cavalier
18 as to how he approached the thing, and it's just part of
19 doing business. Go about my life.
20 I will take into consideration his health, his age, and
21 I don't know if this sentence will send a message to other
22 people in our area that are dealing in drugs, they may not
23 go to jail for drug dealing, but if they get in a situation
24 like this, and kill somebody, they may end up in jail for
25 the rest of their lives.

1 And I've got to send some message. I don't know any
2 other way to, to combat it. Just seems like it's a never
3 ending problem that we experience, and we get people who is
4 intelligent as your client is, and they choose to go down
5 this path. I don't know any, any other way other than send
6 a message that they can't do this.
7 All right. Mr. Smith, on Indictment 97-GS 42-1639,
8 Count One, murder, the Sentence of the Court, you be
9 committed to the State Department of Corrections for a
10 determinate period of 35 years.
11 On the Count Two, that's five years. That runs
12 concurrent with Count One.
13 As I understand this sentence, it's a day for day
14 sentence. You've done about nine years of it. You got 25
15 more to go. Puts you at age around 70, 71, 72.
16 Good luck to you.
17 SOLICITOR COLER: Thank you, Your Honor.
18 SOLICITOR GANSS: Thank you, Your Honor.
19
20 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *
21
22
23
24
25

1 C E R T I F I C A T E

2

3 I, Pamela E. Green, Official Court Reporter for the
4 Seventh Judicial Circuit of the State of South Carolina, do
5 hereby certify that the foregoing is a true, accurate and
6 complete Transcript of Record of the proceedings had and
7 evidence introduced in the trial of the captioned case,
8 relative to appeal, in the Court of General Sessions for
9 Spartanburg County, South Carolina, on the 31st day of
10 October and the 1st day of November, 2005.
11 I do further certify that I am neither of kin, counsel
12 nor interest to any party hereto.
13
14 January 27th, 2006
15
16
17 Pamela E. Green
18 PAMELA E. GREEN, Court Reporter
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID DWIGHT SMITH,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Attorney

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF FACTS 4

ARGUMENT 5

CONCLUSION 12

CERTIFICATE OF COUNSEL 13

TABLE OF AUTHORITIES

Cases

State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) 8, 10

State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999) 10

State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) 6

State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983) 7

State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) 6

State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) 10

State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) 6

State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990) 10

State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005) 9

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 8

State v. White, 253 S.C. 475, 171 S.E.2d 712 (1969) 9

State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) 6

STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

2. The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

3. The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

STATEMENT OF FACTS

On October 31 and November 1, 2005, David Dwight Smith stood trial in Spartanburg County on an indictment charging him with murder and possession of a firearm during the commission of a violent crime. The victim was a known crackhead, Robert Finley, who was shot once through the left eye at close range. Judge Jack Early presided at Smith's jury trial. Smith testified that his gun discharged accidentally as he was defending himself from Finley's physical attack after Finley stole the crack cocaine Smith had brought to sell him. In addition to murder, the judge instructed the jury on self-defense, but refused defense counsel's request to charge and accident. (That ruling forms the basis of this appeal.) The jury found Smith guilty as charged, and the judge imposed concurrent sentences of thirty-five and five years.

ARGUMENT

1.

The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

Smith admitted that he shot Finley. The only question at his trial was the nature of the killing – that is, whether it was intentional (and thus, murder, voluntary manslaughter or self-defense) or unintentional (and therefore involuntary manslaughter or accident). The State's theory of the case was that Smith had murdered Finley over $40 Finley owed him from a previous crack cocaine purchase. ROA p. 9, lines 7-15. ROA p. 46, line 13 – p. 49, line 7. Smith testified that the gun had discharged accidentally when he used it as a sap to defend himself from Finley's physical attack after Finley stole the crack cocaine Smith had brought to sell him. ROA p. 89, line 11 – p. 97, line 3. He said, "I was hitting him with a gun and it went off and hit him in the face." ROA p. 118, line 19 – p. 119, line 2.

Two State's witnesses corroborated Smith's testimony in its essentials. One stated that Finley told him before Smith arrived that "he was gonna steal the drugs." ROA p. 66, lines 2-7; Court's Exhibit #2 (transcript of testimony of Otis Hyder). The other testified, "All I know is, the door came open and they was falling out the door … [s]cuffling. It's like it happened so quick. They was so close together, that's all I know is I just heard a pop." ROA p. 14, line 23 – p. 16, line 18. This witness describes Smith as "scared" and "frightened" immediately afterwards. ROA p. 17, lines 11-13.

Based on this evidence, defense counsel requested an instruction on voluntary manslaughter (as well as involuntary manslaughter and accident, which are treated subsequently). ROA p. 82, lines 2-24. The Assistant Solicitor responded, "[I]f they're

trying to say that legal provocation was the attack of Mr. David Smith by Robert Finley, then that goes to a self-defense charge. ... They can't use the sufficient legal provocation as their self-defense element and to make it voluntary manslaughter." ROA p. 135, lines 9-24. The judge bought this argument and refused to charge voluntary manslaughter. ROA p. 138, lines 13-16. His final instructions to the jury do not contain a charge on voluntary manslaughter. ROA p. 139, line 3 – p. 151, line 17. Defense counsel objected to its omission. ROA p. 151, line 21 – p. 152, line 1.

Voluntary manslaughter is defined as the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). A trial judge should refuse a charge on the lesser-included offense of voluntary manslaughter only where it very clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000).

In this case, the trial judge erred by listening to the Assistant Solicitor: self-defense and voluntary manslaughter and not mutually exclusive as a matter of law. *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998). In *State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596, 597 (1988), the Supreme Court explained:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. ... The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

Here, Smith testified that Finley attacked him without provocation. Eyewitness testimony corroborated his account. Such evidence has routinely supported a charge on

voluntary manslaughter. See, for example, *State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983).

Therefore, under the circumstances of this case, the judge should have instructed the jury on voluntary manslaughter. Since he did not, this Court should reverse Smith's conviction for murder and possession of a firearm during the commission of a violent crime and remand for a new trial.

2.

The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

Once again, Smith testified that the gun discharged accidentally as he was using it to strike Finley, who was attacking him. Two eyewitnesses, who testified for the State, corroborated Smith's account. The judge rejected defense counsel's request to charge involuntary manslaughter simply because Finley was killed during a drug deal. ROA p. 129, line 20 – p. 130, line 15. His final instructions to the jury do not contain a charge on involuntary manslaughter. Defense counsel took exception to its omission.

In support of his request for involuntary manslaughter, defense counsel cited *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). ROA p. 135, lines 18-21. In view of this, the trial judge's error is incomprehensible.

Involuntary manslaughter is defined as either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Moreover, "the unlawful activity must proximately cause death." *Burriss*, 513 S.E.2d at 110, footnote 11. The judge erred by failing to take this requirement of causation into account.

The evidence in this case would support a finding that Smith was lawfully armed in self-defense at the time the fatal shot occurred. *Burriss*. "[T]he negligent handling of a loaded gun will support a finding of involuntary manslaughter." *Id.*, citing *State v. White*,

253 S.C. 475, 171 S.E.2d 712 (1969); see also, *State v. Mekler*, 368 S.C. 1, 626 S.E.2d 890 **331** (Ct. App. 2005).

Therefore, under the circumstances of this case, the judge should have instructed the jury on involuntary manslaughter. Since he did not, this Court should reverse Smith's conviction for murder and possession of a firearm during the commission of a violent crime and remand for a new trial.

3.

The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

The same evidence which supported charges on manslaughter also supported a charge on the law of accident. The trial judge refused to charge accident because he found that Smith was "in the middle of the drug deal." ROA p. 137, line 19 – p. 138, line 2. His final instructions to the jury do not contain a charge on accident. Counsel excepted to its omission.

For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). As in *State v. Burriss*, Smith claimed that he armed himself in self-defense, but the fatal shot occurred when the gun fired accidentally. As in his refusal to charge involuntary manslaughter, the judge erred by failing to take into account the rule that the unlawful activity (here, drug dealing) must proximately cause the death. Instead, the judge should have considered whether Smith was otherwise acting lawfully when the fatal shooting occurred. See *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999).

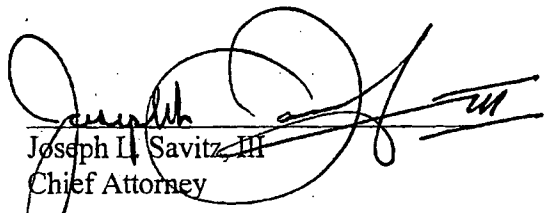
Again, *Burriss* – which was before the trial judge – is dispositive. Since Smith was entitled to arm himself in self-defense when the gun went off, he was entitled to a charge on accident. In addition to *Burriss* and *Goodson*, see *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990). There is ample evidence in the record to support Smith's claim that he armed himself in self-defense at the time of the fatal shooting.

Therefore, under the circumstances of this case, the judge should have instructed the 333 jury on accident. Since he did not, this Court should reverse Smith's conviction for murder and possession of a firearm during the commission of a violent crime and remand for a new trial.

CONCLUSION

Based on the foregoing arguments, the Court should reverse Smith's convictions for murder and possession of a firearm during the commission of a violent crime and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Chief Attorney

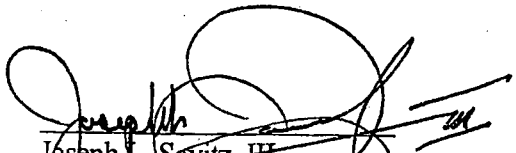
ATTORNEY FOR APPELLANT.

This 8th day of May, 2007.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 8, 2007



Joseph L. Savitz, III
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211-1589
803) 734-1343
Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

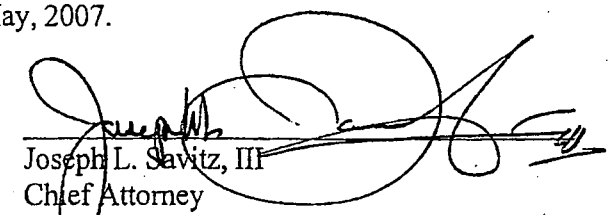
V.

DAVID DWIGHT SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of May, 2007.



Joseph L. Savitz, III
Chief Attorney

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2007.

Karen D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Jack Early, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID DWIGHT SMITH,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

DERRICK K. McFARLAND
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit

180 Magnolia Street, Third Floor
Spartanburg, South Carolina 29306
(864)596-2575

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENTS 5

1. **The trial judge properly denied Appellant's motions to charge voluntary manslaughter, involuntary manslaughter and the law of accident to the jury where the undisputed facts of the case fail to support these charges** 5

   A. **Voluntary Manslaughter** 5

   B. **Involuntary manslaughter** 7

   C. **Accident** 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) 7, 8

State v Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) 8

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (2003) 5

State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) 5

State v. Light, 363 S.C. 325, 610 S.E.2d 504 (Ct.App. 2004) 7

State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) 6

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) 6

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 7

State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) 5

OTHER AUTHORITIES

S.C. Code Ann. § 16-23-410 7

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

2. The trial judge committed reversible error by refusing to instruct the jury on the lesser included offense of involuntary manslaughter.

3. The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

STATEMENT OF THE CASE

Appellant, David Dwight Smith was indicted at the April 3rd, 1997 term of the Court of General Sessions for Spartanburg County for murder and possession of a firearm during the commission of a violent crime. The charges arose from the January 12th, 1997 shooting of Robert Finley. The case proceeded to trial on December 4th, 1997 before the Honorable Joseph Derham Cole, Circuit Court Judge and a jury. Appellant was represented by T. Louis Cox, Esquire.

The jury found Appellant guilty as charged. Judge Cole sentenced Appellant to life imprisonment for murder and five (5) years, concurrent, for possession of a firearm during the commission fo a violent crime.

Appellant, through Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense filed a Final Brief of Appellant. The South Carolina Supreme Court dismissed the appeal by Order dated December 2nd, 1999 and subsequently denied Appellant's petition for rehearing by Order dated April 6th, 2000.

Petitioner next filed an Application for Post-Conviction Relief ("APCR"), on June 7th, 2000. The State filed a Return on December 18th, 2001. The Honorable Donald W. Beatty held an evidentiary hearing in the matter on November 6th, 2002. Petitioner was present and represented by E.P. Godfrey, Esquire. The state was represented by Assistant Attorney General Douglas E. Leadbitter. At the hearing, Petitioner proceeded on the following grounds:

1. Ineffective assistance of counsel.
2. Failure to call an expert witness.

Petitioner testified on his own behalf. The State presented the testimony of trial counsel Cox. After the hearing, Judge Beatty issued an Order Granting Post-Conviction Relief dated

May 23rd, 2003.

The State timely filed and served with the South Carolina Supreme Court a notice of appeal from Judge Beatty's Order. On January 9th, 2004, the State filed a Petition for Writ of Certiorari raising the following issues for review:

1. Did the PCR Court err in finding that trial counsel was ineffective for failing to file his own formal Rule 5/Brady motion?

2. Did the PCR Court err in finding that trial counsel was ineffective for failing to call a ballistics expert as a defense witness?

3. Did the PCR Court err in finding that trial counsel was ineffective for failing to call a crime scene analyst or blood splatter expert as a defense witness?

4. Did the PCR Court err in finding that trial counsel was ineffective for failing to interview or call Investigator Mike Kitts as a defense witness?

5. Did the PCR Court err in finding that trial counsel was ineffective for failing to adequately cross examine Detective Steve Denton?

Appellant filed a Return to Petition for Writ of Certiorari dated February 23rd, 2004. By Order dated December 1st, 2004, the South Carolina Supreme Court denied the petition for writ of certiorari. A remittitur dismissing the appeal was also filed on December 17th, 2004.

Appellant was retried on October 31st, 2005 before the Jack Early, III, Circuit Court Judge, and a jury. Appellant was represented by William Godfrey. The State was represented Robert Coler and Sara Ganss, Assistant Solicitors for the Seventh Judicial Circuit.

The jury found Appellant guilty as charged. Judge Early sentenced Appellant to imprisonment for thirty-five (35) years for murder and five (5) years, concurrent, for possession of a firearm during the commission of a violent crime.

A timely Notice of Appeal was served. This appeal follows.

STATEMENT OF FACTS

At approximately 2:30 am on January 12th, 1997, Robert Finley left his mobile home to walk to his neighbor's (Otis Hyder) mobile home to borrow his phone. Finley wanted to use the phone to purchase some crack. Finley called a dealer, Rodney Smith, but Rodney refused to help him. However, Rodney's sister, Angie Smith, volunteered to set up a drug buy between Finley and another dealer, David Dwight Smith (Appellant). Appellant picked Angie up at home and the two drove to meet Finley at Hyder's mobile home. Appellant mentioned to Angie that Finley owed him $40 from a previous drug trade. (R. 1-9; Tr. pp. 62-70).

Appellant stayed in the car while Angie entered Hyder's trailer. Angie attempted to facilitate the drug deal, but Finley wanted to deal with Appellant. (R.161, 10; 1997 Tr. p. 84; Tr. p. 71). Angie walked back to the car and informed Appellant that Finley did not have money for the deal. Appellant reached for something in the car and then walked to the trailer. (R. 11-12; Tr. pp. 72-73). Once inside Appellant recognized that Finley did not have money for drugs that night or the $40 he was owed. A verbal argument ensued which led to Appellant brandishing a hand gun. Appellant and Finley began physically struggling with each other in the doorway of the mobile home. Appellant shot Finley once in the left eye and fled. Appellant told Angie "you don't know nothing, you ain't seen nothing." (R. 162-66, 15-17; 1997 Tr. pp. 85-89; Tr. pp. 76-78).

ARGUMENT

I.

The trial judge properly denied Appellant's motion to charge voluntary manslaughter, involuntary manslaughter, and the law of accident to the jury where the undisputed facts of the case fail to support these charges.

Appellant contends the trial court erred by finding that Appellant's testimony did not justify a charge on voluntary manslaughter, involuntary manslaughter, or accident in this case[1]. First, hee asserts that the victim had attacked him without provocation, therefore he was entitled to a voluntary manslaughter charge. Next, he asserts that evidence would support a finding that Appellant was lawfully armed in self-defense when the shooting occurred and consequently, he was also entitled to a charge of involuntary manslaughter. Finally, Appellant asserts that since Appellant was entitled to arm himself in self-defense when he shot the victim, he was entitled to a charge on accident.

The State disagrees and submits that the trial judge properly refused to give the requested instructions because there was no evidence to support them in the record. To the contrary, the only evidence presented to the trial jury was that Appellant was either guilty or not guilty of the offense of murder.

A. Voluntary Manslaughter

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. ***State v. Wood***, 362 S.C. 135, 607 S.E.2d 57 (2004); ***State v. Ivey***, 325 S.C. 137, 481 S.E.2d 125 (1997). Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. *Id.* Both heat of passion and sufficient legal

---

1The trial court issued a self defense charge. (R. 146-48; Tr. pp. 305-307). However, the State takes the position that the evidence also did not support a charge on self defense.

provocation must be present at the time of the killing. ***State v. Grubbs***, 353 S.C. 374, 577 S.E.2d 493 (2003). To reduce a killing to manslaughter, the provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection. ***State v. Locklair***, 341 S.C. 352, 535 S.E.2d 420 (2000). A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter. ***State v. Shuler***, 344 S.C. 604, 545 S.E.2d 805 (2001).

Here, Appellant testified he was selling crack to the victim and was allowing the victim to test the drugs. The victim indicated he did not have money to pay for the drugs, but would take them anyway. Then, according to Appellant, the unarmed victim walked towards him in a threatening manner. Appellant then pulled his gun. *The victim then stopped and an exchange of words occurred.* Next, Appellant claims he lowered the gun to put it back into his pocket and the victim tried to knock the gun out of his hand. This lead to a struggle over the gun, which fired "unintentionally" while the Appellant was repeatedly hitting the victim in the head with the butt of the gun. (R. 90-96; Tr. pp. 208-214).

In this case, although Appellant testified the victim was walking towards him in a threatening manner, he also noted his act of brandishing a pistol stopped the victim. Even under Appellant's scenario, he "had the drop" on the victim and the only weapon at the scene. The victim's attempt to take the gun away from Appellant in a move of self preservation cannot be considered sufficient legal provocation. Finally, Petitioner's testimony indicates the shooting was not intentional. Because there was no sufficient legal provocation in the Appellant's scenario, he was not entitled to a voluntary manslaughter charge. The trial court did not err in denying this request.

B. Involuntary Manslaughter

The trial judge should refuse to charge a lesser-included offense where there was no evidence that the defendant committed the lesser rather than the greater offense. ***State v. Tucker***, 324 S.C. 155, 478 S.E.2d 260 (1996). To be entitled to a charge on involuntary manslaughter, there must be evidence that the defendant either: (1) killed another without malice and unintentionally, but while engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) killed another without malice and unintentionally, but while 'acting lawfully with reckless disregard of the safety of others. ***State v. Burriss***, 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999)).

The trial judge properly ruled in the present case that Appellant was not entitled to have the jury instructed on the law of involuntary manslaughter.

While Appellant's testimony indicates the shooting was unintentional, clearly he was engaged in an unlawful activity tending to cause death or great bodily harm. S.C. Code Ann. § 16-23-410 provides that it "is unlawful for a person to present or point at another person a loaded or unloaded firearm. A person who violates the provisions of this section is guilty of a felony. . . ." Furthermore, Appellant's testified the gun fired unintentionally while he was hitting the victim repeatedly in the head with the butt of the gun.

Although Appellant was not engaged in a lawful activity when the crime occurred, even if he was, the act of hitting another in the head repeatedly with the butt of a gun does tend to cause death or great bodily harm. Also, Appellant's testimony does not indicate he handled the gun with reckless disregard for the safety of others. Instead, he maintained the discharge was merely an accident. *See* ***State v. Light***, 363 S.C. 325, 610 S.E.2d 504 (Ct.App. 2004). An involuntary

manslaughter charge was not appropriate under these circumstances.

C. Accident

Appellant's next argument is that the trial judge erroneously refused to charge the jury concerning the law of accident. The State disagrees and submits that the trial judge properly refused the requested instruction because there was no evidence that the killing was accidental. Far from it, the only evidence was that Appellant was engaged in the felony of pointing and presenting a firearm at the time he discharged the weapon; and, more importantly, he shot the victim as the victim attempted to prevent him from using the gun. As a result, he was either guilty or not guilty of murder.

In ***Burriss, supra***, the Court explained that "[f]or a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." 334 S.C. at 259, 513 S.E.2d at 106. When the prosecution's evidence in this case is taken as a whole, it is clear that it reasonably tended to prove that Appellant murdered the victim; and it would be improper for this Court to consider Appellant's contention that he is entitled to a charge on accident based upon an "accidental" shooting that occurred because Appellant introduced the only weapon into the scenario.

More importantly, even Appellant's own statement reveals that he was not acting lawfully at the time of the offense. Instead, he was engaged in the crime of pointing and presenting a firearm. He presented the weapon when he pulled it from his coat pocket from where he had secreted it. Further, it is respectfully submitted that it would be impossible for the crime to have occurred in the manner described by him – shooting the victim in the left eye while pistol whipping him – if he was exercising due care in the handling of the weapon at the time it

discharged.

Therefore, he was not entitled to a jury instruction on the law of accident. ***Burriss***; ***State v Goodson***, 312 S.C. 278, 440 S.E.2d 370 (1994). More importantly, it is undisputed that the weapon was discharged and the victim killed while he was reacting from having a gun pulled on him. Under these circumstances, he was guilty of murder and could not have been entitled to a charge on the law of accident. *Id.* This argument is without merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

DERRICK K. McFARLAND
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit

BY: _____
ATTORNEY FOR RESPONDENT

April 20, 2007.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Jack Early, Circuit Court Judge

THE STATE,

Respondent,

vs.

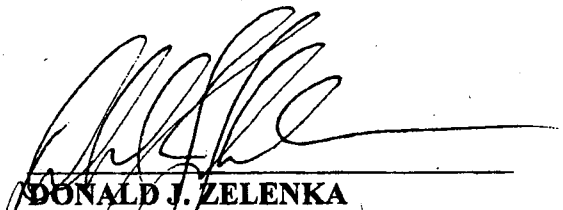
DAVID DWIGHT SMITH,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR 211(b).

This 20th day of April, 2007.



DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Jack Early, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID DWIGHT SMITH,

Appellant.

PROOF OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Joseph L. Savitz, III, Chief Attorney,
S.C. Commission of Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 20th day of April, 2007.

DONALD J. ZELENKA
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

352

2008 WL 9840396
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

The STATE, Respondent,
v.
David Dwight SMITH, Appellant.

No. 2008–UP–194.
|
Heard Nov. 6, 2007.
|
Decided March 20, 2008.

Appeal from Spartanburg County; Doyet A. Early, III, Circuit Court Judge.

Attorneys and Law Firms

Chief Attorney Joseph L. Savitz, III, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

Opinion

PER CURIAM.

*1 David Dwight Smith (Smith) was convicted of murder and possession of a firearm during the commission of a violent crime. He asserts on appeal the trial judge erred in refusing to instruct the jury on: 1) voluntary manslaughter, 2) involuntary manslaughter, and 3) accident. We reverse and remand.

FACTS

Smith was indicted for murder and possession of a firearm during the commission of a violent crime. The charges arose from the January 12, 1997 shooting of Robert Finley (Finley). At trial, the jury found Smith guilty of both charges and the judge sentenced him to life imprisonment for murder and five years, concurrent, for possession of a firearm during the commission of a violent crime.

Smith unsuccessfully appealed his case and then filed an application for post-conviction relief (PCR) alleging (1) ineffective assistance of counsel and (2) failure to call an expert witness. After a hearing, the judge granted Smith post-conviction relief.

Smith was retried on October 31, 2005. The jury found him guilty of both charges. The judge sentenced him to imprisonment for thirty-five years for murder and five years, concurrent, for possession of a firearm during the commission of a violent crime.

At trial, testimony revealed that at approximately 2:30 a.m. on the night in question Finley walked to Otis Hyder's (Hyder) mobile home to use his phone. Finley wanted to purchase some crack cocaine and called a dealer, Rodney Smith (Rodney).[1] Rodney refused to help Finley, but Rodney's sister, Angie Smith (Angie), volunteered to set up a drug buy between Finley and another dealer, Smith. Smith picked Angie up at home and the two drove to meet Finley at Otis Hyder's mobile home.

Initially, Smith stayed in the car while Angie entered Hyder's trailer. She attempted to facilitate the drug deal, but Finley wanted to deal with Smith directly. Angie returned to the car and informed Smith of the situation. Smith walked into the trailer; once inside Smith realized Finley did not have money for the deal and that Finley insisted on keeping the drugs. Smith testified that Finley tried to rob him. The situation escalated into a fight and struggle over control of a firearm that was in Smith's possession. During the fight, the firearm discharged striking Finley in the left eye killing him.

During the first trial, Judge Derham Cole charged the jury on the law of voluntary manslaughter, involuntary manslaughter, and accident, the three charges at issue in this appeal. In the case at hand, Judge Jack Early charged the jury on murder and self-defense. In addition, Smith requested charges on voluntary manslaughter, involuntary manslaughter, and accident, which the judge denied.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001); *State v. Wood,* 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct.App.2004). Generally, the trial judge is required to charge only the current and correct law of South Carolina. *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472–73 (2004); *State v.. Brown,* 362 S.C. 258, 261–62, 607 S.E.2d 93, 95 (Ct.App.2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Patterson,* 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct.App.2006). If any evidence supports a jury charge, the trial judge should grant the request. *Brown,* 362 S.C. at 262, 607 S.E.2d at 95. "Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense." *State v. Small,* 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct.App.1992). "To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Patterson,* 367 S.C. at 232, 625 S.E.2d at 245.

DISCUSSION

ISSUE:

***2** Did the trial judge err in refusing to charge voluntary manslaughter, involuntary manslaughter, and accident?

Voluntary Manslaughter

First, Smith contends that his murder conviction should be reversed and remanded for a new trial based on the trial judge's failure to charge the jury on the law of voluntary manslaughter. We agree.

Voluntary manslaughter is defined as the "unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation." *State v. Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Both heat of passion and sufficient

legal provocation must be present for the killing to constitute voluntary manslaughter. *Id.* at 302, 555 S.E.2d at 394; *State v. Cole,* 338 S.C. 97, 101–02, 525 S.E.2d 511, 513 (2000).

"[T]o warrant the Court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Gardner,* 219 S.C. 97, 64 S.E.2d 130, 134 (1951) (citing *State v. Norton,* 28 S.C. 572, 6 S.E. 820 (1888)). Moreover, South Carolina case law consistently holds that a request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. *See State v. Goldenbaum,* 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988). "In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant." *Cole,* 338 S.C. at 101, 525 S.E.2d at 512–13 (citing *State v. Byrd,* 323 S.C. 319, 474 S.E.2d 430 (1996)).

The record supports a charge on the law of voluntary manslaughter. Smith claims the victim was attempting to rob him thereby provoking the altercation which he ultimately claims caused the alleged accidental shooting. Smith specifically testified that Finley "was coming toward me, the expression on his face and everything was a real serious demeanor, and I, you know, I didn't know what to expect from him next: ... [h]e looked like he was on something." Smith further stated, "[a]s I said, he had this look about him, and he was approaching me. So, I took the gun out of my pocket hoping that if he saw it, that maybe he would cease." Smith also testified that Finley "tries to knock the gun out my hand. He hit me with the left, with the left arm and grabbed me in my collar of the jacket ... I thought I was gonna lose the gun. He had hit it and I got the grip on the gun and he's got me ... I went to defend myself. I threw my left arm over his, over his arm that he had me grab, and I hit him with the butt of the gun.... I was trying to get out of there ... He was coming up on me, I was afraid.... I was hitting him with the gun and it went off and hit him in the face."

This testimony, coupled with the testimony of Angie who described the encounter right before the shot was fired as two men scuffling and falling out of the trailer door, sufficiently depicts a fight between Finley and Smith immediately preceding the shooting and after Smith claimed Finley was trying to rob him. Thus, the record contains testimony from Smith that Finley initiated the physical confrontation by trying to rob him and aggressively approaching him. Smith testified he was trying to escape the situation and feared Finley would gain possession of the firearm. Moreover, Smith testified that the discharge of the pistol was a "[f]luke accident. I was hitting him with the gun and it went off and hit him in the face." Smith testified "I didn't intend to use it, and I never pointed it at him."

***3** The trial judge, in denying Smith's request to charge voluntary manslaughter, determined that there was insufficient evidence to show sudden heat of passion although Smith claimed Finley tried to rob him and that they were fighting. In *State v. Davis,* 278 S.C. 544, 298 S.E.2d 778 (1983), the court found that a voluntary manslaughter charge was appropriate where "a witness testified that appellant and the victim had been 'fighting.' From this circumstance of 'provocation' and 'heat of passion,' guilt of voluntary manslaughter could be fairly and logically deduced and was thus a proper matter for jury determination." *Id.* at 546, 298 S.E.2d at 779 (citing *State v. Kahan,* 268 S.C. 240, 233 S.E.2d 293 (1977)).

Viewing the case at hand in the light most favorable to Smith, the requested charge is appropriate. *Cole,* 338 S.C. at 101, 525 S.E.2d at 513. The trial judge charged self-defense[2] but declined to also charge voluntary manslaughter. If the trial judge concluded, as the solicitor argued, that the element of legal provocation could not be simultaneously used in support of both self-defense as well as voluntary manslaughter, that conclusion nonetheless constitutes legal error.

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. *State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981). The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter. *Id.*
> *State v. Gilliam,* 296 S.C. 395, 396–97, 373 S.E.2d 596, 597 (1988).

Further, any concern about whether the defendant was acting with presumed malice (or a mandatory presumption of malice) as a matter of law because of the alleged commission of a felony has recently been answered and revisited by our supreme court in *Lowry v. State,* Op. No. 26436 (S.C. Sup.Ct. filed Feb. 11, 2008). In *Lowry,* the supreme court rejected the presumed malice (substantive rule of law) approach to the felony murder rule as unconstitutionally shifting the state's burden of proof on the issue of malice. The court continues to adhere to precedent regarding the alternative inference of malice approach suggested in *State v. Norris,* 285 S.C. 86, 92, 328 S.E.2d 339, 342 (1985) (overruled on other grounds by *State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991). Any implication of malice arising from an act occurring during the commission of a felony may be accepted or rejected by the jury as it deems appropriate.

We, therefore, respectfully find the trial judge should have instructed the jury on voluntary manslaughter and that Smith was prejudiced by the failure to charge the lesser offense. Because we reverse on the issue of voluntary manslaughter, we need not address the remaining issues presented. *Whiteside v. Cherokee County School Dist. No. One,* 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

CONCLUSION

*4 We respectfully conclude the trial court erred in refusing to instruct the jury on voluntary manslaughter; we also find that Smith was prejudiced by this error. Therefore, we reverse the conviction and remand the case to the circuit court for a new trial. Furthermore, in reversing Smith's murder conviction, we must also reverse the conviction for possession of a firearm during the commission of a violent crime because the former conviction is a prerequisite to the latter. *E.g.,* S.C.Code Ann. § 16–23–490(E) (2003) (noting the additional punishment for possession of a firearm during the commission of a violent crime may not be imposed unless the defendant is convicted of the underlying violent crime); *State v. Taylor,* 356 S.C. 227, 235 n.4, 589 S.E.2d 1, 5 n.4 (2003) (noting defendant's conviction for possession of a weapon during the commission of a violent crime must be reversed where the court was reversing defendant's murder conviction). Based on the foregoing, Smith's convictions are hereby

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., and CURETON, A.J., concur.

All Citations

Not Reported in S.E.2d, 2008 WL 9840396

Footnotes

1 Since the appellant is referred to as "Smith" throughout this order and there are two key witnesses named Rodney Smith and Angie Smith, these witnesses will be referred to as Rodney and Angie respectively to avoid any confusion.

2 No issues on appeal have been argued as to the judge's charge of self-defense.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID DWIGHT SMITH,

Appellant.

OPINION NO. 2008-UP-194

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
PURSUANT TO RULE 219, SCACR

INTRODUCTION

The above-named Respondent would respectfully ask this Court to grant a petition for rehearing pursuant to Rule 221, SCACR, based upon the following facts or points of law which the majority of this Court may have overlooked, misapprehended or misconstrued.

I.

On March 20, 2008, this Court issued an unpublished Opinion in which it reversed Appellant's 2005 Spartanburg County convictions for murder and possession of a firearm during the commission of a violent crime. *State v. David Dwight Smith*, Opinion No. 2008-UP-194 (S.C. Ct. App., Mar. 20, 2008). In doing so, the Court addressed Appellant's arguments that the trial judge

erroneously failed to give instructions on the law of voluntary manslaughter, involuntary manslaughter and accident. The Court held that the failure to instruct the jury on voluntary manslaughter constituted reversible error. *Id* at *3- *7. Because the Court reversed on the failure to instruct the jury on voluntary manslaughter, it held that "we need not address the remaining issues presented. *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)." *Smith*, at *7.

II.

In holding that the trial judge erred by not charging voluntary manslaughter, the Court may have overlooked that there was no evidence to support a jury charge on this lesser-included offense.

Respondent agrees that the law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). However, "[o]nly the law applicable to the case should be charged to the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). Voluntary manslaughter is an "unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. S.C. Code Ann. § 16-3-50 (Supp.2007); *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394; *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. *Walker*; *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996).

Voluntary manslaughter mitigates an otherwise felonious killing to manslaughter, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they must "be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what,

according to human experience, may be called an uncontrollable impulse to do violence." *Walker*, 324 S.C. at 260, 478 S.E.2d at 281 (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). Where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951). Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter. *State v. Mason*, 115 S.C. 214, 105 S.E. 286 (1920). A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). When determining whether a defendant is entitled to a voluntary manslaughter charge, the court must view the facts in the defendant's favor. *Byrd*, 323 S.C. at 321, 474 S.E.2d at 431.

III.

In the present case, the Court held that Appellant's testimony, coupled with that of Angie Smith (Angie) supported a manslaughter charge. *Smith*, at *4-*7. However, the Court may have overlooked or misapprehended that Appellant's testimony simply did not support a manslaughter charge. The forty-seven year old Appellant testified that he was selling crack to the victim at a trailer;[1] and that he was allowing the victim to test the drugs. The victim indicated he did not have money to pay for the crack, but stated that he was "taking this" [the crack] anyway. Then, according to Appellant, the **unarmed** victim walked towards him. "The expression on his face and everything was a real serious demeanor," and ... **I didn't know what to expect from him next**." (Emphasis added). **R. pp. 84; 90-92.**

---

[1]This was Otis Hyder's mobile home. **R. pp. 11-12; 160-66.**

Appellant had his hand in his pocket, where he also had a gun. Appellant pulled his gun. The **victim** saw the gun, **stopped and an exchange of words occurred.**[2] Next, Appellant claims he lowered the gun to put it back into his pocket and the victim tried to knock the gun out of his hand. This lead to a struggle over the gun, which fired "unintentionally" while the Appellant was repeatedly hitting the victim in the head with the butt of the gun and after they had fallen out of the trailer.[3] Finally, he testified that the shooting was not intentional and that he did not intend to kill the victim. **R. pp. 84; 92-97.**

In this case, the Court found that "Smith claims the victim was attempting to rob him thereby provoking the altercation which he ultimately claims caused the alleged accidental shooting." *Smith*, at *. However, the victim never threatened Appellant verbally. He simply indicated a desire to take the crack and pay for it the following day. Further, Appellant admitted that he was uncertain of the victim's intent. He also candidly admitted that his act of brandishing a pistol stopped the victim. Even under Appellant's scenario, he "had the drop" on the victim and the only weapon at the scene. Also, the trailer door was open at all times, and he could have simply retreated (with his crack and his money) to the sanctuary of his vehicle. However, he did not make any effort to do so. *See Byrd, supra.*

Moreover, neither the victim's "serious demeanor" nor his actions were "such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool

---

[2]The victim asked Appellant to give him the gun, so that he could shoot **himself** (as opposed to Appellant). Appellant said no. He told the victim to return his crack to him and he said that he would leave.

[3]Appellant testified that the victim had left the trailer door open throughout the transaction. **R. pp. 108-09.**

reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *See Walker*, 324 S.C. at 260, 478 S.E.2d at 281. Indeed, Appellant all but admitted, at trial, that not only was he capable of "cool reflection," he demonstrated cool reflection. *Cf. Walker, supra*. As discussed, his testimony was that he used his pistol to beat the victim in the head; and he never intended to fire the gun. Rather, his intention was merely to get "[the victim] off of me. To simply hit him with the gun, get him off of me," so he could leave. (In other words, he was trying to defend himself). [4] He likewise testified that he never pulled the trigger on his weapon, and that it discharged while he was beating the victim. **R. p. 96, ll. 7-13**. *See also* **R. p. 95, ll. 10-14; p. 96, ll. 22-25**. Indeed, he described the manner in which the gun discharged as a "[f]luke accident." **R. p. 119, ll. 1-2**. As a result, there is no evidence that the killing was intentional, which is necessary for a manslaughter charge.

Therefore, the Court may have overlooked or misapprehended that Appellant's testimony did not support a voluntary manslaughter charge. Instead, it is consistent with cases where the South Carolina Supreme Court and this Court have held that a manslaughter charge was not warranted. *See, e.g., Byrd*, 323 S.C. at 322-23, 474 S.E.2d at 432-33 (defendant's response to the victim's statement that "she was 'fixing to end' it" did not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation, where he returned to his vehicle and, "[i]nstead of driving away, or simply remaining in the vehicle, [he] retrieved a nine millimeter pistol from his car's glove compartment and proceeded to the front of Victim's car[. There, he] ... shot at her two times

---

[4]Although the trial judge submitted self-defense to the jury (**R. pp. 146-49**), Appellant did not act in self-defense because he was not without fault in bringing on the difficulty. *Cf. State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007); *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007).

through the front windshield and then moved to the side of her car, where he shot two more times. Byrd testified that at no time did he stop to call to Victim"); *Rogers*, 320 S.C. at 525-26, 466 S.E.2d at 362-63 (evidence of racist statements made by victim's father and father's action of leaning into his truck did not demonstrate sufficient legal provocation to support jury charge on voluntary manslaughter); *State v. Light*, 363 S.C. 325, 610 S.E.2d 504 (Ct. App. 2005) (evidence was insufficient to establish that defendant had right to use deadly force in self-defense so as to warrant self defense charge; although defendant vacillated in his various accounts, he stated he had disarmed victim and taken possession of rifle when shot was fired, so victim, then unarmed, no longer posed threat to armed defendant and defendant could not have reasonably believed she did). *See also Knoten, supra.*[5]

IV.

Likewise, in relying upon Angie Smith's testimony to hold that a manslaughter charge should have been given, the Court may have overlooked or misapprehended that Angie's testimony did not support a voluntary manslaughter instruction. First, the Court may have overlooked that it improperly parsed only a segment of her testimony as supporting a manslaughter charge. *See State v. Foxworth*, 269 S.C. 496, 238 S.E.2d 172 (1977) ("the presence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice"); *State v. Rucker*, 319 S.C. 95, 459 S.E.2d 858 (Ct. App. 1995), *cert. denied*, Mar. 21, 1996 (same).

While it is one thing to give a charge based on an account given by a State's witness, it is quite

[5]The victim's attempt to take the gun away from Appellant in a move of self-defense also cannot be considered sufficient *legal* provocation.

another, as is necessary here, to cherry pick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually. Indeed, among the cases that have applied this principle, all of them have relied on one cohesive account, and not one of them has simply picked out various disparate facts from various versions to get sufficient elements for the charge. *See State v. Crosby*, 305 S.C. 445, 409 S.E.2d 391 (2003) (relying on defendant' statement to police); *Knoten, supra* (relying on the version of events in Appellant's second statement to support voluntary manslaughter); *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (relying on defendant's testimony); *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (relying on testimony of surviving eyewitness); *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986) (relying on defendant's repudiation of his statement in his trial testimony, in which he claimed that as he was putting the gun back in the car the victim grabbed it, causing it to fire); *State v. Mekler*, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005) (cert. granted) (relying on defendant's testimony at trial).

It is respectfully submitted that the Court may have misapprehended this distinction in relying upon Angie's testimony. More importantly, the Court may have misapprehended the substance of her testimony. This testimony simply does not support the requested charge. When her testimony is viewed in its entirety, it supports the inference that Appellant murdered the victim because the victim owed money to him from a prior drug deal. It does not support his account nor a manslaughter charge.

Angie testified that Finley called her brother, Rodney Smith, but Rodney refused to get involved because he was tired. However, Angie volunteered to set up a drug buy between Finley and another dealer, Appellant. Appellant thereafter picked Angie up at home and the two drove to meet

Finley at Hyder's mobile home. During the ride, Appellant mentioned to Angie that Finley owed him $40 from a previous crack deal. **R. 1-9; 25.**

Once they reached Hyder's trailer, Appellant stayed in the car while Angie went inside and tried to facilitate the drug deal. However, the victim wanted to deal with Appellant. So, Angie walked back to the car and informed Appellant that Finley did not have money for the deal. Appellant reached for something in the car and then walked to the trailer. He was calm at this point and did not say anything to Angie. **R. pp. 9-14; 24-25.**

Shortly thereafter, Angie saw both men fighting as they exited the front door of the trailer. Angie heard a pop and she saw the victim fall. Then, Appellant hurriedly returned to his vehicle. Angie saw a gun at this point. Appellant told Angie "you don't know nothing, you ain't seen nothing." She was scared because she was worried that Appellant could have shot her. So, she asked him to drop her off in the street, instead of taking her home. **R. pp. 10-11; 15-19; 23-24; 28-29; 31.**

Even more significantly, the Court's holding that Angie's testimony supported a manslaughter charge overlooks that she admitted that she did not "have any way of knowing what started that scuffle," and that she did not "know what happened ... inside that mobile home" before she saw Appellant shoot the victim. **R. p. 31, ll. 10-17.** Thus, the Court may have overlooked or misapprehended that her testimony could not support a manslaughter charge, although it did support the inference of a malicious killing.

As a result, in holding that the trial judge committed reversible error by not giving a manslaughter instruction, the Court may have overlooked or misapprehended that there was no evidence in the current record that supported a manslaughter instruction. The Court may have further overlooked that its decision is inconsistent with those cases cited, *supra*, wherein this Court

and the South Carolina Supreme Court have held that a manslaughter charge was not warranted, Finally, Respondent submits that Appellant is not entitled to relief on the remaining allegations that were not addressed by the Court (**Arguments I(b)-(c),** for the reasons set forth on pages 7-9 of the Final Brief of Respondent.

CONCLUSION

Based upon the foregoing, Respondent would ask the Court to grant the Petition for Rehearing, with a suggestion for rehearing *en banc* pursuant to Rule 219, SCACR.

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III.
Solicitor, Seventh Judicial Circuit
3rd Floor, 180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

April 4, 2008.

BY: _____
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID DWIGHT SMITH,

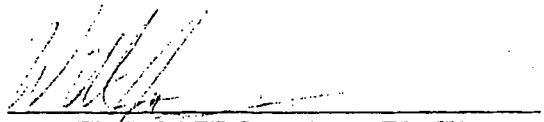
Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within ***Petition for Rehearing and Suggestion for Rehearing En Banc Pursuant to Rule 219, SCACR,*** on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz,III., South Carolina Commission on Indigent Defense, P.O. Box 11589, Columbia, South Carolina, 29211.

I further certify that all parties required by Rule to be served have been served.

This 4th day of April, 2008.



WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEY FOR RESPONDENT

April 4, 2008.

ATTORNEY GENERAL'S OFFICE
RECEIVED 5-28-08
ADMINISTRATIVE LAW DIVISION
OPEN ... BY
MAIL ... COPIES MADE
ROUTED TO
ORDER ... TRANSCRIPT
RECORDS ... CLERK RECORD
OTHER:

The South Carolina Court of Appeals

The State, Respondent,

v.

David Dwight Smith, Appellant.

The Honorable Doyet A. Early, III
Spartanburg County
Trial Court Case No. 1997-GS-42-01639

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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.

It is, therefore, ordered that the Petition for Rehearing be denied.

Thomas E. Huff, J.

Daniel Pieper, J.

Jasper M. Cureton, A. J.

