

VOLUME IV of IV

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable Paul M. Burch, Circuit Court Judge

S.C. SUPREME COURT

ANDRE T. BOONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000943

APPENDIX

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1 willingness to fight.

2 And, ladies and gentlemen, I beg you look at
3 their actions prior to any fighting taking up, look
4 at their reasons for being there. Both these young
5 men, all three of these men wanted to fight. You
6 don't bring the gun to the fight, talk about how
7 you're going to shoot, flash the gun in people's
8 faces. The gangs don't come together because they
9 get along. It's all about who disrespected who and
10 who's going to show the other one.

11 A mutual intent and willingness to fight. This
12 intent may be shown by the acts and conduct of the
13 parties and the circumstances surrounding the
14 combat. In addition, it must be shown that both
15 sides in the conflict were armed with a deadly
16 weapon. And, ladies and gentlemen, bullets were
17 fired.

18 Now, you have heard how three people are
19 charged in this case. And the defense in their
20 opening argument talked to you about there's only
21 one dead person, thank goodness. Horrible for Brian
22 Wright and his family, I guess.

23 MR. SUTHERLAND: Objection, Your Honor, that's
24 inflammatory.

25 THE COURT: Disregard that statement, ladies

1 and gentlemen.

2 Go ahead, Solicitor.

3 MS. CAMPBELL: Proximate cause. And what is
4 proximate cause? The law recognizes that more than
5 one person can be responsible for the death of
6 another under differing theories, of which you have
7 heard many. A defendant cannot be convicted of
8 murder unless his acts were a proximate cause of the
9 death of the victim. Proximate cause is akin to
10 being a direct cause, a cause without which the
11 death would not have resulted.

12 The law recognizes there can be more than one
13 proximate cause of an injury or death. You can have
14 a situation where an act is the proximate cause, or,
15 perhaps better stated, the sole proximate cause of a
16 death, or you can have a situation where an act is a
17 proximate cause, in other words, a situation where
18 acts of malice by more than one person contribute to
19 each other and combine to proximately cause death.

20 In criminal law, proximate cause is a cause
21 which in the natural and continuing sequence of
22 events unbroken by an efficient intervening cause
23 produces the death and without which the death would
24 not have occurred.

25 Ladies and gentlemen, they've got a sign up

1 here, which they've put in, Captain Smith, the
2 nature of the room prevents the actual determination
3 of the murder weapon to ever be made; therefore, all
4 parties involved in the gun battle will be held
5 accountable for Wright's death. In instance (ph),
6 the gun battle itself and each contributor to that
7 gun battle killed the victim.

8 That's the law. Continuing sequence of events
9 unbroken by efficient intervening cause. In other
10 words, there's not a third person, another person
11 that came in and contributed to this. These three
12 people were in the shootout that night.

13 The intervening cause has to be independent of
14 that particular defendant's wrongful act. It has to
15 be an act that's adequate to bring about the death
16 on its own and it had to be an act that was not
17 foreseeable to that particular defendant. And I
18 submit, ladies and gentlemen, when people, young men
19 get together for purposes of fighting in gangs and
20 start spraying bullets across parking lots, whether
21 they meant to or not is not the issue.

22 However, an intervening act by another person
23 or another defendant that is simply a proximate
24 cause and merely joins with a particular defendant's
25 conduct to cause the victim's death will not break

1 the cause -- I submit, ladies and gentlemen, when
2 Tayson Boone started shooting, when Eugene Patterson
3 and Oliver Feldman went back to their car and got
4 their guns and started shooting, those acts combined
5 together as a proximate cause. Those three people
6 combined, from rival gangs, to cause the death of
7 Brian Wright and that is the law in our state.
8 Listen to the Judge.

9 You've also heard about transferred intent.
10 What is transferred intent? The Judge will explain
11 this a little more in depth than this right here.
12 If a defendant who has malice aforethought, and
13 remember all we have to prove is an unlawful killing
14 with malice aforethought, those are the elements of
15 murder, attempts to kill a person, and I submit,
16 ladies and gentlemen, that when you pick up a gun
17 and shoot at people, be it over their head, quote
18 unquote, or at them, and we know at least one of
19 Tayson's shots goes downward because it goes down to
20 that gas station, y'all were lucky enough to get to
21 go to the scene, or starts randomly and wildly, you
22 heard about all the malice inferences, shooting
23 anywhere, death is a probable consequence, but by
24 mistake or inaccuracy kills a different person, the
25 law considers that the defendant still had the

1 intent to kill.

2 Intent is a mental state, exists in the mind.

3 So if the State proves the defendant acting with
4 malice had the intent to kill one person and
5 mistakenly killed another, the intent to kill is
6 merely transferred from the original person the
7 defendant intended to kill than the actual person
8 killed.

9 Now, as the Judge will tell you we don't have
10 to prove the specific intent to kill. We have to
11 prove the specific act coupled with malice that
12 could cause the killing. And we went through those
13 inferences earlier. Although I submit, ladies and
14 gentlemen, what other intent did the shootout have?

15 Now, the Judge is going to tell you that there
16 are different types of evidence in this case, you
17 have both, direct and circumstantial evidence. What
18 is direct evidence? Generally, it's referred to as
19 eyewitness evidence, ladies and gentlemen.

20 In this case, you've heard from many
21 eyewitnesses at the scene. They haven't seen the
22 actual shooting itself, but they are very, very
23 important because they saw parts of what happened
24 that night. In addition to that, you actually have
25 statements from the defendants and what they

1 admitted to. Direct evidence is the type of
2 evidence that you get through your senses, what you
3 hear or feel or see or touch.

4 There's also circumstantial evidence. And what
5 is circumstantial evidence? The law will -- the
6 Judge will charge you, there's both direct evidence
7 and circumstantial evidence. Direct evidence is
8 testimony of a person who asserts or claims to have
9 actual knowledge of a fact, such as an eyewitness.

10 Circumstantial evidence is proof of a chain of
11 facts and circumstances indicating the existence of
12 a fact. So the fact that no one actually saw the
13 bullet enter the head of Brian Wright,
14 circumstantially it is reasonable to infer that one
15 of the bullets being fired that night caused his
16 death because there is no other evidence to the
17 contrary. That is circumstantial.

18 The law makes absolutely no distinction between
19 the weight or value to be given to either direct or
20 circumstantial evidence nor is a greater degree of
21 certainty required of circumstantial evidence than
22 of direct evidence. You should weigh all of the
23 evidence in the case. After weighing all of the
24 evidence, if you are not convinced of the guilt of
25 the defendant beyond a reasonable doubt, you must

1 find the defendant not guilty. If, on the other
2 hand, you are convinced of the defendant's guilt
3 beyond a reasonable doubt, then you must find him
4 guilty. That is what's circumstantial evidence.

5 The Judge will also charge you that you were
6 able to hear from some experts in this case. And
7 very simply, the law recognizes that lay people such
8 as myself aren't experts. I cannot come in here and
9 testify about what an expert is going to say or
10 about an opinion that I have, but if certain people
11 have certain training or a background in a certain
12 area, then they can be qualified as an expert and
13 come in here and give you opinions.

14 You heard from David Collins, he is an expert,
15 you heard from Zane Padgett, the crime scene expert,
16 things of that nature, they are qualified. However,
17 you judge their credibility the same way you judge
18 anyone else's.

19 Now, the Judge is also going to instruct you,
20 in this case, there was certain identifications
21 made. Now, identification procedures are not
22 necessary if a person knows someone, say, by name
23 and sight. In this case, you heard from many
24 witnesses who, say, the ones in the car with Tayson
25 that night. You also heard from witnesses, the ones

1 that were in the car with Eugene Patterson that
2 night. They know these people by name or sight.

3 However, if there's any question to identity,
4 sometimes the police show photo lineups. In
5 weighing whether or not a person had a reasonable
6 opportunity to identify someone if they didn't know
7 them, then you have to look at the procedures used
8 by the police to see if they were suggestive.

9 And I submit, ladies and gentlemen, in this
10 case, with these facts, some photo lineups are in
11 before you, there is no dispute as to the identity
12 of the shooters in this case, but the law will
13 instruct you, and listen to him about what he says
14 about whether or not a person was able to identify
15 someone, did they get a good look at them, were
16 there lights out there. And y'all were out there
17 last night and saw the lighting in that parking lot.

18 The other thing the Judge is going to instruct
19 you on is that before you can consider a defendant's
20 statement against him, and it's very important in
21 this case, you can only consider Andre Boone's
22 statement against Andre Boone. And in that same
23 fashion, you can only consider Eugene Patterson's
24 statements against Eugene Patterson. The Judge will
25 instruct you on that.

1 Before you can consider anyone's statements, we
2 have to prove that it was a voluntary statement.
3 The Judge will instruct you that if a person is not
4 in custody, it is not necessary for them to be given
5 the Miranda rights. As you can see with the first
6 statement of Eugene Patterson, he was merely brought
7 in and then he left that day. He was not in
8 custody. He was not under arrest. He was not
9 detained in any way and he was not read his rights
10 because of that. You just have to show that it was
11 a voluntary statement -- we have to show it was a
12 voluntary statement, but he doesn't have to get his
13 Miranda rights.

14 But as you will note and as the police should,
15 whenever they're going to question a suspect and
16 they detain him in any way, that they have to read
17 him his rights and the reason for that is because
18 the constitution is there to protect, as it should,
19 every defendant's rights before they take a
20 statement.

21 In this case, ladies and gentlemen, there is
22 absolutely no evidence that the police had any
23 misconduct. They jumped every hoop as they should
24 and be held to that level.

25 You have the advice of rights with the

1 statements that were given and then you have the
2 statements where the defendants themselves were
3 given the opportunity to say whatever they wanted to
4 say. And I'll talk to you about the statements in a
5 little while.

6 Before I go any further, murder, as I've
7 explained it and everything, as the Judge is going
8 to charge you, you are not going to hear him say
9 anything about premeditation. You are not even
10 going to hear him say that we have to prove motive.
11 He will not use those words. Although I submit we
12 have proven motive. This is a gang war. Those are
13 not necessary elements to murder, so listen
14 carefully to him as he charges you on the various
15 elements of the crime itself.

16 Now, the last thing I want to talk to you about
17 right now as far as the law goes is credibility. In
18 every case, it boils down to credibility. You heard
19 from the witnesses, some of whom got up here and
20 they told you forthright, yeah, I originally lied to
21 the police. Were they trying to protect someone?
22 Were they trying to not be involved? Were they
23 scared? There are different reasons.

24 Credibility, in doing that, the Judge will tell
25 you you can look at their demeanor on the stand,

1 were they forthright or hesitant, was their
2 testimony corroborated by other people, was their
3 testimony corroborated by the physical evidence. We
4 have brought some of these witnesses, we couldn't
5 get their statements, but you have their drawings
6 where they showed you the approximate areas where
7 they saw people shooting, who they saw shooting,
8 things of that nature.

9 Many of the people you heard from are members
10 of gangs. You must judge their credibility. And I
11 submit, ladies and gentlemen, in judging their
12 credibility, what do they have to gain or lose by
13 coming in here and saying that they saw Tayson Boone
14 shooting that night? What do they have to gain or
15 lose by saying what this man did?

16 They're going to talk about how you can't
17 believe Eugene -- excuse me -- Oliver Feldman.
18 Ladies and gentlemen, I submit Oliver Feldman's
19 testimony is totally corroborated. What does he
20 have to gain or lose? He's still charged with
21 murder and those other charges.

22 Yeah, he hopes the Judge will consider it one
23 day. What did he have to gain or lose when he
24 originally gave his statement back in February? Is
25 he credible? He even told you that, yeah, he

1 thought it was two different people because he saw
2 shooting from two different areas, one on one side
3 of the car and one on the other. That makes him
4 credible.

5 Each one of these witnesses, ladies and
6 gentlemen, there's no script that's rehearsed, or if
7 there is, you better be a suspect, each one talks
8 about the approximate area they saw. Do they think
9 it was five feet from the car, do they think it was
10 five feet from the building, do they think it was
11 closer over here.

12 The circumstances of that night were, to say
13 the least, chaotic. It's kind of like if two people
14 are standing on different corners at a red light,
15 one says the light was yellow, the other says the
16 light was red as the car actually passed them. No
17 one is up there telling them to lie. It's their
18 perception.

19 And, ladies and gentlemen, I submit to you what
20 makes these people believable is the fact that they
21 do not say exactly the same thing. Were their time
22 periods a little different? Did they put one person
23 a little more this way and a little more this way?
24 It's perception, that's what makes them believable.
25 Is their testimony corroborated by the physical

1 evidence at the scene?

2 All the State asks, ladies and gentlemen,
3 Tayson Boone, and he's young, Eugene Patterson, they
4 made choices, together with Oliver Feldman, that
5 cost 15-year-old Brian Wright his life. Malice and
6 an unlawful killing. All the State asks is that you
7 hold them responsible for their choices and what
8 they did. Thank you.

9 **THE COURT:** Thank you, Solicitor.

10 We'll take a five minute break, ladies and
11 gentlemen. I'll get you back out to hear the
12 closing argument of Mr. Sutherland. Don't discuss
13 the case.

14 (The jury retires to the jury room.)

15 **THE COURT:** Court's in recess for five minutes.

16 (Brief Recess.)

17 **THE COURT:** Mr. Sutherland, are you ready?

18 **MR. SUTHERLAND:** Yes, Your Honor.

19 **THE COURT:** Bring in the jury.

20 (The jury returns to the courtroom.)

21 **THE COURT:** Mr. Sutherland, you're recognized
22 for your closing argument.

23 **MR. SUTHERLAND:** Please the Court.

24 **THE COURT:** Yes, sir.

25 **MR. SUTHERLAND:** Ladies and gentlemen, good

1 morning -- or almost afternoon. I'm actually going
2 to use the boards that Ms. Campbell had -- well,
3 I'll just write the word up here and sort of a
4 mimeograph up here. I'm not going to write the
5 bazillion words that were underneath it.

6 And y'all recall in the beginning when I told
7 y'all exactly how this case was going to be. It's
8 sort of a shifting sayings approach or a wide net or
9 a dragnet, throw anything up against the wall, see
10 what sticks.

11 Did anybody hear her say the hand of one is the
12 hand of all? Weren't y'all told this is the theory
13 that we're proceeding under, the hand of one is the
14 hand of all that they were prosecuting these kids
15 under? I didn't hear anything about that and I
16 suspect you're not going to hear anything from the
17 Court during the instructions on the law either.

18 This is sort of where they have been funneled
19 to by the fact that they're throwing all these
20 theories up here and all of these different laws. I
21 mean, you saw all these boards that she had full of
22 all these words and she's telling you what this word
23 means and what that word means and, you know, that's
24 the Court's job, she did say that. She's up here
25 trying to weave all this stuff together into some

1 kind of blanket to throw over these kids. This is
2 where they're going, the chain of inferences, chain
3 of events, the Court is going to instruct you on
4 that and, you know, make your own decision.

5 They talk about, you know, there's a chain of
6 people, person A does something, then person B does
7 something, person C does something and person D and
8 since -- or person C does something. And since we
9 don't know if there's an E, F, G, H, I, J, K, L, M,
10 N, O, P involved, we're going to confine it to these
11 three, we're going to cut it a deal with this one
12 here and then we're going to say that these two are
13 responsible for a chain that we don't know the
14 length of it, we can't determine the final point of.
15 That's their proximate cause argument, just think
16 about it.

17 They say, well, you know, but for this, but for
18 that, now y'all have heard evidence, you're going to
19 receive a jury charge on self-defense. They can
20 come up here and they can make fun about it, but the
21 issue is with self-defense, is someone in imminent
22 danger, and I'm not even going to write that stuff
23 down, is someone in imminent danger when someone is
24 shooting at you or at your friends? Uh, yes. And
25 it's self-defense, defense of others.

1 The testimony that you heard from their
2 witnesses, and Ms. Campbell made the big deal
3 because I'm leading these witnesses. Well, guess
4 what, they are their witnesses. If they don't want
5 them to testify the way that they testify when I'm
6 cross-examining them, don't put them on the stand
7 because I'm not going to let them sit down until I
8 get the truth out of them. Their witnesses get up
9 here and their witnesses testify, and, okay, it's
10 like pulling teeth, but I get the answers out of
11 them. There is no way, I have personal knowledge,
12 but there is no way that he was discharging a
13 firearm, in what direction by the way, back corner
14 of the Waffle House and over where that Ford
15 Explorer thing was supposed to be, Brian Wright's
16 over here.

17 How many shots? They say two to three. How
18 many shell casings did they get? Two. They got the
19 one live round, one, two, that's it, there is no
20 three. You don't -- I think they actually left a
21 map up here.

22 **MS. CAMPBELL:** Your Honor, I don't believe
23 that's in evidence.

24 **MR. SUTHERLAND:** Y'all didn't introduce that?

25 **THE COURT:** What's the number on the back of

1 it?

2 MR. SUTHERLAND: It says 63 I.D.

3 COURT REPORTER: It's I.D.

4 THE COURT: Let me see it.

5 MR. SUTHERLAND: It was the drawing of Padgett.

6 THE COURT: Is there another version of that
7 somewhere?

8 MS. CAMPBELL: Yes, sir.

9 THE COURT: Is it in evidence?

10 MS. CAMPBELL: There's Bill Allen's, actually
11 it's --

12 MR. SUTHERLAND: I tell you what, I'll just
13 talk about it and just sort of point. I mean, y'all
14 have seen this and heard all of this stuff. But
15 sorry to disjoint that there for a second. And I'm
16 not going to spend a great deal of time on this
17 thing here.

18 Here's the Waffle House and all these parking
19 places, big 'ol Waffle House sign with these steel
20 beams supporting it, in between that a parking
21 place, one, two parking places, telephone pole and
22 this should shift down here a little bit. But the
23 point, you know, you heard testimony maybe the shots
24 were fired from in front of the door at the Waffle
25 House. Well, that's where the shell casings are

1 found, but Investigator Padgett says, you know, they
2 can go anywhere, get in people's hair or whatever.

3 Well, I mean, y'all know from looking at the
4 evidence, they found shell casings here, they traced
5 them back to this other stuff, they found shell
6 casings here, this is the area we're talking about.
7 But because there's testimony from one or the other
8 of these people, we'll talk about this area here,
9 too.

10 Now, the testimony is shooting in two different
11 directions towards the back corner of the Waffle
12 House. Their guy Feldman gets up here and changes
13 his testimony. And recall his response, I think Ms.
14 Campbell talked a little bit about that he was
15 honest, you know, he said he thought there were two
16 shooters and he decided there was one.

17 Well, he had the evidence in this case and he
18 read their reports and then he decided there were
19 two shooters. When he gave the statement to the
20 police, he said there were two shooters. There was
21 one guy here, one guy here. Whether it's his
22 running back and forth or whatever it is, it doesn't
23 really, through the purposes of, you know, what I'm
24 trying to demonstrate here, it doesn't really do
25 anything. I just feel like I need to talk about all

1 this stuff as we go along.

2 So we've got one here and here is this Ford
3 Explorer truck and we've got one there. Now, cut
4 this off, you can put it here, anywhere in this area
5 here. You've got one, two shell casings, one live
6 round. Shot one, back corner of the Waffle House.
7 Shot two at the truck. Is this projectile that they
8 recovered, and this is interesting, this is one of
9 their bullet fragments, one of their disintegrated
10 bullets, but that's a substantive portion of this
11 thing and that was nonsense anyway frankly.

12 Now, they recovered this here. Well, did that
13 belong to this firearm? Now, y'all know I can't
14 stand up here and say that because Investigator
15 Collins -- for whatever reason, they left this thing
16 I went through with Investigator Collins up here for
17 like five days where there's a .357, a .380 firearm,
18 a .38 Special and nine millimeter. And then there's
19 a group of the different makers, manufacturers,
20 under each one. There's a little plus sign out
21 there because we don't know what's in the FBI data
22 base. So at least 21 and certainly more than 21,
23 that's his testimony, 21 different firearms,
24 according to the science that's available, according
25 to the forensics that's available, 21 different

1 firearms could have fired this little bullet
2 fragment over here, which ain't so little.

3 But let's assume for their argument, I mean
4 y'all are going to go through all of these
5 scenarios, work through all this stuff, that well,
6 that kind of corresponds with what we heard. So
7 one, two, it was backed back in out of the front, we
8 get this projectile here. So we know the one shot,
9 again y'all know where I'm going, the one shot here
10 that they retrieved out of here, didn't turn around
11 and go that way. So that leaves this shot. Again,
12 two shell casings, two shots.

13 Now, you can take issue with their crime scene
14 involved where we know at least one, and I'm certain
15 more than one person, was in and out of there
16 without ever being written down. And, of course,
17 according to Investigator Smith, you know, we just
18 initialed the thing. They've got procedures written
19 on there for a reason. Why? The integrity of the
20 crime scene because you don't want these bullet
21 fragments, these projectiles disappearing or
22 disintegrating, however they may choose to put it.

23 So we eliminate this one, so it must have been
24 shot number two that came all the way back around
25 here and found poor Brian. It's nonsense for a

1 number of reasons, first of all, physics, second of
2 all, what kind of sense does it make.

3 Again, they're over here, they're these rotten
4 little gang bangers and they're just horrible human
5 beings and, you know, they have no souls or whatever
6 they're saying about them. But we know from the
7 testimony that people over here are friends,
8 associates from the neighborhood, a couple of
9 neighborhoods, and people over here are from the
10 other neighborhood.

11 Now, are there tensions between the
12 neighborhoods? It's been that way as long as I can
13 remember when I was a kid and kids come from across
14 the street and come through there, they're going to
15 get beat up or don't go in the other neighborhood.
16 I mean, it's been like that.

17 Now, again, there are firearms in this equation
18 and it blows my mind, but, again, there's no
19 distinction here between, you know, human history
20 and human nature. Your friends are over here, the
21 people you're trying to protect, that their
22 witnesses testified that he was trying to protect.
23 Now, remember they said once all of these people
24 were out of the way, they stopped shooting at the
25 car and left, okay. That's defense of others even

1 though the law doesn't require them to stop shooting
2 at that point.

3 But what kind of sense does it make, and we'll
4 take it from this position here, that well, there's
5 no third bullet that one of these -- well, let's say
6 I don't even -- what sense does it make for him to
7 turn around -- he's got a threat, the back corner of
8 the Waffle House down here, then he's got a threat
9 over here, why is he going to turn and fire in the
10 direction of his friends who are running for their
11 lives? Is he -- are these people -- they hate each
12 other they say. They despise each other, why would
13 he want to help the other people shoot his friends?

14 This is the kind of stuff that's been driving
15 me crazy about this case from the beginning. It's
16 nonsense.

17 They've known about these two shell casings.
18 They've known when people say, oh, two to three
19 shots, and with their science, they know it's two
20 and they know it was one here and it's one here, but
21 for the last 15 months, they've been calling him a
22 murderer and it's been getting under my skin ever
23 since as y'all can tell. I'm going to try and calm
24 down and get back to this world wind part one of Ms.
25 Campbell, who's very good, I have a lot of respect

1 for her. My late grandfather used to say something
2 about persuasive people. She'd sell milk to a cow,
3 okay.

4 Now, let's take it back here since there are
5 some statements saying, well he was at the back
6 corner, so obviously the State's theory, aha, then
7 he has a better shot over here at his friend, his
8 associate, his person from his neighborhood or his
9 fleeing friends because they're saying it was bad
10 aim or something, anyway. But if he's here, let's
11 see, back of the Waffle House, strikes the Explorer,
12 recovered a projectile, keeping in mind it could
13 have been 21 different kinds, but that's something,
14 you know, that -- actually that's some
15 circumstantial evidence for you to consider, you
16 know, they say he shot at this truck, they recovered
17 this in this truck. Well, okay, okay. Now -- and
18 you combine that with direct evidence that
19 somebody's saying that he was shooting at the truck,
20 but here we've got one, two, the shell casings are
21 still found up by the door here. Ah, so maybe
22 they're saying he actually turned and shot into his
23 fleeing friends rather than shooting up here at all.

24 The problem that they have with that is nobody
25 said that. Nobody says anything. And, you know,

1 this is about evidence. And y'all decide, you know,
2 you believe one thing like that kid Corey Sanders,
3 it appeared to me that he did not like Eugene. He
4 changed his statement. And Ms. Campbell was talking
5 about that, oh, he showed up waving a gun around.

6 Well, Corey Sanders told the officer, before he
7 knew that he was going to be charged with these
8 assault and battery with intent to kill whatever
9 (sic) and he was going to be needed, he can help
10 himself out by coming up here throwing him under the
11 bus in a murder trial, way back when, he gave a
12 statement and in the statement, he said he made a
13 gun gesture. But now, I think, he said it was a big
14 'ol high power whatever it was he said up there.

15 Well see that's part of his testimony. And I
16 mean, you can think about bias as it relates to each
17 and every part of everybody's testimony. He's here
18 to try and get himself out from under these serious
19 charges, what do they want, what do they need, what
20 in his mind would be helpful to them. You know,
21 it's a contradiction. At the time his statement was
22 taken initially, he wasn't charged with all of this
23 other serious stuff. And, again, you can even
24 disregard that without the gun gesture.

25 But I think the way, in this nebulous weave of

1 words and legal theories, I think she did work in
2 there somehow that he got there, she did, he got
3 there and he's waving this gun around or whatever
4 and that's unlawful she says. So since Corey
5 Sanders says that he was waving a gun from the
6 window of a car, you can infer that he's a murderer,
7 if you follow the zigzags, the ups and downs and the
8 throughs of their proximate causes and their hand of
9 one, the hand of all, which they've abandoned at
10 this point. I think I might have mentioned I
11 consider that changing the rules again.

12 Now, I actually should look at my notes at some
13 point because there's some stuff that I can't
14 forget. I mean, honestly, I was watching that, and
15 there's more to come, that opening presentation and
16 I was trying to figure out, I was asking myself what
17 am I seeing here, what am I seeing here. And it's
18 just this world wind of bits and pieces of this and
19 bits and pieces of a fact just coming together.
20 It's like a tornado coming through the courtroom.

21 You know, by the time -- I may perhaps think
22 something's improper like, oh, this is us against
23 them, the citizens of Richland County. No, no, no.
24 The Constitution of the United States is written for
25 us against them. It protects us from them. There's

1 none of this we stuff, okay. They're the
2 government, we are the people. All of our founding
3 documents indicate that. Our history indicates
4 that.

5 Fine and dandy, come on in, ladies and
6 gentlemen of the jury, come along with us. We, the
7 citizens of Richland County, are going to cast this
8 dragnet over these teenagers who are monsters that
9 everybody should hate and want to put in prison for
10 however long. No, they're separate and apart. They
11 are separate from us and we need protection from
12 them, otherwise what's the point of the
13 constitution, otherwise, why the break with anyone?

14 You know, why the Bill of Rights, why the right
15 to remain silent? Because they can't make us talk,
16 because people know throughout history, and it's
17 done today in places like Pakistan and all these
18 other countries over there, you get somebody in
19 custody and you keep them in there and eventually
20 they're going to tell you whatever they think you
21 want to hear, okay. That's an example.

22 The right to bear arms, the Second Amendment,
23 is that to protect us from each other? No. It's to
24 protect us from them and from foreign invasions. So
25 that made me a little upset.

1 Some of the other stuff they did, I did manage
2 to get in an objection. At one point, I thought
3 frankly was -- well, I didn't think it was right.
4 Now, this I was characterizing it as sort of a
5 tornado pulling in little bits and pieces of stuff.
6 And, you know, enough people's lives have been
7 ripped apart by this incident, you know. And so are
8 we going to say -- you know, because we think
9 there's something wrong with kids today, there's
10 something wrong with these teenagers. Well, I agree
11 that this gun business, I'll tell you it's the same
12 as it's always been.

13 I never got in any trouble in school. If we
14 got in a fist fight with another kid, they stuck us
15 in a room and they made us do math work, okay.
16 Today they arrest you for disturbing schools and,
17 you know, get DJJ involved and, you know, that's the
18 government's typical answer to every problem that we
19 have in this country is to go in there like a bull
20 elephant and stomp all over everything, stomp all
21 over these kids.

22 And by the way, if they're successful with this
23 net, with this mess, guess what, they've got a
24 template to where any time anybody says someone is
25 discharging a firearm at a scene like that where

1 there's a bunch of kids and somebody gets killed,
2 they'll get everybody. That's what this -- that's
3 what this has ultimately become about.

4 Now, you know poking fun at my characterization
5 of their meeting or whatever, they -- I'm -- either
6 Ellis or Smith, probably Smith, I mean I was upset
7 with myself because I wanted to go back and talk
8 about, well what did you swear to in front of the
9 magistrate. You know, if you don't know what these
10 words --

11 **MS. CAMPBELL:** Objection, Your Honor, as to
12 speculation on what he wanted to do. I think he's
13 got to stick to the facts.

14 **THE COURT:** Do you want to be heard?

15 **MR. SUTHERLAND:** Your Honor, I'm going to talk
16 about -- they actually heard me question Captain
17 Smith about it and then withdraw and say, that's
18 right, that was Ellis. So I mean I think if I
19 should just talk about what I wanted to ask or what
20 I did ask Captain Smith -- I'm not sure what their
21 objection is, sir, I'm sorry.

22 **THE COURT:** I think their objection is that you
23 want to talk about tactical decisions you made
24 during the trial or you want to inject your own
25 personal opinion in the thing.

1 MR. SUTHERLAND: Yes, sir. So I'll step off
2 that, Your Honor.

3 THE COURT: Okay. Thank you.

4 MR. SUTHERLAND: Thank you, sir.

5 All right. Well, I did ask Captain Smith about
6 some of the procedures. And I know that I asked
7 him, you all investigate crimes, you do reports, you
8 gather evidence and you go in front of a magistrate
9 judge and you swear out an affidavit and magistrate
10 reviews the facts in those affidavits and decides
11 whether or not there's probable cause. And remember
12 there were some things, I was all up, what's
13 probable cause, what's this, what's that.

14 And I mean, the point of it is, you know, from
15 the beginning of this thing, they just sort of threw
16 this all together and they're like, you know, we can
17 do this, we're the government, we'll have a meeting
18 and, you know, we'll figure this out. We'll come up
19 here with 10,000 words worth of this, that and the
20 other. And, you know, everybody's going to be sad
21 because of the tragedy and it will work out. And
22 we'll get all these convictions and, you know, the
23 media, the newspaper, the T.V.'s going to say, you
24 know, convicted, guilty of murder. And then they
25 can use it again and again and again.

1 What I told you in the beginning I believe with
2 all my heart, I believe it to this moment that this
3 is wrong that to cast this kind of net over people
4 that you don't know that they have been this
5 straight away in the beginning, we can't prove who
6 killed him, but we want you to guess that it was one
7 of these three. That -- I mean, I know I simplify
8 things, but that is what they're saying because this
9 thing that they're so proud of, talking about, oh,
10 the gun battle, the gun battle that walks, talks and
11 chews gum.

12 Here it is, that happened on the a.m. of March
13 1st, 2007, at approximately 0930 hours, I.O. What's
14 that? Investigating officer presented the case to
15 Solicitor Giese, the man, Deputy Solicitor Meadors,
16 also the man, and first assistant Ms. Campbell, I
17 respect her greatly and she's in her position of
18 authority for a reason because she's darn good at
19 this stuff.

20 After lengthy review and case analysis, it was
21 determined that probable cause existed to charge
22 anyone who was involved in the shootout at the
23 Waffle House with the murder of Brian Wright. The
24 P.C. was determined to be based on the concepts of
25 mutual combat, transferred intent. They forgot the

1 hand of one and inject it and now they back off of
2 that. The through and through nature of the wound
3 to Wright's head prevents the actual determination
4 as to the murder weapon ever to be made; therefore,
5 all parties involved in the gun battle are to be
6 held accountable.

7 That sounds good, holding people accountable
8 for something. You know, you've got to make sure
9 that somebody's done it. They say murder, you know,
10 make -- it's a good idea to know who did it. And
11 they can't come up here even at the end, because
12 they told you in the beginning, we don't know. We
13 think it was one of these three. We believe that it
14 was one of these three, you know, all of this
15 corroborating stuff. It could have been somebody
16 else. You know, what was it, people come up here,
17 at first, there's two shooters, then there's one
18 shooter, whatever it is.

19 And frankly there was talk of .357s that people
20 had and all this other kind of stuff. And I mean, I
21 think y'all have got a picture of the environment,
22 you know, I mean it's certainly not unreasonable to
23 believe that there were other firearms out there,
24 you know, other people were discharging firearms.
25 You know, they say, well tires come in and they pick

1 up shell casings and so forth and, you know, I don't
2 know, but I don't doubt that they did.

3 They didn't follow procedures with respect to
4 the crime scene and then they left it and the guy at
5 the gas station said, hey, there's a bullet hole in
6 my wall a few feet from where Brian was killed.
7 Now, we went out to the crime scene and y'all saw
8 this. They needed the guy from the gas station say,
9 you know, y'all might want to come out here and look
10 at this. I mean, we know they missed some shell
11 casings.

12 And I'm sure -- well, I guess Captain Smith was
13 sort of the cleanup hitter, cleanup batter. You
14 know, this meeting, I meet with them all the time.
15 I said, well, I know you meet them all the time
16 because you're here and I knew it would be you and I
17 know that we have a trial. I see you up here for
18 trials all the time. You know, okay, fine, paper
19 over that.

20 Crime scene log, well we can just initial it
21 even though we have orders to do otherwise. Leaving
22 a scene, well it was dark out there. It was dark
23 out there. Well, they said they stayed until
24 daylight. Well, you know what, you can stay longer.
25 You can look longer. How long is long enough,

1 especially with the way it turned out where they've
2 got three people that they can't prove killed
3 anybody, but they're calling them murderers?

4 I'm supposed to respond or answer or go
5 through, you know, this means this with respect to
6 self-defense, this means that. It's common sense
7 stuff. They say you have a duty to retreat. Can
8 you run faster than a bullet? No. Fair enough.

9 Take your personal experience, your common
10 sense, your life and define them to all this stuff,
11 all these -- and the instructions will come from the
12 Court not from Ms. Campbell and her things here,
13 again sort of like mixing all this stuff up, well
14 here's a fact, here's a fact, here's a piece of law,
15 here's a fact, here's a fact, here's a piece of law,
16 here's a piece of law. There you go, that's it,
17 they're murderers.

18 And they're going to come back and do it again
19 and maybe talk about some of this stuff, you know,
20 that I'm talk -- that will be fine, let them talk
21 about this mess. It's their mess. They can't clean
22 it up. They weren't able to clean it up with their
23 witnesses, their firearms expert, you know, I mean,
24 they had two, they had this Padgett guy who was just
25 up there and he doesn't want to give me anything.

1 Well, no, it can be consistent with this and ten
2 other things.

3 I mean, the one thing I liked about
4 Investigator Collins is, you know, they asked the
5 question of these people, they're like, yes, yes,
6 ma'am, it could be consistent with that. Well, the
7 one thing I liked about Investigator Collins, he was
8 like, yeah, it can be consistent with that. So it's
9 sort of the same answer. And that's another -- as
10 far as determining credibility of people, that's
11 called demeanor on the stand.

12 Now, they're all, the laboratory personnel,
13 their experts and everything from anthropology to
14 zoology, whatever they want to put up here, all of
15 these people are government agents. They all work
16 for them. I mean, they work in the chain of
17 command. They work in the executive branch,
18 whatever, law enforcement, underneath the
19 prosecutors, the executive branch of government,
20 okay. They all work together. They all work for
21 them.

22 Their interest in coming here as a whole and
23 individually is what? Success, conviction, close
24 the case, get the new theory out on the street and
25 start throwing them nets all over the place. We'll

1 get rid of these pesky little gang bangers, these
2 little monsters with this tool. All these people,
3 you know, they have an agenda, they have an
4 interest.

5 These kids, they got up here and testified that
6 with all these, you know, ABWIKs, this, that and the
7 other and drug charges, they have an interest,
8 they're scared because they're kids and they're
9 charged with serious crimes. And, you know what, if
10 they're guilty of them, they shouldn't have been
11 doing this stuff. And half of the stuff that
12 they're doing out there anyway is ridiculous. If I
13 would have been out at midnight when I was a kid, I
14 would have wanted to go to jail because my dad would
15 have killed me. You know, I mean, this is all stuff
16 they're not supposed to be doing.

17 But with respect to their credibility, again,
18 going back to Sanders, you know, pick the parts that
19 you believe or you can just throw it all out. You
20 know, I think the part that Sanders talked about
21 that was particularly interesting because it could
22 be of no use whatever to the State in as far as
23 throwing these kids under the bus, I mean, he
24 doesn't have, like Feldman, he doesn't have the
25 evidence, he doesn't have their reports, he doesn't

1 have their theories as they existed at the time that
2 the evidence was given to him. Obviously, it's
3 changed in the last eight days and several times
4 since then. But here, I've made quite a mess, he
5 said he heard shots coming from where, three areas,
6 you know, one, two, three.

7 Now, why would he say that? Could he know that
8 it might be helpful to these boys? Maybe he thought
9 it would be harmful. He figures three people been
10 charged, shot from three areas. No. He knows two
11 people were on trial here. He knows what he's here
12 to testify about. Over here at the Mobil station
13 right near where this poor kid was found he hears
14 shots. So then there's another shooter, maybe, and
15 Feldman's the other shooter. And all the people
16 that nobody gave statements to them said were
17 shooting, all the evidence that was lost, all the
18 revolvers like they say they don't, you know, shell
19 casings don't drop out of revolvers. Well, they
20 don't. My money says this projectile was that
21 projectile, but what if it wasn't, what if it was
22 one of these 21 other guns here.

23 You know, reasonable doubt, the Court is going
24 to instruct y'all on that. I like to say that you
25 can't be doubting for the sake of doubting, you have

1 to have a reason for it. Reasonable doubt, it's a
2 doubt you have a reason for. That's me. Y'all will
3 get the Court's instruction on the law of reasonable
4 doubt.

5 But I think the fact that to this point in time
6 that they don't know who did it, although they say
7 they know because three people that they know were
8 shooting so it must have been one of them, but they
9 can't tell you who did it, I would say a little
10 something about whether or not there's a reasonable
11 doubt. I mean, holy cow, you know, you don't know
12 who the murderer is so it's everybody.

13 It's like I said in the beginning, of course
14 it's more complex than that and it gets more complex
15 as we proceed through the months and as we proceed
16 through the trial, as they change their theories in
17 mid-trial.

18 I guess the decision is, is it okay, is it okay
19 because these little monsters -- well, they're
20 American citizens and, you know, maybe whether
21 they're little gang bangers and, you know, mean or
22 confused or stupid or smoking dope or whatever, you
23 know, they're American citizens and they have that
24 much in common with us. And do we want to give the
25 government the power to come in here and make stuff

1 up and throw out nets and put our fellow citizens
2 away?

3 It's tragic. It is a profound, profound
4 tragedy. And this cannot -- this is not justice.
5 This is not -- this is not justice. This is not
6 finding out who did this and making them -- and
7 holding them accountable for it. This is not who we
8 are.

9 Some times in the past with respect to certain
10 groups of people, you know, it's been unfair, it's
11 been messed up, but we're evolving and we're rising
12 to meet these principles that bind us as fellow
13 citizens and we can't give an inch back to them. If
14 you give them an inch, they'll take a mile.

15 The income tax was one percent, what was it, in
16 1919. It was up to, what, in 1980 --

17 MS. CAMPBELL: Objection, Your Honor.

18 THE COURT: What are you arguing now? About
19 the income taxes?

20 MR. SUTHERLAND: Well, give them an inch, take
21 a mile. I was using the income tax as an example.

22 THE COURT: Your objection is?

23 MS. CAMPBELL: Relevance.

24 THE COURT: You can't make us against them
25 arguments. Your objection's sustained.

1 MR. SUTHERLAND: Yes, sir.

2 Okay. Well, I think I should grab my note pad
3 and I should look because the last thing I want to
4 do is get over there and say to myself, idiot, you
5 forgot that, you know, whatever it is. And I
6 already know from having this in my hands sort of
7 through osmosis, transferred intent, transferred
8 intent. They say you take a shot at a particular
9 person, you miss, you hit another person. The
10 intent is reasonable, if you intend to kill someone
11 and you miss, it's fair that your intent to kill
12 that person transfers to the next person over. Does
13 it transfer to the person over here? Is it really a
14 magic bullet?

15 Oh, maybe they didn't find more -- there were
16 more shell casings that they didn't find. No, you
17 know, this is their evidence and the doubts are
18 resolved in favor of the citizen on trial. They say
19 two to three shots. They're stuck with two.
20 They've got two shell casings, one, two. No magic
21 bullet.

22 Who could he have possibly been shooting at
23 over here in the direction in which his friends are
24 fleeing, who? And nobody's ever said that, but
25 because of the -- but because of the theory, I have

1 to sit up here and say, well, you know, the bullet
2 could have gone around here and he could have turned
3 around and start shooting at friends. I'm forced to
4 go through this stuff.

5 Also, with transferred intent, if you're going
6 to have malice, you're going to have malice toward
7 someone, they need to be identifiable because you
8 have to connect that malice, it's like a spotlight,
9 from a person to the person that -- they're intended
10 target. And when that spotlight is over here and
11 hits another person, that's transferred intent.

12 Now, if they don't know where that spotlight is
13 shining, they can't argue transferred intent. Who's
14 the target? Are they going to say it's the people
15 back here? Then fine. Then it's impossible, case
16 closed.

17 Y'all went to the crime scene. I think I might
18 have mentioned it's interesting with respect to
19 these parking places. If you noticed the Mobil
20 station, I've been there six or seven times, I guess
21 about three to five feet below the ground level down
22 there when you're standing in front of the store, so
23 when you come up that hill, y'all were there, you
24 remember it, you hit these parking places here three
25 to five feet, y'all can make that judgment. You put

1 cars in the parking spaces, you put in steel support
2 beams on either side of one car, you put the
3 telephone pole here, pack, Ms. Campbell's own words,
4 the place was packed with cars, trick shot, you
5 can't make that shot. It's a wall of vehicles,
6 steel, wood and because of the difference in the
7 elevation where it's five feet lower down here, if
8 they had the tiniest little car up here, the thing
9 would have been eight, nine, ten feet tall if it had
10 been in the Mobil station. You see what I'm saying
11 about obstruction -- about the obstruction? It's
12 hard to somehow leaning around or get him up on some
13 sort of ladder or something, again impossible,
14 impossible.

15 Okay. Dr. Nichols got into this somewhat,
16 their firearms, their ballistics expert, Mr.
17 Collins, characterize him as the most failure in the
18 balance of their government agent witnesses, Ms.
19 Campbell goes up to them and she's trying to take
20 this away from Feldman, you know, oh, it couldn't
21 have possibly happened -- well, no. Then she says,
22 well let me make sure -- well, actually, I mean,
23 y'all are going to remember it because you can
24 actually view the testimony if there's any sort of
25 dispute between what I say and what these people

1 say, y'all can just review the testimony.

2 She comes up here and she's like, I'm going to
3 have to prepare for this a little bit, she's like,
4 but a .380 could have produced this through and
5 through wound. Investigator Collins, well I've seen
6 it happen. She follows and, you know, there's a lot
7 of calculation involved in this business, so she
8 asked him again. His answer, it's possible, it's
9 possible. They're the scientists. They're the
10 witness. I've seen it happen. It's possible.

11 All of this stuff, review it and use your
12 judgment. I mean, I think transferred intent -- I
13 mean, the self-defense claims, defense of others, go
14 through those instructions and, you know, apply the
15 facts to what their witnesses say. They wouldn't
16 have returned fire if they weren't fired upon,
17 that's self-defense. You can break it down into the
18 little four categories they got there, you ain't
19 running anywhere from a bullet. Are you without
20 fault?

21 Very little -- her -- she -- this was
22 interesting, I think I brought this up a little bit.
23 He actually was, he can't claim self-defense because
24 Corey Sanders says he was waving a big 'ol high
25 power something or other out the window instead of

1 doing like this (indicating). So he's at fault for
2 something earlier, then you need to be taking that
3 as true, well it's all his fault.

4 They're all in this together because they're
5 all a bunch of rotten kids and we can do whatever we
6 want with them. It's self-defense and a complete
7 defense. They have to affirmatively disprove
8 self-defense. So in addition to proving the
9 tornado, they have to disprove self-defense, so
10 there's another hurdle for them to jump. And I'm
11 sure you'll hear all kinds of stuff about how they
12 did it in not too long.

13 And that's everything I got, ladies and
14 gentlemen. I mean, no need to talk about hand of
15 one since it's disintegrated along with the
16 projectile like a lot of other stuff these people
17 were throwing up against the wall. Use your common
18 sense, use your judgment. And believe me, from the
19 bottom of my heart, this is wrong. Please do not
20 find Eugene Patterson guilty of murder. He killed
21 no one, no one. Seventeen years old.

22 Some of these kids are -- I can congratulate
23 Derrick Guilyard, yeah, good job, buddy, you know,
24 getting a job, 17 years old, he's staying employed,
25 that's something, that's progress, that's moving

1 forward.

2 He's not a murderer, don't buy into it. And,
3 you know, thanks so much for your attention, your
4 consideration. I mean, this has been a long, long
5 trial. And everybody at the crime scene about
6 observations and everything, thank you. Thank you
7 for your consideration. Thanks.

8 **THE COURT:** Thank you very much, Mr.
9 Sutherland.

10 Ladies and gentlemen, we'll take another five
11 minute break. I'll get you back out here. Don't
12 discuss the case

13 (The jury retires to the jury room.)

14 **THE COURT:** We're at ease for five minutes.

15 (Brief Recess.)

16 **THE COURT:** Ms. Everhart, you're real soft
17 spoken, please keep your voice up, okay.

18 **MS. EVERHART:** Yes, Your Honor.

19 **THE COURT:** Bring the jury in.

20 (The jury returns to the courtroom.)

21 **THE COURT:** Ms. Everhart, you're recognized for
22 your closing argument.

23 **MS. EVERHART:** Thank you, Your Honor.

24 One bullet, one victim, one murder, three
25 people arrested, three people indicted, two people

1 on trial. The State is right, someone murdered
2 Brian Wright that night. The State is also right
3 that someone should be held accountable, but that
4 someone should be the person who shot and killed
5 Brian Wright and that is not Mr. Boone.

6 Now, you've heard from a lot of different
7 witnesses this week. You've heard from multiple
8 officers. You've heard from officers who came to
9 the scene initially. You've heard from crime scene
10 investigators and you've heard from the lead
11 detectives on these cases. And we've learned a
12 variety of things.

13 We have learned that they never recovered a
14 bullet either from Brian Wright or from the crime
15 scene. We have learned that they have absolutely no
16 idea what kind of gun shot this bullet. We have
17 learned they have no idea who shot the gun that
18 killed Brian Wright.

19 We have learned that Eugene Patterson and Andre
20 Boone don't know each other. They never met before
21 that night. They had no plan to get together and
22 come to this Waffle House.

23 We have learned that some guns do not expel
24 bullet casings. We have learned that .357s are more
25 powerful than .32s. And two witnesses put a .357 in

1 Oliver Feldman's hands. We learned that a bullet
2 was removed from Mr. Boone's vehicle that could be
3 part of a bullet from a .357.

4 Now, there is no doubt the police worked hard
5 on this case. This case was difficult for them.
6 This crime occurred at night. There may have been
7 some witnesses who were there that were reluctant to
8 speak to the police and there was no bullet. Even
9 though the police worked hard on this case, there
10 were some things they may have neglected to do and
11 there were some things they may not have been able
12 to do.

13 We learned, over the course of this trial, that
14 the very night of the incident they were able to
15 recover four different bullet casings from the
16 scene. Two of those were .380s and two of those
17 were from a nine millimeter. They also recovered
18 one live bullet.

19 You heard testimony, however, that the police
20 did not return to that scene for three days, three
21 whole days. David Collins took the stand this week
22 and he told you that bullet casings can be easily
23 moved around. They can get caught up in the grooves
24 of your shoes and your boots. They can get caught
25 in tires.

1 How many people walked through the Waffle House
2 parking lot over those three days? How many people
3 drove through the parking lot there or at the Mobil
4 Gas Station? There were a lot of shots that night.
5 Could there have been other bullet casings at this
6 scene from different guns? We'll never know. \

7 The police told you that they talked to
8 numerous eyewitnesses in this case. Matt Ellis took
9 the stand and he said that there were people there
10 that night that they didn't speak with. He let you
11 know that some of these people were uncooperative
12 and didn't want to talk to the sheriff's department.
13 We also heard that there were numerous people they
14 interviewed and they got statements from that did
15 not come up here and testify this week. He let us
16 know that these people didn't want to be here and
17 that's why they weren't.

18 Well, with all due respect, the people
19 investigating this crime were the sheriff's
20 department. If they wanted to bring someone into
21 court, they could have. If they wanted to talk to
22 them about what they saw that night, they could have
23 done it.

24 Captain Stan Smith took the stand this week and
25 he told y'all that they have no idea what Brian

1 Wright was doing that night at the Waffle House. He
2 speculated that perhaps Brian Wright was out
3 watching the fight right up in it, that two shots
4 rang out and that Brain started running from that
5 point and he was caught in the cross fire and then
6 he proceeded through the Waffle House parking lot
7 into the Mobil Gas Station 20 feet before falling
8 from the through and through head wound. There is
9 absolutely no evidence that was presented that goes
10 along with this theory.

11 We do know that Brian Wright was found with
12 change in his pocket and a bag of peach ring candy
13 in his hand. It would make sense that he entered
14 the Mobil Gas Station after they arrived on the
15 scene. How long was he in there? Did he walk up
16 and down the candy aisles thinking about what he
17 wanted to buy? Did he go into the bathroom? When
18 he came out, was that before or after the fight
19 between Corey and Chad? Was it before or after the
20 gunshots?

21 You heard from Corey Sanders. Corey told you
22 he knew Brian Wright. He told you he didn't see
23 Brian Wright out there. And that after the initial
24 shots, he ran through the Mobil Gas Station parking
25 lot and he didn't see Brian Wright laying on the

1 ground.

2 Chad Robinson took the stand, he was right up
3 in that fight. He says there were two shots that
4 were fired and everyone ran and he ran all the way
5 from the Waffle House through the Mobil parking lot
6 to the far end to Randy's Trailblazer and he did not
7 see Brian Wright.

8 Karmindae Leggett also testified this week and
9 he knew Brian. He didn't see him there either.

10 Additionally, we learned from the police that
11 there may have been more people with weapons that
12 night at the Waffle House. They did not follow up
13 on all these leads.

14 Also, this week the police did not put up a CSI
15 expert to talk about blood stains. You did hear
16 from Don Girndt and he told you that he looked at
17 the crime scene photographs and there was not a lot
18 of blood spatter on the ground. This was a through
19 and through head wound. Clay Nichols told you that
20 that kind of wound would bleed and it could bleed
21 profusely. There was not substantial blood on the
22 ground and not a blood trail.

23 Now, in addition, to all of the officers you
24 heard from, you heard from other eyewitnesses.
25 Thirteen different people who were there that night

1 took the stand this week, including Mr. Boone. You
2 also heard what Eugene Patterson experienced that
3 night because Investigator Roe got up here and told
4 you what he learned from him. Through these
5 eyewitnesss, you learned that there were multiple
6 guns at the Waffle House that night.

7 Corey Sanders said that he heard shots coming
8 from three distinct areas, the back of the Waffle
9 House parking lot, the front of the Waffle House
10 parking lot and all the way over at the Mobil Gas
11 Station.

12 Chad Robinson testified that Rob Portee was up
13 in the fight with him and reached into his pants.
14 What was he reaching for? Could it have been a gun?
15 Possibly. He called the police several hours later
16 because people were blaming him for being involved
17 in the shooting and shooting a gun that night. The
18 police did do a gunshot residue test on him. Could
19 he have washed his hands before?

20 Both Quintez Clemons and Samuel Clemons told
21 you that they saw a .357 in Oliver Feldman's lap
22 when that car came riding through. Quintez said he
23 may have seen another gun as well. That's two more
24 guns that could have been out there, one a .357.

25 You also heard from Karmindae Leggett. He

1 testified that he thought there might have been two
2 shooters at the back of the Waffle House. And he
3 knew there were a lot of shots out there that night.

4 Oliver Feldman took the stand, too. And he
5 admitted to you that the first time he talked to the
6 police 12 days after this occurred, he told the
7 police there were two different individuals at the
8 back of the Waffle House, one who shot up into the
9 air and another one who was standing five feet from
10 the back of the Waffle House, this was the person he
11 was exchanging fire with.

12 Now, granted when he took the stand, he changed
13 his story and said, no, it was probably just one
14 person back there, but Oliver Feldman was charged
15 with this murder and he is not on trial this week.
16 He told you that he hopes if Eugene Patterson and
17 Andre Boone are convicted of this crime, he won't
18 be. He has a motive to change his story.

19 We also learned from witnesses who took the
20 stand that there was a party that night out at the
21 Windsor Lakes Clubhouse and that this party was
22 broken up by a gunshot from Byron Morant. We
23 learned Byron Morant was also at the Waffle House
24 that night. Where was he? What was he doing?
25 Could he have been this guy at the back of the

1 Waffle House that Karmindae and Oliver saw?

2 We have multiple eyewitnesses who put Andre
3 Boone as firing twice into the air. We have
4 eyewitnesses who say that after those initial shots,
5 he ran around to the back of his vehicle, which was
6 pulled in backwards. Karleisa Brabham took the
7 stand and she told you he even bumped into her black
8 Cadillac as he was going back there.

9 That night that parking lot was packed. There
10 were tons of teenagers in tons of cars. Andre Boone
11 bent down behind his vehicle and he shot after the
12 shots were fired at him toward the direction of Two
13 Notch Road over the heads of the two men firing at
14 him.

