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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
PLAINTIFF,) TRANSCRIPT
vs.) OF
DAVID DWIGHT SMITH,) RECORD
DEFENDANT.) 97-GS-42-1639

October 31st, 2005
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE JACK EARLY, JUDGE; and a jury.

A P P E A R A N C E S:

ROBERT COLER and SARA GANSS
ASSISTANT SOLICITORS
Attorneys for the State

WILLIAM GODFREY
ESQ.
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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PROCEEDINGS

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

THE COURT: Mr. Solicitor, you may call your first case.

SOLICITOR COLER: Thank you, Your Honor.

May it please the Court.

Judge, this is The State versus David Dwight Smith. Indictment 97-GS-42-1639 charging him with one count of murder and one count of possession of a gun during a crime of violence.

THE COURT: Thank you.

State ready to proceed?

SOLICITOR COLER: Yes, sir, Your Honor.

THE COURT: Defense ready to proceed?

MR. GODFREY: Yes, Your Honor.

THE COURT: Okay. All right. Ladies and gentlemen of the jury panel, as you heard, the State is called the case of the State of South Carolina versus David Dwight Smith. I remind you that you are still under oath from this morning.

I will have several questions to ask. And if the cases, if the questions apply to you, please stand, identify yourself, give me your jury number, if you remember it. If you do not, give us a chance to find it, and then we'll go

over these questions.

It will take us about maybe a half an hour to draw this jury. Once I get my jury drawn, the rest of you will be excused to go back to the jury assembly room where I think Judge Few, who is also holding court today, will draw a second jury. And those who are not fortunate to get on the first or second will be excused probably for the balance of the day, and I'm sure they've explained to you we have a call back system where you could call back in this afternoon.

So, I'm gonna get the first shot at you. Judge Few will get second shot, and then we'll see how we go from there.

Again, if you have any questions as we go along, just please raise your hand and we will accommodate you at that point.

Has anyone ever been related by blood or marriage to David Dwight Smith?

Mr. Smith, good morning.

How are you?

DEFENDANT: Morning.

THE COURT: Would you please stand and face the jury panel?

DEFENDANT: Yes, sir.

(Defendant complies.)

THE COURT: Has anybody ever been related by blood or marriage to the defendant, David Dwight Smith, if so, please stand.

(No response.)

THE COURT: You may be seated, Mr. Smith.

Thank you.

Has anyone ever had any close personal or social relationship with the defendant, David Dwight Smith, if so, please stand.

(No response.)

THE COURT: The alleged victim's name is one Robert Andrew Finley, F-I-N-L-E-Y.

Any member of the jury panel ever been related by blood or marriage to Robert Andrew Finley, if so, please stand.

(No response.)

THE COURT: Has any member of the jury panel ever had a close personal or social relationship with Robert Andrew Finley, if so, please stand.

(No response.)

THE COURT: Listen carefully. I'm gonna give the names of potential witnesses in the trial of the case, and I'll ask you the same question after I read through these, this witness list.

And if any of the witnesses are in the courtroom, will they please stand when I raise, when I call their name?

Ken Camp with the Spartanburg County Sheriff's Office.

(Witness stands.)

THE COURT: Thank you, sir.

Deanna Burgess, Spartanburg County Sheriff's Office.

SOLICITOR COLER: She's not present, Your Honor.

THE COURT: Steve Denton, Spartanburg County Sheriff's Office.

(Witness stands.)

THE COURT: Thank you, Mr. Denton.

Joseph Powell with SLED, South Carolina Law Enforcement Division.

SOLICITOR COLER: He's not present.

THE COURT: Angie Smith.

(Witness stands.)

THE COURT: Thank you, Mrs. Smith.

Rodney Smith.

(Witness raises hand.)

THE COURT: Thank you, Mr. Smith.

Cynthia Roseburgh.

(Witness stands.)

THE COURT: Thank you, ma'am.

Allen Newman.

(Witness raises hand.)

THE COURT: Thank you.

Doctor David Wren, W-R-E-N.

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

THE COURT: 170.

Mrs. Hardy, which one of these witnesses do you know?

JUROR: Angela Smith.

THE COURT: And the fact -- and you're related by blood or marriage or just know them?

JUROR: I know them.

THE COURT: And the fact that you are acquainted with that potential witness, would that, in any way, preclude or keep you from being a fair and impartial juror in the trial of this case?

In other words, I want a juror who can simply decide the facts of the case based on the facts they hear from the witness stand, apply those facts to the law that I give, and not any outside considerations in the courtroom including your friendship with that potential witness.

Can you---

JUROR: I known her all my life.

THE COURT: Well, can you or can you not be impartial?

JUROR: Probably. I don't know.

THE COURT: All right. I'm gonna excuse you from the trial of this case.

JUROR: Thank you.

THE COURT: No, ma'am. Can't let you go.

Yes, sir, the burgundy short sleeve shirt.

JUROR: Charles Wharton, Number 140.

THE COURT: And who are you---

JUROR: I'm acquainted with Doctor David Wren.

THE COURT: And what is your relationship with Doctor Wren?

JUROR: We secure his house with a security system.

THE COURT: Do what?

JUROR: Secure his house for, with a security system.

THE COURT: Oh, okay.

And the fact that he's a client or a customer of yours, I assume, is that correct?

JUROR: Uh-huh. (Affirmative).

THE COURT: Would that, in any way, affect your ability to be a fair and impartial juror in the trial of this case?

JUROR: No, sir.

THE COURT: Thank you. You may be seated.

The State, in this case, is represented by two solicitors from the Solicitor's Office, Ms. Sara Ganss and Mr. Bob Coler.

I'll ask y'all to please stand.

(Parties stand.)

THE COURT: Thank you. Be seated.

The defendant is represented by Mr. Bill Godfrey of the Spartanburg County Bar.

MR. GODFREY: Greenville County Bar.

THE COURT: Greenville County Bar. I apologize.

Mr. Godfrey, would you give the names of the people in your firm?

JUROR: My law partner is Mrs. Mary Alice Godfrey. There's only two attorneys in the firm.

THE COURT: Thank you so very much.

Has any member of the jury panel ever been represented by any of the attorneys involved in this case or by the law firms, if so, please stand.

(No response.)

THE COURT: In other words, have they ever represented you or, or are they representing you now, if so, please stand.

(No response.)

THE COURT: Has anyone ever been related by blood or marriage to or have you ever had a close personal or social relationship with any of the lawyers involved in the case or anyone in their firms, if so, please stand.

(No response.)

THE COURT: Ladies and gentlemen, the defendant, in this case, was indicted by the Spartanburg County Grand Jury. An indictment is simply the charges by which a case is brought into this Court, and is, in no sense, evidence in the case. It's simply the charging documents. The defendant has pled not guilty to these charges. Therefore, the burden is on The State of South Carolina to prove,

beyond a reasonable doubt, all of the elements of the offense.

But I must tell you a little bit about what we're here for cause I have to ask you if you know anything about the case.

So, basically he's indicted or charged and he's pled not guilty to an incident which occurred on, on or about January 12th, 1997, here in Spartanburg County where he is alleged that he feloniously, and with malice aforethought, malice aforethought, did kill one Robert Andrew Finley by shooting him with a gun, and he's also indicted or charged with possession of a firearm during the commission of that same alleged offense.

In other words, it's an incident which took place on January 12, 1997, where he is being charged with the murder of Robert Andrew Finley and also with possession of a violent, possession of a weapon during the commission of a violent crime.

Does any member of the jury panel know anything at all about the facts of this case?

Have you read anything about it in the newspaper, heard anything about it on the radio, seen anything about it on the TV, or formed or expressed any opinion about any issues or matter involved in this case, if so, please stand.

(No response.)

THE COURT: Is any member of the jury panel aware of any bias or prejudice towards either The State of South Carolina or the defendant in this case, if so, please stand.

(No response.)

THE COURT: Is any member of the jury panel -- were or is any member of the jury panel or were you a member of the Spartanburg County Grand Jury in April 3 of 1997 that issued the true bill in this case, true bill of indictment, if so, please stand.

(No response.)

THE COURT: Is there any member of the jury panel who is a member of or a contributor to any group which has as its primary concern the promotion of law enforcement or victim's rights?

These groups would include, but certainly not be limited to MADD, that's Mother's Against Drunk Drivers, SADD, Students Against Drunk Drivers, or CAVE, Victims Against Violent Crime, if so, please stand.

(No response.)

THE COURT: Is any member of the jury panel have such strong feelings regarding the sale, use, or possession of illegal drugs that you could not be fair and impartial in a case involving the alleged sale, use, or possession of illegal drugs, if so, please stand.

(No response.)

THE COURT: Has any member of the jury panel now, you or your family, ever been the victim of a violent crime, if so, please stand.

(Juror responds.)

THE COURT: Yes, ma'am, your name?

JUROR: Christina Thomason. It's 131.

THE COURT: And Mrs. Juror 131, the fact that you or a member of your family had been a victim of a violent crime, could you set that aside and be a fair and impartial juror in the trial of this case?

JUROR: Yes.

THE COURT: And without divulging any personal information, just tell me was it you or a member of your family?

JUROR: A member of my family.

THE COURT: And just in general terms, what happened?

JUROR: My father was murdered in '87.

THE COURT: Okay. And the fact that your father was murdered in 1987, could you set that aside and be a fair and impartial juror in the trial of this case?

JUROR: Yes.

THE COURT: Thank you so very much. You may be seated.

Does any member of the jury panel know of any reason whatsoever why he or she should not serve as a juror in this case with particular emphasis being placed on your ability

to be fair and impartial to both the State of South Carolina and the defendant, if so, please stand.

(No response.)

THE COURT: Mr. Coler, Ms. Ganss, any additional questions?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: Mr. Godfrey, any additional questions?

MR. GODFREY: No, Your Honor.

THE COURT: Now, ladies and gentlemen of the jury panel, this is what we call General Sessions Court, which is Criminal Court as opposed to the other type of Court we have is Common Pleas or Civil Court. Civil Court is where a, me and Mr. Godfrey get into a car wreck and he claims I ran the red light and he's suing me for damages or I'm his doctor and I may of done something wrong in an operation. He sues me for medical malpractice. Those are civil cases.

In a civil case, what we could do at this time is the clerk would draw out 20 names and put on a piece of paper. The plaintiff would have four strikes and the defendant would have four strikes leaving us with, with 12 people to serve on the jury panel.

In a criminal or a case tried in General Sessions Court, we do it differently. So, what we do in this situation, the clerk will pull out a name out of the, the rolling box, anonymous name at random. And if they pull out

your name, you will come down here and stand right here and face both the prosecutor and the defendant and they will either say swear the juror or excuse the juror, and basically they can do that for any reason or no reason at all.

So, if they excuse you, don't be offended or if they take you, you don't be offended. There's really no rhyme or reason as to what they do.

And in a case such as this, the State has five strikes?

SOLICITOR COLER: Yes, sir.

THE COURT: And the defendant has ten strikes.

Ma'am, you need some water?

You okay?

Give her some water.

(Pause.)

THE COURT: So, as your name is called, if you would, please come down and just stand where Mr. Humphries is and he'll instruct you just to turn around and face both sides and we'll be through with this in just a minute.

(Whereupon, a jury panel of twelve was selected at this time.)

THE COURT: All right. Two alternates.

Two and one.

(Whereupon, two alternates were selected at this time.)

THE COURT: All right. Let me see the lawyers up here,

please.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: Y'all step up here for a, just a second.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: Ladies and gentlemen, would y'all like to get started now or would you like to go ahead and let's take a lunch break, be back at two o'clock, and get started after lunch?

Makes no difference.

(Jurors respond as to making no difference.)

THE COURT: No difference.

Well, I try to please y'all ahead of everybody else.

Let me just tell you a little bit about what we'll do and we'll go ahead and take our lunch break. And we'll start right back at two o'clock. And I'm very punctual when we start back. So, please be back in your jury room. The bailiffs will show you where to come back and be back a little bit before 2:00.

And I suspect we will go -- is 5:30 a problem with anybody this afternoon?

Does that create a problem?

(No response.)

THE COURT: I'll stop somewhere between 5:00 and 5:30.

Unless we're right in the middle of somebody, I may stop a little bit earlier or may just go a few minutes beyond that. But I won't go very far.

We'll take an afternoon break, stretch your legs. I suspect we'll be back in the morning. I suspect we'll finish tomorrow. But you -- that's just a guess, a guesstimate.

If y'all decide you want any snacks in the morning, I'll have you donuts, coffee, those sorts of things, and we'll be ready to go.

All right. At this time, I'm gonna let you go with the bailiff to the jury room and be back and be ready to go at two o'clock and we'll start then.

Thank you very much.

Everybody else please remain seated.

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

(Whereupon, the pre-interrogation waiver form was marked as State's Exhibit No. 1. An affidavit was marked as State's Exhibit No. 2. A statement was marked as State's Exhibit No. 3. All of the above were for identification purposes only at this time.)

THE COURT: All right. Let the record reflect that subsequent to the drawing of the jury, I inquired of both the State and the defense counsel as to whether or not they

had any motions concerning the composition and or the drawing of the jury, i.e. Batson motions, and they both advised me that they did not.

Is that correct, Mr. Coler?

SOLICITOR COLER: Yes, sir, Your Honor.

THE COURT: Mr. Godfrey, is that correct?

MR. GODFREY: Yes, sir, it is.

THE COURT: Now, before I swear the jury in after lunch, I'll appoint a foreperson.

Is there anything for the record on behalf of the State?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: Mr. Godfrey?

MR. GODFREY: No, Your Honor.

THE COURT: Okay. We have anything that we need to discuss outside the presence of the jury that would require us being back before two o'clock?

SOLICITOR COLER: Unless you want to take up that, that deceased witness issue, Your Honor. That's the only thing I can think of.

THE COURT: All right. Let's do this. Let's be back, just out of an abundance of caution, about quarter of 2:00 if there's anything we need to do outside the presence of the jury. Be ready for opening statement at two o'clock, and we'll go 5:00, 5:30 in the afternoon depending where we

are.

Hope your head feels better.

MR. GODFREY: Thank you, sir.

THE COURT: Let me just put on the record, I don't even know who the lady is sitting right there with the black leather jacket on, sparkly red colored, of red family colored blouse, I noticed she was crying, and I asked the bailiff to find out what was wrong.

She said that she was crying because she can't take her baby trick-or-treating this afternoon and she normally goes about 4:30. So, I'm gonna try to break no later than 5:00, and it will probably be on this side of 5:00 so I can accommodate her. I don't know who she is.

This case is not gonna last, but---

SOLICITOR COLER: No, sir, I think we can get through most of our witnesses today by about 4:30, and maybe have one or two in the morning. So---

THE COURT: All right. When she comes back in, I'm gonna just sort of tell her that. I'm gonna make sure she doesn't miss trick-or-treating with her child.

All right. Anything for the record -- is that -- any problem with that situation on behalf of the defendant?

MR. GODFREY: No, sir.

THE COURT: State?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: Y'all -- I just asked the bailiff to find out why she was crying.

Is this okay with everybody?

SOLICITOR COLER: Yes, sir.

MR. GODFREY: Yes, Your Honor.

THE COURT: All right. Defendant's in custody.

We'll break till quarter till.

Thank you.

(Whereupon, Court was in recess for the lunch hour.)

THE COURT: All right. Anything on behalf of The State before I bring the jury?

SOLICITOR COLER: Just briefly, Your Honor, about that the issue of the witness who testified at the last trial, who's now deceased, Otis Hyder. We offer his testimony through his, through the transcript of his testimony, and we're offering that under Rule 804, one of the hearsay exceptions. Specifically---

THE COURT: 804?

SOLICITOR COLER: Yes, sir, 804(a) Subsection 4. He's a, he's an unavailable declarant because of his death.

THE COURT: 808?

SOLICITOR COLER: Its 804 Subsection A.

THE COURT: Little what?

SOLICITOR COLER: (a)(4).

THE COURT: All right. Well, let's do this. Let's get

started and try to stay away from that in opening statement unless you have to.

SOLICITOR COLER: Yes, sir.

THE COURT: And I think I'll run till about 4:30 so I can make sure that juror gets to spend some time with his child, and we'll take full arguments on that at the appropriate time.

SOLICITOR COLER: Yes, sir.

THE COURT: Anything else on behalf of the State?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: How about on behalf of the defendant?

MR. GODFREY: Nothing, Your Honor.

THE COURT: All right. Bring the jury in.

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

THE COURT: I hope y'all had a pleasant lunch.

We got everybody?

(Bailiff nods affirmatively.)

THE COURT: All right. Somebody had a little concern about not being able to trick-or-treat tonight.

We're gonna stop at 4:30.

Will that be okay?

JUROR: Thank you.

THE COURT: All right. All right. At this time, what I'd like to do, if you would, stand please and raise your

right hand, and the clerk will swear you in for this particular case.

(Whereupon, the jury was placed under oath at this time.)

THE COURT: Thank you. Be seated.

Is it Resch, R-E-S-C-H, Resch, Resch?

JUROR: Resch.

THE COURT: Mr. Resch and Mr. Wharton, I would ask you two that you always take those seats. You're my alternates in this case.

And Madam -- ladies and gentlemen of the jury, what I'm gonna do, normally sometimes I will appoint a foreperson to serve as the spokesman for the jury. But I think, if it's okay with y'all, I'm gonna let y'all decide among yourselves who you'd like to be the foreperson. So, when we take our afternoon break, just talk among yourselves as to who would be foreperson.

The foreperson is simply someone who acts as the speaker or the moderator for the group. If you have any questions, the foreperson would write it out and send it back out here to me.

And at, of course, at the conclusion of all the evidence and after all the instructions on the law and the lawyers have argued, then you would be in charge of the deliberations. But it's not a difficult task. And y'all

just choose among yourselves who you'd like to be the spokesperson and let me know at the break.

And if you can't decide on somebody, then I'll just ene, meni, mino, mo I guess because I don't know any of you and I'll just pick one out.

What I'd like to do now is just give you a, a little bit of general remarks about the trial, what we expect in the trial. It's just sort of an introduction to the trial of the case. It's not a charge on the law. When I say charge, those are instructions on the law that would be applicable to this case, and I'll give you those at the conclusion of the, of all of the evidence.

As I told you in this case, the defendant has been charged by an indictment, two counts. One is for murder and the other is possession of a firearm during the commission or attempt to commit a violent crime.

I will explain to you, at the close of all the elements, the close of the trial, what the elements of each of these crimes consist of. But as I told you when we drew the jury, the indictments in this case is simply the documents or the charging documents that bring the case before the court. And it is not, in any sense, of any evidence in the case. It's simply what he's charged with.

And to, to these indictments, the defendant has pled not guilty. Therefore, the State has the burden of proving

each and every element of the indictments beyond a reasonable doubt to you, and, of course, it will be your responsibility and duties, ladies and gentlemen, to decide whether or not the State has met that burden of proof after all of the testimony and the evidence is in, and you've heard me charge you on the law.

You and I have distinct obligations during the trial of this case. As the judge, I am the judge of the law. Not me. But my position. And you have to take the law as I give it to you at the conclusion of the case.

And if you think that the law is something else other than what I tell you it is or if you have some idea that the law ought to be something else other than what I tell you it is, tell you that it is, then you have to set that aside and you've been sworn and you've sworn to say that I will accept the law as the judge gives it to me as the law of the case.

So, I'm the judge of the law, and likewise, you 12 are the judges of the facts. It will be up to you to determine what the true facts are during the trial of this case. You are to determine the facts from the testimony that you hear from the witness stand and any other evidence may be, that may be introduced during the trial of the case. It's up to you to determine what inferences which you may feel may properly, properly be drawn from the evidence.

Just some general caveats or instructions. I will tell

you every time you leave the courtroom do not commence your deliberations. We are -- you, you've sworn yourself that you would not commence deliberations until all the evidence is in and I've instructed you on the law in the case and the lawyers have made their final arguments and then you may begin deliberations.

It may be that the last witness has something to testify to that would sway your mind. So, it would be unfair both to the State and particularly the defendant if you go back in the jury room after the first witness and start discussing the case.

So, I will tell you, each and every time, do not commence deliberations until after all of the evidence is in. You can talk about anything you want to in the jury room, introduce yourselves to each other, eat the donuts, whatever else I send back there. But do not, under any circumstances, discuss the case until I tell you to do so.

And whoever I appoint as foreperson or y'all select as foreperson, that will be one of your duties is to ensure that no deliberations start before we finish. If anybody wants to discuss the case or tries to discuss the case, Mr. and Mrs. Foreman, then it'd be up to you, to you to say no, the judge says we can not do so until everything is in.

So, y'all talk about anything you want to back there except for the case until it is time to start your

deliberations.

I don't think that there will be any publicity generated in this case. I hadn't seen any newspapers or TV people here. But I would ask that, if anything does appear on the news, that you not look at it.

We simply want to try this case based on what we hear from this Court, testimony that comes from the witness stand, and any exhibits that may be introduced, and not from any outside sources. I will ask that you keep an open and, open mind and not decide any issue until all the evidence has been presented.

As I told you before, it is your solemn responsibility to determine the guilt or innocence of the defendant, and your verdict must be based solely on the evidence that is presented during this trial and on the law that I tell you at the close of the trial.

In just a few minutes the solicitor will make an opening statement on behalf of the State, and that will be followed by an opening statement on behalf of the defendant.

Opening statements are not evidence in the case. They're simply what the lawyers feel they will be able to prove. Sort of a road map that they're gonna show you. But that is not evidence. That's their take on it. So, don't accept that as evidence. As I said, the only evidence comes from the witnesses and or the testimony by way of exhibits

that come into the trial of the case.

Now, as I said, you are the finders of the facts. A couple of matters on that. If, at anytime during the trial of this case I may say something about the facts, please disregard it. I have absolutely no right to comment on the facts. That is for the 12 of you collectively, collectively to determine what the facts are.

So, if anytime I may comment on it, obviously I'll try not to, but if I do, please disregard it because I have no right to comment on the facts. That is simply your responsibility.

Now, in determining what the facts are in the case, you must decide whether or not the testimony of a witness is believable. My judge, my job, as the judge, is to determine whether or not that testimony is admitted under our rules of evidence. Ninety-nine percent of the testimony you hear will be admitted.

If one side has an objection and I say that is improper, then I will tell you not to consider that particular piece of evidence. But ninety-nine to a hundred percent of it is gonna come in. And once I admit it into evidence, then it's up to you to determine whether or not you believe it. So, that's pretty simple. Once it's in, then the 12 of you decide who you believe and what you believe.

Now, in deciding whether to believe a witness, you have the right to consider the interest of any witness, the bias of any witness, the prejudice of any witness, and the opportunity for the witness to have seen the matters and things about which the witness may testify, and even the way the witness acts on the stand.

You have a right to consider anything that is in the record that will help you evaluate the credibility or believability of the witnesses.

So, I ask that you pay close attention to that after all the testimony is in, the exhibits are in, you've heard the arguments of counsel, and I've given you the instructions on the law, you will be in a position to render a true and just verdict in the case, which is your responsibility.

When you choose the foreperson, as I mentioned before, he or she will be responsible for the deliberations, for helping out the deliberations at that time, and will be responsible for signing the verdict form, which I'll give you. I'll explain all of that to you. It's not that much responsibility associated with it. But someone has to take that job.

Now, any objections, on behalf of the State, to my opening remarks?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: From the defendant?

MR. GODFREY: No, Your Honor.

THE COURT: Okay. If y'all would please give the lawyers, the State, your full undivided attention, followed by the defendant. They'll make short opening statements. And at the conclusion of the opening statement, then the State goes first. They present their witnesses because they have the burden of proof, and then we'll see where we go after that.

Okay. Mr. Coler, Ms. Ganss.

SOLICITOR COLER: Thank you, Your Honor.

May it please the Court?

THE COURT: Yes, sir.

SOLICITOR COLER: I got to get rid of this gun. I got to get rid of this dope. You ain't seen nothing. You don't know nothing.

Those are the words spoken by the defendant, David Dwight Smith, minutes after he shot and killed Robert Finley. He shot him in the face, right in the eye to be precise, with a .25 caliber handgun, semiautomatic handgun.

Those words were spoken to an eye witness to this crime. Her name is Angie Smith and she is not in -- she's in the back of the courtroom.

After shooting Robert Finley, David Dwight Smith fled the scene and left Robert Finley lying on a concrete set of

porch steps to a mobile home with a gunshot wound to the eye and left him laying there to die.

My name is Bob Coler and I'm assistant, I'm one of the assistant solicitors here in Spartanburg County, and it will be my job to present the evidence to you, the jurors, for your determination.

The way I'll present that evidence is through testimony. People will come and tell you what happened and pictures and exhibits. You'll see items and you'll get to take those back to your jury room.

Assisting me will be Sara Ganss. Ms. Ganss is also an attorney in our office. She will be helping me throughout the trial.

Over the next day and a half, two days maybe, you're going to hear from witnesses who will piece together all the events, the things that led up to the killing of Robert Finley on January 12th, 1997, at about 2:30 in the morning.

And basically what you'll hear is that Robert Finley was 32 years old at the time, lived in a mobile home, and he left that mobile home at about two o'clock in the morning that Sunday morning. He was walking down to his neighbor's mobile home, Otis Hyder. He was going down there because Otis had a telephone and Robert did not have a phone in his, his mobile home.

He was going down there to use that phone to make a phone call to get some crack cocaine. He was a drug user, probable a drug addict.

One of the things I want to impress upon you and ask you not to do is we're not here to try the life-style of Robert Finley. We admit he was a drug addict. He had a drug problem. We're here because David Dwight Smith is on trial for shooting him and killing him.

So, you're gonna hear stuff about drugs. You're gonna hear stuff about crack cocaine and the money he owed. And that's important to this trial. But I want you, to impress upon you and ask you to focus on the reason we're here. David Dwight Smith is charged with killing him.

Anyway, Robert goes down to Otis' house to use the phone. And he gets there and he's using the phone and he calls the home of Angie and Rodney Smith.

Rodney Smith had helped Robert get some drugs on, on a previous occasion. He helped put him in touch with some crack cocaine.

Well, in this particular date, 2:30 in the morning, Rodney Smith didn't really want to be bothered, didn't want to fool with Robert Finley. It was late. He was probably tired. He didn't want to do it.

But Angie was willing to take the call for Robert. Angie took Robert Finley's phone call, and what she did in

turn was she paged, used a pager to contact David Dwight Smith. And the purpose of that page was to get David Dwight Smith to bring some drugs and to deliver them to Robert Finley.

Just minutes after Angie made that, that call to Robert, to David Dwight Smith's pager, David Dwight Smith, the defendant, showed up at Angie's house. He pulled up in a burgundy vehicle. Angie came out of the house. She got in the car. A neighbor from across the street saw her get in the car, saw the car, the burgundy vehicle and even saw David Dwight Smith driving the car.

One thing that's important to keep in mind, David Dwight Smith, the defendant on trial, is not related to Angie or Rodney Smith. Same last name. But that's it. They're not related.

Angie and Rodney -- I mean Angie and David Smith drive over to the home where Robert Finley is waiting. Robert Finley is at Otis' house waiting to get some crack cocaine.

When they get there, they pull into the driveway and David Dwight Smith, who's, who's here to deliver some drugs to Robert Finley, demands or commands or orders Angie to go inside, to get the money, and you come back out. I'll wait in here. Doesn't give her the drugs. I'll stay here in the car.

Well, Angie goes in and comes out a few minutes later.

When she comes out, she doesn't have the money. She tells David Smith he doesn't have any money.

As you can imagine, David Smith has been paged or called out at 2:30 in the morning to make this drug deal, and now he's, he's faced with this situation. Got a guy inside the trailer that doesn't have any money that wants some of my drugs.

David Dwight Smith is not a happy individual. He is not pleased with this at all.

In addition to that, there is a $40 debt that Robert Finley, the drug addict and the victim in this case, owed David Smith for a previous drug deal. So, you've got David Dwight Smith in his car. It's a cold January morning, 2:30, it's dark, he's been paged, he's been called. You can imagine his, what's going through his mind. He's displeased, displeasured with this situation.

The guy in there owed him $40. That guy in there is paged me, wants more drugs, doesn't have any money. It's a waste of my time. This is ridiculous. I'm tired of this.

What David Dwight Smith does then is orders Angie to stay put, stay in the car. I'm going in.

He gets out of the car, takes with him a loaded .25 caliber pistol, and goes into the trailer, into the mobile home where Robert Finley is.

A couple of minutes later, Angie Smith, who's sitting

in the car and driveway, looks up and sees the doorway, the front doorway into the mobile home, she sees David Dwight Smith, the defendant, and Robert Finley face-to-face in the doorway, and she hears what she described as a pop or a gunshot.

She sees Robert Finley drop to the ground and fall and he's been shot. She sees David Smith kind of push him off. He stumbles a little bit and he immediately just leaves Finley there laying on the ground, gunshot wound to the face, walks around, and gets in his car.

That's when he says to Angie Smith for the first time you don't know nothing, you didn't see nothing.

They leave the scene and leave Robert Finley lying on that kind of concrete porch step face down, his body kind of twisted, legs still in the doorway, one gunshot wound right to the left eye bleeding, and they leave him there that faithful morning to die.

At the end of this trial, Judge Early is gonna tell you a little bit about the law. I just want to mention it. He's the expert on the law in, in this courtroom. But I know the law and will mention it to you.

He's gonna tell you what the law of murder involves. He's gonna tell you the elements of murder. He's gonna tell you that murder is an unlawful killing of another human being with malice aforethought.

There's no question in this case that there was a killing, an unlawful killing. There's no question it was another person. If you ask Robert Finley's family and friends, they'll tell you he was a person. And there's no question that it was done with malice aforethought.

You will probably or may or may not have heard the words malice aforethought before. The judge will essentially describe them for you. And I think he'll tell you malice is doing something with an evil heart, with, with a blackened wicked heart, a heart devoid of social requirement or responsibility, a heart bent of doing harm.

And when David Smith shot Robert Finley in the eye and left him to die there on those, that porch step that morning, he did that with, with malice in his heart.

The judge also is gonna tell you that it requires aforethought, and aforethought means you got to have, to have the malice sometime before the killing. But it doesn't mean you got to have a premeditated plan that you plan a year in the advance and then take steps to execute it.

The aforethought means that the malice is got to exist some time before the killing. It could exist a week before the killing. It could exist one day before. It could exist one hour before the killing. It could even exist one minute, one second, or just as the fatal blow is being struck.

David Dwight Smith formed that malice in his heart the morning he got over there and, and realized that Robert Finley was inside wanting more of his drugs, wasn't gonna pay him the $40. That's when he formed that malice and started when we -- that's when he acted on it and went inside with a loaded .25 caliber.

The judge is also gonna tell you that the defendant is charged with possession of a gun during a crime of violence and that's just like it sounds. He possessed the gun during a murder, which is a crime of violence. And for that, he's also guilty.

At the end of this trial, at the end of this testimony, I'm gonna ask you for verdicts on both of those charges. I'm gonna ask you to find David Dwight Smith guilty of murder, and I'm gonna ask you to find him guilty of possession of a gun during a crime of violence.

I tell you now that I look forward to presenting our case to you, and I want to thank each and every one of you for your attention. I look forward to getting started on this trial.

Thank you.

