

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

JOE LEWIS HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001493

APPENDIX

SARAH E. SHIPE
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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1 officer in the Marine Corps for three years. After
2 that I returned to school to try to get into medical
3 school, I went to the University of Northern
4 Colorado and then returned to Iowa for medical
5 school. Completed medical school, did a family
6 practice type internship in Iowa for a year. Later
7 returned to the naval service, went in the Navy and
8 did a psychiatry residency at the Naval Hospital San
9 Diego. Between --

10 Q. Let me -- I want to go over the years. In
11 1973 were you at the University of Cincinnati
12 Medical Center?

13 A. Correct. I was doing a -- that was part of
14 medical school. I was doing a preceptorships in
15 neurology.

16 Q. In 1976 you did an internship at Des Moines
17 General Hospital?

18 A. Correct.

19 Q. And did you a residency, you were just
20 talking about San Diego, California, at the Navy
21 Medical Center in San Diego?

22 A. Yes. That was in psychiatry at the medical
23 center, Naval Medical Center, San Diego. I'm board
24 certified in psychiatry and I'm board specialty
25 certified in addiction medicine.

1 Q. Okay. Did you do a fellowship?

2 A. Yes. I did that while on naval service at
3 the Medical University of South Carolina during 1991
4 and '92 in addiction.

5 Q. Now, you indicated that you are board
6 certified?

7 A. Correct.

8 Q. Is that by the American Board of Psychiatry
9 and Neurology?

10 A. Yes.

11 MR. MARSHALL: Your Honor, I've reviewed
12 his vitae, I'm not going to object to his
13 qualification as an expert in this field.

14 MR. FELDMAN: We appreciate that, your
15 Honor, but we would like to let the jury know his
16 qualifications.

17 THE COURT: Okay. Go ahead, sir.

18 BY MR. FELDMAN:

19 Q. You were board certified, I think you just
20 said, in addiction psychiatry?

21 A. Correct.

22 Q. And are you at the present time an examiner
23 for the American Board of Psychiatry and Neurology?

24 A. Yes, I am.

25 Q. Are you presently a reviewer for the American

1 Journal of Psychiatry?

2 A. Yes, I am.

3 Q. Now, what is your teaching experience?

4 A. I'm trying to remember it all, frankly.

5 Q. I'll go through it quickly. You were an EMT,
6 emergency medical technician, instructor back in
7 '76/'77 back in Iowa?

8 A. Yes.

9 Q. You were an assistant professor at the
10 University of Osteopathic Medicine and Health
11 Sciences in Des Moines?

12 A. Yes.

13 Q. You were clinical instructor at the Naval
14 Hospital in North Charleston from '86 to '88?

15 A. Yes.

16 Q. You did a fellowship and were a clinical
17 instructor in the Institute of Psychiatry here in
18 Charleston at MUSC '90 to '92?

19 A. Yes.

20 Q. From '92 to the present you are a professor
21 at Webster University here in Charleston?

22 A. Yes.

23 Q. And also from '93 you're an assistant
24 professor at the Institute of Psychiatry; is that
25 correct?

1 A. Yes. That's my primary job.

2 Q. You mentioned you were in the military; is
3 that correct?

4 A. Correct.

5 Q. You were in the Marine Corps from '66 to '70?

6 A. '66 to '79. I mean, I'm sorry, '66 to '69.

7 Q. Okay. You were not a doctor in the military?

8 A. No. I was a Marine Corps line officer.

9 Q. Okay. You served in Vietnam from '67 to 68?

10 A. Yes, I did.

11 Q. Were you in the field or on a ship, or what?

12 A. I was in the field. I was a combat officer.

13 Q. You were a lieutenant commander in the
14 Medical Corps in Kaneohe, Hawaii?

15 A. When I returned to naval service I went in as
16 a lieutenant then became a lieutenant commander
17 while on a Marine base in Kaneohe, Hawaii.

18 Q. And what is the designation when you're in
19 the Marines? You were a Marine battalion sergeant?

20 A. That was when I was in the Navy. During the
21 Iranian crisis I was a battalion sergeant in the
22 Indian Ocean with a Marine amphibious group.

23 Q. Were you promoted to commander in 1985?

24 A. Yes.

25 Q. And were you promoted to captain in the

1 Medical Corps in 1990?

2 A. Yes, I was.

3 Q. Okay. In what states -- well, you retired in
4 1996 from the military?

5 A. About a week to the date last year.

6 Q. And are you licensed in any states other than
7 South Carolina?

8 A. Iowa, Florida, Hawaii and Colorado.

9 Q. And have you received any awards, Dr. Cusack?

10 A. Well, in the military I received a fair
11 amount.

12 Q. Well -- well, tell the Court what your
13 military decorations are.

14 A. The most --

15 Q. You received a Legion of Merit?

16 A. Yes, I did.

17 Q. What is that?

18 A. It's a high ranking prestigious decoration,
19 it's usually given to senior officers for doing a
20 pretty good job.

21 Q. Did you receive a Meritorious Service Medal
22 with a Gold Star twice?

23 A. I received two of those decorations.

24 Q. What is that about?

25 A. That's of a lower ranking than the Legion of

1 Merit, but it's also a high -- you may say high-
2 priced decoration. And then also a Naval
3 Commendation Medal and a Combat Action Ribbon twice,
4 then numerous campaign medals from the Desert War
5 and then also Vietnam.

6 Q. Did you receive a commendation from the
7 Governor of Hawaii in 1983?

8 A. Yes, I did.

9 Q. Did you receive the Admiral B. W. Hogan Award
10 in 1986 from the Navy?

11 A. Yes, I did.

12 Q. What is that award?

13 A. That would be something I would put on an
14 academic résumé, but it was given to the most
15 promising psychiatric resident in the Navy at the
16 time.

17 Q. And have you been published, Dr. Cusack?

18 A. On numerous times. Approximately 33, 34
19 times.

20 MR. FELDMAN: Your Honor, may we just
21 rather than going through all these, may we just
22 submit the CV for the jury's examination at the
23 appropriate time?

24 THE COURT: Any objection?

25 MR. FELDMAN: He's got a lot of

1 publications I would like to go through, but....

2 MR. MARSHALL: No, sir. I object to
3 that.

4 MR. FELDMAN: Okay.

5 THE COURT: Go ahead, sir.

6 BY MR. FELDMAN:

7 Q. I want to go through your publications. Do
8 you have your résumé, please, sir?

9 A. Yes.

10 Q. Would you tell the jury what publications,
11 how many times you've been -- not how many times,
12 but would you tell them what you have published?

13 A. Mostly medical articles.

14 Q. Okay. Well, please read for the jury what
15 they are.

16 A. Sure. And these articles vary depending on
17 what I was doing in my life at the time. In the
18 beginning many of them are militarily oriented and
19 then later on they would be more eclectically or
20 widespread across psychiatry.

21 Q. Well, let me go ahead and ask you. Did you
22 write -- did you publish "A Physiatriest's Look at
23 Leadership" for the "Marine Corps Gazette" in July
24 of '86?

25 A. Yes. That was my first publication. The

1 next one was the "Custer Complex" about military
2 leadership. And these were in various journals and
3 magazines. Then "Psychiatric Casualties in Combat,"
4 there were two publications on that, book reviews
5 for the "American Journal of Psychiatry," numerous
6 book reviews. And I guess I should say that's the
7 most prestigious psychiatric journal possibly in the
8 world, but it's certainly in the top one or two.

9 Q. Did you publish -- let me ask you, Doctor,
10 did you publish with K. R. Melaney "The Diagnostic
11 Psychiatric Interview for Emergency Medicine" in
12 1989?

13 A. Yes, sir. I did.

14 Q. Did you publish "The Hospital and the
15 Hurricane for Navy Medicine" in January/February of
16 1990?

17 A. Yes, sir.

18 MR. MARSHALL: Your Honor, I have an
19 objection, it's so we might try to move the trial
20 along. I object to any more leading questions from
21 Mr. Feldman. And I would object to the witness
22 reading anything. He can refresh himself with his
23 notes, but I'm going to object to those two things.
24 If we could stay within the rules and try to move
25 the trial along.

1 THE COURT: I'll sustain that objection.
2 Go ahead, sir.

3 MR. FELDMAN: All right.

4 BY MR. FELDMAN:

5 Q. Would you just -- if you need to refer to
6 your notes, please do, but otherwise please tell the
7 jury as many things as you can that you've
8 published.