15 We also heard from eyewitnesses that once those
16 first two initial shots were fired by Mr. Boone,
17 everyone scattered. Chad Robinson told you that he
18 was right up in that fight, he heard the shots and
19 everyone took off running. Even Oliver Feldman said
20 after those first two shots went up into the air,
21 that by the time he pointed his weapon to the back
22 of the Waffle House, there was no one in that cross
23 fire.

24 In addition to all of these witnesses, you got
25 to hear from Andre Boone. Andre Boone was 16 years

1 old the night this happened, 10th grader. He told
2 you he went out that night to go to a party, didn't
3 get to go to that party so he drove around with his
4 friends and stopped at a Waffle House. Yes, he
5 learned that Dameon Dowling, the guy he had fought
6 with before at the Main Event Club, was out that
7 night and he thought about fighting him and they
8 picked a couple of different spots, but this fight
9 never happened.

10 Andre, determined that it wasn't going to
11 happen at all, so when his girlfriend, Doneisha
12 Smallwood, called him up, he agreed to meet her at
13 this Waffle House. Andre Boone did not go to this
14 Waffle House to fight. He did not bring a gun to
15 this Waffle House. He gets out, he goes in and
16 talks to his girlfriend and they come back out of
17 the restaurant. His friend, Jerome Thompson, does
18 have a gun, a gun he didn't know about until they
19 got to this Waffle House that night.

20 While he's talking with his girlfriend, this
21 fist fight breaks out between Corey and Chad and
22 other people jump in. He sees Dameon Dowling down
23 there, so he decides he's going to go down there and
24 join in as well, but before he can get to this
25 fight, before he can even throw a punch, a

1 23-year-old man named Oliver Feldman flashes his gun
2 at him and threatens to kill him. He did the only
3 thing he could think to do to protect himself and to
4 protect his friends and that was run back to that
5 car and grab that gun from Jerome Thompson and fire
6 into the air.

7 He didn't want to kill anyone. He didn't want
8 to hit anyone. He didn't have any kind of intent.
9 All he wanted to do was make everyone disperse
10 because he didn't want Oliver Feldman to shoot
11 someone.

12 At that point, he ran to the back of his car
13 because he saw them pointing weapons at him and when
14 they fired, he fired back, but he did not fire at
15 them, he fired over their heads. Andre Boone did
16 not know Oliver Feldman and he did not know Eugene
17 Patterson. He did not intend to kill them. He
18 wanted to protect himself. He wanted to protect his
19 friends. As soon as he emptied his gun, he jumped
20 in the vehicle and drove his friends out of there.

21 You learn later that the police came to his
22 house with a search warrant and he was helpful with
23 them. He took them to this old broken .22 they had
24 in the house and he showed it to them. Later, while
25 he was talking with the police, he told me them that

1 he had shot the nine millimeter before out at Meadow
2 Lakes at a dead end near the woods and he took them
3 out there and they searched around until they found
4 these bullets.

5 He admitted, after being confronted, that there
6 had been a story about a .22 that Derrick Guilyard
7 made up and he went along with and that wasn't the
8 case. It was a nine millimeter belonged to Jerome
9 Thompson, but Andre told them he used it.

10 In his statement, Andre Boone indicated he was
11 in a gang, but he told you on the stand he was not
12 in a gang, that he had told that to the police over
13 and over, but they didn't believe him. And they
14 kept accusing him of being in a gang and he was
15 scared, someone had died at the Waffle House, he
16 wanted to tell his story. So, finally, he told the
17 police what they wanted to hear that he was in a
18 gang. He said it was the Bloods and he was a TTP.
19 Corey Sanders used to be a TTP and he took the stand
20 and said Andre Boone wasn't in his sect, wasn't in
21 his gang.

22 A lot of these gang references are irrelevant
23 because ultimately this fight was about what
24 occurred between Chad and Corey at a basketball
25 game. It was a dispute over one of them tripping

1 the other. They wanted to beat each other up over a
2 fight at a basketball game.

3 In addition to hearing from Andre Boone, you
4 heard from another witness this week, but this was a
5 silent witness, and that's the crime scene. This
6 witness has no motive to lie. This witness has no
7 bias. It is what it is. It is silent, but it
8 speaks volumes.

9 Part of this crime scene were the shell
10 casings. You heard testimony this week that three
11 nine millimeter shell casings were found over in the
12 grassy area at the back of the Waffle House. You
13 had the opportunity to go out and walk around this
14 crime scene and walk to the area where these bullets
15 and shell casings were found.

16 Don Girndt took the stand this week and he
17 testified that he had the opportunity to review
18 photographs of these shell casings and to visit the
19 scene himself. And in his expert opinion, Andre
20 Boone would not have been able to fire the shot that
21 killed Brian Wright from this vantage point. For
22 Andre Boone to have shot and killed Brian Wright
23 from this position, he would have had to shoot
24 through a wall, which did not occur, or his bullet
25 would have had to turn a 90 degree angle.

1 You also got to hear about blood stains. This
2 is part of the silent witness, the crime scene. The
3 blood spatter on the ground was minimal. There was
4 no blood trail leading in to the gas station parking
5 lot. You learned that this was a through and
6 through wound that would have bled heavily.

7 Brian Wright himself is also a part of this
8 crime scene. His body fell with the momentum of the
9 bullet. It fell with his feet diagonal toward the
10 Waffle House.

11 You have heard numerous theories this week
12 about the law and about this case. In their
13 opening, the State told you they arrested Andre
14 Boone and Eugene Patterson using the concepts of
15 mutual combat and transferred intent and also a
16 concept known as hand of one, hand of all. These
17 theories do not work.

18 Mutual combat by it's very title requires that
19 the combat be mutual, two people need to agree to
20 enter into a fight with weapons. That did not occur
21 in this case. Additionally, the person who ended up
22 getting shot was not involved in that fight.

23 With transferred intent, that's when one
24 person, person A, decides they want to kill person B
25 and by accident, they hit person C. In order to

1 prove this, the State has to show that Andre Boone
2 had an intent to kill either Eugene Patterson or
3 Oliver Feldman and that he ended up killing Brian
4 Wright. In order to have intent to kill, there
5 needs to be malice. There is no malice in this
6 case. There is only fear when he fired into the air
7 and then fired over their heads.

8 Additionally, there is no evidence that he shot
9 Brian Wright. They never removed a bullet. They
10 never found one.

11 The other theory they introduced in opening was
12 the hand of one, hand of all. This theory doesn't
13 work either because for hand of one, hand of all,
14 you have to have people who know each other who
15 enter together in a common scheme or plan to commit
16 some kind of crime. Obviously, Andre Boone and
17 Eugene Patterson don't know each other.

18 And today Ms. Campbell discussed a couple of
19 other legal theories. One of the things she talked
20 about was malice and that malice can be expressed or
21 implied. She referred to Rob Portee who took the
22 stand this week. Rob Portee testified that that
23 night at the Waffle House Andre Boone came up to me
24 and told him that he wanted to chunk someone, which
25 apparently means shoot someone.

1 Andre Boone did not talk to Rob Portee that
2 night, he told you that. Rob Portee was the first
3 person that people thought shot at the Waffle House.
4 He called the police that night in an attempt to
5 clear his name and that's when he told them that
6 Andre Boone said he wanted to chunk someone.

7 Malice doesn't have to be expressed. It can be
8 implied. It can be implied through the use of a
9 weapon. It can be implied through your actions.
10 Andre Boone did have a weapon in his hands that
11 night, but he did not bring it to the Waffle House.
12 He did not fire that weapon with any intent to harm
13 anyone. He fired into the air to make people
14 scatter and run. He did not have malice.

15 The State also introduced a concept called
16 proximate cause and they defined proximate cause for
17 you. The Judge will define it again. But,
18 essentially, proximate cause is the direct cause,
19 what act, what incident occurred that made this
20 outcome inevitable.

21 There were so many things that happened that
22 night out at the Waffle House, who can determine
23 what the proximate cause of Brian Wright's death
24 was. This is a slippery slope. If Corey and Chad
25 had never fought that night, would Brian Wright be

1 alive? If Oliver Feldman and Eugene Patterson
2 hadn't opened fire after Andre Boone shot into the
3 sky, would Brian Wright be alive? Every single
4 bullet that was fired that night intervened and was
5 an additional cause in this chain. There is no way
6 to determine proximate cause.

7 Brian Wright was tragically killed in the early
8 morning hours of February 19th. This was a travesty
9 for his family and this was a travesty for our
10 community.

11 The police tried, they pounded the pavement,
12 they worked this case, they wanted to make arrests.
13 Finally, after ten days, they got together with the
14 Solicitor's office. And in their rush to justice,
15 in their rush to find solace for his family and for
16 our community, they ended up arresting three
17 individuals. Unfortunately, you cannot achieve
18 justice by promoting injustice.

19 At the beginning of this case, Danielle Payne,
20 my co-counsel, got up and she addressed you. And
21 she talked to you about reasonable doubt and how we
22 have reasonable doubt in criminal cases and this is
23 the highest standard we have in any of our court
24 systems here in the United States. We have this
25 high standard for multiple reasons. We do have it

1 to protect people who are on trial so that they are
2 not convicted of something they didn't do. And we
3 have it to protect the men and women who serve on
4 our juries so they can be confident in their
5 decisions.

6 The police told you they don't know what kind
7 of gun was used that night. They don't know who
8 shot Brian Wright. The State has told you they
9 don't know who shot Brian Wright. So what they've
10 done is they brought you everything they could find
11 about his case and they presented it to you and they
12 have asked you to do something they cannot. This is
13 reasonable doubt.

14 There were three people charged with murder in
15 this case, two that are on trial, one's missing, but
16 there was only one wound that night in Brian Wright,
17 that's reasonable doubt.

18 Andre Boone was 16 years old the night this
19 occurred. He made a stupid, juvenile decision, but
20 he did not kill Brian Wright. If ever there was a
21 case for a reasonable doubt, this is that case.
22 Thank you.

23 **THE COURT:** Thank you, Ms. Everhart.

24 Ladies and gentlemen, we'll take a recess.
25 I'll decide whether -- if your food is here or

1 whether to let you go ahead and eat or not.

2 **THE CLERK:** It's here.

3 **THE COURT:** All right. I'll let you go ahead
4 and eat. Don't discuss the case.

5 (The jury retires to the jury room.)

6 **THE COURT:** We're going to take 45 minutes for
7 lunch. Y'all be back in 45 minutes. Thank you.

8 (Whereupon, there was a luncheon recess.)

9 **THE COURT:** Yes, ma'am.

10 **MS. CAMPBELL:** Your Honor, with the Court's
11 permission, I just want to hold this up. I will not
12 take it from the table. I just want to hold it up
13 to show the jury which gun I'm referring to and I'll
14 hold it by the barrel pointing it downward if I can.

15 **THE COURT:** Is there any objection to that?

16 **MR. SUTHERLAND:** As long as she's not waving it
17 around or anything, no, sir.

18 **THE COURT:** Any objection?

19 **MS. EVERHART:** No, Your Honor, as long as she's
20 just holding it.

21 **THE COURT:** All right. You have permission of
22 the Court to do what you said.

23 Bring in the jury.

24 **MS. CAMPBELL:** Thank you, Your Honor.

25 (The jury returns to the courtroom.)

1 **THE COURT:** Solicitor, are you ready?

2 **MS. CAMPBELL:** Yes, sir. May it please the
3 Court.

4 **THE COURT:** Yes, ma'am.

5 **MS. CAMPBELL:** Preparing for every case before
6 it comes to trial, you try to anticipate what the
7 possible defenses may be. You never really know
8 until you get into court. And as I have listened
9 this morning and into this afternoon to the defense
10 attorneys argue, basically, as I can sum it up, the
11 defense is this, they're victims.

12 Eugene Patterson, who was 17 years old, is a
13 victim. Tayson Boone, who was 16 years old, is a
14 victim. They aren't in gangs, just everyone else
15 they hung with was. They're just boys, children,
16 don't hold them responsible. I believe, and I wrote
17 this down, as Mr. Sutherland said, enough people's
18 lives have been ripped apart by this incident.

19 Ladies and gentlemen, Brian Wright's life
20 wasn't just ripped apart, it was ended when he fell
21 forward as his brains lay there on the sidewalk.
22 And the people that are responsible, three of them,
23 together, all contributing are Oliver Feldman,
24 Eugene Patterson and Andre Tayson Boone. Enough
25 people's lives have been ripped apart? Don't hold

1 them responsible?

2 The law recognizes that when someone is a
3 teenager and they choose to join a gang, and I'll
4 get back to that, and they go somewhere to see a
5 gang fight evolve and then they start getting their
6 guns together and they get in a shootout, each one
7 of them is responsible under the law. I heard
8 something about we're just throwing out a net, we're
9 creating new law. This is not new law. This is the
10 law that the Judge gets and he's going to give to
11 you. Listen carefully. This is not creating some
12 net. This is not us or, I guess, I'm them.

13 You notice that night when Brian Wright lost
14 his life, the U.S. Government wasn't out there. Who
15 was? The Bloods, the Folks and the Crips, and
16 that's the reality of what we're dealing with. And
17 it's ugly and it's wrong and it cost people their
18 lives for no reason.

19 Brian Wright was tagging along. Was he a
20 wannabe? He was eating his candy. According to the
21 defense I just listened to, you can't convict Tayson
22 Boone or Eugene Patterson because Brian Wright may
23 have gone into the store and purchased candy that
24 night. You can't convict because Corey Sanders
25 didn't see Brian Wright when he got shot. You can't

1 convict because there's only one bullet and one
2 murder. There aren't enough shell casings at the
3 scene for you to convict. You're supposed to ignore
4 all the testimony.

5 Interestingly enough they got up here and each
6 one mentioned that they were acting in self-defense.
7 Did either one ever talk about the elements of
8 self-defense, the four elements they must meet for
9 there to be self-defense involved in this case? No.

10 They got up here and now they bashed Oliver
11 Feldman who is charged with murder, who has received
12 no deals. By the way, Oliver Feldman got to that
13 scene because he's friends with Big Gene, that's who
14 he chooses to hang out with. But then in the other
15 breath, you're aren't supposed to believe him
16 because they don't want you to remember the part
17 about how Oliver Feldman told you that after the two
18 shots were up in the air, they ran back to the car
19 and got the guns, that negates self-defense, along a
20 myriad of other things. You aren't supposed to
21 believe him about how the guns were there.

22 No one got up and argued that Eugene Patterson
23 wasn't shooting. No one got up and argued that
24 Andre Tayson Boone wasn't shooting and that they're
25 shooting at people and that infers the intent to

1 kill among a myriad of others, and I won't go over
2 them again, the Judge will tell you what that is,
3 inferences that you can get from these facts in this
4 case, in this courtroom, which is unique.

5 Listen to the law the Judge gives you. This
6 isn't about the U.S. government trying to throw a
7 net over young men who are innocent of wrongdoing.
8 This case is about a feud between rival gangs who
9 then want to go out there and fight and it elevates
10 to the point where murders are committed.

11 All the State asks is for you to hold these
12 young men, be they 16, 17, 18, 19, who are old
13 enough to be driving around at midnight to the
14 Waffle House, who are old enough to take their guns
15 with them, whether or not Jerome brings it, he's
16 shot it before, he has his own .22, he just didn't
17 have it on him that night, who are old enough to
18 choose to go to a fist fight with the guns and to
19 use them when they get dissed, that's all the State
20 asks. Hold them responsible for their decisions.
21 Hold them responsible for their participation in
22 Brian Wright's death. And it doesn't matter if it
23 was Brian Wright. It doesn't matter if it's the
24 person driving down the street. It doesn't matter.

25 And, ladies and gentlemen, listen carefully to

1 this Judge. He's going to talk to you about
2 proximate cause, transferred intent, mutual combat.
3 Listen to what the law is that you're to apply. We
4 aren't asking you to go out on a limb. We're asking
5 you to follow the law. We want you to talk about
6 the elements of self-defense. We want to talk about
7 the elements of mutual combat.

8 They talked about we had this theory of hand of
9 one, hand of all. Where has that gone? Listen
10 carefully when the Judge charges you on proximate
11 cause. What is proximate cause?

12 Defendant cannot be convicted of murder unless
13 his acts were a proximate cause of the death of the
14 victim. Proximate cause is akin to being a direct
15 cause, the cause without which death would not have
16 resulted. The law recognizes there can be more than
17 one proximate cause of an injury or death. In other
18 words, in situations that acts of malice by more
19 than one person contribute to each other and combine
20 to proximately cause the death. An intervening act
21 by another person or another defendant is simply a
22 proximate cause and merely joins with that
23 particular defendant's conduct to cause the victim's
24 death to form the causal link.

25 No one's abandoned any theory here. It is up

1 to the Judge to instruct you on what the proper law
2 is, the elements of self-defense, the elements of
3 mutual combat, the elements of transferred intent.
4 This case is about an ugly situation that escalated
5 into a murder. All we ask is that you follow the
6 law.

7 They talked about how you can't convict because
8 somebody said they saw a .357 in Oliver Feldman's
9 lap. When shown this item, which is the .32
10 recovered from Oliver Feldman, remember Samuel
11 Clemons testified right after his brother, he said,
12 yeah, that's what I thought was the .357.

13 Smoke and mirrors. There's an old joke from
14 law school, and I haven't been there in a while, and
15 they talked about how there's a preacher and a
16 lawyer walking down the street. It rained the night
17 before. There's an area of mud right next to the
18 sidewalk, it's a puddle. And right in the middle of
19 the puddle is a silver dollar and you can look down
20 and you can see the silver dollar. And the preacher
21 says to the lawyer, look, there's a silver dollar.
22 And the lawyer picks up the stick and he churns up
23 the water and the silt and the mud and you can't see
24 it anymore. And he looks at the preacher and he
25 says, where's the silver dollar?

1 Ladies and gentlemen, I want to take this
2 opportunity, and I'll try to be brief, but it's
3 important, I want to take this opportunity to talk
4 about the cold, hard facts in this case. Nobody's
5 selling anything here. I want to talk about the law
6 because that is ultimately what you must decide when
7 you all go back there, each of you individually and
8 then collectively.

9 And you've heard from a number of witnesses in
10 this case. Some of the witnesses from different
11 gangs, did they come forward willingly with the
12 police? Some did, some didn't. Did ultimately they
13 corroborate what they said? But let's talk about
14 which ones were friends with each defendant and what
15 that evidence shows ultimately.

16 Jerome Thompson was the first person that got
17 up here and talked to you. He is a member of the
18 Bloods. He is good friends with his friend, Andre
19 Tayson Boone. On the night in question, he had his
20 nine millimeter with him, but give him credit, he
21 didn't use it.

22 What did Jerome Patterson testify about?
23 Jerome Patterson -- excuse me -- Jerome Thompson
24 told you that on the night in question, he was
25 driving, he had his nine millimeter in his lap, he

1 went there. When they went inside, he decided to
2 leave it in the truck. When he came back out to the
3 truck, he was sitting in the car. At which point,
4 he had seen Andre go down towards the fight. Tayson
5 comes back from there, demands the gun, grabs it
6 from him and then starts shooting. He then states
7 that he shoots around -- he moves around to the
8 other end of the car and starts shooting across the
9 parking lot.

10 Who else did you here from? Karleisa Brabham.
11 She was in the Cadillac parked right next to that.
12 What did she see? She sees Andre Tayson Boone come
13 up, grab the gun, starts shooting into the air and
14 then goes to a different area. She hears more
15 shots, she can't tell you who.

16 What did Derrick Guilyard tell you? Derrick
17 Guilyard told you that he was in the car that night,
18 that he sees Andre Tayson Boone after the fight
19 start come up there. And all of these people tell
20 you what they've been doing all night. You know,
21 they keep trying to say he wasn't there to fight
22 Dameon at that point, he'd been spending the whole
23 night going from Waffle House to Waffle House to
24 Wendy's to wherever the police weren't trying to
25 find Dameon to fight him. It's in his own

1 statement. I'll get to that in a minute.

2 Derrick Guilyard told you he was in the car, he
3 was in the back seat. Remember he got his little
4 brother Demon get in the way back because he didn't
5 really see anything. What did he tell you happened?
6 The same thing everyone else tells you happens.
7 They get in the car, sees Tayson shooting from one
8 end of the car. He then runs around to the front of
9 the car shoots some more, gets into the car, pulls
10 off, Jerome jumps in, they leave the scene. William
11 Bernard Kee, what did he tell you? The same thing.

12 What's interesting about Derrick Guilyard is
13 remember he had a conversation the next day with
14 Andre Tayson Boone, and what was Tayson worried
15 about? He even mentioned it in his statement.
16 Tayson's worried about that he may have a body on
17 that gun. And notice they got rid of it. He's
18 worried he may have a body on the gun. You remember
19 the testimony, if I'm misquoting, something similar
20 to that, but you remember what he testified to and
21 these are his friends.

22 Corey Sanders testified. He was there that
23 night. He's the cause of the fight. He's in the
24 middle of it. He hears gunshots from different
25 areas. He thinks it's three areas.

1 Ladies and gentlemen, what is that consistent
2 with? One thing the defense didn't want to talk to
3 you about, they talked to you at length about there
4 are only two shell casings found, .380s, which
5 apparently he doesn't dispute his client was
6 shooting that night, Eugene Patterson. Where are
7 those found? Look at State's Exhibit Number 17.
8 The shell casings are found over here in front of
9 the door.

10 But what is interesting, the live round that he
11 never mentioned. What does that mean? Where does
12 that put Eugene Patterson shooting on that night?
13 It puts him in a different area of the parking lot,
14 which if you look at State's Exhibit Number 63,
15 which is the diagram done by the crime scene
16 investigator that night, look where it's shooting,
17 it's a third area. Did Corey Sanders hear shots
18 from three areas in that parking lot? Yes, I
19 submit.

20 The defense also contends that there's no way
21 that Eugene Patterson could have shot his own
22 friend, Brian Wright. There's no evidence he knew
23 it was Brian Wright. What did he see when he looked
24 over there? He saw people running. Did he see a
25 flash of red? Did that trigger something to him?

1 Was that when he was unjamming the gun over, because
2 he's over in that corner of the parking lot? Corey
3 Sanders corroborates what happened, doesn't dispute
4 it.

5 You heard from Rob Portee. Rob Portee, he's
6 the one that was trying to help Corey, came in and
7 remember hit Chad on the back of the head and he
8 ended up getting hit and going down himself. What
9 does Rob Portee tell police? By the way, he called
10 the police. Tayson Boone never calls the police.
11 Rob Portee calls the police the night within hours
12 of it happening, because remember they can do a
13 gunshot residue kit. They do one on him and one
14 other guy that's still responsible enough to be
15 there. They're both negative. What is that
16 consistent with? Not having handled a gun, not
17 having shot a gun, not having had a gun.

18 Rob Portee, he walks by Tayson Boone's car that
19 night. And what does Tayson Boone, his friend, say
20 to him? I'm going to chunk those, and I won't use
21 the word. What did that mean? I asked that
22 question specifically. Shoot. This is way before
23 the fight breaks out. This is way before anybody
24 else is there with more guns.

25 What were his intentions? Was he acting with

1 malice that night? According to the defense, he's
2 bravely trying to save his fellow friends. Yet, he
3 tells his friend what he wants to do that night is
4 shoot people. And guess what he does.

5 Quintez Clemons, Chad Robinson, he was in the
6 middle of the fight. What was interesting about
7 what Chad Robinson told you? He did run over to the
8 area of the Mobil Gas Station as soon as he heard
9 the first shots. And remember he said as he was
10 running towards the Mobil, he could hear bullets
11 whizzing by his head.

12 Somebody shot over there. There aren't any
13 shell casings. There's no evidence. There's no
14 witness. There's nothing to put anyone shooting in
15 the Mobil parking lot, but Brian Wright was shot
16 there and there's a gun -- excuse me -- a bullet
17 hole in the side of the Mobil Gas Station that just
18 happens to point right back to the area where he was
19 standing. I guess he just hadn't practiced enough.

20 Karmindae Leggett, Bay, did he want to be here?
21 No. Did he tell you what he knew? He's the one
22 that was so emphatic about who was shooting right up
23 in the parking lot. Well, he couldn't have been
24 shooting the way Karmindae Leggett said because at
25 this point, he's over in the grassy area right in

1 front of his car, remember, or behind his car, he
2 was backed in. So there is a cross fire going on.
3 Did he want to help out Big Gene?

4 And then Oliver Feldman, who came before you,
5 and, ladies and gentlemen, the fact that he said he
6 thought it was two people, that gives him
7 credibility. He saw two people he couldn't see
8 their face, remembered the clothing description,
9 shooting from different areas, one on one side of
10 the car, one on the other. He puts him within five
11 feet of the corner of the Waffle House, that makes
12 him credible. I don't think he was out there
13 measuring things that night.

14 Do the witnesses corroborate each other and do
15 they corroborate what happened that night?

16 Now, you heard from law enforcement, crime
17 scene. And what's significant? Deputy Beeler, he
18 was the first officer on the scene, he did his best
19 to contain it. He's going to tell you that there
20 were still some people out there when he got there.

21 And, ladies and gentlemen, no one, no matter
22 how good the police are, can control a crime scene
23 before they get there. They can't control what
24 happens to every single shell casing. And we know
25 for a fact that some shell casings are missing

1 because Tayson Boone, in his testimony and his
2 statement and everything, says he shot five times in
3 that grassy area. We recovered three, that's how
4 fragile evidence can be. We do know there were
5 other cars.

6 Oh, and I like the defense that this couldn't
7 have happened because no one could shoot over their
8 cars into the Mobil Gas Station. It is elevated and
9 there are spaces between the cars and there's no
10 testimony that every single one of those spaces was
11 taken up. We know, according to each one, that
12 there was a clear path between those individuals
13 shooting back and forth at each other, so they
14 couldn't have been shooting through cars.

15 Deputy Howie Austin, Investigator Bill Allen,
16 they managed the crime scene. All this about who --
17 I didn't understand the whole crime scene argument,
18 but the police were in the crime scene and they
19 initialed when they went in and went out, even
20 checked with investigators before they did to make
21 sure they didn't further contaminate a possible
22 crime scene.

23 Lieutenant Zane Padgett, he talked to you about
24 what Investigator Allen did that night and what he
25 photographed. You have the photographs. And the

1 reason the photographs is so important in this case
2 as to why, because in addition to having the luxury
3 that y'all had in going to the scene itself, even
4 though it is 15 months later and some things are
5 going to be slightly different, you know, some
6 things may have been painted over, some things may
7 have been moved a little bit, but you get the
8 essence of the scene out there, but you've got the
9 photographs from that night and it's specifically
10 very important because they talked about how Tayson
11 Boone could not have shot Brian Wright because he
12 fell too far in front of the gas station. Look
13 where his feet are.

14 The testimony from the pathologist, the expert,
15 was that the momentum of him going forward, not the
16 momentum of the bullet would have carried him
17 forward. He told you he couldn't tell you which way
18 his head was turned at the time, which is one thing
19 we -- it can't be done, but what he can say is that
20 he could have continued as he was running lowering
21 his head as if to duck, which would be consistent
22 with gunshots coming towards him forward.

23 As far as any blood spatter, it's going to
24 follow, the blood spatter is not coming out here,
25 it's going to come out here and he is going forward

1 into it and falls into it. And the EMS person told
2 you, yeah, there's a bunch of blood at the scene.
3 He's lying all over it from the top of his body to
4 the bottom.

5 Lieutenant Zane Padgett went out there several
6 days later discovered the other three shell casings
7 that hadn't been seen that night. Those shell
8 casings later match up to the ones at the scene, the
9 nine millimeters, which are different from the .380s
10 that were in front of the door. But the .380s in
11 front of the door match the unfired cartridge casing
12 which had been chambered into the same gun.

13 Investigator Stan Richards. Deputy Bouknight
14 went to the autopsy, again did a gunshot residue kit
15 on Brian Wright, negative. He didn't handle a gun.
16 He didn't have one.

17 You heard from chain witnesses, DNA. DNA did
18 not play a role in this case. No one's got up here
19 and argued that it did.

20 Mike Moskal did the gunshot residue kits. Dr.
21 Clay Nichols, the pathologist.

22 Investigator David Collins, I want to talk
23 about him for a second. He was able to tell you
24 what he could. The strongest of these weapons would
25 have been the nine millimeter, the .380. And what's

1 the testimony about? He said all three of these
2 guns could have created a through and through
3 gunshot, that's common sense, depending on the
4 circumstances, how far away, things of that nature.

5 Investigator Collins testified the strongest of
6 these weapons was a nine millimeter, the next was a
7 .380 and the weakest would be the .32 revolver. He
8 testified about the testing he did on those items,
9 that he was even able to match up those old, and
10 you'll see them, weathered shell casings from the
11 back of Meadow Lake where Tayson Boone did his, I
12 guess, his practice range to that. Ballistics in
13 this case, even though two of the guns were never
14 recovered, which is not unusual, that's the
15 testimony.

16 You also heard from a number of investigators
17 about how many people they interviewed. They went
18 out there, they interviewed a lot of people, 30
19 something written statements, more than that
20 interviewed. We brought forth everyone who could
21 add something, who was willing to.

22 You heard about how they were looking for
23 Dameon Dowling, he's on the run.

24 Every witness that came before you, though, was
25 talking about who the shooters were and where the

1 shots are coming from, that is not in dispute.

2 You heard about statements and what's
3 significant, and you will have these back there with
4 you. Eugene Patterson, his first interview I
5 believe either the next day or that night even,
6 you'll have the date, when he gives his first
7 statement, what does he tell the police? All he
8 tells the police is he went there in his green Neon,
9 and he's very specific about that, ladies and
10 gentlemen. He went there in his green Neon. He got
11 out and he went into the Waffle House to talk to
12 some girls and then he heard some shots and he left
13 and he didn't really know much.

14 In his second statement, after he was arrested
15 for obstruction of justice because everything he had
16 told them had not been the truth, in his second
17 statement, he says he was in a green Neon. At that
18 point, he says he saw Rob Portee shoot one time into
19 the air and then one time into the crowd, that he
20 saw a dude in blue shoot at the Waffle House parking
21 lot and then shoot into the Mobil Gas Station
22 parking lot. That was what he put in his second
23 statement.

24 In his third statement, after he was brought
25 back the next day on the 23rd, he was interviewed

1 again after being advised of his rights. At that
2 point, he's confronted with the overwhelming
3 evidence that he's in the burgundy car and that he's
4 shooting. All he says at that point is, well I was
5 in the burgundy car with Eugene -- it was Eugene,
6 Bay and Oliver in the car, that he saw a guy in the
7 back of the parking lot shoot one time and that he
8 saw the Crip shoot a lot.

9 He never came forward. His own attorney didn't
10 get up here and argue that he wasn't the shooter.
11 Why would he not tell the truth? And I submit,
12 ladies and gentlemen, because he's guilty.

13 Andre Tayson Boone gave a statement after being
14 advised of his rights. And in his statement, he
15 made the following assertions and he admits in his
16 statement -- and oddly enough, somewhat interesting,
17 they want you to believe certain parts of his
18 statement like when he says he was firing over their
19 head, but they just want you to not believe certain
20 parts they don't like. Like this first part:

21 Tayson, are you in the Bloods gang?

22 Yes.

23 What sect are you in?

24 TTP, Tree Top Piru.

25 Have you been promised anything or threatened

1 in any way?

2 No.

3 And it continues. They start questioning him
4 about the events of the night, remember. The first
5 thing he does is lie. Have you been completely
6 honest with us this whole time this morning?

7 No.

8 What did you initially tell us about your
9 involvement in the incident at the Waffle House?

10 I said I was there to fight a boy named Dameon
11 who was a Folk.

12 He just happens to know he's a Folk. Oh, by
13 the way, he's not a Blood, that was what was just
14 said. Yet when I asked him the specific question,
15 remember on cross-examination, do the Folks and the
16 Bloods get along, and he says, Oh, yeah, sometimes
17 they do because I get along with, I believe he said,
18 Samuel Clemons and he's a Folk. What does that make
19 him other than a Blood? It was in response to that
20 question. But he's not a Blood.

21 I saw a bunch of Folks pull into the Waffle
22 House by the entrance. I saw some pull into the
23 Mobil station. Some of them acted like they were
24 going for guns and some were running to their cars
25 like they were going to get guns. I told you that I

1 shot into the air with the .22 pistol you found at
2 my house this morning. I said I shot in the air to
3 scare Folks from coming at me and the guys that I
4 was with with the guns.

5 What is the real truth? This is his initial
6 statement. He blames a bunch of Folks. What is the
7 real truth?

8 Corey was outside by then. He yelled over that
9 the people in the cars were Folks we were supposed
10 to fight earlier that night. We were supposed to
11 have met up earlier at the Waffle House by the
12 Kangaroo, then it changed to the Wendy's by Spring
13 Valley. The Folks never showed at either place. We
14 were either -- supposed to meet at the Waffle House
15 on Hard Scrabble.

16 That would be the same Waffle House, I think,
17 that they couldn't stay because, I think, Jerome
18 testified that there were too many police around.

19 They didn't show up there either. Then Corey
20 and Chad started fighting in the parking lot. That
21 is when I ran up there, and remember his testimony
22 from yesterday, this is what's in his statement
23 before he knew, that is when I ran up there to try
24 to fight a guy named Dameon who was right there
25 where Corey and Chad were fighting. Dameon and I

1 had a beef over him punching me that previous
2 Saturday night at the Main Event Club. A guy
3 wearing blue who had a bandana over his face reached
4 in his waistband as I walked up. I think he was a
5 Crip. He was light skinned. He said if you don't
6 back up, I'm going to shoot your ass. I saw the
7 butt of the gun. I then backed back up to my
8 Explorer. Jerome and them were standing in front of
9 the Explorer. I knew Jerome had the nine millimeter
10 with him. I asked Jerome for the gun. Jerome gave
11 me his gun.

12 And remember Jerome Thompson's testimony and
13 other people's. He went up and actually grabbed the
14 gun from Jerome, who I believe was in the car at the
15 time, make sure I'm right on that.

16 I then turned and faced the fight, which was
17 still going on. I fired it twice in the air. I
18 then ran behind my Explorer because I saw the Crip
19 dude and another dude with him begin to point the
20 guns in my direction.

21 Ladies and gentlemen, the testimony in this
22 case is the Crip dude and Eugene had to get the
23 guns. He was already running around. If this was
24 self-defense, why is he running around to the back
25 of his car? Does he know that firing a gun into the

1 air is going to cause a gun fight? Is he without
2 fault in bringing it on? Again, the elements of
3 self-defense.

4 When I got behind the Explorer, I fired five
5 more times. I fired at the Crip dude. After I
6 fired those five shots I got into the truck.

7 Then he talks about how as he pulls out, he
8 hears more gunshots as he's leaving. And isn't it
9 interesting, you heard from Demon Griffin, you heard
10 from Guilyard, all those people, no one else
11 testified about hearing more shots once Tayson got
12 in the driver's seat and left. Why does he want to
13 do that? He needs to divert attention from himself.

14 Did you feel one of the shots you fired may
15 have hit the boy?

16 I was worried about it. This is when he was
17 talking about his girlfriend, so that's when he
18 asked where he got shot. But I knew I couldn't have
19 done it because he was shot in front of the gas
20 station.

21 Again, the expert's testimony, he could have
22 been shot at that corner and continued forward. And
23 we know where his momentum was as he was running
24 because his feet dropped right there at that door
25 and he falls forward, that puts his back to the

1 Waffle House.

2 I felt none of my shots hit him because I was
3 firing in the direction of the Crip. At that point,
4 he's sticking with that.

5 And what changes as the police question him?
6 He describes who he was firing at. They were the
7 first people who pulled up of the Folks at the same
8 time. They're the only ones who actually pulled up
9 in the Waffle House parking lot. So he knows
10 specifically who he's aiming at.

11 When you fired, were you aiming your pistol or
12 simply firing random towards that direction?

13 I was aiming, but I was aiming over the Crip
14 head as if to say bullets are coming your way.

15 When confronted by Captain Smith about the
16 evidence from the Mobil Gas Station, the bullet hole
17 on the side that Lieutenant Padgett examined, what
18 would you say if I told you there was a shot in the
19 side of the Mobil station which came at an angle as
20 if coming from where you were parked and where the
21 shell casings from the nine millimeter were located?

22 Then his story changes. I guess it's possible
23 the round in the side of the building might be one
24 of the nine millimeters I fired because as I was
25 running back towards the back of the truck, I could

1 see the wall of the Mobil. I was running with the
2 gun in my hand and I quickly turned to fire after I
3 took cover behind my Explorer. When I fired that
4 shot, it wasn't well aimed. I took better aim.

5 Specifically asked about is anyone else out
6 there around where he is when he's shooting.

7 I'm not sure.

8 Do you know if anyone was firing from anywhere
9 behind you or not?

10 I don't think so, but maybe.

11 When asked about people running back and forth,
12 I was ducking and dodging because those two boys
13 were shooting and coming at me.

14 When asked then, not yesterday, why he was
15 there, so you were basically looking to fight Dameon
16 all that night; is that correct?

17 Yes. I was upset because he hit me for no
18 reason. He waited for a fight to break out in the
19 club and he punched me when my attention was on that
20 fight.

21 Have you ever fired the same nine millimeter
22 before?

23 Yes.

24 Ladies and gentlemen, there is no dispute, we
25 were the first people to tell you, there was one

1 bullet that hit Brian Wright and there was one
2 bullet that caused his death and three people who
3 contributed. Proximate cause, mutual combat,
4 however you want to look at it because it can't be
5 self-defense.

6 Mutual combat, as the Judge will instruct you,
7 doesn't require that they have to meet ahead of time
8 and plan out that they're going to shoot at each
9 other. The Judge will tell you, and listen to what
10 the Judge tells you, what is mutual combat because
11 it negates any possibility, and I submit in this
12 case we don't even need it because the facts
13 themselves negate self defense.

14 If a defendant voluntarily participated in
15 mutual combat for purposes other than protection,
16 the shooting would not be self-defense. This is
17 true even if, during the combat, the defendant
18 feared death or serious bodily injury. For mutual
19 combat, there must be a mutual intent and
20 willingness to fight.

21 You don't see in here any words about they met
22 ahead of time, said they were going to shoot each
23 other. There just has to be a mutual intent and a
24 willingness to fight.

25 The intent may be shown by the acts and conduct

1 of the parties and the circumstances surrounding the
2 combat. In addition, it must be shown that both
3 sides were armed. And there's no dispute in this
4 case, both sides were armed.

5 Ladies and gentlemen, mutual combat is an old,
6 old law, negates any possibility of self-defense and
7 holds them responsible if they shoot each other, and
8 even more importantly, when they shoot an innocent
9 person.

10 The Judge is going to talk to you about
11 transferred intent. Again, what is transferred
12 intent? If two people engage in mutual combat
13 acting with malice, and all we have to show is
14 malice, we don't even have to show a specific intent
15 to kill, then they are both guilty.

16 Proximate cause, I talked to you a little bit
17 about it. And the best way I can put it, the
18 easiest way to understand it is but for these three
19 young men's actions that night, Brian Wright would
20 still be alive. To say one is more culpable than
21 the other is not correct because each directly
22 contributed because but for Andre Boone going to get
23 that gun and started firing, but for the fact that
24 Eugene Patterson and Oliver Feldman brought their
25 guns so that they could run back and get them and

1 shoot back, but for those three people combining
2 together, ironically against each other, there is no
3 murder.

4 Ladies and gentlemen, all I ask, they chose to
5 arm themselves that night, they chose to shoot
6 randomly across the parking lots because of a beef
7 over somebody disrespecting the other one, all the
8 State asks is hold them responsible, stop the
9 violence.

10 THE COURT: Ladies and gentlemen, we'll again
11 take a very short break and I'll get you out here
12 and tell you the law. Don't discuss the case.

13 (The jury retires to the jury room.)

14 THE COURT: We're at ease for just a few
15 minutes.

16 (Brief recess.)

17 THE COURT: Ladies and gentlemen, during the
18 charge, you'll need to stay still and stay quiet.
19 Please don't do anything to distract the jury. If
20 there's an emergency, respond accordingly. If you
21 have a coughing fit and you can't stop, get up and
22 leave, but otherwise stay still and stay quiet.

23 So anybody that wants in, needs to come in;
24 anybody that wants to go out, needs to go out
25 because we're going to lock this door in a second.

1 Everybody in that wants to come in?

2 BAILIFF: I asked them, Your Honor.

3 THE COURT: Thank you. I appreciate the help.
4 Bring in the jury.

5 (The jury returns to the courtroom.)

6 THE COURT: Ladies and gentlemen, this charge
7 on the law that I'm going to give you is 22 pages
8 long, which means it's going to take me right at 44
9 minutes to tell you the law. This is just a matter
10 of my personal practice, it has nothing to do with
11 this particular case, but I don't ever like to talk
12 that long to a jury without taking a break in there.
13 So if I get beyond 30 minutes, a charge that's going
14 to go beyond 30 minutes, I usually will break it
15 into two parts. That's what I'm going to do here.

16 I've got a logical breaking part at page 11
17 right in the middle, so I'm going to go 11 pages and
18 then I'm going to stop, but I have to tell you that
19 you are not to glean from that that I'm trying to
20 emphasize one section over another or anything like
21 that. That's just the way it's going to work. I
22 just don't want to talk at you for 44 minutes, all
23 right.

24 All right. Members of the jury, all of the
25 evidence has been presented, you've heard the

1 arguments of counsel and now it's time for me to
2 instruct you on the law that applies. Please
3 continue to pay close attention during this next
4 stage.

5 Now, first, you need to understand some basic
6 ground rules. You, the jury members, are the sole
7 judges of the facts. You decide all the issues of
8 fact. You alone determine the truth of the
9 evidence, its effect, its value and its weight.

10 You alone judge the credibility of witnesses.
11 In other words, whether or not a witness' testimony
12 is believable.

13 In evaluating the testimony of the witnesses,
14 you may believe all that a witness said or none of
15 it. You may believe part of what a witness said and
16 not believe the balance. You may believe one
17 witness against many or many against one. You may
18 consider any interest, bias or prejudice that you
19 feel that a witness has in the case. You may
20 consider the demeanor and the appearance of the
21 witness and the opportunity for knowledge that the
22 witness had. You may consider whether a witness has
23 been consistent or inconsistent.

24 But you're not to exercise these considerations
25 arbitrarily. What I want you to do is use your

1 common sense, use your sense of logic and reason and
2 your good judgment.

3 It's improper for me to give you a charge on
4 the facts of the case. I can't discuss the facts
5 with you. I'm not even permitted to convey to you
6 an impression as to what, if any, personal opinions
7 I may have about the facts of a case. So if, during
8 any stage of this trial, you develop an impression
9 that I've got a personal opinion about the facts,
10 you must remove that totally from your mind. You're
11 the sole judges of the facts.

12 Now, I am the Judge of the law that applies to
13 the case. And under your oath, you have to accept
14 and apply the law as I give it to you. If you've
15 got conflicting ideas about what the law is or what
16 it should be, you have to abandon those. I give you
17 the law, you apply it to the facts as you determine
18 them to be and in that way, you reach your verdicts.

19 It's also my job to decide what evidence is
20 admissible. If I've told you to disregard something
21 or rule something inadmissible, you're not to
22 consider those things in arriving at your verdicts.
23 Base your verdicts on the competent evidence before
24 you, consider the testimony of the witnesses and the
25 exhibits admitted in the trial.

1 I need to explain to you that the rules of
2 evidence that we operate under allow for opinion
3 testimony to be given under certain circumstances.
4 One area where that's allowed is where someone by
5 virtue of education, training and experience is
6 permitted to testify as an expert witness.

7 Now, the mere fact that someone is allowed to
8 give opinions under our rules does not mean that you
9 have to accept the opinions given if you choose not
10 to do so. You may accept or reject the opinions of
11 an expert witness just as you may any other witness
12 in whole or in part.

13 I need to explain to you that there are two
14 types of evidence generally presented in the trial,
15 direct evidence and circumstantial evidence. Direct
16 evidence is evidence of direct perception including
17 the testimony of a person who asserts or claims to
18 have actual knowledge of a fact, such as an
19 eyewitness. Circumstantial evidence is proof of a
20 chain. It's proof of a chain of facts and
21 circumstances indicating the existence of a fact.

22 Now, the law makes absolutely no distinction
23 between the weight or value to be given to either
24 direct or circumstantial evidence, nor is a greater
25 degree of certainty required of circumstantial

1 evidence than of direct evidence. What you need to
2 do is weigh all of the evidence in the case. And
3 after weighing all of the evidence, if you're not
4 convinced of the guilt of the defendant beyond a
5 reasonable doubt, you must find him not guilty.

6 I remind you that the fact that Mr. Patterson
7 elected not to testify is not a factor to be
8 considered by you in any way in your deliberations
9 and in your consideration on the question of whether
10 he is guilty or not guilty. It must not be
11 considered by you in any manner whatsoever against
12 him. An accused has the constitutional right to
13 remain silent and the assertion of that right cannot
14 and must not be considered by you in any way in your
15 deliberations.

16 Under your oath, you are to reach no inference,
17 you're to draw no conclusion whatsoever from the
18 fact that Mr. Patterson elected not to testify. His
19 decision not to testify should not be discussed by
20 you in the jury room. It should not enter your mind
21 in making your decision on his case. The State has
22 the entire burden of proof. The accused has no
23 obligation to prove anything at all.

24 Now, the defendants in these cases,
25 Mr. Patterson and Mr. Boone, are presumed to be

1 innocent. This is no mere legal theory. It is a
2 fundamental and substantial right to which everyone
3 is entitled. It's been described as being like a
4 robe of righteousness that's placed around an
5 accused and remains with him through every stage of
6 the trial. It continues to exist after you go back
7 to your jury room to deliberate so that he is
8 presumed to be innocent, each of them, unless and
9 until you, the jury, determine that the State has
10 proven that defendant guilty beyond a reasonable
11 doubt.

12 A defendant is not required to prove his
13 innocence. He's not required to prove anything at
14 all. The burden is on the State to prove the guilt
15 of the defendant and the State has to prove every
16 essential element of an offense charged beyond a
17 reasonable doubt.

18 Now, this doesn't mean that the State has to
19 prove the guilt of the defendant beyond all doubt or
20 beyond every doubt. The appropriate standard is
21 proof beyond a reasonable doubt.

22 So what do I mean by that? Some of you folks
23 may have served as jurors in civil court and if you
24 have, you know that the burden of proof in civil
25 court requires establishing that something is

1 probable, that it's more likely than not, and that
2 is called the greater weight or preponderance of the
3 evidence. But in a criminal court setting such as
4 we're in now, the standard is much higher and the
5 proof has to be much stronger than what we require
6 in civil court. As I've told you numerous times,
7 the burden of proof in a criminal case is proof
8 beyond a reasonable doubt.

9 What do I mean by that term? Proof beyond a
10 reasonable doubt is proof that leaves you firmly
11 convinced of the defendant's guilt. There are few
12 things in the world that we know with absolute
13 certainty and in criminal cases, the law does not
14 require proof that overcomes every possible doubt.

15 If, based on your consideration of the
16 evidence, you are firmly convinced that a defendant
17 is guilty of the crime charged, then you must find
18 him guilty. If, on the other hand, you think there
19 is a real possibility that he is not guilty, you
20 must give him the benefit of the doubt and find him
21 not guilty.

22 There is no obligation on the part of the
23 defendant to raise any doubt or any other
24 possibility. The defendants are presumed to be
25 innocent and the State has the entire burden of

1 proof and has to prove each defendant guilty to the
2 exclusion of any other real possibility.

3 Even if circumstances are strongly suspicious
4 and the guilt of a person appears to probable, that
5 is not enough to convict someone of a crime. Mere
6 presence at the scene of a crime is not enough. You
7 have to be satisfied that the defendant is guilty
8 beyond a reasonable doubt.

9 The State has to prove beyond a reasonable
10 doubt the identification of a defendant as a
11 perpetrator. You have to be satisfied beyond a
12 reasonable doubt of the accuracy of the
13 identification.

14 Now, identification testimony is an expression
15 of belief or impression by a witness. You must
16 determine the accuracy of the identification and
17 consider the believability of each identification
18 witness in the same way as any other witnesses. You
19 may consider whether the witness had an adequate
20 opportunity to observe the offender at the time of
21 the offense and make a reliable identification
22 thereafter. If the identification may have been
23 affected by the circumstances surrounding how the
24 defendant or his likeness were presented to a
25 witness, you should examine that identification with

1 great scrutiny.

2 Now, testimony has been given in this trial
3 about statements allegedly made by the defendants.
4 In evaluating alleged statements, you first need to
5 determine if the State has proven that the
6 defendant, in fact, made the statement. If not,
7 then you cannot consider that alleged statement in
8 any way against the defendant.

9 If you find that the defendant made the
10 statement, the next thing you're going to have to
11 determine is whether the defendant was in police
12 custody and if he was, whether the statement was
13 given in response to police questioning.

14 So in order for you to know what the law
15 requires concerning statements, I have to explain
16 some things to you. You've probably heard about
17 Miranda warnings. Miranda warnings are that you
18 have the right to remain silent; that any statement
19 made can and will be used against you in court; that
20 you have the right to an attorney; and if you do not
21 have the resources to hire a lawyer, the court will
22 appoint one at no expense; that you have the right
23 to consult a lawyer before answering any questions
24 or making any statement; that you have the right to
25 have a lawyer present with you at all times during

1 all interviews and all interrogations; and that you
2 may stop answering questions at any time.

3 Now, while those exact words do not have to be
4 used, the substantial equivalent have to be
5 communicated in order to constitute adequate Miranda
6 warnings.

7 Now, what I need to explain to you is that not
8 all police questioning requires Miranda warnings.
9 Miranda warnings are required before the police may
10 question a person whom they have in custody. And
11 I'm going to explain these terms more to you in more
12 detail.

13 So in evaluating the alleged statements of a
14 person that are given to the police and whether
15 Miranda warnings were required, you first have to
16 determine two questions: First, was the person in
17 police custody, and, second, was the statement in
18 question given in response to police questioning?
19 Was the person in custody of the police and was the
20 statement in question in response to police
21 questioning?

22 The term in custody refers to situations where
23 the person is under arrest, is held in police
24 custody or has his freedom of movement prohibited by
25 the police in any significant way. If a person is

1 not in custody, the police may question him without
2 first giving Miranda warnings. But if he is in
3 custody, the police cannot question him without
4 first giving him Miranda warnings.

5 Now, whether the person was in custody or not,
6 Miranda warnings only relate to interrogations by
7 the police. Police interrogation means that the
8 police are questioning the person or performing the
9 substantial equivalent of questioning, in other
10 words, where the police makes some statement or
11 engage in some conduct that is designed to elicit a
12 response.

13 So Miranda warnings are not required unless the
14 police are questioning a person in custody. So if a
15 person makes a spontaneous statement, a spontaneous
16 statement that's not prompted by police
17 interrogation, the statement can be considered by
18 the jury even if Miranda warnings have not been
19 given.

20 If someone is in custody, the police cannot
21 question or interrogate that person unless Miranda
22 warnings have been given and the person has waived
23 his rights and voluntarily elected to answer the
24 police questions.

25 If a person was in custody, before you may

1 consider any statement given in response to police
2 interrogation, the State has to prove that the
3 person was properly warned of his constitutional
4 rights, the Miranda warnings, prior to the
5 questioning and the giving of the statement. If the
6 State proves that it gave Miranda warnings prior to
7 interrogating the person in custody, the State then
8 must prove that the person knowingly and
9 intelligently waived his constitutional rights and
10 made the statement to police.

11 The final requirement is that the statement in
12 question must have been given voluntarily. The
13 State has to prove that the statement was the
14 expression of the person's own free will and was not
15 improperly induced by compulsion, duress, force or
16 fear or by the promise of some reward or help of
17 reward. Unless the statement was given freely and
18 voluntarily, you cannot consider it against a
19 defendant.

20 If a statement was made while in custody to a
21 law enforcement officer in response to the officer's
22 questions, I instruct you that you cannot use that
23 statement against the defendant unless you are
24 satisfied that the State has proven beyond a
25 reasonable doubt every requirement that I've just

1 instructed you on, that Miranda warnings were given,
2 that there was a knowing and intelligent waiver of
3 rights and that the statement in question was freely
4 and voluntarily given.

5 The last thing I have to tell you in this
6 section is this. I need to remind you the limiting
7 instruction I gave you earlier. That a statement by
8 one co-defendant can be used against him, but it is
9 not to be used against the other co-defendant. If
10 you determine to consider a statement by one
11 defendant, you may consider it as it relates or
12 pertains to his case and it may not in any way be
13 used against the co-defendant.

14 Okay, folks, that's a logical point to break.
15 It will be a very short break. I'll let you stretch
16 your legs, clear your minds a second and I'll get
17 you back in. Don't discuss the case.

18 (The jury retires to the jury room.)

19 (Brief recess.)

20 (The jury returns to the courtroom.)

21 **THE COURT:** Now, let's turn to the specific
22 crimes charged in these indictments. As you know,
23 each defendant has been separately charged with
24 murder. Each indictment has to be evaluated
25 separately on its own merit or lack of merit. And

1 I'm going to read these indictments to you again.

2 The indictment against Mr. Boone alleges that
3 Andre Boone did in Richland County, on or about
4 February 19, 2007, feloniously, willfully and with
5 malice aforethought kill one Brian Wright by means
6 of a gunshot wound and that the said victim died as
7 a proximate result thereof, which is alleged to be
8 in violation of section 16-3-10 of the South
9 Carolina Code.

10 The other indictment, the one against
11 Mr. Patterson, alleges that Eugene Patterson did in
12 Richland County, on or about February 19, 2007,
13 feloniously, willfully and with malice aforethought
14 kill one Brian Wright by means of shooting the
15 victim and that the said victim died as a proximate
16 result thereof, which is alleged to be in violation
17 of section 16-3-10 of the Code of Laws of South
18 Carolina.

