

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2019-002003

Lester D. Mosley, Jr., #361397.....Petitioner

v.

State of South Carolina.....Respondent

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STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

Lester D. Mosley, #361397

2019 NOV -4 P 3:31

Case No. 2018-CP-39-0318

Applicant,

v.

State of South Carolina,

Respondent.

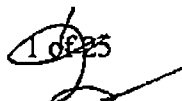
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

ORDER OF DISMISSAL

This matter comes before this Court by way of an Application for Post-Conviction filed on March 2, 2018, by Lester D. Mosley (Applicant). The State (Respondent) filed its Return on August 3, 2018. On November 29, 2018, Applicant filed a Motion to Amend Application for Post-Conviction Relief, which this Courts accepts and will refer to herein as the amended application. An evidentiary hearing in the matter was held before the undersigned on August 29, 2019, at the Greenville County Courthouse. Applicant was present and was represented by William G. Yarborough, III, Esquire, and Lauren Carole Hobbis, Esquire, (both are PCR Counsel). Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Scott David Robinson, Esquire, (Trial Counsel) as a witness. Trial Counsel was called by a witness by Respondent, as was Katherine Haggard Hudgins, Esquire, (Appellate Counsel). Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant

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to orders of commitment of the Greenville County Clerk In July of 2014, the Pickens County Grand Jury indicted Applicant for murder (2014-GS-39-1548), two counts of attempted armed robbery (2014-GS-39-1545; 2014-GS-39-1547;,, possession of a weapon during the commission of a violent crime (2014-GS-39-1546), and first-degree burglary (2014-GS-39-1597). Thirteenth Circuit Solicitor William Walter Wilkins, III, and Assistant Solicitor William Richardson Timmons, IV, prosecuted the case on behalf of the State. Applicant was represented by Trial Counsel. On September 15-17, 2014, Applicant proceeded to a jury trial with the Honorable Edward W. Miller presiding. At the conclusion of trial, Applicant was convicted as indicted on all counts. Judge Miller sentenced Applicant to imprisonment for fifty years for murder, fifty years for first-degree burglary, twenty years for each count of armed robbery, and five years for possession of a weapon during the commission of a violent crime, with all sentences running concurrently, and with credit to Applicant for his time served.

Trial Counsel filed a timely notice of appeal. Appellate Counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on September 10, 2015, and moved therein to be relieved as Applicant's appellate counsel. The South Carolina Court of Appeals denied Appellate Counsel's motion to be relieved and directed the parties to brief specifically the following issue: "[w]hether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations." State v. Mosley, S.C. Ct. App. Order dated December 2, 2016. After the briefing had been completed in the case, the Court granted Applicant's motion to substitute Mr. Yarborough as his appellate counsel in place of Appellate Counsel. State v. Mosley, S.C. Ct. App. dated July 18, 2017. Thereafter, the Court of Appeals affirmed the convictions, and cited the following authorities:

State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant

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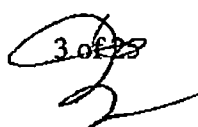
must object at his first opportunity to preserve an issue for appellate review.”); State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) (“The rule in this state is firmly established that failure to object to a charge, when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge.”); State v. Hill, 268 S.C. 390, 395, 234 S.E.2d 219, 221 (1977) (“By failing to object or request additional instructions to the main charge, the appellant waived any objection to similar subsequent instructions.”).

State v. Mosley, 2017-UP-353 (S.C. Ct. App. filed September 6, 2017). The Remittitur was issued on September 27, 2017.

CURRENT PROCEEDING

On March 2, 2018, Applicant, filed an Application for Post-Conviction Relief, in which he alleged that he was being held in custody unlawfully based on his claim that Appellate Counsel failed “to preserve any other arguable issues of merit as directed within the ordered briefing by the South Carolina Court of Appeals.” He further explained therein that he “believes after consideration that there were other issues that should have been preserved for appeal.” In his amended return, Applicant alleged that he was entitled to relief on the following grounds:

1. “Trial counsel was ineffective pursuant to Strickland v. Washington for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the inference of malice and felony murder. The improper instructions diluted the State’s burden of proof to prove Applicant’s guilt beyond a reasonable doubt and shifted the burden to Applicant.”;
2. “Trial counsel was ineffective for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the ‘hand of one hand all’ accomplice liability jury charge. The improper instruction, both in and of itself and together with the aforementioned jury charges on felony murder and inferred malice was prejudicial to Applicant because it was confusing to the jury because Appellant was not tried with his codefendants, diluted the State’s burden of proof to the guilty of Appellant without improper spillover evidence

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from the guilt of his codefendants, as well as improperly shifted the burden to Applicant, whom raised an alibi defense.”;

3. “Trial counsel was ineffective for failing to subpoena cellphone records which would have supported his alibi defense by showing that Applicant was not at the victim’s home the night the charged offenses occurred.”;
4. “Trial counsel was ineffective for failing to sufficiently cross-examine Applicant’s codefendants on their inherent bias in testifying for the State pursuant to a plea agreement.”;
5. “Trial counsel was ineffective for failing to request an adequate jury instruction on the credibility and weight of codefendants’ testimony in light of their inherent bias.”;
6. “Trial counsel was ineffective for failing to object to the admission of evidence of flight and corresponding jury charges.”; and
7. “Trial counsel was ineffective for failing to request an adequate jury instruction on accident, voluntary manslaughter, and involuntary manslaughter.”

At the evidentiary hearing before the undersigned on August 29, 2019, in response to Respondent’s request at the start of the hearing that Applicant specify for the record the grounds upon which he would move forward, Applicant stated that he would move forward solely upon the grounds alleged in the amended application. All other allegations are considered by this Court to have been waived by Applicant and they will not be addressed in this Order.

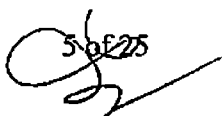
Applicant retained Yarborough to represent him during the late stage of his direct appeal, and Applicant testified at the evidentiary hearing that he does not have any allegations of ineffective assistance of counsel toward his PCR Counsel. The record from Applicant’s direct appeal that shows that Yarborough was retained only after briefing had been completed, and his control over the course of Applicant’s appeal would have been quite limited at that point. This Court finds that Applicant waived at the evidentiary hearing any allegations of the ineffective assistance of counsel as to Yarborough.

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Testimony at PCR Hearing

Applicant first called Trial Counsel as a witness at the evidentiary hearing.¹ Trial Counsel testified that he was appointed to represent Applicant in the underlying criminal case. Trial Counsel had a full-time investigator working with him on the case, and testified that he believes that the investigator's name was Joe Raven. He testified that Applicant's defense was an alibi defense, and that he and the investigator looked into alibi leads in preparation for trial. He testified that Applicant consistently maintained that he had an alibi at the time of the robbery, and that Trial Counsel would have called any alibi witness at trial that Applicant wanted, even though he does not know have an independent recollection of what names Applicant gave to him as potential witnesses. Trial Counsel testified that his usual practice when alibi witnesses are needed is to look into all potential alibi witnesses suggested by a defendant, or else have an investigator look into them, and that he then lets the defendant make the final decision about whether to use the available witnesses at trial based upon Trial Counsel's or an investigator's interviews with the potential witnesses. He testified that he and his investigator pursued every alibi witness named by Applicant. He testified that, if he did not call a particular alibi witness at trial, it was due to the fact that he was unable to locate that witness or else that witness's testimony would not have been helpful to Applicant's defense. He testified that he used the best alibi witnesses that he had at Applicant's trial. When asked by PCR Counsel to explain why he called some witnesses at trial when those witnesses testified that Applicant had been smoking marijuana with them, Trial Counsel testified that he does not coach witnesses and does not have an independent memory as to whether it was he or his investigator who met each with specific witness before trial.

¹ Trial Counsel was also called as a witness by Respondent, so the summary of his testimony here includes the testimony he provided during Applicant's case-in-chief and in Respondent's case-in-chief.

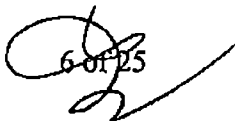
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Trial Counsel testified that he attempted to get a security camera recording from Crock's, a bar at which Applicant and some witnesses testified that they had been on the night of the robbery. Trial Counsel testified that he was unable to acquire the tape because it was unavailable.

Trial Counsel did not remember if Applicant had a cell phone at the time of the robbery. He testified that he looked into the possibility of getting a phone expert to testify on Applicant's behalf at trial, but that he was eventually unable to use the phone records to support Applicant's alibi defense because Applicant was either using Applicant's girlfriend's phone, because Applicant's phone was broken at the time, or because Applicant did not have a cell phone at the time of the robbery. He could not remember which of these reasons undermined his attempt to use a phone expert's testimony as to the phone records in the alibi defense, but did testify that he pursued the issue until it became clear that neither the phone records of an expert's testimony would benefit Applicant at trial.

Trial Counsel testified that Judge Miller did not instruct the jury on flight and that there was not testimony at trial about flight on the part of Applicant. He testified that he moved to suppress any testimony on flight before trial, but that his motion was denied by Judge Miller. He testified that he cross-examined Deputy United States Marshal Douglas Leslie at trial concerning Applicant's alleged flight, and then questioned Applicant about it in an attempt to mitigate any evidence of flight.

Trial Counsel testified that Judge Miller gave the jury a permissive malice instruction, and that Judge Miller did not instruct the jury that it had to infer malice from felony murder. He testified that the case law at the time indicated that permissive malice inferences were acceptable, and that State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), concerned solely an


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inference of malice from the use of a deadly weapon, making it inapplicable to the malice instruction given in Applicant's trial.

He testified that he did not rely on accident as Applicant's primary defense. He testified that he did not start the trial intending to use a defense of accident, but he wanted Judge Miller to instruct the jury on accident by the end of trial because he felt that the testimony of the codefendants did not indicate that the shooting of the victim had been intentional, thereby naturally raising the issue of an accidental shooting.

He testified that he was aware that Appellate Counsel briefed on appeal the issue of Judge Miller's accomplice liability instruction. He testified that the multiple jury instructions given in Applicant's case could have been inconsistent and may have confused the jury, but added that a defense attorney never knows how a jury will evaluate a case. He explained that he wanted the jury instructed on alibi and accident because he wanted to keep all possible options and defenses open to Applicant.

Appellate Counsel testified at the evidentiary hearing. She testified that she was appointed to represent Applicant on appeal from his trial conviction in the underlying criminal case. She testified that she initially filed an Anders brief because she did not identify any preserved issues of merit, but then briefed on the issue of the trial court's instruction of accomplice liability once the South Carolina Court of Appeals instructed her to do so. She testified that she included a footnote in her brief, in which she noted that Applicant could likely raise as an issue in a post-conviction relief proceeding Trial Counsel's failure to preserve for appeal his objection to the trial court's jury instruction on accomplice liability since she believed that the objection had not been preserved for appellate review. She testified that, in her opinion, the trial court's instructing the jury on both accomplice liability and alibi could have confused

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the jury and caused Applicant to suffer prejudice. She testified that the State argued on appeal that Trial Court's objection had not been preserved for review by the Court of Appeals and that Applicant was not entitled to relief thereon. She testified that the State did address the merits of the issue in its brief.

Applicant testified on his own behalf at the evidentiary hearing. He testified that Trial Counsel represented him at trial. He testified that he met with Trial Counsel on approximately three occasions over the course of the representation. He testified that they discussed the upcoming trial a few times, but that Trial Counsel did not review discovery with him. He testified that Trial Counsel was not as prepared for trial as he should have been and that he feels like he should get a "do over."

He testified that he provided the names of multiple people to Trial Counsel as potential witnesses. At the evidentiary hearing, Applicant identified these potential witnesses as: Kellan Goodine, Julien Anderson, Cosha Benson, William Wingard, and Phillip Bruce. He testified that his alibi defense had merit, but that it was not a fruitful defense at his trial because he did not have the right witnesses in order to pull it off. He testified that there was no forensic evidence or fingerprints used against him at trial.

Applicant testified that he was in Georgia with his girlfriend at the time of his arrest for the robbery. He explained at the hearing that he testified at his trial because he did not want the jury to think that he was in Georgia because he was running away from the crime.

When PCR Counsel questioned Applicant about the jury instructions that Judge Miller gave at trial, Applicant testified that he did not know what accomplice liability was at the time and that he was not aware of the theory of hand of one, hand of all. He testified that he wishes that Trial Counsel had done more to help him at trial.

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Applicant testified that he wants this Court to know that he is an innocent man, that he was not involved in the armed robbery or the killing of the victim, and that the extent of his involvement in the crime was in telling the codefendants that they would be able to buy marijuana at the victims' home. He testified that, of his codefendants, he knew only Ramsey.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases.

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Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Trial Counsel was constitutionally ineffective for failing to object to Judge Miller's improper jury instructions on the inference of malice and felony murder.

Applicant argues that Judge Miller's jury instructions on malice and felony murder were improper because they shifted the burden onto Applicant, that Trial Counsel's performance was deficient because he did not object to the instructions, and that Applicant suffered prejudice thereby.

The Supreme Court of South Carolina has held that a defense attorney was constitutionally ineffective for failing to object a trial court's instruction on felony murder. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). In Lowry, the trial court neglected to instruct the jury on the felony murder doctrine in its initial charge to the jury, so it gave the following supplemental instruction to the jury:

[Y]ou will recall I went over and talked with you about accomplice liability, I meant to conclude that by telling you this in regard to what is called the felony murder doctrine. That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder. And, therefore, the killing by one of another in the commission or attempted commission of a felony makes that killing, by virtue of it occurring in that context, a murder.

Id. at 503, 657 S.E.2d at 762.

The Supreme Court found that the defense attorney should have objected to the supplemental instruction because it shifted the burden of proof for the malice element or murder onto Lowry. Id. at 506, 657 S.E.2d at 794. The burden shifted because the supplemental instruction did not contain permissive language that indicated to the jury that it could infer malice from Lowry's participation in the armed robbery, thereby creating "a mandatory presumption of the malice element in the crime of murder instead of permitting the jury" to find that malice existed as proven by the State beyond a reasonable doubt. Id.

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During Applicant's trial, Judge Miller gave the following instruction with regard to felony murder:

[I]f one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, I, again, tell you this inference would simply be an evidentiary fact to be taken into consideration by you along with all the other evidence in the case and you give it the weight you think it should receive. I would tell you that burglary first and attempted armed robbery are felonies.

Trial Tran. at 385-86.

Unlike the trial court in Lowry, Judge Miller's instruction did not mandate that the jury presume malice on the part of Applicant. Unlike Lowry, Judge Miller's instruction informed the jury that it was permitted to find that malice existed. Judge Miller's instruction afforded to Applicant the sort of permissive safeguards that were absent from the instructions in Lowry. For this reason, Judge Miller's instructions did not run afoul of the Supreme Court's holding in Lowry. Trial Counsel testified at the evidentiary hearing that he believed Judge Miller's felony murder instruction was proper because its language was permissive, unlike the instruction given in Lowry. This Court finds that Trial Counsel's performance with respect to the instructions on felony murder and malice was not deficient. This Court finds that Applicant has failed to demonstrate that any supposed error by Trial Counsel with respect to the instruction prejudiced Applicant. This Court finds that Trial Counsel was not constitutionally ineffective with respect to his not objecting to the instruction on felony murder, and this allegation is denied and dismissed with prejudice.

At the evidentiary hearing, PCR Counsel questioned Trial Counsel as to whether Trial Counsel believed that he should have objected to Judge Miller's instruction about implied malice in light of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), but that case is not relevant here. The holding in Belcher was that:

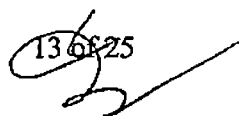
[A] jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide.

Belcher at 600, 685 S.E.2d at 803-04.

Judge Miller did not instruct the jury in Applicant's case that malice may be inferred from the use of a deadly weapon. Trial Counsel testified at the evidentiary hearing that, since Judge Miller did not give such an instruction, there would have been no need for him to object to the jury instructions pursuant to Belcher. Trial Counsel's assessment was correct. Applicant has wholly failed to show that Belcher is applicable to Applicant's case. There was simply no basis upon which Trial Counsel should have objected to Judge Miller's jury instructions in reliance upon Belcher. This Court finds that Trial Counsel's performance as to his not making an objection in reliance upon Belcher to Judge Miller's instructions was not deficient. As such, this Court finds that Applicant was not afforded ineffective assistance by Trial Counsel with respect to the allegation that Trial Counsel should have raised a Belcher objection, and this allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for failing to preserve his objection to Judge Miller's jury instruction on accomplice liability.

Judge Miller instructed the jury on accomplice liability during his charge to the jury. Trial Tran. 383. After doing so, Trial Counsel informed the court that he did not take any exception or have any objection to the jury instructions. Id. at 392. After beginning deliberations, the jury asked Judge Miller if Applicant could be guilty of murder if he did not pull the trigger. Id. at 393. The solicitor suggested that Judge Miller charge the jury on murder and "hand of one, hand of all" Id. Trial Counsel objected to charging the jury on accomplice liability, and requested that Judge Miller give the jury only the definition of murder. Id. Judge Miller overruled Trial Counsel's objection and charged the jury on murder and accomplice liability. Id.

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The Court of Appeals concluded that Trial Counsel did not preserve his objection to Judge Miller's accomplice liability instruction since he did not object to it after the jury charges were first given, but objected only when it was recharged after the jury asked for clarification. State v. Mosley, 2017-UP-353 (S.C. Ct. App. filed September 6, 2017). Applicant argues that Trial Counsel's performance was deficient because, although Trial Counsel did object when Judge Miller gave a supplemental instruction on accomplice liability, his failure to object after the initial instructions to the jury did not preserve the object and Judge Miller's ruling for appellate review, and that Applicant was prejudiced thereby.

This Court finds that, to the extent that the allegation by Applicant includes any contention that Trial Counsel's performance was deficient because he did not object to Judge Miller's instructing the jury on accomplice liability, that allegation is without merit. An issue that was found to be unpreserved on direct appeal may be raised as an allegation in a post-conviction relief action that defense counsel was ineffective for preserving the objection. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Trial Counsel did object to Judge Miller's instructing the jury; the fact that the objection did not come until the parties were discussing the formulation of a supplemental instruction is irrelevant because, at the moment the objection was made, it was within Judge Miller's authority to not charge the jury afresh with accomplice liability or even to amend his previous instruction to as to excise an instruction on accomplice liability. Any contention that Trial Counsel failed to object at all is obviously contradicted by the record. In accordance with McHam, however, Applicant argued that Trial Counsel was deficient for not preserving the objection.

The theory of "hand of one, hand of all" provides that:

[O]ne who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.

Barber v. State, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011) (citing State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010)).

When one is determining whether an accomplice liability charge is warranted, “the question is whether there is any evidence that another co-conspirator was the shooter and [Applicant] was acting with him when the robbery took place.” Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000)).

At trial, Trial Counsel elicited testimony from the victims that they were not able to positively identify Applicant as the shooter. One victim testified that he never saw the fact of the robber who pulled the trigger, and was unable to given an accurate estimation of the shooter’s height. Trial Tr. 114. Another victim testified that he was unable to see which of the robbers fired the fatal shot. Id. at 124-25. A third victim testified that his recent smoking or marijuana and position on the floor prevented him from seeing the shooter. Id. at 131-32. A fourth victim could not identify the shooter because the shooter’s mask concealed his identity. Id. at 159-61. This inability of the victims to positively point to one of the robbers as the shooter was evidence that one of the codefendants other than Applicant may have pulled the trigger. Compounding the problem of the identity of the shooter, Applicant and his codefendant Ramsey are both African-Americans, a fact that is relevant in light of the victims’ testimony as to one of the codefendant’s being black. The evidence of the victims and Applicant’s three codefendants indicated that the robbers were all acting in concert in carrying out the crimes. Since the evidence was clear that the robbers acted together but not clear as to which of the robbers killed the victim, Judge Miller’s charge on accomplice liability was therefore warranted. See State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010) (holding that the law charged to the jury “must be determined from

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the evidence presented at trial.”). This Court finds that Trial Counsel’s performance with respect to his late objection to Judge Miller’s instruction on accomplice liability was not deficient because the jury instruction was warranted based upon the evidence at trial.

This Court finds that Applicant was not prejudiced by the lack of preservation because he has not shown that he would have been successful on appeal had this issue been preserved. Applicant has failed to introduce any evidence that the jury was confused by any one jury instruction or by any combination thereof. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (concluding that an applicant who was seen in chains by the jury failed to establish prejudice when he did not offer testimony of affidavits from the jurors) (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)). Applicant’s offering of Appellate Counsel’s opinion that the issue was arguable because she believed the jury may have been confused by the charging of accomplice liability, alibi, and accident was unconvincing. Applicant merely speculates that Trial Counsel’s performance with respect to jury instructions prejudiced him. Though the jury did ask for clarification, it specifically inquired as to murder and whether Applicant could be guilty of murder if he did not pull the trigger. Rather than indicating that the jury was confused by the interplay between the defenses of alibi or accomplice liability, the jury’s question shows that the jury wanted to know about the nature of accomplice liability and how it would relate to one of the indicted offenses. This Court finds that Trial Counsel was not constitutionally ineffective for failing to preserve his objection to the instruction on accomplice liability because Applicant has failed to demonstrate that the instruction was inappropriate and has failed to demonstrate that the issue would have been successful on appeal. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for failing to subpoena cellphone records that would have supported Applicant's alibi defense.

Applicant argues that Trial Counsel's performance was deficient because he did not subpoena phone records that would have allegedly supported Applicant's alibi defense by showing that Applicant was not at the victims' home on the night of the armed robbery.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds that there was no deficiency in Trial Counsel's conduct with respect to his investigation into Applicant's phone records. Trial Counsel testified that he initially believed

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that Applicant's phone records could support Applicant's alibi defense, but that he was forced to abandon this approach when he discovered that the phone records would have been of no benefit to the defense. He testified that he could not remember specifically the reason that he concluded that the phone records were not helpful to Applicant's defense, but testified that it was either due to Applicant's not having an operational phone at the time of the armed robbery or to Applicant's use of his girlfriend's phone at the time. In either of these situations, the records would not have supported Applicant's alibi defense at his trial. This Court finds that Trial Counsel's testimony on his unsuccessful attempt to support Applicant's alibi defense with phone records is credible. Trial Counsel's testimony indicates that he conducted a reasonable and thorough investigation with respect to the phone records. Furthermore, Applicant has not put before this Court the phone records that supposedly support his alibi defense, but has merely speculated that the phone records supported his alibi. This Court finds that Trial Counsel was not constitutionally ineffective with respect to his failure to introduce Applicant's phone records at trial because Applicant has failed to demonstrate any deficiency in Trial Counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for failing to sufficiently cross-examine Applicant's codefendants on their bias in testifying for the State pursuant to a plea agreement.

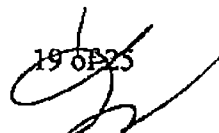
Applicant argued that Trial Counsel's performance was deficient because he did not adequately cross-examine Applicant's codefendants on their bias as witnesses for the State.

Trial Counsel testified at the evidentiary hearing that he had adequately cross-examined Applicant's codefendants at trial. Trial Counsel questioned codefendant Jaron Dalton about his pleading guilty to voluntary manslaughter rather than the indicted offense of murder because the codefendant had told law enforcement that he was not the one who killed the victim. Trial Tran. 202-03. Trial Counsel questioned codefendant Jordan Dalton at trial about the codefendant's

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pleading guilty to the lesser-included offense of voluntary manslaughter instead of the indicted offense of murder. Id. at 237. Trial Counsel questioned codefendant Kadeem Ramsey about his pleading guilty to voluntary manslaughter rather than the indicted offense of murder. Id. at 223. Tavis Campbell was not one of Applicant's codefendants in the underlying criminal case, but he testified about an incriminating statement that he heard Applicant make, and testified about his being charged for hindering apprehension when he was arrested with Applicant in Georgia after the robbery. Id. at 256-66. Trial Counsel cross-examined Campbell about his faxing a letter to the prosecution in which he offered to testify against Applicant in exchange for the conferring upon him of some benefit. Id. at 267-70.

When cross-examining each of Applicant's three codefendants, Trial Counsel questioned their having plead guilty to a lesser-included offense of murder and made the jury aware of the fact. Trial Counsel argued in closing that Applicant's three codefendants testified that Applicant was the fourth armed robber at the victims' home on the night of the robbery, despite the fact that the victims testified that there were three robbers. Id. at 357. Trial Counsel explained the codefendants' identifying Applicant was one of the robbers by arguing that they are biased because they want to get a better deal by cooperating with the prosecution. Id. at 360. This Court finds that Trial Counsel adequately cross-examined Applicant's codefendants about their plea deals, and that his argument in closing that they were lying in order to take advantage of the State's offers to them shows that he was employing a strategy of challenging the credibility of Applicant's codefendants throughout the trial. This Court finds that Trial Counsel was not constitutionally ineffective with respect to his cross-examination of Applicant's codefendants because Applicant has failed to demonstrate any deficiency in Trial Counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

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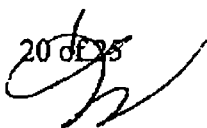
Trial Counsel was constitutionally ineffective for failing to request an adequate jury instruction on the credibility and weight of the codefendants' testimony.

Applicant argued that Trial Counsel's performance was deficient because he did not request a jury instruction on the bias of Applicant's codefendants in testifying as witnesses for the prosecution after accepting plea deals. As discussed earlier in this Order, Trial Counsel cross-examined Applicant's codefendants as to their plea deals and argued that they were biased and not credible during his closing argument. Judge Miller, in his jury instructions, charged the jury as follows:

[I]n determining the believability of the witnesses, you may believe one witness over several or several over one. You may believe a part of the testimony of a witness and reject the remaining part. You may believe the testimony of a witness in its entirety or you may reject that same testimony in its entirety. And you may consider whether the witness has an interest in the result of the trial of that the witness is prejudiced towards either the State or the Defendant

Trial Tran. 379-80.

This Court finds that there was no deficiency in Trial Counsel's conduct with respect to his not requesting a jury instruction from Judge Miller that specifically addressed any bias on the part of Applicant's codefendants. The jury instruction quoted above adequately covered the relevant biases, if any, of all witnesses at trial, not merely Applicant's codefendants. After the aforementioned cross-examination by Trial Counsel as to the codefendants' plea deals and his closing argument, the jury instruction addressed any biases that the codefendants may have had in testifying falsely against Applicant. This Court finds that Applicant has failed to demonstrate any prejudice he suffered in Trial Counsel's reliance upon instruction that Judge Miller gave to the jury about their weighing of witness credibility. This Court finds that Trial Counsel was not constitutionally ineffective with respect to Judge Miller's jury instruction on the jury's findings of witness credibility because Applicant has failed to demonstrate any deficiency in Trial

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Counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for failing to object to the admission of evidence of Applicant's flight to Georgia and corresponding jury charges.

Applicant argues that Trial Counsel's performance was deficient because he did not object to the admission of evidence of Applicant's flight to Georgia after the robbery or request jury charges on flight.

Trial Counsel moved to suppress any evidence of Applicant's flight before the testimony began. Trial Tran. 33-36. Trial Counsel was unsuccessful in his motion because Judge Miller found that there was no evidence before him that should be suppressed, as long as the prosecution did not attempt to introduce speculation as to Applicant's state of mind upon going to Georgia after the robbery. Trial Counsel elicited testimony from the witness who discovered and arrested Applicant in Georgia that Applicant "did not try to leave the room" during the arrest. Id. at 294. Applicant testified at the evidentiary hearing that he wanted to testify at trial so that he could make it clear that he was not in Georgia because he was trying to avoid detection or flee South Carolina after committing the armed robbery. Trial Counsel questioned Applicant at trial about his reason for being in Georgia after the robbery. Id. at 308-11. Trial Counsel testified that he did this at trial in an attempt to mitigate any harm that could have been caused by the evidence of Applicant's flight.

A review of the trial transcript shows that Judge Miller did not specifically give any jury instruction relating to Applicant's apparent flight to Georgia after the armed robbery. Trial Counsel confirmed during the evidentiary hearing that no such jury instruction was given during Applicant's trial. Judge Miller did mention the flight of a defendant during his jury instructions, but only when explaining the elements of burglary, which provide that a defendant is guilty of

burglary if he commits some act while in another's dwelling or in immediate flight therefrom. Id. at 386-88; see also S.C. Code Ann. § 16-11-311.

This Court finds that Trial Counsel was not ineffective in his handling of the issue of Applicant's flight to Georgia. Applicant has failed to demonstrate any deficiency in Trial Counsel's performance. Trial Counsel moved to suppress any evidence and then attempted to mitigate it once it came in at trial. This Court finds that Applicant has failed to demonstrate that he has suffered prejudice due to the references of flight at trial. The prosecution had a single witness who could have been said to have discussed any flight on the part of Applicant. Trial Counsel mitigated this witness's testimony through cross-examination and by questioning Applicant about the reason for his presence in Georgia after the robbery, which was also tied to his alibi defense in that he was with his girlfriend. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for failing to request adequate jury instructions on accident, voluntary manslaughter, and involuntary manslaughter.

Applicant argues that Trial Counsel's performance was deficient because he did not request adequate jury instructions on accident, voluntary manslaughter, and involuntary manslaughter. A defendant is entitled to a jury instruction on a lesser-included offense if "there is evidence from which it could be inferred [that] a defendant committed a lesser rather than a greater offense." State v. Fields, 356 S.C. 517, 522-23, 589 S.E.2d 792, 795 (S.C. Ct. App. 2003) (citing State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986)). "Voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation." State v. Locklair, 341 S.C. 352, 359, 535 S.E.2d 420, 424 (2000) (citing State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998)). Trial Counsel testified at the evidentiary hearing that there was no evidence admitted at trial that would have shown that there was any legal provocation in the

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shooter's killing of the victim, no matter which of the four defendants may have pulled the trigger, and that Applicant would not have been entitled to a voluntary manslaughter instruction. Trial Counsel did, however, ask for such a charge during the charge conference, without success. Trial Tran. 348-49. This Court finds that Trial Counsel was not with respect to requesting a jury instruction on the lesser-included offense of voluntary manslaughter. This Court finds that Applicant has failed to demonstrate that he was entitled to a jury instruction on voluntary manslaughter as the fatal was shot by a masked assailant during an armed robbery, which would not constitute sufficient legal provocation.