9 A. Yeah. In a broad sweeping manner I have
10 published extensively on substance abuse,
11 alcoholism, marijuana, various drugs. And also on
12 psychiatric topics varying from gambling to
13 anti-social personality disorders. I think that
14 covers it.

15 Q. Okay. Thank you very much, Dr. Cusack.

16 Dr. Cusack, tell the Court exactly what you
17 do up at the -- is it the Center for Drugs and
18 Alcohol?

19 A. Yeah. Which is part of the Institute of
20 Psychiatry, part of MUSC. My primary job is I'm in
21 charge of the inpatient service for substance abuse."
22 In other words, someone comes in and they are either.
23 high on a substance, we'll just use the word cocaine
24 or heroin, I'm the doctor in charge for detoxing
25 them, getting them straight, through the withdrawal

1 process, the whole bit, then setting up some type of
2 after-care recovery for the individual.

3 I'm also in charge of the outpatient program
4 on this -- on that floor, it's the fourth floor of
5 the Institute of Psychiatry. However, my mornings
6 are consumed each day with seeing inpatient really
7 some of the sickest in our city. I would go so far
8 as to say they are some of the sickest.

9 Q. Okay. Doctor, have you ever testified in a
10 court of law before?

11 A. Yes.

12 Q. How many times would you say you've testified
13 in a court?

14 A. Primarily in the Navy in court martials and
15 usually always for the prosecution, to tell you the
16 truth.

17 Q. How many times have you testified?

18 A. I'd say about 30 times.

19 Q. And of those 30 times, how many times have
20 you appeared, or how many times have you been called
21 by the prosecutor?

22 A. Mostly always. Several for the defense, but
23 usually the tone has been more for the prosecution.

24 Q. Okay. Have you been qualified before in
25 those courts as an expert?

1 A. Yes, sir. Always. Always.

2 MR. FELDMAN: Your Honor, at this
3 time -- well, let me ask one more question.

4 BY MR. FELDMAN:

5 Q. Are you familiar with the characteristics of
6 drug use, the effects of drug use on individuals?

7 A. If I don't know it now, I don't think I ever
8 will.

9 Q. Okay. Is that a yes?

10 A. I think, yes, that's a yes.

11 Q. Thank you, Doctor.

12 MR. FELDMAN: Your Honor, I would offer
13 Dr. Cusack as an expert in the area of drug
14 addiction, drug effects, in all areas relating to
15 drug usage and their impact.

16 THE COURT: Any objection?

17 MR. MARSHALL: No, sir. Still don't
18 have an objection.

19 THE COURT: Okay. I find -- the Court
20 finds him to be so qualified without objection.

21 MR. FELDMAN: Thank you very much.

22 BY MR. FELDMAN:

23 Q. Dr. Cusack, I want to talk to you about the
24 general reactions, effects, if you will, of various
25 substances. Okay? Let me ask you first about crack

1 cocaine, about the effect that crack cocaine has on
2 individuals generally speaking.

3 A. Number one, it's fast, and that's why someone
4 would use crack cocaine over a different type of
5 cocaine. I'll use what an addict told me when I
6 asked that same question, "Why do you use crack
7 instead of just plain cocaine?" And the addict
8 said, "Plain cocaine is like a hobby horse ride,
9 crack is like a roller coaster ride." And so it's a
10 fast hit and it's in your body fast, really within
11 seconds. And it depends on, I guess, the purity of
12 the compound. And you have to realize all this
13 stuff is adulterated, it would probably stay, the
14 high can stay anywhere from about a few minutes to
15 about 30 minutes. Usually it's a few minutes from
16 what I see only because of the adulterants, but it's
17 a very fast, addictive hit.

18 Part of what makes a substance addictive is
19 how fast it goes to the brain. And a simple way of
20 thinking about it would be beer versus a shot of
21 liquor. A shot of liquor hits you a lot faster than
22 a beer. And crack is a fast hit. Very addictive.

23 Q. And what effect would crack usage have on a
24 perception of an individual?

25 A. Several major, really truly major effects.

1 Number one, crack addicts are generally, they'll use
2 the term themselves, paranoid. They're very
3 suspicious, they're hypervigilant. They talk about
4 it in crack houses. I've never been in a crack
5 house, but in crack houses they're looking out the
6 window fearful police are coming, various things,
7 but they're oversensitive to perceptions, usually in
8 a suspicious, scanning, secretive way. They are
9 paranoid. This paranoia will last deep into the
10 detox sometimes.

11 Another feature of it, it will change your
12 perception insofar as hallucinations. You can have
13 visual hallucinations; in other words, you will see
14 something that did not happen or is not there. On a
15 hallucination there is no stimulus out there and
16 maybe you see a bunny, a pink bunny coming at you or
17 whatever. Where an illusion would be there is a
18 stimulus like a tree line in fall and you think
19 there may be people behind the tree line when it's
20 windy, instead it's just the trees moving. That's
21 an illusion. With crack you can have both. With
22 cocaine, truly, you could have both. So you may see
23 things that quite frankly are not there. Also you
24 may hear -- typically you'll hear voices. You can
25 hear voices without cocaine, but cocaine can help

1 you hear voices --

2 Q. Dr. Cusack --

3 A. -- which are totally abnormal.

4 Q. Excuse me. Dr. Cusack, does -- are there any
5 perceptive issues beyond the term of the high?

6 A. Also anatomically something happens to you
7 when you're high on cocaine, your eyes dilate. They
8 become var -- so bright lights or just the dilation
9 of the eyes is going to change a little bit what you
10 see. If you're a heroin addict your eyes will get
11 very small -- not the eyes, but the pupils will
12 become small. Cocaine and amphetamines, they
13 dilate.

14 Q. If someone is smoking crack during the night,
15 are there any issues of perception beyond the high,
16 beyond the term of the high, which you reported to
17 be minutes to 30 minutes?

18 A. Yeah. When people smoke cocaine they just
19 generally don't -- in the street they call it a
20 rock -- they just don't generally get one rock of
21 cocaine and have that for the evening. They're
22 continually chasing the high, they will continually
23 use as much as they can. So frequently it's more on
24 the term of a binge than it is just having a hit of
25 cocaine, crack cocaine.

1 Q. Let me ask you about --

2 A. So it goes on for a while. It really goes on
3 until they run out. I think a good way to describe
4 what happens to the mind when you're on crack
5 cocaine, there was a patient about two weeks ago who
6 was on the ward who had spent something like \$5,000
7 on a weekend on cocaine, on crack cocaine. And this
8 is not uncommon, by the way, this is not uncommon at
9 all. And it was being brought to him in a motel
10 room in North Charleston. I asked him the question,
11 "If someone barged into the hotel room with a gun
12 and was going to hold you up, what would you do?"
13 Without hesitation he said, "I'd ask him only one
14 thing: Can I have one more hit before you shoot
15 me?" That's addictive stuff.

16 Q. What about the withdrawal period in terms of
17 affect on perception?

18 A. Also the best way to describe cocaine, like
19 amphetamine, they're both stimulants. People take
20 them for essentially two to reasons: Because they
21 are euphoric, highly euphoric, and very energizing.
22 You don't need much sleep. I mean, you can perceive
23 that you're stronger or bigger than life when you're
24 on these drugs.

25 So as with most drugs, the withdrawal is an

1 opposite of what the drug does to you. The
2 withdrawal from a binge of alcohol is you'll be
3 sweaty, you'll have problems sleeping. Alcohol is a
4 depressant, your withdrawal is you'll be
5 hyperactive. Cocaine is a stimulant, very
6 stimulating, so the withdrawal is in quotes "you
7 crash." You tend to be fatigued, listless, you
8 sleep a lot. But also you have vivid dreams and
9 perceptual problems that way, too.

10 On an inpatient service somebody comes in
11 high on cocaine, they will generally sleep for the
12 next two days. They'll look terrible, I mean, take
13 somebody on their worst hangover, multiply it,
14 that's what these people look like. So they're not
15 thinking very clearly, their thinking is hazy and
16 fogged.

17 It's important for the jury to know that
18 cocaine stays in your body generally two to three
19 days. In other words, you can urine test it and
20 it's going to be positive. Crack cocaine, regular
21 cocaine, two or three days in your body. It's not
22 like alcohol, for instance, if one was drunk the
23 night before the next morning they may not have any
24 blood alcohol level at all, it would be zero. Well,
25 cocaine is detectable, it stays around. So in other

1 words, it is affecting the brain for a period of
2 time whether or not the person wants to think so or
3 not.