19 I caution you, ladies and gentlemen, that an
20 indictment is not evidence. It is merely the formal
21 means by which someone is charged and brought to
22 trial.

23 So I need to explain to you the law about
24 murder. Murder is the unlawful killing of another
25 human being with malice aforethought either

1 expressed or implied. So you see that malice is the
2 mental state required for murder.

3 I will explain to you these concepts in more
4 detail, but while murder may involve an actual
5 intent to kill, it does not necessarily require the
6 intent to kill. Murder does not necessarily require
7 that the malice be directed towards the specific
8 person who was killed. But to prove that a
9 defendant is guilty of murder in this case, the
10 State has to prove that the defendant in question
11 intentionally committed an act, and here that's
12 alleged to be the firing of a handgun, that the act
13 took place in Richland County, that he did so with
14 malice aforethought, that the act was a contributing
15 proximate cause of the death of Brian Wright and
16 that the killing was unlawful.

17 Now, first, I'm going to talk to you about
18 proximate cause. A defendant cannot be convicted of
19 murder unless his acts were a proximate cause of the
20 death of the victim. Proximate cause is akin to
21 being a direct cause, a cause without which the
22 death would not have resulted.

23 The law recognizes that there can be more than
24 one proximate cause of an injury or death. You can
25 have a situation where an act is the proximate cause

1 or, perhaps stated better, the sole proximate cause
2 of the death or you can have a situation where an
3 act is a proximate cause. In other words, a
4 situation where acts of malice by more than one
5 person contribute to each other and combine to
6 proximately cause death.

7 Now, in criminal law, proximate cause is a
8 cause which in the natural and continuing sequence
9 of events unbroken by an efficient, intervening
10 cause produces death and without which the death
11 would not have occurred.

12 To be an efficient intervening cause -- let me
13 rephrase that -- to be an efficient cause sufficient
14 to break the causal link, the intervening cause has
15 to be independent of that particular defendant's
16 wrongful conduct. It has to be an act that was
17 adequate to bring about the death on its own. And
18 it had to be an act that was not foreseeable to that
19 particular defendant.

20 However, an intervening act by another person
21 or another defendant that is simply, quote, A,
22 unquote, 'proximate cause and merely joins with the
23 particular defendant's conduct caused the victim's
24 death will not break the causal link.

25 I need to explain to you the concept of malice.

1 To constitute murder, the State has to prove that
2 the defendant was acting with malice. Malice is the
3 mental state required for murder. The necessary
4 criminal intent may be proven by acts and by conduct
5 of the defendant and other circumstances from which
6 you may naturally and reasonably infer criminal
7 intent.

8 Malice is a term that imports wickedness and it
9 excludes just cause or legal excuse. It is
10 something that springs from wickedness, from
11 depravity, a depraved spirit, from a heart devoid of
12 social duty and fatally bent on mischief. It
13 connotes hostility and ill will towards another,
14 though, not necessarily towards the specific person
15 who is injured. It is the intentional doing of a
16 wrongful act without just cause or excuse with an
17 intent to inflict an injury or under such
18 circumstances that the law will infer such an evil
19 intent.

20 Now, malice may be expressed or it may be
21 inferred, which is to say that the element of malice
22 may be shown by direct evidence or by inference.
23 Now, these terms express and inferred do not mean
24 different types of malice, but merely the manner in
25 which malice may be shown to exist.

1 So malice may be proven by direct evidence or
2 by inference from the facts and circumstances that
3 are proven by the State. Examples of expressed
4 malice would be where threats of vengeance were
5 made, where ill will was directly expressed or where
6 the killing was planned.

7 Malice may also be inferred from the facts and
8 circumstances proven by the State. Malice may be
9 inferred from conduct showing a total disregard for
10 human life. Malice may be inferred from the use of
11 a deadly weapon, one that is likely to cause death
12 or great bodily injury.

13 But these inferences are evidentiary only and
14 may be considered by you along with all of the other
15 evidence in this case and given such weight, if any,
16 that you determine the inference should receive.
17 They are permissive inferences. In other words,
18 while you may infer malice from the use of a deadly
19 weapon or by a showing of conduct evidencing a total
20 disregard for human life, you are not required to do
21 so based on your view of the evidence.

22 Malice is an essential element of murder and it
23 has to be proven by the State beyond a reasonable
24 doubt.

25 Okay. I told you that it has to be malice

1 aforethought. Whether the malice is expressed or
2 whether it's inferred, the malice must be
3 aforethought.

4 Now, to make sure that you know the word I'm
5 using and you're not confusing it with similar
6 sounding words, I'm going to spell it for you. It's
7 A-F-O-R-E-T-H-O-U-G-H-T, aforethought. The malice
8 has to exist in the mind of the accused just before
9 and at the time of the commission of the act. It is
10 not required that the malice exist for any
11 particular amount of time, but there has to be a
12 combination of the previous evil intent and the act
13 producing the fatal result.

14 Now, you may find malice if you find that the
15 State has proven beyond a reasonable doubt that a
16 defendant was consciously and unlawfully involved in
17 conduct that constituted an extremely high risk of
18 death or serious injury to others and that he was
19 acting with such recklessness and wantonness to
20 indicate a depravity of mind and a disregard of
21 human life beyond a reckless disregard for the
22 safety of others rising to the level where he
23 consciously disregarded the extremely high risk of
24 death that his conduct was creating.

25 Where this state of mind exists, it is known as

1 a depraved heart or a malignant heart. And if a
2 defendant having such a mental state and acting with
3 malice aforethought engages in such conduct that
4 acts as a proximate cause of the unlawful death of
5 another person, it doesn't matter whether he
6 actually intended to kill anyone, he may be found
7 guilty of murder.

8 Now, while I've just explained to you this
9 concept of malignant heart murder, depraved heart
10 murder where a defendant can be found guilty of
11 murder even if he had no actual intention of killing
12 anyone, there are situations that do involve an
13 actual intent to kill. And if you should find from
14 your view of the evidence that the State has proven
15 that a defendant actually intended to kill another
16 person by firing a handgun, I need to explain to you
17 a concept known as transferred intent.

18 If a person, a defendant, with malice
19 aforethought attempts to kill another person, but by
20 mistake or by inaccuracy kills a different person,
21 the law considers that the defendant still had the
22 intent to kill. Intent is a mental state. It
23 exists in the mind. So if the State proves that a
24 defendant acting with malice had the intent to kill
25 one person, but mistakenly killed another, the

1 intent to kill is merely transferred from the
2 original person the defendant attempted to kill to
3 the actual person killed.

4 And then I need to explain to you that to
5 constitute murder, the killing has to be unlawful,
6 meaning that the killing was not justified or
7 warranted under the law.

8 Now, one of the issues that you will need to
9 consider is whether either defendant was acting in
10 self-defense. Self-defense is a complete defense.
11 If a defendant was acting in self-defense, his
12 conduct was lawful and you must find him not guilty.

13 A defendant does not have to prove
14 self-defense. He does not have any burden of proof,
15 so he doesn't have to prove self-defense. Rather,
16 the State has to prove beyond a reasonable doubt
17 that the defendant did not act in self-defense.

18 If you have a reasonable doubt of a defendant's
19 guilt after considering all the evidence in the case
20 including the evidence of self-defense, then you
21 must find that defendant not guilty. On the other
22 hand, if you have no reasonable doubt of the
23 defendant's guilt after considering all of the
24 evidence including evidence of self-defense, you
25 must find the defendant guilty.

1 Now, the following elements are required to
2 establish self-defense: First, the defendant must
3 be without fault in bringing on the difficulty,
4 without fault in bringing on the difficulty. If the
5 defendant's conduct was the type that was reasonably
6 calculated to and did provoke a deadly assault, the
7 defendant would be at fault in bringing on the
8 difficulty and would not be entitled to acquittal
9 based on self-defense.

10 If a defendant voluntarily participated in
11 mutual combat for purposes other than protection,
12 the shooting would not be in self-defense. Now,
13 this is true even if, during the combat, the
14 defendant feared death or serious bodily injury.

15 For mutual combat, there has to be a mutual
16 intent and a willingness to fight. Now, this intent
17 may be shown by the acts and by the conduct of the
18 parties and the circumstances surrounding the
19 combat. In addition, it has to be shown, for mutual
20 combat to apply, that both sides in the conflict
21 were armed with a deadly weapon.

22 Now, the second element of self-defense is that
23 the defendant must have actually been in imminent
24 danger of death or serious bodily injury, or he must
25 have actually believed that he was in imminent

1 danger of death or serious bodily injury.

2 If the defendant was actually in imminent
3 danger, it must be shown that the circumstances
4 would have warranted a person of ordinary firmness
5 and courage to strike as the defendant did to
6 prevent death or serious bodily injury. So if he
7 actually was in imminent danger of death or serious
8 bodily injury, the circumstances have to be such to
9 warrant a person of ordinary firmness and courage to
10 strike as the defendant did to prevent death or
11 serious bodily harm.

12 If the defendant believed he was in imminent
13 danger of death or serious bodily harm, it has to be
14 shown that a reasonably prudent person of ordinary
15 firmness and courage would have had the same belief
16 under the circumstances.

17 Now, in deciding whether the defendant actually
18 was or believed he was in imminent danger of death
19 or serious bodily harm, you need to consider all of
20 the facts and circumstances surrounding the
21 incident. It is not necessary that a defendant
22 actually be in danger. It is enough if the
23 defendant believed he was in imminent danger and a
24 reasonably prudent person of ordinary firmness and
25 courage would have had the same belief. A defendant

1 has the right to act on appearances even though his
2 beliefs may be mistaken.

3 It's for you to decide whether the defendant
4 has reasonable fear of imminent death or serious
5 bodily injury and that it would have been such as
6 would be felt by a person of ordinary firmness and
7 courage in the same situation.

8 The third element of self-defense, the final
9 element, is that the defendant had no other probable
10 way to avoid the danger of death or serious bodily
11 injury than to act as the defendant did in this
12 particular instance. Now, that's generally referred
13 to as an obligation to retreat. A defendant has no
14 duty to retreat if, by doing so, the danger of being
15 killed or suffering serious bodily injury would
16 increase.

17 Now, ladies and gentlemen, the legislature has
18 enacted a statute dealing with a duty to retreat and
19 that statute provides that if someone is attacked in
20 a place where he is entitled to be and if that
21 person is not doing anything that is unlawful, he
22 has no duty to retreat. He may stand his ground and
23 respond to the attack. In other words, he may meet
24 force with force including deadly force.

25 But in order to be entitled to stand his ground

1 and not retreat, he has to have a reasonable belief
2 that it is necessary to strike back and not retreat.
3 He must have been acting lawfully himself. He must
4 have been in a place where he was entitled to be and
5 he must have been attacked.

6 Now, a person who is confronted with a
7 self-defense situation is not required to make an
8 exact calculation of the amount of force needed to
9 avoid death or serious bodily harm, but the person
10 is permitted to use the degree of force and
11 self-defense that a person of ordinary reason and
12 firmness would have believed to be needed to prevent
13 his own death or serious bodily injury.

14 The force used in self-defense does not have to
15 be limited to the degree or amount of force that was
16 used by the opposing party. A defendant has the
17 right to use so much force as appeared to be
18 necessary for complete self protection in which a
19 person of ordinary reason and firmness would have
20 believed to be needed to prevent death or serious
21 bodily harm.

22 If a defendant was justified in acting in
23 self-defense, if a defendant was justified in
24 defending himself and firing a weapon, that
25 defendant is also justified in continuing to defend

1 himself, continuing to shoot until it is apparent
2 that the danger of death or serious bodily injury
3 has completely ended.

4 And the final thing I have to tell you about
5 the law is that a defendant is entitled to every
6 reasonable doubt arising in an entire case or any
7 defenses. If, upon any issue of fact essential to a
8 conviction, you have a reasonable doubt as to how
9 that should be resolved, you have to resolve that
10 doubt in favor of the defendant. If, upon reviewing
11 the entire case, you have a reasonable doubt as to
12 the guilt of a defendant, he is entitled to that
13 doubt and a verdict of not guilty.

14 On the other hand, if, upon reviewing the
15 entire case, you find that the State has proven
16 every essential element of the charge against that
17 defendant beyond a reasonable doubt, it is equally
18 your duty to find that defendant guilty.

19 Now, that's the law.

20 When you go back to your jury room to decide
21 these cases, you're going to have these verdict
22 forms and you're going to have all the exhibits that
23 have been admitted in the trial.

24 Now, before I forget it, we have some standing
25 rules that I've mentioned some about already that we

1 have to operate under in every case, it has nothing
2 to do specifically with this case, it's just what we
3 have to do. With regard to firearms, I cannot send
4 the firearms back. If you want to look at the
5 firearms that are in evidence, send me a note, I'll
6 send it back. If there's ammunition back there that
7 fits that firearm, the ammunition has to come out.
8 That's just the Supreme Court's ruling.

9 Second, clothing was introduced which purports
10 to have blood on it, so if you want to handle that
11 clothing, you'll be given some latex gloves that you
12 may use to handle that clothing.

13 All right. These are the verdict forms.
14 You'll see that there is one for each case. There
15 is one that is captioned the State versus Eugene
16 Peterson and -- Patterson, I'm sorry, and there's
17 one captioned State versus Andre Boone. You need to
18 look at the caption so you can tell which one fits
19 which.

20 You have two possible forms of verdict on each
21 case. Each case is separate and distinct. On this
22 one for Mr. Patterson, it reads, As to the charge of
23 murder, we, the jury, unanimously find the
24 defendant, and you have two options, you may find
25 the defendant not guilty or you may find the

1 defendant guilty of murder.

2 The case that's captioned State versus Andre
3 Boone, the verdict form reads, As to the charge of
4 murder, we, the jury, unanimously find the
5 defendant, you may find him not guilty or you may
6 find him guilty of murder.

7 Mr. Foreman, part of your job is going to be to
8 record the verdicts of the jury. I think you'll
9 find these forms to be very simple and
10 self-explanatory, just check the response chosen by
11 the jury and sign your name on the verdict form,
12 each verdict form.

13 Folks, I'm supposed to tell you about those
14 verdict forms that I'm not trying to suggest
15 anything to you by the order in which I state those
16 possible forms of verdict. I've got to list one
17 first and one second. The truth is I did these
18 forms at a computer school probably about 12 years
19 ago and all I do now is change names and case
20 numbers, but I'm not trying to suggest anything to
21 you. You have two possible forms of verdict in each
22 case.

23 All right. How you go about your
24 deliberations, how you go about taking your votes,
25 all of that is in your discretion subject to this

1 requirement, the verdicts must be unanimous, all 12
2 jurors must agree before the foreman can record your
3 verdict. When you come out and your verdicts are
4 published, you can be asked individually about that.
5 So please make sure you understand you cannot do
6 anything to change the requirement of a unanimous
7 verdict. Verdicts must be unanimous.

8 When you've reached your verdicts, knock on the
9 door, the bailiff will respond to your knock.

10 Over the course of the last eight days, I
11 probably told you dozens and dozens of times not to
12 discuss the case. Well, it's not time yet. The law
13 says that I have to go over with the attorneys what
14 I just told you.

15 Now, what I did, as I mentioned to you
16 yesterday, is I did this last night. I worked on it
17 the last eight days, I put it together last night.
18 I e-mailed it to the attorneys. We met early this
19 morning and we've been over this. This shouldn't
20 take long, but I have to give them a chance to point
21 out to me anything I may have said wrong. And
22 that's just common sense. We don't want you back
23 there deciding these cases using the wrong law. I
24 never read the charge verbatim, sometimes I say
25 things I don't even realize I said, so they have to

1 be given a chance to point it out to me.

2 Here's the signal you need to look for, if I'm
3 satisfied with what I told you, I will send in the
4 exhibits and verdict forms, the bailiff will bring
5 the two alternates out and it will just be the 12 of
6 you in that jury room. When that happens, you start
7 talking about the case, you don't have to wait
8 another second, but don't talk about it until that
9 happens when the bailiffs are out, the alternates
10 are out and you've got the exhibits.

11 You may take your notes back with you now. I
12 told you the rules about that earlier. You cannot
13 physically show them to another juror. And at the
14 end of the trial, they have to be given to the
15 bailiff and destroyed.

16 Folks, I can't begin to thank you enough for
17 your attention, so I won't belabor it. You may
18 retire to your jury room. Thank you.

19 (The jury retires to the jury room.)

20 **THE COURT:** Please state for the record
21 exceptions, additions or objections to the charge,
22 from the State.

23 **MR. GOLDBERG:** Nothing, Your Honor.

24 **THE COURT:** All right. Mr. Sutherland, do you
25 have any?

1 **MR. SUTHERLAND:** I don't believe so, Your
2 Honor. I do believe that the folding in of the
3 section C of the statute did include violent injury
4 to himself or another person to cover the defense of
5 others.

6 **THE COURT:** Do you want to preserve any
7 objections raised in the other conferences to the
8 charge?

9 **MR. SUTHERLAND:** Yes, sir.

10 **THE COURT:** All right. Subject to previous
11 objections.

12 And do you all have anything, Ms. Payne?

13 **MS. PAYNE:** Subject to previous objections,
14 Your Honor.

15 **THE COURT:** All right. Thank you.

16 Well, folks, I want to thank you for the manner
17 in which you've conducted yourselves. I appreciate
18 the respect you've shown to the Court, everybody.
19 It's a very difficult case. It's been a lot of hard
20 work for a lot of people and a lot of emotion for a
21 lot of people. The jury's got the toughest job in
22 the courthouse and we're going to put it in their
23 hands and we're going to see what they decide, but I
24 do thank you. If you attorneys will please check
25 the verdict forms and check the exhibits and send

1 those back.

2 Now, make sure -- I'm not going to release
3 those two alternates. I'm going to put them in a
4 separate room just in case we have a problem, at
5 least for a while. So I need a bailiff to pay close
6 attention to me now, okay. When you take these
7 exhibits back there and you bring those two
8 alternates out, bring them into the courtroom, okay.
9 Thank you.

10 (The alternates enter the courtroom.)

11 **THE COURT:** I need the alternates to stay
12 around a while. I don't know how long I might keep
13 you, but I need you here in case we have a problem.
14 I'm going to send you into another jury room, the
15 two of you will be together. You cannot discuss the
16 case. If it were to be necessary for me to
17 substitute one of you for one of the 12 jurors, the
18 jury would be instructed that they had to start
19 their deliberations completely from the beginning,
20 so you would pick up at that point.

21 I hate to ask that of you, but it's an eight
22 day trial and I don't want anything to go wrong now.
23 So I need you, if you would, go with the bailiff and
24 they will try to get you snacks or things to make
25 you comfortable, okay. Thank you.

1 (The alternates leave the courtroom.)

2 **THE COURT:** We're at ease pending a verdict.

3 (The jury commenced its deliberations at
4 3:46 p.m.)

5 (A recess transpired.)

6 **THE COURT:** I've been informed that the jury
7 has reached its verdicts. Obviously, I have no way
8 of knowing what the jury's decided.

9 This is something I say in every case. I'm not
10 singling any of you out. You've conducted yourself
11 very well throughout the trial, but, folks, it's
12 really important that you understand that you are
13 not to show any sign of approval or disapproval with
14 the jury's verdict. Whether the verdicts to you are
15 good, bad or indifferent, I expect you to stay still
16 and stay quiet. Don't show any signs of approval or
17 disapproval, don't shake your head in agreement or
18 disagreement, don't make any sounds, control your
19 emotions, we'll get through this just fine.

20 Now, if you violate what I've just told you, I
21 can hold you in contempt, I can have you arrested, I
22 can put you in jail for six months without a jury
23 trial. I've never had to do that before, don't
24 expect to do it today, just feel better if I make
25 sure everybody knows the ground rules.

1 Bring in the jury.

2 (The jury returns to open court to report
3 its verdict at 6:22 p.m.)

4 **THE COURT:** Madame Clerk.

5 **THE CLERK:** Mr. Foreman, has the jury reached a
6 verdict?

7 **FOREMAN:** We have.

8 **THE CLERK:** Hand it to the bailiff, please.

9 (The Clerk hands the verdicts to the Judge.)

10 **THE COURT:** Publish the verdicts, please.

11 **THE CLERK:** State of South Carolina, County of
12 Richland, in case number 2007-GS-40-2324, the State
13 versus Andre Boone as to the charge of murder, we,
14 the jury, unanimously find the defendant guilty of
15 murder, signed the Foreperson, Number 135, dated May
16 13th, 2008.

17 The State of South Carolina, County of
18 Richland, in case number 2007-GS-40-2137, the State
19 versus Eugene Patterson as to the charge of murder,
20 we, the jury, unanimously find the defendant guilty
21 of murder, signed by the Foreperson, Number 135, on
22 May 13th, 2008.

23 Mr. Foreman, is this the verdict of you and the
24 jury?

25 **FOREMAN:** It is.

1 **THE COURT:** Thank you.

2 Ladies and gentlemen, if the verdicts have been
3 properly read, that is guilty as to both defendants
4 on the charge of murder as to each, please signify
5 by raising your right hand.

6 All 12 hands are raised.

7 Are there any matters to take up prior to the
8 jury being discharged on behalf of Mr. Patterson?

9 **MR. SUTHERLAND:** Your Honor, could we poll the
10 jury individually?

11 **THE COURT:** On behalf of Mr. Boone?

12 **MS. PAYNE:** We'd also like to poll the jury,
13 Your Honor.

14 **THE COURT:** Ladies and gentlemen, what I'm
15 going to do, just start with Mr. Patterson, and the
16 clerk will ask you were these your verdicts and are
17 they still your verdicts. So what she'll do is she
18 call your juror number, when she calls your number,
19 raise your hand so she knows where to look, all
20 right, and then she'll ask you those questions, were
21 these your verdicts, are they still your verdicts.
22 Answer her truthfully. We'll start with
23 Mr. Patterson, was this your verdict and is it still
24 your verdict.

25 **THE CLERK:** Number 135, was this your verdict?

1 FOREMAN: It was.
2 THE CLERK: Is it still your verdict?
3 FOREMAN: It is.
4 THE CLERK: Number 123, was this your verdict?
5 JUROR: Yes.
6 THE CLERK: Is it still your verdict?
7 JUROR: Yes.
8 THE CLERK: Number 8, was this your verdict?
9 JUROR: Yes.
10 THE CLERK: Is it still your verdict?
11 JUROR: Yes.
12 THE CLERK: Number 28, was this your verdict?
13 JUROR: It was.
14 THE CLERK: Is this still your verdict?
15 JUROR: Yes..
16 THE CLERK: Number 280, was this your verdict?
17 JUROR: Yes.
18 THE CLERK: Is it still your verdict?
19 JUROR: Yes.
20 THE CLERK: Number 67, was this your verdict?
21 JUROR: Yes.
22 THE CLERK: Is it still your verdict?
23 JUROR: Yes.
24 THE CLERK: Number 152, was this your verdict?
25 JUROR: Yes.

1 THE CLERK: Is it still your verdict?
2 JUROR: Yes.
3 THE CLERK: Number 29, was this your verdict?
4 JUROR: Yes.
5 THE CLERK: Is it still your verdict?
6 JUROR: Yes.
7 THE CLERK: Number 199, was this your verdict?
8 JUROR: Yes.
9 THE CLERK: Is it still your verdict?
10 JUROR: Yes.
11 THE CLERK: Number 214, was this your verdict?
12 JUROR: Yes.
13 THE CLERK: Is it still your verdict?
14 JUROR: Yes.
15 THE CLERK: Number 282, was this your verdict?
16 JUROR: Yes.
17 THE CLERK: Is it still your verdict?
18 JUROR: Yes.
19 THE CLERK: Number 264, was this your verdict?
20 JUROR: Yes.
21 THE CLERK: Is it still your verdict?
22 JUROR: Yes.
23 THE CLERK: The jury's been polled, Your Honor.
24 THE COURT: As to Mr. Boone's case, the same
25 thing, the clerk will ask you was this your verdict,

1 is it still your verdict, same procedure.

2 Madame Clerk.

3 THE CLERK: Number 135, was this your verdict?

4 FOREMAN: It was.

5 THE CLERK: Is this still your verdict?

6 FOREMAN: It is.

7 THE CLERK: Number 123, was this your verdict?

8 JUROR: Yes.

9 THE CLERK: Is this still your verdict?

10 JUROR: Yes.

11 THE CLERK: Number 8, was this your verdict?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR: Yes.

15 THE CLERK: Number 28, was this your verdict?

16 JUROR: Yes.

17 THE CLERK: Is it still your verdict?

18 JUROR: Yes.

19 THE CLERK: Number 280, was this your verdict?

20 JUROR: Yes.

21 THE CLERK: Is it still your verdict?

22 JUROR: Yes.

23 THE CLERK: Number 67, was this your verdict?

24 JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 JUROR: Yes.

2 THE CLERK: Number 152, was this your verdict?

3 JUROR: It is.

4 THE CLERK: Is it still your verdict?

5 JUROR: It is.

6 THE CLERK: Number 29, was this your verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Number 199, was this your verdict?

11 JUROR: Yes.

12 THE CLERK: Is it still your verdict?

13 JUROR: Yes.

14 THE CLERK: Number 214, was this your verdict?

15 JUROR: Yes.

16 THE CLERK: Is it still your verdict?

17 JUROR: Yes.

18 THE CLERK: Number 282, was this your verdict?

19 JUROR: Yes.

20 THE CLERK: Is it still your verdict?

21 JUROR: Yes.

22 THE CLERK: Number 264, was this your verdict?

23 JUROR: Yes.

24 THE CLERK: Is it still your verdict?

25 JUROR: Yes.

1 **THE CLERK:** The jury's been polled, Your Honor.

2 **THE COURT:** Thank you.

3 Anything further prior to the jury being
4 discharged on behalf of Mr. Patterson?

5 **MR. SUTHERLAND:** No, sir.

6 **THE COURT:** Mr. Boone?

7 **MS. PAYNE:** Nothing further, Your Honor.

8 **THE COURT:** Ladies and gentlemen, before I can
9 let you go, there are some matters I have to address
10 with the attorneys and I want to talk to you
11 briefly. If you'll wait back there in the jury room
12 for me, I'll be back as quickly as I possibly can.
13 Thank you.

14 (The jury retires to the jury room.)

15 **THE COURT:** Motions?

16 **MR. SUTHERLAND:** Please the Court, sir,
17 renewing all of my prior motions and objections. At
18 this time, I'd like to move for a new trial based on
19 the fact that we sincerely believe the evidence is
20 not competent to support the verdict, as well as
21 just renewing the prior motions and objections, sir.

22 **THE COURT:** Thank you. Your motions are
23 respectfully denied.

24 Anything on behalf of Mr. Boone?

25 **MS. PAYNE:** Yes, Your Honor. May it please the

1 Court. We would also renew all motions and
2 objections previously overruled, specifically with
3 respect to our motion to suppress all mention of
4 gang references; to Mr. Boone's statement coming in
5 as a voluntary statement; as to the photo lineups
6 that were done on Andre Boone, I believe, Karmindae
7 Leggett; to item number 73, which was put into
8 evidence, which was the red shirt of Mr. Brian
9 Wright's; Mr. Patterson's third statement, I believe
10 under Bruton some of it was not redacted fully, Your
11 Honor; and then a motion for a mistrial based on Ms.
12 Campbell's use of the excluded photo that she showed
13 the jury.

14 Your Honor, we would also move for a new trial
15 on the grounds that the verdict is not supported by
16 the evidence in this case, Your Honor, specifically
17 the Solicitor did not present substantial
18 circumstantial evidence in this case to go past a
19 directed verdict motion, Your Honor. Also, the jury
20 did not deliberate in a time equivalent to the
21 length of the trial and the evidence. And we would
22 respectfully ask that the Court grant a new trial in
23 this case.

24 **THE COURT:** All right. The motions are also
25 respectfully denied. With regard to the jury, I

1 thought they were extremely attentive. And
2 throughout the trial, I was very impressed with the
3 way they conducted themselves and I'm confident they
4 gave the case proper consideration as to each
5 defendant.

6 Are there any matters that I need to address
7 related to sentencing?

8 MS. CAMPBELL: No, sir. I just need --
9 whenever you feel sentence is appropriate, I just
10 need to check with the victim.

11 THE COURT: I'm ready.

12 MS. CAMPBELL: Yes, sir.

13 (Pause.)

14 MS. CAMPBELL: Your Honor, the family has been
15 in court all week. We did move them to the back
16 part just as a precaution as far as safety issues.

17 This is the sister of the victim. I think she
18 would like to briefly just address the Court about
19 the affect it's had on her life.

20 THE COURT: Your name please, ma'am.

21 MS. PRESSLEY: My name is Stephanie Pressley.
22 Pressley is spelled P-R-E-S-S-L-E-Y.

23 THE COURT: Hold on just a second.

24 (Pause.)

25 THE COURT: Go ahead, ma'am.

1 MS. PRESSLEY: I prepared this while I was
2 sitting in trial listening to all the evidence and
3 everything and never intended to be a poem or never
4 intended it to rhyme, but these are my final words.

5 Brian was more than a brother to me. There are
6 many years between us; therefore, I saw him as my
7 baby, my Tank Man, which is the name I gave to him,
8 and now he is gone forever. Although most people
9 would say that we, the family, can have rest or
10 closure when this trial is over, but little do they
11 realize we laid my brother at the tender age of 15
12 to his final rest on February 23rd, 2007. For every
13 time I think about how I will never have my Tank Man
14 present in my life again, there isn't any true
15 closure.

16 To the young men that are responsible for
17 taking my brother's life, I forgive each and
18 everyone of you with my Christian heart. I pray
19 that you repent for your sins and judgment falls
20 down upon you as justice prevailed.

21 It hurts my heart to know that Brian's life is
22 cut short for foolishness by some teenagers in a
23 rage. My final words are left by saying you say you
24 didn't know him nor was you shooting at him, but
25 should that minimize my family's pain. My brother's

1 life was taken away. For that fact remains,
2 therefore, your freedom should result in the same.

3 To the families, you have -- you will be able
4 to hold and hear your loved ones again, even some
5 day hold them in your arms. Please know there's
6 nothing to moan because there's still something
7 called visitation rights. However, my family and
8 our visitation rights is a little different. We
9 cannot hear Brian's voice, never hold him in our
10 arms again. And every time we see his face, it is
11 only a picture, which is on a tombstone that sits
12 above his grave.

13 THE COURT: Thank you, ma'am.

14 MS. CAMPBELL: That's all. I think she's
15 representing the family, Your Honor.

16 THE COURT: Thank you very much.

17 Do you have the sentence sheet?

18 MS. CAMPBELL: And I've got prior records when
19 it's appropriate, Your Honor.

20 THE COURT: Go ahead.

21 MR. GOLDBERG: Please the Court, Your Honor.
22 Mr. Patterson has a prior record. He had a
23 conviction in April 2006 for burglary second degree,
24 it was two counts. He was sentenced under the
25 Youthful Offender Act. It was suspended on three

1 years probation.

2 I believe Mr. Boone's only prior record is a
3 conviction for simple possession of marijuana, that
4 was when he was arrested on these charges.

5 **THE COURT:** Okay. Mr. Sutherland, do you have
6 anything on behalf of Mr. Patterson?

7 **MR. SUTHERLAND:** Yes, sir. Your Honor,
8 obviously, I'm disappointed at the verdict, but the
9 verdict is what it is. I've known Eugene since he
10 was 15. I guess they felt under the theory that he
11 was a murderer, sir.

12 He's a good kid. He had a state job. He had
13 been in that trouble before and that's how I met him
14 earlier, but he was working and he was working at
15 the state job. He had a good plan and he was
16 picking himself up and he was on his way out of
17 these circumstances, sir.

18 I would ask the Court please consider the
19 minimum possible sentence. Twenty-five years from
20 now he'll certainly be a completely different
21 person, although I hope he doesn't change that much.

22 **THE COURT:** Thirty years is the minimum.
23 Anything else, Mr. Sutherland?

24 **MR. SUTHERLAND:** That's all from me, sir.

25 **THE COURT:** Mr. Patterson, do you want to say

1 anything?

2 **DEFENDANT PATTERSON:** Yeah. The only thing I
3 want to say is basically to the victim family, it's
4 a terrible thing, you know what I mean, what
5 happened to Brian and whatnot. I knew him. We
6 wasn't the best of friends, but we was -- you would
7 call us, I guess, you would call us cool, you know
8 what I mean. The only thing I can say is rest in
9 peace.

10 And as far as this murder thing, I mean it's
11 easy for somebody who don't know me to make
12 assumptions and accusations about me, you know what
13 I mean, but it'll never change who I am. I'm going
14 to still stay that way whether time or whatnot, I'm
15 going to still be me. That's it.

16 **THE COURT:** Thank you, sir.

17 Anything else, Mr. Sutherland?

18 **MR. SUTHERLAND:** That's all, sir.

19 **THE COURT:** All right. Do you all have
20 anything on behalf of Mr. Boone?

21 **MS. EVERHART:** Yes, Your Honor. Your Honor, as
22 you've heard, Mr. Boone is 17 years old. He
23 attended school until the 10th grade. Your Honor,
24 he's been incarcerated since February when he was
25 arrested on these charges.

1 Your Honor, I have spent so much time with both
2 he and his family over the duration of the last 13
3 months. His family is loving and generous and they
4 have expressed to me nothing but concern and love
5 for him. His mom and I talk on a regular basis.

6 I met with him at the jail numerous times to
7 see him. I've had multiple conversations with him.
8 And I can honestly say from the bottom of my heart,
9 that he did not intend this outcome on this night.
10 He is a good person. He's going to be a good man.
11 I know he regrets that Brian Wright died that night.
12 And, Your Honor, I know he wants his family to know
13 that that was not an intended outcome.

14 I would ask the Court to consider the minimum
15 sentence in this case. And I'm sure Ms. Payne would
16 also like to address the Court.

17 **THE COURT:** Yes, ma'am.

18 **MS. PAYNE:** If it pleases the Court, Your
19 Honor. I've also had the privilege to get to know
20 Andre over the past couple of weeks as we prepared
21 and his family. And he comes from a good family and
22 they care about him and they love him and they're
23 going to support him.

24 And I know, we talked at length about this,
25 Andre's here today, he's accepting what the jury has

1 decided, but, you know, you've heard this whole
2 case. He got on the stand and he told his story and
3 that's the story that he told us, that's the story
4 that he told the police. And, Your Honor, I just
5 beg the Court to consider the 30 year minimum. I
6 think even when that time comes, if that time does
7 come for him, he will still be able to be a
8 productive member of society.

9 We just ask if the Court would hear from his
10 family.

11 THE COURT: What's your name, ma'am?

12 MS. BOONE: Sandra Boone.

13 THE COURT: Yes, ma'am.

14 MS. BOONE: Your Honor, first of all, my heart
15 does go out for Brian Wright's family and I am
16 deeply sorry for their loss.

17 But, Your Honor, I know my son was in the wrong
18 place at the wrong time. I ask you take mercy on
19 him, Your Honor. My son was a good child, never
20 been in trouble a day in his life. This is the
21 first time he's ever been in trouble in his life.
22 He's an honor student, church going, choir. My son
23 has so much. I have so much paperwork for this
24 young man for the future that he had in front of him
25 from Who's Who among American high school students

1 to medical school. There is so much I can't even
2 begin to name, Your Honor. I just ask that you
3 please take mercy on my baby, please.

4 **THE COURT:** Thank you, ma'am.

5 Anything else?

6 **DEFENDANT BOONE:** I'd just like to say I'm
7 sorry for what happened to Brian Wright. And if I
8 could take back the hands of time, I'd do a lot of
9 things differently.

10 Even though I did not commit this crime, it
11 seemed like 12 people thought different. If I'd
12 known any of this would have happened -- was going
13 to happen that night, surely I would have did
14 different, I would have thought differently. The
15 first time in trouble, now look at me. But I know
16 the grace of God, something good's got to come from
17 this.

18 If only I could change back the hands of time,
19 I would take everything back. I would have never
20 showed up there that night. The female I did go
21 see, you see where she's at. A lot of things -- a
22 lot of things happened out there that night, a lot
23 of things that couldn't be taken back.

24 I just like to say sorry to the victim's family
25 for any hatred y'all might have against me, but I

1 want y'all to honestly know I did not do it, but
2 these are the cards I was dealt at 16 years old,
3 made one mistake of my life. I don't know how much
4 it's going take, but I got to deal with it. I'd
5 like to say sorry for anything, for any pain y'all
6 have. I'd like to just say -- all I can say is I'm
7 sorry, been doing it for -- I'm sorry for just
8 shooting in the air. I didn't commit the crime, but
9 that's what shooting in the air did for me. I just
10 want to say sorry to everyone and I ask everyone to
11 forgive me.

12 **THE COURT:** All right. If there's nothing
13 else, they can have a seat.

14 Do y'all have something else, Mr. Sutherland?

15 **MR. SUTHERLAND:** Yes, Your Honor.

16 Mr. Patterson's father would like to address the
17 Court.

18 **THE COURT:** Sure. What's your name, sir?

19 **MR. PATTERSON:** Eugene Patterson. I just --
20 can touch my son? I haven't touched him in over a
21 year.

22 I guess, first, I would like to just say I'm
23 sorry to the victim's family here about this
24 situation, you know, that we have here. I talk to
25 my son on a regular basis through letter or

1 visitation. And the father of the victim, I know
2 him from in the past, talked to him from day one
3 since I got here, since we were up here. And he
4 shared some things with me. I shared some things
5 with him. And one of the things was something about
6 being making an example of. I ask the Court please
7 don't make an example of my son or Mr. Boone here.
8 Both of them are young, they just were the victims
9 in a sad situation.

10 The night that this incident happened, I woke
11 up out of my sleep just called my son and asked him
12 about it. He said, yeah, dad, I heard about it, you
13 know. I said, well -- then every time the officers
14 would call for an interrogation or whatever, I would
15 get him off the job to come down here, I'll take you
16 down there, you know.

17 Because I was always taught, the way I was
18 brought up, don't run from the law. My mom, like
19 Tivis had said earlier this week, they probably
20 would -- going to jail would have been a good thing,
21 you know what I mean, that's the way I was raised
22 up. I spanked my son several years ago, I spent the
23 night in jail for domestic violence. I wish we
24 could do something about that law because that's the
25 way I was raised. It wasn't to hurt him or to harm

1 him, it was to train him up in the way a child
2 should go as the word of God says.

3 This is real heavy on my heart as it is on the
4 victim's heart, but I guess we just have to deal
5 with what we have to deal with. That's all I've got
6 to say. God bless you.

7 **THE COURT:** Thank you very much.

8 Anything else?

9 Mr. Patterson and Mr. Boone, if you wish to
10 appeal anything from these proceedings, you have to
11 do so in writing. It has to be done according to a
12 strict time line. It's a very short time line, so I
13 would suggest that you advise your attorneys to file
14 a notice of intent to appeal. And then since you
15 have appointed counsel, the Office of Indigent
16 Defense will appoint appellate counsel to pursue
17 your case. Do you understand all that,
18 Mr. Patterson?

19 **DEFENDANT PATTERSON:** Yes, sir.

20 **THE COURT:** Mr. Boone?

21 **DEFENDANT BOONE:** Yes, sir.

22 **THE COURT:** Having nothing else for me to hear,
23 after many years, I've learned that nobody wants to
24 hear me pontificate about anything. They want me to
25 announce the sentence and let them move on with

1 their lives. So I'll keep this short.

2 I'm satisfied without any doubt that both
3 Mr. Patterson and Mr. Boone come from fine families,
4 as did Mr. Wright. I'm satisfied that the jury
5 deliberated with proper motives and that they
6 rendered a verdict that complies with the law.

7 Now, if I'm wrong about that, we'll find out
8 about it down the road, but I can promise you that I
9 could not have put anymore effort into trying to
10 determine what the law actually is and to apply it
11 and the rulings fairly.

12 It's a tragedy all the way around. Nobody's
13 going to like this sentence, but there is no doubt,
14 in my mind, it was a crime. And sometimes when
15 people mess up, they mess up with something rather
16 trivial. And sometimes when people mess up, they
17 mess up with something that is completely
18 devastating.

19 The sentence of the Court is that each of these
20 men be committed to the South Carolina Department of
21 Corrections for 45 years plus costs and assessments.
22 They're given credit for jail time under section
23 24-13-40 to be calculated and applied by the
24 department of corrections.

25 Good luck to you, folks. Court's adjourned.

1 (The jury was excused.)

2 (For purposes of the record, Court's Exhibit
3 Number 8, motion, was marked for identification
4 purposes.)

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6 END OF PROCEEDINGS

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Richland County, South Carolina, on the 5th of May, 2008.

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

November 9, 2008


Stacy L. Sheppard
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE TAYSON BOONE,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the court erred by instructing the jury on "mutual combat" since that charge was burden shifting and inappropriate given the facts of this case since the prior agreement to fight on equal terms must be plain and not merely arise out of "fist fight or a scuffle," and defense counsel correctly cited State v. Taylor when objecting to this proposed jury instruction?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County grand jury with the offense of murder. R. 1648 – 1649.

. His case came on for trial with his co-defendant, Eugene Patterson, on May 5, 2008 before the Honorable William P. Keesely, and a jury. R. 1. Camille Everhart, Danielle Payne and Ashley Thomas represented appellant. Tivis C. Sutherland, IV represented co-defendant Patterson. Kathryn Luck Campbell and Daniel Goldberg were the solicitors. R. 1.

At the conclusion of the trial the jury found appellant and co-defendant Patterson guilty. R. 1624, ll. 11 - 22. Judge Keesley sentenced appellant to forty-five-years imprisonment. R. 1643, l. 19 - 24.

This appeal follows.

ARGUMENT

The court erred by instructing the jury on mutual combat. The doctrine of mutual combat was not applicable to this case which involved a fist fight or scuffle essentially between high school young men under the precedent of *State v. Taylor*. The instruction, as in *State v. Taylor* was also burden shifting, and prejudicial.

Relevant Facts

This case involves an altercation -- a fist fight -- between high school aged young men in the parking lot of the Waffle House near I-20 on Two Notch Road in Columbia. It ended in a young man tragically being shot. Karleisa Brabham was a student at Spring Valley High School. R. 497, l. 25 – 498, l. 17. On the night of February 19, 2007, Brabham said he was “hanging out” with his cousins at the Waffle House. R. 499, ll. 4 - 23.

Brabham said that Morgan Jackson, his cousin, informed him her boyfriend, Cedric Ruff, was going to get into an altercation at the Waffle House and “we went up there to try and stop it.” R. 499, l. 24 – 500, l. 8.

Brabham remembered that Ruff showed up and started fighting with Chad, Cedric and Corey. R. 500, ll. 12 - 23. During this fight, Brabham said he observed appellant walk in front of their car and fire his gun into the air. R. 501, l. 9 – 502, l. 6.

On cross-examination Brabham said appellant fired twice into the air while the other men were fighting and that was the extent in his involvement. Appellant, a ninth grader at the time, would later testify that he only fired the gun into the air to break up the fight. R. 507, l. 6 – 508, l. 7.

Jerome Thompson was in the twelfth grade at Keenan High School. R. 510, ll. 10 - 25. Thompson said that appellant was younger than him. Appellant, in fact, was only in the

tenth grade when this case went to trial in 2008. R. 1378, ll. 10 - 22. Thompson remembered on the evening of February 18, 2007, they planned to go to a party but that the party "got shot up before we got there." Therefore the young men went to the Waffle House instead. R. 514, l. 13 - 515, l. 23.

Thompson said while they were at the Waffle House "a couple people rode by and then some dude in a car came by talking junk." R. 518, ll. 11 - 17. Thompson recalled that "a light-skinned dude and a dark-skinned dude walked by. "One of them was light-skinned with a blue flag around his neck indicating he was a Crip." R. 532, ll. 2 - 15. Thompson acknowledged that he was a "Blood." R. 519, ll. 13 - 14.

Thompson said that he had a gun in his lap as they sat in the car in the parking lot. Appellant was the driver of the car. R. 530, ll. 12 - 21. Thompson said that Corey, one of the young men involved in the fight, did not speak to appellant. Thompson said that Corey waited for the rest of his gang, the Folk, to arrive. R. 533, l. 22 - 535, l. 22. Thompson testified that when the other young men arrived "Corey ran down there [and] started trying to fight with all of them by himself." R. 535, ll. 5 - 25. While this fight was going on, Thompson said "Tayson [appellant] ran up there to see what he was doing." R. 537, ll. 11 - 14. Thompson said one of the young men told appellant if he got involved "he was going to shoot him." R. 539, ll. 13 - 25. As will be seen infra, appellant later confirmed that he was threatened when he went near the fight.

Thompson said appellant at one point asked him for his gun. Thompson gave it to appellant. Thompson said appellant then "just shot two times in the sky." R. 542, l. 5 - 22. Thompson said after appellant fired two shots in the air: "[T]he two dudes start shooting. The light-skinned dude with the flag around his neck and the dark-skinned dude started

shooting.” R. 544, l. 1 – 545, l. 9. Thompson said appellant only fired these two shots. R. 552, l. 6 – 553, l. 23.

On cross-examination Thompson said he was surprised that appellant asked for his gun while the other men were fighting. “[H]e don’t really do stuff like that.” Thompson said he thought of appellant as being “a pretty boy.” R. 571, ll. 10 - 16.

Twenty-one-year-old Robert Portee was the cousin of Corey Sanders. Portee testified that they also intended to go to the party at the Windsor Lake club house. However, the party got “shut down” because someone fired a gun there. R. 580, l. 3 – 581, l. 14.

Portee remembered that he ended up at the Waffle House where “Corey and this guy named Chad got into it.” Portee said he became involved in the fight and threw a punch that hit Chad in the head. R. 585, l. 16 – 588, l. 14. Portee recalled that he heard shots fired during the fight and he said “I was in the cross fire.” R. 590, ll. 11 - 18. Once the shooting started: “I dropped and hit the ground.” R. 591, ll. 13 - 17.

Portee claimed before the shooting started appellant told him: “I was going to chunk at these niggers.” R. 592, ll. 1 - 11. Portee said he called the police after the fight “because people were saying that I was the guy who killed him [the decedent], which was a lie.” R. 594, ll. 7 - 9.

Corey Sanders testified that he was “a blood” and that he was going to fight Chad, who was a folk, that evening. R. 630, l. 20 – 633, l. 4. Sanders remembered seeing Jerome Thompson and appellant in the parking lot of the Waffle House that evening. R. 636, l. 25 – 637, l. 25. Sanders testified that Eugene Patterson, the co-defendant, pointed a gun at him that evening during the fight. R. 650, l. 18 – 651, l. 3.

Oliver Feldman testified that he was a member of the "Rolling 20's crip gang." R. 793, ll. 1 - 4. Feldman claimed that the fight that evening "was going to be a fight between gang members." R. 803, ll. 7 - 15. Feldman said: "I saw somebody started shooting, pointing the gun towards the air and started shooting shots." R. 803, ll. 16 - 25.

Feldman said after a couple shots were fired in the air that shots were fired at him and "me and Gene ran to the back of my car and we both grabbed our guns and started firing back towards that individual." R. 804, ll. 20 - 24. Feldman said that he and Gene, co-defendant Eugene Patterson, "fired shots in the parking lot of the Waffle House. R. 835, l. 5 - 836, l. 6. Feldman said he gave a statement to the police twelve days after the incident. The following occurred a cross-examination of Feldman

Ms. Everhart: And that was the day someone pulled out a gun and shot into the air at the Waffle House?

Oliver Feldman: Yes, ma'am.

Ms. Everhart: And you grabbed your gun and you returned fire?

Oliver Feldman: Yes, ma'am.

Ms. Everhart: And when you talked to that police 12 days after the event, you felt pretty clear about what you saw?

Oliver Feldman: Yes, ma'am.

R. 844, ll. 17 - 25.

Appellant testified in his own defense. Appellant was in the tenth grade at the time of his trial. R. 1378, ll. 10 - 22. Appellant said on the evening of the incident he got a call from his girlfriend "and she wanted to see me at the Waffle House on Two Notch by the Mobil." R. 1381, ll. 7 - 15. Appellant testified while he was at the Waffle House "I seen

Corey walk up there by himself [and he] started fighting Chad. And I seen they was fighting one on one at first, but then I seen more people start to getting –just jumping Corey, that’s when I spotted Dameon. Then I ran –I went to fight Dameon and then that’s when the light-skinned dude with the blue do-rag around his face showed me the butt of his gun and told me if I didn’t back up, he was going to shoot my ass. . . [the] first thing I thought, like, if I don’t stop this, somebody [is] going to end up getting hurt. So I knew the only way I could probably stop it.” R. 1382, l. 19 – 1383, l. 4.

Appellant said he did not know that Jerome Thompson had a gun until they got to the Waffle House. Appellant asked Thompson for the gun after he had been threatened,” and that’s when I shot two times in the air just to stop the fighting and everything so everybody can go home, so Corey could stop getting beat up and everybody can go home.” R. 1383, ll. 5 - 18.

Appellant said he shot the gun four times and he got in the truck and left. R. 1384, ll. 3 - 18. Appellant denied he told Robert Portee, who immediately called the police after the fight to “clear himself,” that he was going to “chunk at anybody” that evening.” R. 1414, l. 25 – 1415, l. 4.

Objection to the proposed charge

At the conclusion of the evidence counsel for co-defendant Patterson objected to the judge giving a mutual combat instruction. He cited State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) which held that in order for there to be a mutual combat instruction there needs to be plain evidence of an agreement to fight not just a fight “arising out of a mere fist fight or a scuffle.” R. 1469, l. 13 – 1470, l. 14. Counsel used those exact words when objecting to the instruction, and he added that the instruction would be burden shifting and

only applied when there was a prior agreement to “fight on equal footing.” R. 1469, l. 13 - 1470, l. 14. Counsel added that a mutual combat instruction “is not appropriate to these facts.” R. 1470, ll. 7 - 18. Defense counsel Payne -- appellant’s attorney -- joined appellant in the objection to charging the jury on mutual combat. Counsel said there was no need to expand on the co-defendant’s objection, and that appellant joined in that objection. R. 1472, ll. 11 - 22.

Over objection the judge then charged the jury that if the defendant “voluntary participated in mutual combat for purposes other than protection, the shooting would not be in self-defense. Now, this is true even if, during the combat, the defendant feared death or serious bodily injury. For mutual combat, there has to be a mutual intent and willingness to fight.” R. 612, ll. 10 – 22.

Discussion

In State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003), the Court noted that the law to be charged to the jury is determined by the evidence adduced at trial. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The Court held that doctrine of mutual combat

“[H]as most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party’s property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 177 S.E. 3 18 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each

other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other)

State v. Taylor, 356 S.C. at 232, 233, 589 S.E.2d at 4. The Court also wrote “in the only modern South Carolina case to refer to mutual combat in a fist-fight setting, this Court apparently assumed it could apply, but held there was no evidence to support it. Nauful v. Milligan 258 S.C. 139, 187 S.E.2d 511 (1972). The Court in State v. Taylor adopted the doctrine in other states that for mutual combat to apply there must be a prior agreement to fight and that it only arises “when the parties are armed with deadly weapons, and that mutual combat does not arise from a mere fist-fight or scuffle.” See Flowers v. State, 146 GA.App. 692, 247 S.E.2d 217, 218 (1978); Grant v. State, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969).

The Court in Taylor noted that mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection.” State v. Taylor, 356 S.C. 227, 234 , 589 S.E.2d 1,4 (2003). The Court also emphasized South Carolina cases involving mutual combat reveal that “each party knew that the other was armed.” State v. Taylor, 356 S.C. 227, 234 , 589 S.E.2d 1,5 (2003). The Court also stated that under the State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) line of cases that the state had to disprove self-defense, and that the unwarranted jury instruction here transferred that burden to appellant and was therefore prejudicial. In State v. Taylor the Court found the evidence was “insufficient to warrant a jury charge of mutual combat,” and reversed and remanded for a new trial.

The same is true here. There was evidence appellant shot his gun into the air, after he was threatened, during a fist fight. Appellant testified he got the gun, and shot the gun

into the air to stop the fighting. Although the evidence was disputed, as it almost always is, there was not any evidence that appellant had a specific quarrel with a specific person and that there was an agreement for there to be an armed fight on equal terms or equal footing. In fact, the only real evidence involving the gun was that appellant only knew Thompson had a gun after they arrived at the Waffle House. He asked Thompson for the gun after he approached the fist fight and was threatened. This is not a case of mutual combat under State v. Taylor because appellant did not have a specific quarrel with a specific person where there was an agreement to have an armed fight.

Thompson also testified he was very surprised when appellant asked for the gun because he thought of appellant as being a "pretty boy," and someone who did not engage in such behavior. As in State v. Taylor, mutual combat was not appropriate for the facts of this case for the reasons above, and since it barred self-defense, and shifted the state's burden to disprove self-defense onto appellant, it was highly prejudicial to appellant. Appellant should be granted a new trial. See, also, State v. Jackson, 384 S.C. 29, 681 S.E.2d 17 (Ct.App. 2009).

CONCLUSION

By reason of the foregoing argument appellant's conviction should be reversed and this case remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2010

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
William P. Keesley, Circuit Court Judge

The State,

Respondent,

vs.

Andre Tayson Boone,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by instructing the jury on "mutual combat" since that charge was burden shifting and inappropriate given the facts of this case since the prior agreement to fight on equal terms must be plain and not merely arise out of "fist fight or a scuffle," and defense counsel correctly cited State v. Taylor when objecting to this proposed jury instruction?