Columbia, South Carolina

MAY 27 2008

cc: Chief Attorney Joseph L. Savitz, III
David Dwight Smith, #245760
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Harold W. Gowdy, III, Esquire

The South Carolina Court of Appeals

The State, Respondent,

v.

David Dwight Smith, Appellant.

The Honorable Doyet A. Early, III
Spartanburg County
Trial Court Case No. 1997-GS-42-01639

ORDER DENYING PETITION FOR REHEARING EN BANC

PER CURIAM: After a careful consideration of the Petition for Rehearing En Banc, the Court has determined that en banc consideration is not necessary to secure or maintain the uniformity of its decisions, nor is the proceeding one involving a question of exceptional importance. Further, the Court finds no other ground appearing to warrant a rehearing en banc.

It is, therefore, ordered that the Petition for Rehearing En Banc be denied.

_____ C. J.

_____ J.

_____ J.

_____ J.

_____ J.

_____ J.

_____ J.

_____ J.

_____ J.

Anderson, Kittredge, Short, JJ. not participating.

Columbia, South Carolina

MAY 27 2008

cc: Chief Attorney Joseph L. Savitz, III
David Dwight Smith, #245760
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Harold W. Gowdy, III, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Spartanburg County
Honorable Jack Early, Circuit Court Judge
ON WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS
Unpublished Opinion No. 2008-UP-194
1997 -GS- 42-01639

THE STATE,

Petitioner,

vs.

DAVID DWIGHT SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit

180 Magnolia Street, Third Floor
Spartanburg, South Carolina 29306
(864)596-2575

ATTORNEYS FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS 1

CERTIFICATE OF COUNSEL 2

QUESTIONS PRESENTED FOR REVIEW ON CERTIORARI 3

STATEMENT OF THE CASE 4

ARGUMENT

The Court of Appeals erred as a matter of law in concluding that the trial judge erred in concluding that Smith was not entitled to an instruction on the lesser offense of voluntary manslaughter when a review of the record in the light most favorable to the defendant reveals there was no evidence to support the instruction from a reasonable reading of the record and the defense theory in the case 7

CONCLUSION 18

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ON WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS
Unpublished Opinion No. 2008-UP-194
1997 -GS- 42-01639

THE STATE,

Petitioner,

vs.

DAVID DWIGHT SMITH,

Respondent.

CERTIFICATE OF COUNSEL

Pursuant to SCACR Rule 226 (d) (1), the undersigned certifies that the Court of Appeals denied its petition for rehearing on May 27, 2008.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR PETITIONER

By: _____

August 19, 2008

QUESTIONS PRESENTED FOR REVIEW ON CERTIORARI

I. Whether the Court of Appeals erred as a matter of law in concluding that the trial judge erred in concluding that Smith was not entitled to an instruction on the lesser offense of voluntary manslaughter when there was no evidence to support the instruction from a reasonable reading of the record and the defense theory in the case?

II. Should certiorari be granted on Question One and jurisdiction over the judgment assumed under Rule 226, whether the trial judge properly denied Smith's motion to charge involuntary manslaughter, and the law of accident to the jury where the undisputed facts of the case fail to support these charges; issues which were not addressed in the opinion of the Court of Appeals where it concluded that "we need not address the remaining issues presented. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)."

STATEMENT OF THE CASE

The Petitioner State of South Carolina makes a petition for writ of certiorari pursuant to SCACR Rule 226 from the the decision of the panel of the South Carolina Court of Appeals on March 20, 2008 in *State v. David Dwight SMITH, Unpublished Opinion Number 2008-UP-194 (S.C.Ct. App. March 20, 2008)* and the subsequent unpublished denial of the timely petition for rehearing and petition for rehearing en banc May 27, 2008.

The Initial Trial before Judge Cole

David Dwight Smith was indicted at the April 3rd, 1997 term of the Court of General Sessions for Spartanburg County for murder and possession of a firearm during the commission of a violent crime. The charges arose from the January 12th, 1997 shooting of Robert Finley. The case proceeded to trial on December 4th, 1997 before the Honorable Joseph Derham Cole, Circuit Court Judge and a jury. Smith was represented by T. Louis Cox, Esquire.

The jury found Smith guilty as charged. Judge Cole sentenced Smith to life imprisonment for murder and five (5) years, concurrent, for possession of a firearm during the commission fo a violent crime.

Smith, through Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense filed a Final Brief of Appellant. The South Carolina Supreme Court dismissed the appeal by Order dated December 2nd, 1999 and subsequently denied Smith's petition for rehearing by Order dated April 6th, 2000.

The State PCR Proceeding Before Judge Beatty.

Petitioner next filed an Application for Post-Conviction Relief ("APCR"), on June 7th, 2000. The State filed a Return on December 18th, 2001. The Honorable Donald W. Beatty held

an evidentiary hearing in the matter on November 6th, 2002. Petitioner was present and represented by E.P. Godfrey, Esquire. The state was represented by Assistant Attorney General Douglas E. Leadbitter. At the hearing, Petitioner proceeded on the following grounds:

1. Ineffective assistance of counsel.
2. Failure to call an expert witness.

Petitioner testified on his own behalf. The State presented the testimony of trial counsel Cox. After the hearing, Judge Beatty issued an Order Granting Post-Conviction Relief dated May 23rd, 2003.

The State timely filed and served with the South Carolina Supreme Court a notice of appeal from Judge Beatty's Order. On January 9th, 2004, the State filed a Petition for Writ of Certiorari. By Order dated December 1st, 2004, the South Carolina Supreme Court denied the petition for writ of certiorari. A remittitur dismissing the appeal was also filed on December 17th, 2004.

The Second Trial before Judge Early

Smith was retried on October 31st, 2005 before the Jack Early, III, Circuit Court Judge, and a jury. Smith was represented by William Godfrey. The State was represented Robert Coler and Sara Ganss, Assistant Solicitors for the Seventh Judicial Circuit.

The jury found Smith guilty as charged. Judge Early sentenced Smith to imprisonment for thirty-five (35) years for murder and five (5) years, concurrent, for possession of a firearm during the commission of a violent crime.

The Appeal Before the Court of Appeals

A timely Notice of Appeal was served. In the Initial Brief of Appellant, the following

issues were presented:

1. The trial judge committed reversible error by refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

2. The trial judge committed reversible error by refusing to instruct the jury on the lesser included offense of involuntary manslaughter.

3. The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

On March 20, 2008, the Court of Appeals issued an unpublished Opinion in which it reversed Smith's 2005 Spartanburg County convictions for murder and possession of a firearm during the commission of a violent crime. *State v. David Dwight Smith*, Opinion No. 2008-UP-194 (S.C. Ct. App., Mar. 20, 2008). In doing so, the Court of Appeals addressed Smith's arguments that the trial judge erroneously failed to give instructions on the law of voluntary manslaughter, involuntary manslaughter and accident. The Court held that the failure to instruct the jury on voluntary manslaughter constituted reversible error. *Id* at *3- *7. Because the Court reversed on the failure to instruct the jury on voluntary manslaughter, it held that "we need not address the remaining issues presented. *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)." *Smith*, at *7.

The State of South Carolina made a petition for rehearing and suggestion for rehearing en banc on April 4, 2008. On May 27, 2008, the Court of Appeals entered separate orders denying the petition for rehearing and the petition for rehearing en banc.

This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred as a matter of law in concluding that the trial judge erred in concluding that Smith was not entitled to an instruction on the lesser offense of voluntary manslaughter when a review of the record in the light most favorable to the defendant reveals there was no evidence to support the instruction from a reasonable reading of the record and the defense theory in the case.

In reversing the conviction and concluding that the trial judge erred, the Court of Appeals made fundamental errors in its analysis to create the existence of voluntary manslaughter where no evidence of it existed within the evidence presented to the jury. Particularly, the ameliorating evidence and testimony at trial revealed that the emphasis placed on parsed testimony taken out of context by the appellate court does not support the conclusion of the appellate court and supports the rejection by the trial judge.

Statement of Facts

At approximately 2:30 am on January 12th, 1997, Robert Finley left his mobile home to walk to his neighbor's (Otis Hyder) mobile home to borrow his phone. Finley wanted to use the phone to purchase some crack. Finley called a dealer, Rodney Smith, but Rodney refused to help him. However, Rodney's sister, Angie Smith, volunteered to set up a drug buy between Finley and another dealer, David Dwight Smith. Smith picked Angie up at home and the two drove to meet Finley at Hyder's mobile home. Smith mentioned to Angie that Finley owed him $40 from a previous drug trade. (R. 1-9; Tr. pp. 62-70).

Smith stayed in the car while Angie entered Hyder's trailer. Angie attempted to facilitate the drug deal, but Finley wanted to deal with Smith. (R.161, 10; 1997 Tr. p. 84; Tr. p. 71). Angie walked back to the car and informed Smith that Finley did not have money for the deal. Smith reached for something in the car and then walked to the trailer. (R. 11-12; Tr. pp. 72-73).

Once inside Smith recognized that Finley did not have money for drugs that night or the $40 he was owed. A verbal argument ensued which led to Smith brandishing a hand gun. Smith and Finley began physically struggling with each other in the doorway of the mobile home. Smith shot Finley once in the left eye and fled. Smith told Angie "you don't know nothing, you ain't seen nothing." (R. 162-66, 15-17; 1997 Tr. pp. 85-89; Tr. pp. 76-78).

REASONS WHY CERTIORARI IS APPROPRIATE

In holding that the trial judge erred by not charging voluntary manslaughter, the Court of Appeals overlooked that there was no evidence to support a jury charge on this lesser-included offense. The State agrees that the law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). See also, *State v. Cottrell*, 376 S.C. 260, 657 S.E.2d 451 (2008); *State v. Light*, 2008 WL 2715948 (Decided July 14, 2008); *State v. Mekler*, 2008 WL 2715956 (Decided July 14, 2008). However, "[o]nly the law applicable to the case should be charged to the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). Voluntary manslaughter is an "unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. S.C. Code Ann. § 16-3-50 (Supp.2007); *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394; *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. *Walker*; *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996).

Voluntary manslaughter mitigates an otherwise felonious killing to manslaughter, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they must "be such as would naturally

disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *Walker*, 324 S.C. at 260, 478 S.E.2d at 281 (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). Where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951). Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter. *State v. Mason*, 115 S.C. 214, 105 S.E. 286 (1920). A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). When determining whether a defendant is entitled to a voluntary manslaughter charge, the court must view the facts in the defendant's favor. *Byrd*, 323 S.C. at 321, 474 S.E.2d at 431.

How the Court of Appeals Misinterpreted the Record

In the present case, the Court of Appeals held that Smith's testimony, coupled with that of Angie Smith (Angie) supported a manslaughter charge. *Smith*, at *4-*7. However, the Court misapprehended the record where Smith's testimony simply did not support a manslaughter charge. The forty-seven year old Smith testified that he was selling crack to the victim at a trailer;[1] and that he was allowing the victim to test the drugs. The victim indicated he did not have money to pay for the crack, but stated that he was "taking this" [the crack] anyway. Then, according to Smith, the **unarmed** victim walked towards him. "The expression on his face and everything was a real serious demeanor," and ... **I didn't know what to expect from him next.**"

[1]This was Otis Hyder's mobile home. **R. pp. 11-12; 160-66.**

(Emphasis added). **R. pp. 84; 90-92.**

Smith had his hand in his pocket, where he also had a gun. Smith pulled his gun. The **victim** saw the gun, **stopped and an exchange of words occurred.**[2] Next, Smith claims he lowered the gun to put it back into his pocket and the victim tried to knock the gun out of his hand. This lead to a struggle over the gun, which fired "unintentionally" while the Smith was repeatedly hitting the victim in the head with the butt of the gun and after they had fallen out of the trailer.[3] Finally, he testified that the shooting was not intentional and that he did not intend to kill the victim. **R. pp. 84; 92-97.**

In this case, the Court of Appeals found that "Smith claims the victim was attempting to rob him thereby provoking the altercation which he ultimately claims caused the alleged accidental shooting." *Smith*, at *. ***However, the victim never threatened Smith verbally.*** He simply indicated a desire to take the crack and pay for it the following day. Further, Smith admitted that he was uncertain of the victim's intent. He also candidly admitted that his act of brandishing a pistol stopped the victim. Even under Smith's scenario, he "had the drop" on the victim and the only weapon at the scene. Also, the trailer door was open at all times, and he could have simply retreated (with his crack and his money) to the sanctuary of his vehicle. However, he did not make any effort to do so. *See Byrd, supra.*

Moreover, neither the victim's "serious demeanor" nor his actions were "such as would

---

[2]The victim asked Smith to give him the gun, so that he could shoot **himself** (as opposed to Smith). Smith said no. He told the victim to return his crack to him and he said that he would leave.

[3]Smith testified that the victim had left the trailer door open throughout the transaction. **R. pp. 108-09.**

naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *See Walker*, 324 S.C. at 260, 478 S.E.2d at 281. Indeed, Smith all but admitted, at trial, that not only was he capable of "cool reflection," he demonstrated cool reflection. *Cf. Walker, supra.* As discussed, his testimony was that he used his pistol to beat the victim in the head; and he never intended to fire the gun. Rather, his intention was merely to get "[the victim] off of me. To simply hit him with the gun, get him off of me," so he could leave. (In other words, he was trying to defend himself). [4] He likewise testified that he never pulled the trigger on his weapon, and that it discharged while he was beating the victim. **R. p. 96, ll. 7-13.** *See also* **R. p. 95, ll. 10-14; p. 96, ll. 22-25.** Indeed, he described the manner in which the gun discharged as a "[f]luke accident." **R. p. 119, ll. 1-2.** As a result, there is no evidence that the killing was intentional, which is necessary for a manslaughter charge.

Therefore, the Court misapprehended that Smith's testimony did not support a voluntary manslaughter charge. Instead, the testimony was consistent with cases where the South Carolina Supreme Court and this Court have held that a manslaughter charge was not warranted. *See, e.g., Byrd*, 323 S.C. at 322-23, 474 S.E.2d at 432-33 (defendant's response to the victim's statement that "she was 'fixing to end' it" did not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation, where he returned to his vehicle and, "[i]nstead of driving away, or simply remaining in the vehicle, [he] retrieved a nine millimeter pistol from

---

[4]Although the trial judge submitted self-defense to the jury (**R. pp. 146-49**), Smith did not act in self-defense because he was not without fault in bringing on the difficulty. *Cf. State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007); *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007).

his car's glove compartment and proceeded to the front of Victim's car[. There, he] ... shot at her two times through the front windshield and then moved to the side of her car, where he shot two more times. Byrd testified that at no time did he stop to call to Victim"); *Rogers*, 320 S.C. at 525-26, 466 S.E.2d at 362-63 (evidence of racist statements made by victim's father and father's action of leaning into his truck did not demonstrate sufficient legal provocation to support jury charge on voluntary manslaughter); *See also Knoten*, *supra*.[5] cf, *State v. Light*, 2008 WL 2715948 (S.C.S.Ct. July 14, 2008).

Likewise, in relying upon Angie Smith's testimony to hold that a manslaughter charge should have been given, the Court of Appeals ignored that Angie's testimony did not support a voluntary manslaughter instruction. First, the Court of Appeals improperly parsed only a segment of her testimony as supporting a manslaughter charge. *See State v. Foxworth*, 269 S.C. 496, 238 S.E.2d 172 (1977) ("the presence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice"); *State v. Rucker*, 319 S.C. 95, 459 S.E.2d 858 (Ct. App. 1995), *cert. denied*, Mar. 21, 1996 (same).

While it is one thing to give a charge based on an account given by a State's witness, it is quite another, as is necessary here, to cherry pick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually. Indeed, among the cases that have applied this principle, all of them have relied on one cohesive account, and not one of them has simply picked out

---

[5]The victim's attempt to take the gun away from Smith in a move of self-defense also cannot be considered sufficient *legal* provocation.

various disparate facts from various versions to get sufficient elements for the charge. *See State v. Crosby*, 305 S.C. 445, 409 S.E.2d 391 (2003) (relying on defendant' statement to police); *Knoten, supra* (relying on the version of events in Smith's second statement to support voluntary manslaughter); *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (relying on defendant's testimony); *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (relying on testimony of surviving eyewitness); *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986) (relying on defendant's repudiation of his statement in his trial testimony, in which he claimed that as he was putting the gun back in the car the victim grabbed it, causing it to fire); *State v. Mekler*, 2008 WL 2715956 (S.Ct. July 14, 2008)(relying on defendant's testimony at trial). Cf, *State v. Cottrell*, 376 S.C. 260, 657 S.E.2d 451 (2008).

The Court of Appeals misapprehended this distinction in relying upon Angie's testimony. More importantly, the Court appeared to have misinterpreted the substance of her testimony. This testimony simply does not support the requested charge for voluntary manslaughter. When her testimony is viewed in its entirety, it actually supports the opposite inference that Smith murdered the victim because the victim owed money to him from a prior drug deal. It does not support his account nor a manslaughter charge.

Angie testified that Finley called her brother, Rodney Smith, but Rodney refused to get involved because he was tired. However, Angie volunteered to set up a drug buy between Finley and another dealer, Smith. Smith thereafter picked Angie up at home and the two drove to meet Finley at Hyder's mobile home. During the ride, Smith mentioned to Angie that Finley owed him $40 from a previous crack deal. **R. 1-9; 25.**

Once they reached Hyder's trailer, Smith stayed in the car while Angie went inside and

tried to facilitate the drug deal. However, the victim wanted to deal with Smith. So, Angie walked back to the car and informed Smith that Finley did not have money for the deal. Smith reached for something in the car and then walked to the trailer. He was calm at this point and did not say anything to Angie. **R. pp. 9-14; 24-25.**

Shortly thereafter, Angie saw both men fighting as they exited the front door of the trailer. Angie heard a pop and she saw the victim fall. Then, Smith hurriedly returned to his vehicle. Angie saw a gun at this point. Smith told Angie "you don't know nothing, you ain't seen nothing." She was scared because she was worried that Smith could have shot her. So, she asked him to drop her off in the street, instead of taking her home. **R. pp. 10-11; 15-19; 23-24; 28-29; 31.**

Even more significantly, the Court of Appeals's holding that Angie's testimony supported a manslaughter charge overlooks that she admitted that she did not "have any way of knowing what started that scuffle," and that she did not "know what happened ... inside that mobile home" before she saw Smith shoot the victim. **R. p. 31, ll. 10-17.** Thus, the Court may have overlooked or misapprehended that her testimony could not support a manslaughter charge, although it did support the inference of a malicious killing.

As a result, in holding that the trial judge committed reversible error by not giving a manslaughter instruction, the Court of Appeals erred as a matter of law because there was no evidence in the current record that supported a manslaughter instruction. The decision is inconsistent with those cases cited, *supra*, wherein the South Carolina Supreme Court have held that a manslaughter charge was not warranted.

Certiorari should be granted on Question One.

II. Should certiorari be granted on Question One and jurisdiction over the judgment assumed under Rule 226, whether the trial judge properly denied Smith's motion to charge involuntary manslaughter, and the law of accident to the jury where the undisputed facts of the case fail to support these charges; issues which were not addressed in the opinion of the Court of Appeals where it concluded that "we need not address the remaining issues presented. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

In its order granting a new trial on voluntary manslaughter, it deferred resolution of the companion issues concerning the failure to instruct on involuntary manslaughter and accident, citing *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive). The State asserted in its petition for rehearing and petition for rehearing en banc that the trial judge did not err in denying these requested instructions. Should this court issue certiorari, it should resolve those issues. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter matter, it may wish to remand to the Court of Appeals to address the remaining issues.

Involuntary Manslaughter

The trial judge should refuse to charge a lesser-included offense where there was no evidence that the defendant committed the lesser rather than the greater offense. ***State v. Tucker***, 324 S.C. 155, 478 S.E.2d 260 (1996). To be entitled to a charge on involuntary manslaughter, there must be evidence that the defendant either: (1) killed another without malice and unintentionally, but while engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) killed another without malice and unintentionally, but while 'acting lawfully with reckless disregard of the safety of

others. *State v. Burriss*, 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999)). Also, *State v. Tyler*, 348 S.C. 526, 528-529, 560 S.E.2d 888, 888 - 889 (2002).

The trial judge properly ruled in the present case that Smith was not entitled to have the jury instructed on the law of involuntary manslaughter.

While Smith's testimony indicates the shooting was unintentional, clearly he was engaged in an unlawful activity tending to cause death or great bodily harm. S.C. Code Ann. § 16-23-410 provides that it "is unlawful for a person to present or point at another person a loaded or unloaded firearm. A person who violates the provisions of this section is guilty of a felony. . . ." Furthermore, Smith's testified the gun fired unintentionally while he was hitting the victim repeatedly in the head with the butt of the gun.

Although Smith was not engaged in a lawful activity when the crime occurred, even if he was, the act of hitting another in the head repeatedly with the butt of a gun does tend to cause death or great bodily harm. *See* , *State v. Tyler*, 348 S.C. 526, 528-529, 560 S.E.2d 888, 888 - 889 (2002) Also, Smith's testimony does not indicate he handled the gun with reckless disregard for the safety of others. Instead, he maintained the discharge was merely an accident. Cf, *State v. Light*, 2008 WL 2715948 (S.Ct July 14, 2008) . An involuntary manslaughter charge was not appropriate under these circumstances.

Accident

Smith's next argument is that the trial judge erroneously refused to charge the jury concerning the law of accident. The State disagrees and submits that the trial judge properly refused the requested instruction because there was no evidence that the killing was accidental. Far from it, the only evidence was that Smith was engaged in the felony of pointing and

presenting a firearm at the time he discharged the weapon; and, more importantly, he shot the victim as the victim attempted to prevent him from using the gun. As a result, he was either guilty or not guilty of murder.

In *Burriss*, *supra*, the Court explained that "[f]or a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." 334 S.C. at 259, 513 S.E.2d at 106. When the prosecution's evidence in this case is taken as a whole, it is clear that it reasonably tended to prove that Smith murdered the victim; and it would be improper for this Court to consider Smith's contention that he is entitled to a charge on accident based upon an "accidental" shooting that occurred because Smith introduced the only weapon into the scenario. See also, *Tisdale v. State*, 378 S.C. 122, 662 S.E.2d 410 (2008).