4 Q. Okay. Dr. Cusack, let me ask you this now
5 about a combination of drugs to use. If someone is
6 drinking alcohol, using cocaine and smoking
7 cigarettes and marijuana, what would, in your
8 professional opinion, would you think his perceptive
9 being would be?

10 A. When they're using it and when they're
11 withdrawing from it they're going to view the world
12 from a pretty sick perspective.

13 Q. Can you be a little bit more specific?

14 A. You're mixing a few drugs here that in large
15 amounts could kill you, just singularly. Your
16 perceptions and your thinking, your judgment, your
17 insight, your memory, all these things are going to
18 be flawed. I mean, I don't know how many people on
19 the jury drink alcohol at all, but you know just to
20 take a simple example many times people will drink
21 alcohol and life will seem a lot simpler, clearer
22 and everything else while they're drinking. But the
23 next morning those ideas just don't seem to work.
24 And while you're on -- that's just with maybe
25 moderate alcohol use. When you're combining

1 alcohol, cocaine, marijuana, and then cigarettes,
2 that's a stimulant, that's nicotine, you're really
3 talking about a mind that's being really juggled
4 around.

5 Q. Doctor, let me ask you specifically, if
6 someone specifically had the -- an alcohol level of
7 .03 percent, cocaine in his system, nicotine in his
8 system, and cannabinoids, marijuana in his system.

9 A. Marijuana.

10 Q. Do you have a professional opinion of whether
11 that person is straight or has an altered state?

12 A. I would have a professional opinion on two
13 levels with that. First of all, their opinion would
14 be altered; and number two, I'd wonder about the
15 voracity or the truth of the individual. Because
16 people who use that polysubstance groups are
17 often -- not often, but you would think as a doctor
18 that they may also be an anti-social personality.
19 Because you're talking about illegal substances
20 here, you're in a deme one now of illegality. And
21 characters who will use these combinations often are
22 well known to the law, and their truthfulness is
23 often questionable.

24 Q. Let me go on and switch to a --

25 A. I would like to just say something. I hear

1 more lies than anybody in the city --

2 Q. Is that because --

3 A. -- for what I listen to. Maybe you hear a
4 lot in this business, too. But, my goodness, it
5 gets fatiguing.

6 Q. Is that because you're dealing with people
7 who come in because they've been using drugs?

8 A. Well, the whole drug culture is a culture of
9 lies. I mean, you cannot be an addict if you tell
10 the truth. It's conning, lies, deceptions. In
11 psychiatry we call it denial, distortion,
12 rationalization, but it boils down to lies.

13 Q. Now let me talk to you about the combination
14 of -- if someone were drinking all night and smoking
15 pot, do you have an opinion on whether or not that
16 activity, the drinking and the pot, marijuana, would
17 affect his perceptions or actions?

18 A. They certainly would.

19 Q. How so?

20 A. They would affect the cognitive function
21 which is memory, the memory would be impaired. What
22 they thought happened, may not have happened. Taken
23 to the extreme, we call that a blackout. Memory
24 would be impaired; judgment, which is a higher
25 echelon of thought insofar as the appraisal of

1 activities would be impaired; and also what they see
2 and what they hear may not be true. Marijuana --
3 it's important to realize also, is you have two
4 drugs in this combination that cause paranoia,
5 marijuana and the cocaine. And the blood alcohol
6 level you talked about there I would question that,
7 that was probably by the time they took it, which is
8 a low blood alcohol, but I'm sure during the time
9 that the person was, can we say on their game, that
10 level was a lot higher.

11 Q. Okay. But talking about marijuana and
12 alcohol alone together in that combination, that
13 would also affect --

14 A. Absolutely. It affects your senses of time,
15 of what is real and what is not real. Time is
16 changed with marijuana.

17 Q. Okay. What about alcohol alone, does alcohol
18 have any effects on --

19 A. Absolutely.

20 Q. -- Perception or what you're saying?

21 A. Of course it does, that's --

22 Q. How so?

23 A. That's why we have things called DUIs. I
24 mean, we -- we designate legally a number that is
25 the -- for a blood alcohol level which is really a

1 number of our tolerance for how much impairment
2 we'll allow on the highway. The number should be
3 zero, we just happen to pick a different number.
4 But alcohol alone will do all those things, and now:
5 we're adding some really powerful drugs, the most
6 powerful of that list is the cocaine. The word
7 "dope fiend" historically had to do with cocaine,
8 that was where that term came from, strictly
9 cocaine.

10 Q. And let me ask you now about a withdrawal
11 again or an addict who is not using, and whether or
12 not either the withdrawal period or the temporary
13 non use, whether that person would still be affected
14 in terms of perceptive abilities?

15 A. Could you rephrase that, only because it was
16 a long question? I just sort of missed it.

17 Q. Yes, sir. Are perceptions affected during
18 the period of withdrawal or non usage by someone who
19 has been using?

20 A. Yes, perceptions are altered.

21 Q. Please explain that.

22 A. Because, as I said earlier, the mind is
23 clouded, foggy. Take the simplest example, I'm
24 using one that's generic about somebody being hung
25 over. If you've ever been in that state, is your

1 thinking as clear as if you woke up after a good
2 night's sober rest the next morning? You don't.
3 You wake up and you're sort of behind in your
4 thinking, things just are not clicking as fast. And
5 also your body may not be working as well, you may
6 put something down and you're off. You're off your
7 game, you're off what is normal, what your normal
8 sense is. That's just the alcohol. It's all
9 extrapolated more when you add these other
10 substances.

11 When you see someone in a cocaine crash, in a
12 withdrawal from this, these individuals are down for
13 the count. I mean, they are really sick appearing,
14 they're fatigued, they're listless, they don't talk
15 much, they're usually hungry, they tend to eat a
16 lot, and they -- they don't seem to -- they don't
17 concentrate well. I mean, you're not going to see
18 them sitting there reading a book or anything like
19 that, their concentration is impaired, flawed.

20 Q. Dr. Cusack, please answer any questions the
21 solicitor has.

22 A. Okay.

23 CROSS-EXAMINATION

24 BY MR. MARSHALL:

25 Q. Dr. Cusack, I'm Cameron Marshall. How do you

1 do.

2 A. How do you do.

3 Q. If a person is on one of these cocaine
4 binges, crack cocaine binges that you described, you
5 said, I believe, that they will just keep going
6 until they run out.

7 A. Of money or product.

8 Q. Of money or product?

9 A. Yeah.

10 Q. Do you have an opinion as to whether a
11 tendency towards violence may be elevated when
12 someone is in one of these crack cocaine binges?

13 A. That's an excellent question. And if I
14 was -- and I'm sure that's written up in the
15 literature, I don't have the exact answer to that,
16 but my gut feeling would be that the propensity
17 towards violence would be increased. People -- just
18 take alcohol and you'll see that happen.

19 Q. Do you have an opinion as to whether or not
20 someone who is in the midst of one of these cocaine,
21 crack cocaine binges, as to whether their propensity
22 for violence might be elevated towards someone they
23 perceived as getting in their way of their goal of
24 achieving more crack cocaine?

25 A. I would say that's likely, or that would be

1 where my mind -- I would say that's probably more
2 likely than unlikely because of the paranoia and --
3 which is a disturbance of perception. The person
4 may not be out to get you, but if you think they're
5 out to get you, you may become violent. Another
6 feature, by the way, of cocaine is often people will
7 think there are bugs calling on them. And it's not
8 uncommon to see them arrive in emergency rooms after
9 they've slashed their arms trying to gets the bugs
10 that don't exist outside their skin. So that alone
11 is violence towards self and others.

12 Q. Thank you, Doctor. That's all I have.

13 MR. FELDMAN: No other questions, Judge.

14 THE COURT: You may step down, sir.

15 MR. FELDMAN: May this witness be
16 excused, your Honor?

17 THE COURT: Any objection?

18 MR. MARSHALL: No, sir.

19 THE COURT: You may be excused. Thank
20 you, sir.

21 Anything further?

22 MR. FELDMAN: No, your Honor.

23 THE COURT: Okay. Ladies and gentlemen,
24 it's about 12:30. I'm going to ask that you come
25 back at 2:00 to hear the final arguments of the case

1 and then the -- then I will instruct you on the law,
2 then you will be permitted to begin your
3 deliberations. Please do not discuss this case in
4 any way whatsoever during this break. Thank you
5 very much.