RESPONDENT'S STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant, Andre Tayson Boone, in April 2007, for the murder of Brian Wright. (R. p. 1648 and p. 1649). Assistant Public Defenders Camille Everhart, Danielle Payne, and Ashely R. Thomas represented Appellant on the charge. Appellant was tried with co-defendant Eugene D. Patterson before a jury May 5-13, 2003. The Honorable William P. Keesley presided. The jury returned a verdict of guilty as charged against each defendant. (R. p. 1624, lines 11-22). The judge sentenced both Patterson and Appellant to forty-five (45) years imprisonment. (R. p. 1643, lines 19-24). This appeal follows.¹

¹ Co-defendant Patterson's direct appeal is also pending before this Court. Patterson's sole issue is whether the trial court "erred by denying Patterson's motion for a directed verdict of acquittal as the State's circumstantial evidence against Patterson was too insubstantial to rise above a mere suspicion that he was guilty." (Eugene D. Patterson, Brief of Appellant, p. 3).

RESPONDENT'S STATEMENT OF FACTS

In the closing minutes of February 18, 2007, a shootout occurred in the parking lot of a Waffle House in Richland County. Just after midnight, on February 19, 2007, an officer from the Richland County Sheriff's Department responded to the scene and found victim's body on the ground. As he approached, he saw blood on the ground and the victim's fatal head wound. Knowing there was nothing to be done for the victim, the officer began to secure the scene and ask what had happened. Though numerous people were milling about, the only response he received was that "nobody saw anything." (R. p. 334, line 17 - p. 336, line 23). Other officers from the Department arrived to investigate the scene. A forensics officer recovered shell casings from "two general areas basically," near the front door and a separate area to the right of the Waffle House. There was a live bullet and two shell casing from a .38 found near the front door, and two 9mm casings recovered from the area to the right of the Waffle House. (R. p. 387, line 3- p. 388, line 20). A search during daylight hours turned up an entrance mark in the Mobil station adjacent to the Waffle House. Investigation of that mark also led to the recovery of three additional 9mm casings in the grass also near the right front of the Waffle House. (R. p. 392, line 19 - p. 394, line 12). The reverse trajectory of the bullet mark in the Mobil station pointed directly to the area where the 9mm shells were recovered. (R. p. 400, line 12 - p. 401, line 18). The investigator noted that while the shell casings could give a general area where the shooter was standing, location of the shell casings were not tied to where the shooter pointed his gun, "[i]t could be anywhere around that circle of the shell casings when he fired it. (R. p. 421, lines 12-20). The victim's body was "directly across" from the front door area of the Waffle House. (R. p. 448, lines 2-11). Either of the two weapons had the range to strike the victim if fired from

the location of the shells. (R. p. 449, line 20 - p. 450, line 4). The bullet that struck the victim was not recovered. (R. p. 450, lines 9-12; p. 496, lines 11-17). Pathologist Clay Nichols testified the gunshot wound to the back of the victim's head was a "through and through" wound. (R. p. 1023, lines 4-14; p. 1029, lines 2-4). The wound indicated that the victim's head was "ducked down forward" when he was shot. (R. p. 1028, lines 1-8). He may have fallen immediately after being shot, or "his momentum could have carried him several feet after he was shot." (R. p. 1029, lines 5-10).

Karleisa Brabham testified that she was with friends on the night of the shooting and the group went to the Waffle House to attempt to stop a planned fight that they had heard one friend's boyfriend, Cedric Ruff, was going to be involved. The group stayed in the car after arriving at the Waffle House. After Cedric Ruff arrived, a fight began. Appellant walked in front of their car. Karleisa saw him fire a gun into the air. She also saw a "brown-skinned guy in a black shirt" fire from the front of the lot back toward them in the back of the lot. (R. p. 499, line 7 - 503, line 23).

Jerome Christopher Thompson testified that on the night of the shooting, he, with friends Derrick Guilyard, "Bernard," Demon "Little Duke" Griffin, and Appellant, were informed that a fight was to occur between Corey Sanders and his "homeboys." They went in search of the fight, apparently to give assistance. (R. p. 512, line 13 - p. 513, line 23; p. 520, line 7- p. 523, line 19). They eventually pulled into the Waffle House where the shooting would later occur. Jermon was a member of a gang -- a "Tree Top Piru" ("TTP") Blood. (R. p. 519, lines 13-18). He saw members of the rival Crips gang drive into the parking lot, wearing their blue colors, and members of the Folk gang (who are aligned with the Crips) arrive. (R. p. 532, lines 11-15; p. 534, lines 2-24). Corey began the fight. (R. p.

535, lines 24-25). Appellant went to where Corey was fighting, near the front of the Waffle House, and "one dude say, if he jump in, he was going to shoot them." (R. p. 539, lines 1-25). Appellant asked Jerome for Jerome's 9mm pistol, and fired the pistol two times into the air. (R. p. 526, line 17 - p. 527, line 10; p. 542, lines 2-22). Jerome saw two people, one light-skinned man wearing blue colors and one dark-skinned man, also open fire. (R. p. 544, lines 2-4). Appellant fired back. (R. p. 552, lines 12-25). Jerome, Appellant, and the rest of their group drove away. Jerome disposed of the gun because he "thought I had a body on it." (R. p. 555, line 2 - p. 556, line 11).

Robert Portee, also a TTP Blood, was also present at the Waffle House. He saw Corey fight with another individual named Chad. Robert also recalled that Chad had several people come to the fight with him, and basically described two groups coming together over the fight. He identified co-defendant Eugene Patterson as being one of the individuals present in the front of the parking lot. Robert eventually joined the fist fight with Corey when he believed Chad was winning. Shots were then fired, from the front and the back, and Robert left. (R. p. 585, line 20 -p. 589, line 19; p. 590, line 11- p. 591, line 20). Prior to the beginning of the fight, and the shooting, Robert spoke to Appellant. Appellant told Robert that he "was going to chunk at these niggers," meaning he intended to shoot at them, and Robert heard the "racking of a gun." (R. p. 592, line 4- p. 593, line 4).

Quintez Clemons testified that he and Sylvester Boone were in the parking lot that night speaking with Tayson when a maroon car and a green car with white writing came by. Quintez recognized his friend, Karmidae a/k/a "Bay," driving the maroon car. He went up to the car to say hello. There were two other people in the car - - "a light skinned" young man with braids, wearing blue colors, and another. The light-skinned man pulled a gun on

Quintez. When he was told that Quintez and Bay were cousins, he put the gun down. Quintez recalled the light-skinned man actually had two guns, a .357 that he pointed at him, and another black semiautomatic in his lap. The group later drove to the front of the parking lot. (R. p. 611, line 14 - p. 614, line 5; p. 618, lines 5-16). After the shooting began, he recalled only seeing on "big black dude" in a black shirt shooting toward Appellant. (R. p. 614, line 22 - p. 615, line 15).

William Kee, also a TTP Blood, was at the Waffle House that night. He testified that he only saw the first two shots that Appellant fired into the air, and he ran to his truck. (R. p. 623, line 14 - p. 624, line 16). He heard multiple other shots, from both the front and the back. (R. p. 626, lines 1-16).

Corey Sanders, another TTP Blood, testified that he, along with Charles Williams and Byron Morant, drove to the Waffle House so he could fight Chad. (R. p. 631, lines 3-7; p. 632, line 1- 25). He knew Chad to be a Folk. (R. p. 633, lines 3-4; p. 636, lines 19-22). Corey testified that he had an "ongoing beef" with Chad over "disrespect," and they set up the fight to resolve those issues. (R. p. 636, lines 7-18). Corey saw a burgundy Malibu with Bay, co-defendant Eugene Patterson, and a "light skinned" guy inside, come into the parking lot. Eugene, who was in the back, made a "gun signal," which Corey described as, he pointed an actual, high caliber, gun as if he was going to shoot, directly at him. Corey described other people coming together for his fight with Chad, and testified "once we met up with each other, we squared off and fought." (R. p. 633, line 11 - p. 635, line 21; p. 650, lines 18-22). When going outside to begin his fight, he noted "the light-skinned guy was already standing outside with a gun in his hand. He wasn't trying to hide it or anything." The light-skinned man was wearing "all blue with a blue bandana around his face" and held a revolver. Corey

also noticed another group at the back of the parking lot, a group that included Appellant and Jermone. Appellant was a Blood, but from a different sect, a "Six Deuce Brim." (R. p. 637, lines 2-8; p. 638, line 16 - p. 639, line 15; p. 640, lines 6-15). Corey acknowledged the "only beef" he had with Eugene was, "I'm Blood, he's a Folk." (R. p. 642, line 25 - p. 643, line 1). Though he did not see who was shooting, he heard shots from what he believed to be three areas, from the nearby Mobil station and from the more immediate parking lot areas. (R. p. 648, line 3 - p. 649, line 13).

Chad Robinson testified similarly, that he and Corey were fighting, another intervened, and "the [n]ext thing you know, pow, pow, we heard shots." (R. p. 964, lines 2-9). Though he could not identify any of the shooters, testifying only that he ran when shots were fired, he did recall seeing Eugene at the Waffle House in a burgundy car. (R. p. 969, line 14 - p. 970, line 2).

Karmindae Legget, a/k/a "Bay," testified that he went to the Waffle House with friends Eugene "Big Gene" Patterson, a Folk, and Oliver Feldman, a Crip, to see the fight. (R. p. 703, line 15 - p. 705, line 17; p. 721, lines 8-13). After the fight began, Karmindae heard gunshots fired from the back of the lot. (R. p. 710, lines 5-19). Oliver and Eugene retrieved their guns from the car. Oliver had a .32 and Eugene had a .38. They fired several shots toward the back of the lot. More shots were fired toward them. Karmindae, Oliver and Eugene got to their car and left. (R. p. 711, line 15 - p. 713, line 20).

Samuel Clemons, who was with Appellant at the Waffle House, recalled seeking Bay, Oliver, and Eugene pull up. He recalled Oliver was wearing blue, and holding a .357 revolver. (R. p. 739, line 7 - p. 740, line 24; p. 761, lines 2-9). He recalled that Appellant "shot in the air twice and then that's when Eugene returned fire." (R. p. 743, lines 2-3).

Derrick Guilyard testified that he went to the Waffle House with Appellant. Derrick had been a Blood since sixth grade. (R. p. 755, lines 19-25). Derrick explained that the Bloods do not "get along" with Folks or Crips, but that Folks and Crips could peacefully coexist. (R. p. 756, line 20 - p. 757, line 4). That night, he saw Appellant approach the fight in the parking lot, then return to the car and ask Jerome for his gun. He saw Appellant fire into the air. Derrick testified he knew what was going to happen, "I mean, after one person shoots, another person begin to shoot." (R. p. 766, line 1 - p. 767, line 18). Derrick dove for cover, but could still hear multiple gunshots. (R. p. 770, lines 2-25).

Demon Griffin, who was in the car with Derrick, did not see the shooting, but estimated there were eleven to twelve shots. (R. p. 788, lines 2-24).

Oliver Feldman, a member of the "Rolling 20's Crip Gang," testified that he knew Eugene through a mutual friend. (R. p. 793, lines 1-25). He knew Eugene to be a member of the Folk Nation. (R. p. 793, line 1 - 794, line 17). The night of the shooting, Oliver was wearing blue with a blue bandana, "[b]ecause it represents [his] gang colors." (R. p. 796, lines 5-12). Eugene wore black. (R. p. 796, lines 13-18). Eugene received a call to go to the Waffle House, and he, Oliver and Bay left, with Bay driving and Eugene in the back. Oliver had a .32 revolver, Eugene had a .38. (R. p. 796, line 21 - p. 798, line 3; p. 799, lines 19-22). He testified that, at first, only two people were involved in the fight, "then a third party got hisself involved." (R. p. 801, lines 12-15). He could tell that gangs were involved, "because one came to the aid of the other one." (R. p. 802, line 24 - p. 803, line 2). The fight was beginning to become "a fight between gang members." (R. p. 803, lines 13-15). He then saw someone from the back of the parking lot shoot into the air. (R. p. 803, lines 17-22). The shooter then began to fire directly at Oliver. Oliver and Eugene retrieved their

weapons from their car and returned fire. (R. p. 804, line 11 - p. 805, line 17). He testified that neither he nor Eugene would have fired but for the fact that they were fired upon first. (R. p. 840, lines 3-12). In cooperating with the investigation, Oliver advised that his handgun, a .32 caliber handgun, was in a coat in his bedroom. The gun was recovered. (R. p. 954, line 7 - p. 956, line 7; p. 1171, line 22 - p. 1172, line 25).

Sgt. William McRoberts of the Richland County Sheriff's Department took Eugene's initial statement at the sheriff's department. In his initial statement, voluntarily given during the investigation, he admitted being at the Waffle House and seeing the fight, but claimed that he left when the fight started. He further claimed that he heard gunshots as he was backing out to leave, and drove "straight home to [his] mom's house...." (R. p. 880, line 20 - p. 881, line 5). Eugene was later arrested as the investigation revealed more facts of his involvement. In his second statement, this one given while in custody, Eugene still denied involvement but stated that he saw Oliver shoot at the crowd and toward the gas station. (R. p. 892, line 9 - p. 895, line 21). He would later admit, in a third statement, that he did not drive himself to the Waffle House, but was with Karmindae, and Oliver in Oliver's burgundy Malibu. He saw a fellow from the back of the lot fire into the air once and into the crowd twice.² He then stated he and Oliver ran to the car, and Oliver began to return fire. (R. p. 920, line 25 - p. 922, line 14).

Forensic testing confirmed that all five 9mm casings recovered from the Waffle House parking lot were fired by the same gun. Further, the two .38 casing recovered from the Waffle House were fired by the same gun, and the one unfired .38 bullet had been loaded into the same gun. (R. p. 1051, line 23 - p. 1052, line 4; p. 1053, line 14 - p. 1054, line 8).

² The statement was redacted pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), to avoid any error. (See R. p. 1448, line 16 - p. 1449, line 11).

Appellant, in his statement to investigating officers, admitted that he was a "TTP Blood" and was at the Waffle House to fight a "Folk," Dameon. As people began to arrive, Corey "yelled over" that "the people in the cars were the Folks who we had been supposed to fight earlier in the night.... We later figured out that they were leading us around just so they could get enough people to outnumber us. We figured out that they were wasting time so that they could get their group up." (R. p. 1255, line 2 - p. 1258, line 2). According to his statement, when Appellant approached the fight between Chad and Corey, a light-skinned man he thought to be a Crip told him to back up or he would be shot. Appellant saw a gun in the man's waistband. Appellant then went back and got the 9mm from Jerome. He fired twice in the air. He saw "the Crip" dude and another person³ point their guns in his direction. Appellant took cover behind his car and fired five more times directly at the Crip, then drove off. (R. p. 1258, line 3 - p. 1259, line 1). He opined that none of his shots could have hit the victim because he fired directly at the Crip, in fact, over his head, and no one was in the line of fire. (R. p. 1260, line 10- p. 1261, line 15).

Further investigation resolved that the victim arrived with individuals associated with the Folks, though there was no evidence of the victim's membership. (R. p. 1295, line 24 - p. 1296, line 9).

Appellant presented a defense in the case. He called Donald Girndt, a forensic consultant, who testified that the victim did not move very far after being shot, "just a few feet," before collapsing, and, according the shell casing groups from the far left of the Waffle House, the victim would not have been in the line of fire from that area. (R. p. 1363, lines

³ This statement was also redacted pursuant to *Bruton* to avoid any error. Respondent notes that Appellant later testified in his own defense, however, only the redacted version of the statement went to the jury, which omitted the reference to Eugene Patterson. (R. p. 1432, line 6 - p. 1433, line 20).

1-23). Appellant also testified in his own defense. He essentially restated the facts of his prior statement, i.e. that he shot twice in the air, the light-skinned man and a dark-skinned man fired toward him, and he fired back, over their heads. He reiterated that no one was in the cross-fire. He claimed, however, that he did not know who the people were pulling up to the Waffle House before the fight, and he was not a gang member. He also claimed that he believed he needed to "stop this" or "somebody [is] going to end up getting hurt," and the only way he knew to do so was to fire in the air so every one would disperse and go home. (R. p. 1380, line 1 - p. 1384, line 8; p. 1386, line 11 - p. 1387, line 7; p. 1392, lines 8-15; p. 1394, lines 5-9).

ARGUMENT

The trial judge properly charged mutual combat as Appellant expressed his intent to shoot at rival gang members prior to any violence, and, when he observed a rival gang member display a firearm, he fired on the armed, rival gang member. The evidence supports there was a mutual intent to engage in armed battle, and the charge was warranted.

Relevant Facts:

Counsel for Eugene Patterson objected to the charge of mutual combat, arguing that mutual combat requires evidence of more than a "fist fight," and an intent to "fight on equal footing." (R. p. 1469, line 13 - p. 23). The evidence, he argued, demonstrated that Eugene only returned fired once fired upon. (R. p. 1470, lines 2-4). Thus, a mutual combat charge was not supported by the evidence and would be "diametrically opposed to the concept of self-defense" as relied upon by the defense. (R. p. 1470, lines 4-13).

The trial judge focused not on the fist fight between others, but on "the conflict between the defendants and the third shooter, Mr. Feldman." (R. P. 1470, lines 22-24). He relied upon evidence that Eugene "flashed" his gun prior to the fistfight, evidencing an intent to use his gun against the rival gang, and other copious evidence of gang warfare, including the wearing of gang colors, bringing guns to the fight and evidencing an intent to shoot rival gang members. (R. p. 1471, line 3- p. 1472, line 9).

After the ruling, Appellant's counsel joined in the objection to the charge, adding, "[n]o need to expand, everything was said pretty much." (R. p. 1472, lines 11-14).

The trial judge charged that in order to find mutual combat, the jury must find there was "a mutual intent and willingness to fight" and "that both sides in the conflict were armed with a deadly weapon." (R. p. 1612, lines 15-21).

In this appeal, Appellant argues that there was no evidence to warrant the charge because “[t]here was evidence appellant shot his gun into the air, after he was threatened, during a fist fight” merely to stop the fight. (BOA, pp. 11-12). He contends there was no evidence of a “specific quarrel with a specific person” or agreement to “an armed fight.” *Id.* Moreover, he claims the purported error “barred self-defense, and shifted the state’s burden to disprove self-defense onto appellant, it was highly prejudicial to appellant.” *Id.*

Discussion:

As a first matter, Appellant’s claim that the charge was not warranted because “there was not any evidence that appellant had a specific quarrel with a specific person” or of an agreement to an armed fight, (BOA, p. 12), was not fully presented below. Appellant did not argue a lack of specificity. (R. p. 1469, line 13 - p. 1470, line 12). That portion of his argument is barred from review. It is well settled that an appellant cannot present one ground to the trial judge and another in his appeal. *See, e.g., State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Even so, this argument is easily dispatched as the trial judge’s ruling was based on evidence of “a specific quarrel with a specific person.”

In general, the evidence shows a volatile situation between hostile groups. This was no simple “fist fight” between young men. Rather, several people expressed an intent to engage in armed battle prior to any violence breaking out.

There was evidence that Appellant was a “Blood.” (R. p. 1255, lines 8-12). There is a basic animosity between the Blood and Crips/Folks. (R. p. 642, line 25 - 643, line 1; p. 756, line 20 - p. 757, line 4). Appellant specifically stated, on the night of the incident but prior to any violence, that he intended to shoot people that night, and “racked” a gun. (R. p. 592, lines 8-22). He acknowledged a “beef” with a Folk gang member, and the massing

of forces for the Crips/Folks that night. (R. p. 1256, line 7- p. 1258, line 13). Co-defendant Eugene Patterson, a Folk, also brought his gun to the Waffle House intending to use the gun that night, and pointed his gun directly at Corey Sanders, a Blood, prior to the violence breaking out. (R. p. 632, lines 15-25; p. 633, line 17 - p. 634, line 25; p. 650, lines 18-22). Oliver Feldman, also of a rival gang, wore his "colors," stood guard at the fight, and displayed his weapon before any shooting had occurred. (R. p. 532, lines 11-15; p. 539, lines 23-24; p. 613, lines 14-20; p. 637, lines 2-6; p. 640, lines 6-9; p. 796, lines 5-12). Clearly, gang violence was anticipated from the very beginning of the two groups coming together. There was evidence of ill-will toward a specific group, and the intent to fight was not limited to an unarmed contest. Even so, the mutual agreement to actually use the guns is more specific and supported by Appellant's own acts and statements.

Appellant stated that "[a] guy wearing blue who had a bandana over his face reached to his waistband as I walked up" to the fist fight. (R. p. 1258, lines 11-13). Appellant further stated the man in blue told him he would shoot if he didn't back up, and displayed his own weapon. He then returned to his vehicle, and retrieved a gun of his own. He fired two shots in the air, but also fired directly at Oliver Feldman. (R. p. 1258, line 14-p. 1259, line 1). (See also R. p. 539, lines 14-16 p. 542, line 17 - p. 544, line 4; p. 552, lines 6-18; p. 711, lines 10-25; p. 743, lines 2-3; p. 766, line 11 - p. 767, line 18; p. 803, line 17- p. 805, line 17). It is this dynamic that the trial judge relied upon in finding the charge was warranted. (R. p. 1470, lines 19-24). There is evidence of a mutual intent to engage in armed battle between specific, identified, individuals.

"Mutual combat exists when there is "mutual intent and willingness to fight." *Jackson v. State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003), quoting *State v. Graham*,

260 S.C. 449, 450, 196 S.E.2d 495 (1973). One looks to “the acts and conduct of the parties and the circumstances attending and leading up to the combat.” to determine mutual intent. *Id.* Where there is evidence of “ill-will between the parties,” threats, and an “apparent willingness of each to engage in an armed encounter with the other,” the charge is warranted. *State v. Graham*, 260 S.C. at 451-452, 196 S.E.2d at 496. It is this willingness to engage in armed battle that supports the charge. *State v. Taylor*, 356 S.C. 227, 234, 589 S.E.2d 1, 4 (2003). In *Taylor*, the charge was not warranted precisely because there was no evidence that the appellant wanted to engage in an “armed” fight. 356 S.C. at 234, 589 S.E.2d at 5. Appellant attempts to cast his case in the same manner. (BOA, p. 12). However, here, there is ample evidence that Appellant not only wanted to fight, he specifically wanted to shoot a rival gang member, and intended to do so before the violence began. (R. p. 592, lines 8-22). In other words, he *intended* to use a weapon that night on a rival gang member. Moreover, when a “Crip” confronted him and displayed his own weapon, Appellant retrieved a weapon and shot in the air, beginning the gun battle, and then directly at him. The charge was warranted. *State v. Mathis*, 174 S.C. 344, ___, 177 S.E. 318, 319 (1934) (“There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other. There was no error in charging and arguing the law of mutual combat.”). See also 40 C.J.S Homicide § 197 (“Mutual combat usually arises when the parties are armed with deadly weapons and mutually agree or intend to fight with them.”).

Even if it could be deemed error to have charged the jury on mutual combat (which it was not), such an error could only be harmless on this record. To find a charging error harmless, the reviewing court “must determine beyond a reasonable doubt that the error

complained of did not contribute to the verdict.” *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct.App. 2000). Essentially, “to warrant reversal, a jury charge must be both erroneous and prejudicial.” *State v. Taylor*, 356 S.C. at 234, 589 S.E.2d at 5. Appellant claims that he was prejudiced as the charge conflicts with self-defense. (BOA, p. 12). Here, however, the charge could not have contributed to the verdict, or prejudiced Appellant, as Appellant did not have a legitimate claim of self-defense.

Appellant was clearly not without fault in bringing on the violence, having retrieved a gun and fired the first shot. It was Appellant who introduced gunfire into the tense rival gang environment. *See State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007)(rejecting self-defense where “the record clearly reflects that Slater approached an altercation that was already underway with a loaded weapon by his side. Such activity could be reasonably calculated to bring the difficulty that arose in this case.”).⁴ *See also State v. Santiago*, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct.App. 2006)(finding the record did not support a charge of self-defense where defendant was not “without fault in bringing about the difficulty”). Moreover, there is overwhelming evidence of guilt. Appellant expressed his intent to fire at rival gang members that night. (R. p. 592, lines 8-22). He admitted to firing his weapon first. He fired two shots into the air, and multiple other shots toward Oliver and Eugene. (R. p. 1258, line 14-p. 1259, line 1; p. 803, line 17- p. 805, line 17). He engaged in a gun battle,

⁴ The trial judge did charge self-defense, based mainly on his interpretation of S.C. Code Ann. § 16-11-440 (2006). (See R. p. 1464, line 8 - p. 1467, line 4). Respondent notes that this was a joint trial, and Oliver Feldman’s testimony suggested that he and co-defendant Patterson only fired having been fired upon. (R. p. 840, lines 3-12). However, no one disputes, that Appellant retrieved the gun and introduced gunfire into this already volatile situation. If one “provokes or initiates an assault” he may not rely upon self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999).

and that led directly to the victim's death. See *State v. Heyward*, 197 S.C. 371, __, 15 S.E.2d 669, 672 (1941) ("If there was malice in appellant's heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake."). It is difficult to imagine how the charge of mutual combat could not have been appropriate, but, if error, it could only be harmless on this record.

Appellant's argument to the contrary should be rejected.

CONCLUSION

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

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

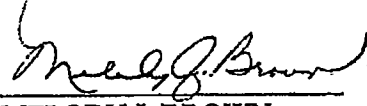
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ATTORNEYS FOR RESPONDENT

April 9, 2010.
Columbia, South Carolina.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Andre Tayson Boone, Appellant.

Appellate Case No. 2008-090386

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Unpublished Opinion No. 2013-UP-155
Heard April 1, 2013 – Filed April 17, 2013

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka, Assistant Attorney
General Melody Jane Brown, and Solicitor Warren B.
Giese, all of Columbia, for Respondent.

PER CURIAM: Andre Boone appeals his conviction for murder, arguing the trial judge erred in instructing the jury on mutual combat because it shifted the burden and was inappropriate given the facts of the case. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (stating the trial court's duty is to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence); *Jackson v. State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat exists when there is 'mutual intent and willingness to fight.'" (quoting *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973))); *id.* ("Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'"); *State v. Taylor*, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) ("The mutual combat doctrine is triggered when both parties contribute to the resulting fight."); *id.* at 232, 589 S.E.2d at 3 ("Whether or not mutual combat exists is significant because 'the plea of self-defense is not available to one who kills another in mutual combat.'" (quoting *Graham*, 260 S.C. at 450, 196 S.E.2d at 495)); *Graham*, 260 S.C. at 451, 196 S.E.2d at 496 (finding a mutual combat charge was proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); *State v. Mathis*, 174 S.C. 344, 348, 177 S.E. 318, 319 (1934) (holding there was no error in charging and arguing the law of mutual combat because there was testimony the appellant and the deceased were on the lookout for each other; were armed in anticipation of a combat; each drew his pistol; and each fired upon the other); *State v. Porter*, 269 S.C. 618, 622-23, 239 S.E.2d 641, 643 (1977) (finding a mutual combat charge was proper when there was evidence the defendant had returned with a gun to one victim's property at least twice in spite of prior verbal abuse, threats, and gunshots); *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (providing the court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal); *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("[I]n determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."); *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using deadly force in self-defense when: (1) [t]he defendant was without fault in bringing on the difficulty; (2) [t]he defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) [i]f the defense is based upon the defendant's actual belief of

imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) [t]he defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.").

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE TAYSON BOONE,

APPELLANT

PETITION FOR REHEARING
2013-UP-155

Appellate Case No. 2008-090386

Petitioner requests rehearing pursuant to Rule 221(a), SCACR. The Court's opinion, respectfully does not specifically apply the case law cited to the record.. Appellant below addresses the legal concepts cited in the opinion to demonstrate that the issue on appeal was preserved, that instructing the jury on "mutual combat" was prejudicial error and that the error was not harmless.

Error preservation

At the conclusion of the evidence counsel for co-defendant Patterson objected to the judge giving a mutual combat instruction. Counsel cited State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) which held that in order for there to be a mutual combat instruction there needs to be plain evidence of an agreement to fight not just a fight "arising out of a mere fist fight or a scuffle." R. 1469, l. 13 – 1470, l. 14. Appellant Boone was not armed when his friend started fighting other young men. That was the objection at trial and on appeal, and that is why defense counsel for

appellant joined in the objection to the "mutual combat" instruction. Co-counsel added that the instruction would be burden shifting and only applied when there was a prior agreement to "fight on equal footing." R. 1469, l. 13 - 1470, l. 14. In addition, counsel added that a mutual combat instruction "is not appropriate to these facts." R. 1470, ll. 7 - 18.

As stated above, defense counsel Payne -- appellant's attorney -- joined in the objection to charging the jury on mutual combat. Counsel said there was no need to expand on the co-defendant's objection, and that appellant joined in that objection. R. 1472, ll. 11 - 22. Appellant fairly presented his objection to the trial court and to this Court on appeal. That was all he was required to do.

Over objection the judge then charged the jury that if the defendant "voluntary participated in mutual combat for purposes other than protection, the shooting would not be in self-defense. Now, this is true even if, during the combat, the defendant feared death or serious bodily injury. For mutual combat, there has to be a mutual intent and willingness to fight." R. 612, ll. 10 - 22.

The "mutual combat" instruction should not have been given and it was confusing.

Mutual combat applies where there are past differences between the men involved in a duel, or duel like situation, or an express or tacit agreement to engage in an armed fight. Here, again, the record shows that while the young men may well have anticipated a regular fist fight could take place, appellant was not armed at the time the fight not involving him began.

As this Court will recall, while the fight was already going on, Thompson said "Tayson [appellant] ran up there to see what he was doing." R. 537, ll. 11 -14. Thompson said one of the young men told appellant if he got involved "he was going to shoot him." R. 539, ll. 13 - 25. Appellant confirmed that he was threatened when he went near the fight. Thompson said appellant at one point asked him for his gun. Thompson gave the gun to appellant, and appellant

"just shot two times in the sky." R. 542, l. 5 - 22. After appellant fired two shots in the air: "[T]he two dudes start shooting. The light-skinned dude with the flag around his neck and the dark-skinned dude started shooting." R. 544, l. 1 - 545, l. 9. Thompson testified appellant only fired these two shots. R. 552, l. 6 - 553, l. 23.

Thompson told the jurors during his testimony that he was surprised that appellant asked for his gun while the other men were fighting. "[H]e don't really do stuff like that." Thompson said he thought of appellant as being "a pretty boy." R. 571, ll. 10 - 16.

Appellant was in the tenth grade at the time of his trial. R. 1378, ll. 10 - 22. Appellant said on the evening of the incident he got a call from his girlfriend "and she wanted to see me at the Waffle House on Two Notch by the Mobil." R. 1381, ll. 7 - 15. Appellant testified while he was at the Waffle House: "I seen Corey walk up there by himself [and he] started fighting Chad. And I seen they was fighting one on one at first, but then I seen more people start to getting -just jumping Corey, that's when I spotted Dameon. Then I ran -I went to fight Dameon and then that's when the light-skinned dude with the blue do-rag around his face showed me the butt of his gun and told me if I didn't back up, he was going to shoot my ass. . . [the] first thing I thought, like, if I don't stop this, somebody [is] going to end up getting hurt. So I knew the only way I could probably stop it." R. 1382, l. 19 - 1383, l. 4.

Appellant said he did not know that Jerome Thompson had a gun until they got to the Waffle House. *Appellant asked Thompson for the gun after he had been threatened,* and that's when I shot two times in the air just to *stop the fighting* and everything so everybody can go home, so Corey could stop getting beat up and everybody can go home." R. 1383, ll. 5 - 18. (emphasis added). Appellant said he shot the gun four times and he got in the truck and left. R. 1384, ll. 3 - 18.

Instructing the law of mutual combat based on the facts in this case was only going to confuse the jurors. That was true regardless of the self-defense instruction.

The law of “mutual combat” was not applicable to the facts of this case.

In State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003), the Court held that doctrine of mutual combat:

“[H]as most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party’s property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where appellant and deceased **had quarreled prior to the killing each knew that the other was armed with a pistol, and each fired his gun at the other**); State v. Mathis, 174 S.C. 344, 177 S.E. 3 18 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased **were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other**)

State v. Taylor, 356 S.C. at 232, 233, 589 S.E.2d at 4. (emphasis added).

The Court in State v. Taylor adopted the doctrine in other states that for mutual combat to apply there must be **a prior agreement to fight and that it only arises** “when the parties are armed with deadly weapons, and that mutual combat does not arise from a mere fist-fight or scuffle.” See Flowers v. State, 146 GA.App. 692, 247 S.E.2d 217, 218 (1978); Grant v. State, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969). (emphasis added).

The Court also emphasized South Carolina cases involving mutual combat reveal that “each party knew that the other was armed.” State v. Taylor, 356 S.C. 227, 234, 589 S.E.2d 1,5 (2003). The Court also stated that under the State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) line of cases that the state had to disprove self-defense, and that the unwarranted jury instruction

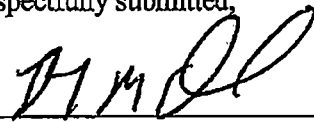
transferred that burden to appellant and was therefore prejudicial. In State v. Taylor the Court found the evidence was "insufficient to warrant a jury charge of mutual combat," and reversed and remanded for a new trial.

This is not a case of mutual combat under State v. Taylor because appellant did not have a specific quarrel with a specific person where there was an agreement to have an armed fight. Appellant was not armed when the fight between the other young men began. He did not have the specific intent to engage in an armed battle with another man.

As in State v. Taylor, mutual combat was not appropriate for the facts of this case for the reasons above, and since it barred self-defense, and shifted the state's burden to disprove self-defense onto appellant, it was highly prejudicial to appellant.. See, also, State v. Jackson, 384 S.C. 29, 681 S.E.2d 17 (Ct.App. 2009).

Mutual combat is not invariably involved whenever gang activity between various gangs is suspected, and a shooting occurs. Appellant asks this Court to reconsider its pinion in this case, and grant rehearing.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

May 1, 2013

The South Carolina Court of Appeals

The State, Respondent,

v.

Andre Tayson Boone, Appellant.

Appellate Case No. 2008-090386

RECEIVED

JUN 20 2013

COURT OF
APPELLATE JUDGES

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.
Paul W. Brown J.
Daniel G. Pieper J.

Columbia, South Carolina

cc:

Melody Jane Brown

Robert Michael Dudek

FILED
June 20, 2013

FORM 5

2013CP4006702

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Richland)ANDRE TAYLOR BOONE # 328364)
Full name and prison number (if any) of Applicant.)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

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

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Terry Correctional Institution
2. Name and location of Court which imposed sentence Court of General Session, Richland County
3. Name(s) of co-defendant(s) (if any) Eugene Patterson; Oliver Fieldman
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Murder
 - (b) Aggravated Breach of Peace
 - (c) Unlawful Carrying and Possession of a Pistol
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 13th 2008, 15 years plus cost and assessments
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals _____
- ii. South Carolina Court of Appeals _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Court of Appeal Affirmed conviction _____
- ii. Court of Appeal Denied Petition for Retesting _____
- iii. _____
- (c) the date of each such result:
- i. April 17, 2013 _____
- ii. June 20, 2013 _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Freiburger, 346 S.C. 125, 131, 620 S.E.2d 737, 741 (2005) _____
- ii. (holding on issue is not preserved for appeal) _____
- iii. Unpublished Opinion No. 2013-UP-155 _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) Ineffective Assistance of Appellate Counsel
- (c) Prosecutorial Misconduct

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See attached documents labeled 10(a)
- (b) See attached documents labeled 10(b)
- (c) See attached documents labeled 10(c)

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

10(a) Ineffective Assistance of Counsel

11(a) Supporting Facts: 1) Trial Counsel Failed to properly preserve the issue of Mutual Combat for Direct Review on appeal. When Co-Counsel for Co-Defendant objected to the jury instructions of Mutual Combat due to it being burden shifting. Also stating in order for there to be a Mutual Combat instruction there needs to be plain evidence of an agreement to fight, not just a fight "arising out of a mere fist-fight or a scuffle" (citing *State v. Taylor* 356 S.C. 221, 589 S.E.2d 1 (2003)) Co-Counsel added, that a mutual combat instruction "is not appropriate to these facts" (see T.T. page 1469 LN 13-1470 LN 18) At the conclusion of Co-Counsel's objection, the judge asked applicant's counsel would they like to be heard and they stated "Yes Sir Your Honor. We would join in on the Mutual Combat objection that Mr. Sutherland has. No need to expand, everything was said pretty much" (T.T. Page 1472 LN 11-14) Applicant's Counsel's conduct was deficient for not expanding an objection and properly arguing that Mutual Combat instructions were not appropriate due to the facts that applicant was not armed when the fight between his friends and the other young men started. (See T.T. Page 538 LN 24-539 LN 25) After being threatened applicant armed himself with weapon for protection (See T.T. Page 541 LN 26-542 LN 20) In *State v. Taylor* 356 S.C. 221, 589 S.E.2d 1 (2003) the court held that the doctrine of Mutual Combat: has most often been applied in situations where the defendant and defendant bear a grudge against each other before the fight in which one of them is killed occurs. *State v. Porter* 269 S.C. 618 239 S.E.2d 64 (1977) (holding mutual combat precluded a plea of self defense where appellant returned to injured party's property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots) *Graham* 260 S.C. at 451, 196 S.E.2d at 496 (finding

Mutual combat arose proper where appellant and deceased had quarreled prior to killing, each knew that the other was armed with a pistol and each fired his gun at the other) *State v. Mathis* 174 S.C. 344, 171 S.E. 2d 318 (1934) (finding Mutual combat charges proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other and that each drew and fired his pistol at the other). The Court in *State v. Taylor* adopted the doctrine in other states that for Mutual Combat to apply there must be a "prior agreement to fight and that it only arises" when the parties are armed with deadly weapons and that Mutual Combat does not arise from a mere fist-fight or scuffle" (*See Flowers v. State*) and (*Grant v. State*).

The Court also emphasized South Carolina cases involving Mutual Combat reveal that "each party knew that the other was armed" (*State v. Taylor*). The Court also stated that under (*State v. Wiggins*) line of cases that the State had to disprove self-defense and that the unwarranted jury instruction transferred that burden to appellant and was therefore prejudicial. In *State v. Taylor* the Court found the evidence was "insufficient to warrant a jury charge of Mutual Combat" and reversed and remanded for a new trial. The same is true for the applicant under *State v. Taylor* because applicant did not have a specific quarrel with a specific person where there was an agreement to have an armed fight. Applicant was not armed when the fight between the other young men started. Applicant never had the specific intent to engage in an armed battle with another man. Just as Courts found the evidence was "insufficient to warrant a jury charge of Mutual Combat" in *State v. Taylor* and reversed and remanded for a new trial the same would have been proven true in applicant case if the issue would not have been procedurally barred due to applicant's counsel ineffectiveness by

Not properly preserved the issue for Direct Review and that this failure, prejudiced the outcome of the applicant's case. Also this violated applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Constitution citing *Strickland v. Washington* 466 U.S. 668 (1984)

2) Applicant's Counsel's were ineffective for failing to object to a prejudice photo that was inadmissible. Applicant's trial judge ruled that State's Exhibit 14 and 15 would be excluded from evidence under Rule 403 stating "that even if relevant, balancing the prejudicial effect and the probative value would require me to exclude them" (T.T. page 344 Ln. 5-13) Then while conducting direct examination of State's first witness (Inv. Michael Ray Beecher) Prosecutor presented State's Exhibit 13 and 14 to witness and jury (See T.T. page 351 Ln 23-25) Applicant's Counsel's failed to object to the use of the inadmissible evidence, that was unduly prejudice to the applicant. Then when Prosecutor was direct examining another State witness (Dr. Clay Allen Nichols) Prosecutor once again presented State's Exhibit 14 to witnesses and jury. (See T.T. page 1029 Ln 11-13).

Applicant's Counsel's once again failed to object to the use of the inadmissible prejudice photo at the time it was presented. Later on in the trial Co-Counsel objected to the inadmissible demonstration of a firearm and applicant's Counsel joined in on that objection. After the judge ruled on that, the Prosecutor brought it to the judges attention that applicant's Counsel's had brought it to her attention the use of the prejudice photo. Co-Counsel then objected to the use of of inadmissible evidence and moved forward with a motion for a mistrial on the basis of the publication of the prejudicial photo. Applicant's Counsel's joined in on the motion and stated the following "We would join in on that motion. And we would also add that both myself and Mr. Everhart are ineffective assistance of counsel because we did not contemporaneously object. I thought I heard 14, I didn't want to raise a huge scene in front of the jury because of it" (T.T. page 1068)

Ln. 23- 1069 Ln 3) Applicant's counsel's performance was deficient and fell below the professional standards of a effective counsel under Strickland v. Washington 466 U.S. 668 (1984) and was a violation of applicant's 6th and 14th Amendment of the U.S. Const and S.C. Const.

3) Applicant's counsel was ineffective for failing to object to the admission of a handgun that was recovered from applicant's house. The admission of the .22 revolver that was submitted into evidence had no relevance to the offense's for which the applicant was charge and standing trial for. The failure to object to this clearly inadmissible evidence was ineffective assistance of counsel not explained by a valid trial strategy citing Holman v. State 674 S.E. 2d 171 (S.C. 2009) This was a violation of applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Const. citing Strickland v. Washington 466 U.S. 668 (1984)

4) Applicant's counsel were ineffective for failing to object to the admission of a firearm demonstration inside a courtroom. Prosecutor's State Witness (David Collins) demonstrated the use of a firearm inside the courtroom by holding it by the handle and pulling the trigger which is a violation of the Rules of the Supreme Court of South Carolina which stated in the guidelines for the use in handling firearms in a courtroom and under subsection (6) it reads the following: "A firearm is to be handled by the barrel and not to be pointed at any person in the courtroom. The firearm will always be handled by the barrel only unless otherwise ordered by the trial judge." (T.T. page 1017 Ln 1- 1018 Ln 1) No order was giving by the judge (T.T. page 1062 Ln 14-17) and this demonstration had no relevance to the applicant's charges. The demonstration was

inadmissible in violation of the S.C. Supreme Court Ruling and harmful to the applicants due to the prejudicial effect the demonstration may have had on the jury, which would have effect the outcome of applicant's case. Applicant's Counsel were ineffective for failing to object to this prejudice demonstration and violated applicant's 6th and 14th Amendment of the U.S. Const. and S.C. Const. citing Strickland v. Washington.

5) Applicant's Counsel conduct was deficient for failing to conduct a proper pre-trial investigation. Applicant's Counsel failed to investigate or attempt to question Co-Defendant after learning that he would be a state witness (Oliver Fieldman). Applicant's Counsel had assumed that Co-Defendant statement had not changed and after being reassured this by the Prosecutor, Applicant's Counsel removed pre-trial Motion to disallow Co-Defendant from testifying. (See T.T. page 264 LN. 19-265 LN. 13) Then when Co-Defendant is asked a leading question on the stand by Prosecutor he makes a critical and significant change in his testimony that was ^(CITING BOTH LN. 14 - 264 LN. 16) unduly prejudice against applicant and made the jury unduly prejudice. * Even though Applicant's Counsel objected to the testimony the damage was already done. If applicant's Counsel weren't ineffective they would have conducted a pre-trial investigation, questioned State witness (Oliver Fieldman) and realized he had made a critical, significant change in his statement and would have went through with the pre-trial Motion to disallow him from testifying. Applicant was prejudice by this deficiency because it made the jury prejudice by hearing the harmful testimony and since applicant's Counsel removed the Motion to disallow the testimony it denied the applicant the right to argue the Motion at trial and also the right to have the Motion preserved as an issue for direct Review on appeal. Applicant's Counsel also recognized their ineffectiveness on the issue and put it on record stating

"Your Honor, I do believe, at this point, we are ineffective as Counsel because we were told his statement was going to remain the same." (See T.T. Page 813 LN 10-12) Also again they stated why they were ineffective. "Your Honor, we would just say that we believe we were being ineffective because we were told that his statement was not changing and it was different. And we would have approached this differently if we had known he was making a different statement; we would have tried to talk with him" (See T.T. Page 813 LN 24-814 LN 3) This is clearly a violation of Applicant's 6th and 14th Amendment of the U.S. Constitution and D.C. Constitution citing *Strickland v. Washington* 466 U.S. 668 (1984)

6) Applicant's Counsel was deficient for failing to file proper pretrial motions. Applicant's Counsel was ineffective for failing to file and move for a motion of change of venue due to the high public viewing surrounding applicant's case. Applicant's case received heavy media viewing for months (news stations, newspaper, internet and radio stations). Out of a 63 member jury pool, 23 members had either viewed applicant's case on the news, read about it in the newspapers, saw it on the internet or heard about it from a friend. This forced applicant to select from a bias and prejudiced jury. Also applicant's counsel should have filed a motion for a change of venue due to the numerous programs and projects started in remembrance, named or dedicated after alleged victim in applicant's case. Senator Dorrell Jackson, pastor at Bibleway Church started a project called BWRIGHT after applicant's alleged victim. (See T.T. page 62 LN 17-63 LN 4). Another program was brought out during the jury selection, where one jury member stated "I have heard of it because where I work at, they have a BWRIGHT intervention program for the young people." (See T.T. page 89 LN 9-12). Applicant was prejudiced by the high

publicity surrounding this case and should have received a change of venue to guarantee him a fair and impartial trial but since applicant's counsel failed to file the pre-trial motion applicant was forced to select from a prejudice and bias jury and received a unfair and partial trial. This violated applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Constitution citing *Strickland v. Washington* 466 U.S. 668 (1984)

Also Applicant's Counsel should have filed a motion for a separation of joint trial since applicant and co-defendant did not know each other and had never met before. (see T.Y. page 283 LNB-15)

Applicant was prejudice by this joint trial because it put in the jury mind that applicant and co-defendant was accomplices and was working in unison when this wasn't true. The joint trial was prejudice against applicant and confused the jury. It also violated his right to a fair trial. The judge also stated that he was concerned that why a severance motion was never mentioned or filed. (T.Y. page 1462 LNB-23)

8) Applicant's Counsel's conduct was deficient for failing to challenge jury #280 ability to be fair and impartial after she stated that she worked for a Corporation that started a Intervention Program named after applicant's alleged victim. Applicant was prejudiced by this bias and partial jury member, that clearly couldn't make a fair and unbiased decision due to her having a connection to the alleged victim through her work environment. This was a violation of applicant's 6th and 14th Amendment of the U.S. Const. and S.C. Const. citing *Strickland v. Washington* 466 U.S. 668 (1984)

9) Applicant's Counsel was ineffective for failing to Request a Competency Hearing. Applicant's Counsel should have Requested for a Competency Hearing due to the facts that applicant was charged with a Capital Offense and applicant was only a juvenile when the incident took place. Applicant's Counsel failed to investigate and discover that applicant had been recently having behavioral

and angry management problems which resulted in him being kicked out of school a month prior to the incident taking place. Also applicant was suffering from the loss of girlfriend that had been tragically killed 6 months after applicant was incarcerated, then 6 months before applicant's trial, his ^{two year old} niece was also tragically killed. Applicant was clearly not in his right mind state at the time of his trial and should have been giving a Competent Hearing. But since Applicant's counsel was ineffective they failed to request one. This was a violation of ~~of~~ applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Constitution Citing Strickland v. Washington 466 U.S. 668 (1984)

10) Applicant's counsel were ineffective for failing to object to the prosecutor vouching for the credibility of State witness (Oliver Fieldman) in her closing argument. (See T.T. page 1512 LN 16-1512 LN 4) State witness (Oliver Fieldman) had made inconsistent statements on the number of shooters he had saw (See T.T. page 807 LN 14-25) He was one of the State's key witness and his credibility was crucial to the State's case. Applicant's counsel were ineffective for failing to object to a comment that constitutes a error of law and that is inherently prejudicial. This is a case of ineffective of assistance counsel under (Matthews v. State 365 S.E. 2d 766 (S.C. 2002) and Gilchrist v. State 365 S.E. 2d 281). Also it violated applicant's 6th 14th Amendment of the U.S. Constitution and S.C. Constitution under Strickland v. Washington 466 U.S. 668 (1984)

10(b) Ineffective Assistance of Appellate Counsel

11(b) Supporting Facts: 1) Applicant's Appellate Counsel was ineffective for not raising the issue of whether or not the judge erred by denying applicant's motion for a mistrial due to Prosecutorial Misconduct under violation of Rule 5 (Disclosure of evidence by the prosecution). At applicant's trial Prosecutor failed to disclose applicant's counsel with the inconsistent statement made by alleged Co-Defendant after becoming a state witness. Applicant's counsels requested any new statement or information giving by Co-Defendant at the beginning of the trial, after applicant's counsels had learned the Co-Defendant had just been interviewed by Investigator a couple days prior to the trial. Applicant's counsels was told by Prosecutor that witness statement had not changed. (TIT. 265 LN 5-8) Then when witness is asked a leading question on the stand by Prosecutor, witness testimony critically and significantly changes. (See TIT. page 807 LN 14-25) Applicant's counsels objected and asked for a mistrial on the grounds that the jury had been prejudiced by the testimony. (TIT. 811 LN 17-19) After hearing arguments from both sides, the judge ruled that he saw no grounds to grant a mistrial which was a extremely harmful error due to the facts that the jury had been unduly prejudiced by the testimony. The judge later contradicted his ruling by stated that he fully agree that the change in witness testimony was "critical and significant" and that it was in some way harmful to applicant and would put a critical inquiry in the jury's mind that applicant shots could have possible hit the victim. (See TIT. page 824 LN 13-825 LN 13) This testimony was clearly prejudice and harmful to applicant and motion for mistrial should have been granted because of it. (See *Gibson v. State*, 514 S.E.2d 320 (S.C. 1999)) This was clearly a reversible error and should have been raised by applicant's appellate counsel.

Appellant's appellate counsel was ineffective and this violated applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Constitution citing Strickland v. Washington 466 U.S. 668 (1984)

2) Appellate Counsel was ineffective for not raising the issue of whether or not the judge erred by denying applicant's motion to disallow the testimony of State witness (Oliver Fieldman) after he made a critical and significant change in his testimony that was harmful and prejudicial against applicant. (See supporting facts in above issue, Issue 1) This also was a reversible issue and should have been raised by applicant's appellate counsel. Applicant's appellate counsel was ineffective under Strickland v. Washington 466 U.S. 668 (1984) and this violated applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Const.

3) Appellate Counsel was ineffective for failing to raise the issue of whether the judge erred by denying applicant's motion for a direct verdict of acquittal due to the fact that the State relied solely on circumstantial evidence that did not rise to the level of substantial circumstantial evidence and that the evidence presented only merely raised a suspicion of guilt and therefore should not have been submitted to the jury. The judge stated himself that he was struggling with the case laws and theories presented by the State and should have granted the motion for direct verdict. (See pp 1001 to 1004 to 1014) This was a reversible issue under the standards set forth in State v. Edwards and should have been raised by appellate counsel. Appellate counsel was ineffective and this violated applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Constitution under Strickland v. Washington 466 U.S. 668 (1984)

4) Appellate Counsel was ineffective for failing to raise the issue of whether the trial court erred by denying applicant's motion for a mistrial on the grounds of prosecutorial misconduct after the prosecutor

presented and showed the jury a prejudice photo that was marked and excluded from evidence under Rule 403 (See T.T. page 1068 LN 15-22) The judge stated that the photo would definitely have a prejudicial effect and probative value on the jury and excluded it from evidence. (T.T. page 344 LN 7-11) The judge knew this photo was prejudice and harmful to the applicant and should have granted applicant's motion for a mistrial when the photo was shown to the jury. This was a reversible error under Prosecutorial Misconduct and should have been raised for direct review, but due to appellate counsel's ineffectiveness it was not. This is clearly a violation of applicant's 6th and 14th Amendment of the U.S. Constitution and S.C. Constitution under *Strickland v. Washington* 466 U.S. 668 (1984)

5) Appellate Counsel was ineffective for failing to raise whether the trial court erred in overruling applicant's objection to the admission of State's Exhibit 73 a red and white ^{shirt} that was covered in blood. The shirt was covered in the victim's blood and was extremely prejudicial to applicant under Rule 403. (See T.T. page 488 LN 18-189 LN 2). Applicant's counsel argued that it would pull at the heart strings and the emotions of the jury and affect their judgement in decision-making. The evidence had no real relevance to the case and should have been excluded under Rule 403. The judge erred by allowing this prejudicial item into evidence and this was not a harmless error, but a reversible one and should have been raised for direct review on appeal. Applicant's Appellate Counsel was ineffective and this violated applicant's 6th and 14th Amendment under the U.S. Constitution and S.C. Constitution under *Strickland v. Washington* 466 U.S. 668 (1984)

6) Appellate Counsel was ineffective for failing to file a writ of Certiorari in the highest court of South Carolina for a issue that was raised in Appellate Court. By failing to do so, the state claim

is not exhausted 7 Federal Review. This violated my 6th and
14th Amendment of the U.S. Constitution and S.C. Constitution.
See Sutherland v. State, 524 S.E. 2d 833 (S.C. 1999) and Strickland
v. Washington 466, U.S. 668 (1984)

10(c) Prosecutorial Misconduct

11(c) Supporting Facts: 1) The Solicitor at applicant's trial committed Prosecutorial Misconduct when she presented inadmissible evidence to the jury. Prosecutor presented a prejudice photo of the victim's body to the jury after it was excluded from evidence under Rule 403. (See T.T. page 344 Ln 5-13). Immediately after the judge made this ruling, the prosecutor presented the ^{prejudice} photo to the State's first witness (Michael Ray Beebe) and the jury. (See T.T. page 351 Ln 23-25) Applicant's Counsel failed to object to this Prosecutorial Misconduct. Then when the prosecutor was examining yet another State witness (Clay Allen Nichols) she presented the same exact prejudice photo (State Exhibit 14) to the witness and jury again. (See T.T. page 1029 Ln 11-13) This is clearly Prosecutorial Misconduct and not just a harmless mistake. The jury was not prejudiced once but twice by this photo and the prejudicial effect and probative value it had on the jury was unduly and clearly made them bias and prejudice in their decision to give the applicant a fair and impartial trial. This is a violation to applicant's 14th Amendment of the U.S Constitution and S.C. Constitution under

2) Solicitor committed Prosecutorial Misconduct when she failed to disclose a witness's inconsistent statement. At applicant's trial applicant's counsel were notified that applicant's alleged Co-Defendant had pulled out of trial and had recently had a meeting with investigators. Applicant's counsel requested during pre-trial for any new information or statements made by Co-Defendant (Oliver Fieldman) pertaining to the night of the incident and was told by Prosecutor that witness (Oliver Fieldman) statement had not changed from its original one that was supplied to the defense. But when witness took

the stand and is asked a leading question by the Prosecutor he changes his testimony. (See T.T. page 807 LN 14-25) Prosecutor failed to disclose this inconsistent statement to applicant's counsel and she also failed to correct the false testimony. This is a issue of Prosecutorial Misconduct under *Riddle v. Ozmint* 631 S.E. 2d 70 (S.C. 2001) where the prosecutor failed to correct false evidence and *Gibson v. State* 514 S.E. 2d 320 (S.C. 1990) where the State failed to disclose a witness's inconsistent statement and trip to the crime scene. Also this is a violation of *Brady v. Maryland* and of the applicant's 14th amendment of the U.S. Constitution and S.C. Constitution.