Involuntary manslaughter is either:

(1) [T]he killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others.

State v. Tucker, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996) (citations omitted).

Trial Counsel testified that he did not think that Applicant was entitled to a jury instruction in involuntary manslaughter since the shooting occurred during an armed robbery, which is a felony that tends to result in death or great bodily harm and is not a lawful act. This Court finds that Trial Counsel was not deficient in not requesting an instruction on involuntary manslaughter because Applicant would not have been entitled to the instruction. This Court finds that Trial Counsel was not ineffective in not requesting the charge.

The Supreme Court has provided that, "[f]or a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of a weapon." State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (citing State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945)). Judge Miller's jury instruction on accident was virtually identical to this definition. Trial

Tran. 384. Judge Miller also instructed the jury that the prosecution bore the burden of proving beyond a reasonable doubt that the killing of the victim was not an accident. Id. The jury was charged on accident at Trial Counsel's request. Id. at 350. Trial Counsel testified that he did not rely upon accident as Applicant's primary defense, but that he believed that some of the testimony at trial could have supported the defense. He also testified that he wanted every available defense to be charged to the jury so that the jury he could keep all of Applicant's options open. Jaron Dalton testified at trial that Applicant was standing up from his position over the victim and "the gun just fired about halfway up." Id. at 196. According to this codefendant, the perpetrators were "kind of shocked that the weapon had fired" Id. Jordan Dalton, another of Applicant's codefendants, testified that Applicant pistol-whipped the victim and that then "the gun went off." Id. at 233. This was similar to the testimony of one of the victims who survived the robbery, who testified that the "gun went off" Id. at 128.

This Court finds that Trial Counsel's performance was not deficient with respect to the jury instruction on accident. Trial Counsel requested that the jury be charged on accident as an alternative defense based on testimony given by multiple witnesses at trial. He made the strategic decision to have the jury charged on accident so that the jury could have multiple avenues of acquitting Applicant. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" Strickland, at 689. Additionally, this saddled the prosecution with the burden of proving that accident did not apply beyond a reasonable doubt. This Court finds that Applicant has not demonstrated any prejudice from the jury's being charged with accident. Applicant has argued that the instruction was inadequate, but has failed to identify any reason that the articulation of accident by Judge Miller was insufficient in any respect. This Court finds that Applicant was not afforded the ineffective

assistance of counsel with respect to the jury instruction on accident because Applicant has failed to show that there was any deficiency in Trial Counsel's performance and that Applicant suffered any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

CONCLUSION

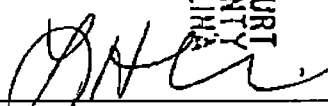
Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Application for Post-conviction Relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of Oct, 2019.


LETITIA H. VERDIN
Presiding Judge

Greenville, South Carolina

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State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Letitia H. Verdin
Judge

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Greenville County Courthouse
305 East North Street, Suite 318
Greenville, SC 29601-2120
Phone: (864) 467-8448
Fax: (864) 467-8504
lverdinj@sccourts.org

October 16, 2019

Pickens County Clerk's Office
214 E Main Street
Pickens, SC 29671

RE: *State of South Carolina v. Respondent*
Case No.: 2018-CP-39-0318

To whom it may concern:

Enclosed herewith please find the above referenced order signed by Judge Letitia Verdin. Please kindly file this order. If you need anything from me with regards to this matter please do not hesitate to contact our office.

With kindest regards,

A handwritten signature in cursive script that reads "Brittany Long".

Brittany Long
Administrative Assistant to
The Honorable Letitia H. Verdin

bpl
Enclosures

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11-10M 1165

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

LESTER D. MOSLEY, JR.)

APPLICANT,)

-VS-)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

2018-CP-39-00318

TRANSCRIPT OF RECORD

AUGUST 29, 2019

GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE LETITIA H. VERDIN

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

ATTORNEYS FOR APPLICANT:

WILLIAM G. YARBOROUGH, III, ESQ.
LAUREN C. HOBBS, ESQ.

ATTORNEY FOR RESPONDENT:

TAYLOR Z. SMITH
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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(No Exhibits Were Presented During This Hearing)

1 **THE COURT:** All right. Mr. Smith. Of course, take your
2 time.

3 **MR. SMITH:** May it please the Court?

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

5 **MR. SMITH:** This is the case of Lester Mosley v. State,
6 case number 2018-CP-39-0318. Mr. Mosley's incarcerated in
7 SCDC pursuant to orders of commitment of the Pickens County
8 Clerk of Court.

9 July of 2014 he was indicted for murder, two counts of
10 attempted armed robbery, possession of a weapon during the
11 commission of a violent crime, first degree burglary. He was
12 represented by Mr. Scott Robinson.

13 In September of 2014 he proceeded to trial before Judge
14 Miller and was convicted of all five crimes as indicted. He
15 was sentenced to 50 years for murder, 50 for first degree
16 burglary, 20 years each for the armed robberies, five years
17 for possession of the firearm with all sentences running
18 concurrently.

19 He did appeal. And Ms. Kathrine Hudgins perfected the
20 appeal. She submitted an Anders brief. And then the Court of
21 Appeals addressed her to brief the following issues; Whether
22 the trial court erred by instructing the jury on accomplice
23 liability. And then in an unpublished opinion the Court of
24 Appeals affirmed the conviction. Mr. Mosley then filed this
25 PCR in March of 2018. And that brings us to court today.

1 And, Your Honor, Mr. Mosley through counsel did file an
2 amended PCR application. I don't know the exact date, but he
3 raised the following issues; Counsel was ineffective for
4 failing to object and preserve for appeal improper jury
5 instructions on inference of malice and felony murder

6 Counsel was ineffective for failing to object and
7 preserve for appeal jury instructions on the hand of one, hand
8 of all, accomplice liability.

9 Counsel was ineffective for failing to subpoena cell
10 phone records to support Mr. Mosley's alibi defense.

11 Counsel was ineffective for failing to sufficiently
12 cross-examine co-defendants on their bias due to their plea
13 agreement and for failing to request a jury instruction on the
14 issue of their inherent bias.

15 Counsel was ineffective for failing to object to
16 admission of evidence of flight and corresponding jury
17 charges, and that counsel was ineffective for failing to
18 request an adequate jury instruction on accident, voluntary
19 manslaughter and involuntary manslaughter.

20 Your Honor, the State is ready to proceed today. We
21 would just ask that Mr. Yarborough confirm that those are the
22 allegations they'll move forward on.

23 **THE COURT:** Mr. Yarborough.

24 **MR. YARBOROUGH:** Your Honor, those are the allegations.
25 And so the Court will know, although we're going to do a

1 normal PCR, the focus of our post conviction relief
2 application is really on the jury charges. And I think
3 they're aware of that.

4 **THE COURT:** All right. You ready to proceed?

5 **MR. YARBOROUGH:** Sure. Yes, Your Honor. We call Mr.
6 Robinson.

7 **THE COURT:** All right. And, Mr. Robinson, any way that
8 you feel comfortable, want to do it, if you would like -- if
9 you would like we could also -- you wouldn't even need to get
10 out of your chair if you don't want to, and we can just move
11 the microphone right there. How about that?

12 **MR. ROBINSON:** Let me see if I can get up there only
13 because I've got all the -- I have the trial notebook ---

14 **THE COURT:** I understand. Whatever you want to do.

15 **MADAM CLERK:** Mr. Robinson, just raise your right hand.

16 **Scott Robinson,** being duly
17 sworn testified as follows;

18 **MADAM CLERK:** Thank you. Please state your full name for
19 the record.

20 **MR. ROBINSON:** Sure. Scott David Robinson.

21 **Direct Examination by Mr. Yarborough:**

22 Q. Mr. Robinson, were you appointed to represent Mr. Mosley?

23 A. I was, sir.

24 Q. And can you tell the Court a little bit about the
25 preparation, just the charges, everything that your recall

1 from back then or ---

2 A. Sure. Well, we had -- I was appointed. We had a full-
3 time investigator appointed. We got funds from the State to
4 get an investigator. His name was Joe Raven. And we looked
5 at every avenue. This case was an alibi case for us because
6 Mr. Mosley was in Toccoa at the time.

7 Q. Right.

8 A. And that was -- and we made sure we had the alibis,
9 investigated that part of it and so forth. We actually went
10 to the -- tried to get video camera footage from Croc's, which
11 is the old restaurant that was in Clemson at the time. And it
12 was actually -- it had been torn down prior to that, so we
13 couldn't get ---

14 Q. Couldn't get the ---

15 A. Yeah.

16 Q. --- pictures?

17 A. Right.

18 Q. And I guess at some point there was an issue about the
19 telephone? His telephone or phone records?

20 A. I don't know who the -- if he had a cell phone at that
21 time or not because we had looked at getting a cell person --
22 expert in that, but I don't think we -- I don't know if he
23 either was using his girlfriend's cell phone, or his cell
24 phone wasn't working or something like that. So we didn't
25 proceed any farther on that point.

1 Q. Okay. But as far as your relationship with him, he
2 always told you that he wasn't there?

3 A. Yes. He said he was in Toccoa.

4 Q. Okay. And you investigated that alibi as much as you
5 could?

6 A. I did. And we presented the alibis to the State as
7 required.

8 Q. Okay. And so then were -- there were witnesses that you
9 called as an alibi defense?

10 A. Yes.

11 Q. And do you recall now who those witnesses were?

12 A. I think it was Wingard was one of the -- and then the
13 other one was the -- I believe she was the girlfriend or
14 someone like that that was called. Let me see if I've got the
15 -- what I sent to the State.

16 (Pause)

17 A. Yeah. We had Mr. Wingard, who testified, and then one
18 other witness that was in the transcript besides Mr. Mosley
19 who testified.

20 Q. Okay. But do you recall, were there other witnesses he
21 wanted called?

22 A. I don't recall that. I don't recall anybody that he
23 wanted to have called. I would have called them.

24 Q. Okay. There weren't people that you couldn't find?

25 A. I don't -- it's five years ago. I don't recall ---

1 Q. Sure.

2 A. --- independently.

3 Q. All right. And at some point y'all went to trial, is
4 that correct?

5 A. We did.

6 Q. And did you submit jury charges?

7 A. We had a charge conference that I think was on the
8 record. And Judge Miller -- we talked about different
9 charges. So we did have a charge conference at that time.

10 Q. Okay. And at that point did -- do you recall, did you
11 ask him to charge an alibi defense?

12 A. Yes. And he charged an alibi defense.

13 Q. Okay. And did -- at the charge conference in the
14 beginning did the question about flight come up before or did
15 that come up during the trial?

16 A. I think we initially -- I reviewed the transcript again.
17 And I think that came up originally because he was in Toccoa,
18 we'd thought about that.

19 Q. Right.

20 A. But they stopped talking about flight during the case
21 mostly. We always said that his alibi was that he was in
22 Toccoa at the time, but the judge did not charge flight in his
23 instructions ---

24 Q. Right.

25 A. --- in this case.

1 Q. But did he let the -- at that point did he let the
2 solicitor's office argue flight?

3 A. He did not argue -- they did not argue flight, no.

4 Q. Okay. But they put witnesses on to discuss flight,
5 correct?

6 A. They did -- they did discuss flight. They just -- that
7 he was in Toccoa, Georgia. They didn't say, well, he took off
8 to wherever it was. It wasn't an issue. They just said they
9 found him in Toccoa.

10 Q. Okay.

11 A. That's all that was said. They didn't say anything about
12 him leaving and so forth to avoid prosecution.

13 Q. Okay. At some point there was a question about the judge
14 charging hand of one, hand of all. Do you remember that?

15 A. I do.

16 Q. Okay. Can you tell the Court about that?

17 A. You know, at the time I didn't -- I didn't think -- I
18 didn't object to it because I didn't really think I could. I
19 didn't think I could object at the time.

20 Q. Okay.

21 A. But I found out later on that the court had -- may have
22 some questions about that.

23 Q. Right. And -- well, I guess go ahead -- and that's
24 pretty simple.

25 **MR. YARBOROUGH:** I think in your package, Judge, you have

1 a question from the jury where they sent a note to Judge
2 Miller during the trial.

3 **THE COURT:** I have it right here.

4 **MR. YARBOROUGH:** Okay.

5 Q. And do you recall the note ---

6 A. I do.

7 Q. Okay.

8 A. I do.

9 Q. Can you tell the Court a little bit about that? Or do
10 you need a copy of the note?

11 A. You can refresh my memory with it, sure.

12 Q. Sure.

13 **MR. YARBOROUGH:** May I approach, Your Honor?

14 **THE COURT:** Certainly.

15 Q. Here are all the charges and the note. And I think to be
16 clear, if you could just go through what the question was that
17 they asked.

18 A. Okay.

19 Q. Does that ...

20 A. Yeah, that's pretty much what you said a second ago,
21 asked me a second ago.

22 Q. Okay. And can you just tell, for the record, can you say
23 what's in that?

24 A. Looks like the jury is asking -- it's -- the first line
25 is what is murder? The third line is does the defendant have

1 to pull the trigger to consider it murder? And can we have a
2 copy of the law?

3 Q. Okay. And at that point the question of hand of one,
4 hand of all comes up, correct?

5 A. It looks -- it appears that it did, yes.

6 Q. Yeah. It appears their question is did, you know, did
7 somebody else -- could have ---

8 A. Right.

9 Q. If the defendant is charged could he also be found guilty
10 if somebody else pulled the trigger?

11 A. Yes, that's what it appears.

12 Q. Okay. And that was kind of the question throughout the
13 trial, correct?

14 A. I don't know if it was throughout the trial. I really
15 don't know because, you know, during the trial they all were
16 saying that Lester pulled the trigger and killed the guy.
17 That's what they ---

18 Q. Right.

19 A. --- were all saying.

20 Q. But that ---

21 A. But I think that -- I think ---

22 Q. Correct.

23 A. --- at that time when the question of accomplice
24 liability or hand of one, hand of all, I didn't -- I didn't
25 really go into it that far. I think later on ---

- 1 Q. Sure. Well, after that Judge Miller decides he's going
2 to charge ---
- 3 A. Right.
- 4 Q. --- recharge hand of one, hand of all, is that correct?
- 5 A. Yes.
- 6 Q. And at that point you object?
- 7 A. Right.
- 8 Q. Okay. And so at -- you thought at that point the
9 objection was preserved for appeal?
- 10 A. Yes. At that time, yes.
- 11 Q. Okay. And now that you've seen the opinion from the
12 Court of Appeals, ---
- 13 A. I did.
- 14 Q. --- it turns out it wasn't.
- 15 A. I think that looking back at that time with everything
16 that was going on, I probably should have objected -- renewed
17 my objection.
- 18 Q. Correct. Okay. I got you. And I guess one of the
19 things that was going on at that point was that there was an
20 alibi defense, too, correct?
- 21 A. Yes, there was.
- 22 Q. So Judge Miller ends up charging both an alibi defense
23 ---
- 24 A. Um-hum (affirmative).
- 25 Q. --- and the hand of one, hand of all?

1 A. Yes.

2 Q. Okay. And do you recall he also charges accomplice
3 liability or did you object to that or ---

4 A. No, I'd have to -- I've reviewed the transcript several
5 times. I'd have to look at the transcript. If you're telling
6 me that he did, then I have nothing that I can -- I can't go
7 back and ---

8 Q. If you look closely with what I handed you before, I
9 think it has the judge's charges on ---

10 A. Okay.

11 Q. --- the pages after that. I put it together for you.

12 A. Oh, thank you.

13 Q. Yeah. And so I'm just -- why don't we just walk through
14 what he charged ---

15 A. Okay.

16 Q. --- because are the -- those are the marked charges, I
17 think, from the courtroom.

18 A. Okay. Looks like there's an index. And there's hand of
19 one, which is the purpose.

20 Q. Okay.

21 A. The next charge is the murder. And it also has the
22 charge on malice.

23 Q. Okay. Can you talk a little bit about that malice
24 charge?

25 A. Um-hum (affirmative).

1 Q. Can you look at it and see if you recall that charge?

2 A. I do. That was the law at the time. That is pretty much
3 -- you can get that out of a book pretty much at that time.

4 Q. Okay. That was just -- that was the straight charge out
5 of the book?

6 A. Yeah.

7 Q. Okay. Now what's the next one?

8 A. Well, the third part of that goes into the reasonable
9 doubt. Next is the felony murder inference.

10 Q. Okay. And is there -- is that it or is there one more?

11 A. There is.

12 Q. Okay.

13 A. That was on page 5. Hand of one was the -- it is on page
14 6.

15 Q. Okay.

16 MR. YARBOROUGH: And, Your Honor, I know they're already
17 in your package, ---

18 THE COURT: Um-hum (affirmative).

19 MR. YARBOROUGH: --- but I'd like to make them part of
20 the record if -- I don't know that I have to say that, but ...

21 THE COURT: They're part of the record. That's easy
22 enough.

23 MR. YARBOROUGH: Okay. They're in there?

24 THE COURT: Yeah.

25 MR. YARBOROUGH: Okay.

1 **Direct Examination by Mr. Yarborough Continued:**

2 Q. So if you go back and -- there's several charges about
3 murder in there, correct? The ones that we just looked at?

4 A. Yes.

5 Q. And some of those charges are inconsistent. Would you
6 agree with that or not?

7 A. Inconsistent?

8 Q. Yeah. Inconsistent meaning if you've got an alibi and
9 then you're also charging hand of one, hand of all, it gets
10 somewhat confusing to the jury.

11 A. Okay. I don't know that they were inconsistent. I think
12 Judge Miller just charged the law as he saw it in the case. I
13 think that's what he did.

14 Q. All right. Well, let's talk about that.

15 A. Okay.

16 Q. Let's go back -- if you look at the charge on implied
17 malice, ---

18 A. You're going back another page. You're going back to
19 page 3?

20 Q. Page 3.

21 A. Okay.

22 Q. In the -- you would not have objected to that charge,
23 correct?

24 A. This -- that was the law at that time. That's kind of
25 what, I mean, when you have a charge conference, ---

1 Q. Right.

2 A. --- and I had different charges and so forth, I think,
3 going back that far, I just went by what the law was at the
4 time.

5 Q. Okay. And are you familiar with the cases of Elmore and
6 Belcher, which are ---

7 **MR. YARBOROUGH:** Just for the Court's -- I know you're
8 familiar with the cases, but that's 279 S.C. 417. And I don't
9 have the cite on Belcher, but Belcher recites Elmore, Your
10 Honor.

11 Q. And it talks about a proper charge on implied malice.
12 And basically if I ask you this question -- the law says if
13 one intentionally kills another during the commission of a
14 felony, the implication of malice may arise if facts are
15 proved beyond a reasonable doubt, sufficient evidentiary facts
16 to be taken into consideration by you, the jury, along with
17 other evidence in this case, and you may give it such weight
18 as you determine it should receive. Did you object to that --
19 to the charge the -- Judge Miller made based on that case?

20 A. I did not.

21 Q. Okay. And ---

22 A. You're arguing the Belcher case, which had actually
23 overruled another case that was talking about this, but I
24 believe -- I think I'm correct on this, but Judge Miller gave
25 a permissive -- it was a permissive inference, you may

1 consider. He didn't give a -- he didn't give a charge that
2 said you shall do this. It was more of a permissive ---

3 Q. Correct. And I go back to, you know, again, my question
4 becomes with all those charges does that become inconsistent?

5 A. I think ---

6 Q. With your defense?

7 A. It may. It may. It could, potentially.

8 Q. Okay. And I guess the big question would become with the
9 jury instruction of a hand of one, hand of all after -- okay.
10 The jury comes back and they ask a question, right? They say,
11 what is murder? Does the defendant have to pull the trigger
12 to consider it murder? And then they ask, can we have a copy
13 of the law? Correct? You remember that?

14 A. Yes, that's correct.

15 Q. And so at that point Judge Miller goes back and charges
16 hand of one, hand of all again, right?

17 A. Right.

18 Q. And at that point you objected?

19 A. Correct.

20 Q. And I think now you'll agree with me that in the
21 beginning you did not object to those charges, correct? That
22 charge or the other charges at the charge conference?

23 A. I'd have to read the transcript to see that, but if
24 you're saying that's what the transcript says ...

25 Q. Well, ---

- 1 A. Go ahead.
- 2 Q. Yeah. Let's -- in reviewing the opinion from the ---
- 3 A. Right. Court of Appeals.
- 4 Q. --- Court of Appeals, you're familiar that they said it
- 5 was not preserved for the record?
- 6 A. Correct.
- 7 Q. Okay. And are you familiar that -- or maybe you're not
- 8 familiar with the fact that after your appeal was filed that
- 9 Ms. Hutchinson [sic] was appointed to represent Mr. Mosley.
- 10 A. Yes.
- 11 Q. Okay. And are you aware that she filed an Anders brief?
- 12 A. I'm aware of that, yes.
- 13 Q. Okay. And are you also aware that at some point she was
- 14 ordered by the court to brief that specific issue?
- 15 A. I recall that, yes.
- 16 Q. Okay. So they said, well, -- they said, you know, and
- 17 there is a meritorious -- or I get -- I don't know exactly how
- 18 you say about an Anders brief, but they said, look, whether
- 19 the trial court erred by instructing the jury on accomplice
- 20 liability in response to the jury's question during
- 21 deliberation is an issue they wanted briefed, correct?
- 22 A. You're talking about the Court of Appeals?
- 23 Q. The Court of Appeals, yeah.
- 24 A. Okay.
- 25 Q. So at that point it becomes an issue, right?

1 A. I think ---

2 Q. You thought it was an issue and they thought it was an
3 issue. I didn't mean to talk over you.

4 A. They -- I'm listening to you, Mr. Yarborough. Sorry.
5 But, obviously, in reading that they thought it was a
6 meritorious issue.

7 Q. Right.

8 A. And they probably wanted that briefed.

9 Q. Okay. And are you familiar with it -- that it was
10 briefed?

11 A. It was an Anders brief.

12 Q. Right.

13 A. I don't know if it was briefed. I don't think that issue
14 was briefed.

15 Q. Okay.

16 A. And I can't say any -- enough great things about
17 Appellate Defense. They do a great job.

18 Q. Right.

19 A. I don't know about this five years ago.

20 Q. Oh, sure. And ---

21 A. But I don't know -- I don't know the mechanics of how
22 that all worked out. It probably should have been briefed. I
23 don't have a particular issue. And that may have changed the
24 whole equation pretty much with Mr. Mosley.

25 Q. And so I guess the long and the short of it is you tried

1 to preserve it for the record, but it -- if it wasn't
2 preserved, that would have -- would fall on you, is that ---

3 A. Oh, absolutely. Absolutely.

4 Q. Okay.

5 **MR. YARBOROUGH:** Just a second, Your Honor. Could I ---

6 **THE COURT:** Certainly.

7 (Pause)

8 Q. Did you object to Judge Miller recharging the jury after
9 those questions came in? I don't -- I don't remember ---

10 A. I don't know if I did or not to be honest with you. I'm
11 not sure if I did or not. I don't ---

12 Q. Okay. But the record would speak for itself?

13 A. You'd have to look at the record, yes.

14 Q. Yeah. And are you familiar that for a argument to be
15 preserved it must be objected to from the beginning, not at
16 the end?

17 A. Am I familiar with ---

18 Q. With that rule of ---

19 A. The rule?

20 Q. Rule of the Court of Appeals?

21 A. Okay.

22 Q. To preserve something for the record.

23 A. I objected the first time. I did that. But I didn't --
24 what you're saying is I should have objected -- renewed the
25 objection, is that -- is that right?

1 Q. Well, what if it was the other way around? If you
2 objected the second time and didn't object the first time?

3 A. I -- I don't know really how to answer that question.
4 It's -- I don't know -- you object once, and if you don't
5 renew the -- they want you to renew your objection, ---

6 Q. Correct.

7 A. --- again. I don't know if I would -- I'm not sure it
8 would -- that would kind of -- that's a little bit different
9 trying to go the other way.

10 Q. Okay. Are you -- are you aware that the Attorney
11 General's Office argued in their briefs that you had not
12 properly preserved the record on that?

13 A. Did I know that?

14 Q. Did you know that?

15 A. I know it now. I did know that, yes, of course.

16 Q. Okay.

17 **MR. YARBOROUGH:** And, Your Honor, I'm not sure about your
18 package, if you have the -- if you have a package that would
19 also have the briefs from the Attorney General's Office or
20 not. I mean, I have them if you need them, but I was thinking
21 you might have them in your ...

22 **THE COURT:** The return?

23 **MR. YARBOROUGH:** The return. Yes, ma'am.

24 **MR. SMITH:** It should be in your ---

25 **THE COURT:** A brief from respondent? I've got both

1 those, yeah.

2 **MR. YARBOROUGH:** Okay. I would just -- may I approach
3 the witness, Your Honor?

4 **THE COURT:** Oh, of course.

5 **Direct Examination by Mr. Yarborough Continued:**

6 Q. I'll just show you the return. And just look at page 21,
7 the bottom of the last paragraph.

8 A. Um-hum (affirmative). I see it.

9 Q. So would you agree with me that they argued that it had
10 not been preserved?

11 A. Looks like from the -- from what you just showed me,
12 which is a copy of that, that's what they say.

13 Q. Okay. And I just ---

14 **MR. YARBOROUGH:** Your Honor, just for the record, that's
15 on page 21. It's the third paragraph ---

16 **THE COURT:** Okay.

17 **MR. YARBOROUGH:** --- down. And they cite State versus
18 Benton.

19 **THE COURT:** Okay.

20 **MR. YARBOROUGH:** One second, Your Honor.

21 Q. I think I asked you this, but just to be clear, after I
22 showed you this morning you would agree with me that the Court
23 of Appeals said that it was not preserved for the record?

24 A. Yes. I actually saw -- yeah, I saw that. Yes.

25 Q. Okay.

1 **MR. YARBOROUGH:** And, Your Honor, I'm -- again, I'm just
2 making sure you would have that in your package as well, ---

3 **THE COURT:** I do.

4 **MR. YARBOROUGH:** --- that that order would be part of ---

5 **THE COURT:** Yes, it is.

6 **MR. YARBOROUGH:** Okay. One second, Your Honor.

7 **THE COURT:** Certainly.

8 (Pause)

9 **MR. YARBOROUGH:** I don't have any further questions.
10 Thank you, Your Honor.

11 **THE COURT:** All right. Mr. Smith.

12 **MR. SMITH:** Yes, Your Honor. Just one moment, please.

13 **THE COURT:** Okay.

14 (Pause)

15 **Cross-examination by Mr. Smith:**

16 Q. Mr. Robinson, I'm going to try to take it in order here
17 just to make sure we get testimony on all the relevant points.

18 A. Um-hum (affirmative).

19 Q. Can you tell me, I guess, just as an initial matter, how
20 long have you been practicing law?

21 A. Forever pretty much. No, I think, right now -- right
22 now, probably about 20 years.

23 Q. Okay.

24 A. It went by very fast.

25 Q. And so this trial was in -- what year was this? 2014.

1 It would have been about 15 years?

2 A. Okay.

3 Q. Is that right?

4 A. That's if the math is right.

5 Q. Okay. Well, I don't know. I'd have to get a second
6 opinion on that. Okay. And Mr. Yarborough asked you some
7 questions about the alibi defense.

8 A. Sure.

9 Q. And I believe your testimony at this point was that you
10 don't have any independent recollection of alibi witnesses
11 that he gave to you, is that ---

12 A. We presented any alibi witnesses that were credible, we
13 presented to the court at that time.

14 Q. Okay. I don't -- do you remember if he gave you any
15 alibi witnesses that you didn't follow up on?

16 A. No.

17 Q. Okay. What's your, I mean, what's your general practice
18 for the alibi witnesses if a client tells you ---

19 A. You get them, you notice the solicitor within the
20 statutory period -- as far as -- there are certain rules for
21 alibis in terms of notifying the solicitor, but the alibis
22 with their address, phone number, things like that. And they
23 were notified of all that.

24 Q. Okay. Unless you determine that you don't want to use an
25 alibi witness?

1 A. It's with the -- it's with the client -- the client also
2 has to agree to that, too. You have to go with the client.

3 Q. Okay.

4 A. We have an investigator, as I told you. And Lester
5 participated. And I thought the alibi witnesses did really
6 well.

7 Q. Okay. So as far as you knew, you got them all there that
8 were credible?

9 A. Yes.

10 Q. Okay. So I guess our other issue is you testified
11 earlier that Mr. Mosley told you the whole time that he was
12 never there?

13 A. Yes.

14 Q. Okay. Let's just -- let's just address the issues raised
15 in the amended application. I think that's an orderly way to
16 go about it. First issue that Mr. Mosley raised was that you
17 didn't object to an instruction on malice and felony murder.
18 So ---

19 A. That was the -- that was the law at the time.

20 Q. Okay.

21 A. That was pretty much textbook law at the time.

22 Q. Okay. Do you have a copy of the transcript there ---

23 A. On my cell phone I do, yes.

24 Q. Okay. Well, I'll let you use mine, then.

25 A. Sure.. The sound is off, so don't worry. Tell me a page.

1 Q. Oh, if you're going to -- you're going to read it on your
2 phone, then?

3 A. Sure.

4 Q. Okay. We're looking at 385 from the record on appeal.

5 A. Um-hum (affirmative).

6 Q. And I believe that those page numbers are the same in the
7 trial transcript and the record on appeal.

8 A. Why don't you do this for me. Let me see what you've got
9 because I don't know if this ---

10 Q. Okay.

11 A. --- practical to use this cell phone.

12 Q. Well, we're going to look at page 385 and probably from
13 about line 5 ---

14 A. Um-hum (affirmative).

15 Q. --- down through about line 24.

16 A. Okay.

17 Q. You don't have to read it out loud, but just if you would
18 look at that for me.

19 A. Yeah, I've seen -- I've thought about this.

20 Q. Okay. And at the time did you believe that was an
21 accurate statement of the law?

22 A. That was the law at the time.

23 Q. Okay. You didn't see any reason to object to that?

24 A. I did not. I thought it was -- I thought it was fair. I
25 thought it was -- Judge Miller is very thorough and he's very

1 careful on this stuff. And he read the law at the time.