MR. GODFREY: May it please the Court?

THE COURT: Yes, sir.

MR. GODFREY: Solicitor.

Ladies and gentlemen, I'm Bill Godfrey and I represent

David Dwight Smith.

As the solicitor said, you're gonna hear a lot of talk about drugs throughout the course of the trial. Drugs are involved in the -- excuse me. Drugs are involved in the facts of the case. But this is not a drug case.

This is a case where my client has been charged with killing someone with malice aforethought.

Ladies and gentlemen, we believe the evidence will show that, in the early morning hours of January 12, 1997, David Smith was tired. He was ready to go home.

He received a page from the Smith residence where Angie and Rodney Smith lived. He did not return the phone call. He recognized the number. He went over there.

When he got there, Angie Smith came out and said that she wanted to hook him up with somebody that wanted to get some drugs. At that point in time, David Smith didn't know who it was that he was gonna be hooked up with.

And Angie Smith got in the car. As they were driving off, Mrs. Roseburgh was in her yard and she knew David Smith, knew his car, and Angie Smith and David Smith, who are not related, drove off.

Angie Smith told David where to go. When they got over to this trailer, there was a trailer that David was not really familiar with. It wasn't where Robert Finley lived and David was tired.

He told Angie to go in. You get the money, come out, I'll give you the drugs, you take the drugs back in.

Angie goes in and she comes back out and says basically he wants to deal with you. David gets the drugs. He goes inside the house. He sees that it's Robert Finley.

David lays the drugs down on the table. Robert Finley looks at the drugs. He tests the drugs and he says I don't have any money.

He said I'll pay you tomorrow. David says you can't pay me tomorrow, I'm not gonna be here. I'm gonna be gone. And Robert Finley tells David I'm gonna take those drugs.

At that point in time, David is trying to back out of the trailer. He has his hands in his pocket because it's a cold night. He did have a .25 semiautomatic pistol in his right front pocket.

When he pulled his hands out, he had the gun in his hand. Robert Finley says what you gonna do, shoot me, and Robert Finley lunges forward and grabs David Smith.

David is by the door. He's trying to get out. He's trying to get away. He hits him and tries to break the hold on him.

It doesn't break the hold. Robert Finley has him. They're both holding each other. They start to fall out the door, and you'll hear testimony that they were very close together falling out the door. As they were falling, there

was a pop. When they hit the ground, David gets up and runs back to the car and he leaves.

David Finley, David Smith did not intend to kill anybody. He will tell you that. He didn't even intend for the gun to go off. He was just trying to get out of there.

Once you hear all of the evidence, you will understand that there is no malice in this case. David was trying to get away from somebody who was attacking him. And once you understand that from the testimony that you're going to hear, you will have no alternative but to find David Smith not guilty of murder and possession of a weapon during commission of a violent crime.

Thank you.

THE COURT: You may call your first witness.

SOLICITOR COLER: Thank you, Your Honor.

The State calls Ken Camp.

KEN CAMP, being first duly sworn, testified as follows:

THE COURT: How about state your full name and spell it for the record, please?

WITNESS: Kenneth Dwayne Camp.

THE COURT: Spell it.

WITNESS: K-E-N-N-E-T-H. D-W-A-Y-N-E. C-A-M-P.

SOLICITOR COLER: Thank you, Your Honor.

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q Would you, officer, tell the jury where you work?

A Spartanburg County Sheriff's Office.

Q How long you been with the Sheriff's Office?

A I started in 1996.

Q Okay. What is your present title or assignment with the Sheriff's Office?

A I'm a deputy three on third shift uniform patrol.

Q Okay. And briefly, what is a, a uniform patrol deputy for the Sheriff's Office?

Do y'all respond to calls?

A Yes, we do.

Q Back in January of 1997, January 12th to be specific, were you on duty that, I guess, early morning hours?

A I was.

Q Do you remember what shift you were working?

A Third shift.

Q Okay. What, what time does third shift start and when do you work till, if you can recall that?

A I believe back then it started at 11:00 p.m. and went to 7:00 p.m.

Q Okay. And you were dispatched to this call -- you got this call about two o'clock in the morning, somewhere in that area?

A I was dispatched at 2:33 a.m. and I arrived at 2:37

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

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

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

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

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

No. 7 that he---

THE COURT: Thank you.

SOLICITOR COLER: ---just published.

I'm also gonna put State's Exhibit No. 6 up briefly, Your Honor.

(Witness comes down from the stand.)

Q The same thing, Officer Camp, does this one -- does this give you a better view of where the driveway to this mobile home is?

A Yes, it does.

Q All right. Show us where that is.

A It's the driveway and this area is my vehicle.

Q Okay. You went inside the mobile home, is that correct---

A Yes.

Q ---officer?

All right. I'm gonna show you what's been now admitted as State's Exhibit No. 5.

Does this appear to accurately portray the inside of the mobile home?

A Yes, it does and Mr., the older white male was at this table talking on the telephone when I arrived.

Q Okay. And in this photograph, can you see where the front door to the mobile home is?

A It's right here.

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

Q That's all the questions I have for you, officer. Please answer any that Mr. Godfrey has.

THE COURT: Cross.

MR. GODFREY: May it please the Court?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GODFREY:

Q Officer Camp, you say you were dispatched at 2:33 and arrived at 2:37?

A Yes, sir.

Q Upon your arrival when you pulled up, did you see -- what did you see?

A When I pulled up -- well, at first when I pulled up, all I saw was the body lying outside the, the door. As I got out my vehicle and approached the, the trailer, I could see an older white male standing in the kitchen area talking on the telephone.

Q Did you see anybody else?

A No, sir.

Q Was there anybody else there?

A No, sir, there wasn't.

Q Wasn't there a second person there in the trailer with Otis Hyder?

A Not that I can recall.

Q Now, you indicated that you checked the victim.

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

Q How did you get inside the trailer?
A Through the steps on the front door.
Q So, you went beside Robert Finley?
A Uh-huh. (Affirmative).
Q And is that the same way you got Otis Hyder out of the trailer?
A Yes, sir.
Q And how long was it before other officers came on the scene to assist?
A I don't recall.
Q But it's a fairly short time?
A Yes, sir, it was.
Q How soon did you take Otis Hyder out of the trailer?
A As soon as I got there and I checked the body, looked at the body. I had to make sure there was no one else inside the trailer. So, I went inside and got him out, and then we checked, I checked the trailer.
Q Now, did any other people arrive on the scene before the officers that came to assist you?
A No, sir.
Q So, the whole time that you were there, it was just you and Otis Hyder, right?
A At first, yes, sir.
Q At first.
All right. What came next, officers to help on the

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

A I'm positive of that.
Q And you don't recall if you started putting up the crime scene tape or if someone else did?
A No, sir, I don't.
Q And of course, this happened a long time ago?
This is the best of your memory, isn't it?
A This happened in '97.
Q All right. Nothing further.
THE COURT: Redirect?
SOLICITOR COLER: Just briefly.

REDIRECT EXAMINATION

BY SOLICITOR COLER:

Q Officer Camp, you didn't -- aside from making a visual examination of the victim, Robert Finley, you didn't touch or move or poke or prod him, correct?
A When I arrived on scene, based on what I saw of that body, I knew there was no way that person could be living laying there on those steps. And with my training and experience, I knew not to touch that body.
Q Okay. And what are you trained, as far as, as a crime scene, to do once you determine that, that is a, possibly a murder scene that you've arrived at?
A We're trained to, you know, locate any victims, secure the area by checking for weapons or anybody else that may be on-scene, and remove everybody else from the crime scene

area.
Q Are you trained to contaminate the scene as little as possible?
A Yes, sir.
Q Okay. That's all I have. Thank you.
THE COURT: All right. Step down.
Next witness.
SOLICITOR GANSS: Allen Newman.
SOLICITOR COLER: Judge, if there's no objection, we also that Officer Camp be excused from his subpoena.
MR. GODFREY: Without objection.
THE COURT: You may be excused.
ALLEN NEWMAN, being first duly sworn, testified as follows:
THE COURT: All right. Give me your full name and spell it for me please.
WITNESS: Sir?
THE COURT: Full name and spell it.
WITNESS: It's John Allen Newman. J-O-H-N. A-L-L-E-N. N-E-W-M-A-N.
THE COURT: Yes, ma'am.
SOLICITOR GANSS: Thank you, Your Honor.
DIRECT EXAMINATION
BY SOLICITOR GANSS:
Q Mr. Newman, could you please tell the, please tell the

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

So, the driver of my ambulance was backing it up and I walked down in there and seen a white male laying outside the door of a trailer. He was twisted, laying on the ground.

Q And at the time that you were, arrived, could you tell if the victim was indeed deceased?

A When we got there, he wasn't moving and it's my duty to check and see if he was alive. I done a pulse check on his neck and he wasn't, he wasn't alive. He was dead.

Q Okay. What did or did you do anything else to the body?

A No, ma'am, on a crime scene, all we can do is visualize crime, make sure the patient is deceased, then we back out and we have to call for a coroner to come and wait for the coroner to come before we can move them.

Q Did you put some bags on his hands?

A After the coroner arrived, he checked the victim, done what he had to do, then he said let's put bags on his hands in case we have to check his hands for certain things, and he lifted the arms up, I slid the bags over them, and taped them up, and then I transported him to the hospital.

Q And so, again, when you arrived at the scene, was it already secured?

A The scene was already secured. They was putting up the crime scene tape when we arrived.

Q Right.

So, is it fair to say nobody could just walk in and out?

A No, they -- it's, it's not like a, a house on the side of the street. It's a little trailer park that had like about four trailers down in it, and you had to go around behind the building to get down into this driveway. It was down off the street really, and if they was anybody there, they would of came from the side where people lived and most of those trailers over there was empty anyway.

Q That's all the questions I have. If you'll just answer any questions that the defense counsel has, that would be great.

A All right.

CROSS-EXAMINATION

BY MR. GODFREY:

Q Other than bagging the hands, you did nothing else, right?

A No, sir, we just bagged the hands and transported, and then I got documents to where we released him, released him at the hospital, and I got the time when I bagged them.

Q Nothing further.

THE COURT: You may step down unless -- I assume nothing on redirect?

May he be excused?

SOLICITOR GANSS: Yes, ask that he be excused.

THE COURT: Sure. Careful.

Next witness.

SOLICITOR COLER: State calls Angie Smith.

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

WITNESS: My name is Angela Denise Smith.

THE COURT: Smith, S-M-I-T-H?

WITNESS: Yes, sir.

THE COURT: Thank you.

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q Okay. Mrs. Smith, start by telling us where you live.

A I live at Fisher Avenue, Pine View Hills, Spartanburg, South Carolina.

Q How long have you lived at Fisher Avenue?

A Almost thirty -- forty-three years.

Q Okay. Who else -- 43?

A Forty-three years.

Q Who else lives there at Fisher Avenue with you?

A My mother, and my brother, and my son.

Q Okay. Tell us what your mother's name is.

A My mother's name is Betty Elmore. My son name is Tyvon Smith, and my oldest son live in Charlotte. His name is Daniel, and my brother, Rodney Smith.

Q Okay. And is Rodney here in the courtroom?
A Yes, sir.
Q Okay. And where is, where is he?
A Sitting right there in the blue jacket.
Q Okay. Do you know the defendant in this case, David Dwight Smith?
A Yes, I do, sir.
Q Okay. And how long have you known David Dwight Smith?
A Over ten years, sir.
Q Okay. When this happened in January of 1997, how long had you known him up until that point?
A I been knowing him a long time, sir.
Q Okay. Had you known him a couple of years before this incident happened or do you remember?
A I just been knowing him a long time.
Q Okay. Did you know him pretty well on January 12th of 1997?
A Yes, I knew him pretty well.
Q Okay. And did you know him for a year at least?
A Yes.
Q Maybe a couple of years?
A Yes.
Q Okay. But you can't remember exactly how much?
A Ten years.
Q Ten years previous to 1997?

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

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

Q Do you know why Rodney didn't want to get up?
A Cause he was tired.
Q Okay. All right. Did you eventually take the phone calls from Robert?
A Yes, I did, sir.
Q Was it more than one call or just one call that got passed between you and Rodney or do you recall?
A Well, at that time, it was just me. At that time, I don't know how many times if he tried to call or not. But at that time, I answered it.
Q So, you answered your phone from Robert?
A Yes.
Q All right. And what did, and what did Robert ask you to do or what did you do in response to Robert's phone call?
A Well, he wanted some drugs. So, I called -- I, I beeped David Smith.
Q Okay. How did you -- you beeped -- you said you called him on his pager?
A Yes.
Q Did you have his pager number written down or did you have it memorized?
A I just---
Q Or do you know it?
A I seen it on the ID box. You know, I seen it on the ID box. You can---

Q But you knew it?
A Yeah.
Q All right. And why did you call David Dwight Smith when Robert Finley called you looking for some crack cocaine?
A Cause David usually take him crack or other people one, you know.
Q And had you, had you, on previous occasions, do you know of that David Dwight Smith got some crack cocaine for Robert?
A My understanding.
Q Okay. And was that usually through your brother Rodney?
A Yes, sir.
Q When Robert called you and was wanting crack cocaine, did he ever mention to you that he wanted David Dwight Smith to, to deliver that or to bring that?
MR. GODFREY: Objection. Leading.
THE COURT: Rephrase your question.
Q Did Robert ever mention any specific names about who he wanted to get the crack cocaine from?
A No, he did not.
Q Did it matter to him?
A I guess it didn't, sir.
Q Did you ever tell Robert, on the phone, who you were

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

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

Q Okay. What, if anything, did you say to Robert, I mean to David or did David say to you about the $40 that Robert---

MR. GODFREY: Objection to leading.

THE COURT: Rephrase your question.

SOLICITOR COLER: I can rephrase it.

Q Did you say anything to David on the ride over there about the $40 that Robert owed to David?

A No, I did not say anything to David about $40.

Q Did David say anything to you about it?

A Yes, he did, sir.

Q What, if anything, did he say about it?

A He just said that Robert owed him $40.

Q Okay. Did he say what it was for?

A Drugs.

Q Okay. Did you, did he say that or did you know that?

A I didn't know that until he said it.

Q Describe for me what happened when you got to the mobile home where Robert Finley was.

A Can I get up and do this?

Q Sure.

A (Witness comes down from the stand.)

Q You need to make sure you speak up so the reporter can hear you.

A Okay. We pulls up in the yard in the, in the trailer

yard.

Am I speaking loud enough?

THE COURT: Yes, ma'am, you're doing great.

A We pulls up in the, the trailer yard. David asked me to get out the car to go in and see what Robert wanted. So, I get out, I go knock on the door to see what Robert wanted. I get, walk in---

THE COURT: Take a deep breath, ma'am.

Let her get her some water. If you need to take a glass of water, there's some water here. Just take your time.

A Anyway, I walked in there and Robert asked me and the older man was sitting there. He was in a wheelchair. And he -- and Robert said Angie, I owe David $40. I said cause David didn't, David didn't give me no drugs to go in there with. So, I come back out and I told David Robert didn't give me any money. So, handle it on your own, you know, cause there wasn't no drugs delivered from me till he didn't give me any drugs and Robert didn't give me no money.

So, I got back in the car, and I, I sat in the car, and I lift -- I started smoking a cigarette. The next thing I know, I lifted my head up and they was coming out the door and that's all.

Q You're doing fine. Take your time.

A And they was -- all I heard was a pop, and was it --

David fell down. David ran on the other side. He -- if I was there, he could of killed me, but he went around to the car, he got in, and he said you don't know nothing, you ain't seen nothing, and we left.

THE COURT: Have a seat back for me, ma'am.

A (Witness returns to the stand.)

Q Mrs. Smith, I'm gonna ask you a couple questions. I want to go back a little bit. Take your time and listen to my question.

When you first pulled up to, to the trailer where Robert Finley was, what were you to do when you went into the trailer?

A I was suppose to go get the money.

Q For what?

A For drugs.

Q Okay. When you got in there, what did you tell Robert you were, you were there to do?

A To pick up money from Robert to buy drugs from, from David.

Q Okay. Did you see somebody else inside the mobile home when you got there?

A The man in the wheelchair. I called him Pops.

Q Okay. Can you describe anything about him?

Was he a white man or a black man?

A White man.

Q Okay. Was he young or old?
A Older man.
Q Okay. Had you ever seen him or been to his house before?
A I just, I don't---
Q Do you know -- let me ask you this.
Do you know if it was his mobile home?
A It's not his mobile home.
Q Do you know if he was living there?
A I think Robert lived up the street from the mobile home. But he come and used the people's telephone.
Q Came and used Pops' telephone?
A. That's what's I call him, Pops
Q Okay. And that's in the mobile home that you went in to to get the money?
A Yes, sir.
Q All right. When you got in there and discovered that Robert didn't have any money for drugs---
A Yes.
Q ---what did you do?
A Come back outside and I told David.
Q Okay. What exactly did you tell David?
A I said David, Robert didn't have the money. So, David reached over to the side. I don't know what he reached for. But he got out the car and he went, I mean he went in the

trailer.
Q What, if anything, can you describe about his mood or his demeanor when you told him Robert is in the trailer and doesn't have any money for you?
A Uh-huh. (Affirmative).
What kind of mood he look like?
Q Yeah.
How did David take that?
A He just went in and he didn't look like he was gonna be -- I mean I ain't know it's gonna be like that.
Q Did he stay pretty calm?
A Yeah, he was calm.
Q Collected?
A Yeah.
Q All right. Did he -- you said he reached for something?
A He reached down, but I couldn't tell what he---
Q Where did he reach?
A On the side of the door. I don't know if he got one of those side things on his door or what.
Q Okay.
A He could of reached down up under the seat. I'm just saying he reached down.
Q After he reached down, what did he do?
A Opened the door up and got out.

Q Okay.
A And went in the trailer.
Q Okay. Did he say anything to you or tell you anything when he left---
A No, he did not.
Q ---or when he got out of the car?
A No, he did not, sir.
Q What were you to do while he went in the trailer?
A What?
Excuse me?
Q What were you suppose to do while he went in the trailer?
A I just sat in the car and waited on him to come out.
Q Okay. About how long did you sit in the car before you noticed something going on at the doorway of the mobile home?
A By the time I leaned my head down and I lit my cigarette and came back up, they was fumbling out the door. That wasn't no more than about---
Q Estimate.
Just a minute, two minutes?
A Maybe two minutes.
Q All right. Describe for me exactly what you saw when you looked up at the doorway to the mobile home.
A The door came opened.

Can I get up again, sir?

THE COURT: You can.

A All I know is the door came open, and they was falling out the door like this.

Q All right. Step this way just a little bit.

A (Witness complies.)

Q I'm sorry. Say that again.

A All I know, they was coming out the door and the door -- this is the trailer door. This is them falling out the door.

Q Okay. Who was inside the mobile home and who was outside the mobile home?

A David was outside the mobile home and Robert was inside the mobile home.

Q All right. Which way was David facing, into the mobile home or out of the mobile home?

A This is, this is Robert. This is David. David was outside.

Q Okay. And what -- was David facing into the mobile home or facing out of the mobile home?

A He was facing in.

Q Okay. Which direction was Robert facing?

Was he---

A Out.

Q Out of the mobile?

A Coming out of the door.
Q All right. And then what can you describe, if anything, about the two?
What were they doing?
A Scuffling. It's like it happened so quick.
Q Okay.
A They was so close together, that's all I know is I just heard a pop.
Q Okay. After you heard the pop, what did you see happen?
A David -- Robert fell and David come right around the side and went from -- he ran from my side to the other side, to the driver's side.
Q All right. What did David do with Robert's body, if anything?
A Just laid there and I was---
Q All right. Did David fall down?
A I mean I can't remember that.
Q Okay.
A No.
Q Did you see where Robert's body fell to?
A On the ground.
Q Okay.
A I mean his feet, his body was laying on the steps almost.

Q Okay. And David ran around the car.
What did he do next?
A Got in the car and say you don't know nothing, you ain't seen nothing. That's all, that's all I hear, that's all I hear, you don't know nothing, you don't see nothing.
Q What, if anything, can you describe about David's demeanor then when he told you you don't know nothing, you don't see nothing?
A What you mean?
Say that again?
Q What was his mood, what was his voice like when---
A He was, he was scared. He was -- I mean frightened. I'd say frightened.
Q When he told you---
A I was frightened.
Q You were frightened?
A I was scared because it could of been me.
Q It could of been you what?
A He could of killed me, you know.
Q All right. And he got in the car, and then what did y'all do?
A He, he dropped me off on Walker Street cause I was scared to go home.
Q Okay. Why did you not want to go home?
A Because I was scared.

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

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

Q Okay.
A They came to see him.
Q Okay. When was that?
A The next day.
Q This happened on Sunday morning at about 2:30.
Was it later on Sunday or do you know?
A Monday. I think Sunday, Monday.
Q Okay. Some time after this?
A Yes.
Q And that's when you told them what happened?
A Yes.

SOLICITOR COLER: Just one moment, Your Honor, if I could. One more question for her.

(Pause.)

THE COURT: Anything else, Mr. Coler?

SOLICITOR COLER: Just briefly, Your Honor.

(Pause.)

Q That's all the questions I have for you, Mrs. Smith. Please answer any that---

THE COURT: All right. Let's do this. Before you cross-examine -- turn the lights back on.

Let's take a quick recess. Y'all -- when you go back in the jury room, don't discuss the case at all among yourselves. But select a foreperson. We'll take about a ten or fifteen minute break so you can stretch your legs.

Everybody else please remain seated.

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

THE COURT: Okay. Mrs. Smith, you may step down. But you're in the middle of your examination. So, do not discuss your case with anybody, either the lawyers or anybody.

Okay?

WITNESS: Thank you.

THE COURT: We'll start back in about ten minutes. Stand at ease for ten minutes.

(Whereupon, a short recess was taken at this time.)

THE COURT: Anything for the record on behalf of the State before we get started back?

SOLICITOR GANSS: No, Your Honor.

THE COURT: Defense?

MR. GODFREY: No, Your Honor.

THE COURT: All right. The jury has informed me they have selected Jennifer L. Ayers, A-Y-E-R-S, Number 151, as the foreperson.

Okay. Mrs. Smith, you can come back and have a seat, please, ma'am.

(Witness returns to the stand.)

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

THE COURT: Okay. Who is Mrs. Jennifer L. Ayers?

(Juror Ayers raises her hand.)

THE COURT: The lady, the girl who's going trick-or-treating this afternoon.

Mrs. Ayers, you're gonna serve as our foreperson?

(Juror Ayers nods affirmatively.)

THE COURT: Thank you so much for being, agreeing to do that or being voted to do that.

JUROR AYERS: No, I agreed.

THE COURT: Good.

Okay. Cross-examine, please.

MR. GODFREY: May it please the Court?

THE COURT: Mrs. Smith, you're still under oath.

CROSS-EXAMINATION

BY MR. GODFREY:

Q Mrs. Smith, you say that you went over to the trailer with David Smith?

A Yes, sir.

Q And you went in the trailer first?

A Yes, sir.

Q And then you went back out to the car?

A Yes, sir.

Q Then David Smith went into the trailer?

A Yes, sir.

Q And you say you were lighting a cigarette?

A I had lit, I had bent my head down to light a cigarette. By the time, by the time I raised my head up, they was coming out the door.
Q Okay. And I believe your direct testimony was they were flying out the door?
A Flying?
Q Well, how did you say they were coming out the door?
A Well, in so many words -- if I said flying, I didn't mean to say flying. They was coming -- scuffling. They was scuffling coming out the door.
Q And David Smith's back was to you?
A David Smith's back was like this and Robert was in front of him.
Q And were they falling at that point in time?
A Yes, sir.
Q And is that when you heard the pop?
A I heard the pop, yes, sir.
Q And that was when they were falling?
A Before, before they was falling, sir.
Q Before they were falling?
A They was scuffling.
Q They were what?
A Scuffling, coming out---
Q Scuffling?
A Scuffling though.

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

A Yes, sir.
Q And Robert Finley wanted to get crack cocaine?
A Yes, sir.
Q And Rodney did not want to deal with him?
A Yes.
Q Because he was tired?
A Yes, sir.
Q And at some point, either during that phone call or another one, you became involved, is that right?
A Yes, sir.
Q And you agreed to help Robert Finley get some crack?
A Yes, sir.
Q And you called or you paged David Smith?
A Yes, sir.
Q And you knew David very well, didn't you?
A Yes, I did.
Q Back in those days, you used crack cocaine too, didn't you?
A Yes, I did, sir.
Q And you got your crack cocaine from David Smith?
A Yes, sir.
Q And on occasion, David Smith would allow you to have crack cocaine even though you didn't have the money to pay for it, didn't he?
A Yes, sir.

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

You, you saw him?
A I seen the car pull up, sir.
Q So, you were looking out the window waiting for him?
A I walked out the door when I seen the car coming.
Q Okay. So, you saw the car coming.
You were looking?
A I mean -- excuse me. I walked -- he pulled up, I seen the car, and I went straight to the car.
Q Okay. And when you got in the car, you told him where to go?
A Yes, sir.
Q And what did you tell him?
A I said Robert wanted, Robert wanted to buy some dope, crack cocaine.
Q Well, what directions did you give him?
A We went up Williams Street off -- it's off -- I forgot the name of the -- we went up Williams Street, and we made a left, and it's off of Farley Avenue, and we went to a trailer park.
Q Well, didn't you, in fact, tell David Smith where to go?
A I showed him where to go, which I---
Q You showed him where to go?
A Uh-huh. (Affirmative).
Q And the trailer that you went to was not where Robert

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

understanding.
Q I'm not talking about your understanding.
A I mean -- excuse me.
Q You never saw a gun, right?
A No, I did not see the gun.
Q Okay. We're not talking about your understanding. We're talking about what you saw.
A Okay. Sorry.
Q Now, they were scuffling, they fell out the door.
A Yes.
Q Right?
And then David Smith ran around the car and got into the driver's side to drive off, right?
A Yes.
Q And he let you off at Wofford Street?
A Yes, he did, sir.
Q And when he left you off at Wofford Street, he gave you the rest of the crack cocaine that he had?
A He gave me something. And as soon as he gave it to me, I took it and I gave it away.
Q But he gave you crack cocaine, right?
A Yes, he did, sir.
Q When he let you out at Wofford Street?
A Uh-huh. (Affirmative.)
He said, he kept saying you don't know nothing, you

ain't seen nothing.
Q All right. Well then is that why you kept calling him later?
A I didn't keep calling him later.
Q You called him later that night, didn't you?
A I didn't?
Q You did, didn't you?
A Yeah, I called him.
Q You called him later that night?
A I sure did, sir.
Q And you wanted more crack?
A Okay. Go ahead, sir.
Q Isn't that right?
A Yes, sir.
Q And he didn't have any and you went to his house and got $20?
A Yes, sir.
Q He gave you $20?
A To pay my, to pay, to pay the young lady for letting me sit at her house cause I was scared.
Q Well, you weren't afraid of him, were you, cause you went back to him?
A Well, I was wondering where his wife was. Excuse me. I'm sorry.
Q You went to his house---

THE COURT: Listen to the question.
Hold on.
Repeat your question.
Q You weren't afraid of David, were you?
A No, I wasn't.
Q Nothing further.
THE COURT: Redirect?
REDIRECT EXAMINATION
BY SOLICITOR COLER:
Q When -- Mr. Godfrey just asked you if they, what they were doing, they were scuffling or fighting, you don't have any way of knowing what started that scuffle if indeed they were scuffling, right?
A No, I didn't, sir.
Q You don't know what happened in that, inside that mobile home before you saw David shoot Robert?
A No, I didn't, sir.
Q Okay. And you did see a gun on, on this night, correct?
A Yes, I did.
Q You saw it when, after David shot Robert---
A Yes.
Q ---and he came around and got in the car?
A Yes, sir.
Q Okay. And you saw him fiddling -- if I understand

where -- did you see him fiddling in the car?
A On the left side.
Q All right. Is there -- do you know if there was a pocket in the doorway of that car?
A Yeah, I believe so, sir.
Q Was that pocket large enough to, to hold the gun you saw---
A Yes, sir.
Q ---in David Smith's hands?
A Yes, sir.
Q Okay. And the crack cocaine that David had on him that night, do you know if that was already in his pocket?
A I don't know, sir.
Q On previous occasions, do you know where David Smith carried his crack cocaine when he would furnish you with it or you see him furnish somebody else with it?
A In his pocket.
Q Okay. He had it on him?
A Yes, sir.
Q Okay. And David Smith, on previous occasions, has testified and told Mr. Godfrey that he's loaned or fronted you drugs --
A Yes, sir.
Q -- when you didn't have the money?
A Yes, sir.

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

A No, you shouldn't.
Okay. I know---
Q I know you shouldn't.
But I'm saying as a drug user---
A Right.
Q ---and addicted and desperate for drugs---
A Uh-huh. (Affirmative).
Q ---are you gonna try to take advantage of somebody who's, who's got the reputation for giving drugs away and not collecting?
A No.
Q You may not understand my question.
A I'm not---
Q That's okay. I'll move on.
When you went into the trailer to see Robert about getting the money---
A Yes, sir.
Q ---at that point, did you know Robert owed David $40?
A I didn't know it till Robert told me, sir.
Q You found out when you got in there?
A Yes, sir.
Q Okay. If you had known it, would you have called David Smith---
A No, I wouldn't.
Q ---to bring drugs to Robert?

A No, I wouldn't.
Q Would it have been your understanding that that would endanger Robert Finley's physical being?
MR. GODFREY: Objection. Calls for speculation.
THE COURT: Sustained.
SOLICITOR COLER: I'll withdraw it.
Q That's all the questions I have, Mrs. Smith.
THE COURT: All right.
MR. GODFREY: May it please the Court?
THE COURT: That's discretionary. You know that of recross. I'll allow it.
MR. GODFREY: Thank you, judge.

RECROSS EXAMINATION

BY MR. GODFREY:

Q Just a couple of questions.
According to your testimony, you did not know that Robert Finley owed David Smith $40 for something till you got to the trailer and talked to Robert Finley?
A Yes, sir.
Q That's correct?
A That's correct.
Q And the pocket in the door, do you actually know whether there was a pocket in the door of the car or not?
A All cars have pockets, sir.
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.
DIRECT EXAMINATION
BY SOLICITOR COLER:
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.

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

So, I had went, had went to the back and checked that door, and then I had come to the front and opened it up and locked my screen door because I got an outside lock. You can unlock it from the outside.

And at the time, that burgundy car was over in front of the door, the window was down. You know, it's all black tinted windows. It was down. I seen Angie Smith out there at the car getting in it.

And in the mean time, if a car don't pull in her driveway, if it just pulls straight like going the opposite end of Fisher, most of them make a U-turn. And in the mean time, I had opened the door and I stood there like, Angie going like this, you know. Not really being nosey.

Anyway, the car made a U-turn and the lights hit my door cause I had a glass storm door, and it made a -- it -- the lights shined right on me. So, they kind of looked and hit the brakes cause I was standing in the door like -- I was saying maybe they think I want them, you know. Hit the brakes. But it paused for like 20 seconds and just pulled on off.

Q Okay. You saw them when the car was pulling away from Fisher?

A Yeah, it made a U-turn.

Q Okay.