3) The Solicitor committed Prosecutorial Misconduct when she improperly vouched for a witness's credibility in her closing argument. (See T.T. page 1511 LN 16-1512 LN 4) When a Prosecutor vouches for the credibility of a witness it constitutes an error of law and is inherently prejudicial. This is an issue of Prosecutorial Misconduct under *Matthews v. State* 565 S.E. 2d 766 (2002) (where the prosecutor vouched for the credibility of a State witness in her argument) and *Gilchrist v. State* 565 S.E. 2d 281 (S.C. 2002) (where the prosecutor improperly vouched for a witness's credibility in opening statements). This is Prosecutorial Misconduct and a violation of applicant's 14th amendment of the U.S. Constitution and S.C. Constitution.

4) The Solicitor committed Prosecutorial Misconduct by allowing State's witness (David Collins) to demonstrate and handle the use of a firearm in a courtroom by the handle and also by pulling the trigger. (See T.T. page 1047 LN 1-1048 LN 1) The Supreme Court of South Carolina has adopted certain guidelines for use in handling firearms in a courtroom. And under subsections (6), it reads as follows. A firearm is to be handled only by the barrel and not to be pointed

at any person in the courtroom. (See T.T. page 1061 LN 14-1062 LN6)

The Prosecutor had not asked for permission before presenting this inadmissible demonstration to the jury who was unduly prejudiced by seeing the witness wave and demonstrate firing the firearm inside the courtroom. The prosecutor admitted she didn't ask for permission. (See T.T. page 1062 LN 14-17) The applicant's 14th Amendment was violated by this Prosecutorial Misconduct.

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- _____
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) The claim that was argue in the Court of Appeals by Appellate Counsel I
- (b) Robert Dudek, was not brought to SC Supreme Court. There fore
- (c) I believe this issue is not fully exhausted. See Ineffective Appellate Counsel Claim.
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Camille Everhart, Danielle Payne, Ashley Thomas of
 - ii. the Public Defender's Office.
 - iii. Robert Duck of the SCCID Division of Appellate Detainer
- (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Direct Appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:

My conviction Reversed and Remanded for New trial

20. Are you now under sentence from any other court that you have not challenged?

No

* 21. The applicant also believes he has additional Claims for Post Conviction Relief, but does not yet have Collateral Counsel, access to the discovery process or funds for expert services to investigate the Claims.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Andrius Boz

Applicant

SWORN or affirmed to, and subscribed before me this
10th day of October, 2013.

Dan C. Munday
Notary Public

My Commission Expires: 1-23-2023

2013 NOV - 1 01:11:23

State of South Carolina
County of Richland

Andre T. Boone #328364

v.

State of South Carolina

In The Court of Common Pleas

Proof of

2013 NOV -1 AM 11:23
JEROME L. BOONE
C.C.P. & S.S.
RICHLAND COUNTY

I, Andre T. Boone, hereby declare, that I personally placed my PCR Application inside a legal envelope on Oct. 15, 2013, to be mail U.S. Postal to the following address.

Richland County Clerk of Court
P.O. Box 2766
Columbia, S.C. 29202-2766

By: Andre T. Boone

Andre T. Boone #328364
P.C.I./S.M.U.-Dy #11
430 Oaklawn Rd.
Petzer, S.C. 29669

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Andre T. Boone, #328364

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-06702

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed November 1, 2013¹, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2007 term of the Court of General Sessions for Richland County for murder (2007-GS-40-2324), breach of peace, aggravated nature (2007-GS-40-2325), and unlawful carry of a pistol (2007-GS-40-2327). Applicant was represented by Camille Everhart, Esq, Danielle Payne, Esq. and Ashley R. Thomas, Esq. Applicant proceeded to trial on May 5, 2008, before the Honorable William P. Keesley and a jury. He was convicted of murder. Judge Keesley sentenced Applicant to a term of forty-five (45) years' imprisonment for murder. The charges of breach of peace, aggravated nature and unlawful carry of a pistol were nolle prossed.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Boone, No. 2013-UP-155 (filed April 17, 2013). The Remittitur was issued on September 13, 2013.

¹ Respondent received this Application on October 15, 2015.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel;
3. Prosecutorial Misconduct.

III.

Applicant's first claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. 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, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See 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 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.*

Respondent submits that 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. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised

this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. 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 those allegations should be dismissed as a matter of law.

VII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code §17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VIII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

IX.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

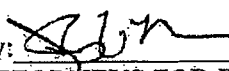
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
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2/24, 2016

STATE OF SOUTH CAROLINA
COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

ANDRE T. BOONE, #328364

2013-CP-40-06702

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

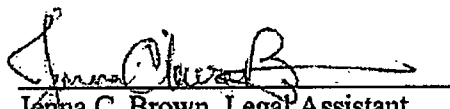
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

David K. Allen, Esquire
The Allen Law Firm, P.A.
PO Box 3241
West Columbia, SC 29171

DATED this 24th day of February, 2016.


Jenna C. Brown, Legal Assistant
For Respondent

In the Court of Common Pleas
Fifth Judicial Circuit
2013-CP-40-6702

Andre T. Boone,
Applicant,
vs.
State of South Carolina,
Respondent.

Transcript of Record

August 28, 2017
Columbia, South Carolina

B E F O R E:

The Honorable Paul M. Burch, Judge

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

Leah B. Moody, Esquire
Attorney for the Applicant

Jessica E. Kinard, Esquire, Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>

No Exhibits Introduced.

1 MS. KINARD: Thank you, Your Honor. May it please the
2 court? This is the matter of *Andre Tayson Boone vs. The*
3 *State of South Carolina*. We're before the court on an
4 application for post-conviction relief that was filed
5 November 21, 2013. The case number is 2013-CP-40-6072.

6 Mr. Boone is presently confined in the South Carolina
7 Department of Corrections pursuant to orders of commitment
8 from the Richland County clerk of court. He was indicted
9 in the April 2007 term of the Richland County grand jury
10 for murder, breach of peace in an aggravated nature, and
11 unlawful carrying of a pistol.

12 At trial he was represented by Camille Everhart,
13 Danielle Payne, and Ashley Thomas. He proceeded to trial
14 on May 5, 2008, before the Honorable William P. Keesley and
15 a jury. He was convicted of murder and sentenced to a term
16 of forty-five years' imprisonment. The other charges,
17 breach of peace and unlawful carrying of a pistol, were
18 *nolle prossed*.

19 A timely notice of appeal filed on his behalf; an
20 appeal was perfected by Robert Dudek of the Office of
21 Appellate Defense. The Court of Appeals affirmed his
22 convictions and sentences in an unpublished opinion filed
23 April 17, 2013. The remittitur was submitted September 13,
24 2013.

25 The state is presently ready to proceed. Mr. Boone is

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 present and represented by Leah Moody.

2 MS. MOODY: Thank you, Your Honor. May it please the
3 court?

4 THE COURT: Yes.

5 MS. MOODY: We are ready to proceed.

6 Mr. Boone, would you please ---

7 Your Honor?

8 THE COURT: Put him under?

9 MS. MOODY: Yes, sir.

10 ANDRE BOONE, BEING DULY SWORN,

11 TESTIFIES AS FOLLOWS:

12 DIRECT EXAMINATION BY MS. MOODY:

13 Q. Mr. Boone, would you please state your full name for
14 the record?

15 A. Andre Tayson Boone.

16 Q. Okay, and where are you currently incarcerated?

17 A. Broad River Correctional.

18 Q. How long have you been at Broad River Correctional?

19 A. I've been here since 2015.

20 Q. And the charges that the state recited for the court
21 -- murder, the aggravated breach of peace, unlawful
22 carrying a gun, possession of a pistol -- those are the
23 charges you're there -- well, one of the charges is the
24 murder that you're in that location for?

25 A. Yes, ma'am.

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

5

1 Q. And as to the murder and the other charges that I
2 alleged -- asserted, who was your attorney?

3 A. Camille Everhart, Danielle Payne, and Ashley Thomas.

4 Q. Who was your first attorney? Was it those ladies or
5 was it another attorney?

6 A. I had Joe Chaplin for my bond hearing, but that was
7 it.

8 Q. Okay. Did you discuss anything about your case
9 outside of the bond hearing context with Mr. Chaplin?

10 A. No. I only seen him for the bond hearing, and that
11 was it.

12 Q. Okay. At the time of your bond hearing, how old were
13 you?

14 A. Sixteen.

15 Q. At the time of this murder, how old were you?

16 A. Sixteen.

17 Q. Okay, and then when Ms. Payne, Everhart, and Ms.
18 Thomas represented you, how old were you?

19 A. Sixteen.

20 Q. Had you ever been in any trouble?

21 A. No, ma'am.

22 Q. So, this was your first charge?

23 A. Yes, ma'am.

24 Q. All right. So, when -- do you recall when Ms. Payne
25 became your attorney?

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 A. I believe, like, a couple months after my bond
2 hearing. So, it was, it was 2007.

3 Q. So, who was the main attorney for you? Was it Ms.
4 Payne?

5 A. No. I always spoke with Camille Everhart.

6 Q. Okay, and so did Ms. Everhart become your attorney at
7 the same time Ms. Payne became your attorney?

8 A. Well, I met Ms. Everhart first and then, like, right
9 before my trial I met Ms. Payne.

10 Q. Okay. So, when you spoke with Ms. Everhart, did you
11 have an opportunity to talk completely about your case?

12 A. Yeah. Well, yeah. She, she came. When I first seen
13 her, she brought me my motion and we went over it.

14 Q. Okay. So when you say motion, you're talking about
15 the evidence the state has against you?

16 A. Yes, ma'am.

17 Q. Okay. So, you went over all the evidence the state
18 had against you?

19 A. Well, we -- well, the statements, like, we -- she was
20 reading statements and whatnot, and basically that was, I
21 guess that was the evidence they had against me.

22 Q. Okay. What, if anything, did you share with her about
23 what happened on that late night, early morning?

24 A. Oh, I explained how I was going to a party and never
25 made it to the party because something happened at the

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

7

1 party. I think the party got shut down, so I never made it
2 there. And then I -- and we went to the Waffle House to
3 eat, and then we ran into some guys that -- and we -- it
4 was -- started off as everybody was just okay. He didn't
5 like my friend, and everybody was just going to fight, and
6 -- but somehow I guess it didn't turn out well. They
7 didn't want to fight there. So, they said let's fight
8 here. They didn't want to fight here.

9 So after, like, two places they wanted to fight, I
10 just -- it -- I really was, like, I really don't care no
11 more. My girlfriend at the time, Donisha Small [phonetic],
12 would call me. It was, like, can I come chill with her at
13 the Waffle House. So ---

14 Q. All right, let me stop you right there because you
15 said a bunch of stuff that's kind of confusing. So, you
16 all were at the -- you and your friends were at the Waffle
17 House first?

18 A. Right.

19 Q. And then some individuals, some guys came to the
20 Waffle House?

21 A. Yes, ma'am.

22 Q. And at the Waffle House, there was some kind of
23 exchange between you, your friends, and these other guys?

24 A. Yes, ma'am.

25 Q. Okay. Did you know they were coming to the Waffle

1 House?

2 A. No, ma'am.

3 Q. Okay. So, you all were there. Then you talk about
4 fighting at the Waffle House or what other location?

5 A. First we didn't -- it was originally going to fight at
6 the one that we were at, but the other, they didn't want to
7 fight there. So, they was, like, well, can we meet at a
8 Wendy's? They didn't fight at the Wendy's, so that was it.
9 And then they wanted to fight at another Waffle House.
10 Didn't fight there. So, after that I was, like, I mean,
11 it's no need. I guess it's not going to happen.

12 So my girl -- at the time my girlfriend called me
13 before I made it home and was, like, can I come chill with
14 her, and she was -- just so happened to be at a totally
15 different -- not, not the Waffle House that we had already
16 been at. A totally different one where I went there with
17 her and we chilled and we talked, and that's when the
18 guy ---

19 Q. So, the individuals that came to the first Waffle
20 House ---

21 A. Uh-huh.

22 Q. --- did they follow you to that Waffle House where
23 your girlfriend was?

24 A. Yeah. They end up, they end up coming there after me
25 and my girlfriend was there chilling.

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

9

1 Q. Okay. So, you explained that all to Ms. Everhart?

2 A. Yes.

3 Q. Okay, and from having that discussion with her, what,
4 if any, defense or strategy did you all talk about?

5 A. She, she told me to just, like, I should get on the
6 stand and tell them basically what happened and that how,
7 how we play it off. Like, I -- we was -- after that, she
8 was speaking about self-defense because of how it was. It
9 was, like, I was there just really with my girlfriend, and
10 they end up coming, and the way it was set up, like, the
11 way they was parked at, it was, like, they was parked by
12 the exit and entrance. So, in order to leave, you got to
13 get -- go through them. So, we was really hope -- we, we
14 were speaking on, like, me getting on the stand and
15 testifying for self-defense.

16 Q. All right.

17 A. And that was, that's what ---

18 Q. That was going into trial, that's how you all were
19 going to approach the case?

20 A. Yes, ma'am.

21 Q. Okay. So, now did you have an opportunity to meet
22 with Ms. Thomas before the trial?

23 A. No, ma'am.

24 Q. Ms. Payne, you obviously met with her.

25 A. Yes. I met with her, like, maybe a week or a few

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

10

1 weeks before the trial.

2 Q. Okay, and did she change any direction you all were
3 proceeding as far as your defense?

4 A. No, ma'am.

5 Q. Okay. So, right before you go into trial that week,
6 did you have an opportunity to meet with your attorneys
7 again?

8 A. I met with Danielle Payne, like, I think that Friday
9 before and my trial was -- but she came and tell me that,
10 like, there was something went on. That they was changing
11 the judge, and that's when I met with her Friday and that
12 was, that was it. The trial was Monday.

13 Q. Okay. All right. So, what, if any, experience did
14 you know that any of these ladies had in handling murder
15 cases?

16 A. I didn't know anything; I didn't know if they had
17 experience or not.

18 Q. Did you ask them?

19 A. No. I, I just knew, I mean, they was nice and I was
20 sixteen, so I just, I thought at that age, I just thought
21 every lawyer knew everything. I really didn't know too
22 much about the law or crimes, anything. So, I just knew a
23 lawyer was supposed to know everything, and so I never
24 asked them.

25 Q. All right. So going into your trial, you were not

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 tried in this case as a sole defendant, correct?

2 A. Correct.

3 Q. Okay. Who else was tried in this case?

4 A. Eugene Patterson, which is one of the guys that came
5 to the place -- one of the other guys that came to the
6 place, you know, to fight.

7 Q. So, basically this was not your friend?

8 A. No. Yes, ma'am, he wasn't my friend.

9 Q. Okay. So, when you say one of the guys that came to
10 the place is one of the guys that followed you to the
11 Waffle House?

12 A. Correct.

13 Q. Okay. So, did your lawyers make any motions to sever
14 your trial with this individual?

15 A. No, ma'am.

16 Q. Did you ask them why you were going to trial with this
17 individual?

18 A. I didn't know I was going to trial with him until the
19 trial.

20 Q. Okay, and what did you think when you got into the
21 trial and you see the person who followed you?

22 A. I was surprised.

23 Q. And did your attorney say anything about that?

24 A. No. Just that we -- they were saying, like, we're not,
25 we're not codefendants but, I mean, but we, we're still

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 being tried together.

2 Q. Okay.

3 A. That's, that's all I was told: that we're not
4 codefendants but we're being tried together.

5 Q. Okay. So, now you filed your PCR application based
6 off of your counsel's performance in this trial, correct?

7 A. Yes, ma'am.

8 Q. Okay, and in your application, you made several
9 allegations as to what you feel your attorneys did not do
10 in this case for you?

11 A. Yes, ma'am.

12 Q. Okay. We're going to go through them for the court.
13 The judge does have a copy of your application and your
14 issues, so we're going to go through them in order, all
15 right?

16 A. Okay, ma'am.

17 Q. Can you please state the first ground for your
18 post-conviction relief?

19 A. Ineffective assistance of counsel.

20 Q. Okay, and when you talk about ineffective assistance
21 of counsel, you're saying that your attorneys did not
22 advance your position the way you wanted it to advance?

23 A. Yes, ma'am.

24 Q. In the first issue, you state that your lawyer was
25 ineffective for raising the issue of whether or not the

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

13

1 judge -- for not raising the issue of whether or not the
2 judge should have denied the motion for a mistrial to
3 prosecution's misconduct?

4 A. Correct.

5 Q. Can you explain what you mean by that?

6 A. Well, when they, when they introduced a jury charge of
7 mutual combat, my -- and they, and they explained, like,
8 what mutual was, I knew that's not, like, how everything
9 went. So, they object -- well, Eugene Patterson, his
10 lawyer objected to the jury charge of mutual combat, and I
11 -- and he stated his basis of -- the grounds why they, why
12 they shouldn't allow the jury charge of mutual combat.
13 Then ---

14 Q. So let's, let's stop for -- right there for a second
15 right there. You're saying why the judge should not charge
16 on mutual combat?

17 A. Yes, ma'am.

18 Q. Okay, and that was your -- the, the other individual
19 who was at trial?

20 A. Yes. That was his lawyer.

21 Q. Okay.

22 A. And after, after his lawyer went through the reasons
23 why they shouldn't give a mutual combat charge for his
24 client, they asked my lawyer did she want to join in on the
25 motion, and she, she joined in on the motion but when they

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 asked her, she just said I would, I would just join in on
2 it, and they asked her, and it was no need to explain or
3 add on anything else.

4 Q. So, when, when ---

5 MS. MOODY: Beg the court's indulgence for a second.

6 Q. --- Mr. Patterson's attorney stated the position that
7 he took on the mutual combat, did he say basically the same
8 story that you had given to your attorneys?

9 A. No, because my story was different from his client's
10 story.

11 Q. Okay, and so what do you feel like your attorney
12 should have done in terms of arguing against the mutual
13 combat?

14 A. She should have stated it clearly, like, my basis of
15 why they shouldn't allow a jury charge of mutual combat
16 because mine, mine was different from his.

17 Q. Okay, and yours was what you relayed to the court just
18 now?

19 A. Yeah. My was that -- like, from my understanding of
20 mutual combat, like, you bring a gun and we have agreement.
21 Mine was I never brought a gun; the gun was never mine.
22 His was different because he actually brought a gun. I
23 don't know. So, of course it's two different situations.
24 I never brought a gun. I never -- the gun wasn't mine, but
25 my -- it wasn't explained because she didn't add on. So,

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 it was just, like, whatever his, his lawyer said about
2 mutual combat, it, it just automatically -- like, I should
3 -- I basically -- like, they just say, okay. Well, y'all
4 both had the same reasons, and my reasons was different
5 from his, but my reasons wasn't explained.

6 Q. Okay, and how did that affect your case?

7 A. It affected my case because when I filed the direct
8 appeal, it was denied on -- because they say it wasn't
9 properly objected to and improperly -- properly preserved.

10 Q. Preserved for the record?

11 A. For the record, yes, ma'am.

12 Q. Okay. What, if any, review did your case get as it
13 relates to your entire case, all the issues that were
14 raised on your behalf?

15 A. Far as that? You ---

16 Q. As far as the Court of Appeals, did your case get
17 reviewed?

18 A. It did get -- no, because they said the issue was a
19 barred issue.

20 Q. Okay. So, the court didn't make any rulings
21 whatsoever?

22 A. No, ma'am.

23 Q. Okay, and that is because your attorneys failed to
24 preserve the record?

25 A. Correct.

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

16

1 Q. Okay, and so that's one of your grounds for your
2 application?

3 A. Yes, ma'am.

4 Q. Is there anything else you want to say as relates to
5 mutual combat?

6 A. No, ma'am. That will, that will be all.

7 Q. Okay. You raised on your second ground the
8 applicant's counsel, counselors were ineffective for
9 failing to object to a prejudicial photo that was
10 inadmissible. Can you explain to the court what you mean
11 by that?

12 A. During the trial they had, like, did, like, far as
13 what they allow into evidence and what they not going to
14 allow into evidence. And when they got to the crime scene
15 photos, some of them was, like, very, I mean, gruesome or,
16 like, all the blood and all that. So, some were marked out
17 of evidence.

18 Q. So, y'all had a pretrial hearing?

19 A. Yes, ma'am.

20 Q. And you took up issues as to suppressing those photos?

21 A. Correct.

22 Q. And when you took up that issue, there were two
23 exhibits that were not going to be allowed to be shown or
24 admitted into evidence, correct?

25 A. Yes, ma'am.

A. BOONE - DIRECT EXAMINATION BY MS. MOODY

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1 Q. Okay, and what were those exhibit numbers?

2 A. Exhibit 14 and Exhibit 15.

3 Q. 14 and 14?

4 A. No.

5 Q. Excuse me, 13 and 14?

6 A. No. It was, it was State's -- the two that wasn't
7 allowed was Exhibit 14 and 15.

8 Q. Okay, and then later on in the trial, there was some
9 exhibits admitted into evidence?

10 A. Correct.

11 Q. Okay, and which exhibits were allowed into evidence?

12 A. State's Exhibit 13, State's Exhibit 16.

13 Q. In your application, you state that Exhibit 14...

14 A. Oh, you saying what -- oh.

15 Q. Yes.

16 A. Oh, yes.

17 Q. Were not -- were entered into evidence ---

18 A. They were shown.

19 Q. --- during the trial. Okay.

20 A. They was marked out of evidence but shown; they still
21 got shown during the trial.

22 Q. Okay, and so Exhibit 14 ---

23 A. Yes, ma'am.

24 Q. --- was not supposed to be shown?

25 A. It was not.

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1 Q. Okay, and so how did 14 get shown in evidence?

2 A. Prosecutor, Ms. Luck Campbell, was, she was talking
3 to, I guess, one of the -- I don't, I don't -- I can't say
4 what his job was, but he ---

5 Q. One of the witnesses?

6 A. One of the witnesses, and while talking to him, she
7 showed -- she asked him how the body was at the crime
8 scene, and she -- and he -- and she was, like, does it
9 resemble State's Exhibit 14 and showed him the picture,
10 along with the jury. And he looked at it, he agreed,
11 and...

12 Q. So, was there any objection to that?

13 A. No, ma'am.

14 Q. Okay. So, none of your attorneys objected to 14 being
15 admitted, admitted into evidence?

16 A. No, ma'am.

17 Q. Okay, and do you know that it was actually entered
18 into evidence?

19 A. That is shown.

20 Q. Yes.

21 A. Yes, ma'am. It's -- trial, it was actually shown
22 twice to two different witnesses.

23 Q. Okay, and what happened -- well, did you notice that
24 it was admitted into evidence and it wasn't supposed to be?

25 A. No, because I didn't -- I mean, I didn't really hear

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1 what numbers they were saying because I, I mean, I was kind
2 of scared the whole trial, so I really was just depending
3 all on my lawyers.

4 Q. Okay, and what brought it to your attention that it
5 was shown or put into evidence?

6 A. Because the second time she shown it ---

7 Q. When you say she, you're talking about Luck Campbell?

8 A. Luck Campbell. The second -- the first time she
9 showed it, it was not objected to at all, but the se -- she
10 showed it again later on, like, in the trial and it wasn't
11 objected to. She showed the witness and she showed the
12 jury again, and it wasn't objected to. Then later on
13 another issue, my lawyers objected to another issue, and
14 then while they was talking about that issue, they brought
15 it to her attention. Like, we think you showed State's
16 Exhibit 14 which was marked out of evidence, and that's
17 when it was brought to every -- that's when it was brought
18 to my attention that it was showed as far as the court's --
19 far as everybody, okay, she was showing the photo.

20 Q. Okay, and so with that, that late objection after two
21 witnesses, you're saying that your attorney should have
22 caught that issue the first time?

23 A. Yes, ma'am.

24 Q. Okay, and of course your -- you -- there was an appeal
25 filed on your behalf, and that wasn't -- the court didn't

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1 rule on anything as far as that issue?

2 A. No, ma'am.

3 Q. Okay. Was that issue preserved?

4 MS. KINARD: Objection.

5 A. No, because they didn't -- there wasn't -- it wasn't
6 objected to.

7 MS. KINARD: Calls for a legal conclusion.

8 MS. MOODY: Well, I -- well, I can rephrase the
9 question, I mean.

10 BY MS. MOODY:

11 Q. Did they object to it?

12 A. No, ma'am.

13 Q. Okay. Was there another ruling given by the judge
14 when they objected later on on the third witness?

15 A. Yeah. It was -- everything was denied, any -- far as
16 dealing with the issue that was brought up later on.
17 Everything was denied.

18 Q. Okay. All right, is there anything else you would
19 like to say as to this issue?

20 A. No, ma'am.

21 Q. Okay. Your third issue you raise is the applicant's
22 counsel was ineffective for failing to object to the
23 admission of a handgun that was recovered from the
24 applicant's house. The admission of this .22 revolver was
25 submitted into evidence?

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1 A. Yes, ma'am.

2 Q. Okay. Can you explain to the court what you mean by
3 this particular gun being admitted into evidence?

4 A. I mean, the gun was found at my house, but it didn't
5 have, like, nothing to do with the case at all, but it
6 still was entered into evidence, you know, and it, it
7 wasn't objected to.

8 Q. Okay, and what was your issue as to that gun? Whose
9 gun was it?

10 A. It was a broke gun that I -- that was just at the
11 house. It was, it was in two pieces.

12 Q. Okay.

13 A. Just something I found. It was my, it was actually my
14 gun. It was just a broke gun that didn't work, but -- so,
15 I didn't really know why it was even submitted into
16 evidence, but it wasn't objected to.

17 Q. Okay. Did they find any .22 revolver shell casings at
18 the scene?

19 A. No, ma'am.

20 Q. And did you tell your attorneys, did you explain to
21 them what the gun -- whose gun it was and the relevance --
22 well, that it lacked relevance as to this particular case?

23 A. Yes, ma'am.

24 Q. And what, if anything, did they say?

25 A. Nothing. It just, it -- nothing.

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1 Q. So, did they -- I guess what I'm getting at is they
2 did not discuss why they didn't object to it?

3 A. Correct.

4 Q. Okay. Anything else you'd like to say about this
5 particular issue?

6 A. No, ma'am.

7 Q. The next issue you have is that your counselors were
8 ineffective for failing to object to the admission of a
9 firearm demonstration inside the courtroom, and can you
10 explain to the court what you mean by that firearm --
11 excuse me -- demonstration in the courtroom?

12 A. Yeah. They was, they -- like, the guy was explaining
13 how a revolver worked, and he actually had the revolver in
14 his hand and holding it by the handle. Even pulling the
15 trigger in the courtroom and, I mean, I -- it wasn't my
16 gun. So, I don't even understand what was the
17 demonstration for or what was they even showing the gun for
18 because it wasn't a gun that belonged to me.

19 Q. Did you ask your attorneys about why they didn't
20 object or why was this individual was allowed to
21 demonstrate the gun?

22 A. I didn't, I didn't even know. I thought, I mean, at
23 the time since I didn't know much about law, I just thought
24 he, he could do it. The way he, like, the way he did that,
25 I just thought he could do it.

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1 Q. Again, you wanted them to object? You feel like they
2 should have objected to that?

3 A. Yes, knowing my -- like, knowing now what I know,
4 like, after actually learning about law, yes, I...

5 Q. Okay. All right, your next issue is that -- well,
6 that goes to the actual gun. I think you've stated that
7 about how he handled the gun in the courtroom?

8 A. Yes, ma'am.

9 Q. So, the next issue would be your counselors did not
10 conduct -- was so -- was deficient for failing to conduct a
11 proper pretrial investigation. What investigation,
12 pretrial investigation do you feel they should have
13 conducted?

14 A. Oh. Well, at the beginning, like, before the trial,
15 we had went through the, like, certain motions they wanted
16 to file. And one of the motions was to, like, disallow the
17 other -- I don't -- they're not, they're not my
18 codefendants, so disallow the other guy that was also
19 charged in the case from testifying.

20 Q. Okay.

21 A. And -- but they were -- end up removing the motion.
22 They asked prosecutors and the investigators, like, did he
23 change his statement because they wanted to disallow him
24 testifying because they thought he changed his statement.

25 Q. Okay. So, disallow him to testify as to you?

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1 A. Well, yeah. Test -- well, he -- I didn't know him, so
2 -- but in his statement, they was explaining to me that he
3 made a lot of -- he made mentions about numerous different
4 shooters that wasn't on trial or that wasn't even charged
5 in his original statement, which was, like, right after
6 when we, we was first charged. He made this statement
7 about all these different shooters. And they actually
8 wanted him to get on the stand and they wanted to, like,
9 attack that or bring it up, use that as a defense for him
10 mentioning all these different shooters that's not on trial
11 and that's not charged. But when they heard he was -- he
12 had done talked with the investigator and, and Luck
13 Campbell, they was, like, they, they was, like, okay, once
14 -- if his statement's changed, we don't want him to
15 testify.

16 Q. So, let me, let me be clear on this. You're saying
17 your attorneys didn't want him to testify if his statement
18 changed?

19 A. Correct.

20 Q. Or your attorneys wanted to impeach him on those
21 previous shootings that he had been involved in?

22 A. No. They wanted to speak about, like, when he gave,
23 he gave a statement of the incident that night and he
24 talked about how he seen numerous shooters, more than was
25 actually charged in our case.

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1 Q. Okay.

2 A. So, they wanted that ---

3 Q. To be clear on what his testimony was going to be.

4 A. Yeah. They wanted that to get out and how -- they
5 wanted that to be said, like, so they can basically tell
6 how it may be -- it's more people that was actually
7 shooting that night, but they're not charged.

8 Q. Okay. All right, and so they originally had that
9 motion before the court in the pretrial?

10 A. Yeah, they, they had the motion to disallow him
11 testifying, but when, when that motion came up, they asked
12 to -- Luck Campbell and investigators did his statement
13 change after talking to y'all. They said no, his statement
14 didn't change. And they said okay, well, if his statement
15 didn't change, we will remove the motion. Like, they
16 removed the motion without even hearing or, like, without
17 actually asking him or getting a new copy if he did write a
18 new statement. They removed the motion.

19 Q. So, they didn't confirm what his testimony would have
20 been?

21 A. Correct.

22 Q. Pretrial?

23 A. Correct. It wasn't confirmed.

24 Q. Okay, and so as a result, they withdrew their motion,
25 and how did that affect your case?

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1 A. Because when he got on the stand -- and instead him
2 talking about all the numerous shooters he seen ---

3 Q. Shooters?

4 A. With a S, yes.

5 Q. Okay.

6 A. Like, far as other people, he basically turned two or
7 three shooters all into one shooter which fit my
8 description.

9 Q. Okay.

10 A. So, now it's no shooters with a S. It's, oh, this one
11 guy that fit my description bouncing around in all these
12 different spots.

13 Q. And so did they object?

14 A. Yes, they objected.

15 Q. Okay, and so I guess you're going as to, like, the
16 court would have limited Mr. Patterson to discussing ---

17 A. No.

18 Q. --- or ---

19 A. Their -- no. Like, they objected, but his testimony
20 was still allowed. So, maybe -- that's what I'm saying.
21 If the motion was -- if we went through with the motion, he
22 probably wouldn't ever testified.

23 Q. Okay.

24 A. But they objected but he still -- the motion -- he
25 still was allowed to testify and now there's no more

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1 shooters. It's just this one guy.

2 Q. Okay. All right. Is there anything else you want to
3 say about that issue?

4 A. No, ma'am. Just the fact that it hurt me.

5 Q. Okay. All right, you indicate that also your
6 counselors were deficient for failing to file the proper
7 pretrial motions in addition to this last pretrial motion
8 we talked about. What other pretrial motions did you want
9 your attorneys to file or should they have filed?

10 A. Oh, a change of venue.

11 Q. Okay. Tell the court what you mean, why you wanted --
12 you felt like a change of venue was appropriate in this
13 case.

14 A. Because of the, like, the high publicity surrounding
15 the case far as with news and newspapers, internet. And
16 even, like, when we was in the midst of, like, during the
17 trial, if came out that, like, senators had started
18 programs about -- like, named after my victim, and it was
19 just, like, a lot of publicity, public stuff, like,
20 surrounding my case.

21 Q. Okay. So, you feel like you would have gotten a
22 fairer trial in other county?

23 A. Yes, ma'am.

24 Q. Did you do ---

25 A. Because when we, when we was, like, doing the jury,

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1 like, picking a jury, like, I think, like -- I don't know
2 the exact number, but more than 50 percent, like 60
3 percent, 70 percent of the jurors had heard about the case
4 from either the internet, newspaper that they just knew.
5 Some of them was in programs, went to church with the
6 family. So, it was, like, majority of the jury already
7 knew about the case before the trial even started.

8 Q. All right. Did you have an opportunity to discuss
9 this with your attorneys?

10 A. Yes. We, we discussed it, like, while we was --
11 during the trial. That's it.

12 Q. So, you discuss a change of venue at the trial?

13 A. No. We discussed that, like, all -- as far as
14 everybody knowing about it.

15 Q. Okay. When you were going through the jury selection?

16 A. Yes, ma'am.

17 Q. Okay, but before you got to trial, did you have -- did
18 you know to discuss this with your attorneys?

19 A. No, ma'am.

20 Q. Did they mention it at all to you?

21 A. No, ma'am.

22 Q. And so you felt that that prejudiced you going forward
23 in your trial?

24 A. Yes. I felt like it was, like, I already had, like,
25 the media had already painted a bad picture of me before

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1 the trial even started. So, I didn't -- I wasn't going to
2 get a fair trial due to all the bad media that was placed
3 on me. I was sixteen and my face was even shown on the
4 news. So, I, I really felt like I didn't have a chance
5 anyway.

6 Q. Is there anything else you want to convey to the court
7 about this issue?

8 A. No, ma'am.

9 Q. Okay. All right. You indicate that your attorneys
10 were -- well, you've indicated your attorneys should have
11 filed a motion for a separation of joint trial since you
12 and the codefendant did not know each other and had never
13 met before. I believe you were talking about a motion to
14 sever?

15 A. Yes. Like, allow separate trials.

16 Q. Okay, and how do you feel this, this affected you in
17 your trial?

18 A. Because, like, for one, like, I, I didn't even -- it
19 was -- to the jury, I don't know if they -- whether or not
20 looking at them, they thought we was codefendants. People
21 still think we was working in the -- like, working
22 together, which we wasn't. I didn't -- I never -- I didn't
23 actually see this man's face clear until the day of trial.
24 I didn't even know what he look like.

25 Q. Okay.

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1 A. So --- but to the jury, they, I'm guessing they
2 thinking, oh, these two codefendants on trial together.
3 Whether the -- whether you telling them that, oh, these are
4 not codefendants, if we're not codefendants, I don't even
5 understand why we on trial together.

6 Q. Okay. So, did you have an opportunity to talk about
7 that with your attorneys?

8 A. No, I didn't.

9 Q. Well, I mean, previously you testified that you didn't
10 know that y'all were going ---

11 A. Yeah, I ---

12 Q. --- to go to trial together.

13 A. Right.

14 Q. So, when -- I can't recall what you exactly said, but
15 when y'all went into the courtroom and you saw this
16 codefendant, did you not question why you were going
17 forward with the codefendant?

18 A. No. They just said, they just told me that -- they
19 just explained to me that, oh, it's a joint trial but we're
20 being charged separately.

21 Q. Okay. So, when you -- throughout the trial, did they
22 make that clear that you all were not friends?

23 A. I'm not -- I mean, during, like, certain statements,
24 but it was not -- it was still to the point that we was --
25 basically, like, that word codefendant kept coming up,

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1 which we were not codefendants.

2 Q. So, you're saying it wasn't made clear that y'all were
3 on opposite sides?

4 A. No, ma'am.

5 Q. All right, and so your attorneys -- well, they didn't
6 file that motion. All right, anything else on that issue?

7 A. No, and even -- I mean, and what really -- I mean, far
8 as, like, after realizing that -- even the judge stated
9 that he didn't know why a severance motion wasn't filed
10 because during the trial, it's like his lawyer pointing the
11 finger, pointing the finger at me, and I know, of course,
12 it's vice versa. So, it's really just, it was just
13 prejudiced the whole time because his lawyer really putting
14 the blame on me. But, I mean, but he still in the -- they
15 were doing the trial together, so it's really -- I don't --
16 that's what even the judge said. I don't understand why a
17 severance motion wasn't filed because all the pointing
18 fingers is going ---

19 Q. The opposite -- opposing defenses?

20 A. Yes, ma'am.

21 Q. Okay. Did your lawyers discuss that after the judge
22 brought that up?

23 A. No, ma'am.

24 Q. Anything else on that issue?

25 A. No, ma'am.

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1 Q. All right. Your next issue is that your counselors
2 were, they were deficient for failing to challenge juror
3 number 280's ability to be fair and impartial after she
4 stated that she worked for a corporation that started an
5 intervention program?

6 A. Yeah. I don't -- it was a program named after the
7 victim, and she, she, one of the jury members, worked for
8 that program. And, like, I was trying to figure out, like,
9 why, like, she wasn't objected to or, like, don't, like --
10 nobody said nothing about her not being able to be on the
11 jury even though she stated that she worked for a program
12 that was named after the victim.

13 Q. Did you ask your lawyers why they didn't object?

14 A. I mean, no, because, like I say, at the time I thought
15 why everything -- I thought lawyers knew everything. And,
16 like, I really -- I was sixteen. Well, I turned seventeen
17 when I went to trial, but I thought lawyers knew
18 everything. So, I really was, like -- and my mind was,
19 like, they -- these are my lawyers, so they, everything
20 they do is to -- supposed to be to help me. So, I'm not
21 really questioning because I'm, like, okay. In my mind
22 they -- this, this is what they're supposed to be doing.
23 So, I'm not really questioning them on why they don't do
24 this and why they don't do that because I'm thinking what
25 they're doing is right.

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1 Q. Okay. Well, I mean, I, I get you didn't question
2 them, but did they explain to you why they didn't object to
3 that juror being seated?

4 A. No, ma'am.

5 Q. Okay. Did y'all have any discussion about any of the
6 jurors that were seated in your case?

7 A. No. No, ma'am.

8 Q. So, did you assist them in picking, or you just, like
9 you said, you just let them handle it?

10 A. I just let them handle it.

11 Q. Anything else as to this issue?

12 A. No, ma'am.

13 Q. All right, next you indicated that your counselors
14 were ineffective for failing to request a competency
15 hearing. Tell the court what you mean by that.

16 A. Far as to know whether, like, I kind -- from -- just
17 to know if -- I was sixteen, so I didn't finish high
18 school. I was only in the tenth grade; I was in the tenth
19 grade. So, I didn't, like, far as everything going on with
20 the -- far as understanding law and -- I didn't have no
21 knowledge to none of that. So, it was really -- I really
22 couldn't help up. If it was up to me, I couldn't really
23 help myself at all. I was really helpless in the whole
24 matter.

25 Q. Okay, but you had some other issues going on?

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1 A. Oh, yes, I had -- and then I was, I was stressed,
2 depressed because I had -- my girlfriend that was actually
3 with me that night, she got killed six months later while I
4 was locked up, and I had to find out while I was locked.
5 Then, like, three months after that my niece got killed,
6 and all this happened while I was locked up my first year.

7 Q. Okay. Did you talk about it with your attorneys?

8 A. Far as about, like, losing in my family? Yeah.

9 Q. And, I mean, what, if anything, did they say? I mean,
10 do you feel like what you relayed to them was strange
11 behavior or anything like that?

12 A. I mean, I know I, I was depressed all the time. Like,
13 I probably, like, I really -- just moping around. Like, I
14 really ain't -- it's just a whole matter far as me being
15 locked up, losing my girlfriend, losing my niece. It just
16 was, like, a -- I really -- really, it was just like I was
17 barely living. Like, I just really was -- I just really
18 ain't have no energy, no mood to do anything.

19 Q. Okay. Anything else you want to say on that issue?

20 A. No, ma'am.

21 Q. All right. You indicated in your last issue that your
22 attorneys were ineffective for failing to object to the
23 prosecutor's vouching for the credibility of the state's
24 witness, and that witness being Oliver Feldman?

25 A. Yes, ma'am.

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1 Q. In the closing argument by the state?

2 A. Yes, ma'am.

3 Q. Can you please explain to the court what you mean by
4 that?

5 A. Well, in the closing argument, Luck Campbell was
6 stating that my lawyers was going to tell you how not to
7 believe Oliver Feldman, but she, she was, like -- but
8 Oliver Feldman is, like, everything he said was -- what's
9 the -- corroborated?

10 Q. Corroborated.

11 A. And that was just -- she, like, basically y'all can
12 believe him because everything he says he -- you can --
13 it's evidence or is a witness to back it up. But she
14 didn't say it was evidence or witness. She just said
15 everything he said is corroborated. So, he's -- everything
16 he say you basically can believe him.

17 Q. So, you feel like your attorneys should have objected
18 to that in the closing?

19 A. Yeah, and made, made -- at least make her state, like,
20 why he's believable or, like, what evidence is backing his
21 credibility and what witnesses is backing his credibility,
22 not just say he's believable and not be specific.

23 Q. Okay. Did you have an opportunity to talk to your
24 attorneys about that?

25 A. No, ma'am.

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1 Q. All right. So, all of these issues that you allege in
2 your PCR application, you feel they prejudiced you in some
3 form or fashion?

4 A. Correct.

5 Q. Okay, and the one as far as, like, your appeals were
6 concerned, your appeal was concerned was that the record
7 wasn't preserved so the court could actually review the
8 mutual combat?

9 A. Yes, ma'am.

10 Q. All right. How -- well, obviously the -- well, tell
11 the court how you were prejudiced.

12 A. Well, because far as with the mutual combat, it
13 basically -- I was prejudiced by that because it basically
14 told -- it basically put in the jury's eyes that that whole
15 plan was to come there and have a gunfight. Like, that's
16 basically what mutual combat is. Like me, I'm planning
17 this gunfight. We planned to -- I'll bring my gun and you
18 bring your gun, and that was the sole purpose of it and all
19 that shots -- I never brought a gun, and I didn't go out
20 that night looking for even a fight. We went out that
21 night, started from a party, I'm just going to a party.
22 So, it was never my intentions to get in no fight that
23 night, and it definitely wasn't my intentions to have a
24 gunfight because I ain't even have a gun.

25 One of -- the guy I had with me, he -- I didn't know

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1 he had his gun until we got to the Waffle House and went
2 inside to eat, and he ain't want to bring it inside. So, I
3 didn't even -- that's when I realized it was a gun even in
4 my car, but I never had no gun. I didn't bring a gun and I
5 wasn't looking for no gunfight. So, I didn't -- I don't
6 understand why mutual combat was even -- that's what made
7 -- that was prejudice because it just made it seem like my
8 whole intention was to have this gunfight when I didn't and
9 it wasn't. It was never my intentions to have a gunfight
10 or to even fight, and I didn't have a gun.

11 Q. Okay.

12 A. I didn't bring a gun.

13 Q. And so as a result of your counselors' performance in
14 this trial, you were found guilty?

15 A. Yes, ma'am.

16 Q. Okay, and you received forty-five years?

17 A. Yes, ma'am.

18 Q. And that's part of the prejudice, right?

19 A. Yes, ma'am.

20 Q. Okay. What relief are you seeking from the court here
21 today?

22 A. I'm seek -- I'm hoping that they reverse and remand my
23 case and allow me to have a new trial and a fair one so
24 I'll be able to plead my innocence.

25 Q. Okay. Is there anything else?

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1 A. No, ma'am.

2 Q. Do you have any other information you want to relate
3 to the court?

4 A. Yeah. Like, during the trial, I -- my lawyer was --
5 and my lawyer was stating -- at, at this time I really
6 didn't, like I say, I didn't really know what it mean, but
7 my lawyer was telling the judge, like, she told the judge
8 numerous times that she was ineffective.

9 Q. Okay.

10 A. And I didn't -- but I didn't, I just didn't know what
11 it mean. So, I'm, like, really -- until, like, now I know
12 what it mean, but she stated to the judge ---

13 Q. But what issue was that?

14 A. Oh, she states the first time, she stated when she
15 says she was ineffective for, for the issue when the dis --
16 like, when he went -- when he made Oliver Feldman, when
17 Oliver Feld -- I think it was the third issue. Hold on, if
18 I'm not mistaken.

19 (A PAUSE.)

20 Q. You mean issue number two?

21 A. No.

22 Q. Where you indicated that your counselor, your counsels
23 were ineffective for failing to object to the exhibit, the
24 Number 14 that was put into evidence?

25 A. Oh, yes.

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1 Q. In your application.

2 A. That, that issue two, that, that was the second time
3 she stated she was ineffective. The first time was on the
4 issue when Mr. Feldman had got on the stand, and for
5 failing to -- proper pretrial, to do the proper pretrial
6 investigation. That's when it was said the first time.
7 And then again on the issue with the photos after it was --
8 after the photo was showed that second time.

9 Q. And so specifically you point the court to the
10 transcript record, page 1068, line 23, through page 1069,
11 line 3?

12 A. Correct.

13 Q. And that goes -- but that goes to the actual picture
14 where they didn't object to the picture being entered into
15 evidence?

16 A. Yes, ma'am.

17 Q. Okay, and so outside of the issues that you put into
18 your application, you don't have any other issues?

19 A. Oh, no, not outside the application, ma'am.

20 Q. Okay. All right.

21 MS. MOODY: At this time, Your Honor, I'll turn the
22 clock -- witness over. No further questions.

23 THE COURT: All right.

24 CROSS-EXAMINATION BY MS. KINARD:

25 Q. Good morning, Mr. Boone.

1 A. Good morning.

2 Q. When you talked about the alleged failure to object or
3 failure to object to preserve the record regarding the
4 mutual combat jury charge, you felt that was a major
5 prejudice to you. Is that correct?

6 A. Yes, ma'am.

7 Q. Did you see the opinion that the Court of Appeals
8 issued?

9 A. Yes, ma'am. I received it.

10 Q. And do you recall that it's, it's a lengthy opinion
11 even though it is -- the first sentence is based on failure
12 to preserve?

13 A. Yes, ma'am.

14 Q. Do you recall the content of any those cases that were
15 listed?

16 A. No, because I know when I asked my lawyer, asked my
17 direct appeal lawyer about it, he said the issue barred.
18 So, the issue -- he told, he told me that I -- it was no
19 need to even file a writ of certiorari because the issue
20 was basically a dead issue.

21 Q. That there was no need to appeal to the Supreme Court?

22 A. Right. He said you would be wasting eighteen,
23 eighteen months because that issue was not properly
24 preserved. So, that issue can't be ruled on.

25 Q. And you discussed that with him?

A. BOONE - CROSS-EXAMINATION BY MS. KINARD

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1 A. Mr. Robert Dudek, yes, ma'am.

2 Q. Okay. Would it be fair to say, though, that in this
3 opinion from the Court of Appeals ---

4 MS. MOODY: Objection, Your Honor. He just conveyed
5 to her what his attorney instructed him as to his case. I
6 think she's getting ready to ask him to interpret the
7 court's opinion.

8 MS. KINARD: I wasn't.

9 MS. MOODY: Okay. I was just catching you.

10 MS. KINARD: Okay.

11 BY MS. KINARD:

12 Q. That there was conversation about mutual combat in the
13 cases cited?

14 A. Far as with the?

15 Q. In the opinion that was issued.

16 A. Yes, ma'am.

17 Q. Okay. Let's move on to some of your more specific
18 allegations of things that happened during trial. For
19 example, one of your issues was failure to object regarding
20 the prejudicial photo that Ms. Campbell showed to the jury,
21 and what was that photo of? Do you recall?

22 A. Photo of the body.

23 Q. Of the body?

24 A. The victim's body.

25 Q. Were other photos of the body introduced at trial?

A. BOONE - CROSS-EXAMINATION BY MS. KINARD

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1 A. Like from a further -- like, like far away photos was
2 -- the pictures, like, that was from a distance, those
3 photos were allowed. That was a close up. No close photos
4 were allowed; they were ruled out.

5 Q. Is it fair to say that most of the photos that were
6 allowed contained blood or other gory things, if you'll
7 pardon the expression?

8 A. I mean, the photos was taken at night, so from a
9 distance, like, from a distance you, you probably wouldn't
10 see because it was the concrete and whatnot. But, I mean,
11 the other photos were allowed but they was, they was taken
12 at nighttime, and the ones from a distance you just saw a
13 body.

14 Q. Okay. You also mentioned pretrial motions, for
15 example, of an alleged failure to move for a change of
16 venue due to publicity. Is that correct?

17 A. Correct.

18 Q. And I, I didn't understand your testimony. Did you
19 talk to your attorneys about wanting to move the trial?

20 A. No, I didn't. During trial, I didn't know anything
21 about change of -- I didn't know anything about law.

22 Q. I understand. Were you aware that your attorneys met
23 with the judge and the solicitors and some investigators,
24 law enforcement the week before trial to discuss the
25 pretrial matters?

A. BOONE - CROSS-EXAMINATION BY MS. KINARD

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1 A. No.

2 Q. You weren't aware of that? And I believe you
3 testified that you didn't discuss with them the motion to
4 severe because similar to your other answer, you weren't
5 aware of that possibility? You need to answer verbally.

6 A. Oh. Yes, ma'am.

7 Q. Thank you. Regarding your request or allegation
8 regarding competency, did you have any mental health
9 diagnoses at the time of trial?

10 A. Besides, like, when I was in, school anger management,
11 and no -- other, other than, like, the stuff I had in
12 school, far as when I was going through high school, no,
13 ma'am.

14 Q. Okay. So, you weren't diagnosed with depression. You
15 were just feeling bad. Is that a fair statement?

16 A. Yes, ma'am.

17 Q. Okay. Talk to me a little bit more about the history
18 of your attorneys. Were you always represented by the
19 public defender's office other than your time with Mr.
20 Chaplin?

21 A. Yes, ma'am.

22 Q. Did you ever consider retaining counsel?

23 A. Yes. I had tried. I had spoke with John Delgado one
24 time, but it was just about, like, far as how he could help
25 me and what his fees would be, but that's it.

A. BOONE - CROSS-EXAMINATION BY MS. KINARD

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1 Q. And that was when? Do you remember when that was in
2 the process, in the life of your charge?

3 A. 2007.

4 Q. Was it after your bond hearing?

5 A. Yes, ma'am.

6 Q. Okay. So, it was before the public defender's office
7 would have had a chance to really start investigating your
8 case. Is that a fair statement?

9 A. No. The public defender's office still had my case.
10 I never retained John Delgado; I ain't have the money for
11 him.

12 Q. Okay.

13 A. So ---

14 Q. Do you remember what you told the public defender's
15 office? If you said hold on, I'm trying to get a private
16 lawyer?

17 A. I don't -- I can't -- I don't recall that.

18 Q. Don't recall? Okay.

19 COURT REPORTER: Speak up, please.

20 A. I don't recall that.

21 Q. Now, when it comes to meeting with your attorneys, you
22 said you mostly met with Ms. Everhart?

23 A. I met with her when she brought me my motion, and I
24 want to say one more time after that, and then I think I
25 met with Ms. Payne that -- like, the week right before my

A. BOONE - CROSS-EXAMINATION BY MS. KINARD

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1 trial, and that was it.

2 Q. So, you're saying you only met with your attorneys
3 three times before trial?

4 A. Yes, ma'am.

5 Q. Okay. When you met with them, did you discuss
6 preparing a defense? I know you mentioned self-defense
7 when you were on direct examination. Did you give them any
8 other information about things that could help you in your
9 defense?

10 A. No, ma'am. I didn't know any -- I didn't really know
11 what I could do. I just was being truthful and relying on
12 them to do everything for me.

13 Q. Did you give them the names of any witnesses that
14 could have testified on your behalf?

15 A. I believe all the witnesses had already -- I, I think
16 so, but I can't, I can't really say because it was so long
17 ago. It was ten years ago, so I can't even recall if I did
18 give them any witnesses to testify on my behalf.

19 Q. Did you give them your girlfriend's information?

20 A. Yeah, but see, all the witness already have made a
21 statement. So, I mean, I'm pretty sure -- I knew they was
22 coming to trial anyway because all of them had already been
23 questioned.

24 Q. Are you aware that if this PCR is granted, all of your
25 original charges will revive? In other words, you'll still

A. BOONE - CROSS-EXAM / C. GUTHRIE - DIRECT EXAM

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1 be facing murder, the pistol charge, and the -- was it
2 disturbing the peace?

3 A. Yes, ma'am.

4 Q. And you could, in fact, face more time than you have
5 now?

6 A. Yes, ma'am.

7 Q. Okay.

8 MS. KINARD: I have no further questions. Thank you.

9 MS. MOODY: No further questions.

10 THE COURT: Thank you. You may step down.

11 (THE WITNESS EXITS THE STAND.)