6 (Jury excused.)

7 THE COURT: Motions?

8 MR. FELDMAN: Your Honor, I would renew
9 my motion that I made at the end of the State's
10 case.

11 THE COURT: I deny that motion based on
12 there's sufficient evidence to submit to the jury.

13 MR. FELDMAN: Thank you. Your Honor, I
14 can gather together my specific requests to jury
15 instructions, but may I at least tell the Court the
16 areas that I would like charged?

17 THE COURT: Yes.

18 MR. FELDMAN: I would like self-defense
19 charged, I've got some instructions; I would like
20 mere presence charged, and I believe I would like
21 manslaughter charged.

22 THE COURT: Okay. Anything from the
23 State?

24 MR. MARSHALL: Your Honor, I just want
25 to clarify. The defense has rested; is that

1 correct?

2 MR. FELDMAN: Yes, your Honor.

3 MR. MARSHALL: We object to any of those
4 three being charged, your Honor, on the basis that
5 there's no evidence of any of those three.

6 THE COURT: I'll hear you out on
7 self-defense, Mr. Feldman.

8 MR. FELDMAN: Thank you, your Honor.
9 Your Honor --

10 THE COURT: First of all, I think there
11 is evidence of voluntary manslaughter, there's
12 evidence that certainly there's unlawful killing,
13 there's evidence of an argument, that may be
14 possibly a jury issue on the heat of passion and
15 same with legal provocation. I think there's some
16 evidence that would allow that question to go to the
17 jury.

18 MR. MARSHALL: Your Honor, may I be
19 heard on that?

20 THE COURT: Yes.

21 MR. MARSHALL: It's black letter law
22 that words alone will never reduce murder to
23 voluntary manslaughter.

24 THE COURT: Right.

25 MR. MARSHALL: And I can produce

1 probably 50 cases if your Honor desires. But in
2 this case all we have is words between this
3 defendant and the victim. Every witness testified
4 that there was not the slightest bit of physical
5 aggression by the victim towards the defendant or
6 anyone else. It's the State's position that there's
7 never been a clearer case where voluntary
8 manslaughter absolutely should not be charged.

9 THE COURT: I disagree. I think there
10 is -- there is no dispute that the law is that the
11 argument standing alone does not constitute
12 sufficient legal provocation. But there is
13 testimony, which if believed, tends to show that
14 the -- that the decedent and the defendant were in a
15 heated argument, and that the decedent -- there is
16 evidence that the decedent was about to, or
17 threatening a physical encounter.

18 There is testimony he went to get a gun,
19 there's testimony of someone else that they felt the
20 same passion of the situation, that they handed him
21 a gun as a result of the decedent's actions.

22 So that's not any indication of the Court
23 that the Court thinks that that's the appropriate
24 finding, but the analysis at this point is that
25 that's a sufficient basis to allow the jury to

1 consider that argument. So I think that that's
2 appropriately submitted to the jury.

3 It's not the argument alone, it's the whole
4 circumstances that suggest that. This is not in my
5 opinion a totally clear-cut case of when
6 manslaughter should not be charged.

7 Now, on self-defense I'll hear out, sir.

8 MR. FELDMAN: Thank you, your Honor.

9 Your Honor, and it kind of goes to the self-defense
10 and why it's not murder are closely related because
11 the evidence is that my client did not bring a gun
12 with him -- and this is even the solicitor's
13 witness -- did not have a gun, that he was -- that
14 there was a gun in the Jeep.

15 The expert testified that in order to be
16 safely out of a range of a 20-gage shotgun he said
17 several hundred yards. The testimony is that it's
18 about 30 yards from the -- from that tree to the
19 road, and then you have that lot.

20 The testimony is that he was about to reach
21 the truck where the shotgun is and White Boy said --
22 and I'm not quoting, I'm paraphrasing -- he's going
23 to get his gun. Here. And White Boy said, I gave
24 it to him for his self-protection. Here.

25 I think that it becomes a factual question.

1 I don't think you have to wait 'til Kenneth
2 Washington draws that shotgun and blows somebody
3 away to say, Well, you know, it was a situation of
4 self-defense, you should have done something. It's
5 at least a factual question that would be submitted
6 to the jury based on whether or not they believe
7 that that shotgun was accessible, based on whether
8 they believe the expert that the shotgun could have
9 shot somebody for, you know, a few hundred yards,
10 and whether or not Joe Holmes had a legitimate fear
11 and therefore a justification under the law of South
12 Carolina for shooting. Under that theory.

13 THE COURT: Okay. Yes, sir.

14 MR. MARSHALL: Well, the test for self-
15 defense, your Honor, is whether a reasonable person
16 under the same circumstances would have believed
17 that they were at risk of serious bodily harm or
18 death. And, furthermore, that they had no means, no
19 reasonable means of safely escaping the situation.

20 And all the testimony here was that the
21 defendant held the gun as the victim walked away
22 from him, held the gun for about ten seconds before
23 he shot him in the back when he wasn't even to the
24 Jeep yet. And there was plenty of testimony about
25 how one could have safely escaped from the location

1 where the defendant was at the time that he murdered
2 Kenneth Washington, if he had so desired. And there
3 was plenty of testimony that nobody else out
4 there -- and this is really telling, nobody else out
5 there -- and we can assume that the conglomerate of
6 those people constitutes the average reasonable
7 man -- nobody else out there fled that scene until
8 after that defendant murdered Kenneth Washington.

9 So in this case you don't have to speculate
10 as to what the reasonable person would have done if
11 they had fear. The evidence is that none of them
12 had any fear. They testified as such, they
13 testified that nobody else out there fled from
14 Kenneth Washington, nobody believed they were in
15 fear from Kenneth Washington. And that defendant
16 didn't believe it either.

17 **MR. FELDMAN:** And, of course, your
18 Honor, that's why it's a question of fact because --

19 **THE COURT:** Okay. All right. I think
20 that is a closer question. I think in abundance of
21 caution it would be appropriate to charge self-
22 defense.

23 Without fault in bringing on the difficulty
24 requires an affirmative unlawful act. Again,
25 starting the argument is not the dispositive factor,

1 but the victim's act of going to get the shotgun in
2 my opinion could be construed as bringing on the
3 difficulty.

4 The second aspect of it about belief and
5 danger of losing life or serious bodily injury,
6 White Boy testified the defendant gave him the (sic)
7 pistol because he thought that the victim and Antwan
8 Venning were going to get the gun from the Jeep.
9 Although there's an indication that no threatening
10 remarks were made at that time, I think that is
11 something for the jury to consider.

12 The issue about no means of avoiding the
13 danger -- I'm looking at my notes -- I'm just
14 convinced that this might be something properly
15 resolved by the jury. There is some testimony from
16 one side that the -- from some witnesses that the --
17 that there may have been an opportunity to flee if
18 there had been some fear for the safety, but I think
19 there is some conflicting testimony that makes it a
20 fact question as to whether or not the defendant
21 should have acted that way under the circumstances
22 that were presented.

23 I think this kind of is intertwined with the
24 issue of whether or not the defendant was -- acted
25 properly under the circumstance. I don't know that

1 you could take it out of the equation. Part of the
2 law of self-defense is that you do not have to wait
3 to let someone get the jump on you. And although
4 the jury would just as well have a basis in
5 believing that was not the circumstance in the
6 defendant's case, I think that it's a question that
7 is appropriately submitted to the jury. So I'm
8 going to charge self-defense.

9 Anything further about charges? What about
10 mere presence?

11 MR. FELDMAN: Your Honor, what I would
12 like, I mean I have some mere presence charges and I
13 just -- I just think that I would like charged, and
14 I'll hand these up. That the State still has the
15 burden, and mere presence, if they should so find at
16 the scene of the crime, is not sufficient to
17 establish guilt.

18 THE COURT: Okay.

19 MR. FELDMAN: I've got some cites,
20 but....

21 THE COURT: Any opposition to that?

22 MR. MARSHALL: No, sir.

23 THE COURT: Okay. If you'll hand that
24 up, please.

25 MR. FELDMAN: (Mr. Feldman complies.)

1 Your Honor, may I make some copies during lunch and
2 give them to everybody?

3 THE COURT: Uh-huh. (Affirmative
4 response.) See you all back. If you would all come
5 about five minutes before 2:00, please.