A Turned around, turned around to go out the other end.

100

Q How long was the car at Fisher before Angie got in it?
A Looked like it, looked like it -- it wasn't turned off. So, I imagine it just pulled up.
Q Okay.
A And she was coming out. She was out there in the yard or middle ways in the yard, and getting in the car, you know, and I'm pretty sure she seen me cause I keep a light on, the hood of my stove all the time. I keep some kind of light on, and it's on my door. With her, you know, with her knowing me, she probably just looked over there and see if that was me.
Q All right. And you just happened to be looking out or did something draw your attention?
A No, I just happened to -- when my TV shuts off, it's got an alarm on it, and if I'm -- I be, I be at home by myself most of the time, and I keep the back-door bolted. I always check my doors.

So, once I woke up and it was dark in my bedroom, I said let me get up, go to the bathroom, go check my doors, and I did that. And that's when the car was out there in front of the door. You know, I'm like looking. And then all this was like in a matter of like say three, four, three minutes, something like that.

Q Okay. And when the car pulled away, you could see who

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

between, before I go to sleep, I set it so the TV won't be on all night. So, I might set it for like 1:00 or 2:00 or something like that. I don't know.

Q All right.

A I can't remember at the time.

Q Okay. Did you say anything to, to Angie or---

A No, no.

Q ---David Smith?

A No, I didn't say nothing to nobody. It was cold. I didn't even open that door. I just turned my thing to see was it locked. I didn't say nothing to nobody, but I paused a little bit when the -- the brake lights hit after it made the U-turn. It, you know, I just paused and closed the door up right then and there. But I didn't say nothing to nobody cause number one, I don't know him and I had on my gown anyway.

Q I'm sorry?

A I had on my gown.

Q Okay. I see.

A It was outdoors and I wasn't coming in the house.

Q That's all the questions I have for you.

A Okay.

Q Thank you for being here. Please answer any of Mr. Godfrey's questions.

THE COURT: Cross, if any.

MR. GODFREY: May it please the Court?

CROSS-EXAMINATION

BY MR. GODFREY:

Q So, you don't know him?

A I don't know him personally. I don't know him.

Q Okay. But you know -- you knew who it was?

A Yeah, I know it was through the car from being over there previous times and seeing him previous times.

Q Okay.

A And I think the light skinned lady that use to be over there with the pretty hair was his wife. I knew him as far as being over there.

Q But other than seeing Angie get into the car, you don't know anything else about what happened?

A I don't know nothing else. I just seen that car make a U-turn and go up the street.

Q Nothing further.

A That was it.

THE COURT: You may step down.

SOLICITOR COLER: Thank you, Your Honor.

THE COURT: Next witness.

SOLICITOR COLER: State calls Rodney Smith.

Your Honor, if there's no objection to Mrs. Roseburgh being excused---

MR. GODFREY: No objection.

THE COURT: You're excused, Mrs. Roseburgh, Roseburgh.

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

WITNESS: My name is Rodney Smith. R-O-D-N-E-Y. S-M-I-T-H.

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q All right. Mr. Smith, tell us where you live.

A Fisher Avenue.

Q You live there with your sister, Angie?

A Yes, I do.

Q And your mother?

A And my mother and my nephew.

Q Those are Angie's two children?

A Yes.

Q All right. And just so I'm clear, you're not related to David Dwight Smith?

A No, I'm not.

Q Nobody in your family is?

A No.

Q Okay. How -- and refresh our memory, how long have y'all been at Fisher Avenue?

A I guess between 25, 27 years.

Q Okay. And do you know the defendant, David Dwight Smith?

A Yes, I do.
Q All right. Describe for us how you know him, what your relationship was with him.
A Well, I, I knew him -- well, I met him through his wife---
Q Okay.
A ---Karen. And I been knowing David for -- we was friends.
Q Okay. Prior to this incident, prior to January 12th, 1997, do you know how many years before that you knew him?
A Three, four, five years.
Q Okay. And on occasion, you would get drugs from David Dwight Smith?
A Yes.
Q Crack cocaine to be exact?
A Yes.
Q And that -- would that be for your use or drugs for other people?
A My use and for other people.
Q Okay. And you would distribute it to other, many other people?
A Yes.
Q Okay. And what would you get out of it or what was -- what did you get out of help distributing drugs from him to the other people?

A Drugs.
Q For yourself?
A Yes.
Q Okay. And you admit you have a -- you used drugs?
A I did then, yes.
Q And had a drug problem?
A Yes.
Q Okay. How about Robert Finley, did you know him?
A Yes.
Q Before this incident, before January 1997, how long did you know him?
A Maybe two, two, three years.
Q Okay. And did he use drugs?
A Yes.
Q And did you supply him with drugs?
A Yes.
Q Where did you get the drugs that you supplied Robert Finley with?
A Well, from David and other people.
Q Okay. But on a number of occasions, you supplied Robert with drugs that came directly from David Smith?
A Yes.
Q Did you know anything about -- well, let me ask you this.
Did you ever see David Smith himself directly give

drugs to Robert or was it always through somebody like you?
A I have seen David give it to Robert.
Q Okay. Did you make that introduction?
A Yes.
Q Do you know about how long before Robert was killed that you made that introduction where you introduced David Dwight Smith to Robert Finley so Robert could get drugs from him?
A It might of been a month or so, a couple of months before then, you know.
Q All right.
A I can't remember.
Q To your knowledge, did David Smith ever loan or front drugs to Robert Finley without getting paid right then and, and expecting to get paid later?
A Yes, from what David would, had told me.
Q Okay. Describe for us, if anybody doesn't know, how that works when, when somebody fronts drugs to somebody else.

How -- what, what happens?
A What you mean now?

If you, if you, you front it to someone---
Q Uh-huh. (Affirmative).
A ---and you expect them to pay you money back at a certain time when they tell you they gonna pay you.

Q Okay. And did -- how -- well, I'll, I'll withdraw that.

Do you know anything in particular about the $40 debt that was owed by Robert to David?

A David told me that Robert owed him $40.

Q For what?

A Crack cocaine.

Q All right. What, if anything, did David say about wanting to collect that?

A He told me he was gonna get his money. He wanted his money from Robert.

Q What was his demeanor or what was his mood when he talked about Robert owing him $40 for, for some drugs he fronted him?

A He---

Q Was he happy about it?

A He wasn't happy.

Q Okay.

A But it wasn't also not a mad tone. But he was just saying he wanted his money.

Q Did it seem to be just matter of fact?

A Yes.

Q Just part of the business?

A Yes.

Q And, and you just testified you said he, David said he

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

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

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

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

and -- but the only person I knew at that time of morning really was David, and I knew that David, Robert owed David $40. So, I told Robert I didn't know nobody. I didn't feel like being bothered with it. And I told him I would just holler at him later.

Q Okay.

A And I went to sleep.

Q All right. Why would you not want to contact David Dwight Smith to get some drugs for Robert Finley knowing Robert Finley owed David $40?

A Because I didn't not want to get in-between that, that drama since David had already told me he wanted his money.

Q Okay.

A So, I would -- I didn't even want to just get in-between that period.

Q And when you say drama, that, that drama, what do you mean?

A Anything could of happened.

Q Okay. So, you didn't take the phone, you didn't, you didn't -- you told Robert you couldn't help him?

A Right.

Q And what did, what happened next?

A Well, the next thing I knowed, I laid down and went to sleep, and the next morning when I woke up, I was getting a call from the Sheriff's Department wanting to talk to me.

Q When was that?
A The next -- Sunday morning, that Sunday morning about---
Q Later that morning?
A About six, or seven, eight o'clock in the morning.
Q All right.
A My phone rung.
Q Were you aware of the, of the telephone conversation between Robert and Angie?
A No.
Q You went to sleep?
A No, I didn't even know Angie had left the house.
Q When the Sheriff's Department called you or contacted you, how, how did they contact you?
Do you remember?
A By telephone.
Q Okay.
A They called me and asked to speak to Rodney Smith. I said I'm Rodney Smith and he said I, I think we need to talk to you.
Q You sure you didn't have a pager back then?
A I did not.
Q They just called you?
A Yeah.
Q And what did you do when they told you they needed to

talk to you?
A I said well, come on over, I'm at the house, you know.
Q Did you speak to the officers?
A Yes, I did.
Q All right. What, if anything, did you tell them about what you might know about Robert Finley---
A Well, when, when they---
Q ---being shot?
A Well, when they told me that Robert Finley had been shot, and some girl was with the person that did it, and I, you know, I started putting one and one together, and I figured well, the girl had to be my sister --
Q Okay.
A -- you know, and I didn't even know she had come back to the house. And -- but she was laying back there in the bed, and I finally told her that if you know anything about this, tell them.
Q That's what you told Angie?
A Yes, sir.
Q What did she do in response to you telling her that?
A That's when she talked to Mr. Denton.
Q She come out of her bedroom?
A Yes.
Q And spoke to Officer Denton?
A Yes.

SOLICITOR COLER: Okay. Beg the Court's patience one moment.

(Pause.)

SOLICITOR COLER: Beg the Court's patience just one moment.

(Pause.)

Q Do you remember ever having a conversation with David about, wherein David told you he contacted Robert's girlfriend, Morgan, to try to collect the money?

A I believe he told me something about that. But I --.

Q You don't recall that?

A I don't recall it. But I---

Q Do you think---

A I believe we might of had a conversation like that, but he had talked to Robert's girlfriend.

Q Well, does that ring a bell?

A It rings a bell.

Q Okay. And what was David Smith's demeanor again, once again when he was telling you about that, how trying to go find Robert Finley's girlfriend to try and collect the $40?

A He, he was serious about he wanted $40.

Q Okay. He was serious about it?

A Yes.

Q That's all the questions I have Mr. Smith. Thank you for being here. Please answer any Mr. Godfrey has.

CROSS-EXAMINATION

BY MR. GODFREY:

Q Mr. Smith?

A Yes.

Q Did David ever front you any drugs?

A Yes.

Q Did you always pay him on time?

A No.

Q Did you ever---

A But I always did things to make it up for not paying him.

Q Well, did you ever have a problem with, with David Smith?

A No, I did not.

Q In fact, you use to deliver drugs for David sometimes, didn't you?

A Yes.

Q And in this case, isn't it true that Robert Finley, the drugs that he owed David for are the ones that you gave to Robert Finley?

A No, no, that is not true.

Q And isn't it true that David Smith told you that he didn't want to deal with Robert Finley anymore until he paid the money?

A I don't remember David telling me that.

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Q Now, you indicated that you were not related to David Smith, which I guess is correct.

Aren't you related to David Smith's wife who died this past year?

A I guess through my mother them might be related somewhere down the line. But it's got to be around about the, the 15th, the 20th cousins out of -- I don't know whether you call that relations or not, related to them or not.

Do you know what I'm saying?

Q Well, do you know David Smith's wife?

A Yes.

Q Did she come over to your house the night of this incident?

A Yes.

Q And about what time did she get there?

A I don't -- that might of been around about 3:00, 4:00. It's like---

Q And you were up at the time?

A Yes, I was up at the time.

Q But you don't know what happened at the trailer, do you?

A No, I do not.

MR. GODFREY: Beg the Court's indulgence.

(Pause.)

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

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

Q Did he tell you why?
A He -- no, he just say he purchased a .25 automatic just to have it, I guess just to have it. But at the same time we was also talking about the $40 that Robert owed him.
Q Okay. That's all I have.
THE COURT: All right. You may step down.
Next witness.
SOLICITOR COLER: State calls Deanna Burgess.
THE COURT: Come around, Mrs. Burgess.
SOLICITOR COLER: Your Honor, if there's no objection, Mr. Rodney Smith would like to be excused.
MR. GODFREY: Without objection, Your Honor.
THE COURT: All right.

DEANNA BURGESS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q Would you state your name for the record?
A Deanna Arnold Burgess.
Q Okay. And tell us where you work.
A Spartanburg County Sheriff's Office.
Q How long have you been with the Sheriff's Department?
A Twenty years.
Q And what is your present title with the Sheriff's Office?

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

testing.

(Whereupon, a shell casing was marked as State's Exhibit No. 8 for identification purposes only at this time.)

Q I'm gonna hand you what's been premarked as State's Exhibit No. 8, and ask you if you'd take a look at the envelope and the contents of the envelope.

Ask you if you recognize the item that, that's in the envelope.

A Yes, I do.

Q What is it?

A It's a shell casing.

Q Okay. Do you -- have you noted on your report what caliber it is?

A Yes, it says one .25 caliber, caliber auto RP casing.

Q One as in the quantity?

A One as in quantity.

Q Okay. A .25 caliber shell casing?

A Yes.

Q Is that a unfired piece of ammunition or a, or a spent piece of ammunition?

A It is a spent round.

Q Okay. Did you take it into your possession on the, on or about the date of January 12th of 1997?

A Yes.

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

hands and what were you looking for?
A It's a gunshot residue collection kit, and I was looking for gunshot residue.
Q All right. Describe what a gunshot residue kit is, what you physically do to collect your sample, and what you do with them.
A It's a prepackaged test that is purchased for law enforcement officers. It has two different tests in it. One test it has a sticky surface on it. You go over the hands, and both part of the hands on the back, on the inside of the palms. There's four separate containers for that. One for the inside right, inside left, the outside right, and the outside left.

You do that test first. It's in a separate cannister, which can not be contaminated unless it's opened. So, you blot the hands with the sticky surface, and put it back in the container and seal that up.

The second test uses a five percent nitric acid on a Q-tip. It's rubbed on over the hands also, on the outside, and up the wrist, and on the inside of both hands. Then each swab is put into a separate container. It's sealed. The outside envelope is then sealed with the, some tape that's resistant. If you -- if it's opened it, at all, you can tell that it's been tampered with, my initial's are on it, and then it's, it's sent to the evidence department, and

sent to SLED after that.
Q What is the purpose of taking those samples from the back and the front of both hands of the deceased?
A You are looking for a, traces of gunshot residue.
Q All right. What do you do with your samples after you collect them and put them back in the container and seal them up in those envelopes you described?
A They go straight to the evidence department, and the evidence department is responsible for transporting them to SLED for testing.
Q All right. SLED has a laboratory in Columbia?
A Yes.
Q Okay. Do you do the test yourself here in Spartanburg or anywhere?
A No.
Q And after SLED does it, do you get the results?
A The detective usually gets the results that's in charge of the case.
Q Okay. The -- do you recall whether or not the hands of the deceased were covered or backed when you made your samples?
A Yes.
Q They were?
A They were.
Q Okay. And what is the purpose of covering or bagging

the hands of the, of the deceased before you take your samples?

A It protects them from being contaminated.

SOLICITOR COLER: All right. Beg the Court's patience one minute.

(Pause.)

Q That's all the questions I have. Sergeant, please answer any that Mr. Godfrey has.

THE COURT: Cross?

MR. GODFREY: No questions.

THE COURT: You may step down.

Next witness.

MR. GODFREY: State calls Steve Denton.

THE COURT: Mr. Coler, please bear in mind I got to have somebody trick-or-treating at 4:30.

SOLICITOR COLER: Yes, sir.

May we approach?

If there's no objection, Sergeant Burgess would ask to be excused.

MR. GODFREY: Without objection.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

SOLICITOR COLER: State calls Detective Denton.

STEVE DENTON, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q Would you please state your name for the record?

A It's Steven L. Denton.

Q Tell us who you work for.

A Spartanburg County Sheriff's Office.

Q Tell us what your present title or assignment is with the Sheriff's Department.

A I'm a captain with the CID division, which is criminal investigative division. We house about between 55 and 65 investigators and other employees including civilians employees as well as law enforcement employees.

Q And essentially as a captain of the detective division, it's your job to oversee all the detectives at the Sheriff's Office?

A Oversee all criminal investigations whether it be in narcotics, burglaries, any type of crime in general and in other internal matters.

Q How long have you been with the Sheriff's Department? When did you start with the Sheriff's Department?

A 1986.

Q Been with them essentially ever since?

A Twenty years, yes.

Q Back on January 12th of 1997, did -- were you dispatched or asked to investigate this case?

A I was.
Q Do you recall what you first did, where did you go, and what you observed when you first became involved in the case?
A I was on call the night of January 12th, 1997. Received a call sometime after 2:00 or just before 2:00 a.m. I responded to the scene. I believe I arrived somewhere around 3:00, 3:15. I arrived along the same time as the coroner investigator. His name is Dick Seay. He was an investigator at that time with the Coroner's Office.

Upon arrival, my biggest concern was, was to get that crime scene secured. That had been done. It was done by the officer that testified earlier in the, in the afternoon. And my observations immediately were drawn to the front door of the mobile home.

Right at the front door I observed a white male wearing blue jeans, quite a bit of blood, lying at the door, and it was obvious that that, that person was deceased. It was very cold that night. I remember blood had coagulated, had started to even have ice effects on it. And because of that, I immediately had ID come out to the scene to start photographing it, I mean recording that scene.
Q What, if anything -- there's some photographs here showing the, the steps---

THE COURT: Number please.

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

in along with the responding officer. It was noted in the officer's report about Mr. Hyder also being there. No other people were there.

Q All right. You had the officers come out and start making pictures and begin the process of collecting evidence, is that correct?

A I did.

Q All right. Was there anything else essentially for you to do at the scene that night or do you then move to the next phase of your investigation?

A I was obviously interested in, because it appeared to me, to be a gunshot. I was interested in the possible casing or spent round that we could of exited. And again, because it was so cold that night, it's fairly dark back there, the reason it appears that, appears because they're lights being used to photograph. It's not that way and it wasn't that way out there that night.

I decided to wait till I had daylight to actually do a little more crime scene searches, which I did. One thing I did do, I noted that, which I would always do, I work the inside of the mobile home to see if there was anything specific that was interesting to me there.

Q Okay. Did you---

A Essentially that's all.

Q Did you note anything inside the mobile home of

particular interest at that point?
A Other than it was a, you know, it's a standard mobile home with a door, as you see it, the steps. Pretty much all the same in that area. But the home wasn't well kept.

But what I did note, what was important to me is that there was no signs of any kind of struggle inside. That's important. It was important to me to see what I have here and, and to know it happened at the door, but not seeing the sign of struggle inside with furniture being moved, thrown over, things being moved around. That was important to me that particular night.
Q All right. And you've been in the courtroom and have been shown other pictures.

State's Exhibit No. 5, that's one of the photographs of the inside.

Is that essentially how you observed the scene?
A Again, that is the way I observed the scene.
Q Okay. And, and that photograph appears to accurately portray it, correct?
A It does.
Q All right. You made a decision to look for or have your people look for the shell casing when it finally became light?
A I had them do it that night.
Q Okay.

A They weren't able to find it. I kept the scene, I kept -- in fact, I kept two officers at the scene that night. Later went back at daylight. I took a metal detector. I found the, the casing pretty much after being there about five minutes. Given the description of where the body was laying, knowing that it was probably .25 from the autopsy I had just gotten back, and I pretty much knew the ejection pattern of the casing and found it right around the area that we thought it might be in.

Q Can you, can you generally show us, you got a laser pointer there, where the, approximately where the shell casing was located?

A Yes, sir, right in this area.

Q And describe for us -- you're familiar with the semiautomatic firearms and how they eject shell casings?

A Yes.

Q All right. Describe for us how you would expect a shell casing to be where you were in relation to where the gun would of been fired according to your, according to the witnesses in the case.

A Well, most ejection ports, if not all, eject to the left, some out the top. But to the left. And as if David Smith were facing the inside of the trailer and the gun discharging towards the trailer, as was testified, the ejection could come to the left. And with that .25 auto, I

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

Q Okay. And what happened as a result of using that pager number?
A I got a return phone call from Rodney Smith.
Q Okay. And that was Mr. Smith who just testified?
A Absolutely.
Q All right. After you got his return phone call, did you tell him you needed to speak with him?
A I did.
Q All right. And what happened?
A He immediately offered me and the, and the person I was working with to come over and speak to him at his apartment that night or early in the morning.
Q All right. What, if anything, did Rodney Smith -- what information, if anything, did he give you that led you in the direction to David Dwight Smith?
A He had specifically told me that, through his sister's knowledge, that David Smith and Angie, who earlier testified, had gone to that trailer that night and something had happened, and that Angie could tell me about it.
Q Okay. Did Rodney Smith -- was he able to give you an address for David Dwight Smith?
A He did.
Q All right. What did you, what did you do with that information or where did you go based on that information you got?

A I went to the address on Bee Street. I believe it's maybe or---

Q Okay.

A ---Bee Street?

Q Bee Street.

A In the City of Spartanburg. I went to that address. I ran two tag numbers. I ran one that was under a carport awning. That would be the burgundy car that had been described that night. That vehicle came back registered to David Dwight Smith.

I noted the vehicle that had also been mentioned that night, which is a green looking Taurus, Ford Taurus. There was a Maxima across the street, which faced Farley Avenue. I ran that, that tag also. It came back to David, David Dwight Smith at the same address on Bee Street. So, I felt comfortable that was the vehicles I was looking for and the person I was looking for.

Q All right. At that point then when you were there and ran that, those tag numbers, did you make contact with David Dwight Smith?

A I made contact with his wife.

Q Okay. What did you do?

Did you go to her door and knock on the door?

A I went to David's house. I had run, run the first car that was under the awning carport. His wife, Karen Faith

Smith, answered the door. I spoke with her briefly, advised her that I'd like to talk with David, wanted to know where he was. She advised me that he had been called out of town to work specifically in Greensboro, North Carolina, and that she would get in touch with him for me.

At that point, I allowed her to page him and she did.

Q What, if anything, did you observe about her condition when, when she spoke to you that afternoon?

A When I went to the door to knock on the door, first of all, I don't carry a weapon. Just a badge usually. And I had that to show people when I ID who I am. Showed her that. She was already very nervous, very shaky.

When I asked her about David, wanting to talk to him, she was very very nervous, very shaken. Wanted to give very short explanations on where he was.

Q And you asked her to page David for you?

A She -- I, I did. I asked if there was any way she could get in touch with him. She mentioned he had a pager. I asked her to go ahead, if she would, to use that pager and she did.

Q Okay. Did he respond to that page to your knowledge?

A He did, several hours later.

Q All right. Did he call you?

A He did.

Q At the Sheriff's Office?

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

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

did you advise him of his Miranda rights, of his rights that he had?

A I did.

Q I'm gonna show you what's been premarked as State's No. 1.

Is that the pre-interrogation waiver form or a waiver form you used to advise people of their rights before they give you a statement?

A It is.

Q On that form, did you essentially advise him he has a right to remain silent, right to an attorney, right to stop your questioning at anytime at -- all those rights?

A Yes, sir.

Q Did you initial those as you or indicate somehow that you advised him of what his rights were?

A I did. He initialed before he, each sentence. I initialed the outside of each sentence after each period. That indicates that he understands the rights and that I read them to him.

Q And then is there a portion of that document that you asked him if he wants to waive those rights and talk to you and give you a statement about this incident?

A It simply says the above read rights were read to me by Detective S.L. Denton. I've read the same and understand my rights fully. It's witnessed by myself, signed by David,

and it says I waive, which means give up my rights, as explained above and agree to talk to Officer Denton in reference to a murder (homicide). And any statement I may, make is of my own free will without fear, threat, promise, or reward of any kind. I'm able to read and write the English language and finish 15 years in school. I witnessed it, he signed it, and it's notarized also.

THE COURT: What number is that?

SOLICITOR COLER: That's---

WITNESS: No. 1.

SOLICITOR COLER: ---premarked as State's Exhibit No. 1, Your Honor.

Q I'd also hand you what's been premarked as State's Exhibit No. 3.

Is that the written statement that David Dwight Smith gave you after being advised of his rights and after you asking him to essentially tell you about this incident?

A It is.

Q Did he sign that statement?

A He did. It has his name at the beginning. It's signed by David Smith. It's also witnessed by another officer, has the date.

Q And is this -- I'll hand you what's been premarked as State's No. 2 for ID.

Is that an affidavit form that you use that goes along

with the, the statement you took from Mr. Smith?
A It is. This is a sworn statement form that we use after taking the statement from, whether it be a defendant, whether it be a witness, or a victim swearing that what they told us is the truth. It was signed by David Smith on January 12th, 1997, and it was also notarized by Detective Michael Kitts from the same day.

SOLICITOR COLER: Your Honor, at this point, the State would move Exhibits 1, 2, and 3, premarked for ID, into evidence and offer to publish to the jury.

MR. GODFREY: Without objection.

(Whereupon, State's Exhibit Nos. 1 through 3 were received into evidence at this time.)

Q Detective Denton, what I want you to do is read the statement that David Dwight Smith gave to you when you met with him at the Sheriff's Office and were questioning him about this incident for the jury. And if it's possible, I'd like to put it on the overhead while you -- can you read along?
A Yes, sir.
Q All right. If you can read that and just tell us what that statement says.
A Yes, this statement was taken after Miranda was issued to Mr. Smith. It simply says statement of David Smith, age 38, date 1/12/1997, Bee Street. It has a telephone

number.

It starts out as woke about 10:10 a.m. Got up and cleaned myself up. Ate Stax's. Left home. Got gas. Played poker machines at Li'L Cricket, Hayne Street. Played at Rick's in Wellford. Came home, talked to my wife, and brother, and girlfriend and went to liquor store for wife.

Played more poker machines, came home, shaved. 5:30 p.m. about brothers went to Church's Chicken, came back, I ate chicken. Got in shower. Got out. Got dressed and had conflict with wife.

Went to see my girlfriend about 8:00 p.m. Stayed there until between 11:15 and 11:30 p.m. Came home, went with brother and girlfriend to Hot Spot, played more poker machines. Left about 12:15 a.m. to house. Wife and Eddie Gilmore were still there drinking liquor and listening to music.

I went to bedroom and watched fight, Mike McCullough, which he lost. The next show I watched was Tails From The Hood, and then it's, it's timed at 6:23 p.m. from the 12th day of January. And it should be '97. But the year had just changed and that's a, that's a typo. It's also witnessed by another officer and signed by David Smith.

Q And this statement was essentially taken some 14, approximately 14 hours after your officers first responded to the, the mobile home?

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

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

enforcement is not gonna go out and make an arrest based on some statement like this. We continue to investigate it, which we did.

Obviously spoke with Angie Smith after this along with some other folks. Other statements were taken, other forensics were found, an arrest warrant was issued, and he was arrested in Greensboro days later.

SOLICITOR COLER: Okay. All right. Beg the Court's patience just one minute.

(Pause.)

Q That's all the questions I have for you, detective. If you please answer any questions Mr. Godfrey has for you.

THE COURT: Let's hold on a minute. It's after 4:00.

Do you have a problem with me stopping right here?

(Mr. Godfrey nods negatively.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, we're gonna break for this afternoon.

Nine o'clock, 9:30, or ten o'clock, what suits you?

(Jurors answer nine o'clock.)

THE COURT: Nine o'clock a problem with anybody?

(Jurors nod negatively.)

THE COURT: Those with little children?

JUROR: Yeah.

THE COURT: That is a problem?

JUROR: No, it's not a problem. It's -- I have---

THE COURT: Okay. All right. I'll have you hot donuts.

Will they -- Mr. Humphries, will they be hot?

BAILIFF: Yes, sir.

THE COURT: Coffee. So, y'all -- we'll get started at 9:00. But if you want to get some, fill up on some donuts, be here a little before then.

Please do not discuss the case tonight. Do not commence your deliberations. If anybody tries to discuss the case with you, please advise that we will, I will handle them accordingly.

Okay. You're free to leave. Everybody else please remain seated. We'll see you back at nine o'clock in the morning.

Good luck trick-or-treating.

JUROR: Thank you.

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

THE COURT: Mr. Denton, you're right in the middle of your examination. So, I would ask, tonight, do not discuss the case with the Solicitor's Office or defense or anyone else. Just don't, don't discuss it with anybody, and I'll see you back at 9:00 in the morning where you'll remain under oath. So, don't assist the prosecution with any type of preparation or anything like that. I'm sorry.

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

THE COURT: And have you discussed that with your client?

MR. GODFREY: We have talked about it.

THE COURT: And is he understanding of that and agrees with that?

MR. GODFREY: Yes, sir.

THE COURT: Anything else for the record as to Exhibits 1, 2, and 3 that you want to put on it?

MR. GODFREY: No, Your Honor.

THE COURT: All right. Let's take a short break and then let's deal with the testimony of the deceased witness. We'll start back in about 15 minutes or about ten till.

How about that?

Thank you.

(Whereupon, a short recess was taken at this time.)

THE COURT: Okay. Let's go back on the record.

And as I understand, you're trying to put in the testimony that was previously taken at the prior trial of Pops, whose name is Mr. Hyder, is that -- H-Y-D-E-R?

SOLICITOR COLER: Yes, sir, that's correct, Your Honor.

THE COURT: AKA Pops, is that what they call him?

SOLICITOR COLER: That's him.

THE COURT: And it's my understanding that he testified at the last trial. Subsequent to the last trial, he is, he is died and you wish to put it under Rule 804(a)(4), which

says that he is unavailable obviously because of his death, and that it also comes under 804(b)(1), which is the former testimony as a witness in another hearing, and it looks like to me it sort of falls within the rule.

But Mr. Godfrey, I'll be glad to hear from you.

And let also the record reflect that the testimony itself will be the same exact testimony that was used in the previous trial, and you will just publish that testimony, is that correct, Mr. Coler, or are you gonna do anything addition, more or --?

SOLICITOR COLER: No, sir, just that. I'd, I'd offer to just read the questions out of the transcript and have some volunteer read the answers from the, from the witness stand.

THE COURT: All right. Mr. Godfrey, how does that not come within the 804(b)(1)?

MR. GODFREY: Well, may it please the Court?

THE COURT: Yes, sir.

MR. GODFREY: I think the threshold issue is whether or not the, if, whether or not Otis Hyder is truly dead. At this point in time, we believe he probably is. But there's been no proof from the State showing that he has deceased.

THE COURT: All right. You want me to call him?

All right. What proof do you have that he's---

SOLICITOR COLER: We haven't been able to put our hands

on any death certificate. But Allen Newman, who was here and testified earlier, tells me he knew Otis Hyder and Otis Hyder is, in fact, dead. Thought he died---

THE COURT: I guess that's one little thing you and Ms. Ganss can do tonight.

SOLICITOR COLER: Yes, sir.

THE COURT: You can go to the graveyard and take a picture of his tombstone or get me an---

SOLICITOR COLER: We'll do that, judge.

THE COURT: ---his official death record.

Let's assume he's dead.

MR. GODFREY: Well---

THE COURT: I'll make them prove that before I allow it.

MR. GODFREY: Bottom line, judge, when Otis Hyder testified at the first trial, the defense attorney, Mr. Cox, was not aware of a interview note which was taken by an investigator for the Solicitor's Office.

THE COURT: How do you know he was not aware of that?

MR. GODFREY: Because Mr. Cox testified that he did not know about that, and it was an internal note taking from the Solicitor's Office. It was their work product, which is not normally, which is never actually -- under Rule 5 discovery, it was work product from the Solicitor's Office.

THE COURT: Well, if it's not discoverable, then how

could he have known about it?

MR. GODFREY: Well, he should of known about it because it's Brady material. The Brady material involved in it was where there was an indication that Otis Hyder told the investigator for the Solicitor's Office that Robert Finley was going to take the drugs. In other words, he was gonna steal the drugs.