12 MS. MOODY: Oh. I'm sorry, Your Honor. We have no
13 other witnesses.

14 MS. KINARD: The state would call Camille Everhart
15 Guthrie.

16 THE COURT: Come around and be sworn, please.

17 CAMILLE EVERHART GUTHRIE, BEING
18 DULY SWORN, TESTIFIES AS FOLLOWS:

19 MS. KINARD: May it please the court?

20 DIRECT EXAMINATION BY MS. KINARD:

21 Q. Good morning, Ms. Guthrie. How are you?

22 A. Doing well. Thank you.

23 Q. Thank you for being here. I'm going to start with
24 some background questions.

25 A. Okay.

C. GUTHRIE - DIRECT EXAMINATION BY MS. KINARD

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1 Q. At the time of this trial, how long had you been
2 practicing law?

3 A. At the time of the trial, just short of three years.

4 Q. And that was all with the public defender's office?

5 A. Yes.

6 Q. Okay. How did Ms. Payne become involved in this case?

7 A. I was going through my notes, and it looks like
8 originally I was going to have Lauren Mobley as my second
9 seat. She had been in the, the public defender's office a
10 long time and handled a lot of cases. However, it looks
11 like at some point as we were leading up toward trial, she
12 got a job with the Peace Corps and left our office. So, at
13 that point I had to pick another attorney.

14 Unfortunately, by the time you get to three years at
15 the public defender's office, people who've been in three
16 years are the senior attorneys. So, Danielle and I
17 finished law school at the same time, and we started
18 working at the PD's office around the same time, and I felt
19 like she was a good attorney. She had had a murder trial
20 previously, and so I asked her to be my second seat.

21 Q. But to be clear, this case was appointed to you?

22 A. Yes.

23 Q. Do you recall proximally how many times you met with
24 Mr. Boone?

25 A. I was looking through my notes, and it looks like I

1 met with him at the jail about six times. I did talk to
2 his mom a good bit, though.

3 Q. Did you have phone conversations with Mr. Boone?

4 A. I did not document any phone conversations. I do not
5 know that we had phone conversation. I did have several
6 conversations with his mom.

7 COURT REPORTER: Keep your voice up, please.

8 WITNESS: I'm sorry.

9 BY MS. KINARD:

10 Q. I believe Mr. Boone testified that y'all reviewed his
11 discovery together. Do you recall that?

12 A. Yes. Actually, it looks like we split it up over two
13 dates. I went down -- bear with me one moment. I want to
14 make sure. Okay, I went down with him July 18th around
15 3:15. His mom got there around 3:30, and it looks like I
16 stayed with him to about 6:30 that evening going over
17 discovery. We did not finish, so at that point I
18 rescheduled another day.

19 It looks like the plan was to go back on September 6th
20 to meet with him again. We had to cancel, and I actually
21 went back September 7th, and his mom also came, along with
22 his grandmom, and we spent another two and a half hours
23 going over the remainder of the initial discovery.

24 Q. Let me step back one, one second. I questioned Mr.
25 Boone about getting a private attorney. Do you have any

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1 knowledge of that process?

2 A. It looks like -- and bear with me because I do have to
3 look through my notes -- that we opened the case March 5th,
4 and his bond setting was going to be the 9th. At that
5 point, Joenathan Chaplin came to the bond setting. I did
6 talk to Mr. Chaplin, and he said that he'd only been
7 retained for the bond setting. He was planning to waive
8 it, and that he would -- he and his -- Mr. Boone's family
9 were going to talk about further representation, and he
10 would let me know.

11 By March 13th, I still didn't know anything. So, I
12 went down to see Mr. Boone at the jail, and he was in the
13 juvenile section at that time, and he did tell me their
14 family was thinking about hiring a private attorney. He
15 didn't know his name. I told him to make sure and let me
16 know if they hired someone so that I could be relieved if I
17 were not going to be the attorney.

18 And at that point, it looks like it wasn't until June
19 28th that my legal assistant checked to see if anyone else
20 had filed a Rule 5. There was no other Rule 5, so we filed
21 our Rule 5 at that point, and then I believe I talked to
22 his mother. About two weeks later she called and indicated
23 they were not going to hire Joenathan.

24 COURT REPORTER: Keep your voice up, please.

25 WITNESS: I'm sorry. I'm sorry.

1 BY MS. KINARD:

2 A. They were not going to hire Joenathan at that point.

3 Q. Okay. So from there, as you said, you'd filed a Rule
4 5. Got discovery. Reviewed it with him. During these
5 meetings, did you talk to him about the charges he was
6 facing?

7 A. Yes.

8 Q. And as well as what those entailed?

9 A. Yes.

10 Q. Did you talk to him about his constitutional rights,
11 what he faced going to trial?

12 A. Yes, we would have gone over that.

13 Q. How did you describe trial to him and what he could
14 expect?

15 A. You know, I let him know there would be a jury, that
16 the jury would be of his peers. At that point, the state
17 would be required to put up all the evidence that they had
18 against him. That he could testify or not testify. That
19 if he didn't testify, it would not be held against him. I
20 let him know that, you know, there was an appeals process
21 afterwards, PCR.

22 Q. Okay. Did you talk about the burden the state had to
23 prove?

24 A. Yes, we would have talked about beyond a reasonable
25 doubt.

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1 Q. Okay. Tell me about the discussions that y'all had
2 regarding his facts of the case.

3 A. It looks like we talked about it several different
4 times. There were a ton of kids in this parking lot, and I
5 think there was a lot of chaos, potentially multiple
6 shooters. I certainly got the impression that Mr. Boone
7 was a scared kid who was trying to protect his friends.
8 That he didn't really understand the gravity of his
9 actions.

10 One of the codefendants in the case, Mr. Feldman, I
11 believe he was, like, twenty-one years old, and I think he
12 came across as sort of a scary, intimidating guy, and he
13 flashed a gun at Mr. Boone. I just think it was a
14 frightening situation all around. I think it was one that
15 it sounded like it got out of hand. That it was mostly
16 really young kids running around sort of -- and I don't
17 mean this to sound demeaning, but sort of playing at being
18 in gangs. You know, calling each other up on the phone,
19 hey, let's go have a fight in the Waffle House parking lot.
20 I don't -- you know, it, it was a situation that really got
21 out of hand.

22 Q. Based on that, what were the possible offenses that
23 you discussed or that you developed?

24 A. I felt like there was a self-defense issue and perhaps
25 even a protection of others. Certainly as the case

1 developed, there were some issues that the prosecution had
2 brought to my attention, things that they were talking
3 about -- mutual combat; hand of one, hand of all --
4 theories I felt did not fit the fact pattern at all.
5 Mainly I felt like that Mr. Boone was just trying to
6 protect himself and his friends.

7 And I felt like Mr. Boone was a very sympathetic kid.
8 I hate to say kid. Young man. And, you know, a lot of
9 times as a defense attorney, if you think about your client
10 taking the stand, you may not want them to. I very much
11 wanted him to take the stand because I felt he was very
12 authentic.

13 Q. All right. When it came time to begin trial, you were
14 -- how many codefendants were there?

15 A. There were three.

16 Q. How did we get to two?

17 A. I want to say maybe a week before trial, we learned
18 that Mr. Feldman would be testifying. So, at that point
19 there were two.

20 Q. So, you learned that a week before trial?

21 A. I believe. Let me glance through my notes because I
22 could be incorrect. It may have been a little more than
23 that.

24 (A PAUSE.)

25 Q. That's all right. We can, we can come back to that if

1 it's necessary.

2 A. Okay.

3 Q. So when you got down to two, what were your thoughts
4 about severance?

5 A. It looks like we had a discussion. I did not remember
6 this until I went through my notes. Looks like we did have
7 a discussion on it. One second. Okay, I have that on
8 April 8th, Danielle and I were doing trial prep. At that
9 point, we had a three-way email conversation with Tivis
10 Sutherland, who was representing Mr. Patterson, and I'm
11 just going to read it verbatim because I can't really
12 remember the details of the conversation. These are my
13 notes; I assume they were my impression at the time. It
14 said that:

15 We were all in agreement that the state is
16 probably hoping ---

17 At this point we believed it was all three.

18 --- to get the three clients to duke it out in
19 court, pointing the finger at each other. If
20 that happens, I think we lose. Meanwhile,
21 Danielle did research on severance, and it
22 appears we do not have a good argument for
23 severing the cases. Regardless, we may want to
24 try to preserve the issue for appeal. We
25 discussed the issue with Mobley.

1 Lauren Mobley.

2 She thinks a jury would be more likely to convict
3 Mr. Boone if he is the only one there that they
4 can blame, less likely if they have several to
5 choose from.

6 So, it sounds like there was some debate.

7 I did makes notes after the trial about things that,
8 you know, I was concerned about it; and I did note that I
9 thought it was an issue we did not make a severance motion
10 at the beginning of the trial.

11 Q. Regardless, is it fair to say it was a well researched
12 and discussed issue prior to trial?

13 A. We did discuss it. I do not have the reasoning for
14 why we did not do it. We discussed it; it sounds like we
15 thought it was a good idea. We researched it. Lauren
16 Mobley in our office thought maybe it would be better if
17 there were multiple people on trial rather than one, and
18 that I did note we didn't make the motion and I had a
19 concern about that.

20 Q. Okay. When it comes to jury selection, how did that
21 go?

22 A. From my memory, it seemed like a long process. The
23 case was in the news and because a child died, a
24 fifteen-year-old boy -- I believe he was fifteen at the
25 time -- it did get a lot of press at the time. So, I

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1 remember it was a long process, and it seemed like a lot of
2 people had heard about the case or were familiar with it.

3 Q. Do you feel like a fair jury was struck?

4 A. I did not remember the person that may have been a
5 member of an organization or started an organization for
6 the victim. You know, I felt like it was a fair jury, you
7 know, but obviously wasn't completely thrilled with the
8 makeup. It would always be great if I could hand pick
9 everyone, but for what we had, I think it was fine.

10 However, I did not remember that issue. Obviously it
11 would not be great to have someone on the jury who worked
12 at an organization or founded an organization that involved
13 the victim.

14 Q. All right, let's talk a little bit about things that
15 went forward during the trial. Mr. Boone raised an issue
16 about a prejudicial photo that had been deemed inadmissible
17 or agreed not to be presented, State's 14. Do you recall
18 anything about that being shown to the jury or how those
19 objections were or were not made?

20 A. I did not recall it. I reread this case a while back.
21 Did not recall it. However, as I was going through my
22 notes I saw that after trial, I made a note that we did not
23 object contemporaneously with Luck accidentally showing the
24 jury a photo of the body that had been excluded, Exhibit
25 14. So, I did note that that was an issue.

1 I do remember that, you know, I mean, there were a lot
2 of photos and a lot were fairly graphic. I'm pleased that
3 we were able to keep out many of the graphic photos. I
4 hate one was shown, but there were photos of a, you know,
5 of a deceased fifteen year old which I think are hard, you
6 know.

7 Q. To make sure I understood, most of the -- there were
8 photos that contained photos -- or that contained images of
9 the body?

10 A. Yes.

11 Q. And this was just one of the more graphic ones?

12 A. That's what it, what it sounds like, and perhaps Mr.
13 Boone has seen it since then or more familiarity with the
14 time. To me, Exhibit 14 doesn't mean anything, but clearly
15 there was a reason we excluded it, and I did make a note it
16 was not such a great thing that it came in.

17 Q. But even if it were allowed in, it certainly wouldn't
18 have been the only photo of the body that the jury saw.

19 A. No.

20 Q. Next, Mr. Boone discussed the issue of a handgun, a
21 firearm being demonstrated inside the courtroom. Do you
22 recall that?

23 A. I do. For some reason I thought Luck had something to
24 do with it. It sounds like it may have been a witness that
25 used it. I thought there was an objection made about the

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1 use of -- the demonstration of the firearm, but I don't
2 know that I made the objection. I could be incorrect.

3 Q. Well, there are several different times, if I may
4 state that. There was once during Mr. Collins's testimony.
5 He, he did pick up the gun and demonstrate with it, and
6 there are objections that are made -- I'm looking for the
7 page number; forgive me -- where Ms. Campbell does
8 apologize and say: I apologize for handling the gun without
9 permission first. And the judge speaks about South a
10 Carolina Supreme Court order ---

11 MS. MOODY: Objection. I'm trying to find the
12 question.

13 MS. KINARD: I was about to ask it.

14 BY MS. KINARD:

15 Q. Are you familiar with the order that the Supreme Court
16 put out regarding handling firearms?

17 A. No, not at all.

18 Q. Okay. Did it seem like anyone in the courtroom really
19 was familiar at that point?

20 A. I, I can't remember. That was so long ago, but in
21 memory, I don't remember anything about the proper way to
22 display a firearm. It was not something I was personally
23 familiar with.

24 Q. All right, and just for reference, that's around page
25 1059 through early 1060s, the discussion about the firearm

1 and how it should be probably handled.

2 Mr. Boone also alleged you failed to conduct a proper
3 pretrial investigation. Would you describe your
4 investigation process and how that went?

5 A. I do know there was a period of time where we did not
6 do very much on the case. I think part of that was that we
7 didn't know if it was going to be our case. However, you
8 know, looking back through my notes, I wish I had been more
9 aggressive about locking down Mr. Chaplin in determining
10 whether or not he was taking the case. I don't know that
11 three months was -- yeah, I mean, that seems like a long
12 time to go without locking that down.

13 I can say that, you know, this was my first murder
14 trial. I didn't know for sure it was going to be a trial.
15 It does -- we did not hire or -- a crime scene expert until
16 almost a year later. I did note that I started asking for
17 funding in December of '07. So, that was -- the case, we
18 got the case in March. I asked for funding in December.
19 Unfortunately the public defender's office, it takes a
20 while to get the kind of money you need, and there's an
21 approval process. Eventually we hired Don Gertz, but that
22 was a process, and I did not actually get to meet with him
23 until February 1st of '08.

24 I know, I remember in trial Luck Campbell made a very
25 big deal out of the fact that I had not hired the crime

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1 scene expert earlier. I think at the time I probably just
2 didn't realize how necessary that was. I guess I was
3 thinking oh, you know, any bullet casings might be gone at
4 that time, but honestly that's not really my call because
5 I'm not a crime scene expert. If I had it to do over
6 again, I would have hired him earlier because I don't know
7 what evidence he may have found. There was that
8 possibility of another shooter back, toward the back of the
9 Waffle House and, you know, we'll never know if there were
10 things casings that maybe the police missed back over
11 there.

12 Q. Okay. Regarding other pretrial options, Mr. Boone
13 alleged you failed to file pretrial motions. Specifically,
14 that he desired a change of venue. Can you talk about the
15 pretrial motion process, the change of venue, how all of
16 that went forward?

17 A. I, I don't have anything in my notes about change of
18 venue, so I have no idea if I ever even thought about that
19 as an option. We had a lot to pretrial motions. I do
20 remember that, so much so that the week before, we sat down
21 and met with Judge Keesley on the case. I believe in my
22 notes I indicated I think it was me, Luck, Danielle, Dan, a
23 lot of different police that were there in the courthouse,
24 and we talked about a number of issues, but I don't know if
25 change of venue was an issue that ever came up.

1 Q. In that conference, what came up out of that? Were
2 you able to resolve anything in his favor?

3 A. I do remember that the judge wanted to put a stun belt
4 on him as well as cuff him, and Danielle, Ashley, and I
5 were fairly horrified at the idea that there would be a
6 stun belt. And I believe Danielle was, like, I'm sorry,
7 you know, I don't want to sit next to him if he might be
8 electrocuted in the courtroom, and ultimately there was no
9 stun belt, I believe, but he was -- did have cuffs on.

10 I believe there was some discussion about whether
11 there should be some closed courtroom. There were issues
12 about possible -- because there was a potential gang issue
13 with the case, issues about any gang colors, things like
14 that in the courtroom as well.

15 Q. All right, the last allegation that they presented was
16 a failure to request a competency hearing. Did you ever
17 have any concerns regarding Mr. Boone's competency?

18 A. You know what? I did not in terms of, like, his
19 ability to communicate with me about his case. But after
20 hearing Mr. Boone testify today, you know, I remember about
21 his girlfriend dying, and I will be honest. Most of my
22 client were grown ups. I did not handle juvenile cases. I
23 had maybe one or two, you know, where kids were arrested
24 but charged as an adult. So, I was used to, you know,
25 older guys, fairly hardened. So, I, at the time I did not

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1 think about Mr. Boone was sixteen years, that his
2 girlfriend had been killed. I wish now in retrospect I had
3 done something more to check on his mental health, but that
4 just didn't enter my mind, and I think that's because I
5 mostly dealt with grown ups who I felt like had control of
6 their issues, and I certainly would get them mental health
7 treatment when they needed it. I just did not think about
8 the fact that he was a child.

9 Q. Were you able to have clear conversations with him?

10 A. Yes.

11 Q. Did you feel like he understood what you discussed?

12 A. I felt like he understood what I discussed as much as
13 a sixteen year old could. You know, really until today
14 didn't really think about the fact that he probably was
15 incredibly frightened and relying on us to do the best we
16 could for him, but I think he understood me.

17 I did have his mom there a good bit, and I
18 communicated with her because I felt like, unlike your
19 normal case where I would have an older client, that, you
20 know, she did need to be in the loop. And I had explained
21 to him, too, you know, if his mom's in the loop, that, that
22 attorney-client privilege, you know, would be at issue, but
23 I think it was important for him to have his mother in the
24 loop.

25 Q. I appreciate your compassion for him.

1 There are a few more issues that I do want to discuss.

2 Do you recall the directed verdict motion in this case?

3 A. Yes.

4 Q. Who argued that?

5 A. That would be Danielle.

6 Q. Did you discuss the development of that motion
7 together?

8 A. Yes, we did.

9 Q. Can you describe it for us, please?

10 A. And I can't remember all the nuances, but essentially
11 my understanding is the prosecution was going forward under
12 mutual combat and hand of one, hand of all. Neither theory
13 fit the case.

14 I remember we made the directed verdict motion. I
15 felt like it was -- that Danielle did a great job on it,
16 and I remember that Judge Keesley pretty much at that point
17 said you know what? Those theories aren't going to work.
18 Why don't we try proximate cause, and that is how the state
19 closed, with proximate cause. And I remember being
20 distressed by that, and in retrospect I wish I had asked
21 for a mistrial.

22 Q. Why did you not ask for a mistrial? Do you recall
23 your reasoning?

24 A. I felt like Judge Keesley had been a very fair judge
25 thus far, and I don't believe he had yet ruled on whether

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1 or not we could take the jury to the crime scene, and I
2 felt it was very necessary for the jury to see the crime
3 scene.

4 I think we didn't want to upset Judge Keesley by
5 basically saying Your Honor, you think you are acting as a
6 prosecutor in this case. I think we were intimidated by
7 him, not because he did anything, but just the nature of
8 the power of the judge, and it was definitely one of those
9 things. I mean, I made notes about it and I just, if I had
10 it to do all over again, I would have made that motion.

11 Q. Two questions that didn't quite fit into my timeline.
12 The gun that was found at Mr. Boone's house, do you have
13 any recollection of that?

14 A. I don't remember anything about it, and I'm sorry. I,
15 I don't have anything in my notes about it, and it has been
16 a while since I reread the case. But I would think that
17 the admission would be prejudicial.

18 Q. Okay, and were there any plea negotiations in this
19 case?

20 A. I do not have that in my notes. I don't. It was
21 Luck, so maybe not. I'm sure it was an offer. You know,
22 if there was an offer, it would have been, like, he
23 complete the thirty, but I don't have anything in my notes.

24 Q. Is there anything else you'd like the court to know
25 about this case and your representation of Mr. Boone?

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1 A. No.

2 MS. KINARD: I have no further questions.

3 WITNESS: Thank you.

4 MS. MOODY: May it please the court?

5 THE COURT: Yes.

6 CROSS-EXAMINATION BY MS. MOODY:

7 Q. Your new last name, could you tell me that again?

8 A. Oh. Guthrie.

9 Q. Guthrie. Okay, Ms. Guthrie, good morning. So, you
10 worked on this case from, I guess, March of 2007?

11 A. Yes.

12 Q. And earlier you indicated that Mr. Nathan came into
13 the picture. I guess you were appointed. Then Mr. -- it's
14 not Nathan but ---

15 A. Chaplin, yeah.

16 Q. --- Mr. Chaplin came in.

17 A. Joenathan Chaplin came in.

18 Q. And then Mr. Chaplin was out?

19 A. Uh-huh.

20 Q. Okay. So, is it your, your normal practice on a case
21 -- well, like, I know this was, like, your first murder?

22 A. Well, not my first murder. My first murder trial for
23 sure.

24 Q. Okay, first murder trial. Okay. So, it wasn't your
25 first murder. Is it your normal practice to just put the

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1 case aside?

2 A. Normally I would say that I would have reached out
3 before those three months and been, like, hey. You want to
4 send me a copy of your Rule 5 and try to lock down that
5 attorney. I had the one in-face conversation with him four
6 days after the arrest at the bond setting where ---

7 Q. Well, when you say him, you're talking about Mr.
8 Boone?

9 A. No. I'm sorry. Joenathan Chaplin. He ---

10 Q. Okay.

11 Q. --- when he came to the bond setting. I was going to
12 go do it, and I had a conversation with him, and he said
13 that he was going to talk with the family about further
14 representation. He would let me know. Then I believe I
15 saw Mr. Boone on the 13th, and he said his family might be
16 hiring a private attorney. Didn't remember the name. I
17 assumed it was Joenathan. It sounds like it may have been
18 John Delgado.

19 Q. Let me stop you right there.

20 A. Uh-huh.

21 Q. When you say the 13th, you're saying 13th of March?

22 A. Yes.

23 Q. Okay.

24 A. I went down to the jail, and at that point it just
25 looks like I took a step back and we have -- the next

1 notation the legal assistant has made June 28th where she
2 says, hey, we checked to see if Joenathan's office had
3 filed any kind of Rule 5 work at the clerk of court's, and
4 at that point we filed ours because he had not, but I have
5 no notes that I sent him an email or made a call or had my
6 legal assistant make a call to verify that he was taking
7 over the case.

8 Q. So, this case -- so, essentially, and I'm not trying
9 to twist your words, but this case just sat from March
10 until June 28th. And during that period of time, did you
11 communicate with Mr. Boone at all?

12 A. No. I saw him March 13th and I did not have
13 communication with him.

14 Q. And at that time, time he was sixteen?

15 A. Uh-huh.

16 Q. Did he have a prior record?

17 A. No.

18 Q. Had you communicated with his mother at any point?

19 A. No, not at that point. I talked with her. It looks
20 like she called our office on the 16th of July, and she
21 indicated that she was not hiring Joenathan Chaplin at that
22 time, and she spoke to my legal assistant, it looks like.
23 And from there I tried to call her back. She called me
24 back, and we talked about getting together and going to the
25 jail. She wanted to be there ---

C. GUTHRIE - CROSS-EXAMINATION BY MS. MOODY

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1 Q. Okay.

2 A. --- when I talked to her son and I ---

3 Q. So, let me ask you this. When you say -- you said
4 June 16, 2007?

5 A. Sorry. July 16th she called my office, left a
6 message. I called her back. We talked. The 17th I had my
7 legal assistant call down to the juvenile side of Alvin S.
8 Glenn to find out if parents were allowed to go in at that
9 point. They are.

10 Q. Okay.

11 A. And we ---

12 Q. So, let me stop you right there.

13 A. Yes.

14 Q. So on June 16, 2007, Ms. Boone called you?

15 A. Yes. She reached out to me.

16 Q. Okay. So, during -- from March 13, 2007, to July the
17 7th -- 16, 2007, nobody from your office made contact with
18 your client?

19 A. No.

20 Q. Okay. So, he was just sitting there?

21 A. He was just sitting there.

22 Q. Okay.

23 COURT REPORTER: Speak up, please.

24 A. Yes. He was sitting there.

25 Q. Had you talked to Luck Campbell or anybody from the

1 solicitor's office?

2 A. No, there is indication because we had not filed a
3 Rule 5 until June 28th. So, at that point I assumed the
4 solicitor's office wasn't sending anything to anyone.

5 Q. Okay. All right. So, then you were getting ready to
6 say you talked to his mother. Y'all went to discuss the
7 discovery. So, when you discussed -- when you spoke with
8 him on the 13th, did you have an opportunity to find out
9 from him his version of what happened?

10 A. The time I saw him in March or?

11 Q. The time you saw him in March. March 13, 2007.

12 A. No. It looks like -- wait. We did talk briefly about
13 the facts of the case. Let's see, just -- I'm -- just
14 briefly, and bear with me one second. Okay, when I went to
15 see him, he indicated they might hire a private attorney.
16 I talked to him about how to contact our office, how to
17 write me. I got permission to speak to his mom and any
18 other family members that might contact me. He did tell me
19 that he was at the Waffle House on the night of the
20 shooting, that he did not shoot the, the guy. That there
21 was another guy with him in DJJ who knew who the real
22 shooter was. I told him to give me a name, but he doesn't
23 know it. I did warn him of the dangers of talking to other
24 inmates about his charges, reminded him not to make any
25 statements to the police. He had given statements

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1 previously to the police. His parents were not there at
2 that time. He was being held on other gun charges. I
3 talked to Lauren ---

4 Q. Let me stop you ---

5 A. I'm sorry.

6 Q. --- right there. All this occurred on March 13, 2007?

7 A. Yes.

8 Q. Okay, and so he gave you a name but he didn't know the
9 person's name. Was this person picked up from the same
10 incident?

11 A. He just said that there was another guy in DJJ with
12 him that knew who the real shooter was, but he couldn't
13 tell me the name. I said, well, give me the name, and he
14 doesn't know it. That's ---

15 Q. Because this is somebody who's not his friend?

16 A. Right.

17 Q. Okay.

18 A. Right.

19 Q. All right. So then after that, after you talked to
20 him on that occasion, is it your normal practice when
21 another attorney is saying they may come on to a case that
22 you just stop all work?

23 A. No, not normally. I mean, for a brief period of time
24 I might if they're, like, imminently they're thinking of
25 hiring somebody at that point. I wouldn't spend public

1 defender money, you know, to go after it if a private
2 attorney is getting ready to take it, but normally I would
3 not wait three months.

4 Q. So when you say public defender money, are you
5 speaking of, like -- well, well ---

6 A. In terms of like ---

7 Q. Tell me what you're talking about.

8 A. --- hiring a crime scene investigator, something like
9 that. I would have just sort put things on pause but not
10 for three months.

11 Q. Okay, and so in this particular case, did you not
12 think that it was urgent that a crime scene investigator
13 got out there to see if there was any other evidence?

14 A. In retrospect, I wish I had done that at the time. It
15 was my first murder case that turned into a trial, so I
16 have the benefit now of looking back on it at the time.
17 You know, I, I don't know why I didn't do that.

18 Q. Okay, and earlier you testified you didn't document
19 any calls with him. Is that to say you didn't have any
20 calls with him?

21 A. My, my -- normally I document everything. So, if I
22 did not document it, we probably did not have any telephone
23 calls.

24 Q. Okay. You can't tell me. Now, you indicated on April
25 8th, and I think this is April 8, 2007, or is it April 8,

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1 2000 ---

2 A. '8.

3 Q. --- '8 when you discussed the severance issue?

4 A. Yes.

5 Q. So, 2008?

6 A. Yes.

7 Q. Okay, and you indicated that you talked to someone
8 else in your office?

9 A. Yes.

10 Q. That person, was that person initially going to help
11 you, or that person...

12 A. At this point, it looks -- Lauren Mobley was the lady
13 who was going to be my second seat, but she was leaving to
14 join the Peace Corps, but she still -- I cannot remember if
15 she was my direct supervisor. I believe she was. I
16 believe she was underneath the public defender. She was,
17 like, the deputy public defender. It looks like Danielle,
18 who was my cocounsel, and I did have a conversation with
19 Tivis Sutherland in regard to severance. And I, I noted in
20 here that we felt like the state wanted all -- the three
21 defendants to duke it out in court, that that was sort of
22 the intent, pointing the finger at each other. And that I
23 noted I thought we would lose if that happened.

24 Q. Okay.

25 A. And ---

1 Q. Well, I'm fine with that. I'm just saying Lauren
2 Mobley ---

3 A. Right. We ---

4 Q. --- did she have any knowledge of this case, like the
5 facts involved in this case?

6 A. Not other than what we would have told her at the time
7 we spoke to her. It looks like we -- Danielle did some
8 research on the severance, and I put down: It appears we do
9 not have a good argument for severing the cases. I did not
10 -- and then we went to Lauren Mobley and discussed it, and
11 she said that she thought a jury would be more likely to
12 convict Mr. Boone if he were the only one there.

13 Q. Okay. So, like, I'm trying to get to the basis of
14 her ---

15 A. Right.

16 Q. --- opinion. So, like, when she gave you that
17 information as to the likelihood of him being convicted,
18 was that after you had given her the facts of the case, or
19 was that ---

20 A. We probably would have ---

21 Q. --- about just talking about severance in general?

22 A. We probably would have given her some basic facts. I
23 don't have them enumerated, but we went to her because she
24 was my supervisor.

25 Q. Okay. All right, but at the end, you followed her

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1 advice based off of ---

2 A. I assume. I have in here: We may want to try to
3 preserve the issue for appeal. I have that in my notes in
4 terms of severance, that we might want to just make the
5 motion anyway.

6 Q. Okay.

7 A. To preserve it. That is in my notes, and I have that
8 -- at the end of the trial I noted we didn't make the
9 motion maybe we should have.

10 Q. Okay.

11 A. Now, I can't remember why I didn't make it. I don't
12 know if it was Lauren Mobley's statement that made me
13 decide not to go forward with it or if we just...

14 Q. Right, but you didn't know what the judge was going to
15 say if you ---

16 A. No, we ---

17 Q. --- made the motion, so there was no harm in making
18 the motion.

19 A. Exactly. We could have gone forward and made the
20 motion. I don't know why, why we ultimately didn't.

21 Q. Well, during the trial, do you think you did -- that
22 you made it clear to the jury that they were on opposite
23 sides of ---

24 A. Yes.

25 Q. --- in, in terms of they weren't truly codefendants?

1 A. Right. I, I think we did. I mean, I know I did a
2 rather lengthy closing argument where I pointed that all
3 out, but it was discussed through the witnesses as well. I
4 can't -- I don't have the trial transcript in front of me,
5 but these guys didn't know each other.

6 Q. But -- so, like, when I say during the trial ---

7 A. Yes.

8 Q. --- you didn't make a motion for the court to prohibit
9 the state from referring to them as codefendants?

10 A. No, I did not.

11 Q. So during the trial, what, if anything, do you recall
12 that you did to distinguish the fact that they were not out
13 there that night together, they didn't know each other?

14 A. It would have ---

15 Q. I mean ---

16 A. It would have probably been through opening and
17 closing statement and maybe crossing the witnesses. But
18 no, you're right. I did not make a motion at the beginning
19 that would have done that, and they probably may have even
20 been referred to as codefendants throughout the trial and,
21 and the testimony.

22 Q. As to -- and I think you acknowledged that you did not
23 raise the -- so, you raised the issue about suppressing
24 some of the photos that were taken at the crime scene that,
25 you know, encompassed the victim. And you obviously made

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1 it as to Exhibit 14 for a reason.

2 A. Right.

3 Q. Okay, and so you made that at the -- in the pretrial,
4 and when Luck Campbell was presenting it to her witnesses
5 on the stand, you didn't -- did you not hear them say
6 Exhibit 14? What was going on?

7 A. You know, I can't remember. Obviously we should have
8 noticed that, but I can't remember if I didn't hear it, or
9 if I just didn't realize that they said Number 14, but
10 clearly we made no objection. And so for whatever reason,
11 it did not dawn on us that that was an excluded photo.

12 Q. And then you later came back and I guess you recall --
13 your comments were you recall not making an objection
14 contemporaneously with Luck Campbell offering it up. You
15 came back and you made the objection on the third witness,
16 and at that time you were just -- were you trying to
17 preserve the record?

18 A. I don't, honestly don't remember if I made it or if
19 Danielle made the objection. I don't remember it
20 occurring. I just know that in my notes after the trial, I
21 was aware that we should have made an objection, and we did
22 not.

23 Q. Right.

24 A. So, I don't remember which one of us said it at trial
25 or what, you know.

1 Q. But you knew -- I mean, I guess what I'm getting to is
2 you knew that you needed to make an objection ---

3 A. Yes.

4 Q. --- when it came up in the trial?

5 A. Yes.

6 Q. Okay. All right, as to the firearm, I think you
7 indicated that you didn't remember this .22 caliber -- I
8 mean .20 -- yeah, .22 caliber revolver?

9 A. I cannot remember that at all.

10 Q. So, you don't recall discussing it with him?

11 A. I do not.

12 Q. Okay.

13 A. I don't even remember it being an issue, and I'm so
14 sorry about that.

15 Q. Okay. All right, as far as -- you all had a pretrial
16 meeting with, I guess, Judge Keesley. Had you had an
17 opportunity to review the issues since you all had a lot of
18 issues?

19 A. In terms of me reviewing it with the judge and ---

20 Q. Prior to going ---

21 A. --- the prosecutors?

22 Q. --- and meeting with the judge.

23 A. That's when we first sat down and reviewed, sort of
24 went through and, and discussed possible pretrial issues.

25 I think he wanted to get a handle on it because he

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1 understood there were, like, a huge number of possible
2 witnesses. And he realized, I think, pretrial -- it might
3 have gone on for a day and a half or two days. It was a
4 long pretrial period, multiple motions.

5 Q. Okay, but this was in chambers or?

6 A. This was in a conference room. He reserved a
7 conference room, and there were a good number of us in
8 there.

9 Q. Now, you testified that you hired the crime scene
10 expert almost a year later, and were you trying -- what
11 were you trying to understand at that point since any
12 evidence might be missing or lost?

13 A. I felt like the way the scene was set up -- and this
14 is why we took the jury -- is you have the Waffle House
15 parking lot, and then you had a Mobil gas station, and the
16 Mobil gas station was closer to the road than where the
17 Waffle House is. The little boy who was killed was laying
18 in front of the Mobil gas station a fair bit in. From
19 where Mr. Boone was saying he was standing, there was no
20 way his bullet could have been the one that hit this child.
21 And I wanted the crime scene investigator to go out there
22 and take a look at the scene.

23 And there was still a hole, a bullet hole in the side
24 of the Mobil gas station. Go check it out based on what
25 Mr. Boone was telling me where he was and what the other

1 witnesses were stating in terms of where they believed
2 shots were fired to see if there was any way Mr. Boone
3 could have been the person who shot the boy on other side
4 of the building.

5 Q. Okay. All right. So, then the possibility of there
6 being other shooters was your strategy, or you were trying
7 to get to that?

8 A. Yeah, yeah. Definitely. There was certainly an
9 indication that in addition to Mr. Feldman and Mr.
10 Patterson, Mr. Boone, there may have been another boy a
11 little further back. I say boy. I guess it could have
12 been a girl. Another person a little further back that may
13 also have been shooting a weapon as well.

14 Q. Okay.

15 A. I believe Oliver Feldman originally had indicated
16 that.

17 Q. Okay. All right. As to the mutual combat, the jury
18 charge in regards to that, Mr. Patterson's attorney, I
19 guess Sutherland made the -- his argument, objection as to
20 the mutual combat, and when it came to you having the
21 opportunity to make your objection -- so, you didn't
22 expound on that, if I recall correctly. In the transcript,
23 you didn't expound on his argument. You joined in his
24 argument.

25 A. I think, yeah, I think it was Danielle. I think she

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1 was the one ---

2 Q. Okay.

3 A. --- that addressed the issue. That's fine. We
4 actually look alike, too, so -- but she was the one who
5 did. And, no, it looks like -- I was rereading that part
6 recently, and it looks like, yes, she didn't expound on it.

7 I did notice, or I'm sure -- normally we would confer.
8 If I had noticed that was inappropriate, I'm sure I would
9 have said, hey, please, you know, give some more
10 information. I don't think either of us realized it wasn't
11 sufficient.

12 Q. Okay, and so when you -- I'm -- so, you've read that
13 portion. Was -- as far, like, what you all had talked
14 about in terms of mutual combat as far as with Mr. Boone,
15 you and your cocounsel, was your argument the same as Mr.
16 Sutherland's?

17 A. Honestly I can't remember. It was so long ago. I
18 can't remember what argue -- and I didn't read all of
19 Tivis's -- Mr. Sutherland's argument again when I ---

20 Q. Right. Okay.

21 A. --- was going through that part.

22 Q. So, like, the general theory of the case was that, at
23 least from Mr. Boone, was he didn't go out there ---

24 A. Exactly.

25 Q. --- to enter into any kind of fight with anybody.

1 A. Right.

2 Q. I think maybe -- you might have testified to this.

3 Correct me if I'm wrong, but it was kind of the
4 self-defense and protection of others ---

5 A. Right.

6 Q. --- that you thought this case was?

7 A. Right.

8 Q. And so, I mean, it didn't dawn on you and, I guess,
9 Danielle to say that -- the reasons why it didn't apply to
10 Mr. Boone?

11 A. It doesn't sound like it. We should have.

12 Q. Okay, and you're familiar with how you preserve the
13 record. You have to state specifically on the record what
14 the objection is.

15 A. Yes.

16 Q. Correct?

17 A. So.

18 Q. And get a ruling from the court, yes?

19 A. Yes.

20 Q. All right. So, you, you don't recall, but you do know
21 that based on the opinion from -- or the, I guess it's the
22 opinion from the court that they said that the -- the court
23 said that it was not preserved for the record.

24 A. Right.

25 Q. As to the mistrial, and, and I get what you're saying.

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1 You said you felt kind of intimidated by the judge, and I
2 kind of, like, want you to expound on that. Do you feel
3 like he would have -- well, actually, tell me what you felt
4 like the repercussions would have been ---

5 A. Right.

6 Q. --- to say you wanted a mistrial.

7 A. And certainly I don't want to make it sound like Judge
8 Keesley was being intimidating in any way. I just ---

9 Q. No. I hear what you're saying.

10 A. We were just, you know -- I mean, it was our -- my
11 first murder trial. I think maybe Danielle had had one,
12 and I felt like Judge Keesley was being pretty fair as we
13 went along and, like, a good judge for us, and I didn't
14 want to upset him, and if I -- basically the argument I
15 would've been making was Your Honor, you're acting like a
16 prosecutor in the case, and we want a mistrial because, you
17 know, you're, you're doing something that's wrong. I
18 didn't want to upset him, and I believe at the time we were
19 still waiting on him to decide whether or not to let the
20 jury go to the crime scene. So ---

21 Q. But when you say he was acting like a prosecutor, what
22 do ---

23 A. He ---

24 Q. --- you mean?

25 A. What happened is the prosecution is going forward on

1 hand of one, hand of all, mutual combat. And Danielle and
2 I and Ashley, we all felt that those theories of the case
3 did not fit the facts because in our fact situation, these
4 boys didn't know each other. There was no mutual combat.
5 They didn't plan to go and engage in battle. No hand of
6 one, hand of all. There was no meeting of the minds where
7 they were, like, oh, we want to go out and have a gun
8 battle that we know is illegal. They did not know each
9 other. At least Mr. Boone did not know these other two
10 boys. So, we didn't think those theories fit at all, and I
11 believe the judge understood that. So, when it came time,
12 we did our directed verdict motion, afterwards he said you
13 know what? I think y'all should proceed forward on
14 proximate cause, the gun battle.

15 Q. When you, when you say y'all should proceed, you're
16 saying ---

17 A. To the state.

18 Q. Oh. Okay. So, he's suggesting to the state what they
19 should go forward ---

20 A. Yes.

21 Q. --- instead of making a ruling as to what they had
22 asked for?

23 A. Right. Yes. He encouraged proximate call and that --
24 cause and that was the theory they closed on.

25 Q. Okay, and so you didn't want to make the objection as

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1 to him making that ---

2 A. Yes.

3 Q. --- suggestion?

4 A. Yes.

5 Q. Because you thought he was going to not grant?

6 A. I didn't want to upset him, and I know that should not
7 -- I should have made it. I should have made that mistrial
8 motion, but I didn't. I didn't want to upset him, and I
9 wanted us to get to the crime scene because I felt like if
10 the jury got to the crime scene, that they would see there
11 was no way Mr. Boone was the person who killed that little
12 boy.

13 Q. And just, just to be clear on this, there were no plea
14 negotiations. You never talked to Luck Campbell about any
15 kind of plea offer in ---

16 A. Bear with me one moment.

17 (A PAUSE.)

18 A. I'm not seeing that I noted any kind of offer, and I
19 could be incorrect. Maybe I just didn't write it down. I
20 just don't have it in my notes.

21 Q. So from the beginning, this was, this situation, there
22 was no entertaining a plea, at least from Mr. Boone's
23 standpoint. He didn't want to entertain a plea?

24 A. No. I don't think it was that. My assumption is by
25 not having it in my notes that perhaps we did not get an

1 offer, and a plea to thirty years is a lot.

2 Q. Did you have any other theory of what he could
3 possibly plea to?

4 A. No. I mean, I was just hoping that there would be an
5 offer forthcoming, forthcoming.

6 Q. Do you normally just wait on the state to make an
7 offer?

8 A. You know, I think it was sort of, like, a case-by-case
9 basis, just depending on the facts of the case. If I had
10 something that I felt like made, you know, sense, I would
11 go ask for it. So, I must not have had a reason to go to
12 Luck and ask for anything specific.

13 MS. MOODY: No further questions for this witness.

14 MS. KINARD: No redirect, Your Honor.

15 THE COURT: Thank you. You may step down.

16 WITNESS: Thank you.

17 (THE WITNESS EXITS THE STAND.)

18 MS. KINARD: That's the state's case, Your Honor.

19 THE COURT: Anything further?

20 MS. MOODY: No, Your Honor. I'd just ask the court to
21 consider this. We could give you the cites of all the
22 testimony from my client.

23 MS. KINARD: The state would like to move that all
24 claims not raised be deemed abandoned. There were several
25 other claims that were raised in Mr. Boone's application

1 alleging appellate misconduct, as well as -- not
2 misconduct, excuse me, ineffectiveness of appellate
3 counsel, as well as prosecutorial misconduct that were not
4 gone into during the presentation of the case today. So,
5 we'd like to move that those be deemed abandoned. Other
6 than that, we're happy to provide closing if Your Honor
7 would like.

8 MS. MOODY: Your Honor, that's fine.

9 THE COURT: I will leave it up to you if you want to
10 make closings. I certainly, I don't have any preference
11 whether you do or not. A lot of folks don't. A lot of
12 attorneys do, so.

13 MS. MOODY: Well, Your Honor, I won't make a closing,
14 but I would ask the court to allow me to submit to you the
15 specific transcript pages in which we talk about the lack
16 of objection and preserving the record for my client, and
17 I'll get that to Your Honor. I'd ask for at least until
18 Friday to get you those.

19 THE COURT: We'll take it under advisement certainly,
20 and you will have certainly more time than that, too. I'll
21 try to get a decision out.

22 I don't want to cut the state off. Anything?

23 MS. KINARD: No, Your Honor, no objection to them
24 providing cites. If we could have a little bit of time if
25 necessary?

1 THE COURT: All right. Ten days is too long. If
2 you'll exchange back and forth anything that you want to
3 send to me.

4 MS. KINARD: Thank you, Your Honor.

5 THE COURT: Thank y'all.

6 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 28TH DAY OF AUGUST, 2017.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 28TH, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Andre T. Boone, #328364,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-06702

ORDER OF DISMISSAL

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This matter is before this Court by way of an application for post-conviction relief (PCR) filed November 1, 2013 by Applicant, Andre T. Boone (hereinafter "Applicant"). The State filed a return to the application denying the allegations and requesting an evidentiary hearing. On August 28, 2017, a PCR evidentiary merits hearing was held before this Court at the Richland County Courthouse. Applicant was present along with his PCR counsel, Leah (PMB) Moody, Esquire. Respondent was represented at the hearing by Jessica Kinard, Assistant Attorney General. Applicant testified at the hearing in his own behalf. Applicant's trial counsel, Camille Everhart Guthrie, Esquire, testified on behalf of Respondent. At the evidentiary hearing, this Court had the opportunity to observe the witnesses, observe their demeanor, listen to their testimony, and judge their credibility accordingly. This Court also had the opportunity to review the transcript of Applicant's trial and the evidence introduced at trial. As a result of this Court's review of the entire record and evidence, its credibility determinations, and application of the law, this Court finds and concludes Applicant is not entitled to post-conviction relief and denies and dismisses this application with prejudice.

ANN

PMB

encl/ce

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2007 term of the Richland County grand jury for the crimes of murder (Indictment # 2007-GS-40-2324), breach of peace of a high and aggravated nature (Ind. # 2007-GS-40-2325), and unlawful carrying of a pistol (Ind. # 2007-GS-40-2327). Applicant was represented by three (3) attorneys, Camille Everhart Guthrie, Danielle Payne, and Ashley Thomas, Esquires. The charges arose out of the murder of 15 year old Brian Wright, which occurred on the night of February 18th / the early morning hours of February 19th, 2007, in the parking lot of the Waffle House and adjacent ABC Packaging store / Exxon/Mobile gas station located near the intersection of Two Notch Road and I-20 in Richland County.

Facts

In the closing minutes of February 18th, the first few minutes of February 19th, 2007, a shootout occurred in the parking lot of a Waffle House in Richland County. Just after midnight, on February 19, 2007, an officer from the Richland County Sheriff's Department responded to the scene and found victim's body on the ground. The victim, Brian Wright (hereinafter "the victim"), was located on the asphalt or pavement in front of the adjacent ABC Packaging store / Exxon/Mobile station. The victim's feet were in the direction of the Waffle House parking lot. The front of the Waffle House faces the adjacent ABC Packaging / Exxon/Mobile station which itself directly faces Two Notch Road.¹ As he approached the victim, the officer saw blood on the

¹ If one exits the Waffle House from its interior, to the left is Two Notch Road and to the right is the back of the Waffle House parking lot. The front door of the Waffle House is located on the side of the Waffle House which faces the adjacent ABC Packaging store / Exxon/Mobil station, which are in the same building. The ABC Packaging store is closer to the Waffle House than the Exxon/Mobile station.

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ground and the victim's fatal head wound. Knowing there was nothing to be done for the victim, the officer began to secure the scene and ask what had happened. Though numerous people were milling about, the only response received was "nobody saw anything." (R. 334, ln. 17 - 336, ln. 23).

Other officers arrived to investigate the scene. A forensics officer recovered fired shell casings from "two general areas," in the parking lot near the front door of the Waffle House and a separate area to the right of the Waffle House as one exits the Waffle House. Specifically, there was a live bullet and two (2) fired shell casings from a .380 found in the parking lot in front of the front door of the Waffle House, and two (2) fired 9mm casings recovered from the area to the right of the Waffle House if one exits its interior. (R. 387, ln. 3- 388, ln. 20).

A search during daylight hours turned up an entrance mark in the ABC Packaging/Exxon/Mobil station adjacent to the Waffle House. Investigation of that mark also led to the recovery of three (3) additional fired 9mm casings in the grass near the right back of the Waffle House parking lot if one is exiting the interior of the Waffle House. (R. 392, ln. 19 - 394, ln. 12). This grass separates the Waffle House parking lot from the ABC packaging / Exxon Mobile Station parking lot. The reverse trajectory of the bullet mark in the ABC Packaging / Exxon/Mobil station pointed directly to the area where the fired 9mm shells were recovered in the grass. (R. 400, ln. 12 - 401, ln. 18).² The investigator noted that while the shell casings could give a general area where the shooter was standing, location of the casings were not tied to where the shooter pointed his gun, "[i]t could be anywhere around that circle of the shell casings when he fired it. (R. 421, ll. 12-20). The victim's body was "directly across" from the front door area

² This bullet mark actually struck the outside wall of the ABC Packaging store which is closer to the Waffle House than the front door of the Exxon/Mobile station. The trajectory of this bullet was from the back of the Waffle House parking lot into the side of the ABC Packaging store at an angle with the bullet traveling toward Two Notch Road.

of the Waffle House and in front of the adjacent ABC Packaging / Exxon/Mobile station. (R. 448, ll. 2-11). Either of the two (2) weapons that the fired shell-casings came from [the .380 or the 9mm] had the range to strike the victim if fired from the general location of the recovered shells. (R. 449, ln. 20 - 450, ln. 4).

The bullet that struck the victim was not recovered. (R. 450, ll. 9-12; 496, ll. 11-17). Pathologist Dr. Clay Nichols testified the gunshot wound to the back of the victim's head was a "through and through" wound. (R. 1023, ll. 4-14; 1029, ll. 2-4). The wound indicated the victim's head was "ducked down forward" when he was shot. (R. 1028, ll. 1-8). He may have fallen immediately after being shot, or "his momentum could have carried him several feet after he was shot." His wound was consistent with his fleeing the gun battle that occurred in the Waffle House parking lot when shot. (R. 1029, ll. 5-10).

Karleisa Brabham ("Karleisa") testified that she was with friends on the night of the shooting and the group went to the Waffle House to attempt to stop a planned fight they had heard one friend's boyfriend, Cedric Ruff, was going to be involved in. The group stayed in the car after arriving at the Waffle House. After Cedric Ruff arrived, a fight began. Applicant [Andre Boone] walked in front of the car Karleisa and her friends were in. Karleisa saw Applicant fire a gun into the air. She also saw a "brown-skinned guy in a black shirt" fire a gun from the front of the Waffle House parking lot [closer to Two Notch Road] back toward them in the back of the same lot. (R. 499, ln. 7 - 503, ln. 23).

Jerome Christopher Thompson ("Jerome") testified that on the night of the shooting, he, with friends Derrick Guilyard, "Bernard," Demon "Little Duke" Griffin, and Applicant, were informed a fight was to occur between Corey Sanders and his "homeboys." They went in search of the fight, apparently to give assistance. Applicant was driving his SUV and the other men

were passengers in the vehicle. (R. 512, ln. 13 - 513, ln. 23; 520, ln. 7 - 523, ln. 19). They went to several locations but the fight did not occur at any of them. They eventually pulled into the Waffle House where the shooting would later occur. Jerome was a member of a gang - a "Tree Top Piru" ("TTP") Blood. (R. 519, ll. 13-18). He saw members of the rival Crips gang drive into the parking lot, wearing their blue colors, and members of the Folk gang (who are aligned with the Crips) arrive. (R. 532, ll. 11-15; 534, ll. 2-24). Corey began the fight. (R. 535, ll. 24-25). Applicant went to where Corey was fighting, near the front of the Waffle House, and "one dude say, if he jump in, he was going to shoot them." (R. 539, ll. 1-25). Applicant returned to his SUV and asked Jerome for Jerome's 9mm pistol, which was laying in Jerome's lap and had been before they arrived at the Waffle House; and, after obtaining the gun Applicant fired the pistol two (2) times into the air. (R. 526, ln. 17 - 527, ln. 10; 542, ll. 2-22). Jerome saw two (2) people, one light-skinned man wearing blue colors and one dark-skinned man, also open fire. (R. 544, ll. 2-4). Applicant fired back at these two (2) men. (R. 552, ll. 12-25). Applicant eventually got back in his vehicle. Jerome, Applicant, and the rest of their group then drove away in Applicant's vehicle. Jerome later heard the victim had been killed in the shootout. Jerome disposed of the gun Applicant fired at the Waffle House because Jerome "thought I had a body on it." (R. 555, ln. 2 - 556, ln. 11).

Robert Portee ("Robert"), also a TTP Blood, was also present at the Waffle House. He saw Corey fight with another person named Chad. Robert also recalled that Chad had several people come to the fight with him, and basically described two (2) groups coming together over the fight. Robert identified Applicant's co-defendant at trial, Eugene Patterson, as being one (1) of the individuals present in the front of the Waffle House' parking lot [nearest Two Notch Road]. Robert eventually joined the fist fight with Corey when he believed Chad was winning.

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Shots were then fired from the front and the back of the parking lot, and Robert left the scene. (R. 585, ln. 20 - 589, ln. 19; 590, ln. 11 - 591, ln. 20). Prior to the beginning of the fight, and the shooting, Robert spoke to Applicant. Applicant told Robert that he "was going to chunk at these niggers," meaning he intended to shoot at them, and when Applicant said this Robert heard the "racking of a gun." (R. 592, ln 4 - 593, ln. 4).

Quintez Clemons ("Quintez") testified he and Sylvester Boone were in the Waffle House parking lot that night speaking with Applicant when a maroon car and a green car with white writing came by. Quintez recognized his friend, Karmidae a/k/a "Bay," driving the maroon car. Quintez went up to the car to say hello. There were two (2) other men in the car - - "a light skinned" young man with braids, wearing blue colors [Oliver Feldman], and another man [Eugene Patterson]. The light-skinned man pulled a gun on Quintez. When the light skinned man was told that Quintez and Bay were cousins, he put the gun down. Quintez recalled the light-skinned man actually had two (2) guns, what Quintez thought was a .357 revolver that he pointed at Quintez, and another black semiautomatic in his lap. The group of men in the maroon car later drove to the front of the Waffle House parking lot. (R. 611, ln. 14 - 614, ln. 5; 618, ll. 5-16). After the shooting began, Quintez recalled only seeing one (1) "big black dude" in a black shirt shooting toward Applicant. (R. 614, ln. 22 - 615, ln. 15).

William Kee ("William"), also a TTP Blood, was at the Waffle House that night. He testified that he only saw the first two (2) shots that Applicant fired into the air, and he ran to his truck. (R. 623, ln. 14 - 624, ln. 16). William then heard multiple other gun shots, from both the front and the back of the Waffle House parking lot. (R. 626, ll. 1-16).