2 Q. Okay. And if we notice there, especially down toward the
3 bottom of the page when ---

4 A. Which page?

5 Q. Of 385.

6 A. Is it -- is it where you're highlighted? Is that what
7 you're ---

8 Q. That could be it. It's down there around lines 20 -- 20
9 through 24.

10 A. Okay. Got you.

11 Q. The charge on inference of malice and felony murder, can
12 you just read that section for me, please.

13 A. You want me to start at 21?

14 Q. Wherever he starts talking about felony murder.

15 A. Sure. Okay. Now if -- this is starting at line 21.

16 Now, if one intentionally kills another during the commission
17 of a felony, the inference of malice may arise. If facts are
18 preserved beyond a reasonable doubt sufficient to raise an
19 inference of malice to your satisfaction, I again tell you
20 this inference would simply be an evidentiary fact to be taken
21 in consideration by you along with all the other evidence in
22 the case and you give it the weight you think it should
23 receive.

24 Q. Okay.

25 A. I would tell you that burglary, first, and attempted

- 1 armed robbery are felonies.
- 2 Q. Okay. Did he direct the jury that they had to infer
- 3 malice?
- 4 A. No.
- 5 Q. It was ---
- 6 A. It was, as I said before, it was permissive.
- 7 Q. Okay.
- 8 A. And because he says may. But he says, it would simply be
- 9 an evidentiary fact to be taken in consideration. He didn't
- 10 say shall. And that's ...
- 11 Q. Okay. And I'm sure you're aware in this case that we've
- 12 -- you've already testified about this, but hand of one, hand
- 13 of all, accomplice liability was charged to the jury?
- 14 A. Yes.
- 15 Q. Okay. And you did object to it when it was raised after
- 16 the jury had begun deliberations?
- 17 A. Yes.
- 18 Q. Okay.
- 19 A. Again, if the transcript -- if the transcript says that,
- 20 then, yes.
- 21 Q. Okay. Well, we can look at it to confirm it ---
- 22 A. Oh, no, that's okay. I'm ---
- 23 Q. Okay.
- 24 A. --- not going to go back on the transcript again, but ---
- 25 Q. Do you remember if the court sustained or overruled that

1 objection?

2 A. I'm not -- I'm not sure.

3 Q. Okay. Well, let's look at ---

4 A. I don't think -- I don't think they sustained that
5 objection.

6 **MR. SMITH:** May I approach, Your Honor?

7 **THE COURT:** Certainly.

8 Q. Let's look at 393.

9 A. Sure.

10 **MR. YARBOROUGH:** Can you say that number?

11 **MR. SMITH:** 393.

12 **MR. YARBOROUGH:** Thank you.

13 Q. And, I'm sorry, I only have one copy.

14 A. Got you. Go ahead.

15 Q. Okay.

16 A. I think you actually may have -- if this is what you're
17 talking about. He says he overruled my objection.

18 Q. Okay. That's exactly what I was talking about.

19 A. Okay.

20 Q. Thank you. Would you agree with me that the testimony of
21 the co-defendants at trial was that Mr. Mosley fired the fatal
22 shot?

23 A. Yes.

24 Q. Okay. And Mr. Mosley's defense was that he wasn't there?

25 A. Yes.

1 Q. Okay. From that, I mean, I suppose that leads us to
2 believe that someone else would have fired the fatal shot
3 under Mr. Mosley's theory?

4 A. I guess that's what you're getting at.

5 Q. Right.

6 A. If he wasn't there, someone else obviously did it.

7 Q. Right. So a fatal shot was fired. If his defense is he
8 wasn't there, ---

9 A. It wasn't him.

10 Q. --- by implication someone else had to do it?

11 A. Yes.

12 Q. Okay. And so that would have been an issue of if his
13 alibi theory were true, someone else had to have fired the
14 fatal shot?

15 A. Yes.

16 Q. Okay. And if we look at page 320 in the transcript.
17 Look about lines 5 through 24. Would you agree with me that
18 this is the solicitor cross-examining Mr. Mosley?

19 A. Yes.

20 Q. And does Mr. Mosley there indicate that he did speak to
21 Mr. Ramsey, one of the co-defendants, about which house had
22 weed?

23 A. I think on -- I'll read this. But it says, I'm telling
24 you I told them where to go to. That's what he said.

25 Q. Okay. So there was some communication with Mr. Mosley

- 1 about where the co-defendants could buy weed?
- 2 A. That's all it would be. It would just -- he would just
- 3 say, well, this is a weed house.
- 4 Q. Okay.
- 5 A. But that's all he would have said, ---
- 6 Q. Okay.
- 7 A. --- according to that.
- 8 Q. Okay. Let's move on to your investigation.
- 9 A. Um-hum (affirmative).
- 10 Q. And you talked earlier about a cell phone.
- 11 A. Um-hum (affirmative).
- 12 Q. So to your memory I believe you testified that either he
- 13 didn't have a phone at the time or it wasn't working. Can you
- 14 tell me why the consultation with a phone expert didn't pan
- 15 out?
- 16 A. Well, we looked at that. It was something -- we looked
- 17 at every possible way we could establish that he wasn't there,
- 18 okay? And either the phone records were -- he either didn't
- 19 have a phone, or it wasn't working, or he was using his
- 20 girlfriend's phone.
- 21 Q. Okay.
- 22 A. So he couldn't really get much traction with that.
- 23 Q. Okay. So you're saying the phone evidence wasn't
- 24 helpful?
- 25 A. No.

1 Q. Okay. And you don't remember exactly what the reason it
2 was not helpful was, just that ---

3 A. I can just tell you this, if it would have been helpful,
4 that person would have been there. We would have -- we would
5 have pursued that.

6 Q. Okay.

7 A. But at the time, it was five years ago, but it was not
8 helpful at that time.

9 Q. Person or phone records?

10 A. (Affirmative nod).

11 Q. Is that right?

12 A. I'm sorry?

13 Q. If there had been phone records that ---

14 A. Oh, yes.

15 Q. --- would have confirmed ---

16 A. Absolutely.

17 Q. Okay. And there was testimony at trial from the co-
18 defendants that Mr. Mosley was using the phones of other
19 people to make calls?

20 A. I believe that's true.

21 Q. Okay. And Mr. Mosley's also raised the issue of inherent
22 bias of his co-defendants. And so tell us, you know, this was
23 an issue at trial. Tell us how you handled the fact that the
24 co-defendants had plea deals. How did that factor into the
25 case?

1 A. If you read the transcript, I question each one of them
2 about the fact that their charges had been dropped, the murder
3 charge had dropped down to voluntary manslaughter. But I
4 think before it even began, my strategy with three, or excuse
5 me, the co-defendants in this case was they were all
6 inconsistent. They all gave different testimony on things.

7 And that was my purpose enlisting the questions -- the
8 answers that I was trying to get from them. And you can see
9 in the transcript, they all testified to different things.

10 Q. Okay.

11 A. They were inconsistent.

12 Q. And that would have been -- those points of inconsistency
13 would have been what clothing Mr. Mosley would have been
14 wearing?

15 A. Yeah.

16 Q. Okay. Another would have been in what order the co-
17 defendants entered ---

18 A. Um-hum (affirmative).

19 Q. --- the home, the victim's home?

20 A. (Affirmative nod).

21 Q. Okay. And let's just look at the cross-examination on
22 these points. If we look at page 202 of the transcript.

23 A. Um-hum (affirmative).

24 Q. At the very bottom of 202 through 203 will you confirm
25 there just generally the kinds of questions you asked to the

- 1 co-defendant Jaron Dalton?
- 2 A. You talking at the bottom of 202, is that right?
- 3 Q. At the very bottom.
- 4 A. About the fact that he pled to a charge that carries less
- 5 time than murder, that he was offered a lesser included charge
- 6 in this case, all that -- went through that.
- 7 Q. So you did cross Mr. Jaron Dalton on ---
- 8 A. Yes.
- 9 Q. Okay. On bias?
- 10 A. Um-hum (affirmative).
- 11 Q. Let's look at page 223, then. And this is when you're
- 12 cross-examining Mr. Ramsey. And he was a co-defendant, too,
- 13 right?
- 14 A. Um-hum (affirmative). And that was -- that started at
- 15 line 10 down to 17.
- 16 Q. And you're crossing him on bias there, too?
- 17 A. Yes, I am.
- 18 Q. All right. And our last would be on page 237. And this
- 19 would be Mr. Jordan Dalton, the brother ---
- 20 A. That would be ---
- 21 Q. --- Jaron.
- 22 A. --- 237, line -- start at line 4, ends at line 9, yes.
- 23 Q. Okay. And that's where you cross him on bias as well?
- 24 A. Yes.
- 25 Q. Okay. And then if we look at page 267 and we come to Mr.

1 Tavis Campbell, ---

2 A. Um-hum (affirmative).

3 Q. --- do you remember his part of the case? What was his

4 ---

5 A. Well, he was in the Oconee County Jail at the time, I
6 think. I think that he -- I didn't really think much of it to
7 be honest with you. He gave a statement, and the statement
8 was contradicting what he said in court.

9 Q. Okay.

10 A. And I raised that issue with him as far as credibility
11 goes and the fact that he would be offered a better deal if he
12 cooperated with the State.

13 Q. Okay. And if we look at page 267, beginning with your
14 cross-examination, can you tell me a little bit about those
15 facts that comes into evidence here from Mr. Campbell?

16 A. It was a -- looks like there was a fax that he sent to
17 the solicitor's office.

18 Q. Okay. And I believe at some point here he -- it's
19 published to the jury.

20 A. Um-hum (affirmative). Yes.

21 Q. And if you will find that and tell us what that fax was
22 about.

23 A. Oh, the fax, it talks about I would like to have the --
24 would like to have something to benefit me before
25 participating. So that indicated that he was being -- he

1 wanted a better -- he wanted a good deal or some benefit to
2 him if he testified for the State.

3 Q. Okay. So that was something you'd crossed Mr. Campbell
4 on, too?

5 A. I did. Um-hum (affirmative). Yes.

6 Q. All right. Well, if we look at page 357, and that gets
7 us to closing arguments, lines 2 through 12, what's does --
8 what's the summary of your argument to the jury there?

9 A. What that's talking about is the inconsistencies in the
10 statements. That's what it's talking about.

11 Q. Okay. And do you give an explanation for the
12 inconsistencies there?

13 A. Just the jury an opportunity to listen to them and the
14 tapes -- the tape says three, and asked the jury to think
15 about that, why are the victims saying one thing and the co-
16 defendants another?

17 Q. So you posed the question there?

18 A. Yes.

19 Q. Okay. And if we look at 360 here, ---

20 A. Okay.

21 Q. --- lines 1 through 17, tell me what point you make there
22 in reference to the bias of the co-defendants.

23 A. They had better deals. They were all, you know, getting
24 benefits from testifying against Mr. Mosley.

25 Q. Okay. And then -- so that's your argument on closing.

1 A. Um-hum (affirmative).

2 Q. And then if we look at page 379, is there anything in
3 this instruction that you would have interpreted as a charge
4 related to your argument on the bias issue?

5 A. Well, it goes into the -- the judge is going into
6 credibility, and believability and so forth in this case. So
7 he's talking about bias and so forth of the witnesses and you
8 need to consider that.

9 Q. Okay. Including bias in favor of the State?

10 A. It does, yes.

11 Q. Okay. If we flip to our next issue that Mr. Mosley's
12 concerned about is flight.

13 A. Um-hum (affirmative).

14 Q. And you testified earlier that he was arrested in
15 Georgia.

16 A. Um-hum (affirmative).

17 Q. Okay. If we look at page 33 of the transcript, ---

18 A. All right.

19 Q. --- did you have a motion here in regards to the issue of
20 flight?

21 A. Yes. Looks like in the beginning, yes.

22 Q. Okay. And what was the outcome of that? Did the judge
23 sustain or overrule that?

24 A. I don't know. Let me see.

25 (Pause)

1 A. I think we put -- I think from reading this we did argue
2 that in the beginning. And then he talked about -- then we
3 talked about different things, with the witnesses they
4 couldn't find. But he didn't ...

5 Q. He didn't suppress that?

6 A. He didn't, no.

7 Q. Okay. And when that issue came up in the case you did
8 cross-examine ---

9 A. I did.

10 Q. --- on that?

11 A. Yes, I did.

12 Q. Okay. And you -- did you question Mr. Mosley about why
13 was he in Georgia?

14 A. That's -- yes.

15 Q. Okay. And that was -- was that an attempt to mitigate
16 any testimony that could have been construed as going towards
17 whether he was fleeing to Georgia?

18 A. I don't think there was any testimony at all that he --
19 he always said that he was in Georgia at the time. There was
20 nothing -- the judge didn't charge flight. And they stayed
21 away from anything regarding flight. I think Mr. Wilkins did
22 not talk about that in his closing. So throughout the case it
23 was shown he was in Georgia at the time -- was in Georgia when
24 they arrested him.

25 Q. Okay.

1 A. And that's it.

2 Q. And Mr. Mosley also raises the issue of whether he should
3 have gotten certain jury instructions. In this case you did
4 ask the judge for a voluntary manslaughter instruction, didn't
5 you?

6 A. If the transcript says I did, I did.

7 Q. Okay. And looking on it now was there facts in this case
8 that would have supported a conviction on a voluntary
9 manslaughter?

10 A. No, of course not. Of course not. You've got to have --
11 it has to be -- it's got to be a legal -- something legal that
12 you're doing with an involuntary kind of thing. There's
13 nothing -- he had two felonies in this case. So you did not
14 -- doesn't have any of the prerequisites, excuse me, for an
15 involuntary charge in this case.

16 Q. Okay. And the facts in this case show that there was an
17 armed robbery, ---

18 A. Uh-huh (affirmative).

19 Q. --- which -- and that would have been a felony?

20 A. Yes.

21 Q. Okay. Not a lawful activity?

22 A. No.

23 Q. Okay. The judge did charge accident, didn't he?

24 A. He did.

25 Q. Okay. Was there any evidence at trial that the victim in

1 this case did anything to provoke a sudden heat of passion?

2 A. No, this was -- this was -- these folks broke in, hit one
3 guy, shot -- there's no sort of -- nothing like that.

4 Q. Okay. The testimony was that all the victims were lying
5 on the floor?

6 A. Right.

7 Q. And the testimony was that Mr. Mosley was pistol whipping
8 ---

9 A. Allegedly. Allegedly.

10 Q. Allegedly.

11 A. Yes.

12 Q. Okay. Well, there was testimony on that, so ...

13 A. Um-hum (affirmative).

14 Q. But did either of the co-defendants or the victims
15 testify that Mr. Grich had provoked anything in the ---

16 A. No, of course not. He didn't.

17 Q. Okay. Did Mr. Mosley testify about any kind of
18 provocation?

19 A. There was no -- there was no -- no. No provocation.

20 Q. Okay. And just tell me generally, I mean, you know, you
21 did charge -- the judge did charge alibi and accident. What
22 was your thinking on why it was fine to have both of those
23 things charged at the same time?

24 A. Why at the same time? Okay. This is going back five
25 years, ---

1 Q. Right.

2 A. --- is my thinking ---

3 Q. Well, just tell me, you know, in a case like this why
4 would you want both of those things charged?

5 A. I wanted to have -- I wanted to have options is what I
6 wanted to have. That's what I was interested in.

7 Q. Okay.

8 A. I thought that we'd proven that Lester was not there at
9 the time this happened, that the witnesses in this case, these
10 co-defendants had a substantial reason to lie in this matter
11 about Lester because they were offered these sweet deals in
12 this case. And I thought -- I wanted to have options because
13 I did not believe that Lester did this, did this crime.

14 Q. Okay. And there was testimony at trial that would have
15 supported an alibi charge, right?

16 A. There was. There was -- there were two witnesses, I
17 believe, were alibis.

18 Q. Okay.

19 A. And Mr. Mosley also testified he was not there at the
20 time.

21 Q. Do you remember what the testimony was at trial about the
22 actual gunshot, about how that came about? Was it a sudden
23 thing? Or did it look planned?

24 A. It wasn't planned. It didn't appear to be planned. No,
25 it was -- it could have been construed as an accident, yes.

1 Q. Okay. And, in fact, didn't multiple witnesses testify
2 that it was sort of a sudden unexpected bang?

3 A. Yes. That's why it would fit into the accident part.

4 Q. Okay. Thank you.

5 MR. SMITH: I have no more questions at this time.

6 THE COURT: Mr. Yarborough, anything else?

7 MR. YARBOROUGH: I have -- just quickly, Your Honor.

8 **Redirect Examination by Mr. Yarborough:**

9 Q. He was asking you about the -- what took place on page
10 393, and after there was a note from the jury. Do you
11 remember that?

12 A. Yeah, you had asked me ---

13 Q. Yeah, ---

14 A. --- about that previously.

15 Q. --- and he just asked you about it again.

16 A. Yeah.

17 Q. At that point the jury asked what means murder? Does the
18 defendant have to pull the trigger to consider it murder? And
19 may we have a copy of the law?

20 A. Yeah, that's what -- that's what -- I've got a copy of
21 the note in front of me.

22 Q. Okay. And at that point you did not object to hand of
23 one, hand of all or to accomplice liability at that point, is
24 that correct?

25 A. That's correct.

1 Q. Okay. And -- but you -- you had not made that objection
2 before, but you made it at that time?

3 A. Yes.

4 Q. Okay. And now you've realized that became an issue on
5 appeal, correct?

6 A. It did.

7 Q. And the -- at some point the jury was handed copies of
8 the charge that Judge Miller had given them. Do you remember
9 that?

10 A. I'd have to -- if the transcript -- I don't have ---

11 Q. I think the transcript -- it says on page 394, y'all want
12 to look at these -- this is right after the question. And
13 he's -- there was something about trying to find it and get it
14 together. And we'll send three copies back. Do you remember
15 that correctly?

16 A. If the transcript says it, that's what happened.

17 Q. It says it on page 394 ---

18 A. I don't have the transcript ---

19 Q. No, that's fine. And that's -- that was Court's exhibit
20 number 6, 7 and 8, which was handed back. I'll show you -- I
21 can show you.

22 **MR. YARBOROUGH:** Can I approach, Your Honor?

23 **THE COURT:** Sure. Go ahead.

24 Q. Page 394, okay?

25 A. Yeah, looks like -- yeah, you're correct.

1 Q. Okay. And you did not -- at that point you didn't object
2 to that being handed back there. You only objected to the
3 hand of one, hand of all being charged, is that correct?

4 A. If the transcript says that, yes.

5 Q. Okay. Safe to say -- at that point Judge Miller
6 overruled your objection. And his statement, well, you object
7 to the hand of -- it says here in the transcript, hand of all
8 [sic] is the hand of all is what you're saying. That's what
9 he asked you. And you said at that point, I do just based on
10 the question, Your Honor. Is that correct?

11 A. Again, if the transcript recites that, that's correct.

12 Q. And now we know, playing this thing all the way out to
13 the opinion of the Court of Appeals, that they said that
14 wasn't reserved for the record because that was the first time
15 that was objected to?

16 A. All right. I think you showed me a copy of that before
17 we started today.

18 Q. Okay.

19 **MR. YARBOROUGH:** And just so it's not confusing, Your
20 Honor, for the record, the Court of Appeals after the Anders
21 brief asked whether the trial court erred by instructing the
22 jury on accomplice liability in response to the jury's
23 question during deliberation. And they asked for that. And
24 then it was later determined that that had not been preserved
25 for the record.

1 **THE COURT:** Okay.

2 **Redirect Examination by Mr. Yarborough Continued:**

3 Q. There was some -- he asked -- and I'll follow back up on
4 it. There was some identification issues during the -- during
5 the co-defendant's testimony, is that correct?

6 A. Your question's a little confusing. Tell ---

7 Q. Yeah.

8 A. --- me what you're asking me.

9 Q. Your argument was that Mr. Mosley wasn't there, correct?

10 A. Right. And as I told the assistant attorney general, I
11 was trying to show the inconsistencies, not just bias of these
12 guys, but also the inconsistencies in their testimony. Yes.

13 Q. Okay. And we've talked about this before, but do you
14 recall Solicitor Wilkins asking the defendant to stand up
15 during those parts of the trial?

16 A. Yeah. We initially -- when Mr. Wilkins was starting
17 that, we had a sidebar at one point. And the judge was -- had
18 an issue with that a little bit. He kind of was trying to
19 figure out what he was trying to do.

20 Q. Right.

21 A. And it was demonstrated -- demonstrative evidence in this
22 case, which he could do. It wasn't -- it wasn't -- and I
23 actually have used that in trials I had subsequent to that.
24 So it wasn't something that was objectionable because it
25 wasn't -- it was just demonstrative evidence. That's all it

1 was.

2 Q. Okay. But -- and it's safe to say you didn't object to
3 it, correct?

4 A. Oh, I didn't. Of course not, no.

5 Q. Okay. And ---

6 A. Now I did -- now I will tell you that I found it really
7 unusual, but ---

8 Q. Right.

9 A. --- I went back and checked out other cases like this,
10 and it was pretty common to do that. Wasn't very -- it wasn't
11 unusual to do that.

12 Q. And Solicitor Wilkins argues that that -- in his closing
13 argument that that goes towards identification, correct?

14 A. It did, but I didn't see it helping their -- because the
15 reason it didn't help them is because all the witnesses in
16 this case, they all gave different statements. They all gave
17 different ideas of what the people were wearing, just, you
18 know, going to the door. They just weren't very credible in
19 this case. And they all had bias in this matter. And they
20 were going to testify to anything ---

21 **MR. SMITH:** Objection.

22 A. --- that the State tells them to do.

23 **THE COURT:** All right. What's the objection?

24 **MR. SMITH:** Your Honor, I move to strike this line of
25 questioning because the issue of the identification, and

1 comparison and heights was not an issue that's been pled. The
2 State has no ---

3 **MR. YARBOROUGH:** Your Honor, we alleged ineffective
4 assistance of counsel. This is one of the issues that I was
5 just bringing up. We've talked about it. He went into
6 identification. He said that they called all these witnesses.
7 I'm not going to spend a whole lot ---

8 **THE COURT:** All right.

9 **MR. YARBOROUGH:** --- of time with it.

10 **THE COURT:** I'll allow you to continue with it for what
11 it's worth. All right.

12 Q. Anyway, it was unusual. Would you agree with that?

13 A. It wasn't so unusual that I would object to it. As I
14 said, I looked at different cases that it's been done.

15 Q. All right.

16 A. And it was kind of hokey a little bit, but it didn't
17 really -- it wasn't something I could, as an officer of the
18 court, object to because there really wasn't an objection to
19 it in this case.

20 Q. I'll ask you one more question about that, and then I'll
21 leave it alone. Now thinking back on it could you look at it
22 and say that that put the defendant's right not to testify in
23 question?

24 A. Okay. You're saying -- are you saying that because those
25 persons came in and said about the height and so forth that --

- 1 what is your -- what are you -- I ---
- 2 Q. And then ---
- 3 A. --- get your question.
- 4 Q. And then Solicitor Wilkins would ask the defendant to
- 5 stand up, correct?
- 6 A. Right.
- 7 Q. Right. And you didn't object to that?
- 8 A. Well, it was an alibi case. It was an alibi case, that's
- 9 one thing.
- 10 Q. Right.
- 11 A. But, secondly, as I said before, it's not objectionable.
- 12 It's not an objectionable -- I couldn't make an objection to
- 13 it. I mean, as an officer of the court I can only make
- 14 objections that are credible and that are -- it's an objection
- 15 that is not credible that you're just doing. It's a
- 16 superfluous kind of objection. That's -- that's not proper.
- 17 Q. Okay. But it's safe to say you didn't object to it?
- 18 A. It's safe to say that I didn't object to it because it
- 19 was not objectionable.
- 20 Q. Okay.
- 21 A. Yes.
- 22 Q. Well, we'll leave it -- we'll leave that ---
- 23 A. Okay.
- 24 Q. --- at that. When the -- when the jury -- can you kind
- 25 of go back over what you were telling the attorney general

1 about when the -- when the jury came back with the question,
2 what was going through your mind with the specific questions
3 they asked? Do you recall that? You've got that list right
4 there.

5 A. What was going through my mind?

6 Q. Yeah. I mean, ...

7 A. Okay.

8 Q. Well -- yeah, did ...

9 A. They obviously -- they obviously wanted to know what
10 murder was. They obviously wanted to know about -- the
11 question was, does the defendant have to pull the trigger to
12 consider it murder?

13 Q. Okay. And that's the question I've got for you. At that
14 point the State has raised all these issues that there was a
15 robbery going on and it was this intentional act, correct?

16 A. Mr. -- Lester was charged with other charges besides
17 murder.

18 Q. Right.

19 A. There were two -- there were two other felonies that were
20 involved in this case.

21 Q. Right. And the State's position at trial was that they'd
22 proved malice by the fact that he was engaged in this other
23 robbery.

24 A. The malice -- the malice came from those felonies,
25 correct. That's where it came from.

1 Q. Right. Okay. So the malice came from those arguments.

2 And your defense was alibi, right?

3 A. Yes.

4 Q. Okay. And at some point from that question the jury goes
5 to the question of hand of one, hand of all, right?

6 A. It appears that the question, does the defendant have to
7 pull the trigger to consider it murder, it appears that the --
8 that they may be moving in that direction in terms of hand of
9 one, hand of all, yes.

10 Q. Okay. And -- or accomplice liability, right? That's
11 another way of saying it.

12 A. That's -- you know, there's six of one and a half dozen
13 of the ---

14 Q. Right. Okay. And did you believe at that point you had
15 objected to that before? Or do you recall?

16 A. At that time -- I don't recall at this time.
17 Independently, I don't recall what I was thinking five years
18 ago at that time. I don't -- I don't know that.

19 Q. Okay. But you did object -- you objected to it then?

20 A. I objected at some point, yes.

21 Q. Right. Okay.

22 **MR. YARBOROUGH:** I don't have any further questions.

23 Thank you, Your Honor.

24 **THE COURT:** Mr. Smith.

25 **MR. YARBOROUGH:** Thank you, Mr. Robinson.

1 **MR. SMITH:** Yes, ma'am. Just a few.

2 **Recross-examination by Mr. Smith:**

3 Q. Mr. Robinson, the co-defendants in the case did testify
4 that Mr. Mosley was their accomplice in these crimes, right?

5 A. Yes.

6 Q. Okay. And that he had picked out the house?

7 A. That's what they -- that's what they said, yes.

8 Q. Okay. Picked it out because he knew that there was a lot
9 of weed there?

10 A. It was -- it was a weed house, yes.

11 Q. Okay. And didn't they testify that he was the main
12 aggressor once they entered the home?

13 A. I believe that they -- in the interest -- it was all
14 self-interest that they testified to that, yes.

15 Q. Okay. But they did testify to that?

16 A. Yes.

17 Q. Okay. And they also did testify that he was the person
18 who fired the shot?

19 A. Yes.

20 Q. Okay. Didn't they testify that he was shouting, where's
21 the dope?

22 A. If the transcript says that, ---

23 Q. Okay.

24 A. --- as far as what they said, I have to go with the
25 transcript.

1 Q. Okay.

2 A. Independently, I can't tell you without looking at the
3 transcript what they said. But if they said -- if you're
4 telling me that, okay.

5 Q. Okay. And the victims in the case, ---

6 A. Yes.

7 Q. --- their identification of the person who was the main
8 aggressor in the home was -- their testimony at that point was
9 that Mr. Mosley's height was consistent with the height of the
10 person who was doing the majority of the abuse in the home?

11 A. That's all -- they didn't testify they saw him. They
12 just testified he looked -- he had the same height ---

13 Q. Right.

14 A. --- of this guy. But there could be a million guys that
15 have the same height.

16 Q. Okay.

17 A. Not just -- not just Lester.

18 Q. Okay. But at the very least their testimony was that the
19 short person was the one who was the aggressor?

20 A. Uh-huh (affirmative). Right.

21 Q. Okay. And the judge charged the jury on malice, but he
22 charged that the jury can affirm malice in multiple ways,
23 right?

24 A. Yes.

25 Q. It wasn't just a charge of malice on the felony murder.

1 He also charged that malice could be inferred from other
2 actions?

3 A. Let me look at his -- let me look at the charge ---

4 Q. Okay.

5 A. --- again.

6 Q. Do you need the page number again?

7 A. I've got it here. Yes, he did charge that.

8 Q. Okay.

9 A. That was in -- that was paragraph 3.

10 Q. Okay. So to summarize ---

11 A. Paragraph 4, excuse me.

12 Q. By the judge's charges to the jury, they could reach
13 malice by other avenues other than merely felony murder?

14 A. Yes.

15 Q. Okay. Thank you.

16 **MR. SMITH:** I have no more questions, Your Honor.

17 **THE COURT:** Mr. Yarborough.

18 **MR. YARBOROUGH:** Nothing further, Your Honor.

19 **THE COURT:** All right. Mr. Robinson, you can step down.

20 **MR. SMITH:** And, Your Honor, I would just ask that he
21 stay here just in case I need rebuttal testimony.

22 **THE COURT:** Okay. Sure.

23 **MR. SMITH:** Sorry to make him do that.

24 **THE COURT:** All right. We're in recess for five minutes.

25 **MR. YARBOROUGH:** Thank you.

1 **MR. SMITH:** Thank you.

2 **THE COURT:** Thank you.

3 (Whereupon court was in recess at 11:13 am)

4 (Whereupon court reconvened at 11:39 am)

5 **THE COURT:** All right. Are we ready to proceed?

6 **MR. SMITH:** I think we are, Your Honor. She should be on
7 the phone still.

8 **MR. YARBOROUGH:** She should be -- and if the Court -- I'm
9 going to let Ms. Hobbs from our office ---

10 **THE COURT:** Okay. Perfect. Yeah.

11 **MR. YARBOROUGH:** Thank you.

12 **MS. HOBBS:** May it please the Court?

13 **THE COURT:** Yes.