THE COURT: Mark as Court's Exhibit 1 please.

MR. GODFREY: And---

THE COURT: Hold on one second.

(Whereupon, a note was marked as Court's Exhibit No. 1 for identification purposes only at this time.)

THE COURT: All right. Mr. Godfrey, I've marked, as Court's Exhibit No. 1, what was given to me, in a little pretrial conference we had and I think I just showed it to you while the court reporter was marking other exhibits, does Court's Exhibit 1 appear to you to be the memo that you just spoke about?

MR. GODFREY: Yes, sir, it is.

THE COURT: And Mr. Cox, who later testified in a post-conviction relief hearing, you're telling me that he testified that he did not know about Court's Exhibit 1?

MR. GODFREY: That is correct, sir.

THE COURT: And did he testify that his cross-examination would of been different had he known about

Court's Exhibit 1?

MR. GODFREY: Judge, I would have to refer to the PCR transcript. I can't answer that one off the top of my head, sir.

THE COURT: Well, you would agree with me that if the guy is unavailable, obviously -- and this testimony was taken under oath in a former proceeding, it appears, at first glance, that it would come within the rule. What you're telling me is though had Cox known about Court's Exhibit 1, then perhaps his cross-examination would have been different, and now that you know about Court's Exhibit 1, and Mr. Hyder being dead, and if you had cross-examined him back then with Court's Exhibit 1, your cross-examination would also have been different?

MR. GODFREY: That is correct.

THE COURT: Sort of a violation of, sort of a violation of, of what?

What's the name of the new case?

It's right on the tip of my tongue.

Confrontational testimonial---

MR. GODFREY: Crawford.

THE COURT: Crawford. I'm sorry. Crawford.

Sort of a hybrid Crawford question?

MR. GODFREY: Yes, Your Honor.

And also, it's a Brady issue I believe because, when

you look at that, it shows that Robert Finley was going to take the drugs or steal the drugs, or to put it another way, rob a drug dealer.

THE COURT: Well, it says Finley---

MR. GODFREY: And that goes---

THE COURT: It says Finley came to trailer late at night and wanted to use the phone. Finley called someone, didn't hear conversation. A few minutes, car pulls up, black female voice. Robert said I don't want to see you, I, I want to see him.

Black male voice was heard, figures standing about arm's length apart, no fighting. "Go ahead and shoot me and give me gun and I'll do it myself."

Smith backed off. Finley reached for him, heard pop. Knew it was gunfire. Yelled at Terry Bradley, who was at, who was asleep on couch, to call 9-1-1. That's when Finley reached for Smith. He intended to take the drugs from him.

MR. GODFREY: And if it please the Court, there goes two issues when you read the full thing. Obviously the testimony that Otis Hyder would of had, pursuant to that memo, about what was actually said in the trailer goes, is in direct contradiction to what Angie Smith testified to. So, you would have a contradiction of testimony. Plus you have Otis Hyder indicating that Robert Finley intended to take the drugs.

If you take those two things together, that Robert Finley did not want to deal with Angie Smith, he only wanted to deal with David Smith, and that he intended to take the drugs, I think it goes a long way to blunting or perhaps even taking away the malice element of murder.

THE COURT: Who took these notes, Exhibit 1?

SOLICITOR COLER: I've never been able to determine it, judge. I think it was an investigator who's no longer with our office. I think it might of been Charlie Henderson, who's an investigator up until about 2002.

THE COURT: Well, why can't you ask the, Detective Denton tomorrow on cross-examination aren't these part of the investigative records and wasn't this said, bla, bla?

You can't do that?

MR. GODFREY: Well, I'm not sure that Steve Denton has any knowledge of that because Charlie Henderson worked for the Solicitor's Office. Not for the Sheriff's Office.

THE COURT: Yeah, but Denton has knowledge of this part of the file, doesn't he?

MR. GODFREY: Judge, I don't know if Steve Denton would of had knowledge of the work product from the solicitor's file or not.

THE COURT: All right. What -- if I said that it violated Crawford because Mr. Cox didn't have this at the time he cross-examined him, therefore, the, it would be

testimonial and he didn't have an opportunity to cross-examine him and it violates Crawford, what would you say to that Mr. Coler?

SOLICITOR COLER: Judge, the first thing I point out is I think, although we admit Mr. Cox, Louis Cox didn't have a copy of this --

THE COURT: This being Court's Exhibit 1.

SOLICITOR COLER: -- Court's Exhibit 1, he certainly had a copy of Otis Hyder's written statement given, given to the police, and I've given the Court a copy of that. I contend that the notes made by whoever this investigator with our office back in 1997 was essentially mimic or mirror the written voluntary statement given by Otis Hyder to the police on January 12th of 1997. The only difference, judge, where Charlie Henderson, or whoever the investigator was, in his last statements he writes thinks when Finley reached for Smith he intended to take drugs from him. The only difference is in Otis, Otis Hyder's written statement of the police, he wrote Robert grabbed something from the man.

That's the same thing to me, judge. And, and regarding that, Otis Hyder was vigorously cross, cross-examined by T. Louis Cox about that. As a matter of fact, they went so far, after asking questions about, about the grabbing, to put the written statement of Otis Hyder in to evidence so

the jury heard that, saw that written statement, and you know Otis Hyder's written statement he says Robert grabbed something from the man.

I think that, being cross-examined on that sentence would of been the same line of questioning that Louis Cox would of questioned on the sentence that Charlie Henderson wrote thinks when Finley reached for Smith he intended to take drugs from him.

THE COURT: Well, Mr. Godfrey, it does look like the statement of Otis Calvin Hyder, AKA Pop, pretty much does mirror Court's Exhibit 1, and I reviewed the cross-examination of Mr. Cox, and it does look like he covered that rather extensively, and I don't know how you distinguish what he would of done different had he had Court's Exhibit 1 in addition to the statements of Otis C. Hyder dated, what, 1/12/97.

But here's what I, I'm tend -- right now I think I'm gonna let it in. But I will give you the evening hour to come up with any additional cases or any additional argument and present it to me in the morning before we start back.

MR. GODFREY: Thank you, Your Honor.

THE COURT: As part of this proffer or part of this argument, I'm gonna go ahead and note for the record that I marked, as Court's Exhibit 1, the actual, the notes in question. I'm gonna mark as Court's Exhibit 2 the

examination of Mr. Hyder in the previous trial, which includes a copy of the statement just so we'll have a record for this afternoon.

THE COURT: Anything else?

And I'll give you a, whatever time you need in the morning to revisit that. But unless we come up with something different, it appears to me that it falls within all four corners of the, of the, Rule 804(b)(1) provided they satisfy me that the, Pops is dead.

Okay. And I admire all two of my lawyers for the prosecutor's office and their investigator. But I may need a little bit more than he's dead.

SOLICITOR COLER: Yes, sir, we'll, we'll get that information.

THE COURT: Sound pretty confident.

SOLICITOR COLER: I believe he's dead.

THE COURT: Okay. Anything else for the record before we break for the evening?

SOLICITOR GANSS: No, sir.

SOLICITOR COLER: No, sir, Your Honor.

MR. GODFREY: No, sir.

THE COURT: All right. We'll see you back here at a little bit before 9:00 in the morning to address that.

The defendant is in custody, and have a pleasant evening.

Thank you.

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

Tuesday, October 31st, 2005

THE COURT: Okay. As I understand, the word of the day is "he's alive."

SOLICITOR COLER: That's correct, Your Honor.

THE COURT: I'm not singing some hymn he's alive, he's alive.

SOLICITOR COLER: That's correct, judge. Otis Hyder, Senior is alive. We had some bad information. His son is here.

THE COURT: I'll say real good information for him.

SOLICITOR COLER: Yes, sir.

His son is here, was gonna explain to the Court his medical conditions. He is home bound and not well. But I think both sides now have agreed to use, simply use his previous testimony from the first trial and just read that into the record. I'll find a volunteer to the, play Otis Hyder, Senior and just read his responses into the record in response to my questions from the transcript.

THE COURT: Well, you know, it just goes to show that maybe before we make representations we need to investigate it a little further. But I can certainly understand that. I've been in your shoes before.

And we've resurrected your dad overnight and we had him deceased in the courtroom yesterday. And---

MR. HYDER: Well, he's, he's living.

THE COURT: Well, tell Pops we said hello. That's what we call him.

WITNESS: All right. I'll do it.

THE COURT: All right. Mr. Godfrey, as I understand, with this latest development, you're going to withdraw your motion, withdraw your objection and allow the testimony, the testimony from the prior proceeding to be introduced into the trial of this case?

MR. GODFREY: Yes, sir, that's correct.

THE COURT: And have you had an opportunity to discuss that with Mr. Smith?

MR. GODFREY: Yes, I spoke with him briefly about that this morning. Spoke to his family about it last night.

THE COURT: Okay. Mr. Smith, you have any questions about that?

DEFENDANT: No, sir.

THE COURT: All right. Okay. Anything else for the record before we start back?

SOLICITOR COLER: No, sir, the only other thing I ask is I gave the Court my copy of the testimony of Otis Hyder, the transcript. That was the copy that I was gonna let the volunteer use.

THE COURT: Well, you know, I took mine home with me last night to study it and I've left it.

SOLICITOR COLER: Yes, sir, I'll make two more copies, one for you and one for---

THE COURT: I'm just kidding here. I put Court Exhibit 1 on it. I guess that's still okay.

SOLICITOR COLER: We're just gonna read it into the record. I have that.

Okay. Detective Denton, if you would, come back and take the stand please.

(Witness returns to the stand.)

THE COURT: Your co-counsel gonna join you?

SOLICITOR COLER: Yes, sir, she was, she's looking for the volunteer to play Otis Hyder, Senior.

THE COURT: There's a good one right back there.

SOLICITOR COLER: If he's willing to do it.

THE COURT: No, no, I'm talking about that young---

SOLICITOR COLER: Yes, sir, if there's no objection.

MR. GODFREY: I won't object.

SOLICITOR WELLS: Your Honor, I have to be in court at ten o'clock in front of Judge Few.

THE COURT: All right. Let's go.

Everybody ready?

SOLICITOR COLER: Yes, sir.

THE COURT: If Mr. Ganss comes to the door, let her in obviously. No one else.

All right. Bring my jury in, please.

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

THE COURT: Good morning.

Hope y'all all had a pleasant evening, and those donuts start working on you and your eyes start getting heavy, I'll send you back for more coffee.

How about that?

Were they good?

(Jurors nod affirmatively.)

THE COURT: You can thank Mr. Humphries. He ordered four dozen and the lady said he could get five dozen cheaper.

So, y'all ate all five dozen?

(Jurors nod negatively.)

THE COURT: Okay. Well, I'm glad you had a pleasant evening.

And Mr. Coler.

SOLICITOR COLER: Judge, I think we were at the point of cross-examination.

THE COURT: You are.

SOLICITOR COLER: Thank you.

MR. GODFREY: May it please the Court.

THE COURT: Certainly.

CROSS-EXAMINATION

BY MR. GODFREY:

Q Detective Denton, I believe you said that, when you went to David Smith's house to look for him, you talked with David's wife?
A I did.
Q And she told you that David was in Greensboro, going up to, to Greensboro for a job?
A He did. She did.
Q And you told her that you really wanted to talk to David?
A I did.
Q And she contacted David for you?
A I believe she paged him.
Q And did David call you back?
A He called me back in my office some hours later, yes, sir.
Q And then he voluntarily came to your office?
A He did.
Q And at that point in time you took a statement from him?
A I did. I took the statement that he wrote. That's correct.
Q And then subsequently, you had a statement from Angie Smith and that's when you got a warrant for David's arrest, is that correct?
A That's correct.

Q Let me show you some pictures I received in the discovery package.

(Whereupon, four photographs were marked as Defendant's Exhibit Nos. 1 through 4 for identification purposes only at this time.)

Q This picture is marked for identification as No. 1.

THE COURT: Defendant 1 for ID?

MR. GODFREY: Defendant 1 for ID.

A Yes, sir.

Q And do you recognize that?

A It looks like a door jam to the trailer.

Q And I'm gonna show you what's been marked as, for identification, as Defendant's No. 2.

A Yes, that looks like a piece of molding from that door jam.

Q And marked for identification No. 3.

A Yes, that's the open door of the trailer with the deceased body.

Q And identification No. 4.

A This is a different view of the same photograph, deceased body at the door as it fell out.

Q Do those pictures appear to be an accurate reflection of what you saw when you arrived on the scene?

A They do.

Q And they appear to be accurate in all details?

A They do.

MR. GODFREY: Judge, at this time, I would move---

THE COURT: Hold on a second. Let me see both of you up here, all three of you up here.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

MR. GODFREY: Judge, I would---

THE COURT: All right. Without objection, 1, 2, 3, and 4, photos.

(Whereupon, Defendant's Exhibit Nos. 1 through 4 were received into evidence at this time.)

Q Now, you indicated, during your direct testimony, that you did not see any evidence of a struggle, is that correct?

A I indicated that I did not see any evidence of a struggle inside the mobile home, that's correct.

Q You didn't see any evidence inside the mobile home?

A No, sir.

Q If the struggle occurred at the door, there wasn't much that could be disturbed, was there?

A If the, if the struggle itself occurred at the door, started at the door, that would be a correct statement.

Q And when you looked at Defense No. 1 --

A Uh-huh. (Affirmative).

Q -- and you say that's a door jam?

A That's what it appears to be.

Q And it appears that there is a piece of wood missing from the bottom of the door jam?
A There is.
Q If you look at Defense No. 2, what do you see?
A A piece of the molding on the floor.
Q And doesn't it look like it belongs on the door jam?
A It does.
Q So, there is a good possibility that there was a struggle there at the door, isn't there?
A At the door where people are falling out, I would expect to see possibly what I'm seeing in those photographs, and I've seen those photographs before. But again, I testified there was no struggle that I could see inside the trailer.
Q All right, sir. Nothing further.
THE COURT: Redirect?
SOLICITOR COLER: No further questions.
THE COURT: Thank you. You may step down.
Call your next witness.
SOLICITOR COLER: State calls Doctor David Wren.

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

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q Doctor, would you please state your full name for the

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

education, and training in a certain field, may render an opinion in a case as opposed to just testifying as to what they see or saw.

So, the doctor will be qualified as an expert in pathology, and, and if asked, may render an opinion. You treat that opinion evidence just like you would any other evidence and give it whatever weight you deem necessary, if any at all.

Mr. Coler.

SOLICITOR COLER: Thank you, Your Honor.

Q Doctor, if you just briefly tell the jury what forensic pathology is.

A Well, forensic pathology is a subspecialty of general pathology. General pathology is that branch of pathology, I mean of medicine that deals with diseased processes. Whether they be natural or non-natural.

Pathology is, itself is divided into two general parts, anatomic pathology and clinical pathology. Clinical pathology is that part, portion of pathology that actually deals with various laboratory tests and things that are done in the laboratory whereas anatomic pathology deals with tissues mainly. Whether it be Pap Smears as, as a cytology specimen, or surgical pathology specimen where certain, a biopsy may be done or tissue removed at, during surgery that a surgical pathology examines that tissue and tells whether

it's benign, malignant, and tries to determine the underlying ideology or cause of the abnormality to direct the physician in how to treat the patient.

Forensic pathology is a subspecialty of anatomic pathology generally dealing with medical/legal cases. And as such, a forensic pathologist either performs autopsies or investigates medical legal cases being an expert in that area to try to determine not only the manner of death, but the cause of death and circumstances associated with death after a complete investigation is done.

Q Thank you, doctor.

As part of your duties, were you asked to perform an autopsy on the victim in this case, Robert Finley, back on January 12th of 1997?

A Yes, I performed an autopsy on Robert A. Finley in the Spartanburg Regional Medical Center autopsy room on January 12th, 1997, beginning at approximately 9:10 a.m.

Q As a result of your autopsy, were you able to make a determination as to the cause of death of Mr. Finley?

A Yes.

Q What, what was the cause of death of Mr. Finley within a reasonable bounds of medical certainty?

A I simply assigned the cause of death as gunshot wound to the left eye and head.

Q What, if anything, can you describe for us about the

gunshot wound that you observed on Mr. Finley?
A Well, the gunshot wound was directly in the left eye. It was a gunshot wound that was rather close, close range rather than being a distant or intermediate gunshot wound basically because there appeared to be tattooing in a 1-inch diameter area about the entrance, which was directly, of course, in the eye. The eye collapsed from the gunshot wound, and there were -- the stippling or tattooing that I am referring to is actually burning particles of, of powder as they leave the barrel of the gun, follow the path of the bullet out for a, a short distance. Usually no more than 12 to 15 inches if it's a high velocity rifle. But in handguns, it's usually less that 8 to 10 inches.

And if there is an intervening object in the way, it will actually hit that object, and in this case, it hit the skin around his eye, and left a pattern of tattooing it's called from the burning powders.

There was no soot there meaning that the soot that -- actually the smoke that comes from the barrel did not hit the, hit the body. So, it was a little bit further away than, than soot deposition. But it was close enough to where there were burning powder there.
Q And doctor, when you say a relative close range shot, can you approximate for us how far the barrel was from Mr. Finley's eye.

If you can make an estimate based on what you found.
A Well, I can make an estimate. But it takes actual firing of the weapon itself with the ammunition that is used or comparable ammunition where a ballistics expert will take the weapon and fire it into a white paper usually. It varies distances as he moves back from the, from the, from contact with it, and it will leave the soot, as I talked, real closely, will leave the soot. As it goes further back, no soot will be there, but the particles will still deposit on there until there's none seen.

That will give a more accurate estimate. But generally speaking, in handguns, it's 2 to 6-inches, and I figured maybe 4-inches from his face.

Q And that would be the barrel of the gun from his face?
A Yes.
Q Approximately 4-inches?
A That's correct.
Q All right. As part of your autopsy, did you also note other, what you characterized as superficial wounds on Mr. Finley's body?
A Yes, he had some stippled abrasions with some lacerations that were minor.
Q You've had an opportunity to look at some of the photographs in this case that were taken at the crime scene, how Mr. Finley's body was found.

Did you find or do you find the superficial injuries you found on him, the stipples, the cuts and scrapes, consistent with his fall after he was shot and the way he was found?

A I felt like they were more consistent with a fall on to a rough surface such as concrete because, as everyone knows, if you fall onto a rough surface like concrete, the little ridges and raised areas in the concrete will actually contact the skin first and make more indentations into it, and it was that type of pattern that I noticed in the majority of the, of the injuries.

Q And when you say rough concrete, would a -- I believe you've seen these.

The -- I'm showing the witness, State's Exhibit No. 6, Your Honor.

The support steps leading up to the mobile home, is that the type of rough, rough surface you would find consistent with his, with his injuries?

A There appear to be two concrete steps with a slight rise from the upper step into the trailer. His feet are actually in the trailer, and his body is -- well, the upper portion of his body is on the ground and he's actually inclined over the steps. And it looks like there's some rough surface of possible gravel right directly beneath his body there.

Q Okay. And, and that would -- you would find his injuries consistent with falling on that type of a surface?
A More consistent with that than actually someone hitting him or him hitting---
Q Okay.
A ---hitting someone.
Q That's all the questions I have for you, doctor. Thank you for being here. Please answer any that Mr. Godfrey has.
THE COURT: Cross.
MR. GODFREY: May it please the Court.
THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GODFREY:

Q Doctor Wren, you say your best estimate is the gun would be about 4-inches from the barrel to the impact on the body?
A Two to six inches, and yeah, I just took an average. Like I said, it has to be fired by the ballistics expert with correlation.
Q Now, you looked at this picture. Let's see. Let me show you a picture which is been marked as Defense Exhibit No. 4, and ask you to take a look at this picture.
Given the position of Robert Finley's arm, does it appear that his body has been moved?
A Yes.

Q And what brings you to that conclusion?
A Well, when someone dies and rigor mortis sets in, the rigor mortis, until it disappears -- usually rigor mortis starts -- it can start as early as 40 minutes. But certainly by four hours after death, rigor mortis starts and it's actually stiffening of the body.

If a person dies and is in a certain position, whatever it is, gravity will cause the extremities or, or the -- and, and the position the body is lying in, whether it's against an object or something, will cause the body to stiffen in a natural position due to gravity. Once rigor mortis has set in, which, or becomes fully fixed, which is about 12 hours after death, then if you move the body, let's say my arm were across my chest, and I moved the body to where it moved like that, then the arm would stay here until the, the rigor mortis started to disappear, and one could tell that the person had been moved because it's not natural to die with your arm up in the air. It will usually just fall over anyway.

But if you -- and if you move the body, you can tell. For instance, if a person were sitting on a, on a seat, and they happened to die sitting on the seat, then their legs will be probably bent. If you take a, took that person and laid them on the ground, their feet would be up in the air, and you could tell the person probably had been moved.

In this case, his arm is in an unnatural position. So, I would surmise that he'd been rolled over probably to take this other picture.

Q Now, what injuries did Robert Finley have about his face and neck?

A Well, he had a, in the mid-forehead, there's mid-forehead, he had a, a irregular deep superficial abrasion much like a deep scratch mark if you were, if it were really severe, and he had a laceration within that abraided area. It was more directed to the right side and inferior, and it measured about -- well, I measure things in centimeters usually unless it's gunshots. Nine, nine by five and a half centimeters. And a rule of thumb is 2.5 centimeters per inch.

So, dividing two and a half into nine, it's not quite four. So, it's a little over 3-inches long and 5.5 centimeters wide, which is a little over 2-inches. That size, with the laceration measuring an inch by about a third of an inch lateral to his eye, I'm sorry, within that abrasion.

He also had a vertically oriented, meaning that the abrasion, you could tell it was moving in a vertical direction along the right upper face lateral to the eye, it covered a little over 2-inches by 1-inch on the side of his face. He had a half a centimeter, which is about a

two-tenths of an inch long, very small area of abrasion in the right ear itself within the ear.

His left eye contained a periorbital hematoma meaning there was a, a, blood about his eye that could be seen. It was actually from the gunshot wound, and he had some stippling in that area, which I referred to as a tattooing.

He had a laceration about the bridge of the nose measuring about six-tenths, or a little over half an inch long, and it extended all the way, with abrasion there, it extending all the way to the tip of the nose, and that covered an area of two by a little over 1-inch altogether. He didn't have a fracture of the nose. It was just an abrasion with the laceration along the bridge itself.

He had a laceration along the mid-upper lip just inferior to the nose with the frenulum, which is the little piece of skin or tissue that is between the, the fold of the lip and the gum was torn meaning that it had been pushed some way. That hemorrhage was 2-inches, 2-centimeters, just about an inch in diameter.

He had an abrasion, a very mild horizontal abrasion along the mid-left mandible that measured about a half inch by a very, very thin two-tenths of a centimeter, which is a tenth of an inch or less abrasion there.

He had an abrasion over his left shoulder, I'm sorry, his left collar bone, clavicle, near the joint there which

joins the chest plate.

And he had some scars. He had a little abrasion along his dorsal right wrist that measured about four, eight-tenths, eight-tenths of an inch long by a little less than a half inch wide, and it had a stippled surface too meaning that it was from a, from hitting a rough surface rather than a smooth flat surface.

He had two very small abrasions, which I called punctate, meaning they were extremely small, overlying the right knuckle of the mid-finger each measuring approximately a tenth of an inch in diameter and closely approximated meaning he had some scratch marks that I thought were probably healing along his right upper forearm on the dorsal surface, the back surface.

And he had a contusion or bruise along his right dorsal hand between the middle and ring fingers covering about a half a, a, less than a half an inch with some abrasion and contusion to the right leg or bruise to the right leg superior to the patella meaning just above the knee. It measured about 2 by 1.6 inches in overall dimensions, and he had an abrasion overlying the patella or the knee cap itself about a tenth, I mean, I'm sorry, about two-tenths of an inch in diameter.

Then he had some abrasions and contusions to his tibia regions, the bone that's in front of the lower leg, that

measured about 2-inches and one and, one and three-quarter inch in maximum diameter on the, on the right side and then on the left side.

That was all the, all the injuries I found.

Q So, it appears that, from that list that you just gave, that he had some what I would call superficial abrasions and lacerations to his face and body, and---

A He had, he had one laceration and the rest were abrasions, yes, sir.

Q All right, sir. Isn't it true that some of these injuries could of occurred from a scuffle where, whereas others were probably more associated with falling?

A Well, of course, any of them could of, could of, could have been associated with a scuffle, if, if, during the scuffle, he fell on to a, on to a rough hard object. None of them by themselves could be to someone hitting him or him hitting someone themselves unless they had on a concrete vest or something similar.

Q All right, sir. Nothing further.

THE COURT: Redirect?

SOLICITOR COLER: Just briefly.

REDIRECT EXAMINATION

BY SOLICITOR COLER:

Q Just so I understand, doctor, the body essentially gets different injuries when it's injured in different ways. A

fist or some kind of object punching a body, punching a human being, is gonna leave a different injury than the body being scraped along concrete, right?

A Yeah, basically that's true.

Q Okay.

A For instance, if someone took a two-by-four and, with the thinner edge, hit you, hit someone on the side with a two-by-four, it would usually leave two and, two horizontal impressions about the width of the two-by-four that the surface it hit it if it were flat, if the, if the edge of the two-by-four. Now, if the sharp edge of the two-by-four hit, it would only be one. But most likely be a laceration and -- but it would not be rough. It would be, it would be smooth in there and it would be blanched out because the blood is forced out to the side and the blood is actually around both edges of it.

If someone punches someone themselves and they don't hit something sharp, they'll just get a bruise on their hand unless they've hit some rough clothing or something like that that may get, one may get an abrasion there.

If someone hits a person with their fist, if there's a underlying bone under it, sometimes you'll get a, a laceration. But most often you'll just get a big bruise and it will be smooth. It won't be rough like the majority of these were. Well, all of these were.

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

THE COURT: Thank you. You may step down and be excused.

Any objection to him being excused from his subpoena?

MR. GODFREY: Without objection.

SOLICITOR COLER: Thank you, Your Honor.

THE COURT: Next witness.

SOLICITOR COLER: May we approach briefly, Your Honor?

THE COURT: You may.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: Call your next witness.

Call your next witness.

SOLICITOR GANSS: The State calls Kenny Hasty to the stand, Your Honor.

THE COURT: Okay. Ladies and gentlemen of the jury, as I understand, Mr. Hasty is not available for testimony this morning. He is testified in a previous proceeding, and we will simply read his testimony from that previous proceeding.

This gentleman here is a lawyer within the Solicitor's Office?

WITNESS: Yes, sir.

THE COURT: Your name?

WITNESS: My name is Kenny Hasty. I'm reading the testimony of Mr. Hyder.

THE COURT: And Mr. Hasty is gonna read the testimony. It's just -- so take it just as if this were a live witness here in the courtroom. He was unable to be here this morning, and this is permissible, under our rules, and it's being done without objection from the defense.

So, we often times do this. So take him for the witness Mr.---

SOLICITOR COLER: Otis Hyder, Senior.

THE COURT: ---Hyder.

(Whereupon, the transcript of the testimony of Otis Hyder was marked as Court's Exhibit No. 2, and published for the jury at this time.)

THE COURT: Next witness, Mr. Solicitor.

SOLICITOR COLER: Joe Powell.

Joseph Powell.

JOSEPH POWELL, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR COLER:

Q State your name for the record if you will.

A My name is Joseph D. Powell. P-O-W-E-L-L.

Q And tell us where you work.

A I'm currently employed as a supervisor in the trace evidence section at the South Carolina Law Enforcement Division commonly known as SLED.

Q Okay. And where is your SLED office located?
A It's located in Columbia, South Carolina.
Q All right. And what is -- how long have you been in your position as a supervisor of trace evidence?
A I've been in the trace department a little over 23 years. As supervisor, 13 years.
Q And is one of your duties now to oversee the examination of gunshot residue kits?
A Well, yes, sir. Not only do I train others on how to be able to examine the kits called gunshot residue, but I also take cases and I still run actual case work and come testify about it.
Q Back in 1997, when you worked on this case, was, was it one of your primary duties to analyze or process gunshot residue kits?
A Yes, sir, at that time I was supervisor and I still carried a case load, which I use as part of my training on all the applicants that come into my department.

(Whereupon, the SLED report was marked as State's Exhibit No. 9 for identification purposes only at this time.)

Q And we have a copy of your report here. I'm handing you what's been premarked as State's Exhibit No. 9.

Is that the report you generated after analyzing or processing the gunshot residue kit for this case?

A Yes, sir, what's listed as State's Exhibit No. 9 is a photocopy of my report, which bears my signature and the date that I signed it.

SOLICITOR COLER: Your Honor, at this point, I also believe we have a stipulation between the State and the defense that Agent Powell is an expert in the analysis of gunshot residue kits.

THE COURT: Is that correct?

MR. GODFREY: That's correct, Your Honor.

THE COURT: All right. He will also be qualified as an expert in this particular area, and will be allowed to give opinions, and you can give that whatever weight you wish.

Q If you will -- thank you, Your Honor.

If you will, Agent Powell, just describe for us what a gunshot residue kit is, what its purpose is, and what your role is in analyzing or testing the samples.

A Yes, sir, any weapon that is discharged, that is using the principle of exploding gun powder, will give off residue. We have devised a kit which is designed to capture or collect that material from someone's hands or clothing or some area around the weapon to see if that weapon has been fired, discharged, anywhere near it.

The kit is composed primarily of two components. One of which is a flattened piece of aluminum with a sticky adhesive somewhat like adhesive tape, and it's actually used

to be able to pick up particles, I'm actually demonstrating here on the back of my left-hand, for particles that may be on the surface and it's used to pick those particles up.

After completing this region of the hands, we divide the hands up into four regions. Left palm, left back, right palm, right back. After collecting that using the particle, I will then follow-up with cotton swabs, which have been wetted with a weak acid solution. The idea is that while the particle will pick up the large particles which may be on the surface, they're many more tiny particles which can be trapped within the pours or down in the creases of the hands, and this is used to mop up any material which may be there.

What we apply is one cotton swab to the back of the hands, rubbing it across that area until the cotton swab is filled, is dry. And then we'll take a second cotton swab and do the same area, same test. We'll continue this process on each area of the hands until the, both hands have been completely analyzed giving us four different regions that we collect the samples for.

The kit is then sealed, sent to our laboratory. We'll then open up the kit, run an analysis on the swab to see what kind of materials may be there. This -- the swabs are actually much more sensitive test as it will pick up a lot of debris material that the lifts will not.

If we find materials on the swabs, which tells us there may be an indication of gunshot residue, we will then take the particle list and place them into a microscope which allows me to actually see the smoke particles from a gun. If I'm able to find those smoke particles, someone has fired or been around a weapon to be able to get this material on their hands.

Now, this test is, has several issues. One of them is that if you are alive after discharging a weapon, and you go wash your hands, the material is gone. Just normal activity without even washing your hands after six hours it is gone. However, someone who is deceased, once the heart stops, the material will stay on the hands indefinitely until someone physically removes that material.

Q Okay. Time is crucial obviously to the collection of the samples from the hands you're looking at?

A That is correct, until someone has deceased. One that occurs, time is no longer relevant.