6 MR. MARSHALL: Your Honor, on your
7 charge of reasonable doubt are you charging what you
8 stated in your opening comments as well as the
9 Victor versus State of Nebraska?

10 THE COURT: No. Just what I state in my
11 opening comments.

12 MR. MARSHALL: Would you consider
13 charging the language from Victor versus Nebraska in
a South Carolina Supreme Court case?

14 THE COURT: No, I won't charge that.
15 That case didn't require it, they just said it was
an error to do it and I'm not going to -- I think
16 that the best approach is to stick with what's been
tried and true. And I'm going to do that.

17 And there is one particular prong of that
18 charge that I don't particularly like, so to the
19 extent that it's not error for me to not charge it,
I'm not going to do.

20 So you're free to argue it any way you want,
21 though, as you've done in other cases before me.

22 MR. MARSHALL: Yes, sir.

23 MR. FELDMAN: Are we at ease, Judge?

24 THE COURT: Yes.

25 MR. FELDMAN: Thank you very much.

1 **THE COURT:** Now, circumstantial
2 evidence, that change that they made on July 21st in
3 State versus Grippon, so if you're thinking about
4 all this moral certainty and everything else I'm not
5 charging that just to put you on notice.

6 **MR. FELDMAN:** State versus what?

7 **THE COURT:** Grippon. July 21st, 1997.
8 "The law makes absolutely no distinction between the
9 weight or value to be given either direct or
10 circumstantial evidence, nor is a greater degree of
11 certainty required of circumstantial evidence than
12 of direct evidence. You should weigh all the
13 evidence in a case."

14 **MR. FELDMAN:** Yes, sir.

15 **THE COURT:** I'm not charging that be
16 moral certainty analysis, or to the exclusion of
17 every other reasonable hypothesis, that's what I'm
18 thinking in my mind. None of that.

19 (Lunch recess taken.)

20 **THE COURT:** Please be seated. There's
21 no evidence to suggest that it was an accident in
22 this case?

23 **MR. FELDMAN:** No, your Honor.

24 **THE COURT:** I'm not going to charge
25 accident.

1 MR. FELDMAN: Can you just eliminate
2 that word from that instruction? That top was just
3 the title.

4 THE COURT: I think generally everything
5 else would be included in my self-defense
6 instruction.

7 MR. FELDMAN: Okay.

8 THE COURT: If you all want to look at
9 it -- perhaps you should just look at it real quick.

10 MR. MARSHALL: Judge, I'm going to ask
11 that you charge the law that words alone -- that
12 words alone will never reduce murder to
13 manslaughter.

14 THE COURT: I'll tell you what I charge.
15 I didn't bring my -- you didn't give me a mere
16 presence, I didn't grab that.

17 MR. FELDMAN: You mean yours? I handed
18 one up.

19 THE COURT: Oh, you did? Okay. That's
20 fine. I don't see one.

21 MR. FELDMAN: I'm sorry.

22 THE COURT: I don't seen one. You
23 handed up three, but -- Okay.

24 MR. FELDMAN: I guess it's the third
25 paragraph.

1 **THE COURT:** I won't charge that third
2 paragraph in my charge. Here you go, if you all
3 want to skim through it.

4 **MR. MARSHALL:** I don't like the part
5 where it says frequently involves some physical
6 aggression, if that's going to be in there I would
7 like the specific charge words alone will not reduce
8 murder to manslaughter. Is it in there?

9 **THE COURT:** Yeah.

10 **MR. FELDMAN:** Your Honor, there was a
11 question that I had approached the bench and kind of
12 objected to and then didn't object. And I may have
13 made a mistake, but let me for the record at least
14 move that the State not be allowed to argue the
15 thing about, well, the lawyer could have gone and
16 done these tests himself. Because I think what that
17 does, is that that forces an unfair suggestion that
18 we have any burden whatsoever. And if I made a
19 mistake before and it came out, then it did.

20 **THE COURT:** I thought he restated his
21 question.

22 **MR. FELDMAN:** No. I just said -- the
23 question was, and Mr. Feldman could have come to you
24 for the purpose of getting that shirt to take any
25 tests he wanted. And I made a mistake, I did, but I

1 don't think he should be allowed to argue Feldman
2 could have done that because it suggests that I have
3 a burden.

4 THE COURT: I'm not going to allow you
5 to argue that. Are you planning to?

6 MR. MARSHALL: I was planning to, yes,
7 sir.

8 THE COURT: No, sir.

9 MR. MARSHALL: If he hadn't offered any
10 evidence I might have refrained, but I think since
11 they put up a case that I would be entitled to argue
12 that.

13 THE COURT: No. I think that does
14 reflect on whether or not they -- that suggests that
15 he had to do that, which he does not have to do.

16 MR. MARSHALL: Well, are you going to
17 ask him to refrain from talking about why we didn't
18 do it or the fact that we didn't do it?

19 THE COURT: He can do that. You've got
20 the burden, not the defendant. Also I've got a note
21 from a juror if you all want to come up here and
22 read it.

23 (Both attorneys approach the bench to
24 read a note from a juror.)

25 THE COURT: Any problems? No problems

1 from the State or defense? Make this a Court's
2 Exhibit, please.

3 (Entered into evidence was
4 Court's Exhibit 1.)

5 THE COURT: Okay. Please the jury in.
6 (Jury present.)

7 THE BAILIFF: Present, your Honor.

8 THE COURT: Please be seated. Thank
9 you. Okay. Ladies and gentlemen, the testimony and
10 evidence in the case has been completed. We've
11 reached that phase of the trial which I referred to
12 as the closing statements by counsel. Again, this
13 is an opportunity for counsel to summarize the
14 evidence from their respective points of view, to
15 put the pieces of the puzzle together so to speak.
16 Please remember these arguments by counsel are not
17 to be considered as evidence.

18 What will happen is the State will go first,
19 then defense counsel, and then since the State has
20 the burden of proof it gets an opportunity to have
21 the final remarks in this matter.

22 After the closing arguments are completed, I
23 will then instruct you on the law in South Carolina,
24 then you will be permitted to begin your
25 deliberations in order to reach a verdict.

1 Go ahead, sir.

2 **MR. MARSHALL:** Thank you, your Honor.

3 Ladies and gentlemen, on behalf of all of the
4 citizens of South Carolina, thank you for the time
5 and attention that you're giving to this case.

6 How do you spell malicious? Well, you could
7 spell it like this, the traditional way,
8 m-a-l-i-c-i-o-u-s. But after this case, there's a
9 new way to spell it, same number of letters, it's
10 J-o-e-H-o-l-m-e-s. Quite a coincidence, same number
11 of letters. Because that man defines malicious. He
12 is the definition, he is the embodiment of that
13 word.

14 You're going to hear from the judge some
15 legal terms about what malicious means. It means
16 somebody who is devoid of a sense of social
17 responsibility, has no regard for others.

18 **MR. FELDMAN:** Your Honor, I would
19 object. And may we approach?

20 **THE COURT:** Yes.

21 (Whereupon, a conference was held at
22 side bar.)

23 **THE COURT:** Go ahead, Counsel.

24 **MR. MARSHALL:** And let me give you an
25 example of what I'm talking about. First of all,

1 let me give you a definition that I looked up last
2 night, and this is probably different from what the
3 judge will give you, but it is a definition out of
4 *Random House Dictionary*. As I was thinking about
5 this case I went and looked up the word "malicious,"
6 and this is what *Random House Dictionary* says about
7 malice. It says, "A desire to inflict injury or
8 suffering on another, especially when based on
9 deep-seeded meanness." That's a pretty good
10 definition. "A desire to inflict injury or
11 suffering on another, especially when based on
12 deep-seeded meanness."

13 And let me replay just a few seconds of
14 events that occurred up the street about a mile up
15 Rivers on July the 19th of 1996. It started out
16 with a disagreement between the defendant and
17 Kenneth Washington over the quality of \$20 worth of
18 crack cocaine.

19 As Mr. Washington left, it went like this:
20 Joe Holmes said to William Phillips -- well, first
21 of all he said to Kenneth Washington over his
22 shoulder, "Don't go out like that." And as Kenneth
23 Washington walked off he said to William Phillips,
24 "You got your thing, White Boy?" He took that .38
25 caliber handgun from William Phillips and he waited

1 about ten seconds, looking at Kenneth Washington
2 walk across the lot that whole time. And then was
3 bam, bam, bam, bam, four shots across that vacant
4 lot at the back of an unarmed man. He hit with one
5 of them. Those other three were scattered out over
6 there among the houses behind the street and the
7 houses that you see in the photographs as you look
8 at that scene.