14 (Whereupon Kathrine Hudgins was appearing via telephone)

15 **MS. HOBBS:** Ms. Hudgins, can you hear us?

16 **MS. HUDGINS:** I can hear you.

17 **MADAM CLERK:** Ms. Hudgins, I'm going to swear you in.

18 **Kathrine Hudgins,** being
19 duly sworn testified as follows;

20 **MADAM CLERK:** Please state your full name for the record.

21 **MS. HUDGINS:** Kathrine Hudgins. It's spelled H-u-d-g-i-
22 n-s.

23 **MADAM CLERK:** Thank you.

24 **MS. HUDGINS:** Kathrine with a K.

25 **THE COURT:** And I'll just let everybody know, one of the

1 pitfalls of having a witness via telephone is that sometimes
2 there's the tendency to talk over one another. So if y'all
3 would just both, please, just be real careful since the court
4 reporter's taking down everything. All right?

5 **MS. HOBBS:** Yes, Your Honor.

6 **THE COURT:** Thank you.

7 **Direct Examination by Ms. Hobbs:**

8 Q. Ms. Hudgins, good morning.

9 A. Good morning.

10 Q. I just want to go back a little bit to the start of how
11 you came on to this case.

12 A. Okay.

13 Q. You were with the Appellate Defense and you perfected Mr.
14 Mosley's appeal, correct?

15 A. That's correct.

16 Q. And do you recall what issue you raised in your Anders
17 brief?

18 A. I've got the Anders brief in front of me. So I could
19 just read you the statement -- the issue that I raised. It
20 was whether or not the trial judge erred in instructing the
21 jury that malice can be inferred if one intentionally kills
22 another during the commission of a felony.

23 Q. And eventually the Court of Appeals asked for both
24 parties to brief a different issue. And that issue was a
25 completely different one.

1 A. That's correct.

2 Q. And that issue had to do with hand of one, hand of all
3 being charged after this jury note came back.

4 A. That's correct.

5 Q. When you were briefing this issue did you feel at the
6 time that it was preserved?

7 A. I did not, which is part of the reason I didn't raise it
8 initially.

9 Q. And is that why you have this footnote here on page 9 in
10 the brief that you eventually submitted to the court after
11 their orders? Do you recall your thinking when you put that
12 in the -- your brief?

13 A. Yes, because there was -- there was no objection
14 whatsoever to the charge when it was initially given by the
15 trial judge. The objection came only after the jury came back
16 with its question.

17 Q. And ---

18 A. And that's what the Court of Appeals ultimately decided
19 as well, I believe, in their opinion.

20 Q. Do you think that had this been preserved for appeal that
21 it would have been reversible error?

22 A. You know, it certainly would have been an issue that the
23 Court of Appeals would need -- have needed to decide. You
24 know, the State in their brief argued that the accomplice
25 liability -- the initial accomplice liability charge was

1 correct. I think there are some arguments to be made that it
2 was not correct. Ultimately it would have been for the Court
3 of Appeals. And that -- the Court of Appeals wasn't given the
4 opportunity to decide that issue because it was not preserved.

5 Q. Do you believe that it may -- there might have been
6 prejudice had it been preserved in light of the alibi defense
7 and ---

8 MR. SMITH: Objection.

9 THE COURT: What's the basis for your objection?

10 MR. SMITH: The question calls for a legal conclusion.
11 That's left to the Court.

12 THE COURT: I'm going to allow her to testify to this if
13 she has some sort of an opinion about it. And I'll take it,
14 again, for what it's worth.

15 MR. SMITH: Okay.

16 THE COURT: Thank you.

17 MS. HOBBS: Thank you, Your Honor.

18 Q. Going back to your brief, you argue that it would be
19 reversible error in light of -- that it could have been
20 accident in the jury note, and because there was a lot of
21 testimony on accident. Did you feel that that was not
22 elicited too much on the record about what the jury was
23 specifically referring to? Sorry, that was long-winded.

24 A. In just re-reading my brief when I'm arguing that the
25 error was not harmless, that I do note in my brief that the

1 jury may have erroneously inferred that appellant was guilty
2 of murder, burglary and attempted armed robbery as an
3 accomplice by telling Kadeem Ramsey where he could purchase
4 marijuana as opposed to his actually being involved and being
5 present at the scene.

6 Q. I want to clarify that the resulting harm is not just
7 from recharging it once we get that note, but you believe that
8 it was just in light of not -- in light of charging hand of
9 one, hand of all, period?

10 A. Initially.

11 Q. Is that because alibi was -- is averse just inherently to
12 hand of one, hand of all?

13 A. Correct.

14 Q. And it was not objected to, but there's some discussion
15 by the State and the court back and forth about State versus
16 Belcher and an inferred malice instruction. Do you recall
17 that?

18 A. I don't. If you can point me to the record, I'd be glad
19 to look at it.

20 Q. Yes. I have the pages right here. Let me just make sure
21 I have the correct one. We are going to page -- it starts on
22 page 351.

23 A. Is that 351 of the record or the transcript?

24 Q. I believe they're the same page, actually.

25 A. May be the same. 351, let me get there. Okay. I see

1 the court brings up State versus Belcher.

2 Q. And they -- the State and the court go back and forth
3 that it would not be applicable because there was conflicting
4 testimony about it being mitigating and that it's an accident
5 and also that, of course, he was doing something unlawfully at
6 the time when the gun went off, right?

7 A. Okay.

8 Q. My question is is that had that been preserved, is the
9 State versus Belcher mitigating argument, is that something
10 that you would have raised on appeal?

11 A. Well, I sort of raised it in the Anders brief even though
12 there wasn't an objection to it.

13 And I was thinking about it this morning. I'm not sure
14 -- it's not a pure Belcher situation because it doesn't -- the
15 inference doesn't come from the use of the deadly weapon. It
16 has to do more with the felony murder rule. And I'm not sure
17 our court has addressed it yet.

18 But to answer your question, yes, I would have raised it.
19 I think I did.

20 Q. When State versus Belcher talks about mitigating factors
21 and how you cannot charge the jury on inferred malice if
22 there's a mitigating factor such as self-defense, did you
23 feel, I mean, in your decision-making do you believe that
24 alibi or accident -- are both of those mitigating factors that
25 could fall under that?

1 A. It could certainly be argued that there were mitigating
2 factors.

3 **MS. HOBBS:** That's all the questions I have.

4 **THE COURT:** Thank you. Mr. Smith.

5 **MR. SMITH:** Yes, ma'am.

6 **Cross-examination by Mr. Smith:**

7 Q. Hello, Ms. Hudgins.

8 A. Good morning.

9 Q. Good morning. Just got a few questions. In your -- when
10 the court denied your motion to be relieved and directed you
11 to brief the issue of accomplice liability, they did not also
12 direct you to brief the issue of the inference of malice and
13 felony murder, correct?

14 A. I believe the order states this and any other issues. I
15 felt like since I'd already raised the issue in the Anders
16 brief that I didn't need to raise it again since they directed
17 me to raise that other issue and the fact that there wasn't an
18 objection to it.

19 Q. Okay.

20 A. Did I answer your question?

21 Q. It did. So it was not an issue that you were directed to
22 brief in the same way that you were -- in the way that you
23 were directed to brief the accomplice liability issue?

24 A. That's correct.

25 Q. Okay. And you pointed out that you did brief this issue

1 of accomplice liability. The State also briefed the issue.

2 And I believe you mentioned earlier that one of the State's

3 argument was that the issue had not been preserved. The State

4 also addressed the merits, correct?

5 A. Correct.

6 Q. And argued that there was only harmless error, right?

7 A. That's correct.

8 Q. Okay.

9 A. Yes.

10 Q. Okay. That's the only questions I have. Thank you.

11 A. Thank you.

12 **THE COURT:** Ms. Hobbs.

13 **MS. HOBBS:** I just have one, Your Honor.

14 Q. And I believe Ms. Hobbs has some more questions.

15 A. Okay.

16 **Redirect Examination by Ms. Hobbs:**

17 Q. I didn't clarify earlier. When we were talking about the

18 footnote that you put in your brief after the Anders order,

19 can you read that for me, and I'll ask you a follow-up

20 question?

21 A. Sure. Let me get that. I think it's on page 9 of the

22 brief. You want me to read the footnote?

23 Q. Yes. I'm sorry. Just have it read into the record. And

24 then I'll ask you a follow-up question.

25 A. Sure. Okay. I just -- I just dropped the footnote.

1 Trial counsel's failure to object to the initial charge on
2 accomplice liability may need to be raised at post conviction
3 relief.

4 Q. And going back to what the assistant attorney general
5 asked you on direct [sic] about your issue in the Anders brief
6 not being raised in the brief that you eventually filed after
7 the Anders order, would you have raised that had it been
8 preserved?

9 A. Yes.

10 Q. That's it. Thank you, Ms. Hudgins.

11 A. Thank you.

12 **THE COURT:** Mr. Smith, anything else?

13 **MR. SMITH:** No, ma'am.

14 **THE COURT:** All right. Thank you so much for appearing

15 ---

16 A. Thank you.

17 **THE COURT:** --- via telephone. We appreciate it.

18 A. I appreciate your allowing telephone testimony. I
19 appreciate everybody for that. Thank you.

20 **THE COURT:** Absolutely. Thank you.

21 **MR. SMITH:** Have a good day.

22 A. You, too. Bye bye.

23 **MR. YARBOROUGH:** Your Honor, could we briefly call back
24 Mr. Robinson based on that testimony and ask him a couple of
25 questions about what she said?

1 **THE COURT:** Any objection to that, Mr. Smith?

2 **MR. SMITH:** Well, Your Honor, I would just --

3 logistically, I may call Mr. Robinson as a rebuttal witness

4 depending on if Mr. Mosley testifies. So I just -- in the

5 interest of efficiency I wouldn't want to make him move around

6 ---

7 THE COURT: Okay.

8 **MR. SMITH:** --- if we could do it ---

9 **THE COURT:** That's fair enough.

10 **MR. YARBOROUGH:** That's fine. We'll just -- if we can

11 ask him some questions at that ---

12 **THE COURT:** Sure. Absolutely. That sounds good.

13 **MR. YARBOROUGH:** We'd call Mr. Mosley.

14 **THE COURT:** All right. Sir, if you'll come forward and

15 be sworn, please.

16 **MADAM CLERK:** Mr. Mosley, please place your left hand on

17 the Bible and raise your right hand.

18 Lester Mosley, Jr., being

19 duly sworn testified as follows;

20 **MADAM CLERK:** Thank you. You may be seated. Please

21 state your full name for the record.

22 **MR. MOSLEY:** Lester Devaria Mosley, Jr.

23 Direct Examination by Mr. Yarborough:

24 Q. Mr. Mosley, are you the applicant in this case?

25 A. Yes, sir.

- 1 Q. And how old are you?
- 2 A. Twenty-five.
- 3 Q. And how old were you when all this happened?
- 4 A. Eighteen.
- 5 Q. And did -- who were you represented by?
- 6 A. Scott Robinson.
- 7 Q. And how often did you have a chance to meet with Mr.
- 8 Robinson?
- 9 A. I stayed in the County about 22 months, so out of 22
- 10 months I met with him about three times.
- 11 Q. Okay. And did y'all discuss your trial?
- 12 A. A couple of times.
- 13 Q. Okay. Did you ever want to talk to him about anything
- 14 about a guilty plea?
- 15 A. Not really because I'm not guilty.
- 16 Q. Okay. And did you go over your discovery with him?
- 17 A. No.
- 18 Q. Okay. But you did give him the name of some witnesses to
- 19 call, right?
- 20 A. Yes, sir.
- 21 Q. Okay. Tell us -- who were those witnesses?
- 22 A. Julian Anderson, Kellan Goodine, Phillip Bruce, Cosha
- 23 Benson and William Wingard.
- 24 Q. Okay. And were all those witnesses called at trial?
- 25 A. Only two of them.

1 Q. Okay. And did you want the other ones called?

2 A. Yes, sir.

3 Q. Okay. And what were -- what was your purpose in wanting
4 the other ones called?

5 MR. SMITH: Objection. Your Honor, failure to call alibi
6 witnesses is not an issue that's been pled. So it falls
7 outside the pleadings and it's irrelevant to the pled issues.

8 THE COURT: All right. Mr. Yarborough.

9 MR. YARBOROUGH: Your Honor, I think it goes to the issue
10 of ineffective assistance of counsel, which is the first
11 argument we'd make. And I'll just ask him a couple of
12 questions about it ---

13 THE COURT: All right. Let's just be brief with that.

14 MR. YARBOROUGH: Okay.

15 THE COURT: Thank you.

16 Q. Can you -- what did you hope in getting an alibi witness?

17 A. That -- by the alibis, it would go ahead and get me on
18 out, you know, like, go ahead and help me, you know, get on
19 out the door, like, because my alibis were, you know,
20 sufficient. They were, you know, there when, you know, when I
21 was -- that were the ones that helped me, you know what I'm
22 saying? They were the ones that I was with. So ---

23 Q. Okay. And they weren't the people that did the murder?

24 A. No.

25 Q. Okay. And did you have a problem at some point about --

1 this thing about flight? Do you know what I'm -- where were
2 you when you were arrested?

3 A. I was at -- I was arrested in Toccoa.

4 Q. Okay. And what were you doing in Toccoa?

5 A. My girlfriend stayed in Toccoa at the time. That's what,
6 you know, ---

7 Q. Okay. So you -- you had not run away?

8 A. No.

9 Q. Okay. And you wanted people to know that, right?

10 A. Yes, sir.

11 Q. Okay. And at some point did you testify at trial?

12 A. Yes, sir.

13 Q. Okay. And did you feel like you were as prepared as you
14 wanted to be for your testimony?

15 A. Not as I should have been. Not as prepared as I should
16 have been, but I was, you know ...

17 Q. Okay. And would -- having it to do over again would you
18 -- would you have liked to have had that opportunity?

19 A. Yes, sir.

20 Q. Okay. And those are the -- is there anything else that
21 you wanted Mr. Robinson to do that he didn't do?

22 A. I just wish he would have called my alibis.

23 Q. The -- okay. Now let me ask you this, did -- do you
24 understand this information that they're talking about, hand
25 of one, hand of all?

- 1 A. Not a hundred percent.
- 2 Q. Okay. Was that ever discussed with you?
- 3 A. I mean, it was brought up probably once when I first got
- 4 arrested, but after that I never heard it again.
- 5 Q. Okay. And what about the notion of -- do you know what
- 6 the notion of accomplice liability means?
- 7 A. No, sir.
- 8 Q. Okay. And you don't know what the idea of flight means,
- 9 right?
- 10 A. No.
- 11 Q. Okay. Do you -- now that you've heard something about
- 12 it, do you know what that means now?
- 13 A. Yeah. They was basically trying to say I was like
- 14 running or ---
- 15 Q. Okay. And you would have wanted everybody to know you
- 16 didn't run?
- 17 A. Yes, sir.
- 18 Q. Okay. And at some point are you aware that the jury
- 19 charges were given to the jury about accomplice liability or
- 20 the hand of one, hand of all?
- 21 A. No, sir.
- 22 Q. You're not aware of that?
- 23 A. No.
- 24 Q. Okay. In hindsight do you wish Mr. Robinson would have
- 25 done more to help you in this case?

1 A. Yeah, a lot more.

2 Q. Okay. And are you familiar with what an Anders brief is?

3 A. Yeah, I mean, I am because I had to file one, but I'm not
4 too familiar with it.

5 Q. Okay. And so did you ever meet or talk to Ms. Hutchinson
6 [sic]?

7 A. No, I never saw her.

8 Q. Okay. And at some point you had a brief filed that the
9 Court of Appeals asked to have done, right?

10 A. Yes, sir.

11 Q. Okay. And when that was done, sometime after that, after
12 that brief was filed you got me involved, right?

13 A. Yes, sir.

14 Q. Okay. And you don't have any problem with me arguing
15 those issues, is that correct?

16 A. No, sir.

17 Q. Okay. And you want me to, right?

18 A. Yes, sir.

19 Q. Okay. And you don't -- there's nothing you think I did
20 wrong in those things ---

21 A. No, sir.

22 Q. --- because that was all done before I got involved?

23 A. Yes, sir.

24 Q. Okay. Is there anything else you -- this is your day.
25 Is there something you want to tell Judge Verdin about this

1 case?

2 A. Basically I just want to let her know, like, I'm
3 innocent. Like no matter what anybody thinks, I'm innocent,
4 you know? I may have, you know, ---

5 Q. Let's don't go into what you may have, but ...

6 A. I did tell a guy, you know, where he can buy weed. I
7 didn't -- I didn't know the motive of what they were going to
8 do. I didn't, you know, -- I just wish that I was never even,
9 you know, involved in this situation at all, period, you know.
10 But ---

11 Q. Do you have any relationship with those guys that ---

12 A. I don't even know the brothers. I don't even -- I know
13 Bernard Ramsey. I grew up with Bernard. I don't know the
14 other two.

15 Q. Did you know anything about that gun that was buried?

16 A. I never -- see, when the forensics came back, my
17 fingerprints was not even on the gun. Nothing that they found
18 had indicated that I was even involved in the situation.

19 Q. All right. Did you think that having a phone expert
20 would have helped your case?

21 A. Yes, sir.

22 Q. Okay. And why is that?

23 A. Because, like, they were saying that I had made a call
24 from Bernard's phone to -- to Erica's phone, which it didn't
25 happen. It didn't happen.

1 Q. Right.

2 A. Because every -- when they brought it up at trial, every
3 call was a incoming instead of -- it wasn't outgoing. You
4 know, if I would have called her, it would have been a
5 outgoing call instead of a incoming call.

6 Q. Right. Okay. And you don't know anything about that
7 gun?

8 A. No, sir.

9 Q. Okay.

10 **MR. YARBOROUGH:** Just a second, Your Honor.

11 **THE COURT:** Sure.

12 (Pause)

13 **MR. YARBOROUGH:** I don't have any further questions.

14 Q. There's nothing else you want to tell the Court? I mean,
15 I -- this is your day. I just want to make sure.

16 A. No.

17 Q. Okay. Thank you.

18 **THE COURT:** Any questions for this witness?

19 **MR. SMITH:** Yes, ma'am. Not many.

20 **Cross-examination by Mr. Smith:**

21 Q. And, Mr. Mosley, I apologize. I'm a slow writer. Those
22 alibi witnesses you mentioned, I don't remember how many there
23 were, can you tell me their names again?

24 A. It was Kellan Goodine, Julian Anderson, William Wingard,
25 Cosha Benson and Phillip Bruce.

- 1 Q. Okay. All right. And who was the first one again?
- 2 A. Kellan Goodine.
- 3 Q. How do you spell that?
- 4 A. K-e-l-l-a-n G-o-o-d-i-n-e.
- 5 Q. Okay. Kellan Goodine, Julia Anderson ---
- 6 A. Julian. Julian.
- 7 Q. Julian. Okay. Cosha?
- 8 A. Benson.
- 9 Q. Okay. William Wingard?
- 10 A. Yes, sir.
- 11 Q. And Phillip Bruce?
- 12 A. Yes, sir.
- 13 Q. Okay. That's all of them?
- 14 A. (Affirmative nod).
- 15 Q. Okay. And some of those did testify at trial, though,
- 16 didn't they?
- 17 A. Two of them.
- 18 Q. Okay. And, you know, when it -- you wanted -- at trial
- 19 you wanted everyone to know you didn't run, right?
- 20 A. Yes, sir.
- 21 Q. Okay. And Mr. Robinson did ask you about that at trial?
- 22 A. Yes, sir.
- 23 Q. And you told everybody you didn't run, you were there
- 24 with your girlfriend?
- 25 A. Yes, sir.

1 Q. Okay. And you -- you testified a few minutes ago that
2 you weren't involved with the robbery, that all you did was
3 tell, you know, Mr. Ramsey where a weed house was?

4 A. Yes.

5 Q. Okay. And that's something you also testified about at
6 trial, too?

7 A. Yes, sir.

8 Q. And you mentioned that there were no fingerprints on the
9 gun. And that was something Mr. Robinson talked about at
10 trial, too, wasn't it?

11 A. Yes, sir.

12 Q. Okay. And you testified at trial that you didn't have
13 anything to do with this robbery?

14 A. Yes, sir.

15 Q. But the co-defendants, they said you did, right?

16 A. Yes, sir.

17 Q. Okay. And that was the dispute you had?

18 A. Yes, sir.

19 Q. All right. Okay. Thank you.

20 **MR. SMITH:** I have no more questions.

21 **THE COURT:** Any other questions for this witness?

22 **MR. YARBOROUGH:** No. No, ma'am.

23 **THE COURT:** Sir, you can step down.

24 A. Thank you.

25 **THE COURT:** Anything else from the applicant?

1 **MR. YARBOROUGH:** No, ma'am, not at this time.

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

3 **MR. SMITH:** I'd like to call Scott again as a witness.

4 **THE COURT:** All right. I think there's no objection to
5 recalling ---

6 **MR. YARBOROUGH:** No objection, Your Honor.

7 **THE COURT:** All right.

8 **MR. SMITH:** And I think they had some questions they
9 wanted to ask, too.

10 **THE COURT:** Sure.

11 **MR. YARBOROUGH:** Your Honor, on the recall, I know it's a
12 little bit unusual, but because the questions we have was
13 about the law that was brought up, I was going to let Ms.
14 Hobbis ask the questions of Mr. Robinson for that if ---

15 **THE COURT:** That's fine.

16 **MR. YARBOROUGH:** Okay.

17 **THE COURT:** I think the rule of only one attorney
18 questioning a witness wouldn't apply, necessarily, to a recall
19 since they're called by another party.

20 **MR. YARBOROUGH:** Thank you.

21 **THE COURT:** Do you want to just -- let's just turn the
22 microphone ---

23 **MR. SMITH:** Yeah.

24 **THE COURT:** --- for him.

25 **MR. SMITH:** Because I don't think -- I don't need anymore

1 evidence or papers.

2 **THE COURT:** Okay. All right. Mr. Smith.

3 **MR. SMITH:** Thank you, Your Honor.

4 **THE COURT:** You're still under oath.

5 **MR. ROBINSON:** Sure.

6 **THE COURT:** All right?

7 **MR. ROBINSON:** Okay.

8 **MR. SMITH:** I just have a few questions.

9 **Scott Robinson,** having been
10 previously sworn testified as follows;

11 **Direct Examination by Mr. Smith:**

12 Q. Earlier there was testimony about the fact that the
13 witnesses compared the height of Mr. Mosley to the shooter at
14 trial. Do you remember that?

15 A. Yes.

16 Q. Okay. But Mr. Mosley, he did testify at trial?

17 A. He did. Yes, he did.

18 Q. At what point had you discussed with him his testifying
19 at trial?

20 A. We talked about it beforehand. I mean, it was really --
21 it's his decision. You can't force a client to testify.

22 Q. Okay.

23 A. But he also knew he had to tell the truth. You don't --
24 I mean, you can't coach a witness. You can't tell the
25 witness, well, you know, say it this way or that way.

1 But he knew -- and I think the judge talked with him in
2 the middle before he testified. He was very clear, when you
3 testify, the State has the right to cross-examine you. And
4 there are dangers and there are -- there are also benefits to
5 testifying.

6 But as far as preparing a witness to testify, other than
7 telling them to tell the truth, that's really all you can do.
8 You don't want to -- you don't want to coach a witness to tell
9 things that aren't true. You can't do that.

10 Q. Okay.

11 A. The only thing I would tell him was tell the truth and
12 don't say what other people say.

13 Q. Okay. And did he want to testify?

14 A. Yes.

15 Q. Okay. All right. And the fact that he testified, was
16 that just part of the trial strategy or was that because you
17 felt he had to based on the fact that the heights were
18 compared at trial?

19 A. I think he had to only because I think that -- you had a
20 number of co-defendants all testifying against him in this
21 case. And although they -- I believe they weren't very
22 credible, I believe in this case he had to testify so the
23 jury, first, they could see that he was telling the truth,
24 and, second, they could view his credibility.

25 Q. Okay. Do you remember how many times you met with Mr.

1 Mosley while you represented him?

2 A. I don't. I don't remember the number of times, but it
3 was -- it was enough to get information from him and talked
4 about the status of the case and so forth.

5 Q. Okay. Do you think it was more than three times?

6 A. I can't tell -- I can't -- I have no independent
7 recollection of exactly the number of times, but it was enough
8 times.

9 Q. Okay. So you felt it was sufficient to ---

10 A. I do.

11 Q. Okay.

12 A. And he also would have met with the investigator as well.

13 Q. Okay. Independently -- he would have met with him
14 independently?

15 A. Yes, without me.

16 Q. Okay. And you testified -- I know you testified earlier
17 about alibi witnesses, ---

18 A. Um-hum (affirmative).

19 Q. --- but he did mention some names. And, you know, I want
20 to go through them and see if you remember any specifically.
21 Kellan Goodine?

22 A. The witnesses that we had on our witness list for alibis
23 were the witnesses that he asked us to put on there.

24 Q. Okay.

25 A. Those are the witnesses. And we submit -- there were

1 three of them. And we submitted those to the solicitor's
2 office. Two of them testified at the trial of the case in
3 this matter.

4 Q. Okay. And I'll accept your previous testimony, too, ---

5 A. Um-hum (affirmative).

6 Q. --- as fleshing out that issue.

7 A. Yes.

8 Q. I believe those are all the questions I have. Thank you.

9 **THE COURT:** All right. Ms. Hobbs.

10 **Cross-examination by Ms. Hobbs:**

11 Q. Good afternoon, Mr. Robinson. I want to go back to
12 talking about flight for just one minute. Your motion to
13 exclude evidence regarding Mr. Mosley being a fugitive from
14 justice in Georgia was based on the fact that he was just
15 merely living there and not evading law enforcement, is that
16 right?

17 A. Right. That's what I mentioned, yes.

18 Q. Were you aware at the time that charges had not been
19 filed against Mr. Mosley when he went to Georgia?

20 A. Yes.

21 Q. And are you -- are you familiar with, I believe it's the
22 case of State versus Payne?

23 A. Yes, I am.

24 Q. That the State cannot argue that evidence of his flight
25 in Georgia was evidence of a guilty conscience?

1 A. I don't think I -- I think that -- the judge never
2 charged that. That was never a charge that was going to come
3 up. And the testimony in this case didn't indicate that he
4 had any -- that he flowed to Toccoa, Georgia to evade law
5 enforcement. There was no warrant at the time or anything
6 like that against him.

7 Q. One of the people that he was with, though, was charged
8 with, I believe, hindering an investigation?

9 A. You're talking about the person out of Oconee County?

10 Q. Yes.

11 A. Oconee County, sure. Uh-huh (affirmative).

12 Q. And there was a lot of testimony about him hiding in the
13 bathroom and trying to dye his hair and things like that.

14 A. Yeah, he -- Mr. -- Lester gave a false name to the police
15 when he got arrested. That's it.

16 Q. Do you recall the State arguing in closing arguments that
17 he went there because he knew he did bad?

18 A. I don't know if I -- I don't recall that. I don't recall
19 that in their final. I can't tell you word -- what they
20 argued.

21 Q. Would you refer -- prefer to refer to the record or would
22 you like me to show it to you?

23 A. Yeah, you can refer to the record. That's fine.

24 **MS. HOBBS:** Just give me one second, Your Honor.

25 (Pause)

1 **MS. HOBBS:** I apologize, I didn't mark it.

2 (Pause)

3 **MS. HOBBS:** May I approach the witness?

4 **THE COURT:** Certainly.

5 **MS. HOBBS:** I apologize, my copy is marked with my own
6 notes. And I'm showing him page 373.

7 **Cross-examination by Ms. Hobbs Continued:**

8 Q. I don't know if you want to hold my binder or not.

9 A. Sure.

10 Q. Do you want to read or ---

11 A. Yeah, I saw -- I remember that.

12 Q. He argues that he goes to Georgia because he saw it on
13 the news and he knows he's doing -- he knows he did bad. He
14 knows he's going to get in trouble. He knows he just killed
15 somebody. He goes to Georgia to try to get out of town. When
16 the jury note came back asking that question, and I'm just
17 going to go over this briefly, what did you understand that
18 jury note to be referring to?

19 A. Well, he just talked about -- you just talked about
20 something totally different.

21 Q. I know. I'm sorry ---

22 A. You went into the -- you went in -- you were trying to
23 elicit testimony as far as why I didn't object to them going
24 into that, I think, is the one thing you were trying to do.
25 Is that true?

1 Q. I'm sorry?

2 A. You were going another direction. And now you're going
3 into something different.

4 Q. Yes. I'm going to go to the hand of one, hand of all ---

5 A. Okay.

6 Q. --- and ask you a few questions about that, if that's
7 okay.

8 A. Okay. Go ahead.

9 Q. What did you understand the jury note to be referring to?

10 A. Hand of one, hand of all. That's what -- that's what it
11 appeared -- five years ago, that's what it appeared to be.

12 Q. At that time you did not also ask Judge Miller to
13 recharge accident, correct?

14 A. If the ---

15 **MR. SMITH:** Objection.

16 A. --- transcript shows that, correct.

17 **THE COURT:** Yes.

18 **MR. SMITH:** These same questions have already been asked
19 in earlier testimony.

20 **THE COURT:** We are re-plowing old ground. This is
21 supposed to be new -- these are supposed to be new questions
22 that were not asked by Mr. Yarborough.

23 **MS. HOBBS:** Your Honor, I apologize. I thought that
24 also this rebuttal would also be a chance to talk about -- to
25 re-ask him -- to ask him questions in light of Ms. Hudgins'

1 testimony. I was going to be very brief.