Q Okay. What, what, what do you instruct your lab personnel and officers who collect the samples, what do you tell them about time frames as far as collecting samples from a living person or a dead person?

A We insist upon having this collection within a six hour window. If the kit is collected outside of that six hour window, we will not run that kit because it -- if someone's

alive, then that material is gone after six hours. Even if we did run that kit, if there's, something was found that was not from that crime scene, it was from some other source, and it is not, it has no value to us. So, we have a six hour window on someone who's alive.

Again though, someone is deceased, let's say they're at the scene, that material stays there and we collect it the next day with no problem.

Q If an officer encountered a, a suspect or someone who may of fired a gun more than six hours after the shooting occurred, and collected samples and submitted it to you, what would you do with that sample?

A We would return it, return it back to them with no analysis because, after six hours, there is nothing that is probative on those samples.

Q Okay. And describe for us the importance of the preservation of the hands of, in this case, a deceased individual.

What's important about the preservation of, what do you suggest the officers do to preserve these samples on a, on a deceased person's hand?

A One of the suggestions that we have made is to take the hands of someone who's deceased and place them within a bag and tape it around their wrist. The reason being is that this material can be dissolved in blood. It can be removed

by water. And so, if we put a plastic or, excuse me, a paper bag around it, that will give it a, a way of or a mechanism of preventing something from happening to it unless someone physically washes the hands off.

Q And just so I'm clear, when you're performing your analysis, you're trying to make a determination whether someone fired a gun or whether those hands were in the vicinity of a fired gun, correct?

A Yes, sir.

Q Okay.

A Based upon where we find residue at, they're times that we're able to actually determine if someone is fired a weapon or handled a weapon. For example, if I just pick up a weapon, there will be a transfer of that weapon of residue from the gun on to my palms. And so, when I run the test, I will find levels on the palms only. That, that, to me, indicates someone who's just handled the weapon.

However, if someone fires a weapon, we may find it on the palms as well as on the back. And being on the back of the hand tells me more that someone may have fired a weapon.

Again, it depends upon the levels that may be there. There are times we can not make the distinction. But there are times that we can.

In the case of a defensive posture, this is one where someone puts their hands up or a way to block their being

shot at. We can tell that usually by the levels of extreme -- they're very high. Usually you get a lot of material on your hands. Especially, very close, you'll actually get a blackening or darkening on the hands, which is absolutely indicative of someone being shot at.

Q Okay. And you did perform an analysis on the gunshot residue kit from the victim, Robert Finley, in this case, correct?

A Yes, sir, I did.

Q What, what are your findings?

What was the results of your analysis that you performed?

A The quantity of the metals detected on the hand regions do not indicate the presence of gunshot residue. So, there was nothing on the hands which indicated that he had fired a weapon. There was no indication that he had been close enough to a weapon to be in a defensive posture, which means that if someone shot him, they would be far enough away that the materials will not deposit on the hands or the hands were down by his side or covered in a, such a way that no materials would of gotten on those hands.

Q That's all the questions I have for you, Agent Powell.

THE COURT: Don't you want to introduce 9?

Is it 9?

SOLICITOR COLER: Yes, sir. I'm sorry.

THE COURT: Any objection?
MR. GODFREY: Without objection.
THE COURT: Nine is in evidence without objection.
Cross.
MR. GODFREY: May it please the Court?

CROSS-EXAMINATION

BY MR. GODFREY:

Q Of course, his hands, you say, could be down by his side and it would not show any gunshot residue particles, right?

A Yes, sir, that is correct. When a weapon is discharged, it's a cone of debris that will come out from it. Your hands need to be somewhere within that cone of debris that's coming out. If they're dropped down by your side, that, they're not in the range of that cone as far as someone being shot straight up. So, thus they would not be contaminated.

Q Well, if somebody's hands were about the neck of someone and then that person fires a shot, his hands would not have gunshot residue on them either, would it?

A Depending upon where you place the weapon at. If someone, if I'm grabbing somebody, and they are, have the weapon near my hands when it's discharging, shooting towards me, I can get materials on my hands, on my hands. If, however, when they shoot the weapon, they shoot it away from

my hands, shoot it downward, then it would be like I would not get the materials or if they place the weapon into my body where they would be a contact shot, where it would be contained within my body, they would not get residue on their hand, on my hands either.

Q Well, as I understand it, the most logical reason that there's no gunshot residue is that Finley's hands were behind the gun, is that correct?

A Well, his hands could have been behind the weapons away from the material. They could have been situated that nothing could of gotten on his hands or the person could of been far enough away they could not deposit on his hands. Any of those possibilities -- I know nothing about this case as far as any particulars.

Q Nothing further.

THE COURT: Redirect?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: You may step down --

WITNESS: Thank you, sir.

THE COURT: -- Officer Powell.

SOLICITOR COLER: Judge, may we---

THE COURT: May he be excused?

SOLICITOR COLER: Yes, sir, if there's no objection.

MR. GODFREY: No objection.

SOLICITOR COLER: May we approach just briefly?

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: All right. Mr. Coler, I understand you, without objection, you need to place one more piece of evidence---

SOLICITOR COLER: Yes, sir, we're offering State's Exhibit No. 8, the shell casing, into evidence.

MR. GODFREY: Without objection.

THE COURT: All right. Shell casing.

(Whereupon, State's Exhibit No. 8 was received into evidence at this time.)

SOLICITOR COLER: Beg the Court's patience just one moment?

(Pause.)

THE COURT: Next witness.

SOLICITOR COLER: Your Honor, that's the State's case. We rest our case.

THE COURT: All right. Thank you.

Madam Forelady, ladies and gentlemen of the jury, that concludes the presentation by the State. I have a few matters I need to take up outside of your presence. I'll just go ahead and give you a morning break. I'm sure they're donuts left. But if you want something besides donuts, Mr. Humphries will be glad to try to accommodate you unless it's hamburgers, fried chicken.

Anyway, y'all take your break. Do not commence your deliberation, and I'll have you back in just about, probably about 15 minutes if that's okay.

Thank you.

Everybody else please remain seated.

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

THE COURT: All right. Motions.

MR. GODFREY: May it please the Court.

The defendant would move for a directed verdict. If you take the evidence in the light most favorable to the State, you can see that there is no malice in this case. From the testimony of Otis Hyder, it was clear that David Smith was being robbed. From the testimony of Angie Smith, we know that David Smith was backing out of the trailer.

THE COURT: It's clear that David Smith was being robbed?

MR. GODFREY: That he grabbed the, he grabbed -- according to Otis Hyder, he grabbed the drugs. He wasn't paying for the drugs. He grabbed the drugs.

THE COURT: Oh.

Go ahead.

MR. GODFREY: And we know, from the testimony of Angie Smith, that David, David Smith was backing out of the trailer. According to Angie Smith, there was a scuffle, the

gun did go off, and David left.

But Your Honor, we would submit that that would be more akin to self-defense in that David was being attacked by Robert Finley at the time of the incident. We point out that the fact that someone may hold a gun illegally, even though a gun is unlawful, it can be used lawfully in a self-defense situation.

We would submit that's what we have here. We would move for an acquittal.

THE COURT: Well, I've obviously listened to all the evidence, and, to me, there is ample evidence in the record for the jury, for it to be a jury's decision as to whether or not he actually had malice aforethought. And I respectfully deny your motion for directed verdict.

THE COURT: Anything else?

MR. GODFREY: Nothing, Your Honor.

THE COURT: All right. While we're at the break, let me -- have you had an opportunity to talk to your client about whether or not he's gonna testify?

MR. GODFREY: Yes, Your Honor, I have. I've gone over his constitutional rights with him, and he is ready to be questioned by the Court.

THE COURT: All right. Mr. Smith, would you mind standing please?

DEFENDANT: Yes, sir.

THE COURT: Would you raise your right-hand and be sworn?

(Whereupon, the defendant was placed under oath at this time.)

THE COURT: You can put your hand down.

How are you this morning?

DEFENDANT: Doing okay.

Yourself?

THE COURT: Sir, just remain standing for me if you don't mind.

DEFENDANT: Okay.

THE COURT: Mr. Smith, we've now reached the stage of the trial where obviously you can present your defense. And during that defense, you have a right to testify if you want to do so. But you also have the right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States.

And that amendment, Fifth Amendment states, in part, "no person shall be compelled, in any criminal case, to be a witness against himself.

And you understand that?

DEFENDANT: Yes, sir.

THE COURT: What that means is that you can not be required, in other words, Mr. Coler, Ms. Ganss, can not require you to testify. You do have, however, have the

right to testify on your own behalf. But nobody could make you do that. If you wish to testify, it's a personal right and no one can waive it except you.

Does he have a prior record?

SOLICITOR COLER: Judge, I don't think he has any impeach, impeachable offenses.

THE COURT: Okay. If you decide to testify, you will be subject to the same rules that govern other witnesses, and you may be examined and cross-examined on any relevant issue in the case.

I have been told that you have no prior convictions. So, obviously that will not be an issue in the, in the trial of this case. But you would be subject to cross-examination fully on the matter.

If you decide to testify, this decision must be freely, voluntarily, and intelligently made with the knowledge of the protections given to you under the Fifth Amendment of the Constitution and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they can not consider the fact that you did not testify when they deliberate your guilt or innocence, and, in fact, I will tell them that they can't even discuss that fact in the jury room, and that absolutely no prejudice be taken because you did not testify.

In other words, I'm gonna tell them the fact that this

guy didn't testify can't even be discussed. Y'all can't talk about it. It's not to be considered. He has the right not to testify. I'll put all that on the record.

It's left entirely up to you as to whether or not you testify. Obviously you can talk with your lawyer. You have your family here. They've been here with you all yesterday and today. But in the end, the final decision will be yours.

First of all, do you understand what I've explained to you?

DEFENDANT: Yes, sir.

THE COURT: You have any questions whatsoever about your Fifth Amendment rights to self-incrimination or the right to testify or any other questions concerning this discussion?

DEFENDANT: No, sir.

THE COURT: Do you need any additional time with your lawyer?

DEFENDANT: I would like to have just a couple minutes---

THE COURT: Certainly. You may.

DEFENDANT: ---before I---

THE COURT: Well, why don't we do this. We're gonna take a break right now. Over the break, discuss it with your lawyer. We'll come back out before we start up. I'll

decide and find out whether or not you're gonna testify and make that decision.

Is that fair?

DEFENDANT: Yes, sir.

THE COURT: Anything else you need from me?

DEFENDANT: No, sir.

THE COURT: All right, sir. You may sit down.

All right. Mr. Godfrey, as I understand, you got at least one witness, Mr. Girndt.

MR. GODFREY: That is correct, Your Honor.

THE COURT: You may have two. You may call your defendant. Is -- that depends on his---

MR. GODFREY: That's correct, sir.

THE COURT: Anything other than that?

MR. GODFREY: No, sir.

THE COURT: So, we should conclude testimony by 11:00?

MR. GODFREY: Probably.

THE COURT: All right. Let me ask you this.

Do y'all have any proposed jury charges?

SOLICITOR COLER: No, sir, judge, we just ask for your standard charge on, on murder. If it becomes relevant, I presume you use the standard four element self-defense charge. But I think that's premature at this point.

THE COURT: I do too.

Are you gonna request a lesser included offense of

voluntary manslaughter?

MR. GODFREY: We would request voluntary manslaughter. We would also, and maybe premature for this, request involuntary manslaughter.

THE COURT: Well, I may give you voluntary. But I'm not so sure on involuntary. But we'll put all that on the record at the appropriate time. I'll try to have a rough draft of the jury charge by the time you finish your testimony and we can look at those.

MR. GODFREY: May it please the Court?

THE COURT: Yes, sir.

MR. GODFREY: Since you're going ahead and starting to prepare a jury charge at this time---

THE COURT: Well, I just like to try to have them done, speed things up, and be glad to hear you on anything of that. But my clerk is pretty good at getting these done.

MR. GODFREY: Well, the only thing---

THE COURT: Rough draft.

MR. GODFREY: I apologize.

THE COURT: No, sir, I said, just said it's a rough draft.

MR. GODFREY: Well, would you like me to go ahead and hand up cases I would be handing up after the defense case so you can go ahead and start looking at them---

THE COURT: That's for your self-defense?

MR. GODFREY: ---and give a copy to the State.

THE COURT: What is that for?

MR. GODFREY: It is request, request for involuntary cases, and also accident, which was charged in the first case as well.

THE COURT: Yes, sir, I'll be glad to look at all of that.

Okay. We'll stand at ease. I told them 15 minutes. That's about six more minutes.

Y'all need longer than that?

SOLICITOR COLER: No, sir.

THE COURT: Mr. Godfrey, you need a few more extra minutes?

MR. GODFREY: I would appreciate it.

THE COURT: All right. Let's go till about 25 after.

Mr. Humphries, tell the jury that it looks like I'm not gonna make 10:15 cause we're just getting out of here now. I'm gonna extend it till 25 after.

Okay. We'll stand at ease until 25 after.

(Whereupon, a short recess was taken at this time.)

THE COURT: Ready to proceed?

MR. GODFREY: Yes, Your Honor.

THE COURT: Mr. Coler, you ready?

SOLICITOR COLER: Yes, sir.

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?

A I am a licensed aircraft mechanic, and that's how I ended up here. I got a job at Lockhead over in Greenville, Lockhead Arrowmont.

Q And, at some point, did you begin selling drugs?

A Yes, sir.

Q And why did you do that?

A Well, my, my brother was living with me. Also my wife used drugs. And I was in-between jobs at the particular time. My brother was bringing drugs into my home. So, I came back home around December 2nd, 1996, and he came to live with me shortly thereafter.

Q All right.

A That's when I got involved with the drugs.

Q When you say you came back in 1996, where had you come back from?

A I was in Macon Georgia working for McDonald Douglas Technical Services.

Q Now, there's been testimony about you having a job in Charlotte in January.

What was that job involving?

A Basically more of the same work for -- the job was in Greensboro, North Carolina for the same company, McDonald Douglas Technical Services. I'm a licensed mechanic in the airlines and several other carriers needed additional people to keep their maintenance records up or qualified people to

do the job. And that's why I did travel, and get paid, you know, a little more than the average pay because you're traveling.

Q And at that time, where was your permanent residence?

A I lived here in Spartanburg, South Carolina. I was buying a home. My home was at Bee Street.

Q David, how is your health?

A Well, I've -- a year ago today I had bypass surgery, heart bypass surgery. I had five.

Q Five bypasses?

A Yes, sir, times five. That's how many vessels.

Q And are you on medication now from the doctor?

A Yes, sir.

Q David, do you remember the early morning hours of January 12th, 1997?

A Yes, sir.

Q At the time, did you receive a page from the Smith residence?

A I did receive a page from the Smith residence. And before receiving the page, I had been dealing with Angie Smith and another person, Mike, for about the last three or four hours that evening, and I had, I was on Herbert Street right off of Wofford Street, which is two or three minutes from the Smith house.

Q Well, when you say you were, had been dealing with

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

A Well, she started giving me directions as she, you know, was talking, telling me which way to go, and, and where I should be going. She told me that she was going, she, she was going to someone who wanted drugs, and that she was gonna give me the directions to get there. So, she's directing me where I need to go.

Q Well, when you got to the trailer, did you know whose trailer it was?

A No, sir, I had never been there before.

Q Did Angie tell you whose trailer it was?

A No, she didn't. She said that the person she wanted to deal with was in there.

Q Did she tell you who it was that she wanted you to deal with?

A No, sir, as a matter fact, when she pulled up, when we pulled up to the trailer, which I didn't, I didn't know whose trailer it was, I pulled the drugs out and tried to give them to her, and she told me just wait until she went in and see what was going on.

Q So, how long do, was she in the trailer?

A Maybe about three, four minutes.

Q What did she do when she left the trailer?

A She came back and got in the car, and I asked her well, what do you need or whatever, and she started telling me well, they didn't want to deal with me. He wants to deal

with you.

Now, I asked well, who are you talking about. She said Robert. I said well, I don't really deal with that guy. This -- her brother, you know, dealt with Robert, and I knew who he was, Robert Finley, I knew who he was.

Q Well, was Rodney Smith delivering drugs for you?

A Yes, he was. I would --

Q And---

A I would, I would drive him sometime to where he would deliver. He didn't have a car.

Q So, what did you do after you found out that he wanted to deal with you?

A Well, my first instinct was to pull off because I'm at a strange trailer, and, you know, Rodney had told me that he -- Rodney owed me some money for drugs, and he had told me that the reason he was short is because he had fronted some drugs to Robert, and I told him myself well, you can work it off, but I won't give you any extra until then.

So, I told her I just didn't really prefer to deal with Robert. But she said he's got the money, go ahead in there. And being though it was that time of night, which was 2:30 in the morning, I had already left Mike's house and I brought her over here, I agreed and went ahead in.

Q Well, what happened when you got to the trailer?

A When Angie came out, he had closed the door. When I

went up to the door and knocked, he opened the door and left it wide open. So, I walked in the trailer after he opened the door.

Q Then what happened?

A Robert was -- when, when I, when he opened the door, he turned around and walked toward the kitchen area over there, the sink, and there was a table right next to it over there. So, he told me that he wanted $50 worth. I told him, I said, well, okay, no problem. I said from what I know, Rodney is telling me he dealt with you, and I understand you, you supposedly had the money. So, I put the drugs down on the table.

Q Where was Otis Hyder?

A Otis Hyder was sitting about from here to the table, to the Solicitor's table, which is inside of the trailer and the television was right next to him right there.

Q Well, what happened when you put the drugs on the table?

A Well, when I put them down on the table, Robert was looking at them, but he said, you know, like he wanted to check them out. I said go ahead and check them out, because the people that normally use drugs, they want to make sure that they're not, you're not selling them something that's not authentic or whatever. So, I told him to go ahead and check it out.

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

and all of my other bills. I have children that I have to support. So, I had the job scheduled and I needed to go to work.

Q Well, when you told him that you wouldn't be here tomorrow, what happened next?

A He looked at me and said well, I'm taking this.

Q And he said what?

A He said I'm taking this.

Q And what did he do?

A I don't know what he did with the drugs, but he started coming towards me.

Q Now, where were you at this time?

A Along the wall where the heater was.

Q And where was the door in relation to that, the outside door?

A It was to my left.

Q What was he doing as he was coming towards you?

A Well, when he 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.

Q Well, what did you do?

A Well, I, I had my hands in my pocket. Like I said, I was warming them, sticking them in my pocket, and I'm standing there, and I had a gun in my pocket. So, I pulled my hands out alongside me, and I had the gun in my hand when

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

So, it was still time for him to, like I said, rethink or stop, you know, what he was doing. But that's what he said at that point.

Q Well, what did you do next?

A Well, I went to put my hands back in my pocket because I saw that the situation was gonna, was gonna go beyond that. And when I went to put them in my pocket, he's already on, almost towards me, and he 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.

Q Now, are you right-handed?

A Yes, sir.

Q Was the gun in your right hand?

A Yes, sir, he, he had hit it. 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.

Q And where are you in relation to the door now?

A Well, as I said, I had started to turn to go to the door. I'm not at the door. I'm maybe a couple steps from that heater cause I'm trying to move on now.

Q Well, what happened next?

A Well, when he grabbed 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.

Q Where did you hit him with the butt of the gun?

A Somewhere in the, in the face area.
Q Well, how is it that you ended up at the door?
A Well, when I hit him the first time, he didn't -- his grip -- he didn't lose his grip on me. He still had a grip on me. And we, we were still headed that direction. My -- I'm trying to get out. I'm -- you know, that's which way I was headed. I was trying to get out of there.

So, when I hit him, the momentum from me hitting him, we're still moving that way.

Q Well, what happened when you got to the door?
A Well, when we got to the door, I had hit him maybe two times, three times then, and I'm still trying to get him off of me. But he's pushing at me like he's trying to run me into the wall or something and he's pushing at me.

And then, at this time, we're about at the door and I'm swinging at him. So, I don't know -- you know, I'm hitting him each time I hit him. I'm hitting him. And by this time, we're both falling out of the trailer.

Q What happened next?
A The gun went off.
Q Did you pull the trigger?
A No, sir.
Q Do you know why the gun went off?
A No, sir, I don't. I do know that I had loaded the gun because I had just gotten it maybe a week or two before and

I had loaded the gun. But I never had a chance to fire it and I had the gun with me.

Q So, when did the gun fire?

A As we were coming out of the trailer door.

Q And you didn't intentionally pull the trigger?

A No, sir.

Q What was your intention?

A To get him off of me. To simply hit him with the gun, get him off of me. He tried to knock it out my hand. If he would of succeeded, I, I -- if he would of succeeded, I probably could of, it could of been me.

Q So, you were just trying to leave?

A Yes, sir.

Q And were you in fear of him?

A Yes, sir, Robert, and I don't know if that played a big, how big a part that played, but he's made, he was maybe about 6'2" or whatever. Even, even though he didn't -- he was wider in the shoulders or whatever, and when he was coming up on me, I was afraid.

Also, the way he looked. He, he looked like he was on something.

Q You were just trying to leave?

A Yes, sir.

Q Did you intend to kill Robert Finley?

A No, sir.

Q Did you intend to fire a gun at Robert Finley?
A No, sir, I, I was brought there by Angie Smith to supposedly sell some drugs.
Q When you fell out of the door, what happened?
A When I came down out of the trailer, I heard the gun go off, and I couldn't tell whether he was hit or whatever and I'm stumbling myself. The next thing I knew was -- cause I'm, I'm looking around, and I'm just lying stuck. I'm, I'm in shock. Angie Smith started hollering out the car window get in the car, let's go, let's go.
Q So, what did you do?
A I snapped then because I heard her, and I turned around and, to go get in the car. I didn't even go get in on the driver's side. I went to where the sound was.

When I turned this way, it was a passenger side and I went around the car. And when I got in, I'm, I'm just sitting there, and she's hollering come on, let's go, let's go, drive.
Q Now, did -- what did you say about the gun and drugs when you were in the car?
A I told her, I said, I've got these drugs, I've got this gun. I -- you know, I didn't intend to do any of this. I don't, I don't even need this, I need to get rid of it. She said drive. That's, that's the only thing she said.
Q Well, where did you go?

A She wanted to go to my house and Angie Smith knows my wife. She wanted to go to my house. But I told her, I said, you know, you can't go to my house because, to me, something wasn't right about this whole picture. You know, she paged me, wouldn't tell me who it was, took me over here, and told me that the guy had the money, just go ahead in there. And when I went in there, I ended up getting attacked.

Q Well, where did Angie Smith get out of the car?

A She got off on Wofford Street and Herbert Street, which Mike lives up the street from there on Herbert Street, and she got out of there.

Q Did you give her anything?

A I gave her the rest of the drugs.

Q And then where did you go?

A I drove straight up Wofford Street up by Hub City Apartments.

Q What did you do with the gun?

A Well, after this altercation that he had been running in the car, I had let down out, all of the windows and the sun roof back on the car, and I had the gun still in my pocket. And I mean, you know, like I said, I had just got it. So, I threw the, threw the gun out over into the train trestle over there.

Q And where is that?

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

I've been over there all night, I've got somewhere to be tomorrow, they continued to call me.

Q Well, on this evening, did you intend to hurt anyone?

A No, sir.

Q Did you intend to shoot anyone?

A No, sir.

Q Nothing further.

THE COURT: Cross.

SOLICITOR COLER: Thank you, Your Honor.

CROSS-EXAMINATION

BY SOLICITOR COLER:

Q So, you're an airline mechanic?

A And aircraft -- a licensed aircraft mechanic.

Q And they make pretty good money?

A Yes, sir.

Q And why in the world then would you get involved in dealing drugs?

A Well, so, as I said, my wife was a drug user. Also my brother. I had a drug problem at one time myself, which I've managed to get off of drugs. I went to North Greenville. My wife was in there and I ended up talking to the counselor and that was enough for me to get off.

She was actually in the hospital there in 1992. So, I was able to get off of the drugs, and it was better for me because I couldn't be employed as an aircraft mechanic.

Q The bottom line, Mr. Smith, you got involved in dealing drugs because of the money?

You were greedy and you got involved and you wanted to make money dealing drugs?

That's the bottom line?

A Well, the bottom line, that's the bottom line---

Q Yes or no.

A ---to you.

No, it wasn't the bottom line.

Q You had a good job making good money and you wanted to make more money selling drugs?

A Well, I wasn't working when I, when I did this, and dealing the drugs. And as I said, my family was living there and my brother and my wife. They were using drugs.

THE COURT: Hold on one second.

Everybody with me over there on the jury?

(Jurors nod affirmatively.)

Q And you wanted to make money.

You admit that?

You're not denying the reason you were doing is---

A I'm not denying that. I'm just saying---

THE COURT: All right. Hold on a second.

Let him finish his question before you answer.

Let him---

WITNESS: Yes, sir.

THE COURT: ---answer fully before you question.
Q Why would---
WITNESS: No problem.
SOLICITOR COLER: Thank you, Your Honor.
Q You wanted to make money?
A I wanted to make money.
Q And the money you made dealing drugs was important to you?
A It wasn't everything. But yes, it was.
Q Yeah.
Obviously you wouldn't break the law to deal drugs to, to the community if the money you got wasn't important to you.
A Well, it's how you look at it.
Q Well, every dollar you made was important to you.
Even the $40 that Robert Finley owed, owed that wouldn't, wouldn't pay you, that was important to you?
A Robert Finley didn't owe me money. He owed Rodney Smith.
Q Well, we'll get to that in a minute.
Now, you certainly aren't blaming your brother and your wife for, for coming to your house and getting you involved in drugs?
You did that on your own?
You got involved in dealing it on your own?

A Well, I had a choice to be responsible and listen, this what -- that's what's I chose. I chose to, you know, which I'm not -- enabling them, assisting them, and that's what you call it in Narcotics Anonymous. I enabled them. I helped them to use their drugs without taking money from my household, and also to give them what they were, would be spending money on, drugs.

Q You also enabled your own bank account by dealing drugs to the community?

A Well --.

Q Yes or no.

A That's your take on it, yes.

THE COURT: No, sir, answer him yes or no and then you explain.

WITNESS: Okay.

Yes.

Q Okay. And you did deal in the community because you knew who was using it. You just testified Cynthia Roseburgh was using drugs, Angie Smith was using drugs, Rodney Smith, David, Robert Finley.

You know who you were dealing to in the community?

A If I could explain, I would simply say this.

Q Yes.

A My wife used drugs and all of those people she knew. Everybody, except for Robert Finley, she knew and used drugs

with and that's how I knew them.

Q And you just testified that you did the responsible thing.

You're certainly not telling me that the responsible thing to do, as an adult to support your family and your household, is to go out and deal drugs?

You're not telling me that, are you?

A I'm not telling you that dealing drugs is right.

Q But you chose to do it.

Let me ask you this.

While you were a traveling airline mechanic, were you dealing, were you using the drugs too or just dealing?

A Well, if you were listening to my testimony---

THE COURT: No, sir. No, sir, don't argue with him. Answer yes or no---

WITNESS: Thank you.

THE COURT: ---and then explain.

A No, I was drug free since 1992.

Q So you---

A And I was not dealing drugs while I was traveling as an aircraft mechanic. And if you want an even longer chronological, I was not traveling for about three months before that because I owned my own business in Spartanburg, which was a medical staffing service. When that started to go downhill, I went back to working in aviation.

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

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

not to get involved in the hand to hand delivery of the drugs. You just use your, your drug addict mules to deliver it to the people on down the line.

A Like I said, I dealt with Rodney. If he dealt with other people, that was fine. If he comes and asks for a couple hundred dollars worth, he's got it. I, you know, when he, when he comes back to me, if he brings me $125, I'm fine.

Q No big deal about where he delivers it to?

A No, I, I---

Q You don't care?

A I don't have to have anything to do with it. I have taken him places because he didn't have a car. He went and dealt with the people.

Q You wouldn't care if he'd go to a high school or a middle school, his neighbor?

You don't care where your drugs end up as long as you get paid your money?

That's important to you as a drug dealer?

A It wasn't about -- long as I get paid the money, it was about Rodney Smith and I never took him to a school or whatever. But he dealt though, with those drugs after I gave them to him.

Q You almost said it wasn't about the money.

You're not telling me it's not about the money, are

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

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

went ahead to handle the business since I was suppose to been there to bring some drugs. I went ahead and put the drugs on the table.

Q You deny that, that Finley owed you $40 from, from a previous fronting of drugs?

A As I said, what I was told, Rodney told me because he came up short with his money that Rodney owed him.

Q If it didn't matter to you or are you saying he didn't owe you the money, why did you just tell Mr. Godfrey in your testimony that you didn't, you wouldn't deal with this guy, you wouldn't deal with him?

A Well, I mean if he didn't, if he didn't pay, if he didn't pay Rodney, well, I figured well, why deal with the guy?

Q You didn't deal with him because he was a bad customer who wouldn't pay for his drugs.

A This is what I was told by Rodney, that when Rodney came up short, he told me that's who he gave the drugs to.

Q So, you clearly knew that he owed you, the, the beginning supplier, $40?

A He didn't owe me. Rodney is responsible for his own.

Q All right. And then you said well, if he wanted to, when I took the drugs out and laid them on the table, he could of tested them.

A No, I didn't say if he wanted to. What I said is he

did test them. I told him to go ahead, check them out, because, you know, that's what they do. They want to make sure they're not getting shorted, beat, or whatever, you know, and I gave them, put them on the table so that he could do just that.

Q All right. And you admit that you just told Mr. Godfrey that, if he wanted to, he could of smoked some, and that, that'd be the method he would test some of the drugs?

A What I said is that if he chose to test it that way, it wouldn't of, it would of been the same thing. As long as he tested it, that's what he wanted to do, make sure it was authentic.

Q You're certainly not telling me that you are going to let somebody smoke a rock of crack, test, to test it, and it's gone after he smokes it, and this guy already owes you $40 from a previous drug deal, and you know that, at this point, he doesn't have any money?

A Yeah, I mean I didn't know that he didn't have any money. Yeah, I would let you test it because you're gonna want to make sure that it's, it's authentic. So, the money part came later that he didn't have any.

Q And obviously, when he tested it by smoking it, it's gone?

A And that's one rock. I gave him five.

Q So, so, it didn't matter, you were gonna get your money

one way or the other, whether he smoked it or didn't have any money to pay you now or later?

A Well, somebody else was gonna buy the rest of it. All they had to do was give it back to me. Somebody else would of bought it.

Q Then you said he chose to steal the drugs from you, to grab them from the, the table you laid them on and take them?

A He snatched the drugs up and said I'm taking them.

Q Okay. And then you---

A I'm taking this.

Q ---you agree with me that your statement makes absolutely no logical sense, he took them from you, and then attacked you, or came at you?

A Well, if, if you recall, after I put those five rocks on the table, I put the other drugs back in my pocket, which he saw that as well. I had over $1,800, almost $1,900 in my pocket, which I didn't advertise that. But that's what he did.

After he saw me give him those five rocks, he saw me put the other ones in my pocket, and I walked over by the door to the heater. He left the door open. So, it was cold in there.