More importantly, even Smith's own statement reveals that he was not acting lawfully at the time of the offense. Instead, he was engaged in the crime of pointing and presenting a firearm. He presented the weapon when he pulled it from his coat pocket from where he had secreted it. Further, it is respectfully submitted that it would be impossible for the crime to have occurred in the manner described by him – shooting the victim in the left eye while pistol whipping him – if he was exercising due care in the handling of the weapon at the time it discharged.

Therefore, he was not entitled to a jury instruction on the law of accident. *Burriss*; *State v Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). More importantly, it is undisputed that the weapon was discharged and the victim killed while he was reacting from having a gun pulled on him. Under these circumstances, he was guilty of murder and could not have been entitled to a

charge on the law of accident. *Id.* This argument is without merit.

CONCLUSION

Based upon the foregoing, the State of South Carolina would ask the Court to grant the petition for writ of certiorari, vacate the opinion of the Court of Appeals and affirm the judgment of conviction.

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III.
Solicitor, Seventh Judicial Circuit
3rd Floor, 180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

BY:_____
DONALD J. ZELENKA

ATTORNEYS FOR PETITIONER

August 18, 2008.

charge on the law of accident. *Id.* This argument is without merit.

CONCLUSION

Based upon the foregoing, the State of South Carolina would ask the Court to grant the petition for writ of certiorari, vacate the opinion of the Court of Appeals and affirm the judgment of conviction.

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III.
Solicitor, Seventh Judicial Circuit
3rd Floor, 180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

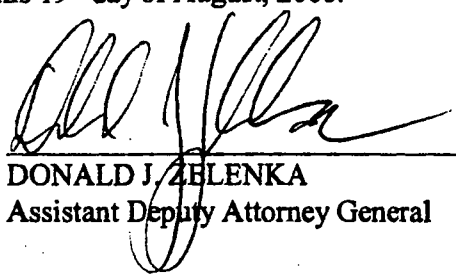
BY: _____
DONALD J. ZELENKA

ATTORNEYS FOR PETITIONER

August 19, 2008.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the InterAgency Mail to Joseph L. Savitz, III, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 19th day of August, 2008.



DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEY GENERAL'S OFFICE
RECEIVED 12-18-08
ADMINISTRATIVE INSTRUCTIONS
FILE ___ CRIM ___ CIV
HAVE ___ COPIES MADE
ROUTE TO ___
ORDER: ___ TRANSCRIPT
PEN RECORDS ___ CLERK RECORDS
OTHER: ___

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

PETITIONER,

V.

DAVID DWIGHT SMITH,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

JOSEPH L. SAVITZ, III
Chief 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 RESPONDENT

INDEX

INDEX 1

ISSUES PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 11

ISSUES PRESENTED

1. The Court of Appeals correctly determined that respondent was entitled to an instruction on voluntary manslaughter at trial and that the trial judge had committed reversible error by refusing to instruct the jury on that lesser-included offense.

2. The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

3. The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

STATEMENT OF THE CASE

For purposes of this stage of the proceeding, counsel for David Dwight Smith agrees to the Statement of the Case contained in the petition for writ of certiorari (pages 4 through 6) filed by the State.

ARGUMENT

1.

The Court of Appeals correctly determined that respondent was entitled to an instruction on voluntary manslaughter at trial and that the trial judge had committed reversible error by refusing to instruct the jury on that lesser-included offense.

Smith admitted that he shot Finley. The only question at his trial was the nature of the killing – that is, whether it was intentional (and thus, murder, voluntary manslaughter or self-defense) or unintentional (and therefore involuntary manslaughter or accident). The State's theory of the case was that Smith had murdered Finley over $40 Finley owed him from a previous crack cocaine purchase. App. p. 9, lines 7-15. App. p. 46, line 13 – p. 49, line 7. Smith testified that the gun had discharged accidentally when he used it as a sap to defend himself from Finley's physical attack after Finley stole the crack cocaine Smith had brought to sell him. App. p. 89, line 11 – p. 97, line 3. He said, "I was hitting him with a gun and it went off and hit him in the face." App. p. 118, line 19 – p. 119, line 2.

Two State's witnesses corroborated Smith's testimony in its essentials. One stated that Finley told him before Smith arrived that "he was gonna steal the drugs." App. p. 66, lines 2-7; Court's Exhibit #2 (transcript of testimony of Otis Hyder). The other testified, "All I know is, the door came open and they was falling out the door ... [s]cuffling. It's like it happened so quick. They was so close together, that's all I know is I just heard a pop." App. p. 14, line 23 – p. 16, line 18. This witness describes Smith as "scared" and "frightened" immediately afterwards. App. p. 17, lines 11-13.

Based on this evidence, defense counsel requested an instruction on voluntary manslaughter (as well as involuntary manslaughter and accident, which are treated subsequently). App. p. 82,

lines 2-24. The Assistant Solicitor responded, "[I]f they're trying to say that legal provocation was the attack of Mr. David Smith by Robert Finley, then that goes to a self-defense charge. ... They can't use the sufficient legal provocation as their self-defense element and to make it voluntary manslaughter." App. p. 135, lines 9-24. The judge bought this argument and refused to charge voluntary manslaughter. App. p. 138, lines 13-16. His final instructions to the jury do not contain a charge on voluntary manslaughter. App. p. 139, line 3 – p. 151, line 17. Defense counsel objected to its omission. App. p. 151, line 21 – p. 152, line 1.

Voluntary manslaughter is defined as the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). A trial judge should refuse a charge on the lesser-included offense of voluntary manslaughter only where it very clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000).

In this case, the trial judge erred by listening to the Assistant Solicitor: self-defense and voluntary manslaughter and not mutually exclusive as a matter of law. *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998). In *State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596, 597 (1988), the Supreme Court explained:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. ... The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

Here, Smith testified that Finley attacked him without provocation. Eyewitness testimony corroborated his account. Such evidence has routinely supported a charge on voluntary manslaughter. See, for example, *State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983).

As noted, a trial judge must charge voluntary manslaughter if there is *any* evidence which would support a verdict for that lesser-included offense. Compare, *State v. Cooley,* 342 S.C. 63, 536 S.E.2d 666 (2000). The argument the State advances in its certiorari petition is little more than a thinly-disguised attempt to undermine this bedrock principal – but only insofar as it benefits an accused. The State contends:

> While it is one thing to give a charge based on an account given by a State's witness, is quite another ... to cherrypick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually.

Certiorari Petition, p. 12. It further asserts that the evidence must present "one cohesive account" from a single witness before the judge could charge a lesser-included offense. The State makes no effort to reconcile their position with the following routine jury charge:

> You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or you may reject the testimony of a witness in its entirety.

State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 250 (2006).

In short, since there was evidence of voluntary manslaughter, the trial judge erred by refusing to instruct the jury on that offense, and the Court of Appeals correctly reversed Smith's convictions for that reason. This Court should deny certiorari.

2.

The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

Once again, Smith testified that the gun discharged accidentally as he was using it to strike Finley, who was attacking him. Two eyewitnesses, who testified for the State, corroborated Smith's account. The judge rejected defense counsel's request to charge involuntary manslaughter simply because Finley was killed during a drug deal. App. p. 129, line 20 – p. 130, line 15. His final instructions to the jury do not contain a charge on involuntary manslaughter. Defense counsel took exception to its omission.

In support of his request for involuntary manslaughter, defense counsel cited *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). App. p. 135, lines 18-21. In view of this, the trial judge's error is incomprehensible.

Involuntary manslaughter is defined as either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Moreover, "the unlawful activity must proximately cause death." *Burriss*, 513 S.E.2d at 110, footnote 11. The judge erred by failing to take this requirement of causation into account.

The evidence in this case would support a finding that Smith was lawfully armed in self-defense at the time the fatal shot occurred. *Burriss*. "[T]he negligent handling of a loaded gun will support a finding of involuntary manslaughter." *Id.*, citing *State v. White*, 253 S.C. 475, 171 S.E.2d 712 (1969); see also, *State v. Mekler*, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005).

Therefore, under the circumstances of this case, the judge should have instructed the jury on involuntary manslaughter.

Because the Court of Appeals found error in the failure to charge voluntary manslaughter, it did not reach this issue. Counsel for Smith agrees with the State's position:

> Should this Court issue certiorari, it should resolve [this issue]. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter issue, it may wish to remand to the Court of Appeals to address the remaining issues.

Certiorari Petition, p. 15.

The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

The same evidence which supported charges on manslaughter also supported a charge on the law of accident. The trial judge refused to charge accident because he found that Smith was "in the middle of the drug deal." App. p. 137, line 19 – p. 138, line 2. His final instructions to the jury do not contain a charge on accident. Counsel excepted to its omission.

For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). As in *State v. Burriss*, Smith claimed that he armed himself in self-defense, but the fatal shot occurred when the gun fired accidentally. As in his refusal to charge involuntary manslaughter, the judge erred by failing to take into account the rule that the unlawful activity (here, drug dealing) must proximately cause the death. Instead, the judge should have considered whether Smith was otherwise acting lawfully when the fatal shooting occurred. See *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999).

Again, *Burriss* – which was before the trial judge – is dispositive. Since Smith was entitled to arm himself in self-defense when the gun went off, he was entitled to a charge on accident. In addition to *Burriss* and *Goodson*, see *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990). There is ample evidence in the record to support Smith's claim that he armed himself in self-defense at the time of the fatal shooting.

Therefore, under the circumstances of this case, the judge should have instructed the jury on accident.

Because the Court of Appeals found error in the failure to charge voluntary manslaughter, it did not reach this issue. Counsel for Smith agrees with the State's position:

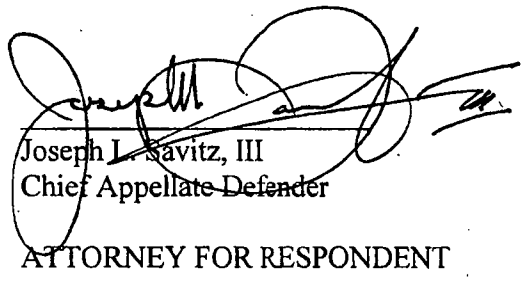
> Should this Court issue certiorari, it should resolve [this issue]. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter issue, it may wish to remand to the Court of Appeals to address the remaining issues.

Certiorari Petition, p. 15.

CONCLUSION

The Court should deny certiorari. Should it grant certiorari to address the Court of Appeals' ruling on the manslaughter issue, it should also address Smith's remaining direct appeal issues dealing with the failure to charge involuntary manslaughter and accident. Alternatively, should it reverse the ruling of the Court of Appeals, it may wish to remand to the Court to address these two issues.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 18th day of December, 2008

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

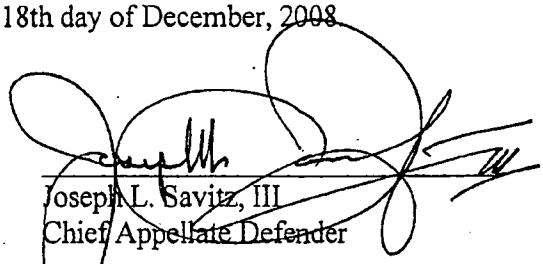
V.

DAVID DWIGHT SMITH,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Donald J. Zelenka, Esquire, this 18th day of December, 2008.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 18th day
of December, 2008.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

The Supreme Court of South Carolina

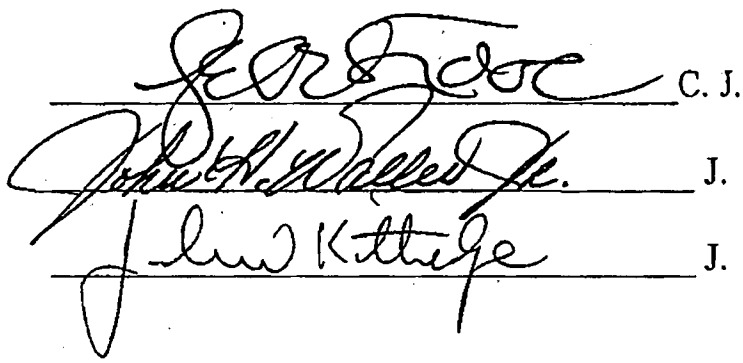
The State, Petitioner,

v.

David Dwight Smith, Respondent.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Smith, Op. No. 2008-UP-194 (S.C. Ct. App. filed March 20, 2008). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(i), SCACR.



C. J.

J.

J.

Columbia, South Carolina

April 10, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Spartanburg County
Honorable Jack Early, Circuit Court Judge

ON WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS
Unpublished Opinion No. 2008-UP-194
1997 -GS- 42-01639

THE STATE,

Petitioner,

vs.

DAVID DWIGHT SMITH,

Respondent.

BRIEF OF PETITIONER STATE OF SOUTH CAROLINA

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit

180 Magnolia Street, Third Floor
Spartanburg, South Carolina 29306
(864)596-2575

ATTORNEYS FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED FOR REVIEW ON CERTIORARI 1

STATEMENT OF THE CASE 2

ARGUMENT

I. The Court of Appeals erred as a matter of law in concluding that the trial judge erred in concluding that Smith was not entitled to an instruction on the lesser offense of voluntary manslaughter when a review of the record in the light most favorable to the defendant reveals there was no evidence to support the instruction from a reasonable reading of the record and the defense theory in the case 6

II. The trial judge properly denied Smith's motion to charge involuntary manslaughter, and the law of accident to the jury where the undisputed facts of the case fail to support these charges where he was pistol whipping the victim on the head with the butt of the gun when the gun fired 15

CONCLUSION 18

State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996) 7, 8, 10

State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) 16, 17

State v. Wigington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007) 10

Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008) 17

Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) 1, 4, 7, 15

STATE STATUTES

S.C. Code Ann. § 16-3-50 (Supp.2007) 7

S.C. Code Ann. § 16-23-410 16

STATE RULES

SCACR Rule 226 . . . . . 2, 4

QUESTIONS PRESENTED FOR REVIEW ON CERTIORARI

I. Whether the Court of Appeals erred as a matter of law in concluding that the trial judge erred in concluding that Smith was not entitled to an instruction on the lesser offense of voluntary manslaughter when there was no evidence to support the instruction from a reasonable reading of the record and the defense theory in the case?

II. Whether the trial judge properly denied Smith's motion to charge involuntary manslaughter, and the law of accident to the jury where the undisputed facts of the case fail to support these charges where the Appellant was pistol whipping the victim with the butt of the gun; issues which were not addressed in the opinion of the Court of Appeals where it concluded that "we need not address the remaining issues presented. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)."

STATEMENT OF THE CASE

The Petitioner State of South Carolina made a petition for writ of certiorari pursuant to SCACR Rule 226 from the the decision of the panel of the South Carolina Court of Appeals on March 20, 2008 in *State v. David Dwight Smith*, Unpublished Opinion Number 2008-UP-194 (S.C.Ct. App. March 20, 2008)and the subsequent unpublished denial of the timely petition for rehearing and petition for rehearing en banc May 27, 2008. On April 10, 2009, the South Carolina Supreme Court granted the State's petition for writ of certiorari. This briefing follows.

The Initial Trial before Judge Cole

David Dwight Smith was indicted at the April 3rd, 1997 term of the Court of General Sessions for Spartanburg County for murder and possession of a firearm during the commission of a violent crime. The charges arose from the January 12th, 1997 shooting of Robert Finley. The case proceeded to trial on December 4th, 1997 before the Honorable Joseph Derham Cole, Circuit Court Judge and a jury. Smith was represented by T. Louis Cox, Esquire.

The jury found Smith guilty as charged. Judge Cole sentenced Smith to life imprisonment for murder and five (5) years, concurrent, for possession of a firearm during the commission fo a violent crime.

Smith, through Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense filed a Final Brief of Appellant. The South Carolina Supreme Court dismissed the appeal by Order dated December 2nd, 1999 and subsequently denied Smith's petition for rehearing by Order dated April 6th, 2000.

The State PCR Proceeding Before Judge Beatty.

Petitioner next filed an Application for Post-Conviction Relief ("APCR"), on June 7th, 2000. The State filed a Return on December 18th, 2001. The Honorable Donald W. Beatty held an evidentiary hearing in the matter on November 6th, 2002. Petitioner was present and represented by E.P. Godfrey, Esquire. The state was represented by Assistant Attorney General Douglas E. Leadbitter. At the hearing, Petitioner proceeded on the following grounds:

1. Ineffective assistance of counsel.
2. Failure to call an expert witness.

Petitioner testified on his own behalf. The State presented the testimony of trial counsel Cox. After the hearing, Judge Beatty issued an Order Granting Post-Conviction Relief dated May 23rd, 2003.

The State timely filed and served with the South Carolina Supreme Court a notice of appeal from Judge Beatty's Order. On January 9th, 2004, the State filed a Petition for Writ of Certiorari. By Order dated December 1st, 2004, the South Carolina Supreme Court denied the petition for writ of certiorari. A remittitur dismissing the appeal was also filed on December 17th, 2004.

The Second Trial before Judge Early

Smith was retried on October 31st, 2005 before the Honorable Jack Early, III, Circuit Court Judge, and a jury. Smith was represented by Bill Godfrey. The State was represented Robert Coler and Sara Ganss, Assistant Solicitors for the Seventh Judicial Circuit.

The jury found Smith guilty as charged. Judge Early sentenced Smith to imprisonment for thirty-five (35) years for murder and five (5) years, concurrent, for possession of a firearm

during the commission of a violent crime.

The Appeal Before the Court of Appeals

A timely Notice of Appeal was served. In the Initial Brief of Appellant, the following issues were presented:

1. The trial judge committed reversible error by refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

2. The trial judge committed reversible error by refusing to instruct the jury on the lesser included offense of involuntary manslaughter.

3. The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

On March 20, 2008, the Court of Appeals issued an unpublished Opinion in which it reversed Smith's 2005 Spartanburg County convictions for murder and possession of a firearm during the commission of a violent crime. *State v. David Dwight Smith*, Opinion No. 2008-UP-194 (S.C. Ct. App., Mar. 20, 2008). In doing so, the Court of Appeals addressed Smith's arguments that the trial judge erroneously failed to give instructions on the law of voluntary manslaughter, involuntary manslaughter and accident. The Court held that the failure to instruct the jury on voluntary manslaughter constituted reversible error. *Id* at *3- *7. Because the Court reversed on the failure to instruct the jury on voluntary manslaughter, it held that "we need not address the remaining issues presented. *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)." *Smith*, at *7.

The State of South Carolina made a petition for rehearing and suggestion for rehearing en banc on April 4, 2008. On May 27, 2008, the Court of Appeals entered separate orders denying

the petition for rehearing and the petition for rehearing en banc.

This petition for writ of certiorari was made on August 19, 2008. The Return to the Petition was made by Mr. Smith on December 18, 2008. On April 10, 2009, the South Carolina Supreme Court granted the Petition for Writ of Certiorari.

ARGUMENT

I. The Court of Appeals erred as a matter of law in concluding that the trial judge erred in concluding that Smith was not entitled to an instruction on the lesser offense of voluntary manslaughter when a review of the record in the light most favorable to the defendant reveals there was no evidence to support the instruction from a reasonable reading of the record and the defense theory in the case.

In reversing the conviction and concluding that the trial judge erred, the Court of Appeals made fundamental errors in its analysis to create the existence of voluntary manslaughter where no evidence of it existed within the evidence presented to the jury. Particularly, the ameliorating evidence and testimony at trial revealed that the emphasis placed on parsed testimony taken out of context by the appellate court does not support the conclusion of the appellate court and supports the rejection by the trial judge of the charge on voluntary manslaughter. The conviction for murder should be affirmed.

Statement of Facts

At approximately 2:30 am on January 12th, 1997, Robert Finley left his mobile home to walk to his neighbor's (Otis Hyder) mobile home to borrow his phone. Finley wanted to use the phone to purchase some crack cocaine. Finley called a drug dealer, Rodney Smith, but Rodney refused to help him. However, Rodney's sister, Angie Smith, volunteered to set up a drug buy between Finley and another dealer, David Dwight Smith. Smith picked Angie up at home and the two drove to meet Finley at Hyder's mobile home. Smith mentioned to Angie that Finley owed him $40 from a previous drug trade. (R. 1-9; Tr. pp. 62-70).

Smith stayed in the car while Angie entered Hyder's trailer. Angie attempted to facilitate

the drug deal, but Finley wanted to only deal with Smith. (R.161, 10; 1997 Tr. p. 84; Tr. p. 71). Angie walked back to the car and informed Smith that Finley did not give her any money for the drugs. R. 10, , l. 12-19. Tr.p. 71, l. 12-19. Angie told Smith to " handle it on your own. . ." Id. Smith reached for something in the car and then walked to the trailer. (R. 11-12; Tr. pp. 72-73). Once inside Smith recognized that Finley did not have money for drugs that night or the $40 he was owed. A verbal argument ensued which led to Smith brandishing a hand gun. Smith and Finley began physically struggling with each other in the doorway of the mobile home. Smith shot Finley once in the left eye and fled. Smith told Angie "you don't know nothing, you ain't seen nothing." (R. 162-66, 15-17; 1997 Tr. pp. 85-89; Tr. pp. 76-78).

REASONS WHY THE CONVICTION SHOULD BE UPHELD

In holding that the trial judge erred by not charging voluntary manslaughter, the Court of Appeals overlooked that there was no evidence to support a jury charge on this lesser-included offense. The State agrees that the law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). See also, *State v. Cottrell*, 376 S.C. 260, 657 S.E.2d 451 (2008); *State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008); *State v. Mekler*, 379 S.C. 12, 664 S.E.2d 477 (2008). However, "[o]nly the law applicable to the case should be charged to the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). Voluntary manslaughter is an "unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. S.C. Code Ann. § 16-3-50 (Supp.2007); *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394; *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Both heat of passion and sufficient legal provocation must be

present for the killing to constitute voluntary manslaughter. *Walker*; *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996).

Voluntary manslaughter mitigates an otherwise felonious killing to manslaughter, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they must "be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *Walker*, 324 S.C. at 260, 478 S.E.2d at 281 (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). Where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951).

Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter. *State v. Mason*, 115 S.C. 214, 105 S.E. 286 (1920). A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). When determining whether a defendant is entitled to a voluntary manslaughter charge, the court must view the facts in the defendant's favor. *Byrd*, 323 S.C. at 321, 474 S.E.2d at 431.