2 THE COURT: Okay. I'll let you go into it very briefly.

3 **Cross-examination by Ms. Hobbs Continued:**

4 Q. And you would agree that hand of one, hand of all,
5 obviously, cuts against alibi?

6 A. Are you talking -- I'm trying to figure out if that was
7 from the -- from what Ms. Hudgins talked about.

8 Q. Well, you had three of his co-defendants ---

9 A. Well, I mean, let me -- let me answer the question. I
10 don't know how to answer that question. It could be.

11 Q. You had three co-defendants that all placed him at the
12 scene.

13 A. Um-hum (affirmative).

14 Q. And they were the only ones that placed him at the scene,
15 correct?

16 A. Okay.

17 Q. And there was no forensic or DNA evidence or anything
18 like that to put him at the scene.

19 A. Okay.

20 Q. And so when you did not object to hand of one, hand of
21 all, ---

22 A. Uh-huh (affirmative).

23 Q. --- did you feel at that time that it was actually averse
24 to your own case?

25 A. I thought -- yes, I think that's probably the truth

1 there. I think the two -- I think the two are kind of
2 mutually exclusive almost, really, when you say, well, I'm not
3 there, but then you charge an accomplice or hand of one, hand
4 of all.

5 Q. Did you agree with Mr. Mosley's decision to testify?

6 A. I did. I think that, you know, all he could do was tell
7 the truth. And you don't -- our investigation, it was hard
8 because we didn't -- we needed to have video cameras from that
9 Croc's restaurant that had been torn down. Couldn't get that.
10 The phone stuff wasn't -- couldn't help us.

11 So it was important that the jury saw that Lester was --
12 would tell the truth and they could look at his credibility
13 compared to these other guys, the co-defendants, that were
14 talking -- they were testifying against him because they had a
15 bias and that they all testified to different things that made
16 no sense. So he had -- he had to be the one that told the
17 truth and made sense in this case. So I thought it was
18 important.

19 Q. When you talk about the co-defendants testifying to
20 different things, are you referring to not only the discretion
21 of what Mr. Mosley might have been wearing or supposedly was
22 wearing, but also how many men were in this home invasion?

23 A. I think it was -- I think there was an issue between four
24 and three, I think it was. But the big -- but the big -- what
25 was different with the other co-defendants is they testified

1 as far as who went first. They were all -- they were
2 different.

3 So that was kind of -- I thought it was important for
4 Lester to testify to the truth. And I would still feel the
5 same way, he would have -- he should testify.

6 Q. You mentioned about whether or not Mr. Mosley went first,
7 according to their testimony. Is that because, I think, all
8 five of the roommates that were present for the shooting
9 testified that the first person in the door was the shooter?

10 A. Right.

11 Q. And do you recall one or more of the roommates being
12 shocked when the gun went off?

13 A. Yes.

14 Q. And that even the shooter himself was startled by it?

15 A. Yes.

16 Q. And, I'm sorry, I want to go back to alibi for just one
17 second. Do you recall that at trial when you were on direct
18 examination with his cousin, who was an alibi witness, that
19 you had stated, I have never met you before today?

20 A. I think he worked with my investigator, not me. I didn't
21 talk to him. I try not to coach people on what to say.

22 Q. It was a -- I'm referring to, I believe, Costa?

23 A. I'm sorry?

24 Q. It was Costa. I'm sorry. You had multiple alibi
25 witnesses. And one of them was his cousin who was -- the last

1 name with a C. It was like Costa.

2 A. It's Cosha.

3 Q. Cosha, excuse me.

4 A. It's Cosha.

5 Q. And you said that just so the jury would not believe that
6 you had coached anyone?

7 A. That's why I typically don't meet a lot of times. It was
8 a very -- investigator met with all the people and so forth.
9 And they give their ideas on it and so forth. But I don't
10 like to coach witnesses.

11 Q. Were you surprised when his -- the alibi witnesses that
12 you did call contradicted one another?

13 A. It was a little different. It was a little different.
14 But what are you going to do, you know? You can only -- I
15 cannot coach witnesses. I can only -- I can -- it is up to
16 the jury. They can look at the witnesses. You know, they're
17 sequestered, so they don't know what's going to go on. The
18 truth is the truth.

19 Q. Had you interviewed and talked to them all beforehand,
20 though?

21 A. I have no recollection -- I have no independent
22 recollection of that.

23 Q. Could you have anticipated what they were going to say,
24 if they were going to provide an alibi at all?

25 A. No. I think, you know, I think that you -- you know, in

1 terms of trial and so forth, you can prepare a witness til
2 doomsday, but they can get on the stand and testify to
3 something entirely different in a totally different way. You
4 have no control over that.

5 Q. I just wanted to clarify, when Mr. Mosley said, I have
6 alibi witnesses, here they are, and you subpoenaed them, did
7 you talk to them to even see if they even would provide an
8 alibi for him? That's what I'm ---

9 A. I think -- he told me who they were, what they would say.
10 They did provide -- the two witnesses -- there were three that
11 we noticed for the State. And the two best ones were the ones
12 that we got on the stand that testified.

13 Q. Were you surprised when Mr. Mosley testified a little bit
14 to smoking a lot of marijuana on other days prior to this
15 incident? Had y'all gotten into areas of his testimony that
16 maybe were not relevant to the issues before he testified?

17 A. Okay. Let's talk about at trial. Let's talk about --
18 I'm sure you've ---

19 **MR. SMITH:** Objection.

20 A. --- tried many cases ---

21 **THE COURT:** What's your objection?

22 **MR. SMITH:** It seems like this question would go to
23 whether counsel was ineffective for advising applicant to
24 testify. And that's not a pled issue.

25 **MS. HOBBS:** Your Honor, I'll move on.

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

2 A. But I can -- I can -- I would like to answer -- if you
3 can repeat the question again, I'll answer it.

4 Q. Mr. Mosley talked a lot about smoking marijuana ---

5 A. Okay.

6 Q. --- prior to the incident earlier in the day and also
7 when he was in Georgia.

8 A. Okay.

9 Q. Were you surprised when that came -- when he offered that
10 on direct examination?

11 A. Okay. Well, when you're trying a case, you know, clients
12 -- you want the client to tell the truth. He could have
13 easily said, no, I had no idea what -- I have no idea.

14 Mr. Wilkins or the solicitors don't give me a list of
15 questions that they're going to ask my witness so I can tell
16 my witness, here's what they're going to ask you, and this is
17 how you're going to say it. I have no control over what
18 they're going to ask in this case.

19 Q. I'm just going to refer back to just one or two
20 clarifying questions on the jury charges here. They charged
21 felony murder and that had an inference of malice, and they
22 charged hand of one, hand of all. And do you recall that,
23 altogether?

24 A. Okay.

25 Q. Did you recall that they charged that if one

1 intentionally kills another during the commission of a felony,
2 the inference of malice may arise?

3 A. I'd have to look at the jury charge again to see what the
4 judge charged.

5 Q. But in addition to alibi you were also trying to elicit
6 and also relying upon accident as a defense, correct?

7 A. I don't, you know, I don't think I relied on that as a
8 defense. I think that was -- this was just -- it was elicited
9 in the questioning from the persons that were there in the
10 room that the gun -- the gun went off by mistake or whatever,
11 something like that. It wasn't -- they weren't, you know, it
12 was an act -- it was just -- I don't think accident was what I
13 was -- I didn't originally start out with accident as a
14 defense in this case because he said he wasn't there.

15 Q. But as the testimony went forward, ---

16 A. Right.

17 Q. --- you know, you decided to request that it be charged
18 to the jury?

19 A. I think that the testimony showed that it was to be
20 charged. The judge didn't charge that as well, I mean, that
21 was what the people said.

22 Q. You don't recall that the judge also charged the jury on
23 accident?

24 A. I do, yeah.

25 Q. Oh, okay.

1 A. I do.

2 Q. Would you think that all of the charges combined, felony
3 murder, hand of one, hand of all, and accident, would that be
4 confusing to a jury?

5 A. I thought -- I thought it was a very -- the jury was a
6 group of good people. And as far as whether it could -- the
7 hypothetical could be confusing, it could be -- I don't know.
8 I have -- I can't answer that question.

9 Q. Each of those -- malice, obviously, is different than
10 accident, the mental state of that. And do you think that
11 that might have caused any confusion with the jury?

12 A. I have -- I have -- don't have any -- I have no idea.

13 Q. One last question is did you talk -- argue in your
14 closing argument anything to clarify that you had a -- there
15 was an alternative defense here between alibi and accident?

16 A. I'd have to look at the -- I don't know if I said
17 anything about that in my closing. I don't know. I don't
18 have the transcript.

19 Q. Thank you. That's all the questions I have.

20 **THE COURT:** All right.

21 Q. Thank you, Mr. Robinson.

22 **THE COURT:** Any other questions for this witness, Mr.
23 Smith?

24 **MR. SMITH:** No, ma'am.

25 **THE COURT:** All right. Thank you, Mr. Robinson.

1 A. Sure.

2 **THE COURT:** All right. Anything else from the State?

3 **MR. SMITH:** That's the State's case, Your Honor.

4 **THE COURT:** All right, then. Very well. Yes, sir.

5 **MR. YARBOROUGH:** The applicant has raised a number of
6 issues. We think we've shown ineffective assistance of
7 counsel, but I think that the bright line kind of comes in the
8 fact that the Court of Appeals looked at some issues in the
9 brief and said, you know, look, I'd like to have another --
10 another look at this.

11 And Ms. Hutchinson [sic] even notes in her brief that
12 what they're asking is not necessarily preserved for the
13 record. And so that was -- that's trial counsel's deficiency
14 that could have been -- could have been rectified by an
15 objection to the charge from the beginning, not after the
16 charge was made after the question came back from the jury.

17 But I would say this, Judge, and I'm happy to try to
18 brief a little bit about what the law is, but I think the
19 question even becomes more than that is was it -- was it not
20 raised before? Which is kind of what the Court of Appeals
21 looked at. But I also think the question then becomes, and it
22 is argued ad nauseam in the brief by the attorney general, was
23 that none of this was preserved.

24 And that other issue is that, you know, what the jury's
25 asking for in that question, you know, hand of one, hand of

1 all, at that point Judge Miller, without objection, he -- and
2 he recharges murder. And it gives the jury the implication
3 that that was the proper charge at that point where the jury's
4 asking a specific question which had not been preserved for
5 the record.

6 And, although, Mr. Robinson does a good job of objecting
7 to it at that point, it -- the rat's already out of the -- off
8 the shoot, and we've gotten into this other argument that is
9 not preserved for the record. And so the applicant did not
10 have -- and, you know, it says in the brief that this -- we
11 could argue this, but it's not preserved for the record now.

12 And it's -- it goes to what Judge Miller not only charged
13 before, but it goes to how he charges it then. And I'd argue
14 that that was -- that's not harmless error, that's real error
15 and that the case should be reversed.

16 Now, I'm happy to send you up some case law, do a short
17 little memo on it so that you can -- you could review what the
18 -- because it is kind of technical if you look at it. And I
19 know that, you know, a number of people have looked at it
20 before I did. But I think that there is -- there's definitely
21 some prejudice to it -- to the applicant.

22 **THE COURT:** All right. Anything from the State at this
23 point?

24 **MR. SMITH:** Your Honor, I believe we've addressed all of
25 the issues raised in the testimony. And maybe I would just

1 bring Your Honor's attention to some law on all of these
2 issues.

3 On the first issue raised -- I'm sorry. Let me briefly
4 look here. From the first issue raised about malice and
5 felony murder, it's just the State's position that that was a
6 correct statement of law. And there have been some cases
7 dealing with that.

8 And since it was a permissive instruction, I believe
9 they're still proper. And I would direct the Court's
10 attention to State v. Norris, and the citation for that is 285
11 S.C. 86, and Lowery v. State, which is 376 S.C. 499.

12 And I believe the Belcher issue was raised today. And
13 Belcher addressed the inference of malice from a deadly
14 weapon. And that's not something that was charged in this
15 case.

16 **THE COURT:** Right.

17 **MR. SMITH:** I'm not sure that Belcher's relevant.

18 As to the second issue of accomplice liability, we would
19 -- of course the State relied on the fact that the issue had
20 not been preserved in its argument on appeal. That's
21 something we do every time.

22 We also address the merits of the case. And I would just
23 rely on the State's arguments there in the appeal on that
24 issue. We address both issues there. And that there was no
25 error.

1 And I'll point out that Mr. Robinson did object to this.
2 And I maybe would point the Court to the case of State v.
3 Washington with the citation 424 S.C. 374.

4 On the third issue about this phone or alibi, there was
5 no phone evidence presented today that would tend to confirm
6 alibi. The only thing we had today was potential alibi
7 witnesses. And I believe Mr. Robinson has testified fully
8 about the steps he took to present the alibi witnesses at
9 trial, so ...

10 In terms of the issue about bias of the witnesses, I
11 mean, Mr. Robinson thoroughly crossed on that issue and argued
12 it. And coupled with that with the jury charge on witness
13 credibility, the State's position is that's something that was
14 thoroughly dealt with at trial.

15 In terms of the flight issue, Mr. Robinson did move to
16 suppress that unsuccessfully at trial. And I'll point to the
17 fact that there was no jury charge informing the jury that
18 flight was evidence of anything. And also point the Court to
19 the fact that Mr. Robinson crossed the witness on that, and
20 Mr. Mosley presented his own testimony in mitigation of that.

21 And he testified today he wanted to testify. He wanted
22 people to know he wasn't running. He was just spending the
23 day with his girlfriend in Georgia.

24 And as to the final issue of jury charges on voluntary
25 accident and involuntary, I would just say it seems like the

1 -- the jury was properly charged on accident. As far as
2 voluntary and involuntary, it would be the State's position
3 that he would not be entitled to jury charges on those issues
4 even though Mr. Robinson, I believe, did try to raise it. But
5 that's something as a legal matter he would not be entitled
6 to. So just as a general principle, Mr. Robinson can't be
7 ineffective if they're not charged, if he was not entitled to
8 them.

9 So to that, Your Honor, we'll just -- that's the State's
10 case that there's been no deficiency or prejudice presented
11 today.

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

13 **MR. YARBOROUGH:** Briefly, Your Honor. When this thing
14 was reviewed originally it was -- this is an unusual
15 circumstance where there was an Anders brief filed, the court
16 asked that, you know, this looks like there's an issue, brief
17 this issue. And at that point they briefed the issue. And
18 they said, well, it's not preserved.

19 I think this is an unusual case where the court is
20 directing us to look at the issue. And I think that we've
21 looked at it and that the applicant would persevere, that it
22 wasn't -- it wasn't protected for the record and could have
23 been an issue that would -- would have been overcome on
24 appeal.

25 **THE COURT:** All right.

1 **MR. SMITH:** May I make ---

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

3 **MR. SMITH:** --- one more statement, Your Honor?

4 **THE COURT:** Please.

5 **MR. SMITH:** I understand the court directed Ms. Hudgins
6 to brief on this issue, but I would submit to the Court that
7 that fact does not establish that there was any prejudice and
8 that in, you know, Mr. Yarborough's argument that it shows
9 there could be something wrong. The applicant's burden is he
10 has to demonstrate there's prejudice, not merely speculate
11 that there could be by the fact that the court directed the
12 parties to brief on this issue. Thank you.

13 **THE COURT:** All right. Well, I want to take this matter
14 under advisement. It'll be probably -- I will look at
15 everything that's been presented and go through everything.
16 I'd anticipate having a decision within two weeks. I hate
17 keeping folks waiting, but I anticipate I'd have a decision
18 within two weeks. All right.

19 **MR. YARBOROUGH:** Thank you, Your Honor.

20 **MR. SMITH:** Thank you.

21 **THE COURT:** Thank you.

22 (Hearing Ended at 12:33 pm)

23 (End of Requested Transcript of Record)

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 29th day of August 2019.

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

January 31, 2020

s/Susan W. Hudgins

Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

LESTER DEVARIA MOSLEY 00361397)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2018-CP-39- 00318

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institute
2. Name and location of Court which imposed sentence Pickens County General Sessions, Thirteenth Judicial Circuit, Pickens, SC
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-39-01548-Murder- 50 years
 - (b) 2014-GS-39-01597-Burglary First- 50 years
 - (c) 2014-GS-39-01547-Attempted Robbery- 20 years
 - (d) 2014-GS-39-01546- Firearm provision- 5 years
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) 9/17/2014-50 years
- (b) 9/17/2014-50 years
- (c) 9/17/2014-20 years (Concurrent)
- (d) 9/17/2014-5 years (concurrent)

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (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. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. December 2, 2016- Court ordered that the Anders Brief previously filed and the

Notice to be relieved as counsel was denied and directed the the parties to brief a specific issue (and) any other issue of arguable merit. (See Order- December 2, 2016). On
appellate counsel filed an Initial Brief. The only issue raised on appeal was the issue directly
ordered by the Court. On September 6, 2017, the South Carolina Court of Appeals affirmed the
trial court's ruling.

ii. _____

iii. _____

(c) the date of each such result:

- i. September 6, 2017

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. The State v. Lester Devaria Mosley, Jr., Unpublished Opinion No.: 2017-UP-353

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984), applicant was denied his Sixth Amendment right to effective assistance of counsel due to appellate counsel's failure to preserve any other arguable issues of merit as directed within the ordered briefing by the South Carolina Court of Appeals.

(b) _____

(c) _____

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

(a) Applicant's counsel first filed an Anders Brief with the South Carolina Court of Appeals and with that filing was included a motion to be relieved as counsel. Counsel was then ordered by the Court to produce a brief entailing the specific issue as outlined by the Court and also any other issue of arguable merit, and therefore denied counsel's motion to be relieved. Counsel then submitted an initial brief including only the issue specifically ordered by the Court. Applicant believes after consideration that there were other issues that should have been preserved for appeal.

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? Yes

(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? _____

Revised 3/2003

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. Direct Appeal
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. South Carolina Court of Appeals, Columbia, SC
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. Dismissed
 - ii. _____
 - iii. _____
 - iv. _____
 - (d) the date of each such disposition:
 - i. September 6, 2017
 - 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?
- No

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) Ineffective Assistant of Counsel- Appellate Counsel
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Scott Robinson PO Box 339 Manning, SC 29102
 - ii. Katherine H. Hudgins, SCCID PO Box 11589, Columbia, SC 29211
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial and Sentencing
 - ii. Direct Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

Reconsideration of Sentence or in the alternative, a new trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA

County of PICKENS

VERIFICATION

I, Lester D. Mosley, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Lester Mosley

SWORN to and subscribed before me this 23rd
day of February, 2018.

Inessa Inoué-Burn (L.S.)
Notary Public

My Commission Expires: 3/20/24

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2018 MAR - 2 P 12:04

X

X

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

Lester D. Mosley, Jr., # 00361397
Applicant.

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2018CP3900318

**MOTION TO AMEND APPLICATION
FOR POST-CONVICTION RELIEF**

2018 NOV 29 A 9 04
CLERK OF COURT

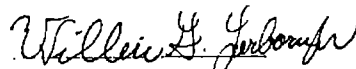
NOW COMES the Applicant Lester D. Mosley by and through undersigned Counsel,
William G. Yarborough III, and moves this Honorable Court for leave to amend the application
for post-conviction relief (APCR) with the following grounds:

- I. Trial counsel was ineffective pursuant to *Strickland v. Washington* for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the inference of malice and felony murder. The improper instructions diluted the State's burden of proof to prove Applicant's guilt beyond a reasonable doubt and shifted the burden to Applicant.
- II. Trial counsel was ineffective for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the "hand of one hand all" accomplice liability jury charge. The improper instruction, both in and of itself and together with the aforementioned jury charges on felony murder and inferred malice was prejudicial to Applicant because it was confusing to the jury because Appellant was not tried with his codefendants, diluted the State's burden of proof to the guilt of Appellant without improper

spillover evidence from the guilt of his codefendants, as well as improperly shifted the burden to Applicant, whom raised an alibi defense.

- III. Trial counsel was ineffective for failing to subpoena cellphone records which would have supported his alibi defense by showing that Applicant was not at the victim's home the night the charged offenses occurred.
- (IV) Trial counsel was ineffective for failing to sufficiently cross-examine Applicant's codefendants on their inherent bias in testifying for the State pursuant to a plea agreement.
- (V) Trial counsel was ineffective for failing to request an adequate jury instruction on the credibility and weight of codefendants' testimony in light of their inherent bias.
- (VI) Trial counsel was ineffective for failing to object to the admission of evidence of flight and corresponding jury charges.
- (VII) Trial counsel was ineffective for failing to request an adequate jury instruction on accident, voluntary manslaughter, and involuntary manslaughter.

Respectfully submitted,



William G. Yarborough, III
Attorney for the Applicant
522 North Church Street
Greenville, SC 29601
(864) 331-1612
SC Bar No.: 10271

Greenville, SC

PROOF OF SERVICE

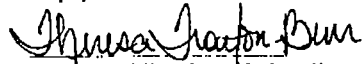
The undersigned hereby certifies, swears, and affirms that the Applicant's motion to amend the PCR application was served upon the Respondent by depositing it in the U.S. mail for with sufficient postage attached, addressed as follows:

Senior Assistant Deputy Attorney General Megan Jameson
SC Attorney General
P.O. Box 11549
Columbia, S.C. 29211

This 14th day of November, 2018


Lauren C. Hobbis, Associate Attorney
William G. Yarborough III, Attorney at Law, LLC

2018 NOV 29 A 9 01
CLERK OF COURT

Sworn before me this 14th day
of November 2018

Theresa Jackson Burr
Notary Public of South Carolina
My commission expires: 3/20/24

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

Lester D. Mosley, #361397

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEA
) IN THE THIRTEENTH JUDICIAL CIRCUIT
)

) Case No.: 2018-CP-39-0318
)

) RETURN
)

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2018 AUG -3 A 11:58

The State (Respondent), making its Return to the application for Post-Conviction Relief (PCR) filed on March 02, 2018, would respectfully show this Court:

I.

Lester Mosley (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to the order of commitment of the Pickens County Clerk of Court. In July of 2014 the Pickens County Grand Jury Indicted Applicant for murder (2014-GS-39-1548), two counts of attempted armed robbery (2014-GS-39-1545, 2014-GS-1547), possession of a weapon during the commission of a violent crime (2014-GS-39-1546), and burglary, first degree (2014-GS-39-1597). The case was prosecuted by Solicitor W. Walt Wilkins, Esquire of the 13th Circuit Solicitor's Office, and he was assisted by Assistant Solicitor William Timmons, Esquire. Applicant was represented by Scott D. Robinson, Esquire. The case was heard before the Honorable Edward W. Miller in the Pickens County Court of General Sessions on September 15 through September 17, 2014. At trial, Applicant was convicted of all five crimes. Judge Miller sentenced Applicant to imprisonment for fifty years for the murder, fifty years for the burglary 1st, twenty years for both armed robberies and five years for possessing a firearm during the commission of a violent crime. All of the sentences were set to run concurrently, and Applicant

was given credit for his time served.

Applicant filed a timely notice of appeal. Katherine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. Applicant's counsel submitted an Anders¹ brief on September 10, 2015. In an order filed December 2, 2016, the South Carolina Court of Appeals denied counsel's motion to be relieved and directed the parties to brief the following:

1. Whether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations.

In an unpublished opinion the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Mosley, 2017-UP-353 (S.C. Ct. App. filed September 6, 2017). The remittitur was returned to the circuit court on September 27, 2017.

II.

On the evening and night of Saturday, December 8, 2012, six friends - Steven Grich (the murder victim), Robert "Rob" McKinley, Kevin Keck, Daniel Persson, Sam Voison and Jonathan Riordan - were in a Pickens County apartment near Clemson, South Carolina, that was shared by Steven, Rob, Daniel and Dalton Johnson.² Around 8:00 p.m., Steven, Daniel, Kevin, Sam and Jonathan were watching TV and drinking downstairs. Rob was upstairs with his friend, Martin, and his girlfriend, Laura Hill. Daniel, Rob and Martin, were smoking marijuana provided by Rob, who had almost two pounds of it.³ *R. pp. 103-05; 117-19; 126-127; 131-34; 136-39; 153-54.*

The surviving friends who testified gave similar testimony about what happened thereafter. As the friends were enjoying themselves, the back door "burst" or "flew open" and "at

¹ *Anders v. California* 386 U.S. 738 (1967)

² The apartment complex, known as Chimney Ridge, is "primarily an off-campus housing area for Clemson students." *R. p. 59.*

³ Two pounds of marijuana costs roughly \$5,000.00. Rob sold small quantities of this marijuana to friends six or eight times day. He was only charged with simple possession. *R. pp. 143-44; 149.*

least three men" entered the apartment. *R. pp. 105; 119; 127; 134; 138.* Kevin Keck testified that these men were wearing ski masks and were armed. Kevin saw the first man who entered strike Jonathan with a gun. He also saw the victim fall to the floor after being struck by the same gun. "After that, everyone got down on the floor," and Kevin did not see much of what happened after that point because he covered his head. *R. pp. 119-21; 124.*

However, he heard one of the men "yelling about money" and demanding drugs. As this was occurring, he heard the victim being pistol-whipped and he heard a gunshot. He did not hear anything after the shot. The victim had been shot victim had been shot and the victim had been shot when Kevin and the others got off of the floor. *R. pp. 120-23.*

The first man who entered was wearing a mask and Kevin had never seen him, but Kevin could see that he was black because Kevin could see the man's skin between the man's glove and sleeve. Also, this man was "probably" Kevin's height, which is 5'7" tall. This is the person who shot the victim. *R. pp. 120-22.* The State had Applicant's co-defendant, Kadeem Ramsey, brought the courtroom and Kevin indicated that Ramsey was much taller than the first man to enter the apartment on December 8th. Upon viewing Applicant after Applicant stood, Kevin testified that Applicant's height was consistent with that of the first intruder. *R. pp. 122-23.*

Daniel Persson testified that although he may have smoked some marijuana, "it was more of a drinking part kind of thing" (*R. p. 129*) and he was "definitely not drunk or intoxicated. *R. p. 131.* While Daniel was sitting on the right end of a couch in the living room,

we were just sitting there and people with guns and masks just came in the back door. One of them just started yelling, ... ["G]et on the ground[.]" ... And ... after ... they came in, [they] started pistol whipping people. I got kicked in the head like once or twice and then pistol whipped when I was laying behind the table right there.

R. p. 127.

Daniel could see that the first assailant was black because he could see "the holes in the mask and stuff." This man was "[d]efinitely shorter" than Daniel. This black assailant made a full circle" as he repeatedly pistol-whipped the victim, Jonathan Riordan, and Daniel. The victim and Jonathan fell off of the couch and onto the floor as a result of this beating. Daniel also "remember[ed] seeing one or two white guys," but he did not remember seeing much else after that point because he had a gun in his face. *R. pp. 127-29; 131.*

The assailants repeatedly ordered everyone to get on the ground and asked where the dope was until they left. *R. p. 128.* After a gunshot was fired, the assailants ran out of the apartment. Daniel immediately checked on the victim but the victim was obviously dead. So, Daniel called 911. *R. pp. 128-30.* When the State had Ramsey brought the courtroom, Daniel testified that Ramsey was much taller than the first man to enter the apartment on December 8th. Upon viewing Applicant after Applicant stood, Daniel could not positively identify Applicant as the first assailant but testified that Applicant's height was "most definitely" consistent with that of the first intruder. *R. pp. 130-32.*

Laura Hill testified that she was living in Clemson and working in Greenville in December 2012. She arrived at the apartment around 8:00 p.m. and went into the bedroom adjacent to the living room. Rob McKinley and Martin were in the room with her. At some point Lara heard the back door open. "... [A]bout 30 seconds later, I heard shouting, profanity, [and] people like scuffling around." At this point, she and Rob "realized that somebody was trying to rob the house. So we went and jumped out [of] the [bathroom] window and ran a couple of houses down to a neighbor's house." Rob accompanied her to this house. *R. pp. 133-35.*

Once they reached the neighbor's residence, Laura saw "several people dressed in black run in between the houses and get into a black SUV. Laura and Robert talked to their neighbors

for roughly ten or fifteen minutes. They then returned to the apartment. She did not recall whether Rob had brought anything with him when he fled his apartment. *R. p. 135.*

Rob McKinley testified that he was in his bedroom, studying for a final exam in chemical engineering and smoking marijuana, around 8:00 p.m. on Saturday, December 8, 2012. Laura Hill and Martin were also in the room. "About 8:20," Rob and Martin heard "a commotion and [people] yelling, Where's the dope, just a bunch of commotion. It sounded like a brawl almost inside the den." *R. pp 136-39.*

Rob immediately sent Laura and Martin into the bathroom. As soon as he could load his marijuana into his backpack, he joined them and all three escaped through the bathroom window. Rob told Laura to run to the closest neighbor's residence and call the police. While she and Martin ran for help, Rob hid his backpack "in the woods about five ... [or] six houses up." On his way back to see whether Laura had called 911, he heard "three robbers" running behind him. He immediately began chasing them. *R. pp. 139-40; 142.*

He continued to follow them after they took a right approximately "six ... or eight houses up," and he followed them until he saw the three jump into a Black Dodge Durango and close the doors. A fourth person was already in the driver's seat. He even chased them as the Durango sped away from the apartment complex, and he thought one assailant looked at him. Rob eventually stopped and began yelling, "[H]ey, those are the guys that were at my house robbing me with a gun" He stopped yelling when the Durango "peeled out" of the apartment complex. Rob then returned to his apartment and discovered what had happened. *R. pp. 140-43.*

Rob testified that although the robbers had been wearing masks and gloves, one of the men who jumped into the Durango was African-American. *R. pp. 142; 149.* He later identified the Durango for law enforcement, when shown the apartment complex's surveillance video. Law

enforcement later found the drugs and drug paraphernalia that he had hidden. Yet, he was only charged with simple possession of marijuana. *R. pp. 142-43.*⁴

Rob testified that he had sold marijuana in the past to Winton Botchway approximately three to five times in 2012. On one occasion in September, he went to Botchway's apartment and sold marijuana to Botchway. He also smoked a "blunt" with Botchway and another individual on that occasion. He identified Applicant as the other person with whom he had smoked the blunt and to whom Botchway had introduced him. Rob subsequently sold marijuana to Botchway at his own apartment, and he had called Botchway on December 8th and told Botchway that he had "just re-up." He had expected Botchway to come by his apartment and purchase marijuana from him. *R. pp. 145-49.*

Jonathan Riordan testified that he had gone over to his friends' apartment between 5:30 and 6:00 p.m. on December 8th and was hanging out with the other people there. Around 8:00 p.m., Rob was in his bedroom with his girlfriend and Jonathan was sitting on the couch next to the victim. The back door to the apartment was unlocked and some men "barged" into the apartment. *R. pp. 154-55.*

Jonathan gave the following description of the events that happened after the men entered the apartment:

I was ... the first person they assaulted when they came in through the door. I was pistol whipped in the head twice. I ... only saw the first guy and a couple of guys behind him. After that, I was semi-conscious conscious. I wasn't looking up or anything, I was just on the ground bleeding..... I saw the person who hit me, I saw his eyes..... He was black.