Q And then your testimony was your hands were in and out of your pockets, you took them out to warm them on the

heater?
A I would hold them out, put them back in my pocket. I'm standing there watching the television.
Q Why wouldn't you just leave your hands out?
You agree with me it makes more sense just to leave your hands out of your pockets by the heater cause that's the warmest source in the trailer?
A I don't know, with the door opened, I mean they would get warmer. But, if I put them in my pocket, they got even warmer.
Q Okay. Warmer than holding them by the heater?
A Yeah.
Q Okay. And---
A It's a kerosene heater.
Q So, the gun you're saying just happened to come out of your pockets on one of those occasions when you're taking your hands in and out of your pockets to warm them by the heater, which is the warmest place in the trailer, and then putting them back?
A No, it didn't just happen to come out of. After he said I'm taking this, he started coming toward me. And as 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.
Q You intended to use that gun?

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

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

being to do when presented with a loaded gun by a drug dealer and in a trailer.

A No.

Q All right. And then you said, of course, the gun just went off?

A Yes.

Q You didn't -- you don't know how it went off?

A No, it went off in the---

Q You said---

A ---in the struggle, in the fight.

Q Okay. You didn't -- you deny that your finger was on the trigger?

A No, I didn't deny my finger was on the trigger. I said I had the gun in my hand.

Q Well, were you holding it like you hold it when you shoot somebody?

A I was holding the gun as you hold a gun.

Q On the -- by the, the grips?

A I'm holding the gun as you hold a gun.

Q And you put your finger on the trigger?

A If that's the way you hold a gun.

Q And you hold a gun like that when you intend to shoot a gun?

A No, you hold a gun like that if you're gonna, if you're holding it in your hand. You don't have to intend to shoot

it.
Q Well, it's a lot more convenient, you admit to me or you agree with me, that if you're holding your finger on the trigger to shoot it, then you're holding it by the barrel or holding it backwards?
A Why would you do that?
THE COURT: Sir, answer the question and then explain. Don't let me tell you again.
WITNESS: I really don't understand what he's, what he's asking me.
THE COURT: Well, tell him you don't understand.
A Would you, would you ask me again?
Q You're holding the gun---
THE COURT: Hold on a second.
When he asks a question, answer it directly and then explain.
WITNESS: Yes, sir.
THE COURT: Thank you.
SOLICITOR COLER: Thank you, Your Honor.
Q You were holding the gun -- the way you were holding a gun is a whole lot more convenient to fire it, than any other way to hold the gun?
A The way I was holding the gun was better for me to have control of the gun then for me to be holding it as you suggested, holding it by the barrel, holding it any other

kind of way. Because if you have this gun in your hand, and if you dealt with any weapon, you wouldn't just hold it that way.

Q And you further admit to me that if your story is it just went off, it's a pretty lucky shot you got him once right in the head?

A Well, I can tell you this, if I'm hitting this man, which I was, in that area, all I know is I was trying to get him off of me. Now, as far as when it went off, how it went off to hit him where I hit him, I didn't intentionally pull the trigger. When he pushed me out, I was coming back towards this way.

Q If, in fact, you were pistol whipping him with the butt of the gun, then there's no way that the barrel of the gun was pointed at his head?

A If I'm stumbling backwards?

Q No, when you say you were pistol whipping him.

A I -- and I was.

Q Now, his head is probably an average size head, and of all of the million of things that that bullet could of hit in that trailer, it happened to just go right through his left eye?

Pretty lucky shot, you admit to me, if it's, if it's, if your version is it just went off and it is just a fluke accident, hit him in the face?

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

A. That's what, that's, that's what you may perceive. But she's the one that took me there. So, I don't know what, you know, the actual intentions were. She took me there and this happened.

So, I, I didn't -- you know what I mean, know who to trust. I didn't know what was going on

Q But you'd admit to me that you, if you had stayed around, were the one that was in trouble because you were the one that just shot Robert Finley in the face and killed him?

A No, sir, I don't believe I'd of been one in trouble knowing that this man attacked me. Now, the thing of it is, is that it, it's not nothing that you do. But you, you have a right to defend yourself.

Q Then if you didn't think you were in trouble and didn't, didn't think you had just done something wrong, why did you flee?

A Why did I flee?

Q Uh-huh. (Affirmative).

A As I told you, she told me to get in the car and drive. I was in shock. If she wouldn't of told me to get in the car, and that's what I did, I got in the car. I went to my home and my wife left there because I asked her, I needed some time to think about what just happened to me.

How did I even get into this?

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

weren't thinking.

You were thinking enough to tell Angie I've got to get rid of this gun, I've got to get rid of this dope, and you were thinking enough to go and get rid of the gun, hide the gun, throw it away, and then go home, and sleep, and then get up and get out of town the next day?

I mean all that was clear to you. You didn't miss work. You didn't oversleep. You didn't not make it to work the next day.

All that -- you were clear minded to do all that?

A I didn't stop living, sir, if that's what you mean.

Q Right.

Cause, cause this---

A I mean the job was already scheduled. I mean this, this has happened to me. I don't know, you know, how to, how to deal with this. I really don't know what's going on with it. But I know I'm gonna, I'm gonna deal with it. I live in Spartanburg -- at that time, I lived in Spartanburg South Carolina, Bee Street. I hadn't moved anywhere. I have a wife. I have a family, and I lived here.

Q You were not gonna let this dead crack head interfere with your life?

You were, you were willing to keep living and just doing what David Smith does?

A No, at some point, sir, I knew that, as I said, it was

gonna be something that had to be dealt with.
Q And you dealt with it by ditching the gun, and fleeing to North Carolina, and lying to the police about your involvement at first, and that's how you dealt with it?
A I didn't lie to the police, and I didn't flee to North Carolina. If my job was already scheduled, that is where I worked at.
Q You didn't lie to the police?
A No, I didn't.
Q You were asked by Detective Denton to give a statement about the events of January 12th, 1997, and nowhere in that statement did you mention that you went over to Robert Finley's house to sell him drugs and shot him in the face and left him on the porch to die?
A This is my statement. I called an attorney. The attorney advised me that you have the right not to answer any questions that the police want to ask you. Detective Denton, Rodney Smith, and two other detectives had been to my home. My wife was terrified.

When I came back, my mother-in-law called me to her house. So, from there is where I called the attorney. He told me that the police would either arrest me or they would let me go. When I went there, he told me you do not have to answer any questions. I am unavailable to be with you there with the police or Sheriff's Department.

He said the only thing that you need to do is give them basic information, where you live, what is your name, this type of thing, if you want to. Whatever they are coming there about, you do not discuss it until I have a chance to talk with you or an attorney has a chance to talk with you, and what Detective Denton did, at that time, was told me he would cross every T and every I, et cetera, to make sure that he convicted me.

So, he asked me well, I tell you what, if you don't want to answer any more questions, you tell me what you were doing from 7:00 a.m. till about midnight that night. And that's what I did. I gave him a statement of what I was doing from that, those times.

Q Till about midnight?

A Correct.

Q He knew that the body was found at 2:30 in the morning. He knew that the incident happened just a minute, few minutes before that.

You're not telling us that he, he wanted to leave out the two and a half hours from midnight till 2:30, that, that he wanted to talk to you about?

A I don't know what he wanted. That's what he told me, and that's what I signed a statement to.

Q Okay. So, your -- so, your -- in your opinion, if you leave out stuff, that's not a lie?

A In my opinion, if you ask me from 7:00 a.m. and I've been advised by an attorney to midnight, if I'm gonna answer any questions or give you any statement, that's all I'm gonna talk to you about. I'm sitting here today because of those reasons, the fact that you have someone who decide they gonna cross every T and dot every I, someone who's forgetting the fact that I was brought there to bring drugs there, somebody, somebody who's forgetting the fact that four of their investigators or these people in their office told them that this guy tried to rob me.

Mr., Mr. Hyder said it. His investigator said it. All of them said it.

Q The money and the drugs that you gave Angie later that night after you shot and killed Robert Finley, that, that was to keep her quiet, right, to keep her satisfied?

A After the gun went off, I gave her those drugs, and to keep -- the gun went off---

Q To keep her quiet?

A I didn't shoot, no, no, not to keep her quiet. To keep her from calling---

THE COURT: No, sir. Sit back down.

Q And at -- and that's what it did. I mean it kept her quiet for a little while, and she, she took your drugs and probably went off and smoking them or whatever, and that was your way of minimizing her because she was the only eye

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

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

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

SOLICITOR COLER: Beg the Court's patience just one moment.

(Pause.)

SOLICITOR COLER: Your Honor, I believe that's, that's all the questions I have for Mr. Smith.

THE COURT: Thank you.

Redirect, if any?

MR. GODFREY: None.

THE COURT: You may step down.

Next witness.

MR. GODFREY: Defense would call---

THE COURT: Hold on one second.

Everybody okay?

(Jurors nod affirmatively.)

Next witness.

MR. GODFREY: May it please the Court.

Defense would call Donald Girndt.

THE COURT: Come around, sir.

DONALD GIRNDT, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GODFREY:

Q What is your name?

A Donald C. Girndt. The last name is spelled G-I-R-N-D-T.

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

Q Mr. Girndt, have you had an opportunity to listen to David Smith's testimony?
A Yes, I have.
Q And have you had an opportunity to talk with David Smith apart, apart from court?
A Yes, I have.
Q Have you also had the opportunity to review previously sworn testimony in this case?
A Yes, sir.
Q Are those the type of things that you use when you go about your crime scene analysis?
A Yes, I would use -- well, usually it's before we get to this stage, but review photographs of crime scenes, statements, incident report, laboratory reports that are generated, autopsy reports, that type of thing. And what I tried to do is look at the photographs, look at the evidence, and look at the statements, and see if these things are corroborated or basically does the physical evidence support what happened at the crime scene.

In this particular instance, there were several different questions that I was asked, and I know that basically the scenario is, where I pick up the scenario is where the confrontation occurred at the trailer between Mr. Smith and the deceased.

And as you've heard, and as I've heard and I've read

also previously, that Mr. Smith was backing out of the door at the time this occurred, and there's also some previous testimony I read that said they actually fell out the door simultaneously, that was together with the scuffle at the door there, and I think the scuffle at the door is basically supported by the fact that the, the molding around the door at one point is broken and lying on the floor. I mean there wasn't anything else around the door to break.

It's also supported by the fact that the deceased fell forward. And from reading the autopsy and listening to Doctor Wren, that he was rendered unconscious immediately. So, he didn't do anything but fall forward out of the trailer on to the ground on to his face.

Also supported, I spoke, you know, with Mr. Smith. And prior to them falling out, Mr. Smith swung at him striking him a few times, and which I think is attributed or why the deceased's hat, as you look at the photographs, the deceased fell out of the trailer, but his hat proceeded him out the trailer. So, his hat is fallen off to the side, and I think that may be a result of the hitting.

And then once he's fallen on to the ground, I think it was -- actually I pointed out to Mr. Godfrey about the fact that apparently the deceased had been turned over at some point, and that's where Doctor Wren agreed, I believe, that the arm was in a stiff position. I mean I think originally

he was face down and then at some point he was rolled. I don't know if that was for EMS purposes or for crime scene purposes or whatever that was.

So, I take those kind of things into account. I don't see anything -- I haven't read anything or seen anything that would give me a different scenario than, other than he's been shot and has fallen out, out the door on to his face.

One of the other factors I saw was that the cartridge case itself from the pistol was collected on the ground outside, and this semi-automatic pistol would eject the cartridge case. So, it was -- this didn't happen inside the case. So, the cartridge case was found out in the yard.

So, all those things support the crime scene and the crime scene analysis. That doesn't have anything to do with the peripheral issues. I don't have anything to do with that at all.

Q All right.

A This is just an analysis by looking at the crime scene, and also there, when you look at the photograph of the body, what else supports the fact that he was face down is that there's pooling of the blood under his head, and then when he turns to the side, the blood runs down his face and to the side.

So, those are the types of things that I look at.

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

So --.

Q And let me show you what's been marked as Defense Exhibit No. 3.

What is that?

A It's a photograph of the deceased. It's taken from the side and his hat is lying on the ground to the side. It would be to his right side if he were facing coming out of the, out of the trailer.

Q And what significance is there to the fact that his cap is off to the side?

A Well, I believe, had his cap stayed on and he fell straight out of the trailer, then it would of been, you know, just fallen straight off his head on the ground, which would of been in front of him. By being off to the side, if -- as Mr. Smith backs out of the trailer, if he's striking with his right hand, if he hits the hat, it's gonna knock it off to the left, which is where it is. It would be to the deceased's right. It would be to Mr. Smith's left. That would be a, the proximate area I would expect to find it in.

I don't believe it stayed on his head, you know, cause it would of been out here in front of him another approximate three or four feet I would think.

Q The gunshot went through Robert Finley's left eye.

Do you have any opinion about how that could of

occurred?
A Well, it, it wasn't a contact shot, and I believe Doctor Wren said approximately 4-inches, which would of put the, the weapon up in the, in that, in that vicinity.
So, if he were, if Mr. Smith were striking at him, I suppose the weapon could of been, if he's blocking with his arm, might of, you know, enabled him to fire the weapon that way. I think the, the major problem though, as it's been brought out, that we actually need the weapon in order to have it tested to see if it was malfunctioned or functioning properly, that type of thing.
So, it would just be conjecture at this point.
Q Nothing further.
THE COURT: Cross, if any.
SOLICITOR GANSS: Just briefly, Your Honor.
THE COURT: Take all the time you need.
SOLICITOR GANSS: Thank you.

CROSS-EXAMINATION

BY SOLICITOR GANSS:

Q So, Mr. Girndt, is it?
A Girndt.
Q Thank you.
If I understand what you do, you take what the defendant, an admitted drug dealer who sells drugs in this community, tells you, and then you find evidence to

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

there was a confrontation, do you have any personal knowledge that there was a struggle inside that trailer on January 12th, 1997?

A No, I don't.

Q Have you ever been to that trailer?

A No, I haven't.

Q You have any idea what condition that trailer was in, whether it was old, beaten, brand new, any idea?

You been in it and lived in it?

A No, I don't.

Q Okay. Any idea if it had been beaten up or someone had gotten in a drunken brawl the night before and maybe touched that molding then along the door?

A No, I don't.

Q Okay. So, I guess you just have the defendant's story.

THE COURT: Is that a question, ma'am?

SOLICITOR GANSS: No, I withdraw that statement.

THE COURT: Thank you.

SOLICITOR GANSS: Apologies, Your Honor.

Q Let's see. Everything then, if you haven't been there, you haven't seen it, haven't gone to the trailer, this is all speculation would be fair to call your testimony?

Just pure speculation?

A No, these facts are provided by the State. I haven't produced anything. The State's produced firearm's report,

photographs, the autopsy, the bullet, the cartridge case, the statements, everything. I haven't produced anything. This is not conjecture.

Q But your interpretation of those facts is paid for by the defendant, yes?

A No, I have the, the same opinion no matter what. I mean he didn't have to choose to use me. I don't know how that's gonna work out.

Q But you are being paid by the defense?

A Of course.

Q Your testimony here today, you said this might of happened or might of been broken that way or something like that.

Can you eliminate any other way that molding might have broken?

A I can not. But I'm just telling you that the photographs provided by the State, it's obviously a focal point for the police photographer. So --.

Q Okay. Can I take a look at those pictures that he showed you?

Let's see.

If I may beg the Court's indulgence, Your Honor.

THE COURT: Sure.

(Pause.)

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.

(Pause.)

SOLICITOR GANSS: Your Honor, at this time we'd like to move State's Exhibit No. 10 into evidence.

MR. GODFREY: Without objection.

SOLICITOR GANSS: Thank you.

THE COURT: Without objection, 10, a photograph.

(Whereupon, State's Exhibit No. 10 was received into evidence at this time.)

Q Can you please describe what's in the photograph for the jury again?

I'm sorry.

A It's just a photograph taken from inside the trailer looking out showing the body lying down the steps.

Q And is there something on the inside of the trailer that you, to the right there?

What is that?

A A broom.

Q It's a broom.

And is that broom, is it upright or is it down?

A It's upright.

Q So, it looks like it hasn't even been moved?

A Well, I don't know what your point is. The molding is off the other side of the door.

Q Okay.

All right. At this time, Your Honor, just like to

publish this to the jury if I may.

THE COURT: You may.

SOLICITOR GANSS: Thank you.

Q So, it's your testimony that there was a struggle, some molding came off, but during that struggle this broom happens to remain standing?

A It's on the opposite side of the doorway.

Q Okay. And this is in a trailer, small exit area?

A Yes.

Q Okay. Thank you.

SOLICITOR GANSS: Nothing further, Your Honor.

THE COURT: Redirect?

MR. GODFREY: None.

THE COURT: You may step down.

May he be excused?

SOLICITOR COLER: No objection from the State, Your Honor.

MR. GODFREY: No objection.

THE COURT: Thank you, Mr. Girndt.

Next witness.

MR. GODFREY: Your Honor, defense rests.

THE COURT: All right. Anything in reply?

And I will allow any motions to be done nunc pro tunc.

SOLICITOR COLER: Just briefly, Your Honor, if I could confer with my counsel?

THE COURT: All right.

(Pause.)

SOLICITOR COLER: And judge, we don't have any reply.

THE COURT: Okay. Madam Forelady, ladies and gentlemen of the jury, how about let's -- I need to discuss some things with the lawyers. It's gonna take about 20 minutes.

Y'all rather go to lunch now or would you rather start back at about 12:00 and I'll order you, some lunch for you?

Rather do lunch now or 20 minute break and we'll do the arguments and all, which would probably take about 45 minutes, and then I'll have your lunch ordered in, and you can start deliberating while you're eating lunch?

I tell you what, y'all go back in your jury room and discuss that, and just give a note to the bailiff, and we'll do -- I'll do it however y'all want to do it.

Is that fair?

(Jurors nod affirmatively.)

THE COURT: Hold on one second. Let that exhibit continue to pass.

Madam Foreperson, just let me know, soon as you get back there, whether you continue going or whether you take a lunch break now.

Y'all will get all the exhibits when you start your deliberations. They'll go to the jury room with you. So, you'll have a chance to look at them all again.

Okay. Everybody please remain seated.

Y'all go back to your jury room and let me know which way you want to go.

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

THE COURT: All right. Mr. Godfrey, anything?

MR. GODFREY: Judge, I renew the motion for directed verdict. That taking the evidence in a light most favorable to the State, and I do not believe they have made a case of murder against my client.

Also, judge, it would appear, from the testimony that we have heard throughout the trial, the testimony we've heard today from my client, that he was attacked, he was defending himself, and that the gun discharged accidentally. We believe there's not enough evidence to go forward. We would ask for an acquittal.

THE COURT: Okay. That is respectfully denied. I think the evidence is -- there's ample evidence. I'll not use the word I was going to use. There's ample evidence to make this a question of fact for the jury to determine.

Anything else?

SOLICITOR COLER: Judge, I don't know if you want to be heard on the charges.

THE COURT: I do.

SOLICITOR COLER: I'd submit to the, to the Court at

this point---

THE COURT: Let me, let me do -- y'all ready to do charges?

MR. GODFREY: Yes, sir.

THE COURT: All right. Let me just go through this.

I'm gonna charge, obviously, multiple charges, presumption of innocence, reasonable doubt, duties of the judge and the jury, credibility of witnesses, expert witness. I'm gonna charge my regular murder charge. I'm gonna charge possession of a weapon during the commission of a violent crime or attempt to commit a violent crime.

And then I've got the question of whether to charge manslaughter, whether to charge involuntary manslaughter, whether to charge self-defense, and whether to charge accident.

And here's my thoughts on that, and I'll let y'all argue it. I probably will charge the lesser included offense of manslaughter. I probably will not charge the involuntary manslaughter.

As I understand involuntary manslaughter, a person must be acting lawfully even if he is in unlawful possession of a pistol. Involuntary manslaughter -- strike what I just said about involuntary.

The Court's have defined that as, either one, 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, but not naturally intending to cause death or great bodily harm or the killing of another without malice and intentionally, but while one is acting lawfully.

Well, my analysis of this whole situation is, taking the evidence in a light most favorable to the defendant on all the grounds, I don't see how in the world anybody can argue that he was acting lawfully in this case. He goes into an apartment, and there's a knowledge drug dealer to sell drugs, and tries to carry out the drug transaction. So, there's no way in the world that he could possibly be acting lawfully in this whole factual scenario, and that's the reason I don't think voluntary manslaughter, involuntary manslaughter is applicable.

I also don't think self-defense is applicable. Self-defense says that you're entitled to a self-defense charge where the evidence shows one, that he was without fault in bringing on the difficulty. Well, by his own testimony, he says that, you know, when the guy approached him, he had this look in his eye that he pulled the gun out to see if he would back off, and then he starts beating the guy in the head with the gun, and then the gun goes off.

I just don't see how in the world that the evidence can be construed that he was without fault in bringing on the

difficulty, and how he was in imminent danger of losing his life or sustaining serious bodily injury. I mean the, the victim was not armed in any manner whatsoever. And last, on the, on the question of accident, for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon.

Well, if you believe him that it was unintentional, but the evidence is certainly that he was not acting lawfully, and the evidence is overwhelming that he was not exercising any type of due care in handling the weapon. So, I just don't see how in the world I can charge self-defense, accident, or involuntary manslaughter.

But Mr. Godfrey, I'll be glad to hear from you.

MR. GODFREY: May it please the Court.

THE COURT: Yes, sir.

MR. GODFREY: In the case of State v. Burris, on Page 5 of 11 of the last paragraph, in that case, they found the evidence would support a finding if felon was lawfully armed in self-defense.

THE COURT: Okay. But if I find self-defense is not applicable because he -- you have to show that he was without fault in bringing on the difficulty, and the evidence is overwhelming, and none to the contrary that he

was not without fault in bringing on the difficulty, then self-defense does not come into play. You'd have to get a self-defense for your argument to fly.

Go ahead.

MR. GODFREY: We believe that self-defense does come into play because the law says if there's any evidence in the record which would support a self-defense charge, he should have a self-defense charge. His testimony was yes, he was over there in an unlawful purpose.

THE COURT: All right. You agree with that?

MR. GODFREY: I agree with that.

But that's not the end all and the be all. Robert Finley came towards him and put David Smith in fear of being robbed, in fear of his life, fear of being injured, and then that's when he pulled out the gun. He was trying to get Finley to back off. Finley didn't back off. He tried to knock the gun out of David Smith's hand.

THE COURT: Well, the first, the first part of deciding whether or not self-defense is a proper charge is one, that the defendant was without fault in bringing on the difficulty.

How can you say he was without fault when he's over there master minding the drug deal and -- go ahead. I'm listening.

MR. GODFREY: Well, the majority of drug deals go down

everyday and nobody has any problem with them. I mean multiple drug deals are done every day.

THE COURT: Well, I don't---

MR. GODFREY: The fact that someone is selling drugs does not mean that you're gonna bring on some difficulty, difficulty.

THE COURT: Well, there are, there are a lot of cases that say that you're not without fault, that you're without fault in bringing on the difficulty when you're simply an, armed with a, unlawfully armed with a, with a pistol. But you can't use that as the fact of bringing it on. You can't use the fact that you were armed with a pistol to show that that's without fault.

But I don't know of any cases that say that when you're in the middle of a drug deal, well, it goes bad or good, that, that you aren't without fault there.

Do you have any cases of that cause the cases---

MR. GODFREY: No, sir.

THE COURT: ---the cases you've given me were unlawful, were the carrying of an unlawful weapon, and I'd be interested in knowing if either one of you have got any cases where, you know, that fact that you're involved in a unlawful drug deal, and it goes south, does that mean that you were without fault in bringing on the difficulty. That's an interesting question.

MR. GODFREY: Judge, I have researched that. I can find no South Carolina case on point.

THE COURT: How about cases from elsewhere?

MR. GODFREY: I did not check the federal circuit.

THE COURT: All right. Mr. Coler, are you gonna acquiesce and let them -- do you agree or disagree that self-defense ought to be charged and or accident?

SOLICITOR COLER: Well, Your Honor, that, that kind of depends on my---

THE COURT: Let me just say this now.

SOLICITOR COLER: Well, what---

THE COURT: I know -- I practiced criminal law for 30 years. I've been a judge now for a year and a half, a long time. And you may not want to create any appealable issues. I don't know what your take on it is.

SOLICITOR COLER: Yes, sir, what I respectfully submit to the Court, Your Honor, is this case, voluntary manslaughter doesn't apply. I think it's murder or nothing because I don't, I don't, I don't believe that there's any in the record, Your Honor, any evidence of a, of sufficient legal provocation to any heat of passion killing. The only evidence about the struggle came from the defendant himself and he, he claims self-defense.

I frankly submit to the Court that I think this is murder. And if the Court's inclined to charge the

self-defense, it's either up or down with murder, and either the jury finds the four elements of self-defense are applicable or they're not. But I don't, I don't think there's---

THE COURT: So, the State's position is that there is no evidence that the defendant took the life of the victim in this case in the sudden heat of passion based on sufficient legal provocation.

SOLICITOR COLER: Yes, sir, I don't see any sufficient legal provocation. If they're, they're trying to bootstrap if -- if 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. So, I think it's murder or nothing.

But frankly---

THE COURT: But you wouldn't have any real strong opposition to murder or nothing plus a voluntary -- strike that. Plus a self-defense and a accident charge?

SOLICITOR COLER: I'd, I'd object to the accident charge, but I wouldn't have any -- I think, in that scenario, under our theory, then, then self-defense is an appropriate charge. But voluntary manslaughter is not. They can't use the sufficient legal provocation as their self-defense element, and to make it voluntary manslaughter.

THE COURT: Time out.

(Pause.)

THE COURT: Ladies and gentlemen, the jury would like to continue and deliberate over lunch.

Anybody have any objection to that?

MR. GODFREY: No, Your Honor.

THE COURT: All right. Let's go back to now a more serious situation.

Mr. Godfrey.

MR. GODFREY: Well---

THE COURT: I sort of like, I sort of like their approach, that it is murder or nothing and go ahead and do the self-defense.

MR. GODFREY: Well, the solicitor said that they either, was no evidence of any struggle from anybody other than David Smith, and frankly that's just not right. I mean Angie Smith herself talked about a scuffle and the people being very close together or locked together.

THE COURT: Okay. Well, then that brings up the self-defense and he's not objecting to that.

MR. GODFREY: All right, sir.

THE COURT: But I don't think it brings up evidence sufficient enough to show sudden heat of passion because he deliberately took the gun out to try to make him back off is what I wrote down. He was -- I thought he would back off if he saw the gun.

So, here's what I, and y'all can take whatever exceptions you want to it, I'm gonna do, what I've said, murder and self-defense, commission of a violent crime, possession of a weapon during the commission of a violent crime.

Any objection by the State?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: Any objection by the defendant?

MR. GODFREY: I would object because I believe we should have the same charges that were present at the first time, which were voluntary manslaughter, involuntary manslaughter, and accident. And the Court has given us today murder and self-defense only. I don't -- we believe that there is sufficient evidence in the record that would support all of those charges, and we think that, regardless of how strong the Court believes the evidence may be, as long as the evidence is in the record, we'd have a right to the charge.

THE COURT: Well, Mr. Godfrey, you admitted to me that he was acting unlawfully, and if he was acting unlawfully, that takes care of, of homicide excused on the grounds of accident, because it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon, and you and I admitted earlier that it was not acting lawfully. He

was in the middle of the drug deal. So, I don't know how we can use accident.

Do you still feel strong about that?

MR. GODFREY: Beg the Court's indulgence?

THE COURT: I'm reading from the case you provided me, State versus Burris. That also goes to involuntary manslaughter in State versus Burris, which says it's defined as the killing of another without malice, an unintentional, but while one is engaged in the commission of some unlawful act not amounting to a felony. Well, this is not the case here. He's either involved in the selling of crack cocaine, which would be distribution of crack, which is a felony.

I'm gonna let you make whatever record you'd like. But I'm gonna, I'm gonna rule that I am not gonna charge accident, I am not gonna charge voluntary manslaughter, for the reasons earlier stated, and you are protected. But I'll be more than welcome to hear any additional grounds that you may want to put on the record to protect.

(Pause.)

THE COURT: Anything else, Mr. Godfrey?

MR. GODFREY: Nothing, Your Honor.

SOLICITOR COLER: No, sir, Your Honor, not from the State.

THE COURT: All right. Y'all ready to argue?

SOLICITOR COLER: Judge, if I could have about one

minute?

I plan to use two power points.

THE COURT: You can have more than one minute. Obviously you can go to the bathroom and stretch your legs.

How about go tell the jury that we have pretty much concluded all of our housekeeping matters in here, and it will be 12:15 by the time Madam Clerk can get all the orders in and everybody get stretched. We'll start at 12:15.

Is that okay, Mr. Coler?

SOLICITOR COLER: I'm sorry, Your Honor?

THE COURT: 12:15?

SOLICITOR COLER: Yes, sir.

THE COURT: Fifteen minutes fine?

MR. GODFREY: 12:15 is fine.

THE COURT: All right. We'll stand at ease until 12:15.

(Whereupon, a short recess was taken at this time.)

THE COURT: Anything on behalf of the State?

Anything for the record before I bring the jury?

SOLICITOR COLER: No, sir, Your Honor.

MR. GODFREY: No, Your Honor.

THE COURT: Open in full.

Not -- you require him to open in full, go first?

MR. GODFREY: No.

SOLICITOR COLER: We'll waive and just close at the

end.

THE COURT: That's fine.

Anything from the defense before we start?

MR. GODFREY: No, Your Honor.

THE COURT: Thank you.

You ready?

SOLICITOR COLER: We just have two power point slides, judge. One I'm gonna argue the elements of murder. That's on a slide, and the elements of self-defense, that's on a slide. We'll soon get them up here. We'll let Mr. Godfrey take an opportunity to look at them.

THE COURT: Well, it's 12:15.

Mr. Coler, you and Mr. Godfrey and Ms. Ganss, come up.

(Whereupon, a bench conference was held at this time.)

THE COURT: Mr. Humphries, bring the jury.

Lock that door.

BAILIFF: Yes, sir.

THE COURT: No one in and out.

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

THE COURT: Okay. We did that -- we're what, three minutes late?

That's not too bad, is it?

What we're gonna do now is all the testimony is in. And as I explained to you in my opening remarks, we will

hear the closing arguments of the lawyers. The -- Mr. Godfrey will go first followed by Mr. Coler and Ms. Ganss. At that conclusion, then I will charge you or instruct you on what the law is in the case. And once I do that, you will then return to the jury room and I'll send all the exhibits back and you can start your deliberations when I give you that heads up.

So, without further ado, Mr. Godfrey.

MR. GODFREY: May it please the Court?

THE COURT: Yes, sir.

MR. GODFREY: Solicitor.

Ladies and gentlemen, this is been a strange trial inasmuch as we're here about a shooting and a death caused by a shooting, and I think probably 60, 70 percent of the trial we were talking about drugs. What I'm gonna ask you-all to do is to take your prejudice about drugs and put it aside.

We're not here talking about the life-style of Mr. Finley, the deceased, in this case. And we're not here talking about the life-style of David Smith.

David Smith is charged with murder to which he has pled not guilty, and has offered a defense of self-defense. That's what's important.

Obviously nobody likes drugs, and we've heard about drugs all through this case.

But the bottom line, for the charge that we have, is how did Mr. Finley get shot?

How was Robert Finley shot?

What was going on?

That's what we're really here about.