9 It's fortunate for everyone that we're not
10 looking at a multiple murder charge here. It's
11 fortunate that nobody was driving down Target Street
12 and happened to take one of his stray bullets. It's
13 fortunate that none of the people in the houses on
14 the other side of Target Street took any of his
15 stray bullets. The police don't know where they
16 went, they never recovered them. He fired four
17 times. He wanted to make sure he got his man.

18 And then after, right after he fired those
19 shots, not realizing that he had just killed Kenneth
20 Washington, he said, "If I'd had my Glock I'd have
21 killed him." And William Phillips said, "Well, Joe,
22 I think you hit him." So what was the response to
23 that? Well, let's get out of here. Let's change
24 our shirts so I don't get caught, and let's go get
25 some more crack. I don't care if I killed him, I

1 want some more crack.

2 That little scene sums up for you that
3 defendant and it sums up for you that word. And
4 that's really all you need to know about this case.
5 I'm going to talk about a lot more, but that's the
6 case.

7 You heard a lot in the cross-examination of
8 the witnesses about the deals they got. That seemed
9 to be the focus of the defense, the deals. You
10 can't believe these people. Well, like I told you
11 at the beginning of this case, those people all had
12 criminal records; you heard exactly what they are.

13 And I told you at the beginning of this case
14 that crimes conceived in hell don't have angels as
15 witnesses. Teachers and preachers and doctors and
16 businessmen don't witness murders like this.
17 Criminals witness murders like this, and that's who
18 witnessed this murder. When you try the devil, you
19 got to go to hell to get your witnesses.

20 Well, if those witnesses are all hellions,
21 that's the guy running hell over there, he's in
22 charge. And when you go to dismantle hell, you
23 don't go by trying to tear down the hellions, you go
24 for the devil himself.

25 And what the State has done in this case, is

1 we have entered some agreements that you heard about
2 with some of these people in order to try to convict
3 a murderer. We've entered agreements with people ;
4 with criminal records, people who use and sell :
5 drugs.

6 It is the first responsibility of government
7 to protect the lives of its citizens. And that's
8 what the State is doing in this case. We are
9 attempting to protect the lives of the citizens by
10 removing a murderer from the street.

11 Would the State like to lock up every drug
12 user and drug seller? Well, maybe, but that's not
13 the goal in this case. None of those witnesses are
14 out shooting people in the back.

15 He is a major-league criminal. He's headed
16 for the Hall of Fame. Those people that you saw
17 testify, they're in the minor leagues. And that's
18 the way that the criminal justice system works
19 frequently when you're going after bad criminals.
20 The only way to get the evidence on them is through
21 criminals who aren't as bad.

22 And if the State can help those lesser
23 criminals without hurting anybody else in an effort
24 to convict a murderer, then the State's going to do
25 it every time, there are no apologies offered for

1 that. It's been going on as long as law enforcement
2 has been around, and that's the way it will continue
3 to be done as long as there is law in this land.

4 Those eyewitnesses who came in here and
5 testified about what they saw that murderer do,
6 deserve more than a thanks. They deserve more than
7 a thanks. They did something brave, they did
8 something courageous. And they want something more
9 than a thanks, that's human nature. Self-
10 preservation, look out for one's self. Nothing
11 unusual or weird or bad about that.

12 You heard from three eyewitnesses who said
13 absolutely, positively with 100 percent certainty
14 they saw Joe Holmes murder Kenneth Washington;
15 Steven O'Brien, Antwan Venning, and William
16 Phillips. You heard from four witnesses, those
17 three plus Maurice Simmons, who witnessed the
18 disagreement over the crack about ten seconds before
19 Holmes murdered Washington. You heard from one
20 witness, Alexander Gaillard, who saw the transfer of
21 the gun about ten seconds after the murder, the
22 transfer of the gun from Holmes back to Phillips.

23 That's strong, ladies and gentlemen. That's
24 a strong case. Frequently the State comes in and
25 tries difficult cases with no eyewitnesses, with

1 circumstantial evidence only. The evidence in this
2 case is overwhelming. It is rock solid.

3 You heard a lot of discussion from the
4 defense attorney about the State giving these people
5 deals because these people weren't charged for
6 smoking crack or selling crack that night. That's
7 right, they weren't. The police never even
8 considered charging them, my office never even
9 considered charging them. It defies common sense to
10 charge somebody with a far lesser crime when they
11 are coming in willingly and telling you about a
12 murder, the most serious crime, the most serious sin
13 known to man.

14 Yeah, if the police had wanted to make sure
15 that those guys would quit being cooperative and
16 quit telling what they had seen, one quick way to do
17 that, Hey, you're under arrest for possession of
18 crack. Oh, I am? Okay. Well, I'll talk to
19 somebody else about what happened out there. Not
20 talking to me anymore, that's not cooperation.

21 Those aren't deals. Those people weren't
22 charged because common sense tells you nobody in his
23 right mind is going to charge those people who come
24 in on the day of the murder and tell about the
25 murder that they saw. If that were the case, we

1 would be able to enforce no laws in this state.

2 That's just not the way that law enforcement works,
3 nor is it the way that law enforcement should work.

4 It would be like if you left your kids, your
5 young daughter, five years old, with your
6 15-year-old son and you told her to go to bed at
7 8:00 but she stayed up in her room watching TV and
8 she got up about 9:30, she peeked out the door to
9 see what her older brother's doing, she sees him
10 torturing the family dog. And she tells the next
11 day her parents, Hey, about 9:30 I saw Brother
12 torturing the dog. It would be like saying, You
13 were up at 9:30? You're grounded forever. What
14 were you doing up at 9:30? That's the way human
15 nature works. The parents are going to say, Well,
16 you shouldn't have been up at 9:30, but thank you
17 for telling me that he was torturing the dog.

18 The defense has the audacity to come in and
19 suggest the State is not doing its job because it's
20 more interested in convicting murderers than
21 crack-heads and crack dealers. That's the defense's
22 position. The State blew this one, should have
23 busted all those guys for that crack they had out
24 there, not to mention that marijuana. What about
25 that? Should have gotten them for that, too.

1 We're talking about a difference between
2 those witnesses and a murderer that is so
3 significant, it's like the difference between the
4 kid who skipped school and the kid that burns the
5 school down when it's full of students. That's how
6 big of difference you're talking about when you're
7 talking about those witnesses and that murderer.

8 But the defense says those are the ones that
9 should go down, and you can't believe them because
10 they were doing drugs. It's like saying when you're
11 going fishing for a man-eating shark, you ought to
12 be satisfied if you can catch a few bait fish.
13 Don't worry about the man-eating shark, you got a
14 few bait fish here.

15 A few points that I'm sure you all picked up
16 on, but I just want to cover them. Those bullets
17 were fired from the same gun, that was the
18 testimony, that's corroborated by what the witnesses
19 told you. The bullet taken out of Kenneth
20 Washington's body right here (indicating) that went
21 in his back and killed him within a few minutes,
22 that one was fired from the same .38 caliber gun as
23 the one that was taken out of the tire.

24 So you have physical evidence through the
25 testimony of Vello Paavel from SLED the ballistics

1 examiner, that indeed what these witnesses say is
2 corroborated. He told you, Yeah, the same gun fired
3 it. And they tell you that the first bullets were
4 fired by Holmes and the last bullets were fired by
5 Phillips.

6 You've heard a lot of suggestion by the
7 defense that these witnesses are fabricating what
8 they told you, making it up because of a deal. And
9 I want to talk about the so-called "deals" in a
10 minute. But remember this: Mark O'Brien went to
11 the police within two hours. He didn't have any
12 deal. He didn't ask for anything. He didn't even
13 ask for any money.

14 The police were so grateful that he had come
15 in there and got them started on this murder case,
16 that they went to Chief Caldwell, they said, This
17 guy just did something unbelievable. Do you think
18 you can give him a little money? He doesn't have
19 much money. I'm sure he would like some. He didn't
20 ask for any. And the police did a few months later,
21 they gave him a couple hundred bucks they were so
22 grateful. And he told the police the same thing on
23 July 19th that he told you all from that stand.
24 Nothing new.