R. p. 155.

After the man had struck him the first time with the butt end of the pistol, Jonathan was "kind of in a daze" and did not know what to do. The second time the man hit him, he

⁴ Rob testified that police arrived within ten minutes of the 911 call. *R. p. 143.*

understood that the intruder meant business and he fell to the floor. This blow left a gash. Following that blow, Jonathan "just heard ringing in my ears and commotion. After some time, there was a shot." *R. pp. 156-58.*

When Ramsey was brought into the courtroom, Jonathan testified that Ramsey was taller than the man who had struck him. However, when he saw Applicant standing, Jonathan indicated that's Applicant's height was consistent with the height of the man who had pistol-whipped him. *R. pp. 158-59.*

Each of Applicant's three co-defendants also testified against him. Jaron Dalton testified that on December 8, 2012, Jaron was at his father's residence cutting wood for a bonfire. He stayed there for most of the day. Eventually, he and his brother, Jordan, went to Clemson in order to pay a bill and to pick up Kadeem Ramsey.⁵ They were riding in Jaron's black Dodge Durango. Their original plan was "[t]o hang out and smoke some weed." *R. pp. 182-84.*

The Daltons picked up Ramsey between 7:45 and 7:50 p.m. They spoke to Ramsey. Then, the three men went to Jaron's Clemson, South Carolina, apartment, which he shared with his roommate, Connor Mann. They stayed there for "a little while." *R. pp. 172; 182-84.*⁶

While at this apartment, Ramsey told the Daltons that Applicant had told him about an apartment that they could go to and rob the occupant of marijuana. Ramsey contacted Applicant by cell phone. Jaron testified that Jordan fashioned a mask out of a toboggan (*see* State's Exhibit 46) by cutting holes in it for his eyes, Jaron wore a baseball cap (State's Exhibit 47), sunglasses, and a black hoodie (State's Exhibit 45); and Ramsey wore a hoodie. Once Ramsey contacted Applicant, the men left Jaron's apartment and drove to pick up Applicant on Vista Dr. in

⁵ Ramsey and Jordan were friends from school and Jaron knew Ramsey through his brother. The Daltons frequently spoke to Ramsey. *R. p. 185.*

⁶ Connor Mann testified at trial. His testimony is found at *R. pp. 172-77.*

Clemson. *R. pp. 186-89; 205-06.*

Applicant met them outside of his residence. So, the Daltons and Ramsey did not get out of the car. Applicant "come up to the window and he was telling us a little bit about where it was and stuff like that. Then he got in the car." Applicant said location was in Chimney Ridge Apartments and that there were between three and four pounds of marijuana at that location. When the men left Vista Dr., they immediately headed for Chimney Ridge Apartments. Jaron was driving, Jordan was in the passenger seat, and Ramsey and Applicant were in the back seat.⁷ *R. pp. 189-91.*

The men discussed a plan as they headed to the apartment complex: they would go into the apartment, "get everybody down and just try to find the weed and get out" *R. p. 191.* When they reached Chimney Ridge Apartments, Ramsey and Applicant pointed out the apartment they were going to rob, which was the first one on the left after entering the complex. *R. pp. 191-92.*

Jaron drove into the complex, parked about three or four houses away from this apartment, and they sat in the SUV until another vehicle pulled out of the complex. Once that car had gone, they got out of the SUV and followed a "back alley" behind the houses to their intended destination. *R. pp. 192-93.*

Initially, Jaron Dalton had a 9 mm (State's Exhibit 42) and Jordan Dalton had a .380 pistol (State's Exhibit 43). However, Jaron gave the 9 mm to Applicant when Applicant pointed out that he was unarmed. Applicant was the first defendant to enter the apartment and Jordan Dalton followed him. They immediately ordered the men in the living room to get on the ground. The men initially hesitated, but quickly complied with this order after Applicant hit one of them with the 9 mm. Jaron and Ramsey then entered the apartment. *R. pp. 194-95; 202; 204-05.*

⁷ Applicant was seated behind Jaron Dalton.

Jaron stood in front of the coffee table, while Ramsey and Jordan "went upstairs to see if there was anybody upstairs or anything." Jaron watched as Applicant "continued to hit people with the pistol and ... ask[] them where the dope was, and ... {ordered them to} ... stay on the ground, keep your faces down, stuff like that." Jaron also testified that Applicant struck the man he later shot "around eight to 10 times probably or more." Following one of these blows to victim, Applicant "[came] up and the gun went off." By this time, Jordan Dalton and Ramsey had come back downstairs and into the living room. *R. pp. 195-97.*

... [W]e all kind of stood there, kind of shocked that the weapon had fired Then I think it was my brother said run. That's when we proceeded out of the house out the back door. We [ran] up the back alley then back to my car..... We got in [the car] and we left Chimney Ridge went back to my apartment ... At a high rate of speed.

R. p. 197.

According to Jaron, "I think we got like one or two grams of weed ... off the coffee table." They smoke some of the marijuana and Applicant used his cell phone to call someone to pick him up from the apartment. That person arrived within five or ten minutes, and both Applicant and Ramsey left with that person. *R. pp. 197-98.*

The Dalton brothers thereafter went back to their father's house and stayed there throughout the night. They left the weapons in Jaron's apartment. The next morning, however, Jordan suggested that they needed to get the guns and hide them somewhere in the woods. Jaron called Connor Mann and asked Mann to bring the weapons to him because "[t]hey might try to point the finger at us." At some point, Mann brought both weapons and the clothing that the Daltons had worn on December 8th to Jaron in a Duke Energy backpack (State's Exhibit 48). The Daltons later buried the backpack and its contents in woods, on their father's property. *R. pp. 173-77; 198-200.*

The Daltons stayed at their father's house for most of the remainder of the weekend and Jaron went to work on Monday. However, he "just couldn't take it anymore," and he turned himself in at the Pickens Law Enforcement Center after work on Monday. He gave a statement to members of the Pickens County Sheriff's Office indicating that Applicant had fired the fatal shot, and he led them to where he and his brother had hidden the backpack around 7:30 p.m. that night. Jaron was prosecuted for his role in the crimes, and was convicted of voluntary manslaughter as the result of Steven Gritch's death. *R. pp. 200-03.*

Kadeem Ramsey testified that he lived with his mother in Clemson South Carolina on December 8, 2012. He was at his grandmother's house that afternoon when he received a text message from Jordan Dalton asking him about marijuana. Although he was unable to locate any marijuana from several friends, he told Jordan Dalton that he knew someone who probably would have some, referring to Applicant. Ramsey and Applicant subsequently communicated on the 8th via text messages. *R. pp. 208-10.*

Ramsey corroborated Jaron's testimony that the Daltons picked him up in the black Durango; that the three friends thereafter picked up Applicant on Vista Dr.; and that the co-defendants then went to Chimney Ridge Apartments, where they planned to rob someone of marijuana. Ramsey "told Jordan Dalton that it was a bad idea, [and] not to go in there. They discussed this briefly before Jordan told Jaron to hand Applicant the 9 mm. With Applicant leading away, the men then went into the apartment."⁸ Ramsey testified that he was the last one to enter the apartment and that he went upstairs. The gunshot occurred as he was coming back downstairs. *R. pp. 210-14.*

Ramsey corroborated Jaron's testimony that, after the gunshot, the co-defendants ran out

⁸ Ramsey testified that neither he nor Applicant covered their faces. However, Jordan was wearing a "ski mask" and Jaron was wearing a Carolina hat. *R. p. 213.*

of the apartment and back to Jaron's vehicle. They then got in and went to Jaron's apartment. After ten or fifteen minutes, he and Applicant got a ride from Ericka Gibson, whom he had called for Applicant.⁹ *R. pp. 214-17.*

They then went to the residence of Applicant's cousin, Cosha. From there, Ramsey wound up going to his aunt's house. Law enforcement pulled him out of a class the following Monday, and he gave a statement what had occurred on December 8th. He told them that he did not know who shot the victim but that only Jordan Dalton and Applicant had guns. *R. pp. 217-21; 223-24.*

Jordan Dalton corroborated his brother's testimony in virtually every key detail. He testified that he was living at his father's house at the time of the murder. On the night of December 8th, he and Jaron went to see Ramsey in order to get some marijuana. Their initial intent was to purchase it. After they picked up Ramsey, they returned to Jaron's apartment where they unsuccessfully attempted to find marijuana. After they were unsuccessful in their efforts, Ramsey told them that Applicant "had a way ... to go get some [marijuana]." Then, they prepared for robbery, as his brother had testified. *R. pp. 225-29.*

Next, they went to Vista Dr. and picked up Applicant. He indicated that he knew where they could rob drugs from someone. Applicant got into the car and they went to Chimney Ridge Apartments. Jordan confirmed that Jaron handed the 9 mm to Applicant before they entered the apartment. Jordan also confirmed his brother's testimony concerning the events surrounding the crimes that night, including his brother's testimony that the 9 mm "went off" when Applicant struck the victim with it, as well as the co-defendants' activities after the crime. *R. pp. 229-35.*

Ericka Gibson testified that she was dating Applicant in December 2012. She was at the residence of his cousin, Cosha Benson, in Ridge Crest, on the night of December 8, 2012. Ericka

⁹ Mari Greenlee was with them as well. Gibson was driving her silver Honda. *R. pp. 216-17.*

called Ramsey's cell phone at 8:45 and 8:48 p.m. that night and spoke to Applicant. Applicant wanted a ride and she agreed to go get him. So, she went to an apartment complex in Clemson, where she picked up Applicant and Ramsey, and she drove them back to Benson's house. After their return, Tavis Campbell, Benson, Ericka, Greenlee, Ramsey, she and Applicant were at Benson's residence. The group later went to Crocs, in downtown Clemson. *R. pp. 246-51; 301.*

Nineteen year old Tavis Campbell testified that he and Applicant are friends and that they were friends back in 2012. On Saturday, December 8, 2012, Tavis was staying at his sister's residence in Creekwood Apartments, in Clemson. Applicant came to Creekwood Apartments around noon or 1:00 p.m. on the 8th and was there for two or three hours. Imari Greenlee and Ericka Gibson were with him. With Ericka driving her silver Honda, they eventually gave Tavis a ride to Vista Dr., where Tavis lived with his mother. *R. pp. 256-59.*

They hung out outside of her residence for several hours. "About 6:00, [or] 7:00 [p.m.]," Tavis saw Applicant get into a black or blue SUV being driven by a "white dude." Ramsey was also in the vehicle. Between forty minutes and an hour later, he saw Ericka's Honda with both Applicant and Ramsey in it. Tavis asked Applicant what happened that night and Applicant replied, "Something went wrong." However, Applicant did not explain to him what that meant. Ramsey said that a gun went off. *R. pp. 258-64.*

Later that night, Tavis went with the group to Crocs between 8:00 and 9:00 p.m. He rode in Ericka's Honda. He spoke with members of the United States Marshalls Service roughly a week later and claimed that he did not know where Applicant was. This obviously was a lie because he was arrested with Applicant in a Toccoa, Georgia hotel. Tavis was charged with hindering an apprehension and he pleaded guilty to that offense. *R. pp. 264-67.*

In order to better pinpoint the approximate time of the crimes in this case, the prosecution

introduced the testimony of Brian Jaynes, the Dispatch Supervisor for the Pickens County Sheriff's Office, that the first 911 call in this case was received at 8:27 p.m. on December 8th. That call, which was introduced as State's Exhibit 2, was published to the jury. *R. pp. 51; 54-55.*

Master Deputy Michael Torres works for the uniform road patrol division of the Pickens County Sheriff's Office. He and a highway patrolman were the first two officers to respond to the crime scene on December 8, 2012, arriving at 8:30 p.m. *R. pp. 56-57.* Upon entering the apartment, Deputy Torres saw the victim lying on the floor and another man was kneeling over him. Deputy Torres sent that person to the porch along with the patrolman, and he cleared the residence so that EMS personnel could attend to the victim. *R. p. 58.* While clearing the residence, he noticed "a heavy order of marijuana coming from the back bedroom area near the back door of the residence." *R. p. 60.*

Deputy Torres testified that there were no barriers that would prevent someone from walking consecutively behind the apartments on a grassy common area surrounding the perimeter of the property. *R. pp. 62-63.*

On the way to the crime scene, dispatch had issued a BOLO for a "black Nissan SUV-type vehicle," and witnesses at the scene confirmed that a black SUV had left the complex. Later, officers viewed a time-stamped surveillance video taken by the complex's management's cameras. *R. pp. 64-65.* The officers began viewing the video at between thirty and forty-five minutes before Deputy Torres arrived. "The only vehicle that matched close to the description that was given initially was a large black Dodge Durango, which on the video." The Durango "had exited the gate house at such a high rate of speed" that it hit a speed bump hard and "bunny hopped." *R. pp. 64-65.* This occurred at 8:26 p.m. The State introduced still photographs taken from the video as State's Exhibits 11-12. *R. pp. 64-67.*

Investigator Gary Anthony, also with the Pickens County Sheriff's Office, arrived at the scene after Deputy Torres. He also saw the victim lying on the floor and smelled the "strong smell of marijuana coming from the residence." *R. pp. 72-74.* Investigator Anthony's responsibility was to supervise others involved in the investigation. Although nothing supporting a motive was initially recovered from the apartment, Investigator Anthony "felt like there had to be something more to it. So I wound up searching the outside rear of the home." In his search, he found both the drugs and drug paraphernalia that Rob McKinley had hidden earlier that night. Rob was arrested on charges related to the drugs. *R. pp. 74-75.*

Investigator Anthony was told the following Monday that the school resource officer had notified the Sheriff's Office that a girl had provided information about the murder. So, he and other officers spoke to Imari Greenlee around 9:00 a.m. Monday. Afterwards, the officers removed Ramsey from a classroom and interviewed him. Following this interview, they arrested Ramsey for murder, burglary in the first degree, attempted robbery and a weapons charge. He was then taken to the Sherriff's Office. Ramsy later pleaded guilty to voluntary manslaughter, burglary in the first degree and the weapons charge. *R. pp. 76-80.*

Jaron Dalton came in while the officers were at the Law Enforcement Center on Monday afternoon. He was driving a black Dodge Durango. After giving a videotaped statement of his and his co-defendants' involvement in the murder, Jordan Dalton arrived and was interviewed. Later, Jaron accompanied the officers to his father's house. Jaron's grandmother gave consent for the officers to search the property, and Jaron led them to where he and Jordan had buried the backpack. The officers then seized the backpack (State's Exhibit 48) and its contents, including the toboggan mask (State's Exhibit 18) worn by Jordan, the hat (State's Exhibit 20) and hoodie (State's Exhibit 17) worn by Jaron, the 9 mm used to kill the victim (State's Exhibit 42) and the

.380 (State's Exhibit 43). *R. pp. 80-86.*

A crime scene investigator found a spent 9 mm shell casing at the victim's feet (State's Exhibit 56) and a projectile (State's Exhibit 55) that had gone through his body and ended up in his clothing under his left armpit. Unfortunately, officers did not find any useable latent fingerprints. *R. pp. 89-97.* In a subsequent search of Jaron Dalton's Durango, officers found a live 9 mm cartridge. *R. pp. 99-101.* SLED Agent Chad Smith, a forensic firearms examiner, compared both the 9 mm shell casing (State's Exhibit 56) and the projectile (State's Exhibit 55) to projectiles and casings test fired by State's Exhibit 43, the 9 mm used by Applicant. He opined that both the shell casing and the projectile had been fired by that 9 mm. *R. pp. 282-83; 285-88.*

Dr. Michael Ward, a forensic pathologist employed as Greenville County's Chief Medical Examiner, performed an autopsy on the victim. Dr. Ward found a single gunshot wound. *R. pp. 239; 242.* He explained that:

... Mr. Grich had a gunshot wound which entered the right lateral chest or the right side of the chest, basically, in the midline of the side. This wound went through the skin and the chest wall at the level of rib number five. It passed through the upper lobe of the right lung, the area we call the pulmonary hilum, which is where the blood vessels coming from the heart pass into the lung. It then went through some fibers of the right atrium of the of the heart, one of the chambers of the heart, then through the left pulmonary hilum. So it got the blood flow out to both lungs. Then [the wound passed] through the tissues of the left upper lobe of lung and it exited the left chest, basically, at the same level of the fifth rib.

R. pp. 242-43.

Dr. Ward opined that the bullet had traveled from the victim's right side to his left side, before ultimately striking a firm object and creating an "abrasion collar." This was consistent with the victim laying on his left side, with the right side of his body up, and the bullet hitting the floor. *R. pp. 243-44.* Also, the trajectory of the bullet could have been consistent with the victim covering his face in a defensive posture. "Toxicology testing of Mr. Grich's femoral blood

revealed marijuana as well as amphetamine.” The amphetamine was “at a therapeutic level and would be consistent with” his known prescription for Adderall. *R. pp. 244-45.*

The State also introduced evidence that Applicant fled the jurisdiction to avoid prosecution for the murder. Deputy United States Marshal Douglas Leslie testified that the Pickens County Sheriff's Office contacted his Office shortly after the murder and sought assistance in locating and apprehending Applicant. Late in the afternoon of December 19, 2012, Deputy Leslie received a call from Deputy Scott Tickner, another member of his task force. He then went to Falls Landing Apartments, where Deputy Tickner had stopped a silver Honda Civic owned by John Gibson, Ericka Gibson's father. The officers found four men in the car: Devonte Montrel Hodges, Marticus Travon Gibson, Tavis Campbell, and Antonio Scott. *R. pp. 288-91.*

These men were interviewed and asked whether they knew Applicant's whereabouts, as well as the last time that each man had seen Applicant. Each person signed a statement indicating that he understood he could be prosecuted if they did not answer the questions truthfully. *R. p. 291.*

On December 21st, the Marshal's Office received a tip that Applicant was with Ericka Gibson at the Budget Inn motel, in Toccoa, Georgia. Deputy Leslie and other members of his task force met with officers from the Stephens County, Georgia, Sheriff's Office, and they arrested Applicant at the motel. They also arrested Marticus Travon Gibson and Tavis “Chico” Campbell. They found Applicant hiding in the bathroom, with a hoodie on and the hood “pulled up.” When asked his name, Applicant claimed to be “Antonio Scott.” *R. pp. 291-94.*

III.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective Assistance of Counsel

- a. "Applicant's appellate counsel first filed an Anders brief with the South Carolina Court of Appeals and with that filing was included a motion to be relieved as counsel. Counsel was then ordered by the Court to produce a brief entailing the specific issue as outlined by the Court and also any other issue of arguable merit, and therefore denied Counsel's motion to be relieved. Counsel then submitted an initial brief including only the issue specifically ordered by the Court. Applicant believes after consideration that there were other issues that should have been preserved for appeal."

Applicant's relief sought is that there be "reconsideration of his sentence or in the alternative a new trial".

Attached to this Return and incorporated by reference are the records of the Pickens County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV..

Applicant alleges that he received ineffective assistance of counsel. Respondent submits that Applicant's allegations of ineffective assistance of counsel are refuted by the record, and that this allegation is without merit.

The Sixth Amendment of the United States guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). Applicant alleges ineffective assistance of counsel, but has failed to set fourth any detailed or specific facts to support this allegation. Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. Where the applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must prove that the conduct of counsel "so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. 668, 669.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test in *Strickland*. *Id.* at 686. First, an applicant must prove that counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, attorneys are held to an objective standard of "reasonably effective assistance" under "prevailing professional norms". *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625, (citing *Strickland*). The proper analysis for performance is whether an attorney provided representation within the range of competency required in criminal cases. *Butler v. State*, 286 S.C. 442, 334 S.E.2d 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement". *Id.* (Citing *Strickland* at 466 U.S. 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, the applicant must show that counsel's deficient assistance produced "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the *Strickland* test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant's also alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of counsel under the Sixth Amendment of the United States Constitution. "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate

counsel's duty of professional responsibility extends to choosing among the potential issues according to their merits. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the decision to exclude certain issues in an appeal is strategic and based on reasonable professional judgement, the failure to appeal all trial errors is not sufficient grounds for ineffective assistance of counsel.

Here, Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by that deficiency, under the same standards as set forth in *Strickland* for all ineffective assistance of counsel claims. *Smith v. Robinson*, 528 U.S. 259, 120 S.Ct. 746 (2000); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gilcrest v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003).

When a claim of ineffective assistance of counsel is based upon Counsel's failure to raise viable issues, the court must examine the record to determine whether there was a failure to present significant and obvious issues on an appeal. *Davila v. Davis*, 137 S.Ct. 2058, 2067 (2017). For judges to undermine or to "impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Jones v. Barnes*, 463 U.S. 745, 77 L.Ed.2d 987 (1983); *Anders v. State*, 386 U.S. 738, 87 S.Ct. 2094 (1967). It is particularly necessary for counsel to use their professional judgement to winnow out the weaker arguments on appeal in consideration of the constraint of a limited time for oral arguments and of ensuring that good arguments are not buried amongst much weaker ones, or ones of no merit at all. *Id.* at 746.

Respondent submits that Applicant cannot satisfy either requirement of the *Strickland* test regarding either trial or appellate counsel. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Therefore,

Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. Any claims not specifically laid out in this post-conviction relief application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. *See also* Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has retained counsel, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRPC. *Pro se* filings will not be considered at the post-conviction relief hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. *See* Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

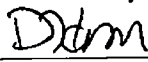
Respectfully submitted,

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August 2, 2018

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

LESTER D. MOSLEY, JR., 361397

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2018-CP-39-0318

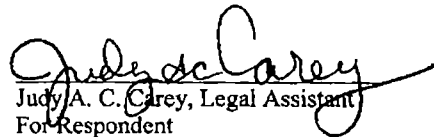
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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville SC 29601

DATED this 2nd day of August, 2018.


Judy A. C. Carey, Legal Assistant
For Respondent



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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September 27, 2017

The Honorable Harold P. Welborn, Jr.
PO Box 215
Pickens SC 29671-0215

REMITTITUR

Re: The State v. Lester D. Mosley, Jr.
Lower Court Case No. 2014GS3901545, 2014GS3901546,
2014GS3901548, 2014GS3901597, 2014GS3901547
Appellate Case No. 2014-002064

Dear Clerk of Court:

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

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Lester Devaria Mosley, Jr., 361397
William Walter Wilkins, III, Esquire
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
J. Robert Bolchoz, Esquire
William G. Yarborough, III, Esquire

**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.

Lester Devaria Mosley, Jr., Appellant.

Appellate Case No. 2014-002064

Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2017-UP-353
Submitted June 1, 2017 – Filed September 6, 2017

AFFIRMED

William G. Yarborough, III, of William G. Yarborough
III, Attorney at Law, LLC, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General J. Robert Bolchoz, Deputy Attorney
General Donald J. Zelenka, and Senior Assistant
Attorney General William Edgar Salter, III, all of
Columbia; and Solicitor William Walter Wilkins, III, of
Greenville, all for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); *State v. Williams*, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) ("The rule in this [s]tate is firmly established that failure to object to a charge, . . . when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."); *State v. Hill*, 268 S.C. 390, 395, 234 S.E.2d 219, 221 (1977) ("By failing to object or request[] additional instructions to the main charge, [the a]ppellant waived any objection to similar subsequent instructions.").

AFFIRMED.¹

SHORT, WILLIAMS, and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

5

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 19 2016

SC Court of Appeals

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LESTER DEVARIA MOSELY JR.,

APPELLANT

APPELLATE CASE NO. 2014-002064

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in instructing the jury on accomplice liability in response to the jury's questions during deliberations?

STATEMENT OF THE CASE

On July 22, 2014, the Pickens County Grand Jury indicted Appellant Mosley for murder, two counts of attempted armed robbery, burglary first degree and possession of a weapon during the commission of a violent crime, indictments #2014-GS-39-1545, 1546, 1547 1548, 1597. On September 15, 2014, Appellant proceeded to jury trial before the Honorable Edward W. Miller. Scott Robinson represented Appellant at trial. Walt Wilkins and William Timmons prosecuted the case. The jury returned verdicts of guilty. Judge Miller sentenced Appellant to fifty (50) years for murder, fifty (50) years for burglary first, twenty (20) years for each of the attempted armed robberies and five (5) years for the weapons charge. A timely notice of intent to appeal was served on September 26, 2014. On September 10, 2015, counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), raising the issue of whether the trial judge erred in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony. On December 2, 2016, this Court directed the parties to brief the issue of whether the trial court erred in instructing the jury on accomplice liability in response to the jury's questions during deliberations. This brief of Appellant follows.

ARGUMENT

The trial court erred in instructing the jury on accomplice liability in response to the jury's questions during deliberations.

The jury found Appellant guilty in the shooting death of Steven Grich. On the evening of December 8, 2012, Grich was at his apartment at the Chimney Ridge Apartment complex located on Smoke Rise Drive in Clemson with friends Kevin Keck, Jonathan "JT" Riordan and a roommate, Daniel Persson, when three men charged in the back door and began demanding money and dope. (R. p. 103, line 17 – p. 104, 105, lines 1-17). Keck testified that one of the men who entered was black and the other two were white. (R. p. 105, lines 13-17). According to Keck, the black male began hitting people with a gun. (R. p. 107, lines 2-11). Keck testified that Grich was taking the brunt of the pistol whipping by the black male when the gun went off. (R. p. 108, lines 4-25). Persson testified, "And then all of a sudden, it just ended. They ran out. Turns out, gun went off and Steve's dead." (R. p. 128, lines 10-11).

One of Grich's other roommates, Robert McKinley, admitted that during the time of the shooting he was selling marijuana. (R. pp. 144-145). McKinley testified that prior to the shooting he smoked marijuana with Appellant at Winton Botchway's apartment. (R. p. 146, line 5 – p. 147, lines 1-24). According to McKinley, on the day of the shooting he called Botchway to let him know he had received a shipment of marijuana. (R. p. 148, line 14 – p. 149, lines 1-12). McKinley testified that on the evening of December 8, 2012, he was in his bedroom with friends Martin and Laura when he heard the commotion in the den and realized they were being robbed. (R. p. 137, line 2 – p. 138, lines 1-25). McKinley admitted that he and Martin were getting high. (R. p. 137, line 25 – p. 138, lines 1-5). An

officer who responded to the apartment after the shooting testified that there was a heavy odor of marijuana coming from the back bedroom. (R. p. 60, lines 17-19).

McKinley testified that upon hearing the commotion in the living room, he put two pounds of marijuana in a backpack and he, Laura and Martin climbed out a bathroom window. (R. p. 139, lines 1-23). McKinley hid the backpack in the woods and upon returning saw three shadows take off and jump in a Dodge Durango where another individual was waiting. (R. p. 140, line 15 – p. 141, lines 1-9). Surveillance video from the apartment complex showed the vehicle leaving at a high rate of speed. (R. p. 64, line 14 – p. 65, 66, 67, lines 1-6).

Police developed Kadeem Ramsey as a suspect. (R. p. 77, lines 4-20). After the police questioned Ramsey, he was arrested and charged with the murder of Grich as well as burglary first degree, attempted robbery and possession of a weapon during the commission of a violent crime. (R. p. 77, line 17 – p. 78, lines 1-24). While officers were questioning Ramsey, Jaron Dalton arrived at the Pickens County Sheriff's Office driving a black Dodge Durango. (R. p. 80, lines 5-13). A short time later Jaron's younger brother also arrived at the sheriff's office. (R. p. 81, lines 3-4). The Dalton brothers were interviewed and they led police to an area on their grandparents' property where they had buried two guns and some other items. (R. pp. 81-83). One of the guns found, a 9 mm, was determined to be the gun that fired the bullet killing Grich. (R. pp. 285-287). The Dalton brothers were arrested and charged in connection with the shooting. Records from the South Carolina Department of Corrections indicate that the Dalton brothers are white.

Both Dalton brothers and Ramsey testified against Appellant at trial. Jaron Dalton testified that he, his brother, Ramsey and the Appellant went to the Chimney Ridge

Apartment Complex to steal marijuana. (R. pp. 186-193). Jaron admitted that he brought two guns with him, a 9 mm gun and a 380. (R. p. 190, lines 6-11). According to Jaron, when they went into the apartment, his brother had the 380 and Appellant had the 9mm. Jaron testified that Appellant was hitting people with the gun. "When he was coming up from hitting him, he come up and the gun just fired about halfway up." (App. p. 196, lines 22-23). Jordan Dalton testified, "I went back downstairs. And by the time I got right there, to the corner of the love seat right there, he [Appellant] came down and hit Mr. Grich one more time and the gun went off." (R. p. 233, lines 1-5).

Appellant testified that he was not with Ramsey and the Dalton brothers on the night of the shooting. (R. p. 315, lines 2-23). The judge instructed the jury with the law on alibi, accident, accomplice liability, "hand of one is the hand of all" and felony murder. During deliberations the jury sent a note asking, "What means murder? Does the defendant have to pull the trigger to consider it murder? May we have a copy of the law?" (R. p. 393, lines 3-5). The State requested that, in addition to the murder charge, the judge reinstruct the jury on accomplice liability, "hand of one is the hand of all." (R. p. 393, lines 7-8). Counsel for Appellant replied, "I do think I would ask for the definition of murder, Your Honor, just the definition of murder." (R. p. 393, lines 10-12). When the judge asked counsel if he objected to hand of one is the hand of all recharge, counsel answered, "I do, just based on the question, Your Honor." (R. p. 393, lines 15-16). The judge overruled the objection and recharged the jury with the law on murder and accomplice liability by submitting written charges to the jury. (Supplemental Record). The trial judge erred.

In State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996), the South Carolina Supreme court wrote:

It is well established in South Carolina that “[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury’s request.” State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct.App.1993); accord Corbin v. Prioleau, 260 S.C. 171, 194 S.E.2d 875 (1973); Rauch v. Zayas, 284 S.C. 594, 327 S.E.2d 377 (Ct.App.1985).