So, put your prejudice and hatred about drugs to the side and just think about the actual facts of this case.

Now, you heard Angie Smith testify. Angie Smith testified that she paged David Smith, and that she was gonna hook him up so he could sell some drugs.

Now, her testimony varies a little bit from David Smith's testimony about when he found out Robert Finley was the one who was in the trailer. She says that she told him on the way over there, and David Smith says he learned when she came back from the trailer.

One thing that Angie Smith testified to, David Smith testified to, there was a scuffle there at the door. You heard Angie Smith talk about the fact that she started to light a cigarette, and the air was blowing through the vent of the car, and she looks up and she sees David Smith and Robert Finley come falling out of the trailer and she heard a pop. At that point in time, David Smith got up. He says she yelled at him, he ran around the car, got into the driver's side, and drove off.

Then Angie Smith said something that was really

interesting. She got up here and she said that she was afraid of David Smith.

Well, when she left the scene with David Smith, David dropped her off at Wofford Street and gave her the rest of the crack cocaine that he had in his pocket.

Okay. Now, David says she wanted to go back to his house. Now, she didn't say that. But David says she wanted to come back to his house.

But if you're afraid of somebody and you want to get away from them, would you end up calling them later that same evening and asking if you could get more crack cocaine?

And when David said I don't have any, but you can come over and I'll give you $20, she went over to his house. She admitted she went over to his house and picked up the money.

Now, was she afraid of David?

Of course not. Of course not.

Now, there was some problems with the testimony in the trailer. She said that -- Angie Smith testified that Robert Finley didn't say I don't want to deal with you, I want to deal with him. She said that never happened.

However, you heard the testimony of Otis Hyder today, the man who was not here. His testimony was read into the record. It was his trailer. He was there. And his testimony was that -- excuse me. His testimony was that Robert Finley told Angie Smith that he didn't want to deal

with her. He wanted to deal with him.

Now, Angie goes back out to the car. David gets out of the car, and he goes into the trailer. Now David's testimony and Otis Hyder's testimony, in large part, is the same about the initial things that happened inside that trailer.

There was discussions about drugs, and Otis Hyder, in his statement to the police, put down that Robert Finley grabbed the drugs. And he said that they were moving towards the door. David Smith went to the door.

Now, Otis Hyder says that David Smith walked out the door. David Smith testified and Angie Smith testified that his back was to the door.

From the position of Otis Hyder, he could not see what was actually going on and because what was happening was outside the trailer. I think you-all remember that comment. He was outside the trailer. The TV was on. He didn't hear the words that were being said. He did hear Robert Finley say, you know, you got a gun, shoot me, or give it to me, I'll shoot myself.

Now, what really happened in that trailer at the tail end is what this case is all about. It was when the drugs were placed on the counter, the drugs were snatched. From that point until they fall out the door is what this case is all about.

What happened there and who did what and why is the crux of this case because that's when everything started that caused the downhill slide to the gun being drawn and to the bullet being fired.

So, what do we know?

Otis Hyder says that Robert Finley grabbed the drugs.

What does that mean?

He was gonna take them. He was basically robbing David Smith. He knew David Smith had more drugs on him because he saw David put the pack back in his pocket.

David told you the man looked wild. He was walking towards him. He said he's about 6'2 and over 200 pounds. He knew something bad was gonna happen.

David said he pulled his hands out and he had the .25 semiautomatic pistol in his hand. He held down to his side. He did that, David said, because he wanted to stop anything else from happening, but instead Robert Finley came forward, and he swatted at the gun, almost knocked it out of David's hand, and David knew that this guy was for real, that he was coming after him.

At that point in time, they were locked up, as David said, one holding the other, and you know that's, that's true. SLED Agent, Agent Powell, the expert in gun powder residue analysis, there was no gun powder residue on the hands of Robert Finley.

How do you explain that?

Because his hands were behind where the gun was. If I grabbed somebody about the face or neck or shoulders, and the person's trying to hit me to knock him off, I've got the gun in this hand and I'm hitting him, if that gun goes off, the hands that are on me are not gonna have any gunshot residue on them. It's behind where the blow back is on the gun.

Now, the other thing about this case which is very interesting, the State wants you to believe -- they have a theory of their case. Their theory of the case, obviously, is that Finley was killed because of a $40 drug deal. And that's what they've been trying to pound in all along.

If that's the case, if David Smith was going to, if David Smith was gonna kill somebody over $40, when he pulled the gun out of his jacket, and he had it down to his side, and Robert Finley says go ahead, shoot me, or give it to me, I'll shoot myself, why didn't David just shoot him right then?

Because David had no intention of hurting the man. He just wanted to get out of the trailer. That's why he didn't hurt him.

Other thing that's interesting about the shot, if somebody is going to shoot someone else, and you're at close range, the doctor said 2 to 6-inches, probably four, if

you're at close range and you're gonna shoot somebody, do you shoot them in the head or do you shoot them in the body?

What's the more natural thing to do?

I would submit to you that the natural thing to do, if you've got a gun in your hand and somebody's directly in front of you, you shoot them in the chest or gut area. That's where everybody else gets shot. This is an unusual shot. The shot went through the left eye.

Now, how did that happen?

That happened because Robert Finley had his hands on David Smith and David was hitting him trying to get him off, and one of the times when he hit him, obviously the gun discharged. That's how the gun ended up at head level. Nobody's gonna try to shoot somebody else in the head when they're moving. You're likely gonna miss.

The other thing that was very interesting about this case, Angie Smith said that she had known David Smith for about ten years. Well, she said several things, but I think, in the end, it was about ten years.

Angie Smith and Rodney Smith lived together in the same house. Obviously Rodney Smith knows David Smith just as well as Angie does. Maybe better. Rodney was delivering drugs for David.

I asked David on cross -- excuse me. I asked Rodney Smith on cross-examination, I said have you ever known David

Smith to be violent. Rodney Smith says no. Rodney Smith is here as the State's witness telling what he knew, which wasn't a whole lot, because he wasn't at the trailer. But he was here as their witness and he says that David Smith, as long as he's known him, and presumably at least ten years, has never been violent.

What happened in this case?

You got Robert Finley, who was probably on crack cocaine at the time or coming down off his crack, wanted to get more crack, calls Angie Smith, Angie goes in. He doesn't want to deal with Angie. Otis Hyder told us that. David told us that. David goes in and Finley wants to grab the drugs and he was going after David to get more drugs or maybe he thought David had money. One or the other.

What happened to David is that he was attacked. The guy was taking his drugs and he was going after more drugs. And when David showed him a gun to try to get him to back off, he comes forward even more. He swats at the gun. David knows this guy is for real. He knows the fight's on. David just wants to leave. David is not a violent person.

Ladies and gentlemen, this is a case of self-defense. David went there to sell drugs. He didn't go there to get into an argument with anybody. He brought the drugs in. There was no loud boisterous argument in the trailer. Otis Hyder told you that.

David did not go there to create a problem. He went there to deliver drugs like he had delivered before. He was not the reason that there was a fight. He's not the reason that he had to pull his gun.

The reason those things happened is Robert Finley. Finley was greedy. Finley was high. Finley wanted crack. Finley didn't care where he got it. Finley was gonna take it from David Smith.

David shows the gun. Finley swats at the gun. You've seen David Smith's size. He's not that big of a man. Finley stands about 6'2, over 200 pounds. He knows there's a fight coming on. The man seen a gun. He won't stop. He's still coming towards him.

What's he gonna do?

He hits -- he's trying to get out of his grasp. And one of the times he hits, obviously the gun discharged and went through the eye of Robert Finley.

It's a terrible thing. But it's a case of self-defense. It began to build and build and build. Just like a snowball going down a hill.

He went to deliver drugs. He wasn't expecting problems. Finley stole the drugs. Finley came towards him. He saw that he, David Smith had a gun. He swatted at him, he came at him.

What could David think except his life was in danger or

he was gonna get beat up?

The man wouldn't stop when he saw a gun. It's a case of self-defense. It's a terrible situation, a situation caused by drugs.

But drugs are not what's driving the charge in this case. What's driving the charge in this case is how and why Robert Finley ended up being shot. That's what's driving this case.

David Smith, as Rodney Smith testified, is not a violent man. Not a violent man.

What happened is a case of self-defense. The State can not prove, beyond a reasonable doubt, that this is murder. Not based on the facts that we have before us. Not based on what Otis Hyder had to say from the testimony that we read today. Not based upon what Angie Smith had to say about them coming out of the trailer, falling out together, locked up, and been scuffling.

There was a fight. It wasn't David's fault. He was just trying to get away.

When you think of everything that you have heard in this trial and have a chance to deliberate, we're certain that you will find him not guilty by self-defense.

THE COURT: Mr. Coler, Ms. Ganss.

SOLICITOR COLER: Thank you, Your Honor.

May it please the Court?

THE COURT: Yes, sir.

SOLICITOR COLER: One of the first things, first things I want to do before we get started is thank you, each and every one of you for your attention in this case. As a, as an attorney, as a prosecutor, all I can ever ask of jurors is that they pay attention, pay close attention to the evidence that we present.

And every time I looked over here, every one of you was focused on the witness that was testifying or whatever we had on the overhead. Y'all -- some of y'all couldn't even see. You were leaning forward and everything.

And we really appreciate that. That's all we really ask of you in a case and do that. And when you do that, and when you do it so commendably, I think you should be recognized for that. So, thank you very much.

The judge is gonna tell you, in a few minutes, that your job is to be the finder of the facts. Nobody else in this entire courtroom, in this entire courthouse, in this world at this point gets to tell you what the facts are. That's your job. You've sat here and you've watched everybody.

The judge, he's the expert on the law. But you and you alone judge the facts.

One of the things you get to do is examine or look at or, or review the demeanor of the witnesses, and you, and

you can do that to determine the credibility, their believability.

When they came in, did they answer forthright and straightforward?

Were they shifty?

Did they try to avoid questions?

Did they not answer straightforward?

And you make a decision and you get to go back into the jury room and decide what do we find happened.

And I submit to you that when you heard from the State's witnesses, Angie Smith, she was straightforward. She, she was so nervous she had to stand up and tell you her story. But you could tell she looked at me, listened to my question, and as soon as I asked the question, she answered it. There wasn't any kind of delay or thinking about it. She was just straightforward.

Same with Rodney Smith. Same with the other witnesses you saw.

You can compare and contrast that to David Smith. When he took the stand, not only did he spend most of his time avoiding my question and not answering them, but sometimes he would repeat my question cause he was trying to think of what to say, and then he would ask me a question in response instead of simply answering the questions about what happened.

So, you get decide that. I could stand up here this morning or this afternoon and go through each and every one of the pieces of evidence, each and every one of the sentences that each witness came and told you. But that's not my job. That's not the judge's job. That's not anybody's job but yours to go back and examine that and make that determination.

So, that's what I'm gonna ask you to do is remember, talk about it, think about it, and, and examine, as you get back there, each of the witnesses, and then you get to decide what happened. And I submit to you that you'll find that the people that we put up were straightforward, answered the questions, told you what happened, didn't beat around the bush, and responded. The defendant, on, on contrast, beat around the bush and didn't really respond.

What I really want to talk to you about is the law in this case, and Judge Early is the expert on the law and he's gonna tell you what the law is regarding two very important things. One is murder and the other is self-defense because that's essentially what the defendant is claiming. He's claiming self-defense. He had no other choice but to defend himself and kill somebody.

And what I want to do is put an overhead up for you. The judge is gonna talk about the elements of self-defense, and this is, I think, what he's gonna instruct you

essentially. He's gonna tell you that these four things must be true. These four things must be accurate for self-defense to apply. If they don't, self-defense simply does not apply. So, I'm gonna -- let's go through them.

First, he's gonna tell you the person who's claiming it, David Dwight Smith, must be without fault in bringing on this difficulty.

How in the world does David Dwight Smith, can he, can anybody in the world argue to you that he is totally without fault in bringing this on?

He's the one, remember, who took the drugs over to her house, to Robert Finley's trailer he was at, and took the loaded gun in there, went inside. He's the one that had the relationship with Robert Finley earlier and the $40 debt. He can't possibly tell you he's without, totally without fault in bringing on this difficulty.

So, once one of these elements fails, self-defense is out. We'll continue on and I'll point out the other ones that fail.

You've also got to find the person must actually believed that he was in immanent danger of losing his life or serious, sustaining serious bodily injury or he actually was in such immanent danger, which means he's got to be so fearful that he decides, instead of doing anything else in the world, to take another human life.

And I submit to you, ladies and gentlemen, there are situations in this world where that happens. But this isn't even close. This isn't even in the same ball park.

He could have done many things and should have done many things if, in fact, the story goes the way he was before he chooses to end the life of another human being.

The third element says that if his defense is based upon his belief of immanent danger, a reasonably prudent person of ordinary firmness and courage would of entertained the same belief. If the person was in actual immanent danger, the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow, shoot the fatal shot, in order to save himself from serious bodily injury.

But basically says is okay, if you claim, if you say you were in immanent danger, you were in such a threat of danger of losing your life, it's got to be reasonable. So another -- if we were to replace another reasonable person and put him in your shoes in that situation, that person would have believed the same thing.

Again, how can somebody who has taken a loaded gun into a trailer to make a drug deal, knows the person he's dealing with, claim that he's a reasonable person who would have had to act his way as opposed to any other way in the world?

He simply can't argue that to you. There's no way that

that element survives this from the, the examination.

Now, at this point, all three of the first elements have failed. If any one of them fails, self-defense is out.

The last element, the fourth element says that before you get to take a life, before you get to kill another human being, the person had no other reasonable means of avoiding the danger of losing his life or sustaining serious bodily, serious and bodily, serious bodily injury than to act as he did in this particular instance. And I remind you that a person, on his own premise, has no duty to retreat before acting in self-defense.

If David Smith were in his own house, perhaps this is a different analysis. But remember, he went to the house or to the home where Robert Finley was. He certainly had other reasonable means, other probable means of avoiding this situation.

One, don't go there. Don't go to sell drugs.

Two, don't bring a loaded gun there.

Three, if you do go in and see that the drug deal is gone bad, leave. You've got a duty to retreat before you can kill somebody else.

Like I said, the law, in some instances, recognizes the ability of one human, one citizen to kill another. But this isn't even close. And there's a duty, there's a responsibility you got to take before you kill somebody

else, and it essentially means you got to retreat.

You can back out that door, go away, forget about the drugs, leave them there, forget about the $40, and just go about, about your business.

He chose instead to use a gun and to end a human life. He chose not to act as a reasonable person would. He chose not to avoid that ultimate final fatal blow that, that he struck on Robert Finley.

Because each and every one of those elements must be present, as I said, must be true for you to find self-defense, and because they're not, because I submit to you all four of them, but several of them fail, you can not find, you're not entitled to find self-defense and the defendant's not entitled to claim self-defense for killing, for shooting and killing Robert Finley.

The other thing the judge is gonna talk to you about is murder, and you may of seen police shows, and you may of seen movies, and you might think well, murder -- well, the State's got prove, to prove a motive and there's got to be premeditation and somebody's got to be lying in wait waiting. Put all that out of your mind.

Murder, in South Carolina, requires three elements, and the judge is gonna tell you what those elements are and at the end of my, my presentation, but essentially he's gonna tell you, that one, there must be a killing. And there, in

this case, was certainly a killing. There's no question about it.

Two, it must be another human being, another person. As I told you in my opening statement, if you were to ask the family and friends of Robert Finley was he a person, certainly they'd tell you, of course, he was.

And finally, the killing must be done with malice aforethought either express or implied.

Express or implied just means how the malice is found by you. If express, if you, express malice were present, that kind of means somebody raising a gun up saying I want to kill you, I want you dead, saying those words, and then pulling the trigger. That's express malice. We -- I admit we don't have that in this case. What we have is implied malice.

The law doesn't let us cut a human being open. Science doesn't allow us to cut a human being open and look inside their heart and determine is there malice, is, did they have malice in their heart and in their brain when they committed this crime. Of course, we can't do that.

So, what does the law tell us to do?

It tells us to look at all the facts and circumstances that surround the incident. And then -- and that's what I'm asking you to do, and make your determination as to whether you find malice.

Let's talk about aforethought quickly. The malice must exist some time prior to the fatal blow, some time prior to the, the shooting. But as I told you, as Judge Early is gonna tell you, it could exist a week before. It could be this festering brewing anger. It could exist a day, an hour, a minute. It could even exist a second or just an instance before the fatal blow was struck. There doesn't have to be this prolonged period before the killing where there's a planned out attempt to murder somebody. It just means aforethought. The malice has to exist some time before or at the same time as the fatal blow.

I submit to you the malice started forming, in David Smith's mind, when he got over there on that cold January morning, was called out to make a drug deal, wanted to make money, we know money was important to him, found out that, that this Robert Finley was in there, this guy already owes me $40, he's called me out in the middle of the night, I'm not gonna make a drug deal, you know, I can be doing these other things.

That's when the malice started to form in David Smith's mind, and he carried that in when he took a loaded gun inside the trailer. That malice kept, kept working it's way up and ultimately he carried it out by shooting and killing Robert Finley.

But how do we know or what have you seen about David

Smith that suggests, that proves, that shows that he has malice in his heart?

Well, first of all, we know he's greedy. He had a pretty good job, was an airline mechanic. Presumably made decent money. But when that wasn't enough, when that required a little bit of a struggle on his part, he chose, instead, to sell drugs. He chose to be guided by his desire for money over anything else.

And then the way he chose to do it is very indicative of what's in his heart. It didn't matter to him where his drugs ended up. All he really cared about was getting them to Rodney and Angie and his other minions. And as long as they delivered it, and brought him back the money, it didn't make a difference to him.

And I asked him, I said, didn't you care if it went to other people in the neighborhood, went to a high school, a junior high. No, as long as I got money, it doesn't matter.

We know he carried a gun. We know he carried a loaded gun because of the, of the, of the business he was in, and we know that he wasn't afraid to use that gun because he told you. Said I, I took it out, I was gonna show him, I was gonna use this to scare somebody. That's just more indication of what's in his, this man's heart, what's in his brain.

We know, immediately after he shot and killed Robert

Finley, he fled the scene. I asked him was there any reason, was there anything to prevent you from, from just calling this in. I mean you say it was an accident, and, and you didn't mean for to, it to happen.

MR. GODFREY: Objection. That goes to remorse.

THE COURT: Move along.

Disregard the last statement.

SOLICITOR COLER: He didn't -- he chose not to call in the incident. And then we know he did more.

He chose then to attempt to silence Angie Smith. You don't know nothing, you didn't see nothing. I submit to you he was calling the shots that night.

Angie Smith, the woman you saw, was directing David Smith what to do after that shooting. David Smith was telling her. So, he tried to silence her. Then he, he decided to, chose to throw away, to dispose of the gun, the murder weapon. Again, this is all more indication of what was in his heart when he did it. And because we can't look inside his heart, we look at what he did after it.

Then he decided well, I want to go home, get some sleep, and go to work the next day because, in his own words I submit to you, were I didn't want this to interfere with my life. I didn't want the fact that I had just killed somebody, just shot somebody in the face, to interfere with the, with my life.

That's somebody who has a blackened heart. That's somebody who has a heart that is void of social responsibility.

Then when the police eventually got to him, which I think he knew they would, and everybody knew eventually they would, he chose to lie to the police. He didn't, he didn't tell them this is what happened, this is just a, this is just a tragic accident, this is just a tragic mistake. He chose to lie.

And his version was well, it wasn't a lie. Detective Denton asked me what happened, and I told him, up till midnight, and then I stopped.

Well, you don't think that Detective Denton called him from Charlotte and asked him to come down here and wanted to talk to him about what he did until midnight?

The police were trying to solve this crime, and they wanted to know everything they could about it. But he chose to lie to them. He says it's not a lie because he just left out some stuff.

Well, he left out the most important things, that he was there, and he shot him, and what happened. I submit to you he didn't admit to that until he knew he had to, until the police got to Angie Smith, found her, she told them what happened, and then he's got to.

And then other things we can look at, ultimately the,

probably the textbook version of malice, he shot and killed somebody and left them where they fell on to their face on to rough concrete. Remember there's no smooth marks on this, this victim's face. Doctor Wren told you that everything was all rough abrasions from falling. Fell on to his face, was shot in the eye, was bleeding profusely.

Their own expert talked about the, the massive amount of blood. And his body was kind of twisted up. It was dark. It was certainly cold out. It was the middle of the night. Left him there to die, and was mostly concerned about getting on with the rest of his life.

That is textbook malice. And for that, I'm asking you to convict him on both counts. Convict him of murder as he's charged, and convict him of possession of a gun during that murder.

Thanks.

THE COURT: Mr. Coler, you want to turn that off please?

SOLICITOR COLER: Yes, sir.

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, my charge takes about 15 minutes, maybe 20 at the most.

Everybody okay?

You need a bathroom break before I start?

(Jurors nod negatively.)

THE COURT: Everybody comfortable?

(Jurors nod negatively.)

THE COURT: Let me tell you, I'm gonna charge you or instruct you on the law in the case, of this case. And what I normally do is I sort of break it down into a couple of areas.

The first is sort of general information, but it's the law in this State. You have to take that. And then I will specifically charge you on murder, self-defense, and some other aspects in the case.

First of all, it's very important, in this case, the indictment charges the defendant with murder and possession of a firearm during the commission of a violent crime. I, once again, remind you, as I did at the beginning of the case, the fact that the defendant was arrested, charged, and indicted in the case is not evidence in the case and can not be considered by you as evidence of guilt in the case nor does it create any presumption or inference of guilt.

The indictment is simply a written formal instrument which contains the charges made against the defendant. It is the formal document by which this defendant is brought into this courtroom.

The indictment, in this particular case, alleges two different offenses against the defendant. The charges are murder, one, and secondly, possession of a firearm during

the commission of a violent crime.

The one indictment charges two separate and distinct offenses. You must decide each offense separately on the evidence and the law applicable to it uninfluenced by your decision as to any other offense. The defendant may be convicted or acquitted on one, and then you will be asked to write a separate verdict as to each charge of guilty or not guilty.

As to the indictment, the defendant has pled not guilty, and that plea of not guilty puts the burden on the State of South Carolina to prove the defendant guilty.

A person charged with committing a criminal offense in South Carolina is never, never required to prove himself innocent. It is a very important rule of law that a defendant, in a criminal trial, no matter what the seriousness of the charge may be will always be presumed innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations. But it stays with the defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence is not a mere legal

theory. It's just not a legal phrase. It is a very substantial constitutional right to which every defendant is entitled unless you, the jury, are satisfied, from the evidence, that the defendant is guilty beyond a reasonable doubt.

What is a reasonable doubt in the law?

Very simple.

A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. I'll repeat it. A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

Let me again remind you that, during the trial, that you and I have had certain duties to perform. As my, as my duty of presiding over the trial, I've had the duty to rule on the admissibility of, of the evidence. As I told you earlier, I didn't think there would be very many objections and they were not. But you're to consider only the evidence which has been presented from the witness stand, and any exhibits which have been made a part of the record.

I also have the additional duty to charge you the law. As presiding judge, I am the sole judge of the law of the case, and it is your duty, as jurors, to accept and apply the law as I now state it to you. If you have some ideas as to what the law is or what the law ought to be and it does not agree with what, with what I now tell you the law is, I

ask that you abandon that idea because you are sworn to accept the law and apply the law as I state it to you.

In every case tried in this Court, you, the jury, become the sole and exclusive judges of the facts. As the trial judge, I can't state, comment on, or make any statement as to the, as to the facts. So, if I have commented or maybe frowned or smiled or anything during the trial of the case, please disregard that. I have absolutely no right to tell you what the facts are. That is your sole province and that is up to you. The law doesn't allow me to have any opinion about the facts.

So, it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during this trial.

In order to do that, you necessarily must determine the credibility of the witnesses who have testified in this case. Credibility simply means believability, who do you believe. It becomes your duty, as jurors, to analyze and to evaluate the evidence and determine which evidence convinces you if it is true.

In determining the credibility or believability of the witnesses who have testified in the case, you have the right to believe one witness over several witnesses, or several witnesses over one witness. 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 witnesses, of a witness in its entirety or you may reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in the case. You may also consider the appearance and manner of a witness while on the witness stand.

We have had a number of witnesses who testified in the case as experts, and I told you, at that time, they were allowed to give opinions. You should consider any expert opinion received in evidence in this case like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not -- give it the weight you think it deserves. If you think or decide that the opinion is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

An expert's testimony is to be given no greater weight than that of any other witness simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it may be uncontradicted.

Now, Madam Forelady, ladies and gentlemen of the jury, those are sort of the general propositions of law that I

charge or instruct in every criminal case that we try, and then I go to the specific elements of the indictments.

So, in this case, the defendant is charged with murder in one count of the indictment. The State must prove -- the burden of proof is on the State to prove, beyond a reasonable doubt, that the defendant killed another person with malice aforethought.

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

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

Malice aforethought may be express or inferred. The terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is by either direct evidence or by inference from the facts and circumstances which are proved.

Express malice is when a person speaks words which express hatred or ill will for another or when the person

prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's minds would be express malice.

Malice also may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case, and the law recognizes certain examples of instruments which may be deadly weapons including the pistol.

In Count Two of the indictment, the defendant is charged with possession of a weapon during the commission of or attempt to commit a violent crime. The State must prove, beyond a reasonable doubt, that the defendant was in possession of a firearm or visibly displayed what appeared to be a firearm during the commission of a violent crime. A firearm is described as any machine gun, automatic rifle, revolver, pistol, or other weapon which is designed to or may be readily converted to expel a projectile.

In order to find the defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the defendant guilty of either committing a

violent crime or attempting to commit a violent crime and murder is a violent crime.

Now, in this case, the defendant has raised the defense of self-defense. Self-defense is a complete defense. And if it is established, you must find the defendant not guilty.

The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt of the defendant's guilt, after considering all the evidence, including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant guilty.

The following elements are required to establish self-defense.

One, without fault. First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to a not guilty verdict based on self-defense.

If the defendant voluntarily participated in mutual combat for purposes other than protection, the killing of

the victim would not be self-defense. This is true even if, during the combat, the defendant feared death or serious bodily injury. However, if, before the killing is committed, the defendant withdraws and tried, in good faith, to avoid further conflict, and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.

For mutual combat, there must be mutual intent and willingness to fight. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly, with a deadly weapon.

Now, the second and third element, which are sort of hand in hand of self-defense, is that the defendant was actually in immanent danger of death or serious bodily injury or that the defendant actually believed he was in immanent danger of death or serious bodily injury.

If the defendant was actually in immanent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the defendant believed he was in immanent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.

In deciding whether the defendant actually was or believed he was in immanent danger of death or serious bodily injury, you should consider all the facts and circumstances surrounding the situation, including the physical condition and characteristics of the defendant and the victim.

The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger, and a reasonably prudent person of ordinary firmness and courage would have had the same belief.

The defendant has the right to act on appearances even though the defendant's beliefs may have been mistaken. It is for you to decide whether the defendant's fear of immediate danger of death or serious boldly injury was reasonable and would have been felt by an ordinary person of the same size in the same situation.

And then the final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance.

Now, you have to make those assessments. You're the finders of the fact. Y'all determine who you believe. You apply those facts to the law as I've just given it to you. And if you believe the State has proven the case beyond a

reasonable doubt, then consider everything, and you render one decision. If you feel that the State has not met the burden, then, of course, your verdict would be different.

All right. They're two possible verdicts in the case. Obviously, not guilty or guilty, and don't put any significance on the order in which I gave them to you. Obviously I've got to put one before the other.

Madam Forelady, ladies and gentlemen of the jury, your verdict must be unanimous. In other words, all 12 of you must agree on the verdict. When you reach the verdict, you will simply sign your name as the forelady and knock on the door and tell the bailiff that we have a verdict.

If you have any questions during your deliberation, you need to write it out on a piece of paper.

Madam Forelady, you sign it as the foreperson, and knock on the door and give it to the bailiff and they'll send it out to me and I will attempt to answer it as the law allows or may not be able to answer it as the law allows. But I will send you back my response or perhaps bring you back out to, to address you with it.

The verdict form is right here and it's very simple. The first is to Count One of the indictment on murder. It simply says we, the jury, find the defendant in this case, David Dwight Smith, to be either one, not guilty, or two, guilty of murder.

MR. GODFREY: Nothing further.

THE COURT: Thank you so very much.

Now, Ms. Ganss, Mr. Coler, Mr. Godfrey, would y'all please come forward and check your exhibits and make sure everybody is in agreement so I can send it back.

(Pause.)

SOLICITOR COLER: Yes, sir.

THE COURT: Everything there?

SOLICITOR COLER: Yes.

MR. GODFREY: Yes, sir.

THE COURT: All right. Let the record reflect counsel for both sides have examined, hold on one second, have examined the exhibits and all of them are there and the verdict form is proper. So, I'm gonna send it back, but with the bailiff -- let him go smoke and then when he gets through smoking, you come back and take it back.

Tell them to go ahead and start their lunch and we'll get back there as soon as the smoker gets back.

BAILIFF: Yes, sir.

THE COURT: Any objection from both sides?

SOLICITOR COLER: No, sir.

MR. GODFREY: No.

THE COURT: All right. We'll stand at ease.

(Whereupon, the jury began deliberations at 1:15 and sent out a question at 2:45.)

Okay. If you find him not guilty, that would be the end because obviously, if he's not guilty, then he would not have committed any crime with the, with the use of a weapon. However, if you find him to be guilty, then you must decide whether or not he was guilty or not guilty of possession of a firearm during the commission of a violent crime.

Just follow the instructions. It's very simple. Once you've done that and y'all have reached a unanimous verdict, you can sign your name and date it and knock on the open door and the bailiff will come back out.

In just a few minutes the bailiff will bring to you the verdict form. He will also bring to you all the evidence that has, that has been introduced during the trial of the case. And once you receive all of that, you can start your deliberations.

I'm gonna ask you to return to your jury room now. But do not, do not start the deliberations. I have to ask the lawyers one more time if I have left anything out of the charge or if they have any complaints about the charge, and they have to put that on the record to protect everybody. That process won't last but just a few minutes, and then, once I go through that, I will send the verdict form, along with all of the exhibits back there, and the bailiff will tell you to start your deliberations.

I suspect somewhere we're gonna get you some lunch.

So, here's what I would suggest, you know, once I say -- you start deliberations. Go ahead and, and start your deliberations. When lunch comes, you can talk through lunch or you can say we don't want to talk over lunch. Y'all do it however you want to do it. And then once you have reached that decision, then you let us know.

So, at this time, I'm gonna ask all of you to return to your jury room except my two alternates.

I'll ask that y'all stay there one second please.

Everybody else please remain seated.

Mr. Bailiff, if you will take the alternates and put them in a separate room.

I'm going to let y'all stay with us through lunch. At least get your lunch. And then we'll go from there. Normally I would release you after you eat your lunch. So, bear with us.

Put them in a separate room please.

BAILIFF: Yes, sir.

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

THE COURT: Any exceptions to the charge, any additional request on behalf of the State?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: On behalf of the defendant other than what you're already protected on your earlier objections?

THE COURT: All right. Gentlemen, ma'am.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: All right. Let the record reflect, at about 2:45 I received a note from the jury. Be marked as Court's Exhibit 3.