25 Antwan Venning when he found out his friend

1 had been murdered, he went to the police and he gave
2 a perfect description of that murderer to the
3 police. He didn't know his name at that time, but
4 he said exactly what he looked like and what color
5 shirt he was wearing and he identified the shirt.
6 He wasn't getting any deal, he didn't have to do
7 that. He hadn't changed his story one bit from the
8 19th when he went and told the police about seeing
9 the murder.

10 Alexander Gaillard, on July 19th, 1996 when
11 he went in and talked to the police he told the
12 police that he saw Joe hand the gun back to William.
13 He hasn't changed his story, he's saying the same
14 thing now.

15 Now, William Phillips, he didn't say anything
16 on that day, he was charged with murder and he's
17 been around the block and he didn't make any
18 statements. Later, after he entered negotiations
19 with the State, he gave a statement and he told us
20 what he told you from the stand. And that is really
21 the only deal that has been struck in this case. A
22 deal was struck with William Phillips, something
23 firm, something in writing, something guaranteed and
24 it's something significant.

25 William Phillips had been charged with murder

1 under a theory of a hand of one is a hand of all.
2 And since he handed Joe Lewis Holmes the gun, even
3 though he didn't pull the trigger and didn't know
4 what Holmes was going to do, he enabled him to do
5 it. Couldn't have happened if Phillips hadn't
6 handed him the gun. That's why he was charged with
7 murder. Never under a theory that he actually shot
8 anybody, that wasn't the theory.

9 He pled to obstruction of justice for his
10 role in getting rid of the gun to whoever he gave it
11 to, he doesn't remember, and for possession of a
12 firearm by a convicted felon. One carries ten, one
13 carries five. The deal he struck is he's getting a
14 ten-year sentence suspended on the service of 19
15 months and up to five years' probation with whatever
16 conditions the judge gives him. So he'll have over
17 eight years hanging over his head if he messes up.
18 If he violates his probation, he's subject to going
19 back to prison for over eight years. That's the
20 deal he got. And that is a proper usage of the term
21 "deal."

22 Let's look at the "deals" as the defense
23 calls them of the other witnesses. What was the
24 deal that Mark O'Brien got, the guy who gave the
25 statement to the police two hours after the murder

1 and broke the case open? Well, the State told him
2 that we'll try to work with him on this criminal
3 domestic violence charge where he got into a
4 screaming match with his girlfriend and he's worried
5 that his four months of time on parole might be
6 revoked. Told him that we will try to prevent that
7 from happening, the solicitor's office. We can't
8 guarantee him anything, we're not the judge, we're
9 not the one that's going to make that determination.
10 But we told him that we will speak on his behalf,
11 tell him what he's done for this community in this
12 case, and let the judge make up his mind.

13 Antwan Venning, the guy that went in the same
14 morning of the murder and gave the police a
15 statement, what is the agreement that was reached
16 with him? Well, he served three years for an armed
17 robbery, and the agreement that was reached with him
18 is that the solicitor's office will recommend that
19 he not be -- his parole not be revoked, that he not
20 have to go back and serve as much as that additional
21 three on his original six-year sentence. He's got
22 three left, he's exposed to three.

23 In consideration of what he's done for this
24 community and this trial and bringing the truth
25 about this murderer to you, that the solicitor's

1 office will recommend that to a judge. The
2 solicitor's office does not sentence. That's why
3 when these -- when Mr. Feldman was asking these guys
4 about deals, they're like, I didn't get any deal. A
5 deal to those guys and a deal to most people means I
6 got something guaranteed to me. These guys got
7 nothing guaranteed to them. The solicitor's office
8 doesn't have the power to guarantee them anything.

9 What about Maurice Simmons? He's another one
10 that got a big deal. What was his big deal? Well,
11 his big deal was that the solicitor's office told
12 him that it would be in his best interest to tell
13 the truth and that we would work with him towards a
14 favorable disposition of his charges. What does
15 that mean? Well, it probably means not going to
16 prison over breaking into some cars. Does that mean
17 he's going to walk away from those charges?
18 Absolutely not. That was his big deal.

19 What about Alexander Gaillard? He had
20 nothing told to him. He came in here because he was
21 a guy that was involved in that thing and he came in
22 and told the truth about it. He got not even a
23 recommendation from the solicitor's office about
24 anything. He's on probation for assault and battery
25 of a high and aggravated nature, and his conviction

1 on that had nothing to do with this trial. That was
2 on the merits of this case.

3 Let's look at some other evidence of guilt in
4 this case. Let's look at flight. The defendant's
5 flight. The defendant's flight from the scene. The
6 defendant changing his shirt. The defendant being
7 on the run for ten days when every police officer in
8 Charleston County was looking for him, when his face
9 was on three news channels, when he wasn't at any of
10 the places where he usually stays, when after ten
11 days his family finally came in with him and he
12 turned himself in. That's the evidence of guilt.

13 A man who doesn't have anything to hide,
14 first of all he doesn't run from a murder scene, he
15 doesn't change his shirt. He stays there, he tells
16 the police what he saw, who actually did the murder
17 if he's not the one that did it. And when he's
18 wanted in an all-points bulletin for ten days, it
19 doesn't take ten days to find him with hundreds and
20 hundreds of police officers and wanted posters out
21 for him.

22 Let's talk a little bit about the defense's
23 attempt to cast suspicion on somebody else, anybody
24 else. A desperate attempt. And they've thrown out
25 sort of a few theories. One is that it's maybe

1 either William Phillips, Maurice Simmons or
2 Alexander Gaillard because all those guys under
3 their theory of the case knew about a \$20 shotgun in
4 the far back of that Jeep and wanted to kill two
5 guys to get that \$20 shotgun. So that was their
6 motive, those three guys had a motive because they
7 wanted to steal that shotgun and they had to kill
8 those guys to get that shotgun. That was sort of
9 thrown out there at you.

10 Another one is that for some reason Maurice
11 Simmons, Kenneth Washington's friend, murdered him
12 by shooting him in the back because he had some
13 residue consistent with having been in the cloud of
14 a fired gun on his hands.

15 Now, that photo of the Jeep that we had a lot
16 of discussions about and where the positioning
17 around that Jeep was, the reason that we tried to go
18 into so much detail is it's important. And
19 Alexander Gaillard got confused. Maybe you
20 understood he was staying; the State had a hard time
21 following what he was saying. It seemed at the end
22 that he was saying -- and this is the State's
23 recollection, remember it as you remember it -- it
24 seemed at the end that he was saying, yeah, that
25 when the shots were fired everybody was on the

1 driver's side of the car.

2 Well, the State submits to you that he was
3 mistaken about that. The physical evidence shows
4 you that it was the back passenger side tire that
5 was shot out. Quite possibly he was confused, he
6 didn't remember it like the other two witnesses who
7 were there did, William Phillips and Maurice
8 Simmons.

9 The way they both remembered it is that
10 William Phillips was standing -- the tire is there
11 (indicating) -- several feet back from the tire, and
12 that Maurice Simmons was on his left when he fired
13 the gun. And that's what accounts for Maurice
14 Simmons having those particles on his hands.

15 I want to talk to you a little bit about the
16 law that controls the case. In order to find
17 somebody guilty you have to find that person guilty
18 beyond a reasonable doubt. And the judge is going
19 to define that for you. It means a reasonable
20 doubt -- he will tell you if you have a
21 reasonable -- if you have a doubt which causes you
22 to hesitate to convict -- hesitate to act, he will
23 tell you, that means hesitate to convict, then you
24 may have a reasonable doubt.

25 He's not talking about when you first get

1 back into the jury room, because when you first get
2 back into the jury room you very well may not have
3 made up your mind. You may need to talk to each
4 other, that's why there's 12 of you. You may need
5 to review the evidence. So he's not talking about
6 before you work through the process of reviewing the
7 case. Some of you may have decided when you get
8 back there. But he's not talking about when you
9 first get back there. But after you've worked
10 through the case together and reviewed it, if at
11 that point you have a hesitation and you're not sure
12 what to do, then you need to ask yourself if you
13 have a reasonable doubt. You may. If you did, then
14 it would be your sworn duty to acquit. But if you
15 don't, then it's your sworn duty to convict.

16 Now, it's the State's position that after
17 you've reviewed the evidence you will not have a
18 reasonable doubt, you will not have a doubt at all,
19 as to the defendant's guilt.