How the Court of Appeals Misinterpreted the Record

In the present case, the Court of Appeals held that Smith's testimony, coupled with that of Angie Smith (Angie) supported a manslaughter charge. *Smith*, at *4-*7. However, the Court misapprehended the record where Smith's testimony simply did not support a manslaughter charge. The forty-seven year old Smith testified that he was selling crack cocaine to the victim at a trailer;[1] and that he was allowing the victim to test the drugs. The victim indicated he did not have money to pay for the crack, but stated that he was "taking this" [the crack] anyway. Then, according to Smith, the **unarmed** victim walked towards him. "The expression on his face and everything was a real serious demeanor," and ... **I didn't know what to expect from him next.**" (Emphasis added). **R. pp. 84; 90-92.**

Smith had his hand in his pocket, where he also had a gun. Smith pulled his gun. The **victim** saw the gun, **stopped and an exchange of words occurred.**[2] Next, Smith claims he lowered the gun to put it back into his pocket and the victim tried to knock the gun out of his hand. This lead to a struggle over the gun, which fired "unintentionally" while the Smith was repeatedly hitting the victim in the head with the butt of the gun and after they had fallen out of the trailer.[3] Finally, he testified that the shooting was not intentional and that he did not intend to kill the victim. **R. pp. 84; 92-97.**

---

[1]This was Otis Hyder's mobile home. **R. pp. 11-12; 160-66.**

[2] Smith claimed that the victim asked Smith to give him the gun, so that he could shoot **himself** (as opposed to Smith). Smith said no. He told the victim to return his crack to him and he said that he would leave.

[3]Smith testified that the victim had left the trailer door open throughout the transaction. **R. pp. 108-09.**

In this case, the Court of Appeals found that "Smith claims the victim was attempting to rob him thereby provoking the altercation which he ultimately claims caused the alleged accidental shooting." *Smith*, at *. ***However, the victim never threatened Smith verbally.*** He simply indicated a desire to take the crack and pay for it the following day. Further, Smith admitted that he was uncertain of the victim's intent. He also candidly admitted that his act of brandishing a pistol stopped the victim. Even under Smith's scenario, he "had the drop" on the victim and possessed the only weapon at the scene. Also, the trailer door was open at all times, and he could have simply retreated (with his crack and his money) to the sanctuary of his vehicle. However, he did not make any effort to do so. *See Byrd, supra.*

Moreover, neither the victim's "serious demeanor" nor his actions were "such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *See Walker*, 324 S.C. at 260, 478 S.E.2d at 281. Indeed, Smith all but admitted, at trial, that not only was he capable of "cool reflection," but that he demonstrated cool reflection. *Cf. Walker, supra.* As discussed, his testimony was that he used his pistol to beat the victim in the head; and he never intended to fire the gun. Rather, his intention was merely to get "[the victim] off of me. To simply hit him with the gun, get him off of me," so he could leave. (In other words, he was trying to defend himself). [4] He likewise testified that he never pulled the trigger on his weapon, and that it discharged while he was beating the victim. **R. p. 96, ll. 7-13.**

---

[4]Although the trial judge submitted self-defense to the jury (**R. pp. 146-49**), Smith did not act in self-defense because he was not without fault in bringing on the difficulty. *Cf. State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007); *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007).

See also **R. p. 95, ll. 10-14; p. 96, ll. 22-25.** Indeed, he described the manner in which the gun discharged as a "[f]luke accident." **R. p. 119, ll. 1-2.** As a result, there is no evidence that the killing was intentional, which is necessary for a manslaughter charge.

Therefore, the Court misapprehended that Smith's testimony did not support a voluntary manslaughter charge. Instead, the testimony was consistent with cases where the South Carolina Supreme Court and this Court have held that a manslaughter charge was not warranted. *See, e.g., Byrd*, 323 S.C. at 322-23, 474 S.E.2d at 432-33 (defendant's response to the victim's statement that "she was 'fixing to end' it" did not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation, where he returned to his vehicle and, "[i]nstead of driving away, or simply remaining in the vehicle, [he] retrieved a nine millimeter pistol from his car's glove compartment and proceeded to the front of Victim's car[. There, he] ... shot at her two times through the front windshield and then moved to the side of her car, where he shot two more times. Byrd testified that at no time did he stop to call to Victim"); *Rogers*, 320 S.C. at 525-26, 466 S.E.2d at 362-63 (evidence of racist statements made by victim's father and father's action of leaning into his truck did not demonstrate sufficient legal provocation to support jury charge on voluntary manslaughter); *See also Knoten, supra.*[5] cf, *State v. Light*, 2008 WL 2715948 (S.C.S.Ct. July 14, 2008).

Likewise, in relying upon Angie Smith's testimony to hold that a manslaughter charge should have been given, the Court of Appeals ignored that Angie's testimony did not support a

[5]The victim's attempt to take the gun away from Smith in a move of self-defense also cannot be considered sufficient *legal* provocation.

voluntary manslaughter instruction. First, the Court of Appeals improperly parsed only a segment of her testimony as supporting a manslaughter charge. *See State v. Foxworth*, 269 S.C. 496, 238 S.E.2d 172 (1977) ("the presence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice"); *State v. Rucker*, 319 S.C. 95, 459 S.E.2d 858 (Ct. App. 1995), *cert. denied*, Mar. 21, 1996 (same).

While it is one thing to give a charge based on an account given by a State's witness, it is quite another, as is necessary here, to cherry pick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually. Indeed, among the cases that have applied this principle, all of them have relied on one cohesive account, and not one of them has simply picked out various disparate facts from various versions to get sufficient elements for the charge. *See State v. Crosby*, 305 S.C. 445, 409 S.E.2d 391 (2003) (relying on defendant' statement to police); *Knoten, supra* (relying on the version of events in Smith's second statement to support voluntary manslaughter); *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (relying on defendant's testimony); *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (relying on testimony of surviving eyewitness); *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986) (relying on defendant's repudiation of his statement in his trial testimony, in which he claimed that as he was putting the gun back in the car the victim grabbed it, causing it to fire); *State v. Mekler*, supra. (relying on defendant's testimony at trial). Cf, *State v. Cottrell*, 376 S.C. 260, 657 S.E.2d 451 (2008).

The Court of Appeals misapprehended this distinction in relying upon Angie's testimony.

More importantly, the Court appeared to have also misinterpreted the substance of her testimony. This testimony simply does not support the requested charge for voluntary manslaughter. When her testimony is viewed in its entirety, it actually supports the opposite inference that Smith murdered the victim because the victim owed money to him from a prior drug deal. It does not support his account nor a manslaughter charge.

Angie testified that Finley called her brother, Rodney Smith, but Rodney refused to get involved because he was tired. However, Angie volunteered to set up a drug buy between Finley and another dealer, Smith. Smith thereafter picked Angie up at home and the two drove to meet Finley at Hyder's mobile home. During the ride, Smith mentioned to Angie that Finley owed him $40 from a previous crack deal. **R. 1-9; 25.**

Once they reached Hyder's trailer, Smith stayed in the car while Angie went inside and tried to facilitate the drug deal. However, the victim wanted to deal with Smith. So, Angie walked back to the car and informed Smith that Finley did not have money for the deal. Smith reached for something in the car and then walked to the trailer. He was calm at this point and did not say anything to Angie. **R. pp. 9-14; 24-25.**

Shortly thereafter, Angie saw both men fighting as they exited the front door of the trailer. Angie heard a pop and she saw the victim fall. Then, Smith hurriedly returned to his vehicle. Angie saw a gun at this point. Smith told Angie "you don't know nothing, you ain't seen nothing." She was scared because she was worried that Smith could have shot her. So, she asked him to drop her off in the street, instead of taking her home. **R. pp. 10-11; 15-19; 23-24; 28-29; 31.**

Even more significantly, the Court of Appeals's holding that Angie's testimony

supported a manslaughter charge overlooks that she admitted that she did not "have any way of knowing what started that scuffle," and that she did not "know what happened ... inside that mobile home" before she saw Smith shoot the victim. **R. p. 31, ll. 10-17**. Thus, the Court may have overlooked or misapprehended that her testimony could not support a manslaughter charge, although it did support the inference of a malicious killing.

As a result, in holding that the trial judge committed reversible error by not giving a manslaughter instruction, the Court of Appeals erred as a matter of law because there was no evidence in the current record that supported a manslaughter instruction. The decision is inconsistent with those cases cited, *supra*, wherein the South Carolina Supreme Court have held that a manslaughter charge was not warranted.

The judgment of the Court of Appeals should be vacated and the judgement of conviction should be affirmed.

II. The trial judge properly denied Smith's motion to charge involuntary manslaughter, and the law of accident to the jury where the undisputed facts of the case fail to support these charges where he was pistol whipping the victim on the head with the butt of the gun when the gun fired.

In its order granting a new trial on voluntary manslaughter, the Court of Appeals deferred resolution of the companion issues concerning the failure to instruct on involuntary manslaughter and accident, citing *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive). The State asserted in its petition for rehearing and petition for rehearing en banc that the trial judge did not err in denying these requested instructions. Since this court granted certiorari, it should resolve those issues. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter matter, it may wish to remand to the Court of Appeals to address the remaining issues.

Involuntary Manslaughter

The trial judge should refuse to charge a lesser-included offense where there was no evidence that the defendant committed the lesser rather than the greater offense. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). To be entitled to a charge on involuntary manslaughter, there must be evidence that the defendant either: (1) killed another without malice and unintentionally, but while engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) killed another without malice and unintentionally, but while 'acting lawfully with reckless disregard of the safety of others. *State v. Burriss*, 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999)). Also,

State v. Tyler, 348 S.C. 526, 528-529, 560 S.E.2d 888, 888 - 889 (2002).

The trial judge properly ruled in the present case that Smith was not entitled to have the jury instructed on the law of involuntary manslaughter.

While Smith's testimony indicates the shooting was unintentional, clearly he was engaged in an unlawful activity tending to cause death or great bodily harm. S.C. Code Ann. § 16-23-410 provides that it "is unlawful for a person to present or point at another person a loaded or unloaded firearm. A person who violates the provisions of this section is guilty of a felony. . . ." Furthermore, Smith's testified the gun fired unintentionally while he was hitting the victim repeatedly in the head with the butt of the gun.

Although Smith was not engaged in a lawful activity when the crime occurred, even if he was, the act of hitting another in the head repeatedly with the butt of a gun does tend to cause death or great bodily harm. *See , State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)(*by pointing gun and waving it in the air, Wharton committed an unlawful act that would naturally tend to cause death or great bodily harm*); State v. Tyler*, 348 S.C. 526, 528-529, 560 S.E.2d 888, 888 - 889 (2002) Also, Smith's testimony does not indicate he handled the gun with reckless disregard for the safety of others. Instead, he maintained the discharge was merely an accident. Cf, *State v. Light*, 2008 WL 2715948 (S.Ct July 14, 2008) . An involuntary manslaughter charge was not appropriate under these circumstances.

Accident

Smith's next argument is that the trial judge erroneously refused to charge the jury concerning the law of accident. The State disagrees and submits that the trial judge properly refused the requested instruction because there was no evidence that the killing was accidental.

Far from it, the only evidence was that Smith was engaged in the felony of pointing and presenting a firearm at the time he discharged the weapon; and, more importantly, he shot the victim as the victim attempted to prevent him from using the gun. As a result, he was either guilty or not guilty of murder.

In *Burriss, supra*, the Court explained that "[f]or a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." 334 S.C. at 259, 513 S.E.2d at 106. When the prosecution's evidence in this case is taken as a whole, it is clear that it reasonably tended to prove that Smith murdered the victim; and it would be improper for this Court to consider Smith's contention that he is entitled to a charge on accident based upon an "accidental" shooting that occurred because Smith introduced the only weapon into the scenario. See also, *Tisdale v. State*, 378 S.C. 122, 662 S.E.2d 410 (2008).

More importantly, even Smith's own statement reveals that he was not acting lawfully at the time of the offense. Instead, he was engaged in the crime of pointing and presenting a firearm. He presented the weapon when he pulled it from his coat pocket from where he had secreted it. Further, it is respectfully submitted that it would be impossible for the crime to have occurred in the manner described by him – shooting the victim in the left eye while pistol whipping him – if he was exercising due care in the handling of the weapon at the time it discharged. Accord, *State v. Wharton*, supra. (Wharton not acting lawfully in waving gun in the air, nor did he exercise due care in handling the weapon).

Therefore, he was not entitled to a jury instruction on the law of accident.

Burriss; *State v Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). More importantly, it is undisputed that the weapon was discharged and the victim killed while he was reacting from having a gun pulled on him. Under these circumstances, he was guilty of murder and could not have been entitled to a charge on the law of accident. *Id.* This argument is without merit.

CONCLUSION

Based upon the foregoing, the State of South Carolina would ask the Court vacate the opinion of the Court of Appeals and affirm the judgment of conviction.

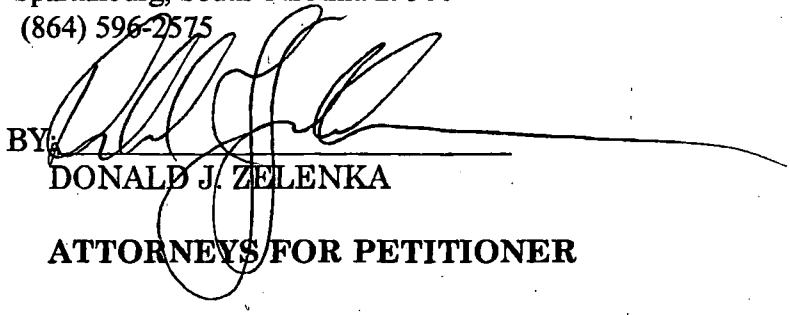
HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

HAROLD W. GOWDY, III.
Solicitor, Seventh Judicial Circuit
3rd Floor, 180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575



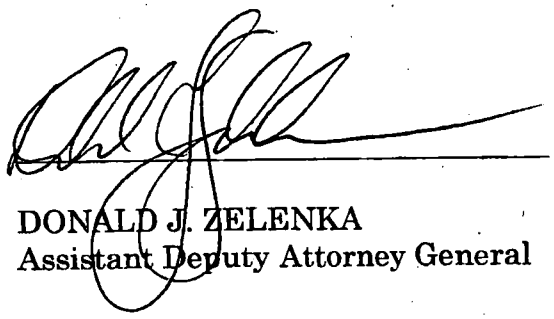
BY: _____
DONALD J. ZELENKA

ATTORNEYS FOR PETITIONER

May 12, 2009.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Brief of Petitioner State of South Carolina in the foregoing action by depositing copies in the InterAgency Mail to Joseph L. Savitz, III, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 12th day of May, 2009.



DONALD J. ZELENKA
Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

PETITIONER,

V.

DAVID DWIGHT SMITH,

RESPONDENT

BRIEF OF RESPONDENT

JOSEPH L. SAVITZ, III
Chief 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 RESPONDENT

INDEX

INDEX 1

ISSUES PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 11

ISSUES PRESENTED

1. The Court of Appeals correctly determined that respondent was entitled to an instruction on voluntary manslaughter at trial and that the trial judge had committed reversible error by refusing to instruct the jury on that lesser-included offense.

2. The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

3. The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

STATEMENT OF THE CASE

For purposes of this stage of the proceeding, counsel for David Dwight Smith agrees to the Statement of the Case contained in the Brief of Petitioner filed by the State.

ARGUMENT

I.

The Court of Appeals correctly determined that respondent was entitled to an instruction on voluntary manslaughter at trial and that the trial judge had committed reversible error by refusing to instruct the jury on that lesser-included offense.

Smith admitted that he shot Finley. The only question at his trial was the nature of the killing – that is, whether it was intentional (and thus, murder, voluntary manslaughter or self-defense) or unintentional (and therefore involuntary manslaughter or accident). The State's theory of the case was that Smith had murdered Finley over $40 Finley owed him from a previous crack cocaine purchase. App. p. 9, lines 7-15. App. p. 46, line 13 – p. 49, line 7. Smith testified that the gun had discharged accidentally when he used it as a sap to defend himself from Finley's physical attack after Finley stole the crack cocaine Smith had brought to sell him. App. p. 89, line 11 – p. 97, line 3. He said, "I was hitting him with a gun and it went off and hit him in the face." App. p. 118, line 19 – p. 119, line 2.

Two State's witnesses corroborated Smith's testimony in its essentials. One stated that Finley told him before Smith arrived that "he was gonna steal the drugs." App. p. 66, lines 2-7; Court's Exhibit #2 (transcript of testimony of Otis Hyder). The other testified, "All I know is, the door came open and they was falling out the door ... [s]cuffling. It's like it happened so quick. They was so close together, that's all I know is I just heard a pop." App. p. 14, line 23 – p. 16, line 18. This witness describes Smith as "scared" and "frightened" immediately afterwards. App. p. 17, lines 11-13.

Based on this evidence, defense counsel requested an instruction on voluntary manslaughter (as well as involuntary manslaughter and accident, which are treated subsequently). App. p. 82.

lines 2-24. The Assistant Solicitor responded, "[I]f they're trying to say that legal provocation was the attack of Mr. David Smith by Robert Finley, then that goes to a self-defense charge. ... They can't use the sufficient legal provocation as their self-defense element and to make it voluntary manslaughter." App. p. 135, lines 9-24. The judge bought this argument and refused to charge voluntary manslaughter. App. p. 138, lines 13-16. His final instructions to the jury do not contain a charge on voluntary manslaughter. App. p. 139, line 3 – p. 151, line 17. Defense counsel objected to its omission. App. p. 151, line 21 – p. 152, line 1.

Voluntary manslaughter is defined as the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). A trial judge should refuse a charge on the lesser-included offense of voluntary manslaughter only where it very clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000).

In this case, the trial judge erred by listening to the Assistant Solicitor: self-defense and voluntary manslaughter and not mutually exclusive as a matter of law. *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998). In *State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596, 597 (1988), the Supreme Court explained:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. ... The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

Here, Smith testified that Finley attacked him without provocation. Eyewitness testimony corroborated his account. Such evidence has routinely supported a charge on voluntary manslaughter. See, for example, *State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983).

As noted, a trial judge must charge voluntary manslaughter if there is *any* evidence which would support a verdict for that lesser-included offense. Compare, *State v. Cooley*, 342 S.C. 63, 536 S.E.2d 666 (2000). The argument the State advances in its certiorari petition is little more than a thinly-disguised attempt to undermine this bedrock principal – but only insofar as it benefits an accused. The State contends:

> While it is one thing to give a charge based on an account given by a State's witness, is quite another ... to cherrypick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually.

Brief of Petitioner, page 12. It further asserts that the evidence must present "one cohesive account" from a single witness before the judge could charge a lesser-included offense. The State makes no effort to reconcile their position with the following routine jury charge:

> You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or you may reject the testimony of a witness in its entirety.

State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 250 (2006).

In short, since there was evidence of voluntary manslaughter, the trial judge erred by refusing to instruct the jury on that offense, and the Court of Appeals correctly reversed Smith's convictions for that reason. This Court should either dismiss certiorari as improvidently granted or affirm the Court of Appeals.

2.

The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

Once again, Smith testified that the gun discharged accidentally as he was using it to strike Finley, who was attacking him. Two eyewitnesses, who testified for the State, corroborated Smith's account. The judge rejected defense counsel's request to charge involuntary manslaughter simply because Finley was killed during a drug deal. App. p. 129, line 20 – p. 130, line 15. His final instructions to the jury do not contain a charge on involuntary manslaughter. Defense counsel took exception to its omission.

In support of his request for involuntary manslaughter, defense counsel cited *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). App. p. 135, lines 18-21. In view of this, the trial judge's error is incomprehensible.

Involuntary manslaughter is defined as either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Moreover, "the unlawful activity must proximately cause death." *Burriss*, 513 S.E.2d at 110, footnote 11. The judge erred by failing to take this requirement of causation into account.

The evidence in this case would support a finding that Smith was lawfully armed in self-defense at the time the fatal shot occurred. *Burriss*. "[T]he negligent handling of a loaded gun will support a finding of involuntary manslaughter." *Id.*, citing *State v. White*, 253 S.C. 475, 171 S.E.2d 712 (1969); see also, *State v. Mekler*, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005).

Therefore, under the circumstances of this case, the judge should have instructed the jury on involuntary manslaughter.

Because the Court of Appeals found error in the failure to charge voluntary manslaughter, it did not reach this issue. Counsel for Smith agrees with the State's position:

> Should this Court issue certiorari, it should resolve [this issue]. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter issue, it may wish to remand to the Court of Appeals to address the remaining issues.

Brief of Petitioner, page 15.

3.

The trial judge committed reversible error by refusing to instruct the jury on the law of accident.

The same evidence which supported charges on manslaughter also supported a charge on the law of accident. The trial judge refused to charge accident because he found that Smith was "in the middle of the drug deal." App. p. 137, line 19 – p. 138, line 2. His final instructions to the jury do not contain a charge on accident. Counsel excepted to its omission.

For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). As in *State v. Burriss*, Smith claimed that he armed himself in self-defense, but the fatal shot occurred when the gun fired accidentally. As in his refusal to charge involuntary manslaughter, the judge erred by failing to take into account the rule that the unlawful activity (here, drug dealing) must proximately cause the death. Instead, the judge should have considered whether Smith was otherwise acting lawfully when the fatal shooting occurred. See *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999).

Again, *Burriss* – which was before the trial judge – is dispositive. Since Smith was entitled to arm himself in self-defense when the gun went off, he was entitled to a charge on accident. In addition to *Burriss* and *Goodson*, see *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990). There is ample evidence in the record to support Smith's claim that he armed himself in self-defense at the time of the fatal shooting.

Therefore, under the circumstances of this case, the judge should have instructed the jury on accident.

Because the Court of Appeals found error in the failure to charge voluntary manslaughter, it did not reach this issue. Counsel for Smith agrees with the State's position:

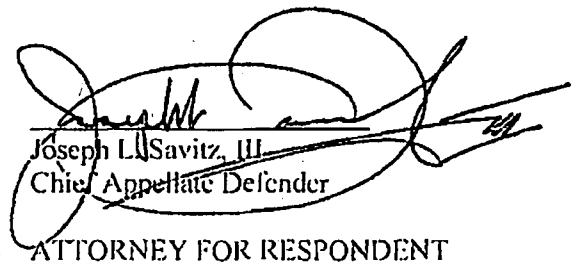
> Should this Court issue certiorari, it should resolve [this issue]. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter issue, it may wish to remand to the Court of Appeals to address the remaining issues.