(Whereupon, the note from the jury was marked as Court's Exhibit No. 3 for identification purposes only at this time.)

THE COURT: Question one. If there is no self-defense, can he still be guilty of a lesser crime?

The answer is no.

Was any drugs from David put on the table ever found in the trailer?

Answer, the Court can not comment on the facts.

THE COURT: Any opposition to that on behalf of the State?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: Defendant?

MR. GODFREY: No, sir.

THE COURT: Carry it back and I need to have that for the record. So --

BAILIFF: Okay.

THE COURT: Okay. We'll stand at ease.

(Whereupon, the jury returned with a verdict at 3:16.)

THE COURT: All right. Mr. Bailiff, I understand we have a verdict.

BAILIFF: Yes, sir.

THE COURT: All right. Anything from the State before we receive the verdict?

SOLICITOR COLER: No, sir, Your Honor.

THE COURT: Defendant?

MR. GODFREY: No, sir.

THE COURT: All right. I -- looks like we got some family here of the victim and the defendant's family. I don't know what the verdict is gonna be. I will not tolerate any outburst. If you can not control your emotions, I'll ask you to leave now. If there are any outburst, I'm gonna hold you in contempt and find you or jail you accordingly.

So, I suggest you leave now if you can not control yourself.

Fair enough?

SOLICITOR COLER: Yes, sir.

THE COURT: Fair enough?

MR. GODFREY: Yes, sir.

THE COURT: All right. Bring the verdict, bring the jury please.

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

THE COURT: Madam Forelady, have y'all reached a verdict?

FORELADY: Yes, sir.

THE COURT: Madam Clerk, would you pass it to the bailiff, please?

(Forelady complies.)

THE COURT: All right. Madam Clerk, would you please publish the verdict?

CLERK: Court of General Sessions, the County of Spartanburg, Case Number 1997-GS-42-1639, State of South Carolina versus David Dwight Smith, we, the jury, find the defendant in this case, David Dwight Smith, to be guilty of murder.

We, the jury, find the defendant in this case, David Dwight Smith, to be guilty of possession of a firearm or a knife during the commission or attempt to commit a violent crime. It is signed by the foreperson, and dated today's date.

Ladies and gentlemen of the jury, if this is your verdict and still your verdict, please raise your right hand.

(All jurors raise their hands at this time.)

CLERK: So say you-all.

THE COURT: All right. Anything on behalf of the defendant before I release the jury?

MR. GODFREY: No, Your Honor.

THE COURT: Thank you.

(Whereupon, the jury was dismissed at this time.)

THE COURT: Okay. You ready for sentencing?

SOLICITOR COLER: Yes, sir, I've got the sentencing sheets. Mr. Godfrey and his client may want to just look at those.

SOLICITOR COLER: May I approach, Your Honor?

THE COURT: You may.

All right. Mr. Godfrey, you and your client come forward, please.

Mr. Coler, you and Ms. Ganss.

MR. GODFREY: May it please the Court?

THE COURT: Yes, sir.

MR. GODFREY: We would respectfully move to have the verdict set aside, make a motion for a new trial based on the fact that the evidence does not support the verdict, and based on my objections and motions so far.

THE COURT: Thank you.

I think, in my view of the evidence, it was overwhelming against your client. I found that his, from my observation, looking at the credibility, et cetera, I just found his testimony was highly unbelievable and not credible at all, and I think the jury, I've watched them. They were very careful in observing all the witnesses, and obviously

it was for them to determine who they believed, and I certainly concur in their verdict if I were sitting in nonjury, and I find that there was ample evidence in the record, overwhelming evidence in the record to support the verdict, and I respectfully deny your motion.

And obviously you have a right to an appeal, Mr. Smith, and your lawyer will be able to discuss that matter with you.

All right. Any prior record, from the State?

SOLICITOR COLER: No, sir, no convictions that I can show the Court.

THE COURT: As I understand, the range of sentence, on the murder case, is anywhere from 30 to life without parole.

Is that your understanding, Mr. Godfrey?

MR. GODFREY: That is correct, judge.

THE COURT: Your understanding, Mr. Coler, Mr. Ganss?

SOLICITOR COLER: That's correct, Your Honor.

THE COURT: And on the possession of a weapon during a violent crime, that is a felony, class F also, carries five years.

SOLICITOR COLER: Yes, sir.

THE COURT: That can be given concurrent or it has to be consecutive?

SOLICITOR COLER: I believe it's consecutive.

MR. GODFREY: I think it---

THE COURT: I was under the impression it had to be consecutive too, but my little book doesn't say that.

MR. GODFREY: It can be either concurrent or consecutive at least is the defense's position.

THE COURT: Somebody hand me the statute. 23-3-620. I'm sorry. That's not correct. 490. 16-23-490.

SOLICITOR COLER: Judge, I believe Mr. Godfrey is, is correct. That can be consecutive or concurrent. I'll hand up the statute if you want to look at it.

THE COURT: Mr. Godfrey, you are correct.

Mr. Coler, anything else?

Ms. Ganss, anything else other than what we've already heard?

SOLICITOR COLER: No, sir, not from the State.

Judge, just for the record, I asked the victim's family if they had anything to add, and they indicate they did not have anything additional.

THE COURT: Okay. Is that correct, family?

(Family members respond in the affirmative.)

THE COURT: Thank you.

Mr. Godfrey.

MR. GODFREY: May it please the Court?

THE COURT: Certainly.

MR. GODFREY: David, as you, as you told from his direct testimony, has a very significant health condition.

He's had five bypasses. He's on medication constantly, will be for the rest of his life.

THE COURT: How old is he?

MR. GODFREY: He is 46 years old, Your Honor.

We would respectfully request that the Court consider the low end of the range as opposed to a life sentence. David has been in jail or in prison since 1997. Obviously, he'll get credit for that time, and his health is gone remarkably downhill since he's been in prison.

And his family and he are afraid that he's never gonna make it out of prison. This is a case, I think, that does have some extenuating circumstances. It wasn't just one person. There was two.

He understands the jury verdict and he accepts the jury verdict. And we would respectfully request the Court's mercy.

THE COURT: And I apologize, give me his age once again.

MR. GODFREY: Forty-six, Your Honor.

THE COURT: Mr. Godfrey, this is just a prime example of what drugs do to people like this. Here you got a man who has a good job, good trade, able to make a decent living, who's lured into the drug business because of his family and their problems, and he claims financial problems, which is absolutely no excuse to be dealing in drugs. Lured

into by another family here in town.

And then another man who wants to buy drugs and needs them so bad that he calls somebody up at two o'clock in the morning. And what we have left is obviously someone dead, a man, your client, who had the ability to lead a productive life, who is now killed someone, and his life is all but for -- just be the rest of it in prison, which is not productive at all.

And it's just a, an example of what drugs are doing to our society, and obviously if you choose to live in that world, you sort of have to -- you know, you live by the sword, you die by the sword. And society can not tolerate, shouldn't tolerate the drugs, but certainly shouldn't tolerate the consequences that flow from these types of activities.

And he certainly didn't seem very sorry or anything else when he took the stand today. It was sort of cavalier as to how he approached the thing, and it's just part of doing business. Go about my life.

I will take into consideration his health, his age, and I don't know if this sentence will send a message to other people in our area that are dealing in drugs, they may not go to jail for drug dealing, but if they get in a situation like this, and kill somebody, they may end up in jail for the rest of their lives.

And I've got to send some message. I don't know any other way to, to combat it. Just seems like it's a never ending problem that we experience, and we get people who is intelligent as your client is, and they choose to go down this path. I don't know any, any other way other than send a message that they can't do this.

All right. Mr. Smith, on Indictment 97-GS 42-1639, Count One, murder, the Sentence of the Court, you be committed to the State Department of Corrections for a determinate period of 35 years.

On the Count Two, that's five years. That runs concurrent with Count One.

As I understand this sentence, it's a day for day sentence. You've done about nine years of it. You got 25 more to go. Puts you at age around 70, 71, 72.

Good luck to you.

SOLICITOR COLER: Thank you, Your Honor.

SOLICITOR GANSS: Thank you, Your Honor.

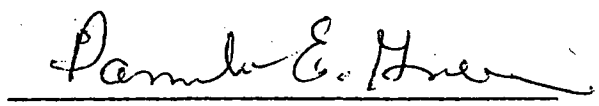
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

CERTIFICATE

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 31st day of October and the 1st day of November, 2005.

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

January 27th, 2006



PAMELA E. GREEN, Court Reporter

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

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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 (Ct. App. 2005). 331

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.

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 H. 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

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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

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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

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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. 347

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,

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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.

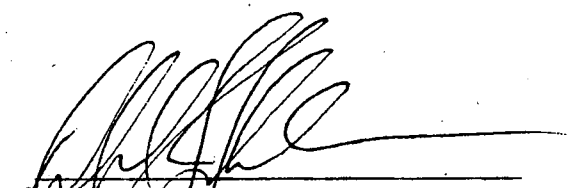
DAVID DWIGHT SMITH,

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

This 20th day of April, 2007.

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2008 WL 9840396
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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.

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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

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[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

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[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.

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Chief Deputy Attorney General

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(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,

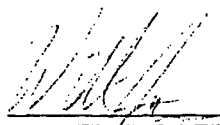
Appellant.

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

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April 4, 2008.

APPELLATE DEFENDER'S OFFICE
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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.

Joseph M. Anderson 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

368

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.

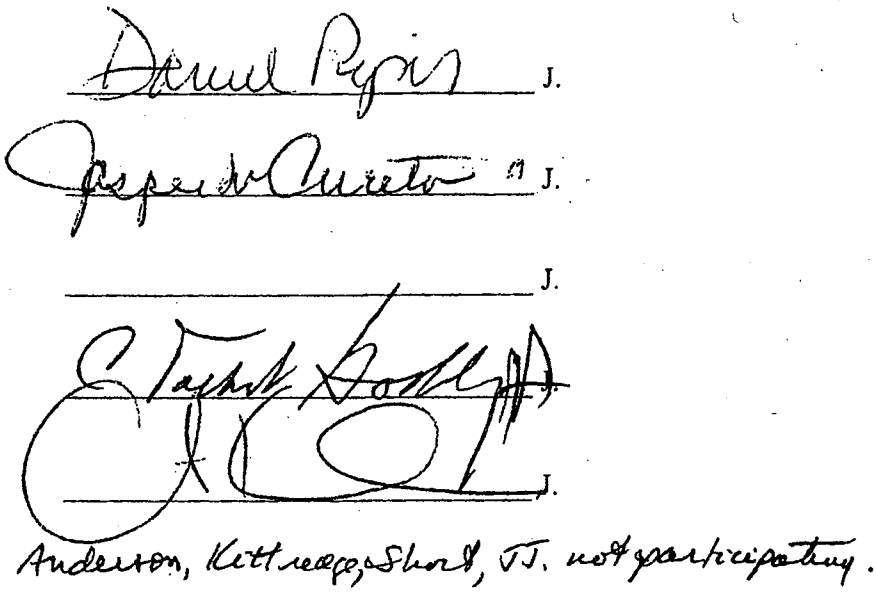
It is, therefore, ordered that the Petition for Rehearing En Banc be denied.

C. J.

J.

J.

J.



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

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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

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[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

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[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

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[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.

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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.

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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
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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

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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,

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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:

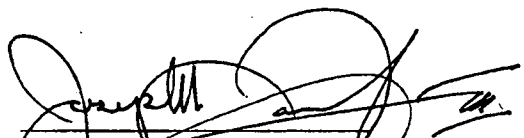
> Should this Court issue certiorari, it should resolve [this issue]. Alternately, should it reverse and vacate the decision of the Court of Appeals on the manslaughter issue, it may wish to remand to the Court of Appeals to address the remaining issues.

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.

404

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

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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

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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.**

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[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.**

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[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.

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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

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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
ATIVE 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.

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[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.

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[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.").

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ATTORNEY GENERAL'S OFFICE
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ADDITIONAL INSTRUCTIONS
3/2/11

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) _____

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SPARTANBURG COUNTY
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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

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

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CLERK OF COURT
GREENVILLE COUNTY
M. HOPE BLACKWELL

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.

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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 ALSO 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) " " " "

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SPARTANBURG COUNTY
2011 MAY 9 P 2:
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

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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.

David D. Smith

Sworn to and subscribed before me
This 10 day of March 20 11

Pamela Dugan McDowell

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.

David D. Smith
Applicant

FILED
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SPARTANBURG COUNTY
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[illegible] BLACKLEY

Sworn to and subscribed before me
This 10 day of March, 20 11

Pamela Dugan McDowell 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 KNOWLEDGEABLE 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

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M. HOPE BLAKELY

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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 **AMENDED POST-CONVICTION RELIEF APPLICATION**

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.

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SPARTANBURG COUNTY
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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;

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SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
J. 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.

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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.

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SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
M. HOLLEY-MCKINLEY

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.

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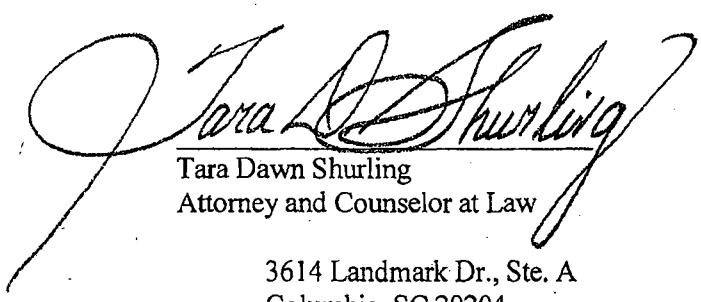
SPARTANBURG COUNTY
2015 MAR 19 AM 9:05
M. HOPE BLACKLEY

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

460

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,)	**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, 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
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(803) 738-8622
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ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 12th day of March, 2015.

Deryanne Graham (L.S.)
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My Commission Expires: 2/28/24

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 18 AM 9:05
H. HOPE BLACKLEY

462

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.

470

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 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.

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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.

This 9th day of June, 2015.

Columbia, SC

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M. HOE BLACKLEY

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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:

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Assistant Deputy Attorney General
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Tara Dawn Shurling
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(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

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

SPARTANBURG COUNTY
2015 JUN 11 AM 9:03
M. HOPE BLACKLEY

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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, 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:

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State of South Carolina
County of Spartanburg

In the Court of Common Pleas

David Dwight Smith,
Applicant,
-vs-
The State of South Carolina,
Respondent.

2011-CP-42-1283
June 11, 2015
Transcript of Record

B E F O R E:

The Honorable R. Scott Sprouse, Judge

A P P E A R A N C E S:

Tara D. Shurling, Esquire
Attorney for Applicant

Suzanne H. White, Esquire
Attorney for Respondent

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

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For the Respondent:

Marked	Description	I.D.	Admitted

None offered.

(WHEREUPON, court convened with all parties present and the following proceedings were had commencing at 10:43 a.m.)

MS. WHITE: Your Honor, we're before you on the case of David Dwight Smith versus the State, case number 2011-CP-42-1283. Mr. Smith is represented today by Ms. Tara Shurling.

I believe we have already given you a brief kind of procedural history, but just to put on the record, there was an indictment April of '97 for murder and possession of a weapon during a violent crime. An initial trial was overturned. We're here on the PCR on the second trial that was held November 1, 2005, where Mr. Smith was convicted and received concurrent sentences of 35 years for murder and five years for possession of a weapon.

He filed an application alleging ineffective assistance of counsel, ineffective assistance of appellate counsel, double jeopardy, Brady violation, abuse of discretion, and newly discovered evidence. And then once represented by counsel, we do have the most recent filed amendment dated day before yesterday, I guess, June 9th, I think, over above one that was filed in March as well that lists and details the allegations. I'm not going to, obviously, go through individually

listing those, but we do have those filed. At this point I'll turn it over to Ms. Shurling.

THE COURT: Ms. Shurling.

MS. SHURLING: Thank you, your Honor.

Your Honor, there was a previous amended application for post-conviction relief filed. What I have done is do a superseding amended post-conviction relief application so that we could have all of the six amended allegations set forth with specificity in the original amendment and the new ones numbered sequentially to avoid it getting confusing. Those were served on opposing counsel on the 9th; however, I didn't get to Spartanburg to physically file them until this morning, but they were filed along with certificates of service on opposing counsel.

I'm going to fill in, if I may briefly, just a couple of things in the procedural history of the case. Your Honor, I have copies of the unpublished opinion from the South Carolina Court of Appeals and the decision that followed in the Supreme Court of South Carolina. I don't know whether those were made part of your packet.

MS. WHITE: They are, your Honor. And I'm sorry I did skip over the appellate records, I'm sorry, but the appellate records and the briefs are part of your

Honor's packet.

MS. SHURLING: Since I made extra copies, your Honor, I'll approach and hand them so your law clerk will have his own copy of those opinions as well.

Essentially, your Honor, the point will become with regards to those, this case, if I'm not careful, can get terribly circular very quickly. But it in long run, the point that will be made that will harken back to the supreme court's decision is that some of the allegations here today go to allegations that trial counsel did not do as good a job as he should have of making a supporting record for a self-defense charge.

Now, at first blush, one would think, well, he got a self-defense instruction. So what. But the so what comes in the form of a footnote in the supreme court's opinion in which the supreme court noted that based on the record before it, they were unable to glean why self-defense was even charged. And so it all ties in, and I will do my best to tie it in in a clear and cogent manner as we proceed. But that's why those appellate decisions will become important as we go forward.

One of the things I wanted to flesh out a little bit concerned the post-conviction relief action that resulted in the grant of a new trial following

Mr. Smith's original trial. That post-conviction relief action was heard by then judge, now Justice Don Beatty here in Spartanburg. And in that case His Honor granted a new trial based on the failures of my client's original trial attorney, Tom Cox. And many of those -- not all, but many of them went to certain failures with regard to cross-examination of a key witness in the case, Mr. Hyder, Mr. Otis Hyder.

That becomes relevant as we go forward in this action, your Honor, because at the time of the second trial Mr. Hyder was represented by the parties to be an unavailable witness. And we'll get into a string of allegations that pertain to that as well.

I am going to proceed at this point with Mr. Godfrey as the applicant's first witness and ask that -- I assume he will be allowed to stay exactly where he is for the moment and we'll proceed.

Mr. Godfrey, do you recall --

THE COURT: Hold on, Ms. Shurling.

EVERETT P. GODFREY, JR.,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: State your name for the record.

THE WITNESS: Everett P. Godfrey, Jr., but everyone calls me Bill.

THE COURT: Thank you.

Ms. Shurling, your witness.

MS. SHURLING: Thank you. I apologize. I heard you being sworn in the previous hearing, and it just stuck in my brain.

Thank you, your Honor.

DIRECT EXAMINATION

BY MS. SHURLING:

Q And if I may call you Bill as well?

A Sure.

Q I appreciate that.

Mr. Godfrey, we really appreciate you being here. I know you're testifying under difficult circumstances, and we're most grateful.

You also represented Mr. Smith in the PCR action that resulted in him being granted a new trial by Justice Beatty, correct?

A Correct.

Q And were you court appointed in that matter or retained?

A You know, I honestly don't remember.

Q Doesn't really matter. I was just curious for the record. And then thereafter you represented him on the retrial?

A Right.

Q Have you been provided -- as a courtesy we sent

you a copy of the superseding amended application. We sent it through your wife since she has been representing you at some juncture concerning whether or not you were going to testify. Did you get a copy of that to look at?

A I looked at it briefly.

Q Okay. Do you have a copy with you?

A I --

Q Let me make it easy. How about I just hand you another one?

A That would be better.

Q Okay. We're going to try to follow right along on this the best we can. We may have to back up and go forward again a few times, but this will help us try to keep it organized. Okay?

Have you had a chance to read the 2005 trial transcript?

A I read that transcript a couple of years ago. My problem right now, based on the medication that I take, I cannot read. And I can read four or five pages and I go to sleep, which is one of the reasons I've suffered severe depression because I was a reader. I read from sunup to sundown. And now I sit on a porch and watch cars like a dog.

Q I'm very sorry to hear that, Mr. Godfrey.

A Yeah. I have read that transcript but it's some time ago.

Q Okay. Do you have a fairly clear recollection of your representation of Mr. Smith?

A This was a case from ten years ago. I've probably defended upwards of ten, probably no more than 15 murder cases since then including a capital resentencing trial on a capital PCR.

I remember, I think, critical parts about the trial, but it's not like a trial that I had two years ago where I can pull out a trial notebook and see everything that I did. So some things to me are clear and some things aren't. I'll just have to tell you what is and isn't.

Q Thank you. And please forgive me for this, Bill, but given the discussion that's gone back and forth about whether or not you were going to be able to be with us today, I feel, as an officer of the court, that I have to make a full record on this.

Are you currently today taking pain medications?

A I take -- yes. In fact, I brought my pain medication with me to take at lunchtime. I take Lyrica three times a day. I take diazepam three times a day. I take Cymbalta one time a day. And the other medications I take are for blood pressure.

Q Now, there's a JD after my name, not an MD, but are Lyrica and Cymbalta both in the class of drugs known as antidepressants?

A I don't know about Lyrica. But -- I don't know. The diazepam was given to me as a muscle relaxer. It was not given to me for depression, and it really works as a muscle relaxer. And when you take it, you go out. The Cymbalta, you know, clearly that's for the depression that I've had. And I honestly don't know about Lyrica. I never defended anybody that had Lyrica, so I don't know.

Q Yes, sir. Are those the only medications that you're currently taking?

A Yes.

Q And so you're not taking any -- well, what was the second one?

A Diazepam is a benzodiazepine.

Q So it is a narcotic?

A Now you're asking me something I don't really know. I mean, you'd need to -- all this drug stuff, I always had to get the drug book and look at it. I don't know. I can't tell you.

Q Okay. Bill, do you feel that you are able here today to follow my questions and answer them directly without any -- is your cognitive ability impaired to

any degree by the medications you're taking?
A I don't believe it is.
Q Okay.
A And if it's something that I don't remember, I'm just going to have to tell you I don't remember. If it's something that I think, I'll tell you it's what I think happened. If it's something that I absolutely know happened, I'll tell you.
Q I can't ask for more. Let's go on so we can try to get through this. But there's quite a lot I need to ask you about. Okay?
Let's start with the fact that you had two different trials here, one in '97 and one in 2005. You did not represent Mr. Smith in the 1997 case, but many of the witnesses who testified in 2005, or at least some of them, had also testified at the 1997 proceeding, correct?
A That's correct.
Q Is there any reason why you did not question various witnesses for the State concerning what, if any, favorable consideration they had either been led to believe they would get or had hopes of receiving in exchange for their testimony at the original trial?
A I didn't think of that.
Q And with regard to various persons who testified

at the 2005 proceeding, was there any particular reason why you did not question each of them with specificity concerning whether they had any hope for reward or gain in exchange for their testimony?

A Well, I didn't because I didn't see where the State could offer them anything. As I recall, and this -- my memory is and it's not clear. I don't have the NCICs with me anymore, but I don't think anybody had anything pending at that point in time that could be negotiated down. Now, you know, if you have an NCIC that shows it's different, I'm obviously wrong.

Q I'll clarify. Let me --

A But I don't remember anybody that could have received a benefit from the State at that time.

Q Well, let's go forward for a moment to the young lady who testified for the State in both proceedings, Angie. Remember Angie?

A Angie was the one that got the phone call and was with David, right, that went over there and originally went in with the drugs and then was sent out, if I remember correctly.

MS. SHURLING: If I might pause for just a second, with leave from the State to catch your Honor up, Angie's brother was a -- there was testimony that he was a drug dealer and that the victim had called the

brother, and the brother wasn't interested in messing with him at that hour of the night. And she overheard that there was this person wanting drugs, and she called Mr. Smith and then went with Mr. Smith over to the trailer where the incident occurred.

Q Now, your theory of the defense was what, sir?

A My theory of the defense was this: David didn't know who was in the trailer. The State wanted to say that David was over there arguing with the guy because he owed him money. He wanted his money. The so-called victim in this case -- and I'm sorry he is deceased -- but the victim in this case had made a statement that he was going to rob a drug dealer.

When Angie went in with the drugs, he wouldn't deal with her. He sent her out, and then David went in. And then when David got in there, it became clear to David that the guy was going to try to rob him.

Q If I can stop you right there. And we'll go through in more detail the evidence that existed to support the idea that this was a plan to rob Mr. Smith all along, correct?

A Right.

Q Did you ever consider the possibility that Angie, who had taken Mr. Smith over there, may have, in fact, been in on it herself, that she may have been part of

the plan to rob Mr. Smith?

A I did not go in that direction, no.

Q Is there any particular reason why you did not consider that?

A Well, based on the discovery, my conversations with David, it never really came up that she possibly could be involved with it.

Q Well, at the trial, the 2005 trial, didn't she claim that she did not know Otis Hyder, the older gentleman that owned the trailer where this happened?

A You know, if that's in the transcript, I will agree with it. I don't remember that.

Q Okay. And did you -- I assume you had discovery materials, some discovery materials. I know the amount of discovery that was obtained by previous counsel for the first trial was the subject of the PCR.

But prior to your jury trial with Mr. Smith in 2005, you had a complete set of discovery or what you believed to be a complete set of discovery from the State?

A That is correct.

Q And among the many things that you had would have been a copy of Angie's statement to law enforcement, correct?

A If you're telling me it was there, then I will

agree with you.

MS. SHURLING: A moment's indulgence, your Honor.

And, your Honor, for the record, one more thing. When I was hired in this case, as is my custom, one of the first things I did was contact trial counsel to attempt to obtain access to review his file in preparation of the post-conviction relief matter.

I was advised at that point that, unfortunately, poor Mr. Godfrey had suffered a plumbing disaster in the basement at his law firm that had resulted in a large number of his files, including this one, being destroyed.

So at that point I issued a subpoena to the solicitor's office and -- a moment's indulgence -- I'll introduce, your Honor, as Applicant's 1 a receipt from the office of Barry Barnette for 189 pages of discovery and the CD. And I will state as an officer of the court that the documents I am moving to introduce all came from those materials. To the extent anything is not something that was handed over directly in this package, I will identify it as such as the hearing progresses.

THE COURT: Is there any objection from the State?

MS. WHITE: No, there is not.

THE COURT: So noted.

MS. SHURLING: And I did, of course, make certain that Ms. White had a copy as well.

(WHEREUPON, Applicant's Exhibit Number 1 was marked for identification.)

(WHEREUPON, Applicant's Exhibit Number 1 was admitted into evidence.)

(WHEREUPON, Applicant's Exhibit Number 2 was marked for identification.)

BY MS. SHURLING:

Q I know that it's been a very long time since you have seen this, so I'm going to hand you --

Ms. White, you have your copy of Angie Smith's -- no relation, your Honor.

MS. WHITE: Yes. I'm going through and getting it online, yes.

BY MS. SHURLING:

Q I'm going to hand you a copy of a statement made by Angie Smith to law enforcement in this case.

Do you recall being given a copy of that?

A Unfortunately, it does not ring any bells with me. Most likely I had it, but I can't say for sure one hundred percent that I did. If it came out of the discovery, I'm assuming I did.

Q If I could get you to look down -- one, two, three, four, five, six, seven -- about eight and nine

lines down.

A Where are you?

Q On the typed version, Angela Denise Smith's statement.

A Okay. "On the way over, he said Robert owes $40"; is that what you're saying?

Q No, sir. I'm referring specifically to where she is describing that, "We left and drove to Robert's, across Textile Road, down Williams Street, crossed the wooden bridge."

A Okay. I went too far. Okay. Go ahead. I'm sorry.

Q You see me? Toward the end of that sentence she says, "We pulled up at Pops' trailer." Do you see that?

A Yes.

Q And isn't it true that it came out during the trial that Pops was the term of endearment that was used for this gentleman by people that knew him in the community?

A Talking about our blind eyewitness?

Q Your blind eyewitness.

A Yes. Otis Hyder.

Q Exactly, sir. And you remember it coming out, I believe even Judge Early says, "Pops, as we know him."

Do you remember that?

A Frankly, I don't.

Q Okay. Had you made note of this reference to pulling up at Pops' trailer, would you have used this portion of her statement to impeach her claim that she didn't know Otis Hyder?

A That would have been proper, yes.

Q Okay. What about --

MS. SHURLING: Oh, your Honor, I'm sorry. I move to introduce a copy of her statement as Applicant's 2.

MS. WHITE: No objection, your Honor. And the State would just stipulate to anything that Ms. Shurling has that was from the solicitor's file, we have a copy of, have reviewed it, and have no objection.

THE COURT: Okay. So noted. Admitted without objection.

(WHEREUPON, Applicant's Exhibit Number 2 was admitted into evidence.)

MS. SHURLING: As I said, I will very specifically draw your attention to anything I obtained any other way.

BY MS. SHURLING:

Q Well, Angie, Angela Denise Smith, ended up admitting in her trial testimony that after the

shooting, your client gave her a stash of cocaine that he needed to get rid of, didn't he -- didn't she?

A Yes, I remember that.

Q And then she went on to testify about how she gave that cocaine to someone else, correct?

A Yes.

Q Last time I checked, that's distribution, isn't it?

A It is.

Q So would that not have been something you would have wanted to question her concerning with regard to any potential benefit she had received in exchange for her testimony?

A There was no charges.

Q Well, isn't the fact that she had not been charged, despite admitting distributing crack cocaine, something that you would have wanted to point out in impeachment for the benefit of the jury?

A I should have.

Q Thank you.

Also, under what we all call the hand of one is the hand of all, people who engage in a plan to commit a crime are each jointly liable for the acts of each other that are the reasonable, foreseeable, either known or foreseeable consequences of the act they

agreed to participate in, correct?

A Correct.

Q Under that theory of accomplice liability, since Angie is the one that set up the drug deal with the victim and took David Smith over there, the State could have made an argument, could they not, that this was a killing that occurred in the course of a drug transaction and that, as such, she, as a knowing, admitted participant in the drug deal, could be found guilty for the victim's death under a theory of accomplice liability?

A They could have.

Q And you did not question her about the fact that she had escaped being named in any charges for murder, did you?

A That's right.

Q Should you have?

A I could have, yes.

Q So those were at least two opportunities to point out to the jury that she was not being charged with two very serious crimes, one of which carried 30 to life day for day?

A Right.

Q Okay. Moving along, you know the elephant in the room is Pops Hyder. Pops Hyder and what Tom Cox did or

didn't find out about with regard to the victim and Mr. Hyder were a big part of your PCR, correct?

A I missed one name in there. It was -- please say that again.

Q Mr. Hyder was the owner of the trailer, correct?

A Right.

Q And the victim claimed to have gone to this older gentleman's house at like 3:00 in the morning, 2:00 in the morning, just to use the telephone, right?

A Right.

Q In the post-conviction relief action, there was -- there was an extensive review and rulings made based on the fact that there were witnesses who said that the victim grabbed drugs from Mr. Smith, had planned to rob a drug dealer that night, and even one witness that said earlier that night he had confessed to trying to rob a different drug dealer, right?

A That's from the PCR that I did prior to this. The first two statements I clearly remember. The last statement that you made in that string of statements is likely true, but I can't tell you that I remember it exactly.

Q And I was trying to speed things up too much. Let me go back to doing this in baby steps. I'm sorry. I forget how long it's been since you have been deeply