Corey Sanders ("Corey"), another TTP Blood, testified that he, along with Charles Williams and Byron Morant, drove to the Waffle House so he could fight Chad. (R. 631, ll. 3-7;

632, ln. 1- 25). He knew Chad to be a Folk gang member. (R. 633, ll. 3-4; 636, ll. 19-22). Corey testified he had an "ongoing beef" with Chad over "disrepect," and they set up the fight to resolve those issues. (R. 636, ll. 7-18). Corey saw a burgundy Malibu with "Bay," co-defendant Eugene Patterson, and a "light skinned" guy [Oliver Feldman] inside, come into the Waffle House parking lot. Patterson, who was in the back of the car, made a "gun signal," which Corey described as he pointed an actual, high caliber, gun as if he was going to shoot, directly at him. Corey described other people coming together for his fight with Chad, and testified "once we met up with each other, we squared off and fought." (R. 633, ln. 11 - 635, ln. 21; 650, ll. 18-22). When about to begin this fight, Corey noted "the light-skinned guy was already standing outside with a gun in his hand. He wasn't trying to hide it or anything." The light-skinned man was wearing "all blue with a blue bandana around his face" and held a revolver. Corey also noticed another group at the back of the parking lot, a group that included Applicant and Jerome. Corey testified Applicant was a Blood, but from a different sect, a "Six Deuce Brim." (R. 637, ll. 2-8; 638, ln. 16 - 639, ln. 15; 640, ll. 6-15). Corey acknowledged the "only beef" he had with Patterson was, "I'm Blood, he's a Folk." (R. 642, ln. 25 - 643, ln. 1). Though he did not see who was shooting, Corey heard shots from what he believed to be three (3) areas, from the nearby Exxon/Mobil station and from the more immediate parking lot areas. (R. 648, ln. 3 - 649, ln. 13).

Chad Robinson ("Chad") testified similarly, that he and Corey were fighting, another person intervened, and "the [n]ext thing you know, pow, pow, we heard shots." (R. 964, ll. 2-9). Though he could not identify any of the shooters, testifying only that he ran when shots were fired, Chad did recall seeing Eugene Patterson at the Waffle House in a burgundy car. (R. 969, ln. 14 - 970, ln. 2).

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Karmindae Legget ("Karmindae"), a/k/a "Bay," testified he went to the Waffle House with friends Eugene "Big Gene" Patterson, a Folk, and Oliver Feldman, a Crip, to see the fight. (R. 703, ln. 15 - 705, ln. 17; 721, ln. 8-13). After the fight began, Karmindae heard gunshots fired from the back of the Waffle House parking lot. (R. 710, ll. 5-19). Oliver Feldman and Eugene Patterson retrieved their guns from the car. Oliver had a .32 and Eugene had a .380. They fired several shots toward the back of the parking lot. More shots were fired toward them. Karmindae, Oliver Feldman, and Eugene Patterson then got into their car and left the crime scene. (R. 711, ln. 15 - 713, ln. 20).

Samuel Clemons ("Samuel"), who was with Applicant at the Waffle House, recalled seeking Bay, Oliver Feldman, and Eugene Patterson pull up. He recalled Oliver Feldman was wearing blue, and holding what he thought was a .357 revolver. (R. 739, ln. 7 - 740, ln. 24; 761, ll. 2-9). He recalled that Applicant "shot in the air twice and then that's when Eugene returned fire." (R. 743, ll. 2-3).

Derrick Guilyard ("Derrick") testified he went to the Waffle House with Applicant. Derrick had been a Blood since the sixth grade. (R. 755, ll. 19-25). Derrick explained that the Bloods do not "get along" with Folks or Crips, but that Folks and Crips could peacefully coexist. (R. 756, ln. 20 - 757, ln. 4). That night, he saw Applicant approach the fight in the parking lot, then return to the car and ask Jerome for his gun. He saw Applicant fire the gun into the air. Derrick testified he knew what was going to happen, "I mean, after one person shoots, another person begin to shoot." (R. 766, ln. 1 - 767, ln. 18). Derrick dove for cover, but could still hear multiple gunshots being fired including around the car he was hiding in. (R. 770, ll. 2-25).

Demon Griffin ("Demon"), who was in the car with Derrick, did not see the shooting, but estimated there were eleven (11) to twelve (12) shots fired in the shootout. Demon heard the shots as he was hiding in Applicant's vehicle during the shootout. (R. 788, ll. 2-24).

Oliver Feldman ("Oliver"), a member of the "Rolling 20's Crip Gang," testified he knew Eugene Patterson through a mutual friend. (R. 793, ll. 1-25). He also knew Patterson to be a member of the Folk Nation gang. (R. 793, ln. 1 - 794, ln. 17). The night of the shooting, Oliver was wearing blue with a blue bandana, "[b]ecause it represents [his] gang colors." (R. 796, ll. 5-12). Eugene Patterson wore black. (R. 796, ll. 13-18). Eugene Patterson received a call to go to the Waffle House, and he, Oliver and Bay left, with Bay driving and Eugene in the back. Oliver had a .32 H&R Magnum revolver, and Eugene had a .380 semiautomatic handgun. (R. 796, ln. 21 - 798, ln. 3; 799, ll. 19-22). Oliver testified that, at first, only two (2) people were involved in the fight, "then a third party got hisself [sic] involved." (R. 801, ll. 12-15). Oliver could tell that gangs were involved, "because one came to the aid of the other one." (R. 802, ll. 24 - 803, ln. 2). The fight was beginning to become "a fight between gang members." (R. 803, ll. 13-15). Oliver then saw someone from the back of the parking lot shoot into the air [Applicant]. (R. 803, ll. 17-22). The shooter then began to fire directly at Oliver. Oliver and Eugene retrieved their weapons from their car and returned fire. (R. 804, ln. 11 - 805, ln. 17). Oliver testified that neither he nor Eugene Patterson would have fired but for the fact that they were fired upon first. (R. 840, ll. 3-12). In cooperating with the investigation, Oliver advised that his handgun, a .32 H&R magnum caliber handgun, was in a coat in his bedroom. The gun was recovered. The gun could easily be mistaken for a .357 revolver. (R. 954, ln. 7 - 956, ln. 7; 1171, ln. 22 - 1172, ln. 25).

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Sgt. William McRoberts of the Richland County Sheriff's Department took Eugene Patterson's initial statement. In his initial statement, Patterson admitted being at the Waffle House and seeing the fight, but claimed he left when the fight started. He further claimed he heard gunshots as he was backing out to leave, and drove "straight home..." (R. 880, ln. 20 - 881, ln. 5). Patterson was later arrested as the investigation revealed more facts of his involvement. In his second statement, Patterson still denied involvement but stated he saw Oliver Feldman shoot at the crowd and toward the gas station. (R. 892, ln. 9 - 895, ln. 21). Patterson would later admit, in a third statement, that he did not drive himself to the Waffle House, but was with Karmindae and Oliver Feldman in Oliver's burgundy Malibu. Patterson saw a fellow from the back of the lot fire into the air once and into the crowd twice.³ Patterson then stated he and Oliver ran to the car, and Oliver began to return fire. (R. 920, ll. 25 - 922, ln. 14).

Forensic testing confirmed that all five (5) fired 9mm casings recovered from the Waffle House parking lot or nearby grass were fired by the same gun, a 9mm semiautomatic pistol [Applicant's gun]. Further, the two (2) fired .380 casings recovered from the Waffle House parking lot were fired by the same gun, a .380 semiautomatic pistol, and the one (1) unfired .380 bullet, recovered near the two (2) fired .380 casings, had been loaded into the same gun that fired the .380 shell casings [Patterson's gun]. (R. 1051, ln. 23 - 1052, ln. 4; 1053, ln. 14 - 1054, ln. 8).

Applicant, in his statement to investigating officers, admitted he was a "TTP Blood" and was at the Waffle House to fight a "Folk," Dameon. As people began to arrive, Corey "yelled over" that "the people in the cars were the Folks who we had been supposed to fight earlier in the night.... We later figured out that they were leading us around just so they could get enough

³ The statement was redacted pursuant to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), to avoid any error. (See R. 1448, ln. 16 - 1449, ln. 11).

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people to outnumber us. We figured out that they were wasting time so that they could get their group up." (R. 1255, ln. 2 - 1258, ln. 2). According to his statement, when Applicant approached the fight between Chad and Corey, a light-skinned man he thought to be a Crip [Oliver Feldman] told him to back up or he would be shot. Applicant saw a gun in the man's waistband. Applicant then went back and got the 9mm pistol from Jerome. Applicant fired it twice in the air. He saw "the Crip" dude and another person⁴ point their guns in his direction. Applicant took cover behind his car and fired five (5) more times directly at the Crip, then drove off. (R. 1258, ln. 3 - 1259, ln. 1). He opined that none of his shots could have hit the victim because he fired directly at the Crip, in fact, over his head, and no one was in the line of fire. However, Applicant admitted the first shot that he fired as he fled behind his SUV was fired wildly and as a result, could possibly have struck the victim or the ABC Packaging / Exxon/Mobil station. (R. 1260, ln. 10 - 1261, ln. 15).

Further investigation resolved that the victim had arrived at the scene with individuals associated with the Folks, though there was no evidence of the victim's membership. (R. 1295, ln. 24 - 1296, ln. 9).

Applicant presented a defense in the case. He called Donald Girndt, a forensic consultant, who testified the victim did not move very far after being shot, "just a few feet," before collapsing, and, according to the shell casing groups from the far left [actually the far right] of the Waffle House, the victim would not have been in the line of fire from that area. (R. 1363).

⁴ This statement was also redacted pursuant to Bruton to avoid any error. This Court notes that Applicant later testified in his own defense; however, even though he testified, only the redacted version of his statement went to the jury, which omitted the reference to Eugene Patterson. (R. 1432, ln. 6 - 1433, ln. 20).

Applicant also testified in his own defense. He essentially restated the facts of his prior statement to police, i.e. that he shot twice in the air, the light-skinned man [Oliver Feldman] and a dark-skinned man [Eugene Patterson] fired toward him, and he fired back, over their heads. He reiterated that no one was in the cross-fire. He claimed, however, that he did not know who the people were pulling up to the Waffle House before the fight, and he was not a gang member. He also claimed that he believed he needed to "stop this" or "somebody [is] going to end up getting hurt," and the only way he knew to do so was to fire in the air so everyone would disperse and go home. (R. 1380, ln. 1 - 1384, ln. 8; 1386, ln. 11 - 1387, ln. 7; 1392, ll. 8-15; 1394, ll. 5-9). Applicant also admitted he initially misled police by telling them he fired a .22 revolver up into the air, not Jerome's 9mm pistol. Applicant admitted he actually showed police where this .22 pistol was located. Applicant admitted when confronted with evidence by the police, that he had misled police and the real weapon he fired at the scene was the 9mm pistol he obtained from Jerome. Applicant admitted they got rid of the 9mm pistol because they thought it had a body on it.

The Trial

On May 5, 2008, Applicant proceeded to a jury trial on the indictment for murder before the Honorable William P. Keesley, Circuit Court Judge. Applicant was tried with co-defendant Eugene Patterson.⁵ At the conclusion of the trial, the jury found Applicant guilty of murder. The jury also found Patterson guilty of murder. Judge Keesley sentenced Applicant to forty-five (45) year's imprisonment for murder. The other charges against Applicant for breach of the peace

⁵ Oliver Feldman was also a co-defendant charged with murder and was to be tried with Applicant and Patterson; however, approximately two (2) weeks before trial, Feldman decided to cooperate and testify truthfully against Applicant and Patterson.

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and unlawful carrying of a pistol were nolle prossed. Judge Keesley also sentenced Patterson to forty-five (45) year's imprisonment for murder.

The Direct Appeal

A timely notice of appeal was filed on applicant's behalf and an appeal was perfected by Robert Dudek of the S.C. Commission of Indigent Defense, Office of Appellate Defense. In the direct appeal, Applicant raised the following issue to the Court of Appeals:

Whether the court erred by instructing the jury on "mutual combat" since that charge was burden shifting and inappropriate given the facts of this case since the prior agreement to fight on equal terms must be plain and not merely arise out of "fist fight or a scuffle," and defense counsel correctly cited State v. Taylor when objecting to this proposed jury instruction?

(Brief of Appellant, p. 3). The State filed a responsive brief. (Brief of Respondent). The Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion filed April 17, 2013. State v. Boone, Opinion No. 2013-UP-155 (Ct. App. filed April 17, 2013). Because of one of the issues raised by Applicant it is necessary to recite the Court of Appeals Opinion. The Opinion read as follows:

PER CURIAM: Andre Boone appeals his conviction for murder, arguing the trial judge erred in instructing the jury on mutual combat because it shifted the burden and was inappropriate given the facts of the case. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is, not preserved for appeal where one ground is raised below and another ground is raised on appeal); State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (stating the trial court's duty is to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence); Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat exists when there is 'mutual intent and willingness to fight.'" (quoting State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973))); id. ("Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'"); State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) ("The mutual combat doctrine is triggered when both parties contribute to the resulting fight."); id. at 232, 589 S.E.2d at 3 ("Whether or not mutual combat exists is significant because 'the plea of self-defense is not available to one who kills another in mutual combat.'" (quoting Graham, 260 S.C. at 450, 196 S.E.2d at

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495)); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding a mutual combat charge was proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 348, 111 S.E. 318, 3.19 (1934) (holding there was no error in charging and arguing the law of mutual combat because there was testimony the appellant and the deceased were on the lookout for each other; were armed in anticipation of a combat; each drew his pistol; and each fired upon the other); State v. Porter, 269 S.C. 618, 622-23, 239 S.E.2d 641, 643 (1977) (finding a mutual combat charge was proper when there was evidence the defendant had returned with a gun to one victim's property at least twice in spite of prior verbal abuse, threats, and gunshots); State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (providing the court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("[I]n determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."); State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using deadly force in self-defense when: (1) [t]he defendant was without fault in bringing on the difficulty; (2) [t]he defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) [i]f the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) [t]he defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.").

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

The Remittitur was issued September 13, 2013.⁶

The PCR Action

Applicant then filed this application for post-conviction relief (PCR) on November 1, 2013. The State filed a responsive Return to the PCR Application, denying the claims and requesting an evidentiary hearing. On August 28, 2017, a PCR evidentiary merits hearing was convened before this Court.

⁶ Applicant's co-defendant Eugene Patterson also appealed his conviction and sentence and it was also affirmed by the Court of Appeals in an unpublished opinion. State v. Eugene Patterson, 2013 W.L. 8507862 (Ct. App. filed April 17, 2013).

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At the PCR hearing and thereafter, this Court had before it the records of the Richland County Clerk of Court regarding the subject conviction and sentence, the transcript from Applicant's trial and sentencing proceeding, Applicant's records from the Department of Corrections, Applicant's appellate records, and the Court of Appeals' Opinion affirming Applicant's conviction and sentence. At the PCR hearing, this Court had the opportunity to view each witness' testimony, judge their credibility, and weigh their testimony accordingly.

II. PCR ALLEGATIONS

In his Application, the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel;
3. Prosecutorial Misconduct.

At the PCR hearing, Applicant proceeded on the following grounds:

1. Ineffective assistance of counsel for failing to move for a severance from his co-defendant;
2. Ineffective assistance of counsel for failing to properly object to the jury charge on mutual combat and preserve the issue for direct appeal;
3. Ineffective assistance of counsel for failing to object to a photograph that was prejudicial and inadmissible;
4. Ineffective assistance of counsel for failing to object to the admission into evidence of a handgun that was recovered from applicant's house.
5. Ineffective assistance of counsel for failing to object to a firearm demonstration in the courtroom;
6. Ineffective assistance of counsel for failing to conduct a proper pre-trial investigation of what the co-defendant was going to testify to and removing the motion to prohibit the co-defendant from testifying;
7. Counsel was ineffective in failing to move for a change of venue;

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8. Counsel was ineffective in failing to challenge Juror 280's ability to be fair and impartial;

9. Counsel was ineffective in failing to request a competency hearing;

10. Counsel was ineffective in failing to object to the Solicitor vouching for the credibility of State's witness Oliver Feldman.

Testimony at the PCR Hearing

Applicant's testimony

Applicant testified that trial counsel was ineffective for not objecting to the trial court's mutual combat charge for a different reason than the objection raised by his co-defendant Patterson. Applicant claimed his testimony was he did not bring a gun to the Waffle House; where Patterson admitted he did, therefore, since his version of events was different from Patterson's and he did not bring a gun to the altercation at the Waffle House a charge on mutual combat should not have been given. Applicant also stated it was his version that he did not agree to a gun fight with Patterson, and therefore mutual combat should not have been charged. Applicant alleged because this specific objection was not made the trial judge charged mutual combat and the issue was not preserved for appeal and the Court of Appeals did not address the issue. However, Applicant admitted on cross-examination that the Court of Appeals Opinion in his case does cite cases discussing mutual combat. (PCR Tr. / App. 12-16, 36-37, 40-41).

Applicant testified that trial counsel was ineffective for not objecting to the State asking two (2) witnesses about State's Ex. 14, a photograph of the victim's body at the crime scene. Applicant testified the witnesses were asked if the victim was found in the same position as reflected in State's Ex. 14. Applicant testified that at a pre-trial hearing State's Ex. 13 and 16 were allowed into evidence, but State's Ex. 14 and 15 were not allowed in evidence. Applicant testified that later during the trial the Solicitor asked two (2) different witnesses about State's Ex.

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14 and showed the exhibit to the jury even though the exhibit was not in evidence. Applicant testified counsel should have objected the first time this occurred with the first witness, but counsel did not object until this occurred with the second witness and not until after this witness was shown the exhibit and testified about it. Applicant testified counsel objected again when it was shown to a third witness but the trial court overruled the objection. Applicant claimed the issue was not addressed by the Court of Appeals on appeal because it was not preserved for appeal by trial counsel. Applicant admitted that other photographs of the victim's body were admitted in evidence at his trial, but he alleged they were not taken from as close an angle. (PCR Tr. / App. 16-20, 38-39, 41-42).

Applicant testified that trial counsel was ineffective for not objecting to the admission into evidence of a hand gun [a revolver] found at Applicant's home. Applicant testified the gun was his, but it was a .22 handgun that was broke into two (2) pieces and did not work. Applicant claimed he had found the handgun. Applicant also testified no .22 caliber shell casings were found at the scene. Applicant claimed the gun had no relevance to the case. Applicant claimed he told counsel this, but counsel made no objection to the gun's admission. (PCR Tr. / App. 20-22)

Applicant testified that trial counsel was ineffective for not objecting to a demonstration in the courtroom by the State's firearms expert. Applicant testified that during the trial the State's firearms expert held a revolver, which did not belong to applicant, and demonstrated to the jury how a revolver works, including pulling the trigger on the unloaded revolver. Applicant alleged since he did not own the revolver, counsel should have objected to the courtroom demonstration but counsel did not object. (PCR Tr. / App. 22-23).

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Applicant testified that trial counsel was ineffective for not further investigating what his co-defendant [Oliver Feldman] was going to testify to and as a result counsel believed his co-defendant's testimony was not going to change from his statement to police and counsel withdrew a motion to prohibit the co-defendant from testifying. Applicant admitted counsel inquired of the Solicitor, after the co-defendant talked to the Solicitor's Office, whether the co-defendant's testimony had changed from his initial statement to police and was told by the Solicitor the co-defendant's testimony would be the same as his original statement to police. According to Applicant, as a result, his trial counsel withdrew their motion to prohibit the co-defendant from testifying. Applicant testified the co-defendant testified in his trial and his testimony was different from his original statement to police, naming only one (1) shooter, Applicant, instead of multiple shooters as the co-defendant had told police. Applicant alleged if counsel had further investigated what his co-defendant was going to testify to, counsel would have known the co-defendant was going to change his statement, and counsel would not have withdrawn the motion to prohibit the co-defendant from testifying and maybe the trial court would have prohibited the co-defendant from testifying. (PCR Tr. / App. 23-27).

Applicant testified that his trial counsel was ineffective for not filing a change of venue motion. Applicant testified there was a lot of publicity surrounding the case and negative press about him, including his photograph in the paper. Applicant testified most of the jury had read or heard something about the case. Applicant alleged some jurors went to church with the victim's family or were involved in community programs named after the victim. Applicant testified he believed he could have gotten a more fair trial in another county. Applicant alleged he and counsel never discussed a change of venue motion before trial. Applicant testified he did discuss this with counsel during jury qualification and selection. (PCR Tr. / App. 27-29, 42).

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Applicant alleged that his trial counsel were ineffective for not filing a motion for a severance for a separate trial from his co-defendant Eugene Patterson. Applicant testified he and Patterson were not friends, did not know each other, and were not real co-defendants, but on opposite sides of the shooting which resulted in the victim's death. Applicant testified while his counsel told the jury he and Patterson were not friends or associates, the name co-defendant kept coming up and this prejudiced him. Applicant testified it was never really clear to the jury that he and Patterson were on opposite sides of shooting. Applicant alleged counsel never discussed with him whether to move to sever his trial from his co-defendant. Applicant alleged he should have been given a severance because he and Patterson were "pointing the finger" at each other, i.e. blaming each other for the crime. (PCR Tr. / App. 29-31, 43).

Applicant alleged that his trial counsel were ineffective for not challenging the impartiality of Juror 280. Applicant alleged Juror 280 worked for a corporation that started an intervention program. Applicant alleged the Juror worked for the intervention program which was named after the victim in his case. Applicant alleged the juror was not impartial because of this fact and he left jury selection up to his trial counsel but they did not object to the Juror's impartiality. (PCR Tr. / App. 32-33).

Applicant alleged that his trial counsel were ineffective for not requesting a competency hearing. Applicant stated he was only sixteen (16) when arrested and he did not complete high school. He claimed he could not understand the law and related matters and assist counsel. Applicant also alleged he had mental issues at the time. Applicant stated his girlfriend was killed six (6) months after he was arrested and his niece was killed three (3) months after that. Applicant stated this all occurred while he was detained pre-trial. Applicant stated he was stressed and depressed and he informed his counsel of the losses within his family. Applicant

stated that he "moped" around, had no energy, had "no mood" to do anything and was barely living. However, on cross-examination, Applicant admitted that at the time of his trial he did not have any formal mental health diagnosis including depression, he just felt bad. Applicant also admitted he had not been treated for any mental health issues in high school except being in an anger management program. (PCR Tr. / App. 33-34, 43).

Finally, Applicant alleged counsel was ineffective for failing to object to the Solicitor's closing argument. Specifically, Applicant alleged counsel should have objected when the Solicitor allegedly "vouched" for the credibility of a witness, Oliver Feldman, during her closing argument. Applicant alleged the Solicitor "vouched" for Feldman when she argued that Feldman's testimony was credible because it was corroborated by other evidence in the case. (PCR Tr. / App. 34-36).

Trial counsel's testimony

Trial counsel testified that the defense team did object to the jury charge on mutual combat. Counsel testified they did not believe mutual combat was appropriate because there was no meeting of the minds between Applicant and Patterson and Feldman to engage in a gun battle. Though counsel did not expound on co-defendant Patterson's objection to the charge, counsel, on the record, joined in co-defendant Patterson's objection to the mutual combat charge. However, the trial judge overruled the objection and charged the jury on mutual combat. Trial counsel testified she did not believe the Court of Appeals addressed the issue on direct appeal because it was not properly preserved for appeal. (PCR Tr. / App. pp. 78-82).

Trial counsel testified that prior to the trial the defense team moved to exclude several graphic photographs of the victim's body at the crime scene and were able to keep out most of those photographs. With regard to State's Ex. 14, the photo of the victim's body referenced

above, counsel testified the Solicitor, Luck Campbell, accidentally showed to the jury that photograph which had been marked as State's 14 for I.D. but was not in evidence and counsel did not contemporaneously object. Counsel testified that she believed the failure to object was not intentional but an oversight caused by either not hearing the specific exhibit number referenced or some other confusion. Counsel testified an objection was lodged when it was realized State's Ex. 14 had not been admitted in evidence. However, counsel testified there were other photographs that were admitted into evidence including graphic photographs of the victim's body at the crime scene. As a result, the jury saw other photographs of the victim's body properly admitted into evidence other than State's Ex. 14. (PCR Tr. / App. pp. 55-56; 74-76).

Trial counsel testified as to Applicant's allegation that counsel should have objected to the .22 revolver that came from his home that allegedly was not related to the case or the crime scene. Because of the passage of time, and the lack of anything in her notes, counsel did not specifically remember this issue or why she did not object to the admission of the .22 revolver recovered from Applicant's home. Counsel did not remember this being an issue or discussing it with Applicant. However, at the time of the PCR hearing, she felt the admission of the gun would have been prejudicial if not related to the case. (PCR Tr. / App. pp. 63; 76).

Trial counsel testified as to Applicant's allegation that counsel should have objected to a courtroom demonstration of a firearm. Counsel testified she believed an objection was made to the demonstration. Counsel testified, although her memory was not clear on the issue, she believed the defense team did object to the demonstration. (PCR Tr. / App. 56-58).

Trial counsel testified she could not recall whether it was considered or discussed by the defense team or with Applicant filing a motion for a change of venue. Counsel testified there

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was nothing in her notes regarding the same. Counsel testified they filed numerous pre-trial motions, and those were heard at a pre-trial motions hearing prior to trial, she simply had no memory of whether a change of venue motion was made. However, counsel testified in her opinion, even though there was press coverage regarding the case, after jury selection, they were able to get a fair and impartial jury. (PCR Tr. / App. 55. 59-60).

Trial counsel testified the issue of making a motion for a severance from Applicant's co-defendants was discussed extensively by Applicant's defense team and with other attorneys. Counsel testified their legal research indicated Applicant did not have a good legal basis for a severance and would probably lose such a motion. Counsel also testified that while they considered making a severance motion simply to preserve the issue for appeal, their discussions amongst themselves determined Applicant had a better chance of an acquittal if he were tried with other co-defendants and not by himself. Based on their discussions and the facts of the case, counsel believed if Applicant were tried alone, the jury would most likely find him guilty because they did not have anyone else to blame for the victim's murder. The victim was an innocent bystander who was not involved in the shootout. If Applicant were tried with another defendant or co-defendant, there was significant likelihood the jury would convict a co-defendant or co-defendants rather than Applicant. Counsel testified it was ultimately decided not to move for a severance. Counsel testified the defense team made clear to the jury throughout the trial that Applicant and Eugene Patterson were not true co-defendants, associates, or friends; and, they were on different sides of the incident at the Waffle House. This was done through opening statements, cross-examination and examination of witnesses, and during the closing argument to the jury. (PCR Tr. / App. 52-54, 70-74).

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With regard to Applicant's allegation that counsel should have struck or challenged the impartiality of Juror 280, counsel testified that obviously it would not be great to have someone on the jury who worked at an organization or founded an organization involving the victim. Counsel testified she did not recall the specific juror raised here, but counsel felt like they were able to strike a fair and impartial jury. Counsel testified that while she would love to hand pick each juror in a criminal case that is not permitted or possible. Counsel testified that while she was not completely happy with everyone on the jury, counsel felt the jury that they selected was fine for what they had to pick from. (PCR Tr. / App. p. 55).

With regard to Applicant's allegation counsel should have requested a competency hearing, counsel testified she never had any concerns about Applicant's ability to communicate with her about his case. She was able to have clear communications with Applicant. Counsel testified Applicant understood her discussions with him. Counsel also testified she had Applicant's mother present during many of the meetings so Applicant and his mother understood what was going on with his case. Counsel testified that in hindsight she wishes she had sent Applicant for a competency evaluation, based on Applicant's age at the time of trial, and his claims while testifying at PCR which she overheard. However, counsel did not testify at the PCR hearing that Petitioner was not competent to stand trial at the time of his trial. (PCR Tr. / App. 60-61).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the records of the Richland County Clerk of Court regarding Applicant's conviction and sentence, the transcript from Applicant's trial and sentencing proceeding, the trial exhibits, Applicant's prison records, Applicant's appellate records, and the Court of Appeals' Opinion affirming Applicant's conviction and sentence. At

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the PCR hearing, this Court also had the opportunity to view each witness' testimony, judge their credibility, and weigh their testimony accordingly. This Court has also carefully reviewed all the evidence in this case. As a result of all of the above, this Court makes the following findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003), based upon all of the probative evidence presented.

Standard of Review

Applicant alleges numerous grounds of ineffective assistance of trial counsel ("IAC"). Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

This Court notes that in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Id.; SCRCP, Rule 71.1. Where ineffective assistance of counsel (IAC) is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. The PCR 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 (IAC). First, the applicant must prove that counsel's performance was deficient. Under this

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prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to prove either prong of the Strickland test results in failure of the claim. Strickland, 466 U.S. at 687; Fields v. Attorney Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992). "A court may always begin with the prejudice prong if it desires, and if a petitioner does not meet his burden of satisfying it, then the reviewing court need not consider the performance prong." Malcom v. United States, 2013 WL 3940775 (D.S.C. 2013)(Not Reported in F.Supp.2d)(*quoting Fields*, 956 F.2d at 1297).

Specific Grounds

Alleged IAC for failing to move for a severance

There is no merit to this ground. Counsel credibly testified at the PCR hearing that this issue was discussed in depth prior to the trial of the case. Applicant was originally to be tried with two (2) other co-defendants, one (1) of whom agreed to cooperate and testify before trial. Counsel credibly testified it was the opinion of the defense team that Applicant would have a better chance of acquittal if tried with one (1) or more co-defendants than if Applicant were tried alone. As a result, counsel made a reasoned professional judgment that it was strategically in Applicant's best interest that Applicant be tried with another co-defendant or co-defendants. As a result, counsel could not be ineffective for making a reasonable strategic decision after a complete and thorough investigation. Strickland v. Washington.

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Further, counsel credibly testified at the PCR hearing that Applicant's defense team researched the issue of whether Applicant would be entitled to a severance and found the likelihood of prevailing on a severance motion was low. This is supported by the record and the case law. Richardson v. Marsh, 481 U.S. 2000, 107 S.Ct. 1702, 1708-09 (1987)(No matter what reason a defendant may advance for severance of his trial from that of a codefendant, the granting of a separate trial seldom outweighs those advantages to be found in the joint trial of defendants); State v. Miller, 342 S.C. 191, 535 S.E.2d 652 (Ct. App. 2000), *affirmed in result on cert.*, 351 S.C. 643, 572 S.E.2d 267 (2002)(a severance should only be granted where there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a codefendant's guilt.); Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999), *Cf. Nafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933 (1993).

The granting or denial of a motion for severance is the discretion of the trial judge. State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1976). His decision in this regard will be reversed only if he abused his discretion. *Id.* See also State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1976).

Further, Applicant was not entitled to a severance from his co-defendant or co-defendants as a matter of right. State v. Thompson, 279 S.C. 405, 308 S.E.2d 364 (1983); State v. Green, 269 S.C. 623, 239 S.E.2d 646 (1977); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). See State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), 351 S.C. 635, 572 S.E.2d 263 (2003). Additionally, Applicant was not entitled to a severance as a matter of right to have the co-defendant testify in

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his favor. United States v. Spooone, 741 F.2d 680 (4th Cir. 1984); United States v. Becker, 595 F.2d 783 (4th Cir. 1978); State v. Littlejohn and Berry, 1 SCL 127, (1 Bay 316 (1793)).

Furthermore, severance is not required when defendants present mutually antagonistic defenses, e.g., when each defendant accuses the other of having committed the crime. Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993). Where co-defendants will present antagonistic or inconsistent defenses, the South Carolina Supreme Court has repeatedly affirmed a trial judge's discretion not to sever a joint trial. State v. Plath, 277 SC. 126, 284 S.E.2d 221 (1981); State v. Atkins, 205 S.C. 450, 32 S.E.2d 372 (1944); State v. Rook, 174 S.C. 225, 177 S.E.143 (1935); State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934); State v. Francis, 152 S.C. 17, 249 S.E. 348 (1929); State v. Joffords, 121 S.C. 443 11S.E. 415 (1922); State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918). Specifically, the South Carolina Supreme Court has affirmed the exercise of a trial judge's discretion not to sever a joint trial, where defendants have accused each other of having committed the crime. State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976). Thus in Britt and Allen, where a factual question existed as to which of the co-defendants was responsible for firing the fatal shot, the denial of a motion for severance was within the exercise of the trial judge's discretion. Even where the evidence is undisputed that only one (1) person could have struck the fatal blow, or fired the fatal shot, the denial of severance is not error. State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1935). Accordingly, the mere allegation of antagonistic defenses does not per se require severance, even if the codefendants are hostile to each other, and seeking to cast blame on each other. United States v. Becker, 585 F.2d 703 (4th Cir. 1978).

As a result, Applicant has failed to meet his burden of proof to show counsel was deficient in not making a motion to sever his case from his co-defendant or resulting prejudice.

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Strickland. As a result, this ground has no merit and must be denied and dismissed with prejudice. Id.

Additionally, Applicant has not shown that even if counsel had made a motion for a severance, and one had been granted, that there is a reasonable probability he would not have been convicted but would have been acquitted. Strickland v. Washington. See also State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). And the trial court gave proper cautionary instructions to the jury regarding the necessity that it consider separately the evidence against each defendant. (R. 283-84; 291; 1603-04; 1616-18). See State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)(holding trial court's cautionary instructions to the jury in a joint trial "protected the rights of each individual appellant); and State v. Stuckey, 347 S.C. 484, 498, 556 S.E.2d 403, 410 (Ct. App. 2001)(similar).

Further, as counsel credibly testified at the PCR hearing, it was made abundantly clear from opening statements by the State through closing arguments, that Applicant and Patterson were not true co-defendants but on opposite sides of a violent gun battle. (R. 305-29).⁷ The record and credible testimony simply does not support a finding of prejudice even if counsel had acted as Applicant alleges. As a result, Applicant has failed to prove prejudice from counsel's failure to move for a severance. Strickland v. Washington; Butler v. State. This ground must be denied and dismissed with prejudice.

⁷ The record also shows the statements of Applicant and his codefendant were redacted to prevent any Bruton issue. (R. 934-35; 992-99; 1008-19). The trial judge gave a limiting instruction to the jury that each defendant's statement could only be used against the defendant who gave the statement (R. 1449-51; 1603). Both Applicant and his co-defendant were also given a self-defense jury instruction, even though Applicant was arguably not entitled to one, but because of the lack of severance, Applicant benefited from a joint trial by receiving jury instruction on a defense he was not even entitled to. (See R. 1462-63).

Alleged IAC for failing to properly object to the jury charge on mutual combat and preserve the issue for direct appeal:

There is no merit to this ground. Applicant alleges counsel should have objected to the trial court's decision to charge mutual combat, because his version of events is different from that of his co-defendant, and if counsel would have objected on this basis, the issue would have been preserved for appeal and Applicant would have prevailed on appeal.

Applicant's contention is simply wrong and not supported by the evidence presented at trial. The law to be charged to the jury is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (2009). Applicant's contention at trial does not control what law the trial judge is required to charge the jury on. It is all the evidence presented at trial that controls what law the trial judge is required to charge the jury on. Id. Evidence was presented at Applicant's trial, including both direct and circumstantial evidence, from which the jury could find or infer that Applicant and his co-defendant Eugene Patterson [and co-defendant Oliver Feldman] engaged in mutual combat; therefore, the trial judge did not err in instructing the jury on the law of mutual combat. See State v. Young, 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018)(discussing the history of and law of "mutual combat"); see also State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918)(discussing law of "mutual combat"); State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003)(similar); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)(same or similar); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906).⁸ Furthermore, the trial judge

⁸ See also People v. Sanchez, 29 P.3d 209 (Cal. 2001)(both rival gang members who engaged in mutual combat with firearms could be convicted of 1st degree murder of innocent bystander, where it could not be determined which gang member fired the fatal shot, as both were a proximate cause of victim's death); State v. Spates, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engaged in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); Roy v. United States, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006)("While the evidence was unclear as to whether Roy's or Settles' bullet was responsible

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appropriately charged the jury the law of South Carolina that if the jury found mutual combat occurred, the defense of self-defense is not applicable. Young, 424 S.C. 424, 818 S.E.2d 486

Nor could counsel have been deficient in failing to object to the charge on mutual combat on the basis which Applicant now alleges. Young, 424 S.C. 424, 818 S.E.2d.486; State v. Hammond, 36 S.C.L. 91, 102 (S.C. App. L. 1850) ("Even in cases of mutual combat, if one begins the fight with a mortal weapon, it is murder..."); State v. Turner, 63 S.C. 548, 41 S.E. 778 (1902) ("Where there is evidence from which a jury may infer that there was mutual combat, on a trial for murder an instruction as to such combat is not error."); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) ("There was evidence of threats which, if true, justified a verdict of premeditated murder. There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other. There was no error in charging and arguing the law of mutual combat."). The jury could simply disbelieve or find not credible Applicant's testimony at trial, and find the other evidence of mutual combat was credible. Therefore, counsel was not deficient in this regard. Strickland v. Washington.

Further, Applicant has failed to meet his burden of proof to prove resulting prejudice. Strickland. This Court finds based on this record, including the testimony introduced at trial, that had counsel objected to the trial judge instructing the jury on the law of mutual combat *on the basis applicant now alleges*, the trial judge would have overruled the objection and still charged

for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered."); Alston v. State, 662 A.2d 247, 254 (Md. 1995)("Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare."); Reyes v. State, 783 So.2d 1129, 1133 - 1134 (Fla. App. 3 Dist. 2001)(noting Alston and adopting logic citing other jurisdictions with similar holdings)..

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the jury on the law of mutual combat because the instruction was supported by other evidence presented in the case. Id. As previously stated, Applicant's version of events is not controlling. The jury could have found Applicant's testimony not credible or believable but found the other testimony of mutual combat introduced by the State was credible or believable. As a result, Applicant has failed to prove resulting prejudice. Id. Therefore, there is no merit to this ground and it must be dismissed.

Furthermore, the record shows counsel objected to the charge of mutual combat by the trial judge, joining in his co-defendant Patterson's specific objection. (R. 1469-73). Patterson's objection was essentially the same as that now argued by Applicant. (R. 1469-73). The trial judge overruled Patterson's objection which was joined in by trial counsel for Applicant, and instructed the jury based on mutual combat, because there was evidence in the record supporting the jury instruction. (R. 1469-73; 1621; 1612). As a result, Applicant cannot show deficient performance or resulting prejudice. Strickland.

Finally, the Court of Appeals addressed this issue in the alternative in its Opinion in the direct appeal, finding the trial judge did not err in charging the law of mutual combat under the facts of this case. State v. Andre Boone, supra (citing State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (stating the trial court's duty is to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence); Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat exists when there is 'mutual intent and willingness to fight.'" (quoting State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973))); id. ("Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'"); State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) ("The mutual combat doctrine is triggered when both parties contribute to

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the resulting fight."); *id.* at 232, 589 S.E.2d at 3 ("Whether or not mutual combat exists is significant because 'the plea of self-defense is not available to one who kills another in mutual combat.'" (quoting Graham, 260 S.C. at 450, 196 S.E.2d at 495)); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding a mutual combat charge was proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 348, 111 S.E. 318, 3.19 (1934) (holding there was no error in charging and arguing the law of mutual combat because there was testimony the appellant and the deceased were on the lookout for each other; were armed in anticipation of a combat; each drew his pistol; and each fired upon the other); State v. Porter, 269 S.C. 618, 622-23, 239 S.E.2d 641, 643 (1977) (finding a mutual combat charge was proper when there was evidence the defendant had returned with a gun to one victim's property at least twice in spite of prior verbal abuse, threats, and gunshots). The Court of Appeals also found the charging of mutual combat on these facts was not prejudicial. Boone, *supra* (citing State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (providing the court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("[I]n determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."); State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using deadly force in self-defense when: (1) [t]he defendant was without fault in bringing on the difficulty; (2) [t]he defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) [i]f the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the

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same belief . . . ; and (4) [t]he defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.").

As a result, Applicant has failed to prove deficient performance of trial counsel or resulting prejudice under this ground. Strickland v. Washington; Butler v. State. Therefore, this ground must be denied and dismissed with prejudice.

Alleged IAC for failing to object to a photo that was prejudicial and inadmissible

There is no merit to this ground. The record reflects that after jury selection but prior to trial, Applicant's trial counsel objected *in limine* to the introduction of autopsy photographs and some of the photographs of the victim's body as it was found at the crime scene. (R. 281-83). Counsel argued that some of the photographs from the crime scene were cumulative and some showed pooling of blood which might arouse the jury's passion or appeal to jury sympathy. The State agreed not to offer any autopsy photographs except possibly photos of some abrasions to the victim's knee which were relevant to issues in the case. The parties agreed to review the crime scene photographs together and see if they could come to some agreement on what was admissible. Judge Keesley agreed and instructed the parties if they could not agree to raise the issue at the appropriate time when the photographs were offered or presented. (R. 281-83; See also R. 286-88 discussing crime scene photographs vis a vis need for jury to view crime scene).

During the testimony of Officer Micheal Beeler, the State then offered certain photographs of the victim's body as it was found at the crime scene to show the location of the victim's body in reference to the following: the Waffle House, the place or location of the various shooters, the bullet hole to the ABC Packaging Store, and the Exxon/Mobile station itself. The location of the victim's body was relevant to not only who likely fired the fatal shot,

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even though that could not be definitively determined, but also that the victim died as a result of [fleeing from] the mutual combat engaged in between Applicant and Patterson. (R. 332-47).

The record shows the State initially offered certain photographs of the crime scene because the State thought there was an agreement with the defense, but upon being informed there was not an agreement, withdrew certain photographs. As defense counsel further objected, the State re-offered certain photographs believing the defense was changing its argument or position from what it had informed the Solicitor of earlier. Eventually, after hearing argument on the matter, the trial court admitted certain photographs of the victim's body at the crime scene, State's 12, 13, & 16, but excluded State's Ex. 14 and 15, which were marked for identification. (R. 281-83; 286-88; 339-47 [admission of photographs and exclusion of 14 and 15]).

At this point in the trial, apparently because of the number of exhibits admitted at one time or because exhibits were offered, withdrawn, and then reoffered or re-submitted, it appears State's 14 [for I.D.] was mistakenly shown to witness Officer Micheal Beeler by the Solicitor, and Officer Beeler testified to the location of the victim's body from State's Ex. 14 in reference to the ABC Packaging Store / Exxon/Mobile station. (R. 339-52).⁹ Officer Beeler also authenticated State's Ex. 12, 13, and 16; these photographs were admitted in evidence through him; and, Officer Beeler testified to the location of the victim's body by use of State's Ex. 12 and 13 which were properly admitted in evidence. (R. 339-52).

Thereafter, other witnesses were called to testify by the State. Several of these witnesses referred to or testified to the location of the victim's body through either State's Ex. 13. (See

⁹ It is also possible the Solicitor merely misstated the exhibit number ["14"] and actually showed Officer Beeler State's Ex. 12, 13, or 16; however, for the purposes of this ground, since the record states it was State's Ex. 14, this Court is assuming the Solicitor actually showed the witness State's Ex. 14 for I.D.

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State's Ex. 13 & 16; R. 378-79; 432; 435; 441-42; 447-48; 451-52; 454). State's Ex. 12, 13, and 16 also went with the jury to the jury room during deliberations since they had properly been admitted in evidence.

When the pathologist, Dr. Clay Nichols testified, the Solicitor inadvertently showed Dr. Nichols State's Ex. 14 instead of State's 13 or 16 in asking Dr. Nichols how far the victim could have moved after being shot. (R. 1029 [State's Ex. 14 referenced]). Trial counsel credibly testified at the PCR hearing she did not object through oversight or confusion or did not hear the exhibit number referenced by the Solicitor.

Later, during the trial, Solicitor Campbell actually brought it to the attention of the Court that she had mistakenly shown Dr. Nichols State's 14 instead of State's 13 or 16 when she was questioning him. (R. 1067-71 [discussion by Solicitor of showing State's Ex. 14 to witness Dr. Nichols]). Trial counsel immediately objected, informed the court it had occurred with another witness earlier, and trial counsel moved for a mistrial. Judge Keesley sustained the objection but denied the motion for a mistrial. Judge Keesley immediately gave the jury a curative instruction to disregard any testimony by Dr. Nichols about State's Ex. 14, telling the jury State's Ex. 14 was not in evidence, but denied the defense' motion for a mistrial because when the photograph was mistakenly shown to Dr. Nichols by the Solicitor, Dr. Nichols was approximately six (6) feet from the jury. Judge Keesley found that under these circumstances the jury would not have been able to distinguish State's Ex. 14 from the other photographs of the victim's body properly admitted into evidence. From that distance Judge Keesley could not tell the difference between State's Ex. 14 or State's Ex. 13 or 16, i.e. there was nothing distinguishable from that distance in State's 14 as compared to State's Ex. 13 or 16. (R. 1067-71).

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State's Ex. 15, which was excluded by Judge Keelsey, is the most graphic of the photographs initially offered by the State, but excluded. It was never shown to the jury mistakenly or otherwise.

This Court finds counsel was deficient in failing to object when the Solicitor showed witnesses Beeler and Nichols State's Ex. 14, which was not in evidence and had been excluded, and had the witnesses testify from the photograph before the jury while the jury viewed the photograph. Strickland v. Washington.¹⁰ While there were over one hundred (100) exhibits in this case, and exhibits had been offered, withdrawn, and then re-offered, and it is understandable that by omission counsel may have failed to object, counsel is still obligated to know what exhibits are admitted in evidence and which have been excluded by the trial judge and to object when those exhibits that have been excluded are mistakenly shown to the jury or attempted to be shown to the jury. Strickland. Therefore, this Court finds that even though counsel moved for a mistrial when they realized the Solicitor had mistakenly shown State's Ex. 14 to two (2) witnesses, instead of State's Ex. 13 or 16, counsel was deficient in failing to object when the Solicitor actually showed the excluded exhibit to each witness, had them refer or testify to what the picture portrayed or showed and actually displayed it to the jury. Id. Therefore, Applicant has proved the 1st prong of the Strickland test, i.e. that counsel's conduct was deficient and fell below reasonable professional norms. Strickland.

However, based on this Court's review of the entire record, including the other photographs of the victim's body properly admitted in evidence, the other testimony regarding the victim's injuries and location of his body, and the evidence of Applicant's guilt, Applicant

¹⁰ This Court would note that it is not necessarily objectionable for an attorney to show a witness a photograph marked for identification and have the witness testify what it depicts or have the witness orient himself using the photo, as long as the proper foundation for the photo is laid, what it depicts is relevant to the case, and the photo is not shown to the jury.

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has failed to prove resulting prejudice, i.e. but for counsel's deficient performance there is a reasonable probability the result of the proceeding would have been different had counsel objected and the jury not seen State's Ex. 14. Strickland v. Washington; see State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)(error in the admission of evidence is harmless when it is cumulative to other evidence that was properly admitted); State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003)(same); State v. Kirton, 381 S.C. 7, 37, 671 S.C. 107, 122 (Ct. App. 2008)("The admission of improper evidence is harmless where the evidence is cumulative to other evidence."(citation omitted)); Campbell v. Jordan, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009)("When improperly admitted evidence is merely cumulative, no prejudice exists; and, therefore the admission is not reversible error.")

There was other testimony in the trial of the victim's location, his head wound, and blood pooling around the victim's body by the officers arriving at the scene. The EMT who initially attempted to treat the victim testified to the head wound, bone and brain matter protruding from the victim's head wound, and blood pooling around the body and running down the pavement of the gas station. (R. 456-57). Defense expert Donald Girndt also testified to the bloodletting and blood stain pattern of the victim based on photographs he reviewed from the crime scene and autopsy. (R. 1363, 1368-1377). The pathologist also testified extensively to the through and through gunshot wound to the victim's head, the damage it caused to the victim's brain, and the bloodletting from the entrance and exit wound. (R. 1016-1034).

Further, and even more importantly, other photographs were properly admitted in evidence and before the jury showing the victim's body as it was found at the crime scene, with the pooling of blood, and they were discussed extensively by witnesses. (See State's Ex. 13 & 16; R. 351-52; 378-79; 432; 435; 441-42; 447-48; 451-52; 454; 1369; 1371). As Judge Keesley

found, these photographs were relevant and admissible because they depicted where the victim's body was found in relation to the Waffle House, the ABC Packaging / Exxon/Mobile Station, the fired shell casings, and the shooters, and were not unduly or unfairly prejudicial. This Court has considered those photographs, as Judge Keesley did at trial in denying the motion for mistrial, and finds that those photographs admitted portray basically the same thing as is portrayed in State's Ex. 14. In fact, State's Ex. 16 and State's Ex. 14 are very similar. And, State's Ex. 13 and State's Ex. 14 are similar in color contrast; they simply show the victim's body from a different angle. As a result, State's Ex. 14 was relevant to the issues in the case and not unduly or unfairly prejudicial. As trial counsel credibly testified at the PCR hearing, there were other photographs that were admitted into evidence including graphic photographs of the victim's body at the crime scene. *See State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978) (admission of improper evidence is harmless if it is merely cumulative of other evidence); *State v. Brockmeyer*, 406 S.C. 324, 356, 751 S.E.2d 645 (2013) (improper admission of photograph with caption was harmless beyond a reasonable doubt where it was cumulative to other evidence and testimony); *Ramos v. Hawley*, 316 S.C. 534, 536-37, 451 S.E.2d 27 (1994) (even if alleged improper admission of photographs with writing on the back had been preserved, the error was harmless where the evidence was cumulative other evidence in the case), (citing as *e.g.* *Long v. Conroy*, 246 S.C. 225, 143 S.E.2d 459 (1965) (admission of improper evidence is harmless where cumulative to other evidence); *State v. Green*, 412 S.C. 65, 83, 770 S.E.2d 424 (Ct. App. 2014) (admission of booking photograph of defendant was not prejudicial as it was cumulative to other evidence given photo line-up photo admitted without objection was the same photograph). As a result, the jury in the present case saw other photographs of the victim's body properly admitted into evidence [State's Ex. 13 & 16] other than State's Ex. 14. (PCR Tr. / App. pp. 55-

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56; 74-76). And, State's Ex. 15, the most graphic photograph, was never shown to the jury. Therefore there was no unfair prejudice from the jury seeing State's Ex. 14. Therefore, this Court finds Applicant has failed to prove the 2nd prong of the Strickland test, resulting prejudice from counsel's failure to object. Strickland v. Washington.

Furthermore, given all of the other evidence in the case of Applicant's guilt, this Court finds Applicant has failed to establish the 2nd prong of Strickland, resulting prejudice. Applicant has failed to show had trial counsel objected when State's 14 was shown to the witnesses, and the objection been sustained, that there is a reasonable probability the result of his trial would have been different. Strickland v. Washington. See State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991)(holding any error in the admission of evidence was harmless given the overwhelming evidence of guilt); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)(similar); State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012)("Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict."); State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) quoting State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)(alteration in original)("A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'"); Pagan, 369 S.C. at 212, 631 S.E.2d at 267 ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006)("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be

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reached, [the appellate court] will not set aside a conviction for an insubstantial errors not affecting the result.”).¹¹

As a result, this Court finds Applicant has failed to prove the second required prong of the Strickland test, resulting prejudice. As a result, this ground has no merit and must be denied and dismissed with prejudice. Strickland.¹²

Alleged IAC for failing to object to admission of a handgun recovered from applicant's house

Applicant alleges counsel should have objected to the admission into evidence of a handgun recovered from Applicant's house by police. There is no merit to this ground.

This Court finds based on its review of the record that Applicant's testimony and allegations in this regard are not credible. This Court also finds trial counsel's testimony at the PCR hearing that the admission of this gun was prejudicial is not credible.¹³

¹¹ This Court also finds there is no reasonable likelihood of a different result had counsel objected and *moved for a mistrial* when the photograph was initially shown to one (1) or both witnesses. Strickland. The record reflects the trial court denied the motion for mistrial even after having been notified State's Ex. 14 for I.D. had been mistakenly shown to two (2) witnesses and this occurred after the witnesses had testified. Based on the cumulative nature of State's Ex. 14 for I.D. as compared to State's Ex. 13 and 16, which were properly admitted in evidence, there is also no reasonable probability the trial court would have granted a mistrial had counsel objected earlier. Id.

¹² Furthermore, this Court would also note that Judge Keesley specifically instructed the jury at the time of Dr. Nichols' testimony that the jury was to disregard any testimony by Dr. Nichols regarding State's Ex. 14. And, Judge Keelsey re-instructed the jury in his closing jury instructions, that if he had instructed the jury during the trial to disregard some testimony or evidence, the jury must do so and could not consider that in reaching its verdict in this case. (R. 1067-71; 1593). Jurors are presumed to follow a trial court's instructions. CSX Transp., Inc. v. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); Foye v. State, 335 S.C. 586, 590 n. 1, 518 S.E.2d 265, 267 n. 1 (1999); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). And, a curative instruction is deemed to have cured any error in the admission of improper evidence. State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009)(noting a curative instruction to disregard the testimony is usually deemed to have cured any alleged error). As a result, for this reason as well, Applicant has failed to prove resulting prejudice from any deficient performance of trial counsel. Strickland v. Washington.

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The victim died as a result of a through and through gunshot wound to the head. The bullet that killed the victim was never recovered. The victim was an innocent bystander who was struck by a bullet fired while Applicant and his co-defendants were shooting at each other in a Waffle House parking lot crowded with people and an adjacent ABC Packaging / Exxon/Mobile station parking lot crowded with people.

According to Applicant's initial statement to police, at the time of the murder, at the crime scene, Applicant fired a .22 revolver into the air, and this was the only gun Applicant alleged he was in possession of. (Trial Tr. pp. 573-74, 626, 773-80; 924-33; 939-44; 948). In his final statement to police, Applicant admitted this was a false statement to police, concocted by Applicant and his associates, to limit Applicant's involvement in the murder of Brian Wright because Applicant actually fired a 9mm pistol at the scene up into the air and then into a crowd of people and at the two (2) codefendants. Because Applicant "threw police off" with this false statement, police executed a search warrant and recovered the .22 revolver Applicant said he used at the crime scene, from Applicant's home. (Trial Tr. pp. 954-57; 958-59). The State's firearms examiner and the State's pathologist testified this weapon could not have been used to kill the victim or left the shell casings found at the scene of the crime. (Trial Tr. pp. 1037-1108). Trial counsel kept out, by objection, anything else from the Applicant's home, including clothing with possible gang related colors. (Trial Tr. pp. 1135). The .22 revolver was relevant and admissible because it was this gun which Applicant and a friend initially intentionally told and misled police was the gun used at the crime scene by Applicant. (Trial Tr. pp. 1165-70; 1242-46; 1249-50; 1256-57; 1266-67; 1280-81). Applicant even showed police where the .22 was located in an attempt to mislead police. (Trial Tr. pp. 1314). The gun was broken and in two (2) pieces.