Brief of Petitioner, page 15.

CONCLUSION

The Court should dismiss certiorari as improvidently granted. Should it address the Court of Appeals' ruling on the manslaughter issue, it should also address Smith's remaining direct appeal issues dealing with the failure to charge involuntary manslaughter and accident. Alternatively, should it reverse the ruling of the Court of Appeals, it may wish to remand to the Court to address these two issues.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 11th day of August, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

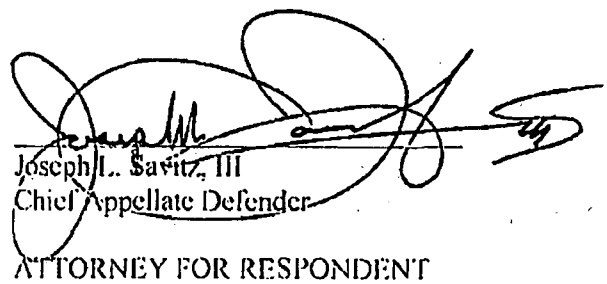
V.

DAVID DWIGHT SMITH,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent in this case has been served on Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 11th day of August, 2009.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 11th day
of August, 2009.

(L.S.)
Notary Public for South Carolina

My Commission Expires: July 1, 2019.

RECEIVED
ADMINISTRATIVE INSTRUCTIONS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

David Dwight Smith, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26926
Heard January 21, 2010 – Filed February 7, 2011

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Petitioner.

Senior Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE KITTREDGE: David Dwight Smith shot and killed Robert Finley in a failed drug deal. The trial court charged the jury on the law of murder and self-defense, but refused to charge voluntary manslaughter, involuntary manslaughter, or accident. The jury convicted Smith of murder and possession of a firearm during the commission of a violent crime.[1] The court of appeals held Smith was entitled to a voluntary manslaughter charge and reversed his convictions. The court of appeals declined to address whether Smith was entitled to an involuntary manslaughter or accident charge. We granted the State's petition for a writ of certiorari. We reverse and reinstate Smith's convictions and sentence.

I.

In the early morning hours of January 12, 1997, Robert Finley (Victim) called Angie Smith's home looking for crack cocaine. Angie contacted David Dwight Smith, a known drug dealer. Angie knew Smith and knew Smith had previously sold crack cocaine to Victim. Victim owed Smith $40 from their most recent drug transaction.

When Smith and Angie arrived at the trailer, Smith sent Angie inside to facilitate the drug deal. Angie returned to the car and informed Smith that Victim wanted to deal directly with Smith. Smith grabbed a gun from under the seat, exited the car, and entered the trailer.

At trial, Angie estimated Smith was inside for approximately two minutes. The trailer door opened, and Angie saw Smith and Victim engaged in a scuffle and "falling out the door." Angie testified she heard a pop and saw Victim's body fall to the ground. Smith then got into the car and told her "you don't know nothing, you don't see nothing," and they drove away.

---

[1] This was Smith's second trial on the charges. The convictions and sentences from his first trial were vacated on post-conviction relief.

Smith's testimony regarding the events leading up to his arrival at the trailer mirrored Angie's. Regarding the encounter with Victim inside the trailer, Smith testified as follows: Victim wanted $50 worth of crack cocaine. Smith placed the drugs on the counter for inspection. Victim informed Smith he had no money, but he would pay him the next day. Smith refused to again give Victim drugs on credit. Victim responded that he was taking the drugs anyway and approached Smith with a "real serious demeanor." At this point, Smith pulled his gun and pointed it at Victim, who was unarmed. Victim continued to approach Smith, stating "what are you gonna do, shoot me, give me the gun, I'll shoot myself." Victim grabbed Smith, trying to knock the gun out of Smith's hand. Smith struck Victim in the face with the gun. As the two men were struggling near the entrance to trailer, the "the gun went off."

II.

The trial court charged the jury on the law of murder and self-defense. The trial court refused to charge voluntary manslaughter because it found no evidence of sufficient legal provocation. The trial court refused to charge accident and involuntary manslaughter because it found there was no evidence Smith was acting lawfully. The court of appeals held the trial court erred in failing to give a voluntary manslaughter charge and reversed his convictions. We granted the State's petition for a writ of certiorari.

The law to be charged to the jury is to be determined by the evidence presented at trial. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. *Lee*, 298 S.C. at 364, 380 S.E.2d at 835.

III.

a. Voluntary Manslaughter

The trial court properly refused Smith's request for a voluntary manslaughter charge. Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Pittman*, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007). The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. *Id.* at 572, 647 S.E.2d at 167. In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. *State v. Norris*, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); *State v. Gardner*, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). "To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Pittman*, 373 S.C. at 572, 647 S.E.2d at 168.

We recognize an overt, threatening act or physical encounter *may* constitute sufficient legal provocation. *See id.* at 573, 647 S.E.2d at 168, (citing *Gardner*, 219 S.C. at 105, 64 S.E.2d at 134) (observing that "[t]his Court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). While Smith's assertion of legal provocation is dubious at best, the record is devoid of any evidence of heat of passion.

For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at

time of the killing. *See State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) ("Both heat of passion and sufficient legal provocation must be present at the time of the killing."). According to Smith, he was not enraged, incapable of "cool reflection," or acting "under an uncontrollable impulse to do violence." Because of the absence of any evidence of heat of passion, the trial court properly declined the voluntary manslaughter charge.[2] We reverse the court of appeals on this issue.

b. Involuntary Manslaughter

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Cabrera-Pena*, 361 S.C. 372, 380-81, 605 S.E.2d 522, 526 (2004).

Smith contends he was entitled to a charge under the second definition of involuntary manslaughter because the evidence would support a finding that he was lawfully armed in self-defense at the time the fatal shot occurred. We find no such evidence.

Smith entered the trailer to sell crack cocaine, a felony, to Victim. Smith pursued the drug deal while armed with a loaded gun, knowing Victim owed him $40 from a previous drug transaction. During the confrontation, Smith brandished the gun and used it to pistol-whip Victim. According to Smith, he pistol-whipped Victim because Victim was approaching him in a

---

[2] The trial court correctly observed that there was no evidence of self-defense, observing, "I just don't see how in the world that the evidence can be construed that [Smith] was without fault in bringing on the difficulty, and how he was in imminent danger of losing his life or sustaining serious bodily injury." It is not entirely clear why self-defense was charged. It appears that the State focused its objections to the requests for charges on voluntary manslaughter, involuntary manslaughter and accident.

"real serious demeanor." Victim was unarmed, the door to Victim's trailer was unlocked, and there is no evidence Smith was unable to retreat from the dangerous situation he created. Based on these facts, we find no evidence to support Smith's assertion that he was acting lawfully by arming himself in self-defense. Specifically, there is no evidence to suggest that Smith was without fault in bringing on the difficulty, that he believed or actually was in imminent danger of losing his life or sustaining serious bodily injury, or that he "had no other probable means of avoiding the danger" other than drawing the loaded weapon. Accordingly, the trial court properly refused the involuntary manslaughter instruction.

c. Accident

For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. *State v. Burriss*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). Because Smith was acting unlawfully, he was not entitled to an accident charge.[3]

IV.

We reverse the court of appeals' determination that Smith was entitled to a voluntary manslaughter charge. We further hold Smith was entitled to neither an involuntary manslaughter charge nor an accident charge. In reversing the court of appeals, we reinstate Smith's convictions and sentence.

REVERSED.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

---

[3] Moreover, there is no evidence Smith exercised due care in the handling of the gun. *See State v. Crosby*, 355 S.C. 47, 51 n.2, 584 S.E.2d 110, 112 n.2 (2003) ("To satisfy the legal defense of accident, it must be shown that the defendant used due care in the handling of the weapon.").

446

ATTORNEY GENERAL'S OFFICE
RECEIVED 2-25-11

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

REMITTITUR

February 24, 2011

The Honorable M. Hope Blackey
Post Office Box 3483
Spartanburg, SC 29304

Re: The State v. Smith, David Dwight
Lower Court Case No. 1997-GS-42-01639

Dear Ms. Blackley:

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

Sincerely yours,

CLERK

DES/lda

Enclosures

cc: Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Harold W. Gowdy, III, Esquire
Mr. David Dwight Smith, #245760
Chief Appellate Defender Robert M. Dudek

STATE OF SOUTH CAROLINA)
)
County of SPARTANBURG)
DAVID DWIGHT SMITH)
Full name and prison number, if any, of applicant.)
)
v.)
)
THE STATE)
Name of Respondent)
)

In the Court of Common Pleas

2011-CP-42-1283

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention EVANS CORRECTIONAL INSTITUTION, 610 HWY 9 WEST, BENNETTSVILLE, SC 29512-2130

2. Name and location of Court which imposed sentence SPARTANBURG COUNTY COURT OF GENERAL SESSIONS, 180 MAGNOLIA STREET, SPARTANBURG, SC

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) 97-GS-42-1639
   (b)
   (c)

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) OCTOBER 31, 2005 35 YEARS
   (b)
   (c)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 17 AM 8:24
M. HOLE BLANKLEY

5. Check whether a finding of guilty was made

(a) after a plea of guilty N/A

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere N/A

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. THE SOUTH CAROLINA COURT OF APPEALS

ii. THE SOUTH CAROLINA SUPREME COURT

iii.

(b) the result in each such Court to which you appealed:

i. REVERSED AND REMANDED

ii. NO ACTION TAKEN BY THE COURT

iii.

(c) the date of each such result:

i. FILED MARCH 20, 2008

ii. FEBRUARY 23, 2011

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. UNPUBLISHED OPINION NO. 2008-UP-194

ii. OPINION NO. 26926

iii.

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) N/A

FILED
CLERK OF COURT
SUPREME COURT

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF TRIAL & APPELLANT COUNSEL

(b) DOUBLE JEOPARDY, BRADY VIOLATION, ABUSE OF DECRETION, NEWLY DISCOVERED LAW

(c) VIOLATION OF THE STATE, UNITED STATES & FEDERAL CONSTITUTION

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) TRIAL COUNSEL DID NOT SECURE STATE WITNESSES STATEMENTS AND TESTIMONY OR DOUBLE JEOPARDY CLAIM. COUNSEL DID NOT REQUEST SPECIFIC INSTRUCTIONS. APPELLATE COUNSEL MADE ITSELF UNAVAILABLE.

(b) PCR ORDER OF MAY 2003, TRIAL 2005, TRIAL 2005, STATE V. BELCHER, 685 S.E.2d 802 (S.C. 2009), MEKLER AND LIGHT.

(c) VIOLATION OF THE 6TH, 8TH & 14TH AMENDMENTS OF THE STATE, UNITED STATES & FEDERAL CONSTITUTION. INDICTMENT DISPUTE. APPLICANT RESERVES THE RIGHT TO AMEND APPLICATION.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

YES

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

YES

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

YES

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. POST CONVICTION RELIEF

ii. PETITION FOR REHEARING, REHEARING EN BANC & APPEAL

iii. HABEAS CORPUS

iv.

(b) the name and location of the Court in which each was filed:

i. SPARTANBURG COUNTY COURT OF COMMON PLEAS

ii. THE SUPREME COURT OF SOUTH CAROLINA

iii. BEXAR COUNTY, SAN ANTONIO, TX DISTRICT COURT

iv.

FILED
CLERK OF COURT
SPARTANBURG COUNTY

(c) the disposition thereof:

i. POST-CONVICTION RELIEF GRANTED

ii. NO ACTION TAKEN BY COURT

iii. NO RULING

iv.

(d) the date of each such disposition:

i. MAY 2003

ii. FEBRUARY 2011

iii. FILED MARCH 2005 NO RULING

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. 2000-CP-42-1649 ALEO 269898

ii. OPINION NO. 26926

iii. UNKNOWN AT PRESENT

iv.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? YES

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. BRADY VIOLATION, PROSECUTORIAL MISCONDUCT

ii. MISREPRESENTATION OF THE FACTS, INCOMPLETE TRANSCRIPT

iii. INDICTMENT

(b) the proceedings in which each ground was raised:

i. POST-CONVICTION RELIEF

ii. IN RESPONSE TO COURT'S RULING IN THE S.C. SUPREME COURT

iii. HABEAS CORPUS, EXTRADITION PROCEEDING IN SAN ANTONIO, TX

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented.

(a) RESERVE THE RIGHT TO RESPOND AND AMEND. NO BRIEF AT THIS TIME.

(b) " " " "

(c) " " " "

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAY 9 AM 9: 29
HOPE BLACKLEY

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

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

YES

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? YES

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. E.P. "Bill" Godfrey, Attorney At Law, 10 East Avenue, Greenville, SC 29601

ii. Joseph L. Savitz, III, Senior Appellate Defender, P.O. Box 11589, Columbia, SC 29211-1589

iii. Initial Attorney's info not available at present

(b) the proceedings at which each such attorney represented you:

i. Trial & Post-Conviction Relief

ii. Direct Appeal

iii. Habeas Corpus

18. State clearly the relief you seek in filing this application.

Vacation Of Sentence, Reverse Of Conviction, Appropriate Relief The Court Deems Appropriate.

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

No

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR 17 AM 9:35
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF SPARTANBURG)

I, DAVID DWIGHT SMITH, 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 10 day of March 2011

Notary Public for South Carolina
My Commission Expires 8-18-2018

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, DAVID DWIGHT SMITH, 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 or perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Applicant

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR 17 PM 2:25
PAMELA BLACKLEY

Sworn to and subscribed before me
This 10 day of March, 2011

L.S.
Notary Public for South Carolina
My Commission Expires: August 18, 2018

MR. DAVID DWIGHT SMITH, SCDC#245760
EVANS CORRECTIONAL INSTITUTION
610 HWY 9 WEST / SMU 141A
BENNETTSVILLE, SC 29512-2130

MARCH 10, 2011

SPARTANBURG COUNTY CLERK OF COURT
THE HONORABLE M. HOPE BLAKELY
POST OFFICE BOX 3483
SPARTANBURG, SC 29304

DEAR HONORABLE BLAKELY,

PLEASE FIND ENCLOSED MY APPLICATION FOR POST-CONVICTION RELIEF. I AM REQUESTING THAT THIS HONORABLE COURT CLOCK-DATE-STAMP-FILE MY APPLICATION AND RETURN A COPY TO ME AT THE ABOVE LISTED ADDRESS. I RESERVE THE RIGHT TO AMEND MY APPLICATION. WOULD THE COURT ALSO CONSIDER APPOINTING SKILLED ADEQUATE COUNSEL FOR MY REPRESENTATION. ATTORNEY C. RAUCH WISE OF GREENWOOD, SC IS SKILLED AND EXTREMELY KNOWLEDGABLE IN THE AREA OF LAW IN MY CASE. APPLICANT CLAIMS THE PROTECTION OF HOUSTON V. LACK, 108 S.CT. 2379 AND ALL IT'S PROGENY. THANK YOU IN ADVANCE FOR YOUR ANTICIPATED ASSISTANCE IN MATTER.

SINCERELY

David D. Smith

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR 17 AM 9:25
M. HOPE BLAKELY

CC: FILE

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
DAVID DWIGHT SMITH, 245760,	)	2011-CP-42-01283
	)	
Applicant,	)	
	)	**AMENDED POST-CONVICTION RELIEF APPLICATION**
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior to and during his jury trial. He alleges that his pleas were not voluntarily and intelligently entered, and that his right to due process of law was violated in the trial court. The Post-Conviction Relief Application previously filed on March 17, 2011 under docket number 2011-CP-42-1238 is hereby amended to include the following additional allegations:

1. Trial Counsel was ineffective for failing to question witnesses for the State concerning any deals they may have been given, or any favorable consideration they hoped to receive, at the time of their original testimony, in exchange for their cooperation and testimony at Applicant's first trial in 1997.

2. Trial Counsel was ineffective for failing to question witnesses for the State concerning any deals they may have been given, or any favorable consideration they hoped to receive, in exchange for their cooperation and testimony at Applicant's second trial in 2005.

3. Trial Counsel was ineffective for failing to question witnesses for the prosecution concerning charges that could have been brought against them concerning this case, and any conversations they had with law enforcement, or anyone affiliated with the Solicitor's Office, concerning their potential exposure to criminal charges.

4. Trial Counsel was ineffective for failing to consistently object to leading questions posed by the State where said examination either directly suggested the desired inculpatory response or lead witnesses to alter previous testimony which was advantageous to the defense.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR 18 AM 9:05

5. Trial Counsel was ineffective for failing to cross-examine Dr. Wren concerning whether some of the abrasions reported in the autopsy may have been caused by a surface on the grips of the hand gun involved in this case. Tr. p. 176, l. 4- p. 179, l. 4.

6. Trial Counsel was ineffective for failing to interview and investigate Julian Terry Bradley as a potential witness in this case where Bradley was present at the scene of this shooting, and left the location for a period of time before law enforcement arrived to investigate this incident.

7. Trial Counsel was ineffective for failing to request criminal records on all the State's witnesses who were neither law enforcement nor experts.

8. Trial Counsel was ineffective for failing to obtain criminal records for Julian Terry Bradley, who was present at the scene of the shooting in this case

9. Trial Counsel was ineffective for failing to request criminal records for the victim, Robert A. Findley.

10. Trial Counsel was ineffective for failing to argue that Terry Bradley could have removed the five (5) rocks of crack cocaine delivered to, and left at, the scene by Applicant.

11. Trial Counsel was ineffective for failing to adequately argue that the prior testimony of Otis Hyder, Sr. could not be introduced in Applicant's second trial where Hyder was not impeached at the first trial with the notes from an investigator from the Solicitor's Office which were subsequently part of the basis for a reversal of Applicant's first conviction in a PCR action.

12. Trial Counsel was ineffective for failing to argue that the prior testimony of Otis Hyder, Sr. was not admissible under Rule 804 (a) (4) SCRE where the State failed to present competent evidence that the witness was unavailable to present live testimony.

13. Trial Counsel was ineffective for counseling Applicant to withdraw his objection to the previous testimony of Otis Hyder, Sr., *where at the first trial,* this witness was not cross-examined concerning the following:

   i. The content of notes taken by an investigator for the Solicitor's Office (introduced Court's Exhibit No. One at Trial No. Two);

   ii. His prior criminal record;

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
A. HOPE BLACKLEY

iii. His knowledge of what happened to the drugs left at the scene by the Applicant;

iv. His involvement in a preconceived plan to rob Applicant;

v. His potential criminal exposure in this case, and any concessions made by the prosecution in exchange for his cooperation against Applicant; and

vi. Details concerning his visual impairment.

14. Trial Counsel was ineffective for failing to adequately cross-examine Otis Hyder, Sr. concerning the nature and severity of his visual impairment at the time of this incident.

15. Trial Counsel was ineffective for failing to present Morgan Simmons Ortez as a witness at Applicant's second trial where her testimony was necessary to establish that she had reported to law enforcement that earlier on the evening of his death the victim confessed to her that he had tried to rob another drug dealer.

16. Trial Counsel did not provide Applicant effective assistance of counsel where he failed to be prepared to use the transcript from his first PCR case to establish that Defense Counsel from Applicant's first trial, Attorney Cox, would have cross-examined Otis Hyder, Sr. differently had he been aware of the existence of the notes of an investigator from the Solicitor's Office marked as Court's Exhibit No. 1, at Trial II.

17. Trial Counsel was ineffective for failing to object to the introduction of Otis Hyder, Sr.'s testimony from Applicant's previous trial where Hyder was not cross-examined at the first trial concerning when the damage to the door frame at his home, the crime scene, occurred.

18. Trial Counsel was ineffective for failing to object to the self-defense charge given at Applicant's trial where the charge given was confusing, addressed facts not present in Applicant's case, and deprived him of the opportunity to have this defense given appropriate consideration by the jury.

19. Trial Counsel was ineffective for failing to object to testimony from Angie Smith wherein she asserted it was "*to her understanding*" the Applicant had crack and a gun. Tr. p. 89, l. 17-90, l. 10.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
M. HOPE ACKLEY

20. Trial Counsel was ineffective for neglecting to cross-examine Angie Smith concerning whether she had ever been charged with, or threatened with, drug charges, in connection with her involvement in the drug transaction she admitted participating in with the victim and the Applicant.

21. Trial Counsel was ineffective for failing to cross-examine Angie Smith concerning what, if any, charges had been brought against her in conjunction with the crack cocaine she admitted distributing after it was given to her by the Applicant after the shooting. Tr. p. 90, l. 15-24.

22. Trial Counsel was ineffective for failing to cross-examine Angie Smith concerning whether she had set the Applicant up to be robbed on the night of the shooting by Otis Hyder, Sr. and/or Julian Terry Bradley.

23. Trial Counsel was ineffective for failing to object to the prosecution not only leading, but misstating previous witness testimony, in its examination of witnesses. *See,* Tr. 92, ll. 15-17, Tr. p. 92, ll. 18-20 *But see*, Tr. p. 88, ll. 17-19, and Tr. p. 80, l. 17-90, 10

24. Trial Counsel was ineffective for neglecting to ascertain what State witness Cynthia Roseburgh was referencing when stated that, "well, both of them got it wrong." Tr. p. 102, l. 5.

25. Trial Counsel was ineffective for failing to cross-examine Detective Denton about his claim that there had been testimony that the gun was discharged "*towards the trailer*" where the record did not support that assertion.

26. Trial Counsel was ineffective for failing to object to Detective Denton's testimony concerning ballistics when he had not been qualified as an expert in that field. Tr. p. 134, ll. 6-11 and Tr. p. 133, l. 17- p. 134, l. 2.

27. Trial Counsel was ineffective for failing to obtain a ruling from the Court concerning Applicant's objection to testimony from Detective Denton wherein he stated that when he first spoke with the Applicant he wanted to know if it was about "*a murder case*" in Spartanburg. Tr. p. 137, ll. 21- p. 138, l. 25.

28. Trial Counsel was ineffective for failing to adequately cross-examine Detective Denton concerning his use of the term *murder* when recalling Applicant's statements to him in their initial conversation.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
M. HOLLY CHILEY

29. Trial Counsel was ineffective for failing to obtain a ruling from the trial judge concerning his objection to leading by the prosecution regarding the crucial assertion that Applicant used the term "murder" when asking law enforcement why they wanted to talk to him shortly after this incident. *See,* Tr. p. 138, ll. 4-21.