In the present case the judge’s recharge was not limited to the jury’s question about the definition of murder. The judge initially instructed the jury on accomplice liability. In asking for the recharge, the jury did not ask for additional instruction on accomplice liability, “hand of one is the hand of all.” Instead, the jury asked, “Does the defendant have to pull the trigger to consider it murder?” (R. p. 393, lines 4-5). There is evidence in the record from which the jury could conclude that Appellant did not pull the trigger but rather the gun accidentally discharged while Appellant was striking the deceased. Rather than asking about accomplice liability, the jury was asking if the accidental discharge of the weapon during a robbery met the elements required for murder. The judge erred in recharging the jury with the law on accomplice liability.

In Wilds v. State, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), reh’g denied (Apr. 24, 2014), cert. granted (Nov. 20, 2014), cert. dismissed as improvidently granted, 414 S.C. 341, 778 S.E.2d 112 (2015), this Court found that because there was no evidence that indicated anyone other than Wilds was the shooter, the PCR court correctly determined the trial court erred in charging the jury on accomplice liability. Wilds presented an alibi defense at trial. In Wilds this Court distinguished Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) writing:

Our supreme court has noted that “[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.” Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In Barber, as in the instant case, four men committed an armed robbery,

and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. *Id.* at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 438. Our supreme court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." *Id.* at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. *Id.* at 237, 712 S.E.2d at 439.

407 S.C. at 438-39, 756 S.E.2d at 390. Like Wilds, the facts of the present case are distinguished from Barber. While the State's evidence indicated that two of the men who entered the apartment were armed, no evidence indicates that anyone other than Appellant, armed with a 9 mm, was the shooter. While there was no objection to the initial charge on accomplice liability¹ (R. p. 392, lines 16-18), the trial court erred in **recharging** the jury on accomplice liability

The error in recharging the jury with the law on accomplice liability was not harmless. Appellant presented an alibi defense and testified that he was not with Kadeem Ramsey and the Dalton brothers on the night of the shooting at the Chimney Ridge Apartments. (R. p. 315, lines 2-23). Appellant, however, testified that he told Kadeem Ramsey that he could buy marijuana from the apartment where the deceased was shot. (R. p. 320, line 5 - p. 321, lines 1-11). By recharging accomplice liability when the jury did not ask for a recharge on accomplice liability, the jury may have erroneously inferred that

¹ Trial counsel's failure to object to the initial charge on accomplice liability may need to be raised in post-conviction relief.

Appellant was guilty of murder, burglary and attempted armed robbery as an accomplice by telling Kadeem Ramsey where he could purchase marijuana.

CONCLUSION

Based on the above argument this Court should reverse the convictions and remand the case for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

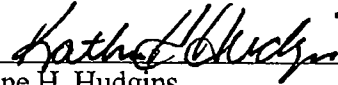
ATTORNEY FOR APPELLANT

This 19th day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 19, 2016



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5

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

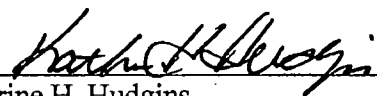
LESTER DEVARIA MOSELY JR,

APPELLANT

APPELLATE CASE NO. 2014-002064

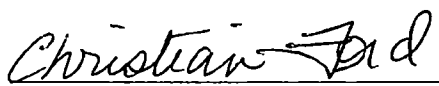
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant have been served on Lester Devaria Mosley, Jr., #361397 at Lee Correctional Institution, this 19th day of December, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of December 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Pickens County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2014-002064**

RECEIVED

**FEB 17 2017
SC Court of Appeals**

THE STATE,

Respondent,

vs.

LESTER DEVARIA MOSLEY, JR.,

Appellant.

BRIEF OF RESPONDENT

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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Pickens County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2014-002064**

THE STATE,

Respondent,

vs.

LESTER DEVARIA MOSLEY, JR.,

Appellant.

BRIEF OF RESPONDENT

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COURT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations?

COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether Appellant waived his right to complain of the trial judge's supplemental jury instruction on accomplice liability that was given in response to the jury's questions during deliberations, where Appellant did not object when the trial judge instructed the jury on accomplice liability in his original jury charge, and he did not make the same arguments in support of his objection to the supplemental instruction at trial, as he raises before this Court?

- II. Whether the trial judge properly instruct the jury on accomplice liability after the jury had begun deliberating where (1) the trial judge instructed the jury on accomplice liability, without objection, in his original jury charge; (2) there was sufficient evidence of accomplice liability in the record to support the State's request-to-charge on this theory; (3) Appellant had the opportunity to address whether he was culpable as an accomplice, and he asserted alibi and a failure to prove identity; (4) a question from the jury rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented to it; and (5) Appellant clearly was not prejudiced by the instruction?

STATEMENT OF THE CASE

Appellant, Lester Devaria Mosley, Jr., is currently serving a life sentence for murder and sentences for other offenses that he and three co-defendants committed in Pickens County, South Carolina, on December 8, 2012. The Pickens County Grand Jury indicted him in July 2014 for murder (2014-GS-39-1548); two counts of attempted armed robbery (2014-GS-39-1545 & -1547); burglary in the first degree (2014-GS-39-1597); and possession of a weapon during the commission of a violent crime (2014-GS-39-1546). *R. pp. 404-05; 407-08; 410-11; 413-14; 416-17.* Scott Robinson, Esquire, represented him on these charges. Thirteenth Circuit Solicitor W. Walter Wilkins, II, and Assistant Solicitor William Timmons prosecuted the case.

On September 15, 2014, Appellant received a jury trial before the Honorable Edward W. Miller. Appellant challenged the State's proof of identity and he presented the defenses of alibi and accident. The State requested a charge on accomplice liability at the charge conference. *R. p. 348, lines 18-19.* The trial judge instructed the jury on accomplice liability, without objection, in his original jury charge. *R. p. 383, lines 4-17; p. 392, lines 16-18.* However, Appellant objected to the trial judge providing a supplemental written instruction on accomplice liability, in response to a question from the jury after it had begun deliberating (Court's Exhibit 5). *R. p. 393, line 1- p. 394, line 6. See also Supp. R. pp. 1-2; 8.*

The jury convicted him of each charged offense. Judge Miller imposed concurrent sentences of fifty years for murder, fifty years for burglary in the first degree, twenty years for each of the attempted armed robberies and five years for the weapons charge. *R. pp. 400-01; 403; 406; 409; 412; 415.*

Appellant timely served and filed a notice of appeal. Kathrine H. Hudgins, Assistant Appellate Defender represents Appellant on appeal. On September 10, 2015, counsel filed a brief

pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and petitioned to be relieved as counsel. Counsel raised the following issue:

Did the trial judge err in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony?

Appellant thereafter filed a *pro se* response addressing the same issue. However, on December 2, 2016, this Court denied the motion to be relieved as counsel and directed the parties to brief the following issue, as well as any other issue of arguable merit:

Whether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations.

Appellant, through counsel, filed a Brief of Appellant on December 19, 2016. This brief follows.

STATEMENT OF FACTS

Viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial reasonably tended to show that on the evening and night of Saturday, December 8, 2012, six friends - Steven Grich (the murder victim), Robert "Rob" McKinley, Kevin Keck, Daniel Persson, Sam Voison and Jonathan Riordan - were in a Pickens County apartment near Clemson, South Carolina, that was shared by Steven, Rob, Daniel and Dalton Johnson.¹ Around 8:00 p.m., Steven, Daniel, Kevin, Sam and Jonathan were watching TV and drinking downstairs. Rob was upstairs with his friend, Martin, and his girlfriend, Laura Hill. Daniel, Rob and Martin, were smoking marijuana provided by Rob, who had almost two pounds of it.² *R. pp. 103-05*;

¹ The apartment complex, known as Chimney Ridge, is "primarily an off-campus housing area for Clemson students." *R. p. 59*.

² Two pounds of marijuana costs roughly \$5,000.00. Rob sold small quantities of this marijuana to friends six or eight times day. He was only charged with simple possession. *R. pp. 143-44; 149*.

117-19; 126-127; 131-34; 136-39; 153-54.

The surviving friends who testified gave similar testimony about what happened thereafter. As the friends were enjoying themselves, the back door “burst” or “flew open” and “at least three men” entered the apartment. *R. pp. 105; 119; 127; 134; 138*. Kevin Keck testified that these men were wearing ski masks and were armed. Kevin saw the first man who entered strike Jonathan with a gun. He also saw the victim fall to the floor after being struck by the same gun. “After that, everyone got down on the floor,” and Kevin did not see much of what happened after that point because he covered his head. *R. pp. 119-21; 124*.

However, he heard one of the men “yelling about money” and demanding drugs. As this was occurring, he heard the victim being pistol-whipped and he heard a gunshot. He did not hear anything after the shot. The victim had been shot victim had been shot and the victim had been shot when Kevin and the others got off of the floor. *R. pp. 120-23*.

The first man who entered was wearing a mask and Kevin had never seen him, but Kevin could see that he was black because Kevin could see the man’s skin between the man’s glove and sleeve. Also, this man was “probably” Kevin’s height, which is 5’7” tall. This is the person who shot the victim. *R. pp. 120-22*. The State had Appellant’s co-defendant, Kadeem Ramsey, brought the courtroom and Kevin indicated that Ramsey was much taller than the first man to enter the apartment on December 8th. Upon viewing Appellant after Appellant stood, Kevin testified that Appellant’s height was consistent with that of the first intruder. *R. pp. 122-23*.

Daniel Persson testified that although he may have smoked some marijuana, “it was more of a drinking part kind of thing” (*R. p. 129*) and he was “definitely not drunk or intoxicated. *R. p. 131*. While Daniel was sitting on the right end of a couch in the living room,

we were just sitting there and people with guns and masks just came in the back

door. One of them just started yelling, ... ["G]et on the ground[.]" And ... after ... they came in, [they] started pistol whipping people. I got kicked in the head like once or twice and then pistol whipped when I was laying behind the table right there.

R. p. 127.

Daniel could see that the first assailant was black because he could see "the holes in the mask and stuff." This man was "[d]efinitely shorter" than Daniel. This black assailant made a full circle" as he repeatedly pistol-whipped the victim, Jonathan Riordan, and Daniel. The victim and Jonathan fell off of the couch and onto the floor as a result of this beating. Daniel also "remember[ed] seeing one or two white guys," but he did not remember seeing much else after that point because he had a gun in his face. *R. pp. 127-29; 131.*

The assailants repeatedly ordered everyone to get on the ground and asked where the dope was until they left. *R. p. 128.* After a gunshot was fired, the assailants ran out of the apartment. Daniel immediately checked on the victim but the victim was obviously dead. So, Daniel called 911. *R. pp. 128-30.* When the State had Ramsey brought the courtroom, Daniel testified that Ramsey was much taller than the first man to enter the apartment on December 8th. Upon viewing Appellant after Appellant stood, Daniel could not positively identify Appellant as the first assailant but testified that Appellant's height was "most definitely" consistent with that of the first intruder. *R. pp. 130-32.*

Laura Hill testified that she was living in Clemson and working in Greenville in December 2012. She arrived at the apartment around 8:00 p.m. and went into the bedroom adjacent to the living room. Rob McKinley and Martin were in the room with her. At some point Lara heard the back door open. "... [A]bout 30 seconds later, I heard shouting, profanity, [and] people like scuffling around." At this point, she and Rob "realized that somebody was trying to

rob the house. So we went and jumped out [of] the [bathroom] window and ran a couple of houses down to a neighbor's house." Rob accompanied her to this house. *R. pp. 133-35.*

Once they reached the neighbor's residence, Laura saw "several people dressed in black run in between the houses and get into a black SUV. Laura and Robert talked to their neighbors for roughly ten or fifteen minutes. They then returned to the apartment. She did not recall whether Rob had brought anything with him when he fled his apartment. *R. p. 135.*

Rob McKinley testified that he was in his bedroom, studying for a final exam in chemical engineering and smoking marijuana, around 8:00 p.m. on Saturday, December 8, 2012. Laura Hill and Martin were also in the room. "About 8:20," Rob and Martin heard "a commotion and [people] yelling, Where's the dope, just a bunch of commotion. It sounded like a brawl almost inside the den." *R. pp 136-39.*

Rob immediately sent Laura and Martin into the bathroom. As soon as he could load his marijuana into his backpack, he joined them and all three escaped through the bathroom window. Rob told Laura to run to the closest neighbor's residence and call the police. While she and Martin ran for help, Rob hid his backpack "in the woods about five ... [or] six houses up." On his way back to see whether Laura had called 911, he heard "three robbers" running behind him. He immediately began chasing them. *R. pp. 139-40; 142.*

He continued to follow them after they took a right approximately "six ... or eight houses up," and he followed them until he saw the three jump into a Black Dodge Durango and close the doors. A fourth person was already in the driver's seat. He even chased them as the Durango sped away from the apartment complex, and he thought one assailant looked at him. Rob eventually stopped and began yelling, "[H]ey, those are the guys that were at my house robbing me with a gun" He stopped yelling when the Durango "peeled out" of the apartment

complex. Rob then returned to his apartment and discovered what had happened. *R. pp. 140-43.*

Rob testified that although the robbers had been wearing masks and gloves, one of the men who jumped into the Durango was African-American. *R. pp. 142; 149.* He later identified the Durango for law enforcement, when shown the apartment complex's surveillance video. Law enforcement later found the drugs and drug paraphernalia that he had hidden. Yet, he was only charged with simple possession of marijuana. *R. pp. 142-43.*³

Rob testified that he had sold marijuana in the past to Winton Botchway approximately three to five times in 2012. On one occasion in September, he went to Botchway's apartment and sold marijuana to Botchway. He also smoked a "blunt" with Botchway and another individual on that occasion. He identified Appellant as the other person with whom he had smoked the blunt and to whom Botchway had introduced him. Rob subsequently sold marijuana to Botchway at his own apartment, and he had called Botchway on December 8th and told Botchway that he had "just re-up." He had expected Botchway to come by his apartment and purchase marijuana from him. *R. pp. 145-49.*

Jonathan Riordan testified that he had gone over to his friends' apartment between 5:30 and 6:00 p.m. on December 8th and was hanging out with the other people there. Around 8:00 p.m., Rob was in his bedroom with his girlfriend and Jonathan was sitting on the couch next to the victim. The back door to the apartment was unlocked and some men "barged" into the apartment. *R. pp. 154-55.*

Jonathan gave the following description of the events that happened after the men entered the apartment:

I was ... the first person they assaulted when they came in through the door. I was

³ Rob testified that police arrived within ten minutes of the 911 call. *R. p. 143.*

pistol whipped in the head twice. I ... only saw the first guy and a couple of guys behind him. After that, I was semi-conscious conscious. I wasn't looking up or anything, I was just on the ground bleeding..... I saw the person who hit me, I saw his eyes..... He was black.

R. p. 155.

After the man had struck him the first time with the butt end of the pistol, Jonathan was "kind of in a daze" and did not know what to do. The second time the man hit him, he understood that the intruder meant business and he fell to the floor. This blow left a gash. Following that blow, Jonathan "just heard ringing in my ears and commotion. After some time, there was a shot." *R. pp. 156-58.*

When Ramsey was brought into the courtroom, Jonathan testified that Ramsey was taller than the man who had struck him. However, when he saw Appellant standing, Jonathan indicated that's Appellant's height was consistent with the height of the man who had pistol-whipped him. *R. pp. 158-59.*

Each of Appellant's three co-defendants also testified against him. Jaron Dalton testified that on December 8, 2012, Jaron was at his father's residence cutting wood for a bonfire. He stayed there for most of the day. Eventually, he and his brother, Jordan, went to Clemson in order to pay a bill and to pick up Kadeem Ramsey.⁴ They were riding in Jaron's black Dodge Durango. Their original plan was "[t]o hang out and smoke some weed." *R. pp. 182-84.*

The Daltons picked up Ramsey between 7:45 and 7:50 p.m. They spoke to Ramsey. Then, the three men went to Jaron's Clemson, South Carolina, apartment, which he shared with

⁴ Ramsey and Jordan were friends from school and Jaron knew Ramsey through his brother. The Daltons frequently spoke to Ramsey. *R. p. 185.*

his roommate, Connor Mann. They stayed there for "a little while." *R. pp. 172; 182-84.*⁵

While at this apartment, Ramsey told the Daltons that Appellant had told him about an apartment that they could go to and rob the occupant of marijuana. Ramsey contacted Appellant by cell phone. Jaron testified that Jordan fashioned a mask out of a toboggan (*see* State's Exhibit 46) by cutting holes in it for his eyes, Jaron wore a baseball cap (State's Exhibit 47), sunglasses, and a black hoodie (State's Exhibit 45); and Ramsey wore a hoodie. Once Ramsey contacted Appellant, the men left Jaron's apartment and drove to pick up Appellant on Vista Dr. in Clemson. *R. pp. 186-89; 205-06.*

Appellant met them outside of his residence. So, the Daltons and Ramsey did not get out of the car. Appellant "come up to the window and he was telling us a little bit about where it was and stuff like that. Then he got in the car." Appellant said location was in Chimney Ridge Apartments and that there were between three and four pounds of marijuana at that location. When the men left Vista Dr., they immediately headed for Chimney Ridge Apartments. Jaron was driving, Jordan was in the passenger seat, and Ramsey and Appellant were in the back seat.⁶ *R. pp. 189-91.*

The men discussed a plan as they headed to the apartment complex: they would go into the apartment, "get everybody down and just try to find the weed and get out" *R. p. 191.* When they reached Chimney Ridge Apartments, Ramsey and Appellant pointed out the apartment they were going to rob, which was the first one on the left after entering the complex. *R. pp. 191-92.*

Jaron drove into the complex, parked about three or four houses away from this

⁵ Connor Mann testified at trial. His testimony is found at *R. pp. 172-77.*

⁶ Appellant was seated behind Jaron Dalton.

apartment, and they sat in the SUV until another vehicle pulled out of the complex. Once that car had gone, they got out of the SUV and followed a "back alley" behind the houses to their intended destination. *R. pp. 192-93.*

Initially, Jaron Dalton had a 9 mm (State's Exhibit 42) and Jordan Dalton had a .380 pistol (State's Exhibit 43). However, Jaron gave the 9 mm to Appellant when Appellant pointed out that he was unarmed. Appellant was the first defendant to enter the apartment and Jordan Dalton followed him. They immediately ordered the men in the living room to get on the ground. The men initially hesitated, but quickly complied with this order after Appellant hit one of them with the 9 mm. Jaron and Ramsey then entered the apartment. *R. pp. 194-95; 202; 204-05.*

Jaron stood in front of the coffee table, while Ramsey and Jordan "went upstairs to see if there was anybody upstairs or anything." Jaron watched as Appellant "continued to hit people with the pistol and ... ask[] them where the dope was, and ... [ordered them to] ... stay on the ground, keep your faces down, stuff like that." Jaron also testified that Appellant struck the man he later shot "around eight to 10 times probably or more." Following one of these blows to victim, Appellant "[came] up and the gun went off." By this time, Jordan Dalton and Ramsey had come back downstairs and into the living room. *R. pp. 195-97.*

... [W]e all kind of stood there, kind of shocked that the weapon had fired Then I think it was my brother said run. That's when we proceeded out of the house out the back door. We [ran] up the back alley them back to my car.... We got in [the car] and we left Chimney Ridge went back to my apartment ... At a high rate of speed.

R. p. 197.

According to Jaron, "I think we got like one or two grams of weed ... off the coffee table." They smoke some of the marijuana and Appellant used his cell phone to call someone to pick him up from the apartment. That person arrived within five or ten minutes, and both

Appellant and Ramsey left with that person. *R. pp. 197-98.*

The Dalton brothers thereafter went back to their father's house and stayed there throughout the night. They left the weapons in Jaron's apartment. The next morning, however, Jordan suggested that they needed to get the guns and hide them somewhere in the woods. Jaron called Connor Mann and asked Mann to bring the weapons to him because "[t]hey might try to point the finger at us." At some point, Mann brought both weapons and the clothing that the Daltons had worn on December 8th to Jaron in a Duke Energy backpack (State's Exhibit 48). The Daltons later buried the backpack and its contents in woods, on their father's property. *R. pp. 173-77; 198-200.*

The Daltons stayed at their father's house for most of the remainder of the weekend and Jaron went to work on Monday. However, he "just couldn't take it anymore," and he turned himself in at the Pickens Law Enforcement Center after work on Monday. He gave a statement to members of the Pickens County Sheriff's Office indicating that Appellant had fired the fatal shot, and he led them to where he and his brother had hidden the backpack around 7:30 p.m. that night. Jaron was prosecuted for his role in the crimes, and was convicted of voluntary manslaughter as the result of Steven Gritch's death. *R. pp. 200-03.*

Kadeem Ramsey testified that he lived with his mother in Clemson South Carolina on December 8, 2012. He was at his grandmother's house that afternoon when he received a text message from Jordan Dalton asking him about marijuana. Although he was unable to locate any marijuana from several friends, he told Jordan Dalton that he knew someone who probably would have some, referring to Appellant. Ramsey and Appellant subsequently communicated on the 8th via text messages. *R. pp. 208-10.*

Ramsey corroborated Jaron's testimony that the Daltons picked him up in the black

Durango; that the three friends thereafter picked up Appellant on Vista Dr.; and that the co-defendants then went to Chimney Ridge Apartments, where they planned to rob someone of marijuana. Ramsey "told Jordan Dalton that it was a bad idea, [and] not to go in there. They discussed this briefly before Jordan told Jaron to hand Appellant the 9 mm. With Appellant leading away, the men then went into the apartment."⁷ Ramsey testified that he was the last one to enter the apartment and that he went upstairs. The gunshot occurred as he was coming back downstairs. *R. pp. 210-14.*

Ramsey corroborated Jaron's testimony that, after the gunshot, the co-defendants ran out of the apartment and back to Jaron's vehicle. They then got in and went to Jaron's apartment. After ten or fifteen minutes, he and Appellant got a ride from Ericka Gibson, whom he had called for Appellant.⁸ *R. pp. 214-17.*

They then went to the residence of Appellant's cousin, Cosha. From there, Ramsey wound up going to his aunt's house. Law enforcement pulled him out of a class the following Monday, and he gave a statement what had occurred on December 8th. He told them that he did not know who shot the victim but that only Jordan Dalton and Appellant had guns. *R. pp. 217-21; 223-24.*

Jordan Dalton corroborated his brother's testimony in virtually every key detail. He testified that he was living at his father's house at the time of the murder. On the night of December 8th, he and Jaron went to see Ramsey in order to get some marijuana. Their initial intent was to purchase it. After they picked up Ramsey, they returned to Jaron's apartment where

⁷ Ramsey testified that neither he nor Appellant covered their faces. However, Jordan was wearing a "ski mask" and Jaron was wearing a Carolina hat. *R. p. 213.*

⁸ Mari Greenlee was with them as well. Gibson was driving her silver Honda. *R. pp. 216-17.*

they unsuccessfully attempted to find marijuana. After they were unsuccessful in their efforts, Ramsey told them that Appellant "had a way ... to go get some [marijuana]." Then, they prepared for robbery, as his brother had testified. *R. pp. 225-29.*

Next, they went to Vista Dr. and picked up Appellant. He indicated that he knew where they could rob drugs from someone. Appellant got into the car and they went to Chimney Ridge Apartments. Jordan confirmed that Jaron handed the 9 mm to Appellant before they entered the apartment. Jordan also confirmed his brother's testimony concerning the events surrounding the crimes that night, including his brother's testimony that the 9 mm "went off" when Appellant struck the victim with it, as well as the co-defendants' activities after the crime. *R. pp. 229-35.*

Ericka Gibson testified that she was dating Appellant in December 2012. She was at the residence of his cousin, Cosha Benson, in Ridge Crest, on the night of December 8, 2012. Ericka called Ramsey's cell phone at 8:45 and 8:48 p.m. that night and spoke to Appellant. Appellant wanted a ride and she agreed to go get him. So, she went to an apartment complex in Clemson, where she picked up Appellant and Ramsey, and she drove them back to Benson's house. After their return, Tavis Campbell, Benson, Ericka, Greenlee, Ramsey, she and Appellant were at Benson's residence. The group later went to Crocs, in downtown Clemson. *R. pp. 246-51; 301.*

Nineteen year old Tavis Campbell testified that he and Appellant are friends and that they were friends back in 2012. On Saturday, December 8, 2012, Tavis was staying at his sister's residence in Creekwood Apartments, in Clemson. Appellant came to Creekwood Apartments around noon or 1:00 p.m. on the 8th and was there for two or three hours. Imari Greenlee and Ericka Gibson were with him. With Ericka driving her silver Honda, they eventually gave Tavis a ride to Vista Dr., where Tavis lived with his mother. *R. pp. 256-59.*

They hung out outside of her residence for several hours. "About 6:00, [or] 7:00 [p.m.],"

Tavis saw Appellant get into a black or blue SUV being driven by a "white dude." Ramsey was also in the vehicle. Between forty minutes and an hour later, he saw Ericka's Honda. with both Appellant and Ramsey in it. Tavis asked Appellant what happened that night and Appellant replied, "Something went wrong." However, Appellant did not explain to him what that meant. Ramsey said that a gun went off. *R. pp. 258-64.*

Later that night, Tavis went with the group to Crocs between 8:00 and 9:00 p.m. He rode in Ericka's Honda. He spoke with members of the United States Marshalls Service roughly a week later and claimed that he did not know where Appellant was. This obviously was a lie because he was arrested with Appellant in a Toccoa, Georgia hotel. Tavis was charged with hindering an apprehension and he pleaded guilty to that offense. *R. pp. 264-67.*

In order to better pinpoint the approximate time of the crimes in this case, the prosecution introduced the testimony of Brian Jaynes, the Dispatch Supervisor for the Pickens County Sheriff's Office, that the first 911 call in this case was received at 8:27 p.m. on December 8th. That call, which was introduced as State's Exhibit 2, was published to the jury. *R. pp. 51; 54-55.*

Master Deputy Michael Torres works for the uniform road patrol division of the Pickens County Sheriff's Office. He and a highway patrolman were the first two officers to respond to the crime scene on December 8, 2012, arriving at 8:30 p.m. *R. pp. 56-57.* Upon entering the apartment, Deputy Torres saw the victim lying on the floor and another man was kneeling over him. Deputy Torres sent that person to the porch along with the patrolman, and he cleared the residence so that EMS personnel could attend to the victim. *R. p. 58.* While clearing the residence, he noticed "a heavy order of marijuana coming from the back bedroom area near the back door of the residence." *R. p. 60.*

Deputy Torres testified that there were no barriers that would prevent someone from

walking consecutively behind the apartments on a grassy common area surrounding the perimeter of the property. *R. pp. 62-63.*

On the way to the crime scene, dispatch had issued a BOLO for a "black Nissan SUV-type vehicle," and witnesses at the scene confirmed that a black SUV had left the complex. Later, officers viewed a time-stamped surveillance video taken by the complex's management's cameras. *R. pp. 64-65.* The officers began viewing the video at between thirty and forty-five minutes before Deputy Torres arrived. "The only vehicle that matched close to the description that was given initially was a large black Dodge Durango, which on the video." The Durango "had exited the gate house at such a high rate of speed" that it hit a speed bump hard and "bunny hopped." *R. pp. 64-65.* This occurred at 8:26 p.m. The State introduced still photographs taken from the video as State's Exhibits 11-12. *R. pp. 64-67.*

Inv. Gary Anthony, also with the Pickens County Sheriff's Office, arrived at the scene after Deputy Torres. He also saw the victim lying on the floor and smelled the "strong smell of marijuana coming from the residence." *R. pp. 72-74.* Inv. Anthony's responsibility was to supervise others involved in the investigation. Although nothing supporting a motive was initially recovered from the apartment, Inv. Anthony "felt like there had to be something more to it. So I wound up searching the outside rear of the home." In his search, he found both the drugs and drug paraphernalia that Rob McKinley had hidden earlier that night. Rob was arrested on charges related to the drugs. *R. pp. 74-75.*

Inv. Anthony was told the following Monday that the school resource officer had notified the Sheriff's Office that a girl had provided information about the murder. So, he and other officers spoke to Imari Greenlee around 9:00 a.m. Monday. Afterwards, the officers removed Ramsey from a classroom and interviewed him. Following this interview, they arrested Ramsey

for murder, burglary in the first degree, attempted robbery and a weapons charge. He was then taken to the Sheriff's Office. Ramsey later pleaded guilty to voluntary manslaughter, burglary in the first degree and the weapons charge. *R. pp. 76-80.*

Jaron Dalton came in while the officers were at the Law Enforcement Center on Monday afternoon. He was driving a black Dodge Durango. After giving a videotaped statement of his and his co-defendants' involvement in the murder, Jordan Dalton arrived and was interviewed. Later, Jaron accompanied the officers to his father's house. Jaron's grandmother gave consent for the officers to search the property, and Jaron led them to where he and Jordan had buried the backpack. The officers then seized the backpack (State's Exhibit 48) and its contents, including the toboggan mask (State's Exhibit 18) worn by Jordan, the hat (State's Exhibit 20) and hoodie (State's Exhibit 17) worn by Jaron, the 9 mm used to kill the victim (State's Exhibit 42) and the .380 (State's Exhibit 43). *R. pp. 80-86.*

A crime scene investigator found a spent 9 mm shell casing at the victim's feet (State's Exhibit 56) and a projectile (State's Exhibit 55) that had gone through his body and ended up in his clothing under his left armpit. Unfortunately, officers did not find any useable latent fingerprints. *R. pp. 89-97.* In a subsequent search of Jaron Dalton's Durango, officers found a live 9 mm cartridge. *R. pp. 99-101.* SLED Agent Chad Smith, a forensic firearms examiner, compared both the 9 mm shell casing (State's Exhibit 56) and the projectile (State's Exhibit 55) to projectiles and casings test fired by State's Exhibit 43, the 9 mm used by Appellant. He opined that both the shell casing and the projectile had been fired by that 9 mm. *R. pp. 282-83; 285-88.*

Dr. Michael Ward, a forensic pathologist employed as Greenville County's Chief Medical Examiner, performed an autopsy on the victim. Dr. Ward found a single gunshot wound. *R. pp. 239; 242.* He explained that:

... Mr. Grich had a gunshot wound which entered the right lateral chest or the right side of the chest, basically, in the midline of the side. This wound went through the skin and the chest wall at the level of rib number five. It passed through the upper lobe of the right lung, the area we call the pulmonary hilum, which is where the blood vessels coming from the heart pass into the lung. It then went through some fibers of the right atrium of the of the heart, one of the chambers of the heart, then through the left pulmonary hilum. So it got the blood flow out to both lungs. Then [the wound passed] through the tissues of the left upper lobe of lung and it exited the left chest, basically, at the same level of the fifth rib.