¹³ This Court would note that counsel could not remember at the PCR hearing why she did not object to the admission of the .22 revolver.

At trial, Applicant testified he was arrested for possession of a weapon under 21, breach of peace of a high and aggravated nature, and possession of a stolen pistol after giving the false statement about the .22 pistol in his house, and he later admitted it was a lie when confronted by police that he used a 9mm pistol at murder scene. Applicant testified on the stand he told police about the .22 and led them to it, but it was a lie concocted by Applicant and his associates to cover up the use of the 9mm pistol in the murder. (Trial Tr. pp. 1388-89, 1395; 1424-25; 211-23; 224-30). Five (5) fired 9mm shell casings were found at the crime scene near where Applicant fired his 9mm pistol. In his final statement to police, after admitting the .22 pistol was not used in the murder, Applicant took police to a location near his residence where he test fired the 9mm pistol actually used in the murder long before the murder even occurred. Shell casings from this location were forensically matched to those found at the crime scene. All were fired by the same 9mm pistol.

The gun recovered from Applicant's home was relevant and admissible as it established Applicant initially deceived and misled police in his initial statement regarding which gun was used in the shooting by him, which was evidence of an attempt to hide and conceal evidence and evidence of consciousness of guilt. See State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999)(attempts to hide or destroy evidence are relevant and admissible as incriminating evidence of guilt); State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946)(similar). Its probative value outweighed any prejudicial effect. Rule 403, SCRE. And its admission, if prejudicial at all, was not unfairly prejudicial.

Furthermore, the .22 revolver was relevant and admissible because it corroborated Applicant's final confession in which he admitted to misleading police about the .22 pistol and that it was in fact the 9mm pistol he used in the murder. Simply because a jury has found a

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statement of a defendant was voluntary and therefore can be considered by it, the jury is not required to accept as true all of the statement, but may find none of it credible or believable, only part of it credible, or all of it believable. State v. Young, 238 S.C. 115, 119 S.E.2d 504 (1961)(after a jury has found a statement admissible, it may nevertheless accept as fact all of the statement, a part of the statement, or none of the statement at all, the same as if they were judging the credibility of a witness's testimony); State v. Clinkscales, 231 S.C. 650, 653, 99 S.E.2d 663, 664 (1957)(even though a jury accepts a written confession as having been voluntarily made, it is not thereby bound to accept every statement contained in it as true; for it is the sole judge of its credibility, and may believe it all, or in part, or not at all; and, it is unreasonable to assume that these matters are within the knowledge of the average juror; he should be informed of them by the Court); State v. Brown, 212 S.C. 237, 47 S.E.2d 521 (1948)(same or similar); State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947)(same); State v. Baker, 58 S.C. 111, 36 S.E. 501 (1900).

Therefore, the State may prove to the jury that the statement of the defendant is in fact true and accurate by showing that the statement itself is corroborated by other evidence. State v. Bullock, 235 S.C. 356, 111 S.E.2d 657 (1959)(pocket book found in cemetery was admissible because it corroborated the defendant's confession), *reversed on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); United States v. Waller, 326 F.2d 314 (4th Cir. 1963)(confession was sufficiently corroborated with evidence of its trustworthiness), *citing* Opper v. United States, 348 U.S. 84 (1954); *see also* State v. Osborne, 335 S.C. 172, 516 S.E.2d 201 (1999). As a result, the .22 revolver was admissible for this reason as well. Its probative value outweighed any prejudicial effect. Further, prejudicial, its admission was not unfairly prejudicial.

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Although it was not forensically matched to any bullets or shell casings recovered from the scene, the pistol was relevant and admissible for the reasons stated above. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)(evidence is relevant and admissible if it tends to establish and make more or less probable some matter in issue upon which it directly or indirectly bears); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)(evidence which assists a jury at arriving at the truth of an issue is relevant and admissible, unless otherwise incompetent); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989)(the evidence in question need not be sufficient in itself to establish the whole or any definite portion of a parties contention). See State v. McWee, 433 S.C. 307, 472 S.E.2d 235 (1996)(whether evidence is relevant and admissible is in the sound discretion of the trial judge): State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989)(a trial judge's determination of admissibility of evidence will not be disturbed on appeal absent a showing of abuse of discretion that has resulted in prejudice to the complaining party); State v. Douglas, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004)(great deference is given to a trial judge's decision regarding the comparative probative value and prejudicial effect of evidence with the judgment of the trial judge only being reversed in exceptional circumstances), *affirmed in part, reversed in part* 369 S.C. 424, 632 S.E.2d 845 (2006); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004)(same or similar); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004)(similar); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

As a result, any objection by counsel to the admission of the .22 firearm into evidence would have been overruled. Applicant cannot show and has not shown deficient performance or resulting prejudice. Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(IAC claims based on a failure to object to the admission of evidence are tied to the underlying admissibility of the evidence; if the evidence was admissible in any event even if an objection had been made, then

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the applicant has failed to prove either prong of the Strickland test as counsel was neither deficient nor was the applicant prejudiced by the failure to object).

Furthermore, Applicant cannot show any resulting prejudice from the admission of the .22 pistol. Strickland. It was conceded at trial that the weapon did not match any weapon used at the crime scene and was not the murder weapon. An officer testified to the recovery of the .22 at Applicant's home at the direction of Applicant. Applicant admitted at trial he lied to police and misrepresented the .22 as the gun he used on the night of the murder, knowing it was the 9mm he actually used. Applicant admitted at trial he led police to the .22 pistol. Its' admission was therefore cumulative and harmless beyond a reasonable doubt. See State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008)(admission of statement taken in violation of Miranda was harmless where statement was cumulative defendant testified to same matter, as did a co-defendant, and a police officer); State v. Henderson, 334 S.E.2d 519 (Ct. App. 1985)(error in admitting statement of defendant was harmless beyond a reasonable doubt where defendant's testimony was cumulative to his statement, and where the state had other evidence). As a result, Applicant has failed to prove resulting prejudice from counsel's alleged failure to object. Strickland. The weapon's relevance and the reason for its admission was it established Applicant's misleading police in his initial statement which was evidence of consciousness of guilt and it corroborated his final confession to police.

Furthermore, given the entire record, and the evidence of mutual combat between Applicant and his co-defendant, Applicant has failed to show had counsel objected to the admission of the .22 pistol and the objection been sustained, that there is a reasonable probability the result of the trial would have been different. Strickland. Therefore, for this reason as well,

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Applicant has failed to establish Strickland prejudice; and, as a result, this ground has no merit and must be denied and dismissed with prejudice.

Alleged IAC for failing to object to a firearm demonstration in the courtroom

There is no merit to this ground. This Court finds counsel was not deficient in failing to object to a firearm demonstration in the courtroom nor was Applicant prejudiced by the failure to object. Strickland v. Washington.

Prior to trial, Judge Keesley explained to the jury the South Carolina Supreme Court's Order regarding the handling of firearms that are admitted in evidence. Other than when a witness was demonstrating something in the courtroom, the gun and ammunition were to remain separate, i.e. in the Clerk's possession. Judge Keesley further explained the jury could not have a gun and ammo in the jury room at the same time, even if both had been admitted in evidence. (R. 298).

The only firearm's demonstration that was conducted in the courtroom before the jury was conducted by the State's firearms expert who was simply demonstrating how a revolver [admitted in evidence] is fired and that a revolver does not eject shell casings when fired. (Trial R. 1047-49).¹⁴ The gun used in this demonstration was a .32 revolver that had been admitted in evidence [State's Ex. 82] because it was the gun used by a co-defendant/witness, Oliver Feldman, who admittedly fired the weapon several times at the crime scene at Applicant. (R. 1047-49; 1170-73. 1282-84).). Such demonstration by the expert was relevant and admissible and not objectionable as it explained why no fired .32 caliber shell casings were found at the

¹⁴The 9mm fired by Applicant and the .380 fired by Patterson were never recovered. As a result, at trial the Solicitor sought to have the firearms examiner or expert conduct a demonstration regarding how a 9mm semiautomatic and a .380 semiautomatic function with firearms not related to this case. Trial counsel objected and the trial judge sustained the objection. (R. 1055-67). As a result, the only firearm demonstration conducted before the jury was that of the .32 pistol which had been admitted in evidence. (R. 1047-49)

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crime scene when fired 9mm and fired .380 caliber shell casings were found at the crime scene and it also explained how fast the weapon could be fired. (R. 1047-49; 1035-1108). See State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996)(allowing courtroom demonstration of murder weapon); State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961)(similar); State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941). The record also reflects the weapon was unloaded at the time of the demonstration and pointed at the floor and away from the jury or anyone on the courtroom. (R. 1055-1067). This Court finds based on this record, and the fact that this weapon was in evidence and admittedly fired at the crime scene at the time of the murder, any objection by counsel to the demonstration by the firearms expert would have been overruled by the trial judge. Brisbon; McIver; Mishoe. As a result, Applicant has failed to prove deficient performance or resulting prejudice. Strickland v. Washington; Butler v. State; Hough v. Anderson. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Furthermore, this Court finds Applicant has failed to show there is a reasonable probability had counsel objected to this firearm demonstration, and the objection been sustained and the demonstration not permitted, there is a reasonable probability of a different result at trial. Strickland. Based on the entire record, including the evidence of mutual combat between Applicant and his co-defendant, and the testimony of the firearms expert and others regarding how a revolver does not eject shell casings, the firearm demonstration itself had no impact on the jury's verdict. (R. 433-34; 1035-1108). Therefore, this Court finds for this reason as well, Applicant has failed to prove resulting prejudice. Strickland. As a result, this ground has no merit and must be denied and dismissed with prejudice.

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Alleged IAC for failing to conduct a proper pre-trial investigation of what the co-defendant was going to testify to and removing the motion to prohibit the co-defendant from testifying

There is no merit to this ground. Applicant alleges that had counsel properly conducted a pre-trial investigation into what a co-defendant, Oliver Feldman ("Feldman"), was going to testify to, counsel would have known the witness was going to change his testimony from a previous written statement, and counsel would not have removed a motion to prohibit Feldman from testifying and could possibly have prevented Feldman from testifying in his trial.

The issue initially arose through a pre-trial motion filed by trial counsel. In a pre-trial motion hearing, trial counsel moved to suppress the testimony of co-defendant Oliver Feldman if he testified differently than his initial statement to police. (See R. 264-65; 284). Feldman was also charged with murder, but was not tried with Applicant and Patterson as he had agreed to cooperate with the State and testify truthfully in Applicant and Patterson's trial. After counsel was informed by the Solicitor, Luck Campbell, that to her knowledge, Feldman had not changed his statement, counsel withdrew the motion to suppress Feldman's testimony. (Id.)

Feldman was later called as a witness by the State during the trial and testified under oath. Feldman testified he was present at the crime scene at the time of the murder with co-defendant Patterson. Feldman testified he fired his .32 caliber revolver at a person at the back of the Waffle House parking lot [Applicant] who was shooting at him. Feldman admitted that in his statement to police he said or believed there were two (2) shooters, one (1) near a black vehicle and one (1) near the corner of the Waffle House, shooting at him. Feldman testified at trial that while he said this in his statement to police, he now believed he was or could have been mistaken because he never saw the shooter's face and the shooter near the black vehicle and the shooter near the corner of the Waffle House were both wearing the same black clothing. Feldman

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testified he now believed there was only one (1) shooter. Outside the presence of the jury, Applicant's trial counsel objected and renewed its motion to suppress Feldman's testimony and moved for a mistrial. (R. 800-07; 808-826). Both motions were denied by Judge Keesley who found it was a proper matter for cross-examination and impeachment whether Feldman's sworn testimony was different from prior statements to police or law enforcement. (R. 800-07; 808-826). After testimony resumed, the Solicitor brought out that Feldman originally told police he believed there were two (2) shooters. Trial counsel also cross-examined Feldman and brought out his prior inconsistent statement to police that there were two (2) shooters shooting from the back area of the Waffle House parking lot. (R. 827-50).

First, there is no merit to this ground because counsel did investigate what Oliver Feldman would testify to by reviewing his statement to police given prior to trial. Further, at the pre-trial motion hearing, counsel was assured by the Solicitor, that based on her knowledge, Feldman would not testify differently than what was in his written statement. As a result, this Court finds that counsel was not deficient in investigating what Feldman would testify to at trial. Strickland. The fact that the witness testified to something new or different once on the stand and under oath does not mean counsel was deficient in their investigation. Id.

Second, there is no merit to this ground because counsel, whether they withdrew the motion to suppress Feldman's testimony pre-trial or not, could not prohibit or stop the co-defendant Feldman from testifying. Applicant could not prevent Oliver Feldman from testifying whether he changed his statement or not. Feldman was an eyewitness and participant in the crime. Whether Feldman's testimony differed from his prior statement or statements to the police went to the weight and credibility of Feldman's testimony, a matter for the jury, not its admissibility. As a result, counsel was simply not deficient nor could they be. Strickland.

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Third, there is no merit to this ground because Applicant could have impeached Feldman on any discrepancy between his trial testimony and any previous statement given to law enforcement, a matter permitted by and for cross-examination, and in fact did so. (R. 827-50 [witness cross-examined or impeached on his prior statement and timing of his alleged change of his testimony, all occurring before the jury]). As a result, Applicant has failed to prove deficient performance on the part of trial counsel or resulting prejudice under this ground. Strickland v. Washington. Applicant has failed to show (1) that counsel was deficient for not further investigating what the Feldman would have testified to and removing a motion to prohibit his testimony. And, (2) Applicant has failed to show had counsel further investigated what Feldman would testify to and not removed the motion to prohibit his testimony, that there is a reasonable probability that the trial court, Judge Keesley, would have granted the motion and prohibited the co-defendant from testifying and the result of the proceeding would have been different. Strickland.

The record shows when Feldman testified and allegedly changed his statement, counsel immediately objected, renewed their motion to prohibit his testimony, and moved for a mistrial. The objection was overruled and both motions were denied by Judge Keesley. (R. 800-07; 808-826 [motion to suppress witness' testimony renewed and denied, motion for mistrial denied]). As a result Applicant has failed to prove deficient performance or resulting prejudice because the motion to suppress and the motion for a mistrial were both made by counsel and denied by the trial judge. Strickland. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Finally, this Court finds even if counsel had been able to somehow successfully keep out Oliver Feldman's testimony, Petitioner has failed to prove resulting prejudice. Strickland.

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Based on all of the other evidence admitted at trial, including the testimony of the eyewitnesses, Applicant's own statement to police, the physical evidence introduced at trial, and Applicant's own testimony, this Court finds there is no reasonable probability Applicant would have been found not guilty instead of guilty. Id. As a result, this ground has no merit and must be denied.

Alleged IAC in failing to move for a change of venue

Applicant alleges his counsel was ineffective in failing to move for a change of venue because there was pretrial publicity involving his case. There is no merit to this ground.

Applicant was not entitled to a change of venue as a matter of right. Motions for a change of venue are addressed to the sound discretion of the trial judge, and the decision of the trial judge shall not be reversed absent a showing of abuse of his discretion. State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978); State v. Thomas, 268 S.C. 343, 234 S.E.2d 16 (1977); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959).

Even where there has been pre-trial publicity regarding a case, Applicant is not entitled to a change of venue as a matter of right. State v. Fowler, 266 S.C. 203, 222 S.E.2d 497 (1976); State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976); State v. Swilling, 249 S.C. 541, 155 S.E.2d 607 (1967). Under South Carolina law, the relevant question in determining whether a change of venue is required "is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." Sheppard v. State, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004). The issue is whether if a juror has been exposed to pre-trial publicity, that juror can set aside what they heard or read and decide the case based solely on the evidence presented in the courtroom. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013); State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). It is the defendant's burden to demonstrate actual

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juror prejudice resulted as a result of such publicity. Sheppard, 357 S.C. at 655, 594 S.E.2d at 467.

This Court has thoroughly reviewed the voir dire of the jury pool regarding this case and finds that the record does not support a finding that Applicant would have been entitled to a change of venue or that his jury was not fair and impartial. (R. 45-126; 13). Stanko, 402 S.C. 252, 741 S.E.2d 708; Evins, 373 S.C. 404, 645 S.E.2d 904; Tucker, 334 S.C. 1, 512 S.E.2d 99. Each of those jurors qualified to serve in this case testified under oath that they would disavow any outside information about the case and decide the case based solely on the evidence presented in the courtroom. Each juror also swore under oath that they were impartial and would remain impartial to both the State and the Applicant. (R. 45-126; 13). Applicant has not proved by any credible evidence that had counsel moved for a change of venue, he would have been legally entitled to one or one would have been granted. Strickland v. Washington; Butler v. State; Stanko, supra; Evins, supra; Sheppard, supra. As a result, Applicant has failed to prove deficient performance or resulting prejudice. Strickland; Butler; Stanko; Evins. Nor has Applicant proved by any credible evidence that had counsel moved for a change of venue and such had been granted, that there is a reasonable probability he would not have been found guilty but would have been acquitted. Strickland; Butler. Therefore, there is no merit to this ground and it must be denied and dismissed with prejudice.

Alleged IAC in failing to challenge Juror 280's impartiality

There is no merit to this ground. This Court has carefully reviewed the voir dire of Juror 280 and finds the Juror was fair and impartial. (R. 89, ln. 7 – 92, ln. 7).

This Court finds Applicant has failed to meet his burden with respect to this allegation. While the Sixth and Fourteenth Amendments to the United States Constitution provide a

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defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. State v. Stanko, 376 S.C. 571, 577, 658 S.E.2d 94, 96-97 (2008); *see also* State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (a defendant is not entitled to the jury of his or her choice); Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 765 (“a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury”). The Constitution, after all, “does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” Stanko at 97, 658 S.E.2d at 576 (*citing* Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)).

The process of jury selection inherently falls within the expertise and experience of trial counsel. Magazine at 617, 606 S.E.2d at 764 (*citing* Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)). In a PCR proceeding, an applicant must provide credible evidence that the trial attorney’s refusal to strike a juror prejudiced the defense.

This Court specifically finds that Applicant’s claims regarding this Juror are not credible. Specifically, when asked whether this Juror knew anything at all about the case, the Juror responded that he did and came forward to speak with the trial judge, Judge Keesley, privately. The Juror disclosed not only that he had heard or read something about the case in the news media, but that he also worked for the Midlands Community Development Corporation, and there was associated with the Midlands Community Development Corporation the BWright intervention program, for at risk teenagers, which was named after the victim in the present case. The Juror testified that he did not work for the BWright intervention program but the Midlands Community Development Corporation and there were a lot of other programs associated with the Midlands Community Development Corporation besides the BWright intervention program.

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The Juror testified he specifically worked with young children, not at risk teenagers and the BWright program. The Juror also testified the only thing he knew about the case was that a young man, the victim, was shot and killed at a gas station. The Juror testified under oath he could set aside anything he had heard, seen, or read about the case and decide the case solely on the facts and evidence presented in the courtroom. He also testified the fact that he worked for the Midlands Community Development Corporation would have no effect on his ability to be fair and impartial. Judge Keesley, after questioning the Juror extensively under oath, found the Juror to be fair and impartial and qualified to serve in the case. (R. 89, ln. 7 - 92, ln. 7).

Applicant has failed to present any credible evidence that his right to a trial by a competent and impartial jury was violated. Applicant has not presented any evidence that counsel's failure to move to strike this juror "for cause" resulted in an unfair or impartial jury.

This Court agrees with Judge Keesley's determination. This Court finds that while the Juror was aware of the intervention program named after the victim, he did not work for that program but a completely different program under the Midlands Community Development Corporation. And, the Juror had only very limited knowledge of the case through outside sources. Furthermore, the Juror testified credibly under oath that he could set aside anything he had heard outside the courtroom and decide the case based solely on the evidence presented at trial. Finally, the Juror testified the fact that he worked for the Midlands Community Development Corporation, not the BWright intervention program, would have no effect on his ability to be fair and impartial in the case, and he would decide the case based solely on the evidence presented in the courtroom. (R. 89, ln. 7 - 92, ln. 7). Since, the juror was fair and impartial, Applicant has failed to prove counsel was deficient in not objecting to the Juror's alleged impartiality. Furthermore, this Court finds that had counsel raised such an objection to

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the Juror, the objection would have been overruled by Judge Keesley who found on the record the Juror was fair and impartial after a thorough voir dire. (See R. 89, ln. 7 – 92, ln. 7). Therefore, Applicant has failed to show resulting prejudice. Strickland. Finally, Applicant has failed to prove there is a reasonable probability had this Juror been somehow removed, a jury of different composition would have found him not guilty based on this record. Strickland. As a result, Applicant has failed to prove resulting prejudice. Id. This allegation is therefore denied and dismissed.

Alleged IAC in failing to request a competency hearing

Applicant alleges counsel was ineffective for not requesting a competency hearing before his trial. Applicant alleged because of his age and things that occurred after his arrest but before trial, he was not competent to stand trial. There is no merit to this ground for the following reasons:

As previously set forth, in a PCR action, "[t]he burden of proof is on applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002)(citing Rule 71.1(e), SCRPC); Strickland, 466 U.S. 668; Butler, *supra*; Cherry, *supra*. The applicant must prove (1) counsel's performance was deficient and (2) resulting prejudice, i.e. "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Failure to prove either prong of the Strickland test results in failure of the claim. Strickland, 466 U.S. at 687; Fields v. Attorney Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992). "A court may always begin with the prejudice prong if it desires, and if a petitioner does not meet his burden of satisfying it, then the reviewing court need not consider the performance prong." Malcom v. United States, 2013 WL 3940775 (D.S.C. 2013)(Not Reported in

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F.Supp.2d)(quoting Fields, 956 F.2d at 1297).

As a beginning point, a criminal defendant is presumed to be sane and competent to stand trial, and it is presumed that a defendant has the requisite capacity to be held responsible for the commission of a crime. State v. Smith, 298 S.C. 205, 379 S.E.2d 287 (1989). The fact that a defendant has committed a heinous offense is not conclusive evidence that a defendant is incompetent or insane. State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951). Similarly, it is to be expected that a defendant facing serious charges and a potential lengthy sentence will be depressed or plagued with feelings of hopelessness, however, such depression or feelings will not render a defendant incompetent to stand trial or to assist in his defense. Patterson v. State, 253 S.C. 382, 171 S.E.2d 235 (1969).

Due process prohibits the conviction of a person who is mentally incompetent. Bishop v. United States, 350 U.S. 961 (1956); Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992); Matthews v. State, 358 S.C. at 458, 596 S.E.2d at 50. "The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003), citing State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). See Godinez v. Moran, 509 U.S. 389 (1992)(same); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980). The mental competency of a defendant to stand trial is a baseline inquiry by the court. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000).¹⁵

¹⁵That a defendant may have some difficulty in understanding the procedures by himself will not preclude a finding of competency, where a defendant's counsel can explain any procedures or discuss any matters with the defendant. Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993). Thus in Sims, where the defendant was medicated and had difficulty understanding the factual and legal proceedings by himself, it was sufficient for purposes of determining competency if

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A PCR applicant must prove he was incompetent to stand trial by a "preponderance of the evidence." Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004), *quoting* State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998); Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011).¹⁶ See also Ramirez v. State, 413 S.C. 351, 776 S.E.2d 101, 110 (Ct. App. 2017)(in order to show prejudice within the context of plea counsel's failure to fully investigate a PCR applicant's mental capacity, the applicant need only show a reasonable probability that he was either insane at the time the crime was committed¹⁷ or incompetent at the time of the plea), *affirmed in part, reversed in part*, Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017). This is the correct legal standard for determining prejudice when the PCR applicant raises a claim such

these matters could be explained to the defendant one-on-one by his attorney. The Sims Court analogized this procedure to an attorney representing a person who does not speak or understand the English language and must have matters translated. Although time consuming, such a process does not render the defendant incompetent.

¹⁶The fact that a defendant bears the burden of proving his incompetence by a preponderance of the evidence does not violate due process. Medina v. California, 505 U.S. 437 (1992). Although a state may presume a defendant is competent to stand trial and require a defendant prove his incompetence by a preponderance of the evidence, it may not require a defendant prove his incompetence by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

¹⁷See S.C. Code Ann. Section 17-24-10 (defining insanity); Lewis, 328 S.C. 273, 494 S.E.2d 115; State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973); S.C. Code Ann. Section 17-24-20(A)(2003)(defining guilty but mentally ill [GBMI]; State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)(GBMI statute does not violate due process). Under South Carolina law insanity is defined as the inability to appreciate right from wrong in the act itself, not that one cannot form the *mens rea* necessary to commit the crime. S.C. Code Ann. Section 17-24-10 (2003); Lewis, supra ("[The key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong'."], *quoting* State v. Wilson, 306 S.C. 498, 413 S.E.2d 19(1992); State v. Senter, 396 S.C. 547, 722 S.E.2d 233 (Ct. App. 2011)(same); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)(S.C. does not recognize the defense of diminished capacity, i.e. because of mental disease or defect the defendant could not form the *mens rea* necessary to commit the crime); State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006)(rejecting diminished capacity relying on Gill). Applicant does not claim he was insane at the time of the crime and did not call any psychiatric expert at PCR to establish he was in fact insane at the time of the crime. Hall, 360 S.C. 353, 601 S.E.2d 335, *quoting* Reed, 332 S.C. at 39, 503 S.E.2d at 749; Lee, 396 S.C. 314, 721 S.E.2d 442; Mathews, 358 S.C. at 458-59, 596 S.E.2d at 51; Jeter, 308 S.C. at 232, 417 S.E.2d at 586.

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as the one raised here. Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018); Ramirez v. State, *supra*.

This Court finds Applicant has failed to meet his burden of proof to show he was either insane at the time of the crime or incompetent to stand trial at the time of his trial. Hall v. Catoe. Applicant called no expert witness to testify at the PCR hearing that he was insane at the time of the crime or incompetent to stand trial at the time of his trial. Applicant introduced no medical records, reports, or other such evidence at the PCR hearing to establish he was insane at the time of the crime or that he was incompetent to stand trial at the time of trial. This Court finds Applicant's testimony that he was incompetent to stand trial at the time of the trial was not credible. As Applicant introduced no psychiatric, psychological, or pharmacological testimony, or medical records or reports at the PCR hearing to corroborate his non-credible claim that he was not competent to stand trial, Applicant failed to prove deficient performance or resulting prejudice. See Garren v. State, (reversing PCR judge's determination counsel was deficient and petitioner was prejudiced by failure to have competency evaluation done where no expert testimony was offered at the PCR hearing that Petitioner was in fact incompetent at the time of his plea); McLaughlin v. State, (PCR judge erred in granting relief on basis defendant was not competent to stand trial when (1) counsel testified at PCR he had no trouble communicating with defendant; (2) the trial transcript showed defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated defendant prior to trial and found the defendant's medical conditions did not affect his mental state), *cited in* Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335; Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008)(defendant's testimony expert would have helped his case was merely speculative where he called no expert to testify at PCR); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815

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(2005)(as applicant failed to have an expert testify at evidentiary hearing, "any finding of prejudice is merely speculative."); Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)(the Court will not speculate concerning what might have occurred if counsel had conducted further investigation); See State v. Colden, 372 S.C. 428, 641 S.E.2d 913 (Ct. App. 2007)(court did not err in refusing to grant motion for mental competency evaluation, where judge questioned defendant, and defendant conclusively revealed his ability to answer questions rationally, appropriately, and on point; defendant demonstrated a manifest understanding of the proceedings, the roles of the various participants, and the charges he was facing, and defendant offered nothing to demonstrate his mental state was such as to render him unfit to stand trial; additionally, there was no evidence of irrational behavior before or during trial, or medical opinion concerning competency as to require evaluation). See also Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998)(state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)(prejudice from counsel's failure to investigate or call witnesses cannot be shown where the witnesses do not testify at PCR); ¹⁸ Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993)(Applicant's mere speculation as to what a witnesses' testimony would have been

¹⁸Federal authority is in agreement. See Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996)(rejecting IAC claim for failing to present mitigation evidence, where there was no proffer of this testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991)(applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense," rather, facts must be presented).

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cannot, by itself, satisfy his burden of showing prejudice); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(same).

This Court had the opportunity to view and judge Applicant's testimony at the PCR hearing and finds Applicant's testimony that he was incompetent to stand trial at the time of trial was simply not credible. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).¹⁹ In fact, based on this Court's review of the record, Applicant's claim in his PCR testimony that he was incompetent to stand trial is not credible given his colloquy with the trial court before testifying at trial (R. 1349-59) and his testimony before the jury (R. 1378-1427). It is also not credible given the testimony at the Jackson v. Denno hearing prior to Applicant's trial. (R. 193-235). And, Applicant's testimony at PCR under both direct and cross-examination also shows that he was in fact competent to stand trial at the time of trial. See Garren v. State, *supra*; Compare Ramirez v. State, *supra*.

This Court also had the opportunity to view and judge counsel's testimony at the PCR hearing as well. Drayton v. Evatt, *supra*. This Court finds credible counsel's testimony that she had no problem communicating with Applicant in preparing for trial or at the time of trial. See Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (counsel may reasonably rely on her own perceptions in deciding whether a client is competent to stand trial). Counsel's credible testimony in this regard is supported by Applicant's trial testimony before the jury (R. 1378-1427) and his colloquy with the trial court before testifying. (R. 1349-59). Counsel's testimony

¹⁹In determining whether a defendant is in fact competent to stand trial, a trial judge is not bound by the opinions or views of expert witnesses. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). See also Kelly, 331 S.C. 132, 502 S.E.2d 99 (where expert testified defendant was not competent to proceed with penalty phase, trial court did not err in finding defendant was competent where same expert testified defendant possessed rational understanding of courtroom proceedings, understood role of judge, prosecutor, defense counsel and jury, and followed advice of counsel not to testify, although ignored advice of counsel not to make closing statement to jury); State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004).

PMB

at the PCR hearing that in hindsight she regrets she did not have Petitioner evaluated for competency because of his age and his claims at the PCR hearing, while understandable, given her sympathy for a client she believes should not have been convicted, is not controlling on this issue. See Strickland (reviewing court must remove from its analysis the distorting effects of hindsight, and judge counsel's conduct by what counsel knew and did at the time). There is simply no credible evidence in the record, that Applicant was incompetent to stand trial at the time of his trial.

Finally, this Court has carefully reviewed Applicant's testimony at trial in his own defense (R. 1378-1427), and his colloquy with the trial court prior to testifying (R. 1349-59), and it is clear that Applicant was not incompetent to stand trial but fully competent to stand trial. See State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002)(if a question as to the defendant's competency arises during a criminal proceeding, it is the duty of the trial judge to determine the defendant's competency; and, deferring to trial judge who had the ability to view the defendant and his behavior). As a result, there is no merit to this ground as Applicant has failed to show either deficient performance on the part of counsel or resulting prejudice. Strickland v. Washington; Washington v. Johnson, 90 F.3d 945 (5th Cir. 1996)(counsel not ineffective for failing to pursue evidence of petitioner's incompetency where petitioner was in fact competent to stand trial).

As a result, this Court finds Applicant cannot satisfy the first (1st) prong of the Strickland analysis, which required Applicant prove that counsel provided representation falling below an objectively reasonable standard. Strickland. Because Applicant's testimony was not credible, counsel's PCR testimony regarding Petitioner's competency at the time of trial was credible, and Applicant introduced no credible evidence at PCR he was in fact insane at the time of the crime

PMB

or incompetent at the time of his trial, Applicant failed to prove deficient performance on the part of counsel. Id

Further, this Court finds Applicant failed to satisfy the second (2nd) prong of the Strickland analysis, which required Applicant prove he was prejudiced by counsel's ineffective representation. Although Applicant claimed a mental evaluation should have been conducted to determine whether he was competent, Applicant provided no expert testimony or report regarding his competence to stand trial. His testimony that he was not competent was not credible. And, the trial record reveals he was completely competent. Therefore, this Court finds Applicant has not shown how he was prejudiced by any of his attorney's alleged failings regarding his competency. Strickland. As such, this allegation is appropriately denied.

Alleged LAC in failing to object to the Solicitor vouching for the credibility of State's witness Oliver Feldman

Applicant contends the Solicitor was improperly vouching for a witness when she argued in closing argument that the witness' testimony was credible because the witness' testimony was corroborated by other evidence. There is no merit to this ground.

This Court has reviewed the entire record in this case, including the closing argument of the Solicitor (R. 1480-1513; 1563-90). This Court has carefully reviewed the portion of the Solicitor's closing argument to which Applicant alleges counsel should have objected, (R. 1485, 1510-13; 1565, 1569-75, See also R. 1576-90). The Solicitor did not improperly vouch for or bolster the credibility of the witness. The Solicitor was properly arguing the credibility of the witness based on the evidence admitted in the case.

In a closing argument, a prosecutor has the right to give her version of the testimony and to comment on the weight to be given to the testimony of the witnesses. State v. Raffaldi, 318

S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468 224 S.E.2d 881 (1976); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971). So long as a prosecutor stays within the record and draws reasonable inferences from the record, any argument is appropriate. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). A prosecutor may argue reasonable inferences from the evidence, especially where the case is circumstantial in nature. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). A prosecutor may state the law to the jury, and argue its application to the facts of the case being tried. State v. Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988). A prosecutor may argue to a jury to return a verdict that she conceives it is their duty to return based upon the evidence presented in the trial. State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976).

It is permissible for a prosecutor, or any attorney, to characterize the credibility of witnesses presented by either the State or the defense, provided the statements are not inflammatory or excessive. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (Ct. App. 2003); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). In a closing argument, the comparison of the credibility of witnesses presented by the prosecution and the defense does not constitute witness pitting. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). Although it is proper for a party to characterize the credibility of a witness, inflammatory characterizations, e.g. that a witness is a "liar" are deemed improper. State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds, on cert.*, 352 S.C. 203, 573 S.E.2d 802 (2002); State v. Davis, 88 S.C. 229 70 S.E. 811 (1911). It is permissible for the prosecutor to argue that the testimony of the state's witnesses was credible, even though they were of the defendant's "ilk" and not "sterling

citizens.” State v. Gather, 295 S.C. 476, 369 S.E.2d 140 (1988). *See also* State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999)(prosecutor’s argument that codefendant had received nothing in exchange for his testimony, and would return to prison as “a rat”, was not improper bolstering, although such testimony was not presented in trial that witness would be ill-treated as a rat, it is a matter of common knowledge and a reasonable inference drawn from the record, which reflected upon the witness’ credibility).

Although a party may argue the credibility of a witness, it is improper to make remarks that “bolster” or “vouch” for the credibility of a witness by the attorney giving his own personal opinion of the witness’ credibility, or referring to matters outside the record to support the witness’ credibility. Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002); Mathews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 767 (2002); Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004). *See also* State v. Douglas, 380 S.C. 473, 7671 S.E.2d 600 (2009).

This Court finds the Solicitor was not improperly “vouching” for or bolstering the credibility of the State’s witness, which is prohibited. *See* Gilchrist. (a prosecutor may not “vouch” for a witness’ testimony, i.e. argue the witness is credible based on the prosecutor’s own personal opinion or information in the prosecutor’s knowledge but not before the jury). Instead, this Court finds the Solicitor was arguing the credibility of the State’s witness based on the fact his testimony was corroborated by other evidence in the case, which is entirely permissible. Caldwell (A prosecutor may argue that a witness is credible based on the witness’ testimony or other evidence in the case); Rudd (same or similar); New (same). This Court finds the Solicitor was properly arguing the credibility of the witness’ testimony based on other evidence introduced in the case which is permissible. Caldwell; Rudd; New.

Ans

This Court finds that had counsel objected to the Solicitor's closing argument as Applicant argues, the objection would have been overruled because the Solicitor's argument was proper and permissible. As a result, Applicant has failed to prove deficient performance. Strickland v. Washington; Butler v. State

Further, this Court finds that Applicant cannot show and has not shown that had counsel objected as he argues counsel should have, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington; Butler v. State. First, as stated above, the objection would have been overruled as the Solicitor's argument was entirely permissible and proper. Second, given the evidence in the record, Applicant cannot show had an objection been made and for some reason the trial court had sustained the objection, there is a reasonable probability the result of the trial would have been different. Id. As a result, for each of these reasons, Applicant has failed to prove resulting prejudice. Id. Therefore, this ground has no merit and must be denied and dismissed with prejudice. Strickland.

ALL OTHER ALLEGATIONS

As to any other allegations raised in Applicant's application or amended applications, no evidence was offered by Applicant at the PCR hearing on those grounds nor did Applicant raise those grounds to this Court. As a result, for the reasons stated below, Applicant waived and abandoned those allegations and failed to meet his burden of proof regarding them.

Applicant had contended in his application that his appellate counsel was ineffective. Respondent contended that 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

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alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) 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.

Applicant also alleged prosecutorial misconduct in his application. Prosecutorial misconduct is not an issue for post-conviction relief (PCR). Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief (PCR) is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on direct appeal but did not. The failure to do so waived this allegation as grounds for relief.

PMB

Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court finds that Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation must be denied and dismissed with prejudice.

As a result of Applicant failing to offer evidence on any grounds other than Grounds 1 through 9 specifically discussed above and addressed by this Court, Applicant has failed to meet his burden of proof to show deficient performance or resulting prejudice on the part of trial counsel or appellate counsel, and applicant failed to meet his burden of proof to show prosecutorial misconduct by the State. Butler v. State; Rule 71.1, SCRCP; Strickland v. Washington; Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983); Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

Further, because Applicant offered absolutely no evidence in support of such grounds. Applicant specifically waived and abandoned such grounds and they must be denied and dismissed with prejudice. Applicant specifically waived and abandoned any other grounds of ineffective assistance of trial counsel than Grounds 1 through 9 previously addressed in this Order. Applicant also specifically waived and abandoned any grounds of ineffective assistance of appellate counsel or prosecutorial misconduct. As a result, those grounds are denied and dismissed as waived and abandoned.

CONCLUSION

For the above stated reasons, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

PMB

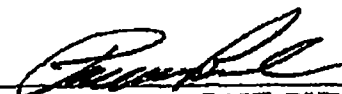
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR, Rule 71.1(g) SCRCP; Bray v. State, 446 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice of intent to appeal has been filed.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 7th day of May, 2019.

Chaterfield, South Carolina


THE HONORABLE PAUL BURCH
Presiding Judge
Fifth Judicial Circuit

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 06 2019

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul Burch, Circuit Court Judge

Case No. 2013-CP-40-6702

Andre T. Boone, #328364,

Appellant,

v.

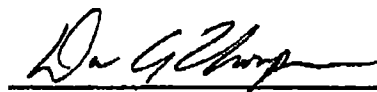
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Andre T. Boone appeals the order of the Honorable Paul Burch dated May 7, 2019.
Appellant received written notice of entry of this order on May 17, 2019.

June 3, 2019



Don A. Thompson
(S.C. Bar No. 5545)
2131 Woodruff Road
Suite 2100, #292
Greenville, S.C. 29607
(864) 270-2831
Attorney for Appellant

Other Counsel of Record:
Lindsey Ann McCallister
Assistant Attorney General
S.C. Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 06 2019

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul Burch, Circuit Court Judge

Case No. 2013-CP-40-6702

Andre T. Boone, #328364,

Appellant,

v.

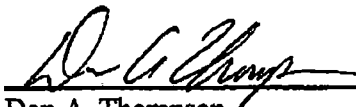
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina (respondent) by depositing a copy of it in the United States Mail, postage prepaid, on June 3, 2019, addressed to the State's attorney of record, Lindsey Ann McCallister, Assistant Attorney General, S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

June 3, 2019



Don A. Thompson
(S.C. Bar No. 5545)
2131 Woodruff Road
Suite 2100, #292
Greenville, S.C. 29607
(864) 270-2831
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 06 2019

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul Burch, Circuit Court Judge

Case No. 2013-CP-40-6702

Andre T. Boone, #328364,

Appellant,

v.

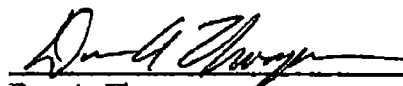
State of South Carolina,

Respondent.

CERTIFICATE OF FILING
WITH RICHLAND COUNTY CLERK OF COURT

I certify that I have forwarded the Notice of Appeal and Proof of Service to the Richland County Clerk of Court, for filing, by depositing a copy of it in the United States Mail, postage prepaid, on June 4, 2019, addressed to The Honorable Jeanette W. McBride, Richland County Clerk of Court, P.O. Box 2766, Columbia, South Carolina 29202-2766.

June 4, 2019



Don A. Thompson
(S.C. Bar No. 5545)
2131 Woodruff Road
Suite 2100, #292
Greenville, S.C. 29607
(864) 270-2831
Attorney for Appellant

WITNESSES

(S) Matthew Ellis - RCSD

ARREST WARRANT NUMBER

1898323

ACTION BY GRAND JURY

TRUE BILL

Person of Grand Jury

APR 19 2007

VERDICT

GUILTY

Foreperson of Petit Jury

Date: 5/13/2008

DOCKET NO. 2007-GS-40-2324

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

APRIL TERM

42

THE STATE
vs.

ANDRE BOONE

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. M. B. B. B.
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on April 18, 2007, the Grand Jurors of Richland County present upon their oath:

MURDER

That ANDRE BOONE did in Richland County on or about February 19, 2007, feloniously, willfully and with malice aforethought, kill one Brian Wright by means of a gunshot wound and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

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



Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATERichland
VS.

AKA:

Race: BSex: M

Age: _____

DOB: 1/30

SS#: _____

Address: _____

City, State, Zip _____

DL# _____

SID# _____

IN THE COURT OF GENERAL SESSIONS

2007 INDICTMENT/CASE#: 40 - 2324A/W#: I 898323Date of Offense: 2-19-07S.C. Code §: 16-3-10CDR Code #: 011116☐ CASE RESTORED
☐ SENTENCE SHEET
☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murderin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ \$17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant Initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
SolicitorAndre T. Boone
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

\$14-1-206 (Assessments 107.5%) _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 _____

\$14-1-211(A)(2) (DUI Surcharge) \$100 _____

\$56-5-2995 (DUI Assessment) \$12 _____

\$35.13 (Public Def/Prob) \$500 _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 _____

\$33.7, 1B TP (Drug Court Surcharge) \$100 _____

\$50-21-114(BUI Breath Test Fee) \$50 _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea _____

3% to County (if paid in installments) _____

TOTAL _____

Barbara A. Scott / v
Clerk of Court/ Deputy ClerkCourt Reporter: S. Sheppard

PTUP _____

days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____

\$ _____ CERTIFIED TRUE COPY _____

Other: OF ORIGINAL FILED,[Signature]

C.C.G.P.&G.S.

RICHLAND COUNTY

☐ Appointing a Public Defender counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE William P. [Signature]Judge Code: 2101510Sentence Date: May 13, 2008

ARREST WARRANT

1-898323

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

THE STATE CASE 07021512-19
against

Andre Tayson Boone

Address: Meadowbury Drive
Columbia, SC 29203-2820Phone: SSN: [REDACTED]
Sex: M Race: B Height: 5 11 Weight: 146
DOB: SC DL #: [REDACTED]
DOB: 1990 Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: Matthew Ellis - 1027

Offense: Murder / Murder

Offense Code: 0116
Code/Ordinance Sec: 16-03-0010, 0020This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Andre Tayson Boone
on 03/02-07

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Personally appeared before me the affiant Matthew Ellis

being duly sworn deposes and says that defendant Andre Tayson Boone

did within this county and state on or about 02/19/2007

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about FEBRUARY 19, 2007 while at 7505 TWO NOTCH ROAD in the DENTSVILLE Magisterial District of Richland County, it is believed one ANDRE TAYSON BOONE did commit the crime of MURDER because he did while engaged in mutual combat murder Brian Wright. The defendant has been identified as a shooter by multiple eyewitnesses. The defendant, a Blood Gang member confessed to being at the Waffle House, having prior ill will and altercations with members of the Folk Gang, did when he saw Folk Gang members armed with guns, retrieve a 9mm gun from the area of his vehicle and started shooting into a crowd in the parking lot. Members of the Folk Gang then shot back. Forensic evidence at the scene corroborated the defendant's statement. The shooting caused the murder of Brian Wright. RCSD Case #07021512-19 Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/19/2007 defendant Andre Tayson Boone

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland / Lykesland Magistrate) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me on 03/02/2007

Signature of Issuing Judge
Michael R Davis

Judge Code: 5458

Judge's Address 1403 Caroline Road

Columbia, SC 29209-2609

Judge's Telephone (803)576-2500

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2009
SCCA 618CERTIFIED TRUE COPY
OF ORIGINAL FILED

Jeannette W. M. S. S. S.
C.C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

07 MAR 13 PM 8:43
BARBARA A. SCOTT
C.C.C. & G.S.

1880

BAIL set by

Judge G.T. COOPER
on 3/9/07
Type and Amount: DENIED
Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision: _____

DISPOSITION before

Judge ES
on 3/9/07
by ES
(indicate jury trial, bench trial, plea, not. pros., etc.)
Disposition: ES
Sentence: ES

JURORS

WITNESSES

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

WITNESSES

(S) Matthew Ellis - RCSD

ARREST WARRANT NUMBER

1898324

ACTION OF GRAND JURY

TRUE BILL

Greg Chiles
Foreperson of Grand Jury
Date:

APR 19 2007

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2007-GS-40-2325

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2007

42

**THE STATE
vs.**

ANDRE BOONE

Indictment for

**BREACH OF PEACE, AGGRAVATED
NATURE**

SC Code: 17-16-30, c/L
CDR Code: 0955
Class FEL/E

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jackie W. Wade
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

1882

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on April 18, 2007, the Grand Jurors of Richland County present upon their oath:

BREACH OF PEACE, AGGRAVATED IN NATURE

That ANDRE BOONE did in Richland County on or about February 19, 2007 did violate the public order causing a disturbance of the public tranquility, by having possession a handgun and shooting the handgun with the intent to incite violence, all in violation of the Common Law of South Carolina.

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

Warren B. Giese
WARREN B. GIESE, SOLICITOR

SCREENING SHEET

1. Prepare this case for Grand Jury: _____
2. Name of Defendant: Andre Dorne
3. DP or Warrant Number: I898324
4. Charge: Breach of Peace
5. Officer/Agency: _____
6. Please Subpoena: _____

Reviewed by: _____
Date: _____

ASOL # _____

☐ Dismiss.
 ☒ NP
 ☐ Remanded
 ☐ Dismissed at Prelim
 ☐ Failure to Appear
 ☐ PTI
 ☐ Restore
 ☐ Judicial Dismissal
 ☐ Other

Council of Murder

Janette W. B. B. B.
C.C.C.P.&G.S.

**RICHLAND COUNTY
SOUTH CAROLINA**

Date of Failure to Appear: _____
Date Bench Warrant Issued: _____

Date:

1-28-08

ARREST WARRANT

-898324

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

THE STATE

CASE 07021512-18

against

Andre Tayson Boone

Address: Meadowbury Drive

Columbia, SC 29203-2820

Phone: SSN: Sex: M Race: B Height: 5 11 Weight: 146

DL: SC DL #: DOB: 1/1990 Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: Matthew Ellis - 1027

Offense: Breach / Breach of peace, aggravated in nature

Offense Code: 0955

Code/Ordinance Sec: C/L, 17-25-0030,

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant on

Andre Tayson Boone
3-2-07

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Personally appeared before me the affiant Matthew Ellis

being duly sworn deposes and says that defendant Andre Tayson Boone

did within this county and state on or about 02/19/2007

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE Breach / Breach of peace, aggravated in nature

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about FEBRUARY 19, 2007 while at 7505 TWO NOTCH ROAD in the DENTSVILLE Magisterial District of Richland County, it is believed that one ANDRE TAYSON BOONE did commit the crime of BREACH OF PEACE, AGGRAVATED because he did along with co-defendants, violate the public order, causing a disturbance of the public tranquility, by having in his possession a handgun while he or someone in the vehicle in which he occupied fired shots. This act was done to incite violence. Witnesses have given statements admitting the same.

RCSD CASE #07021512-19

Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/19/2007 defendant Andre Tayson Boone

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland / Lykesland Magistrate

DESCRIPTION OF OFFENSE: Breach / Breach of peace, aggravated in nature

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 03/02/2007

Signature of Issuing Judge

Michael R Davis

Judge Code: 5458

Judge's Address 1403 Caroline Road

Columbia, SC 29209-2609

Judge's Telephone (803)576-2500

Issuing Court: ☒ Magistrate☐ Municipal☐ CircuitCERTIFIED TRUE COPY
OF ORIGINAL FILEDRichland / Lykesland Magistrate
RICHLAND COUNTY
SOUTH CAROLINA07 MAR 23 AM 9:43
BARBARA A. SCOTT
C.C.C. & G.

BAIL set by

Judge G.T. COOPER
 on 3/9/07
 Type and Amount: DENIED
 Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
 on _____
 Defendant Attorney: _____
 Decision: _____

DISPOSITION before

Judge _____
 on _____
 by _____
 (Indicate jury trial, bench trial, plea, nol. pro., etc.)

Disposition: _____
 Sentence: _____

JURORS

WITNESSES

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

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Name: _____
 Address: _____
 Telephone: _____

CODEFENDANTS

WITNESSES

(S) Matthew Ellis - RCSD

ARREST WARRANT NUMBER

1898326

ACTION OF GRAND JURY

TRUE BILL

Jane C. Lee
Foreperson of Grand Jury
Date:

APR 19 2007

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2007-GS-40-2327

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2007

42

**THE STATE
vs.**

ANDRE BOONE

**Indictment for
UNLAWFUL CARRYING OF PISTOL**

SC Code: 16-23-20, 60(A)(2)
CDR Code: 0044
Class MIS/C

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

**CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. H. H. H. H.
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on April 18, 2007, the Grand Jurors of Richland County present upon their oath:

UNLAWFUL CARRYING OF PISTOL

That ANDRE BOONE did in Richland County on or about February 19, 2007, unlawfully carry about the person a pistol, to wit: a 9mm semi-auto pistol, in violation of §16-23-20, 50(A)(2), Code of Laws of South Carolina, (1976), as amended.

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

Warren B. Giese
WARREN B. GIESE, SOLICITOR



DISCHARGE FROM JAIL

SCREENING SHEET

1. Prepare this case for Grand Jury: _____
2. Name of Defendant: Andre Boone
3. DP or Warrant Number: 1898326
4. Charge: Pistol
5. Officer/Agency: _____
6. Please Subpoena: _____

2007 GS 40 2327

OR

Pending Unindicted

Reviewed by: _____

Date: _____

ASOL # _____

DISPOSITION

☐ Dism.
 ☒ NP
 ☐ Remanded
 ☐ Dismissed at Prelim
 ☐ Failure to Appear
 ☐ PTI
 ☐ Restore
 ☐ Judicial Dismissal
 ☐ Other

Explain: Convicted of murder

OR

Date of Failure to Appear: _____

Date Bench Warrant Issued: _____

Solicitor: Kan C. BooneDate: 1-28-08

CERTIFIED TRUE COPY
OF ORIGINAL FILED,

Jeannette W. M. G. S.
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

ARREST WARRANT

I-898326

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

THE STATE CASE 07021512-19

against

Andre Tayson Boone

Address: Meadowbury Drive

Columbia, SC 29203-2820

Phone: SSN: Sex: M Race: B Height: 5 11 Weight: 146

DOB: SC DL #: 1990 Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: Matthew Ellis - 1027

Offense: Weapons / Unlawful carrying of pistol

Offense Code: 0044

Code/Ordinance Sec: 16-23-0020, 0050

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to the law.

(L.S.)

Signature of Judge

RETURN

A copy of this arrest warrant was delivered to defendant Andre TAYSON BOONE

on 3-2-07

D E C O

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Personally appeared before me the affiant Matthew Ellis

being duly sworn deposes and says that defendant Andre Tayson Boone

did within this county and state on or about 02/19/2007

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE Weapons / Unlawful carrying of pistol

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about FEBRUARY 19, 2007 while at 7505 TWO NOTCH ROAD in the DENTSVILLE Magisterial District of Richland County, it is believe one ANDRE TAYSON BOONE did commit the crime of UNLAWFUL CARRY OF A HANDGUN because he did have in his possession and control a 9mm semi-auto pistol which he fired numerous times. The defendant gave a written confession after signing a waiver of rights form and stated that he had the pistol and fired it. A co-defendant also provided a written statement to the same. Witnesses have given statements admitting the same.

RCSD Case #07021512-19

Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/19/2007 defendant Andre Tayson Boone

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland / Lykesland Magistrate) as set forth below;

DESCRIPTION OF OFFENSE: Weapons / Unlawful carrying of pistol

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 03/02/2007

(L.S.)

Signature of Issuing Judge

Michael R Davis

Judge Code: 5458

Judge's Address 1403 Caroline Road

Columbia, SC 29209-2609

Judge's Telephone (803)576-2500

Issuing Court: ☒ Magistrate, ☐ Municipal, ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 618

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Richland County
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

BARBARA A. S. OTT
C.C.C.&G.S.

07 MAR 13 AM 11:33

BAIL set by

Judge G.T. COOPER
on 3/9/07
Type and Amount: DENIED
Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision: _____

DISPOSITION before

Judge _____
on _____
by _____
(Indicate jury trial, bench trial, plea, not. pros., etc.)
Disposition: _____
Sentence: _____

JURORS

WITNESSES

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

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Telephone: _____

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CODEFENDANTS