30. Trial Counsel was ineffective for failing to cross-examine Detective Denton concerning law enforcement's investigation of Julian Terry Bradley and his role in this case.

31. Trial Counsel was ineffective for failing to object to testimony from Dr. Wren in which he states that law enforcement probably moved the deceased body. Tr. p. 176, l. 3 Tr. p. 52, ll. 22-23 Tr. p. 54, ll. 12-13, Tr. p. 46, ll. 15-18, Tr. 54, ll. 1-8, Tr. p. 60, ll. 1-15.

32. Trial Counsel was ineffective for failing to object to the introduction of the previous testimony of Otis Hyder, Sr., on the ground that this witness could not give competent eye witness testimony when, by his own account, he was virtually blind.

33. Trial Counsel was ineffective for failing to make an objection to Applicant's re-trial on grounds of double jeopardy where his original convictions and sentences were overturned on the ground that certain exculpatory evidence, known to the State, had not been turned over to the defense by the State.

34. Trial Counsel was ineffective for failing to argue that Applicant may have unintentionally put pressure on the trigger as a reflex reaction to losing his balance during his struggle with the victim.

35. Trial Counsel was ineffective for failing to argue that if Applicant had intended to kill the victim over a $40.00 debt he would not have let someone as big as the victim get that close to him, and thereby risk losing control over the gun, before firing.

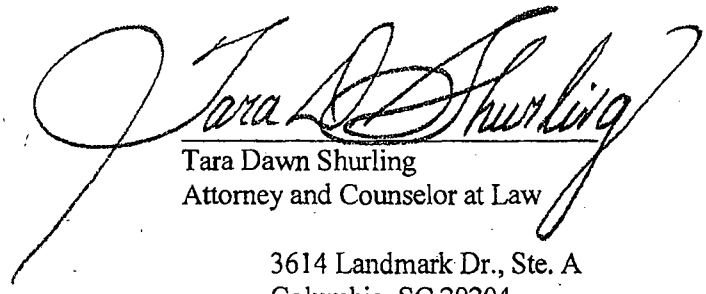
36. Trial Counsel was ineffective for failing to present a closing argument to the jury in which he adequately reviewed the standard for self-defense and illustrated for the jury how the evidence adduced at Applicant's trial fit that standard.

37. Trial Counsel was ineffective for failing to object to the self-defense charge in this case where a portion of that charge indicated that the Applicant had a burden of proof and therefore, was unconstitutionally burden shifting and violated Applicant's right to due process of law where the instruction in question diluted the State's burden of proof beyond a reasonable doubt.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9: 05
M. HOLLAND

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his jury trial proceeding in the Court of General Sessions. Copies of these amendments have been served on opposing counsel, Suzanne White, Senior Assistant Attorney General, and Defense Counsel Everett P. Godfrey, Jr., Esquire.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

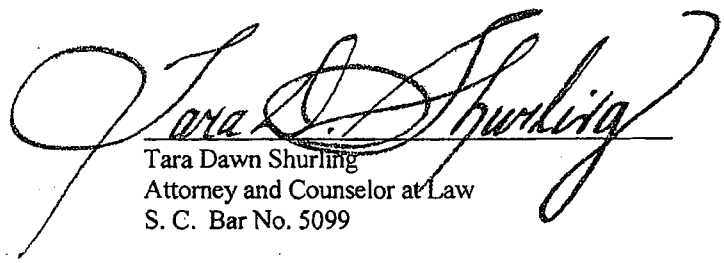
This 12th day of March, 2015.
Columbia, SC

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
N. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
DAVID DWIGHT SMITH, 245760,)	2011-CP-42-01283
Applicant,)	**CERTIFICATE OF SERVICE**
v.)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	

The undersigned attorney hereby certifies that one copy of the Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, trial counsel, E. P. Bill Godfrey, Jr., by email on this the 12th day of March, 2015 to:

E. P. Bill Godfrey, Jr., Esquire
121 Chipwood Lane
Greenville, SC 29615
defense.godfrey@gmail.com



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 12th day of March, 2015.

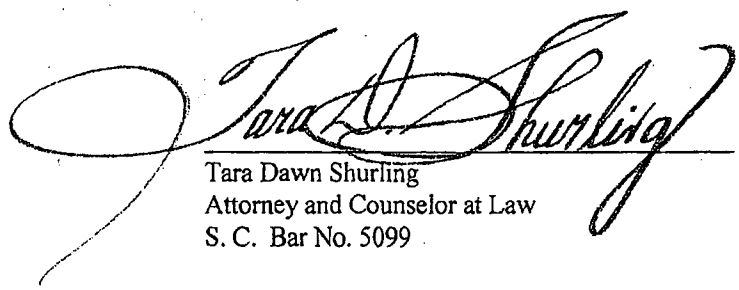
Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
DAVID DWIGHT SMITH, 245760,	)	2011-CP-42-01283
Applicant,	)	
v.	)	**CERTIFICATE OF SERVICE**
STATE OF SOUTH CAROLINA, Respondent.	)	

The undersigned attorney hereby certifies that one copy of the Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Assistant Deputy Attorney General, Suzanne White, by email on this the 12th day of March, 2015 to:

Suzanne White
Assistant Deputy Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211
swhite@scag.gov



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
H. HOPE BLACKLEY

SWORN TO BEFORE ME this 12th day of March, 2015.

Deuzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
David Dwight Smith, #275354,	)	2011-CP-42-1283
Applicant,	)	
v.	)	RETURN
State of South Carolina,	)	
Respondent.	)	

In response to the post-conviction relief application filed on March 17, 2011, the Respondent would show this Court:

I.

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the April 1997 term of General Sessions for murder and possession of a weapon during the commission of a violent crime (97-GS-42-1639, counts 1 and 2). The Applicant was first tried on these charges in 1997 and represented by T. Louis Cox, Esquire. On December 4, 1997, the Applicant was found guilty, after a trial by jury, of both charges. The Honorable J. Derham Cole sentenced the Applicant to life for the murder and to a concurrent term of five years for the possession of weapon during the commission of a violent crime charge.

The Applicant appealed his conviction or sentence to the South Carolina Supreme Court. The South Carolina Supreme Court dismissed the appeal in an Order dated December 2, 1999 and denied the Applicant's Petition for Rehearing in an Order dated April 6, 2000. The Applicant subsequently filed an application for post-conviction relief on June 7, 2000. An

evidentiary hearing was held at which the Applicant was present and represented by E. P. "Bill" Godfrey, Esquire. The Honorable Donald W. Beatty granted post-conviction relief by written Order dated May 23, 2003. Respondents filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on December 1, 2004. The Remittitur was returned on December 17, 2004.

Applicant then proceeded to trial a second time on these charges. E. P. "Bill" Godfrey, Esquire, represented the Applicant. On November 1, 2005, the Applicant was convicted of these charges by a jury. The Honorable Doyet A. Early III sentenced the Applicant to concurrent terms of thirty-five years for murder and five years for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed Applicant's conviction and sentence and remanded the case for a new trial. State v. Smith, Op. No. 2008-UP-194 (filed March 20, 2008). The Respondent filed a Petition for Rehearing and a Petition for Rehearing En Banc, both of which were subsequently denied on May 27, 2008. Respondent then filed a Petition for Writ of Certiorari, which was granted by the South Carolina Supreme Court on April 10, 2009. Following the submission of briefs by the parties, the South Carolina Supreme Court reversed the decision of the Court of Appeals and reinstated the Applicant's convictions and sentence. State v. Smith, Op. No. 26926 (filed February 7, 2011). The Remittitur was returned on February 24, 2011.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR and appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
    a. Counsel failed to secure State witness statements and testimony or double jeopardy claim,
    b. Counsel failed to request specific instructions,
2. Ineffective assistance of appellate counsel, in that;
    a. Appellate counsel made itself unavailable,
3. Double jeopardy;
4. Brady violation;
5. Abuse of discretion;
6. Newly discovered law;
    a. State v. Belcher, 685 S.E.2d 802 (2009), Mekler and Light.
7. Violation of the State, United States, and Federal Constitution;
    a. Violation of the 6th, 8th, and 14th Amendments of the State, United States and Federal Constitution.

III.

Respondent asserts that the Applicant's allegations of ineffective assistance of trial counsel are without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

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 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).

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. Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry v. State, *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).

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. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there

was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate 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).

V.

The third and fifth allegations presented by Applicant appear to raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or

on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss this application for post-conviction relief.

VI.

The Respondent construes ground four to allege that the State withheld favorable evidence in violation of Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

The Respondent submits that this ground for relief is totally without merit. However, the allegation concerning a Brady violation probably raises questions of fact that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.

VII.

The Applicant also claims newly discovered law and lists several case names, but fails to address how he believes these cases apply to his trial. The Respondent submits that this allegation is without merit because the applicant has failed to specifically set forth the grounds upon which the allegation is based in accordance with S.C. Code Ann. §17-27-50. The respondent moves for summary dismissal pursuant to South Carolina Code Ann. §17-27-70 on

the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that this allegation should be dismissed as a matter of law.

VIII.

The Applicant's final allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

IX.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

X.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: _____
ATTORNEYS FOR THE RESPONDENT

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

May 1, 2012.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	))	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
David Dwight Smith, Applicant, v. State of South Carolina, Respondent.	))))))))))	**2011-CP-42-1283** **CERTIFICATE OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

D. Andrew Turman, Esquire
The Law Offices of Lee & Smith, PA
P.O. Box 2229
Spartanburg, South Carolina 29304

Anne Mueller

Anne A. Mueller
Legal Assistant for the Respondent

DATED this 1st day of May, 2012.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
DAVID DWIGHT SMITH, 245760, Applicant, v. STATE OF SOUTH CAROLINA, Respondent.	)	2011-CP-42-01283 **SUPERSEDING AMENDED POST-CONVICTION RELIEF APPLICATION**

The Applicant alleges that his rights to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution, were violated in the trial court and on direct appeal. The Post-Conviction Relief Application previously filed on March 17, 2011 under docket number 2011-CP-42-1238 is hereby amended to include the following additional allegations:

1. Trial Counsel was ineffective for failing to question witnesses for the State concerning any deals they may have been given, or any favorable consideration they hoped to receive, at the time of their original testimony, in exchange for their cooperation and testimony at Applicant's first trial in 1997.

2. Trial Counsel was ineffective for failing to question witnesses for the State concerning any deals they may have been given, or any favorable consideration they hoped to receive, in exchange for their cooperation and testimony at Applicant's second trial in 2005.

3. Trial Counsel was ineffective for failing to question witnesses for the prosecution concerning charges that could have been brought against them concerning this case, and any conversations they had with law enforcement, or anyone affiliated with the Solicitor's Office, concerning their potential exposure to criminal charges.

4. Trial Counsel was ineffective for failing to consistently object to leading questions posed by the State where said examination either directly suggested the desired inculpatory response or lead witnesses to alter previous testimony which was advantageous to the defense.

5. Trial Counsel was ineffective for failing to cross-examine Dr. Wren concerning whether some of the abrasions reported in the autopsy may have been caused by a surface on the grips of the hand gun involved in this case. Tr. p. 176, l. 4- p. 179, l. 4.

6. Trial Counsel was ineffective for failing to interview and investigate Julian Terry Bradley as a potential witness in this case where Bradley was present at the scene of this shooting, and left the location for a period of time before law enforcement arrived to investigate this incident.

7. Trial Counsel was ineffective for failing to request criminal records on all the State's witnesses who were neither law enforcement nor experts.

8. Trial Counsel was ineffective for failing to obtain criminal records for Julian Terry Bradley, who was present at the scene of the shooting in this case

9. Trial Counsel was ineffective for failing to request criminal records for the victim, Robert A. Findley.

10. Trial Counsel was ineffective for failing to argue that Terry Bradley could have removed the five (5) rocks of crack cocaine delivered to, and left at, the scene by Applicant.

11. Trial Counsel was ineffective for failing to adequately argue that the prior testimony of Otis Hyder, Sr. could not be introduced in Applicant's second trial where Hyder was not impeached at the first trial with the notes from an investigator from the Solicitor's Office which were subsequently part of the basis for a reversal of Applicant's first conviction in a PCR action.

12. Trial Counsel was ineffective for failing to argue that the prior testimony of Otis Hyder, Sr. was not admissible under Rule 804 (a) (4) SCRE where the State failed to present competent evidence that the witness was unavailable to present live testimony.

13. Trial Counsel was ineffective for counseling Applicant to withdraw his objection to the previous testimony of Otis Hyder, Sr., *where at the first trial,* this witness was not cross-examined concerning the following:

i. The content of notes taken by an investigator for the Solicitor's Office (introduced Court's Exhibit No. One at Trial No. Two);

ii. His prior criminal record;

iii. His knowledge of what happened to the drugs left at the scene by the Applicant;

iv. His involvement in a preconceived plan to rob Applicant;

v. His potential criminal exposure in this case, and any concessions made by the prosecution in exchange for his cooperation against Applicant; and

vi. Details concerning his visual impairment.

14. Trial Counsel was ineffective for failing to adequately cross-examine Otis Hyder, Sr. concerning the nature and severity of his visual impairment at the time of this incident.

15. Trial Counsel was ineffective for failing to present Morgan Simmons Ortez as a witness at Applicant's second trial where her testimony was necessary to establish that she had reported to law enforcement that earlier on the evening of his death the victim confessed to her that he had tried to rob another drug dealer.

16. Trial Counsel did not provide Applicant effective assistance of counsel where he failed to be prepared to use the transcript from his first PCR case to establish that Defense Counsel from Applicant's first trial, Attorney Cox, would have cross-examined Otis Hyder, Sr. differently had he been aware of the existence of the notes of an investigator from the Solicitor's Office marked as Court's Exhibit No. 1, at Trial II.

17. Trial Counsel was ineffective for failing to object to the introduction of Otis Hyder, Sr.'s testimony from Applicant's previous trial where Hyder was not cross-examined at the first trial concerning when the damage to the door frame at his home, the crime scene, occurred.

18. Trial Counsel was ineffective for failing to object to the self-defense charge given at Applicant's trial where the charge given was confusing, addressed facts not present in Applicant's case, and

deprived him of the opportunity to have this defense given appropriate consideration by the jury.

19. Trial Counsel was ineffective for failing to object to testimony from Angie Smith wherein she asserted it was "*to her understanding*" the Applicant had crack and a gun. Tr. p. 89, l. 17-90, l. 10.

20. Trial Counsel was ineffective for neglecting to cross-examine Angie Smith concerning whether she had ever been charged with, or threatened with, drug charges, in connection with her involvement in the drug transaction she admitted participating in with the victim and the Applicant.

21. Trial Counsel was ineffective for failing to cross-examine Angie Smith concerning what, if any, charges had been brought against her in conjunction with the crack cocaine she admitted distributing after it was given to her by the Applicant after the shooting. Tr. p. 90, l. 15-24.

22. Trial Counsel was ineffective for failing to cross-examine Angie Smith concerning whether she had set the Applicant up to be robbed on the night of the shooting by Otis Hyder, Sr. and/or Julian Terry Bradley.

23. Trial Counsel was ineffective for failing to object to the prosecution not only leading, but misstating previous witness testimony, in its examination of witnesses. *See,* Tr. 92, ll. 15-17, Tr. p. 92, ll. 18-20 *But see*, Tr. p. 88, ll. 17-19, and Tr. p. 80, l. 17-90, 10

24. Trial Counsel was ineffective for neglecting to ascertain what State witness Cynthia Roseburgh was referencing when stated that, "well, both of them got it wrong." Tr. p. 102, l. 5.

25. Trial Counsel was ineffective for failing to cross-examine Detective Denton about his claim that there had been testimony that the gun was discharged "*towards the trailer*" where the record did not support that assertion.

26. Trial Counsel was ineffective for failing to object to Detective Denton's testimony concerning ballistics when he had not been qualified as an expert in that field. Tr. p. 134, ll. 6-11 and Tr. p. 133, l. 17- p. 134, l. 2.

27. Trial Counsel was ineffective for failing to obtain a ruling from the Court concerning Applicant's objection to testimony from Detective

Denton wherein he stated that when he first spoke with the Applicant he wanted to know if it was about "*a murder case*" in Spartanburg. Tr. p. 137, ll. 21- p. 138, l. 25.

28. Trial Counsel was ineffective for failing to adequately cross-examine Detective Denton concerning his use of the term *murder* when recalling Applicant's statements to him in their initial conversation.

29. Trial Counsel was ineffective for failing to obtain a ruling from the trial judge concerning his objection to leading by the prosecution regarding the crucial assertion that Applicant used the term "murder" when asking law enforcement why they wanted to talk to him shortly after this incident. *See,* Tr. p. 138, ll. 4-21.

30. Trial Counsel was ineffective for failing to cross-examine Detective Denton concerning law enforcement's investigation of Julian Terry Bradley and his role in this case.

31. Trial Counsel was ineffective for failing to object to testimony from Dr. Wren in which he states that law enforcement probably moved the deceased body. Tr. p. 176, l. 3 Tr. p. 52, ll. 22-23 Tr. p. 54, ll. 12-13, Tr. p. 46, ll. 15-18, Tr. 54, ll. 1-8, Tr. p. 60, ll. 1-15.

32. Trial Counsel was ineffective for failing to object to the introduction of the previous testimony of Otis Hyder, Sr., on the ground that this witness could not give competent eye witness testimony when, by his own account, he was virtually blind.

33. Trial Counsel was ineffective for failing to make an objection to Applicant's re-trial on grounds of double jeopardy where his original convictions and sentences were overturned on the ground that certain exculpatory evidence, known to the State, had not been turned over to the defense by the State.

34. Trial Counsel was ineffective for failing to argue that Applicant may have unintentionally put pressure on the trigger as a reflex reaction to losing his balance during his struggle with the victim.

35. Trial Counsel was ineffective for failing to argue that if Applicant had intended to kill the victim over a $40.00 debt he would not have let

someone as big as the victim get that close to him, and thereby risk losing control over the gun, before firing.

36. Trial Counsel was ineffective for failing to present a closing argument to the jury in which he adequately reviewed the standard for self-defense and illustrated for the jury how the evidence adduced at Applicant's trial fit that standard.

37. Trial Counsel was ineffective for failing to object to the self-defense charge in this case where a portion of that charge indicated that the Applicant had a burden of proof and therefore, was unconstitutionally burden shifting and violated Applicant's right to due process of law where the instruction in question diluted the State's burden of proof beyond a reasonable doubt.

38. Trial Counsel was ineffective for failing to object, or otherwise respond, when the prosecution answered negatively when asked by the Court what evidence existed which supported Applicant's theory of the case.

39. Trial Counsel was ineffective for failing to object to an improper jury instruction on malice given at his jury trial.

40. Applicant received ineffective assistance of counsel on direct appeal where appellate counsel, Joseph L. Savitz, continued to represent Applicant on direct appeal after Applicant filed a grievance against Savitz without advising the Court of a conflict of interest arising from that grievance which compromised Attorney Savitz's ability to represent Applicant.

41. Applicant received ineffective assistance of counsel on direct appeal where Attorney Savitz failed to notify Applicant of the State's appeal from the favorable decision of the South Carolina Court of Appeals for nearly two years.

42. Applicant received ineffective assistance of appellate counsel where Savitz failed to file a Petition for Rehearing following the Supreme Court's reversal of the Opinion of the South Carolina Court of Appeals' opinion granting Applicant a new trial.

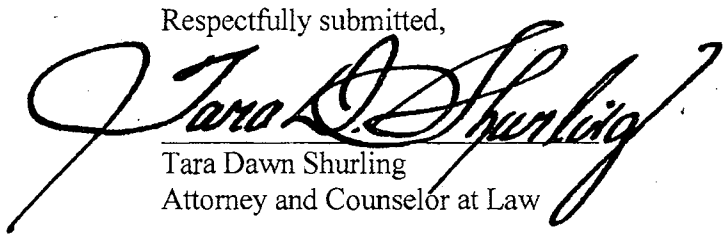
43. On appeal in the Supreme Court of South Carolina, Appellate Counsel was ineffective for failing to file a cross-appeal on the issuance of an improper malice instruction in the trial court following the Supreme Court's decision in *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802

(S.Ct., decided October 12, 2009), where Applicant's jury was charged on the law of self-defense and the inference of malice from the use of a deadly weapon.

44. Applicant received ineffective assistance of counsel on direct appeal where Attorney Savitz neglected to submit as an appellate issue the failure of the trial court to grant Applicant a directed verdict of acquittal.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his jury trial proceeding in the Court of General Sessions. Copies of these amendments have been served on opposing counsel, Suzanne White, Senior Assistant Attorney General, and Defense Counsel Everett P. Godfrey, Jr., Esquire.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

SCAR
2015 JUN 11 AM 9:03
M. HOPE BLACKLEY

This 9th day of June, 2015.

Columbia, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
DAVID DWIGHT SMITH, 245760,)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
Respondent.)

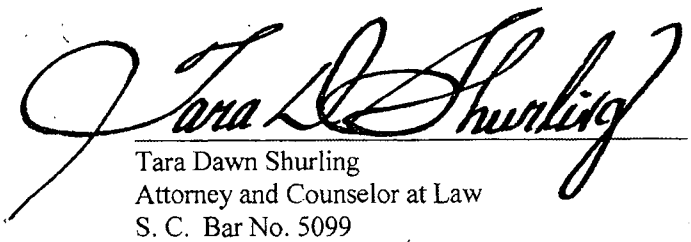
IN THE COURT OF COMMON PLEAS

2011-CP-42-01283

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Superseding Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Assistant Attorney General, Suzanne White, by email on this the 9th day of June, 2015 to:

Suzanne H. White
Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211
swhite@scag.gov



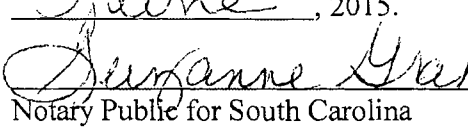
Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

SPARTANBURG COUNTY
2015 JUN 11 AM 9:03
M. HOPE BLACKLEY

SWORN TO BEFORE ME this 9th day of June, 2015.



Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DAVID DWIGHT SMITH, 245760,

Applicant,

v.