R. pp. 242-43.

Dr. Ward opined that the bullet had traveled from the victim's right side to his left side, before ultimately striking a firm object and creating an "abrasion collar." This was consistent with the victim laying on his left side, with the right side of his body up, and the bullet hitting the floor. *R. pp. 243-44.* Also, the trajectory of the bullet could have been consistent with the victim covering his face in a defensive posture. "Toxicology testing of Mr. Grich's femoral blood revealed marijuana as well as amphetamine." The amphetamine was "at a therapeutic level and would be consistent with" his known prescription for Adderall. *R. pp. 244-45.*

The State also introduced evidence that Appellant fled the jurisdiction to avoid prosecution for the murder. Deputy United States Marshal Douglas Leslie testified that the Pickens County Sheriff's Office contacted his Office shortly after the murder and sought assistance in locating and apprehending Appellant. Late in the afternoon of December 19, 2012, Deputy Leslie received a call from Deputy Scott Tickner, another member of his task force. He then went to Falls Landing Apartments, where Deputy Tickner had stopped a silver Honda Civic owned by John Gibson, Ericka Gibson's father. The officers found four men in the car: Devonte Montrel Hodges, MarticusTravon Gibson, Tavis Campbell, and Antonio Scott. *R. pp. 288-91.*

These men were interviewed and asked whether they knew Appellant's whereabouts, as

well as the last time that each man had seen Appellant. Each person signed a statement indicating that he understood he could be prosecuted if they did not answer the questions truthfully. *R. p. 291.*

On December 21st, the Marshal's Office received a tip that Appellant was with Ericka Gibson at the Budget Inn motel, in Toccoa, Georgia. Deputy Leslie and other members of his task force met with officers from the Stephens County, Georgia, Sheriff's Office, and they arrested Appellant at the motel. They also arrested Marticus Travon Gibson and Tavis "Chico" Campbell. They found Appellant hiding in the bathroom. with a hoodie on and the hood "pulled up." When asked his name, Appellant claimed to be "Antonio Scott." *R. pp. 291-94.*

Respondent submits that this evidence of flight to avoid prosecution and giving a false name tended to prove Appellant's consciousness of guilt. *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted); *State v. Crawford*, 362 S.C. 627, 634-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005).⁹

ARGUMENT

I. Appellant has waived his right to complain of the trial judge's supplemental jury instruction on accomplice liability that was given in response to the jury's questions during

⁹ "This common law rule is based on ordinary human experience that echoes its often-quoted Biblical antecedent: 'The wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1." *Ordway v. Com.*, 391 S.W.3d 762, 790 (Ky. 2013). *See also* 2 Wigmore, *Evidence* § 276 (Supp. 2007). Contrary to the evidence in *State v. Odems*, 395 S.C. 582, 585, 589-90, 720 S.E.2d 48, 49, 52 (2012), where a witness offered a plausible alternative reason for Odems fleeing the scene of his arrest in the State's case-in-chief — *i.e.*, he wished to avoid trouble because the driver told him that the driver did not have a license — there was no such plausible explanation for leaving the state here. Instead, viewing the evidence in the light most favorable to the State, the *only reasonable inference* is that Appellant fled because he knew that he would otherwise be arrested for the crimes he and his co-defendants had committed.

deliberations because he did not object when the trial judge instructed the jury on accomplice liability in the original jury charge, and he did not make the same arguments in support of his objection to the supplemental instruction, at trial, as he raises before this Court. Alternatively, the trial judge did not err in giving the supplemental instruction.

Respondent submits that Appellant has waived his right to complain of the trial judge's supplemental jury instruction on accomplice liability that was given in response to the jury's questions during deliberations because he did not object when the trial judge instructed the jury on accomplice liability in the original jury charge, and he did not make the same arguments in support of his objection to the supplemental instruction at trial, as he raises before this Court.

A. How issue was presented in the trial court.

The State requested a "hand of one, hand of all" jury instruction in the charge conference. The trial judge did not specifically rule on this requested instruction. Rather, he immediately asked the defense for its requests-to-charge. *R. p. 348, lines 15-22*. However, it is apparent that the State's requested instruction was granted because the State argued, without objection, that Appellant could be found guilty under principles of accomplice liability. *R. pp. 364-65*. While Appellant's closing did not specifically address the question of accomplice liability, his closing focused upon the State's failure to even prove his presence at the scene and his alibi defense. *R. pp. 355-61*.

Moreover, the trial judge charged jurors on accomplice liability (*R. p. 383*). Appellant did not object to this charge during the charge, itself, and he did not take *any* exception to the jury instructions after the jury was excused. *R. p. 392, lines 16-18*. After the jury had begun its deliberations, it returned with the following questions:

What is murder?

Does the defendant have to pull the trigger to consider it murder?

Can we have a copy of the law?

Court's Exhibit 5, Supp. R. p. 1. See also R. p. 393.

The State suggested instructions on murder and accomplice liability were appropriate, but Appellant asked the trial judge to only charge the definition of murder. When the trial judge asked whether he objected to “the hand of one is the hand of all” charge being given, Appellant stated “I do, just based on the question, Your Honor.” The trial judge overruled his objection. *R. p. 393, lines 6-18*. After a short recess, the trial judge sent the jury printed instructions covering the definition of murder, the permissible “felony murder inference, and accomplice liability. *R. p. 394, lines 1-6; Court's Exhibits 6-8, Supp. R. pp. 2-9.*

B. Discussion.

1. Waiver and procedural bar.

Appellant contends that the trial judge erroneously recharged jurors on accomplice liability because “[r]ather than asking about accomplice liability, the jury was asking if the accidental discharge of the weapon during a robbery met the elements required for murder.” BOA, p. 8. Relying upon this Court’s Opinion in *Wilds v. State*, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), *reh’g denied*, (Apr. 24, 2014), *cert. granted* (Nov. 20, 2014), *cert. dismissed as improvidently granted*, 414 S.C. 341, 778 S.E.2d 112 (2015), he also asserts that the accomplice liability instruction was improper because, allegedly, “no evidence indicates that anyone other than Appellant, armed with a 9 mm, was the shooter.” BOA, pp. 8-9. However, Appellant’s argument is not properly before this Court on appeal for two important reasons.

First, he failed to contemporaneously object to the accomplice liability charge objection at the close of the jury charge. “The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge.” *State v. Williams*,

266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); *see also* Rule 20(b), SCRCrimP (“Failure to object in accordance with this rule shall constitute a waiver of objection”). Also, “the right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver.” *Williams*, 266 S.C. at 335, 223 S.E.2d at 43. Here Appellant has waived his right to complain.

In *Lundy v. Lititz Mut. Ins. Co., Inc.*, 232 S.C. 1, 10, 100 S.E.2d 544, 548 (1957), the Supreme Court found that an objection to a jury instruction first raised when that instruction was presented to the jury for a second time was insufficient to preserve an issue with the instruction for appellate review. In *Lundy*, the trial judge instructed the jury on the applicable law at the conclusion of trial. *Id.* Once his jury charge was finished, he excused the jury and asked counsel if there were any objections to the charge or if any additional instructions were desired. *Id.* Defense counsel did not object to the charge, as given, but did ask the trial judge to present an additional instruction to the jury. *Id.* In response to that request, the trial judge recalled the jury, instructed them in the manner requested, and then presented further instructions to the jury that were “substantially the same” as instructions he had presented during his initial jury charge. *Id.*

After the jury reached a verdict adverse to the defendants, one of the defendants appealed, arguing the trial judge’s further instructions violated the constitutional prohibition against judicial comments on the facts. *Id.* On appeal, the Court indicated it believed the challenged instructions constituted an unconstitutional comment on the facts. *Id.* However, the Court declined to reverse the case because it found that the defendant had waived his constitutional objection to the instructions. *Id.* In reaching that conclusion, this Court concluded that:

[I]n the main charge . . . , the Court gave substantially the same instructions as those now complained of. If appellant thought these instructions violated Article 5, Section 26 of the Constitution, which we are inclined to think they did, counsel should have made timely objection when the jury was excused at the conclusion of the main charge. They waived the objection by failing to do so. Appellant cannot now complain of the Court's repeating substantially the same instruction to which counsel failed to object when given an opportunity to do so.

Id. (citations omitted).

While the Supreme Court decided *Lundy* sixty years ago, the rule stated therein is still good law, and has been more recently relied upon by the Supreme Court and this Court. *See State v. Hill*, 268 S.C. 390, 395, 234 S.E.2d 219, 221 (1977) ("After the main instructions, to which the Appellant neither objected nor requested additional charges, the jury returned for a clarification. At this point, Appellant for the first time requested additional charges which were rejected. By failing to object or requesting additional instructions to the main charge, Appellant waived any objection to similar subsequent instructions") (citing *Lundy*); *Swicegood v. Lott*, 379 S.C. 346, 356, 665 S.E.2d 211, 216 (Ct. App. 2008); *State v. Armstrong*, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge"). Thus, Appellant's objection to the supplemental instruction on accomplice liability was too late to preserve a challenge to the instruction on appeal.

A second and equally important reason that his present arguments are procedurally barred is that Appellant did not make the same arguments in support of his objection to the supplemental instruction as he now makes in this Court. As a result, his arguments are not properly preserved for appellate review. *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000)

(an issue is not preserved if a party argues one ground for objection at trial and a different ground on appeal); *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one ground at trial and then an alternative ground on appeal). Also, he only raised a general objection to the supplemental instruction and this is “insufficient to preserve an issue for appeal.” *State v. Varvil*, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000); *State v. Taylor*, 333 S.C. 159, 508 S.E.2d 870 (1998) (appellant's general objection to solicitor's question was insufficient to preserve issue of whether it was an impermissible attack on appellant's character). Rather, an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” *State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005).

“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all *relevant facts, law, and arguments*.” *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review”). *Cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012) (“this is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation

grounds when it clearly is unpreserved”).¹⁰

2. There was no error in giving supplemental charge.

Yet, even assuming *arguendo* that the Court finds the present argument properly before it, the Court should nevertheless affirm the trial judge’s ruling. “The law to be charged must be determined from the evidence presented at trial.” *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). The trial judge “has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence.” *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002); *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). “A jury charge is correct if when read as a whole, the charge adequately covers the law.” *State v. Drayton*, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct.App. 2015). “When reviewing a jury charge for error, this Court must consider the charge as a whole.” *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 341 (1986).

The Court explained in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 769-70 (Ct.App. 2010), that:

Under the “hand of one is the hand of all” theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).

“Under an accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some

¹⁰ The absence of a contemporaneous, specific objection raising the same arguments now presented explains why appellate counsel did not originally brief the merits of this issue.

overt act.’ ” See *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, “[a] formally expressed agreement is not necessary to establish the conspiracy” which brings the accomplice to the scene of the crime).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70.¹¹

Contrary to Appellant’s contention, it is not readily apparent that the jury’s questions in Court’s Exhibit 5 were seeking an answer to whether the “accidental discharge” of the 9 mm during a robbery met the elements of murder or whether the jury was asking if he could be convicted of murder even if an accomplice fired the fatal shot. Appellant challenged the State’s proof of identity and he presented the defenses of alibi and accident. See *R. pp.* 383-84 (jury instructions). To support his challenge on the State’s failure to prove identity and his alibi defense, he elicited that Kevin Keck never saw the shooter’s face because the shooter wore a mask; when asked the shooter’s height, Kevin testified that he did not have a tape measure; the murder occurred roughly two years before trial; and the crime occurred in a matter of seconds. *R. pp.* 114-15. Also, counsel elicited that Sam Voison’s vision was impaired after the assailants entered the apartment; he never saw who the shooter was because the shooter wore a mask; he never saw Appellant on the 8th; and he did not see who fired the shot. *R. pp.* 124-25.

On cross-examination of Daniel Persson, counsel established that Daniel did not see was who the shooter was because of the shooter’s mask; he was on the ground with a gun in his face

¹¹ “[P]roof of mere presence is insufficient, and the State must present evidence the participant knew of the principal’s criminal conduct. If ‘a person was present abetting while *any* act necessary to constitute the offense [was] being performed through another,’ he could be charged as a principal – even ‘though [that act was] not the whole thing necessary.’ ” *State v. Reid*, 408 S.C. 461, 473, 758 S.E.2d 904, 910 (2014).

throughout most of the ordeal; he had been smoking marijuana that night; and he could not positively say that Appellant was the same height as the shooter. *R. pp. 131-32*. Then, counsel's cross-examination of Jonathan Riordan established that Jonathan did not see the shooter's whole face because the shooter wore a mask and that Jonathan had told the Sheriff's Office that the shooter was "approximately 5'9"." *R. pp. 159-61*.

In his closing argument, Appellant did not specifically address the question of accomplice liability. Yet, this is hardly surprising, since his closing focused upon the State's failure to even prove his presence at the scene and his alibi defense. *R. pp. 355-61*. Appellant meshed his cross-examination exposing perceived weaknesses in proof of identity with evidence supporting his claim of alibi. The prosecution's evidence was that two African-American co-defendants and four co-defendants, altogether, were involved in the murder and other offenses.

While the prosecution's theory was that Appellant fired the fatal shot, it is clear that all four co-defendants were acting in concert with one another. Also, none of the victims positively identified him as the shooter; both Ramsey and Appellant are African-American; each of Appellant's co-defendants who testified against him had already pled guilty to manslaughter; the weapons used by Appellant and Jordan Dalton belonged to the Daltons; and the Dalton brothers hid both the weapons used and the clothing they had worn on their family's property.

Accordingly, it is quite plausible that a juror(s) questioned whether Appellant could be convicted of murder if he did not personally inflict the mortal injury, if a juror had a doubt as to whether another co-defendant's gun was fired. Counsel's failure to request a supplemental jury instruction on accident, when that was a defense presented to the jury, is a strong indication that counsel understood Court's Exhibit in the same manner as the trial judge.

Further, Appellant points to this court's decision in *Wilds* as authority that the law

requires the State show a dispute as to the identity of the one who struck the killing blow to support a charge of accomplice liability. His reliance upon this Court's decision in *Wilds* is misplaced. In *Wilds*, this Court relied upon *dicta* from the South Carolina Supreme Court's decision in *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which implied that a prosecution of a defendant under principles of accomplice liability was an "alternate theory of liability." See *Wilds*, 407 S.C. at 438-39, 450 SE2d at 390.¹² This Court then found that appellate counsel was ineffective in failing to raise a challenge to the trial judge's accomplice liability instruction on appeal because there was no dispute that the defendant was the trigger man in the murder and armed robbery. *Wilds*, 407 S.C. at 439-40, 450 SE2d at 390-91.

However, the *dicta* in *Barber* relied upon in *Wilds* did not support the conclusion reached in *Wilds*. The doctrine of accomplice liability can be directly traced to the early common law distinction between principles in the first degree and principles in the second degree. A person is a principle in the first degree if they are the actor or absolute perpetrator of the crime while a principle in the second degree are those who are present, aiding and abetting the *actus reus*. 4

¹² The reference in *Barber* implying that a charge on accomplice liability is a different theory of liability was necessarily *dicta*, since the Court held that "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted." *Barber*, 393 S.C. at 236, 712 S.E.2d at 439. As further support for the position that this language was *dicta*, Respondent would point out that S.C. Code Ann. § 14-1-50 (2003) provides that the common law of England applies in this state where it is not inconsistent with the laws of this state. Also, "the common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of the common law be changed." *State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980); accord *Page v. Winter*, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("It is not for this court to repudiate the common law rule because we may think it illogical or undesirable"). But see *Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (the Supreme Court has the authority under extremely rare circumstances and for compelling need to substantially change the common law). Because the *Barber* Opinion did not address the common law rule abolishing the distinction between principles in the first degree and principles in the second degree, discussed, *infra*, the language at issue must be considered *dicta*. *Id.*

William Blackstone, *Commentaries on the Laws of England* 34. The law has held that those persons who are present at a crime aiding and abetting are as equally guilty as principals since at least the time of King Henry IV. *Id.*¹³ In 1809, the Court explained that:

It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree has been exploded. It is now a distinction without a difference.*

State v. Fley, 2 Brev. 338, 345, 1809 WL 338, 6 (S.C.Const. App. 1809) (Emphasis added). See also *State v. Anthony*, 12 S.C.L. (1 McCord) 285, 287-88 (S.C.Const. App. 1821); *State v. Jenkins*, 48 S.C.L. (14 Rich.) 215, 226, 1867 WL 2730 (S.C.Const. App. 1867) ("All who are present concurring in a murder are principals therein, and the death, and the act which caused it, is, in the law, the act of each and of all. There is no distinction in the regard of the law, *in the degrees of their guilt*, or the measure of their punishment, *or the nature of their offence, founded upon the nearness or remoteness of their personal agency* respectively") (emphasis added); *State v. Hunter*, 79 S.C. 73, 73, 60 S.E. 240, 240-41 (1908) (where the defense disputed the State's witness who claimed defendant fired the fatal shot, the Supreme Court affirmed the conviction because the identity of the shooter was irrelevant and that the defendant was properly convicted as a principle since he was an aider and abettor). Accord 1 Bishop, *Commentaries* 470. More recently, the Court held that "[i]t is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense."

¹³ King Henry IV of England reigned 1399-1413.

State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Because South Carolina law does not recognize any distinction between liability as a principal in the first degree and a principal in the second degree, and because an accused indicted as a principal may be convicted under accomplice principles, *id.*, the submission of a jury charge on accomplice liability necessarily and logically cannot create an alternative theory of liability.

Yet assuming that the language in *Barber* is not *dicta*¹⁴ and further assuming that *Wilds* was correctly decided, Appellant's reliance thereon is still misplaced. Unlike *Wilds* and similar to the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State's proof as to whether Appellant or one of his accomplice's fired the fatal shots was disputed by Appellant, who relied upon an alibi and the prosecution's failure to establish identity. Additionally, here (1) the trial judge had previously instructed the jury on accomplice liability, without objection, in his original jury charge; (2) there was sufficient evidence of accomplice liability in the record to support the State's request-to-charge on this theory; (3) Appellant had the opportunity to address whether he was culpable as an accomplice, and he asserted alibi and a failure to prove identity; and (4) a question from the jury rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented to it.¹⁵

Finally, “ ‘[a] defendant is entitled to a fair trial but not a perfect one.’ ” *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627 (1968) (quoting *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490 (1953)). *See also State v. Mizell*, 332 S.C. 273, 285, 504 S.E.2d 338,

¹⁴ Of course, if Respondent is wrong and the language in *Barber* relied upon in *Wilds* was not *dicta*, then, *Barber* also contravenes this well settled South Carolina law.

¹⁵ Likewise, this Court's recent decision in *State v. Johnson*, 418 S.C. 587, 795 S.E.2d 171 (Ct. App. 2016), *reh'g and reh'g en banc denied* (Jan. 20, 2017) is distinguishable because the trial judge in this case charged accomplice liability in his original charge and Appellant was given an opportunity to address his liability as an accomplice in closing argument.

345 (Ct.App.1998). “The dual aim of our criminal justice system is ‘that guilt shall not escape or innocence suffer,’ *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). The harmless error doctrine recognizes these principles. See *Neder v. United States*, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 1838 (1999); *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013).

In the present case, Appellant’s convictions should be affirmed because he clearly was not prejudiced by the supplemental instruction on accomplice liability, since an accomplice liability instruction was given in the original jury charge and Appellant did not object. Therefore, it must be considered harmless beyond a reasonable doubt, even if the supplemental instruction was not directly responsive to Court’s Exhibit 5. See *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should affirm Appellant’s convictions and sentence, and the judgment of conviction.

Respectfully submitted,

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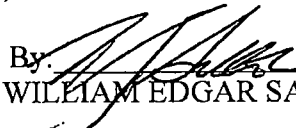
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February 17, 2017.

By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LESTER DEVARIA MOSELY JR,

APPELLANT

APPELLATE CASE NO. 201-002064

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony?

STATEMENT OF THE CASE

On July 22, 2014, the Pickens County Grand Jury indicted Appellant Mosley for murder, two counts of attempted armed robbery, burglary first degree and possession of a weapon during the commission of a violent crime, indictments #2014-GS-39-1545, 1546, 1547 1548, 1597. On September 15, 2014, Appellant proceeded to jury trial before the Honorable Edward W. Miller. Scott Robinson represented Appellant at trial. Walt Wilkins and William Timmons prosecuted the case. The jury returned verdicts of guilty. Judge Miller sentenced Appellant to fifty (50) years for murder, fifty (50) years for burglary first, twenty (20) years for each of the attempted armed robberies and five (5) years for the weapons charge. A timely notice of intent to appeal was served on September 26, 2014. This appeal follows.

ARGUMENT

The trial judge erred in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony.

The jury found Appellant guilty in the shooting death of Steven Grich. On the evening of December 8, 2012, Grich was at his apartment with friends at the Chimney Ridge Apartment complex located on Smoke Rise Drive in Clemson when three men charged in the back door and began demanding money and dope. (R. p. 103, line 17 – p. 104, 105, lines 1-17). One of Grich's friends in the apartment, Kevin Keck, testified that one of the men who entered was black and the other two were white. (R. p. 105, lines 13-17). According to Keck, the black male began hitting people with a gun. (R. p. 107, lines 2-11). Keck testified that Grich was taking the brunt of the pistol whipping by the black male when the gun went off. (R. p. 108, lines 4-25). One of Grich's roommates present on the night of the shooting testified, "And then all of a sudden, it just ended. They ran out. Turns out, gun went off and Steve's dead." (R. p. 128, lines 10-11).

One of Grich's other roommates, Robert McKinley, admitted that during the time of the shooting he was selling marijuana. (R. pp. 144-145). McKinley testified that prior to the shooting he smoked marijuana with Appellant at Winton Botchway's apartment. (R. p. 146, line 5 – p. 147, lines 1-24). According to McKinley, on the day of the shooting he called Botchway to let him know he had received a shipment of marijuana. (R. p. 148, line 14 – p. 149, lines 1-12). McKinley testified that on the evening of December 8, 2012, he was in his bedroom with friends Martin and Laura when he heard the commotion in the den and realized they were being robbed. (R. p. 137, line 2 – p. 138, lines 1-25). McKinley admitted that he and Martin were getting high. (R. p. 137, line 25 – p. 138, lines 1-5). An

officer who responded to the apartment after the shooting testified that there was a heavy odor of marijuana coming from the back bedroom. (R. p. 60, lines 17-19).

McKinley testified that upon hearing the commotion in the living room, he put two pounds of marijuana in a backpack and he, Laura and Martin climbed out a bathroom window. (R. p. 139, lines 1-23). McKinley hid the backpack in the woods and upon returning saw three shadows take off and jump in a Dodge Durango where another individual was waiting. (R. p. 140, line 15 – p. 141, lines 1-9). Surveillance video from the apartment complex showed the vehicle leaving at a high rate of speed. (R. p. 64, line 14 – p. 65, 66, 67, lines 1-6).

Police developed Kadeem Ramsey as a suspect. (R. p. 77, lines 4-20). After the police questioned Ramsey, he was arrested and charged with the murder of Grich as well as burglary first degree, attempted robbery and possession of a weapon during the commission of a violent crime. (R. p. 77, line 17 – p. 78, lines 1-24). While officers were questioning Ramsey, Jaron Dalton arrived at the Pickens County Sheriff's Office driving a black Dodge Durango. (R. p. 80, lines 5-13). A short time later Jaron's younger brother also arrived at the sheriff's office. (R. p. 81, lines 3-4). The Dalton brothers were interviewed and they led police to an area on their grandparents' property where they had buried two guns and some other items. (R. pp. 81-83). One of the guns found, a 9 mm, was determined to be the gun that fired the bullet killing Grich. (R. pp. 285-287). The Dalton brothers were arrested and charged in connection with the shooting.

Both Dalton brothers and Ramsey testified against Appellant at trial. Jaron Dalton testified that he, his brother, Ramsey and the Appellant went to the Chimney Ridge Apartment Complex to steal marijuana. (R. pp. 186-193). Jaron admitted that he brought

two guns with him, a 9 mm gun and a 380. (R. p. 190, lines 6-11). According to Jaron, when they went into the apartment, his brother had the 380 and Appellant had the 9mm. Jaron testified that Appellant was hitting people with the gun. "When he was coming up from hitting him, he come up and the gun just fired about halfway up." (App. p. 196, lines 22-23). Jordan Dalton testified, "I went back downstairs. And by the time I got right there, to the corner of the love seat right there, he [Appellant] came down and hit Mr. Grich one more time and the gun went off." (R. p. 233, lines 1-5).

During the jury charge the judge defined malice as "... [H]atred, ill will or hostility toward another person. It is the intentional doing or wrongful act without just cause or excuse **and with an intent to inflict an injury** or under circumstance that the law will infer an evil intent." (emphasis added) (R. p. 384, lines 19-24). The judge then instructed the jury on the felony murder rule:

Now, if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, I again, tell you this inference would simply be an evidentiary fact to be taken into consideration by you along with all the other evidence in the case and you give it the weight you think it should receive. I would tell you that burglary first and attempted armed robbery are felonies.

(R. p. 385, line 21 – p. 386, lines 1-5). The trial judge erred. The bold portion of the malice charge combined with the instruction on the felony murder rule rendered the charge an improper statement on the facts and improperly diluted the State's burden of proving intent and malice.

In footnote #5 of State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) the South Carolina Supreme Court provided the proper definition of malice writing:

Under South Carolina law, "[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." State v. Fennell, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); see also State v. McDaniel, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904) (same). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." Arnold v. State, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); see also Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984) (same); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct.App.2007) (same).

In Belcher the Court held that that the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

The implied malice charge given in the present case derives not from the use of a deadly weapon as in Belcher, but instead from the South Carolina common law felony murder rule. See Gore v. Leeke, 261 S.C. 308, 315, 199 S.E.2d 755, 757 (1973). In State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) overruled by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) the South Carolina Supreme Court wrote:

A proper charge on implied malice is:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive. See, State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) (suggested charge on implied malice from use of a deadly weapon).

South Carolina Courts, however, have not addressed the felony murder rule since the decision in Belcher. The Supreme Court of Michigan addressed the felony murder rule writing:

Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, "a historic survivor for which there is no logical or practical basis for existence in modern law."

People v. Aaron, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980).

This Court should reconsider the felony murder rule in light of the decision in Belcher. The felony murder charge given in the present case constituted an improper statement on the facts and improperly diluted the State's burden of proving intent and malice. The error is compounded by the charge on malice implying that an intent to inflict an injury constitutes malice. This is particularly confusing in the present case where there is testimony that Appellant was striking the deceased when the gun accidentally discharged. The error requires reversal.

CONCLUSION

Based on the above argument this court should reverse the conviction and sentence for murder and remand the case for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2015.

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IN THE COURT OF APPEALS

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

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APPELLANT

APPELLATE CASE NO. 201-002064

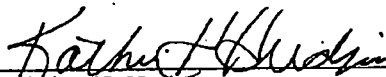
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lester Devaria Mosley Jr. states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Edward W. Miller, which was held on September 15-17, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Lester Devaria Mosley Jr..

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2015.

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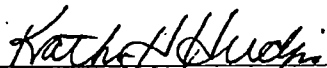
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 10th, 2015


Kathrine H. Hudgins
Appellate Defender

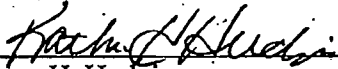
South Carolina Commission on Indigent Defense
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PO Box 11589
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(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 10th, 2015


Kathrine H. Hudgins
Appellate Defender

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SEP 11 2015

SC Court of Appeals

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
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STATE OF SOUTH CAROLINA

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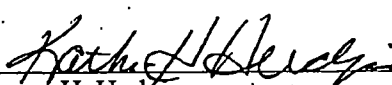
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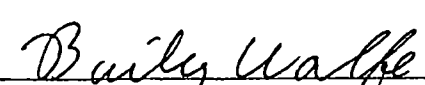
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Lester Devaria Mosley, Jr., #361397 at Lee Correctional Institution, this 10th day of September, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

The South Carolina Court of Appeals

The State, Respondent,

v.

Lester Devaria Mosley, Jr., Appellant.

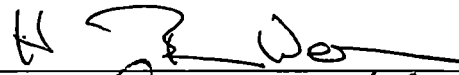
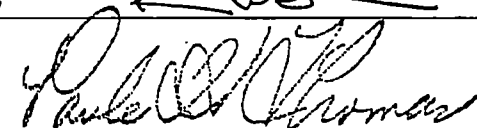
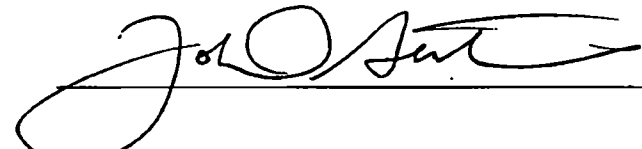
Appellate Case No. 2014-002064

ORDER

Counsel has submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a motion to be relieved as counsel. We deny the motion to be relieved as counsel and direct the parties to brief the following issue and any other issue of arguable merit:

Whether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations.

Appellant shall serve and file a brief on this issue within twenty days of the date of this order. Thereafter, respondent shall have thirty days to serve and file its brief.


_____ J.

_____ J.

_____ J.

Columbia, South Carolina

FILED

December 2, 2016

cc:

Lester Devaria Mosley, Jr., 361397
William Walter Wilkins, III, Esquire
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Kathrine Haggard Hudgins, Esquire
John W. McIntosh, Esquire