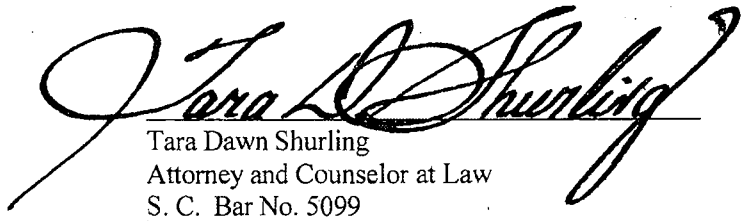
STATE OF SOUTH CAROLINA,
Respondent.

2011-CP-42-01283

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Superseding Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Mary Alice H. Godfrey, Esq. on behalf of trial counsel, E. P. Bill Godfrey, Jr., by email on this the 9th day of June, 2015 to:

Mary Alice H. Godfrey, Esq
10 East Avenue
Greenville, S.C. 29601
chrissie@godfreylawfirm.com



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 9th day of June, 2015.

Suzanne S. Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

SPARTANBURG COUNTY
2015 JUN 11 AM 9:03
M. HOPE BLACKLEY

1 State of South Carolina
2 County of Spartanburg

In the Court of Common Pleas

3
4 David Dwight Smith,)
5 Applicant,) 2011-CP-42-1283
6 -vs-) June 11, 2015
7 The State of South Carolina,)
8 Respondent.) Transcript of Record
9 _____)
10
11 B E F O R E:
12 The Honorable R. Scott Sprouse, Judge
13
14 A P P E A R A N C E S:
15 Tara D. Shurling, Esquire
16 Attorney for Applicant
17 Suzanne H. White, Esquire
Attorney for Respondent
18
19
20
21 Diane L. Marcengill, RPR, CRR
22 Circuit Court Reporter
23
24
25

1 I N D E X

2 Witnesses Page

3 EVERETT P. GODFREY, JR.
Direct Examination By Ms. Shurling 7
4 Cross-Examination By Ms. White 81

5 DAVID SMITH
Direct Examination By Ms. Shurling 86
6 Cross-Examination By Ms. White 101
Redirect Examination By Ms. Shurling 111
7 Reporter's Certificate 116

8

E x h i b i t s

9

For the Applicant:

10

Marked	Description	I.D.	Admitted
1	Affidavit of discovery	17	17
2	Statement of Angie Smith	16	18
3	Handwritten note	24	24
4	Statement of Otis Hyder	26	26
5	Autopsy report	42	42
6	Statement of Terry Bradley	46	46
7	Investigation report-Kitts	51	51
8	Crime scene log	51	52
9	Statement of Morgan Simmons	52	52
10	Toxicology report	71	71
11	Investigation report-Gregory	81	81
12	Arrest warrant	84	84
13	Transcript excerpt	84	84

11
12
13
14
15
16
17
18
19
20

For the Respondent:

21

Marked	Description	I.D.	Admitted

22

None offered.

23
24
25

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 10:43 a.m.)
4 MS. WHITE: Your Honor, we're before you on the case of
5 David Dwight Smith versus the State, case number
6 2011-CP-42-1283. Mr. Smith is represented today by
7 Ms. Tara Shurling.
8 I believe we have already given you a brief kind of
9 procedural history, but just to put on the record,
10 there was an indictment April of '97 for murder and
11 possession of a weapon during a violent crime. An
12 initial trial was overturned. We're here on the PCR on
13 the second trial that was held November 1, 2005, where
14 Mr. Smith was convicted and received concurrent
15 sentences of 35 years for murder and five years for
16 possession of a weapon.
17 He filed an application alleging ineffective assistance
18 of counsel, ineffective assistance of appellate
19 counsel, double jeopardy, Brady violation, abuse of
20 discretion, and newly discovered evidence. And then
21 once represented by counsel, we do have the most recent
22 filed amendment dated day before yesterday, I guess,
23 June 9th, I think, over above one that was filed in
24 March as well that lists and details the allegations.
25 I'm not going to, obviously, go through individually

1 listing those, but we do have those filed. At this
2 point I'll turn it over to Ms. Shurling.
3 THE COURT: Ms. Shurling.
4 MS. SHURLING: Thank you, your Honor.
5 Your Honor, there was a previous amended
6 application for post-conviction relief filed. What I
7 have done is do a superseding amended post-conviction
8 relief application so that we could have all of the six
9 amended allegations set forth with specificity in the
10 original amendment and the new ones numbered
11 sequentially to avoid it getting confusing. Those were
12 served on opposing counsel on the 9th; however, I
13 didn't get to Spartanburg to physically file them until
14 this morning, but they were filed along with
15 certificates of service on opposing counsel.
16 I'm going to fill in, if I may briefly, just a
17 couple of things in the procedural history of the case.
18 Your Honor, I have copies of the unpublished opinion
19 from the South Carolina Court of Appeals and the
20 decision that followed in the Supreme Court of South
21 Carolina. I don't know whether those were made part of
22 your packet.
23 MS. WHITE: They are, your Honor. And I'm sorry I
24 did skip over the appellate records, I'm sorry, but the
25 appellate records and the briefs are part of your

1 Honor's packet.
2 MS. SHURLING: Since I made extra copies, your
3 Honor, I'll approach and hand them so your law clerk
4 will have his own copy of those opinions as well.
5 Essentially, your Honor, the point will become
6 with regards to those, this case, if I'm not careful,
7 can get terribly circular very quickly. But it in long
8 run, the point that will be made that will harken back
9 to the supreme court's decision is that some of the
10 allegations here today go to allegations that trial
11 counsel did not do as good a job as he should have of
12 making a supporting record for a self-defense charge.
13 Now, at first blush, one would think, well, he got
14 a self-defense instruction. So what. But the so what
15 comes in the form of a footnote in the supreme court's
16 opinion in which the supreme court noted that based on
17 the record before it, they were unable to glean why
18 self-defense was even charged. And so it all ties in,
19 and I will do my best to tie it in in a clear and
20 cogent manner as we proceed. But that's why those
21 appellate decisions will become important as we go
22 forward.
23 One of the things I wanted to flesh out a little
24 bit concerned the post-conviction relief action that
25 resulted in the grant of a new trial following

1 Mr. Smith's original trial. That post-conviction
2 relief action was heard by then judge, now Justice Don
3 Beatty here in Spartanburg. And in that case His Honor
4 granted a new trial based on the failures of my
5 client's original trial attorney, Tom Cox. And many of
6 those -- not all, but many of them went to certain
7 failures with regard to cross-examination of a key
8 witness in the case, Mr. Hyder, Mr. Otis Hyder.
9 That becomes relevant as we go forward in this
10 action, your Honor, because at the time of the second
11 trial Mr. Hyder was represented by the parties to be an
12 unavailable witness. And we'll get into a string of
13 allegations that pertain to that as well.
14 I am going to proceed at this point with
15 Mr. Godfrey as the applicant's first witness and ask
16 that -- I assume he will be allowed to stay exactly
17 where he is for the moment and we'll proceed.
18 Mr. Godfrey, do you recall --
19 THE COURT: Hold on, Ms. Shurling.
20 **EVERETT P. GODFREY, JR.,**
21 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:
22 THE COURT: State your name for the record.
23 THE WITNESS: Everett P. Godfrey, Jr., but
24 everyone calls me Bill.
25 THE COURT: Thank you.

1 Ms. Shurling, your witness.
2 MS. SHURLING: Thank you. I apologize. I heard
3 you being sworn in the previous hearing, and it just
4 stuck in my brain.
5 Thank you, your Honor.
6 DIRECT EXAMINATION
7 BY MS. SHURLING:
8 Q And if I may call you Bill as well?
9 A Sure.
10 Q I appreciate that.
11 Mr. Godfrey, we really appreciate you being here.
12 I know you're testifying under difficult circumstances,
13 and we're most grateful.
14 You also represented Mr. Smith in the PCR action
15 that resulted in him being granted a new trial by
16 Justice Beatty, correct?
17 A Correct.
18 Q And were you court appointed in that matter or
19 retained?
20 A You know, I honestly don't remember.
21 Q Doesn't really matter. I was just curious for the
22 record. And then thereafter you represented him on the
23 retrial?
24 A Right.
25 Q Have you been provided -- as a courtesy we sent

1 you a copy of the superseding amended application. We
2 sent it through your wife since she has been
3 representing you at some juncture concerning whether or
4 not you were going to testify. Did you get a copy of
5 that to look at?
6 A I looked at it briefly.
7 Q Okay. Do you have a copy with you?
8 A I --
9 Q Let me make it easy. How about I just hand you
10 another one?
11 A That would be better.
12 Q Okay. We're going to try to follow right along on
13 this the best we can. We may have to back up and go
14 forward again a few times, but this will help us try to
15 keep it organized. Okay?
16 Have you had a chance to read the 2005 trial
17 transcript?
18 A I read that transcript a couple of years ago. My
19 problem right now, based on the medication that I take,
20 I cannot read. And I can read four or five pages and I
21 go to sleep, which is one of the reasons I've suffered
22 severe depression because I was a reader. I read from
23 sunup to sundown. And now I sit on a porch and watch
24 cars like a dog.
25 Q I'm very sorry to hear that, Mr. Godfrey.

1 A Yeah. I have read that transcript but it's some
2 time ago.
3 Q Okay. Do you have a fairly clear recollection of
4 your representation of Mr. Smith?
5 A This was a case from ten years ago. I've probably
6 defended upwards of ten, probably no more than 15
7 murder cases since then including a capital
8 resentencing trial on a capital PCR.
9 I remember, I think, critical parts about the
10 trial, but it's not like a trial that I had two years
11 ago where I can pull out a trial notebook and see
12 everything that I did. So some things to me are clear
13 and some things aren't. I'll just have to tell you
14 what is and isn't.
15 Q Thank you. And please forgive me for this, Bill,
16 but given the discussion that's gone back and forth
17 about whether or not you were going to be able to be
18 with us today, I feel, as an officer of the court, that
19 I have to make a full record on this.
20 Are you currently today taking pain medications?
21 A I take -- yes. In fact, I brought my pain
22 medication with me to take at lunchtime. I take Lyrica
23 three times a day. I take diazepam three times a day.
24 I take Cymbalta one time a day. And the other
25 medications I take are for blood pressure.

1 Q Now, there's a JD after my name, not an MD, but
2 are Lyrica and Cymbalta both in the class of drugs
3 known as antidepressants?
4 A I don't know about Lyrica. But -- I don't know.
5 The diazepam was given to me as a muscle relaxer. It
6 was not given to me for depression, and it really works
7 as a muscle relaxer. And when you take it, you go out.
8 The Cymbalta, you know, clearly that's for the
9 depression that I've had. And I honestly don't know
10 about Lyrica. I never defended anybody that had
11 Lyrica, so I don't know.
12 Q Yes, sir. Are those the only medications that
13 you're currently taking?
14 A Yes.
15 Q And so you're not taking any -- well, what was the
16 second one?
17 A Diazepam is a benzodiazepine.
18 Q So it is a narcotic?
19 A Now you're asking me something I don't really
20 know. I mean, you'd need to -- all this drug stuff, I
21 always had to get the drug book and look at it. I
22 don't know. I can't tell you.
23 Q Okay. Bill, do you feel that you are able here
24 today to follow my questions and answer them directly
25 without any -- is your cognitive ability impaired to

1 any degree by the medications you're taking?
2 A I don't believe it is.
3 Q Okay.
4 A And if it's something that I don't remember, I'm
5 just going to have to tell you I don't remember. If
6 it's something that I think, I'll tell you it's what I
7 think happened. If it's something that I absolutely
8 know happened, I'll tell you.
9 Q I can't ask for more. Let's go on so we can try
10 to get through this. But there's quite a lot I need to
11 ask you about. Okay?
12 Let's start with the fact that you had two
13 different trials here, one in '97 and one in 2005. You
14 did not represent Mr. Smith in the 1997 case, but many
15 of the witnesses who testified in 2005, or at least
16 some of them, had also testified at the 1997
17 proceeding, correct?
18 A That's correct.
19 Q Is there any reason why you did not question
20 various witnesses for the State concerning what, if
21 any, favorable consideration they had either been led
22 to believe they would get or had hopes of receiving in
23 exchange for their testimony at the original trial?
24 A I didn't think of that.
25 Q And with regard to various persons who testified

1 at the 2005 proceeding, was there any particular reason
2 why you did not question each of them with specificity
3 concerning whether they had any hope for reward or gain
4 in exchange for their testimony?
5 A Well, I didn't because I didn't see where the
6 State could offer them anything. As I recall, and
7 this -- my memory is and it's not clear. I don't have
8 the NCICs with me anymore, but I don't think anybody
9 had anything pending at that point in time that could
10 be negotiated down. Now, you know, if you have an NCIC
11 that shows it's different, I'm obviously wrong.
12 Q I'll clarify. Let me --
13 A But I don't remember anybody that could have
14 received a benefit from the State at that time.
15 Q Well, let's go forward for a moment to the young
16 lady who testified for the State in both proceedings,
17 Angie. Remember Angie?
18 A Angie was the one that got the phone call and was
19 with David, right, that went over there and originally
20 went in with the drugs and then was sent out, if I
21 remember correctly.
22 MS. SHURLING: If I might pause for just a second,
23 with leave from the State to catch your Honor up,
24 Angie's brother was a -- there was testimony that he
25 was a drug dealer and that the victim had called the

1 brother, and the brother wasn't interested in messing
2 with him at that hour of the night. And she overheard
3 that there was this person wanting drugs, and she
4 called Mr. Smith and then went with Mr. Smith over to
5 the trailer where the incident occurred.
6 Q Now, your theory of the defense was what, sir?
7 A My theory of the defense was this: David didn't
8 know who was in the trailer. The State wanted to say
9 that David was over there arguing with the guy because
10 he owed him money. He wanted his money. The so-called
11 victim in this case -- and I'm sorry he is deceased --
12 but the victim in this case had made a statement that
13 he was going to rob a drug dealer.
14 When Angie went in with the drugs, he wouldn't
15 deal with her. He sent her out, and then David went
16 in. And then when David got in there, it became clear
17 to David that the guy was going to try to rob him.
18 Q If I can stop you right there. And we'll go
19 through in more detail the evidence that existed to
20 support the idea that this was a plan to rob Mr. Smith
21 all along, correct?
22 A Right.
23 Q Did you ever consider the possibility that Angie,
24 who had taken Mr. Smith over there, may have, in fact,
25 been in on it herself, that she may have been part of

1 the plan to rob Mr. Smith?
2 A I did not go in that direction, no.
3 Q Is there any particular reason why you did not
4 consider that?
5 A Well, based on the discovery, my conversations
6 with David, it never really came up that she possibly
7 could be involved with it.
8 Q Well, at the trial, the 2005 trial, didn't she
9 claim that she did not know Otis Hyder, the older
10 gentleman that owned the trailer where this happened?
11 A You know, if that's in the transcript, I will
12 agree with it. I don't remember that.
13 Q Okay. And did you -- I assume you had discovery
14 materials, some discovery materials. I know the amount
15 of discovery that was obtained by previous counsel for
16 the first trial was the subject of the PCR.
17 But prior to your jury trial with Mr. Smith in
18 2005, you had a complete set of discovery or what you
19 believed to be a complete set of discovery from the
20 State?
21 A That is correct.
22 Q And among the many things that you had would have
23 been a copy of Angie's statement to law enforcement,
24 correct?
25 A If you're telling me it was there, then I will

1 agree with you.
2 MS. SHURLING: A moment's indulgence, your Honor.
3 And, your Honor, for the record, one more thing.
4 When I was hired in this case, as is my custom, one of
5 the first things I did was contact trial counsel to
6 attempt to obtain access to review his file in
7 preparation of the post-conviction relief matter.
8 I was advised at that point that, unfortunately,
9 poor Mr. Godfrey had suffered a plumbing disaster in
10 the basement at his law firm that had resulted in a
11 large number of his files, including this one, being
12 destroyed.
13 So at that point I issued a subpoena to the
14 solicitor's office and -- a moment's indulgence -- I'll
15 introduce, your Honor, as Applicant's 1 a receipt from
16 the office of Barry Barnette for 189 pages of discovery
17 and the CD. And I will state as an officer of the
18 court that the documents I am moving to introduce all
19 came from those materials. To the extent anything is
20 not something that was handed over directly in this
21 package, I will identify it as such as the hearing
22 progresses.
23 THE COURT: Is there any objection from the State?
24 MS. WHITE: No, there is not.
25 THE COURT: So noted.

1 MS. SHURLING: And I did, of course, make certain
2 that Ms. White had a copy as well.
3 (WHEREUPON, Applicant's Exhibit Number 1
4 was marked for identification.)
5 (WHEREUPON, Applicant's Exhibit Number 1
6 was admitted into evidence.)
7 (WHEREUPON, Applicant's Exhibit Number 2
8 was marked for identification.)
9 BY MS. SHURLING:
10 Q I know that it's been a very long time since you
11 have seen this, so I'm going to hand you --
12 Ms. White, you have your copy of Angie Smith's --
13 no relation, your Honor.
14 MS. WHITE: Yes. I'm going through and getting it
15 online, yes.
16 BY MS. SHURLING:
17 Q I'm going to hand you a copy of a statement made
18 by Angie Smith to law enforcement in this case.
19 Do you recall being given a copy of that?
20 A Unfortunately, it does not ring any bells with me.
21 Most likely I had it, but I can't say for sure one
22 hundred percent that I did. If it came out of the
23 discovery, I'm assuming I did.
24 Q If I could get you to look down -- one, two,
25 three, four, five, six, seven -- about eight and nine

1 lines down.
2 A Where are you?
3 Q On the typed version, Angela Denise Smith's
4 statement.
5 A Okay. "On the way over, he said Robert owes $40";
6 is that what you're saying?
7 Q No, sir. I'm referring specifically to where she
8 is describing that, "We left and drove to Robert's,
9 across Textile Road, down Williams Street, crossed the
10 wooden bridge."
11 A Okay. I went too far. Okay. Go ahead. I'm
12 sorry.
13 Q You see me? Toward the end of that sentence she
14 says, "We pulled up at Pops' trailer." Do you see
15 that?
16 A Yes.
17 Q And isn't it true that it came out during the
18 trial that Pops was the term of endearment that was
19 used for this gentleman by people that knew him in the
20 community?
21 A Talking about our blind eyewitness?
22 Q Your blind eyewitness.
23 A Yes. Otis Hyder.
24 Q Exactly, sir. And you remember it coming out, I
25 believe even Judge Early says, "Pops, as we know him."

1 Do you remember that?
2 A Frankly, I don't.
3 Q Okay. Had you made note of this reference to
4 pulling up at Pops' trailer, would you have used this
5 portion of her statement to impeach her claim that she
6 didn't know Otis Hyder?
7 A That would have been proper, yes.
8 Q Okay. What about --
9 MS. SHURLING: Oh, your Honor, I'm sorry. I move
10 to introduce a copy of her statement as Applicant's 2.
11 MS. WHITE: No objection, your Honor. And the
12 State would just stipulate to anything that
13 Ms. Shurling has that was from the solicitor's file, we
14 have a copy of, have reviewed it, and have no
15 objection.
16 THE COURT: Okay. So noted. Admitted without
17 objection.
18 (WHEREUPON, Applicant's Exhibit Number 2 was
19 admitted into evidence.)
20 MS. SHURLING: As I said, I will very specifically
21 draw your attention to anything I obtained any other
22 way.
23 BY MS. SHURLING:
24 Q Well, Angie, Angela Denise Smith, ended up
25 admitting in her trial testimony that after the

1 shooting, your client gave her a stash of cocaine that
2 he needed to get rid of, didn't he -- didn't she?
3 A Yes, I remember that.
4 Q And then she went on to testify about how she gave
5 that cocaine to someone else, correct?
6 A Yes.
7 Q Last time I checked, that's distribution, isn't
8 it?
9 A It is.
10 Q So would that not have been something you would
11 have wanted to question her concerning with regard to
12 any potential benefit she had received in exchange for
13 her testimony?
14 A There was no charges.
15 Q Well, isn't the fact that she had not been
16 charged, despite admitting distributing crack cocaine,
17 something that you would have wanted to point out in
18 impeachment for the benefit of the jury?
19 A I should have.
20 Q Thank you.
21 Also, under what we all call the hand of one is
22 the hand of all, people who engage in a plan to commit
23 a crime are each jointly liable for the acts of each
24 other that are the reasonable, foreseeable, either
25 known or foreseeable consequences of the act they

1 agreed to participate in, correct?
2 A Correct.
3 Q Under that theory of accomplice liability, since
4 Angie is the one that set up the drug deal with the
5 victim and took David Smith over there, the State could
6 have made an argument, could they not, that this was a
7 killing that occurred in the course of a drug
8 transaction and that, as such, she, as a knowing,
9 admitted participant in the drug deal, could be found
10 guilty for the victim's death under a theory of
11 accomplice liability?
12 A They could have.
13 Q And you did not question her about the fact that
14 she had escaped being named in any charges for murder,
15 did you?
16 A That's right.
17 Q Should you have?
18 A I could have, yes.
19 Q So those were at least two opportunities to point
20 out to the jury that she was not being charged with two
21 very serious crimes, one of which carried 30 to life
22 day for day?
23 A Right.
24 Q Okay. Moving along, you know the elephant in the
25 room is Pops Hyder. Pops Hyder and what Tom Cox did or

1 didn't find out about with regard to the victim and
2 Mr. Hyder were a big part of your PCR, correct?
3 A I missed one name in there. It was -- please say
4 that again.
5 Q Mr. Hyder was the owner of the trailer, correct?
6 A Right.
7 Q And the victim claimed to have gone to this older
8 gentleman's house at like 3:00 in the morning, 2:00 in
9 the morning, just to use the telephone, right?
10 A Right.
11 Q In the post-conviction relief action, there was --
12 there was an extensive review and rulings made based on
13 the fact that there were witnesses who said that the
14 victim grabbed drugs from Mr. Smith, had planned to rob
15 a drug dealer that night, and even one witness that
16 said earlier that night he had confessed to trying to
17 rob a different drug dealer, right?
18 A That's from the PCR that I did prior to this. The
19 first two statements I clearly remember. The last
20 statement that you made in that string of statements is
21 likely true, but I can't tell you that I remember it
22 exactly.
23 Q And I was trying to speed things up too much. Let
24 me go back to doing this in baby steps. I'm sorry. I
25 forget how long it's been since you have been deeply