20 A couple other legal contexts. The judge is
21 going to tell you about self-defense, he's going to
22 charge you; in other words, tell you the law on
23 self-defense. In order for somebody to successfully
24 claim self-defense, they have to meet three things.
25 First of all, they have to be without fault in

1 bringing about the difficulty.

2 In this case, all the testimony is that Joe
3 Holmes was in an illegal drug transaction that he
4 voluntarily got into, and then he got mad about it.
5 Right there he doesn't meet that first element, he's
6 not without fault in bringing this thing about. If
7 he hadn't gone looking to buy crack, Kenneth
8 Washington would still be alive.

9 Number two in self-defense, a person, an
10 ordinary reasonable person under the same
11 circumstances must have believed that they were in
12 fear of suffering serious bodily harm or death.
13 Well, there again the defendant fails the second
14 prong as well. 'Cause you don't have to wonder what
15 an ordinary reasonable person would have done in
16 this case. There were a number of people out there,
17 and not a single one of them fled from that
18 location, not a single one of them had a fear of
19 Kenneth Washington or Antwan Venning.

20 The testimony was nobody moved until Holmes
21 fired off the rounds. That's when everybody ran.
22 And they were all seeing the same thing that Holmes
23 was seeing, they had just seen this argument and
24 they just saw Kenneth walk off. And you better
25 believe everybody was looking at this situation.

1 And nobody was scared.

2 Thirdly, in order to successfully claim
3 self-defense, a person must have no reasonable means
4 of safely escaping the situation. There again, the
5 defendant doesn't meet that third prong. The
6 testimony was that anybody there who had had a fear
7 while Kenneth Washington had his back turned for
8 approximately ten seconds, could have gone right
9 around the corner of that house that you saw in the
10 photograph and been safe from any gunfire. Nobody
11 did that because nobody was scared. But if the
12 defendant had been scared, then it's his legal duty
13 to have done that in those ten seconds when he stood
14 there thinking about how many shots he was going to
15 try to put into the back of Kenneth Washington.

16 The judge is also going to charge you about
17 what he calls a lesser included offense. That
18 offense is voluntary manslaughter. That is when one
19 kills another person in a sudden heat of passion
20 after legal provocation. The classic example of
21 voluntary manslaughter is if a spouse goes home and
22 finds their spouse in the bed with another person
23 and kills that person, that traditionally is
24 voluntary manslaughter. That is a sudden heat of
25 passion after legal provocation. Adultery. That's

1 legal provocation. That's the kind of case in which
2 voluntary manslaughter might be appropriate.

3 Words alone, the words that Kenneth
4 Washington and Joe Holmes had between each other,
5 words alone can never under the law reduce murder to
6 manslaughter. There has to be something else. It
7 does not matter what Kenneth Washington said. And
8 all the testimony was that none of his words were
9 threatening, none of his actions were threatening.
10 But it doesn't matter what those words were, there's
11 got to be more than that to reduce this murder to
12 voluntary manslaughter. And there's not in this
13 case. All the testimony is that there's not. This
14 is not a voluntary manslaughter case. The law
15 requires that you be charged on voluntary
16 manslaughter.

17 Additionally on voluntary manslaughter, there
18 is no legal provocation in this case. A person,
19 particularly Joe Holmes, cannot enter into an
20 illegal transaction, the purchase of crack cocaine,
21 and then claim that that illegality creates a legal
22 provocation. You have to initially be engaged in a
23 legal activity to be legally provoked. Once you get
24 into the illegal range of actions, you give up that
25 right to claim any legal provocation. So

1 self-defense and voluntary manslaughter, though the
2 judge is required to tell you about them, they don't
3 apply in this case. This is a murder case, plain
4 and simple. An unarmed man is shot in the back
5 without legal provocation. Common sense tells you
6 that's murder.

7 Now, the definition of the murder, killing
8 another, killing another person, not a law-abiding
9 citizen, another warm-blooded human being, killing
10 another person with malice aforethought. We've
11 talked about malice. What is aforethought? That
12 means you have to form, the murderer has to form in
13 his mind at some point prior to killing the victim,
14 has to form this malice in his mind. And it does
15 not have to be there for any appreciable amount of
16 time. It can be there for a split second, it just
17 has to be there.

18 Well, what's the evidence? That Holmes had
19 it when he murdered Washington. Well, the evidence
20 that Holmes had it when he murdered Washington is
21 first of all when he said, "Don't go out like that."
22 Second of all when he said to William Phillips, "You
23 got your thing, White Boy?" And third of all when
24 he stood there for those approximately ten seconds
25 thinking about how many holes he was going to try to

1 put in Kenneth Washington's back. That's your
2 aforethought, that's all the evidence you need of
3 aforethought.

4 Now, malice can be expressed as in give me :
5 that gun and standing there and holding that gun, or
6 it can be implied just by the use of a deadly weapon
7 which a handgun is. The law says just using it to
8 kill somebody, from that fact alone you can infer
9 that there was malice.

10 Before I sit down I want to give you one more
11 definition that the law recognizes as reasonable
12 doubt. The judge is going to give you one; there
13 are many. And one that a lot of jurors find helps
14 them as they're struggling with that issue is this:
15 "If you are, at the conclusion of your consideration
16 of the evidence, firmly convinced that the defendant
17 is guilty of murder, then you find him guilty of
18 murder. On the other hand, if you think that there
19 is a real possibility that he may not be guilty,
20 then you find him innocent of murder." Firmly
21 convinced and real possibility, those are the guide :
22 words. And many people find those guide words to be,
23 very helpful. Thank you, ladies and gentlemen.

24 THE COURT: Yes, sir.

25 MR. FELDMAN: Thank you, your Honor.

1 Ladies and gentlemen, there are a number of problems
2 with the prosecutor's case. Here's one. If you
3 believe what White Boy said, if you believe that he
4 said, Them boys going to get the gun -- and I'm
5 paraphrasing, not quoting -- them boys going to get
6 the gun. Here. I was scared for his safety. I
7 gave it to him for his safety. So if you believe
8 that -- and I'll get to whether White Boy is
9 believable or not -- then it's self-defense.

10 You know, the expert this morning said,
11 Mr. Vello Paavel from SLED, I asked him what was
12 the -- what is the range, what is the distance that
13 you need to be away from a 20-gage shotgun to be
14 safe? He said, several hundred yards. Okay?

15 Well, if you believe White Boy, and there are
16 some serious questions whether he's believable, then
17 you got to believe that he handed the gun off saying
18 I'm afraid for your safety, that boy's going to get
19 the gun.

20 Now, some of the problems with White Boy are
21 these: You know, White Boy talked to the solicitor
22 and talked to the investigator for, the investigator
23 said, 45 minutes or so. And when they finish, what
24 they did is they worked up a statement,
25 two-and-a-half page statement which was going to be

1 what the deal for White Boy was based on. In other
2 words, if you testify consistent with your
3 statement, then you can have your deal.

4 What's the deal? He gets to walk out of the
5 jail. He gets to walk out. I'm not sure when it
6 is. Now. Soon. Okay? But, mercifully, through
7 the discovery process in the court, I get to know
8 about that taped conversation, too. So what was in
9 the statement I get to know whether it's consistent
10 with what he really said. Because, you see, the
11 prosecutor doesn't want you to know any of those
12 things that were inconsistent with his theory of the
13 case, which for the most part he's just here trying
14 to vindicate his theory.

15 Now, they don't want to you know what White
16 Boy said. White Boy didn't even want to admit it.
17 Maybe a minor point here. White Boy told the
18 solicitor, and the solicitor knew it, that he had
19 been smoking pot. Didn't want to admit that in the
20 court. White Boy, in his statement that was
21 transcribed, admitted drinking beer and smoking pot
22 from midnight, or 2:00, whatever it was. And the
23 solicitor asked him, Well, how were you? How was
24 your mind?

25 Are you kidding me? Funny thing about the

1 criminal court, is if you come up here any other
2 week or the rest of this week, you will hear exactly
3 the opposite being discussed with reference to
4 drugs, alcohol and everything else and credibility.

5 Now, the judge will tell you, you don't have
6 to let somebody get the jump -- and I'll move from
7 this point in a second. So if you believe White
8 Boy, and I'm going to tell you in a minute why he is
9 absolutely unbelievable, then it's self-defense.
10 But let me move on.

11 You saw a couple of the witnesses asked, "Do
12 you see the man who did it?" They didn't seem to
13 say anything. Yeah, he's over there. You know, and
14 it's kind of scary. Kind of pointed in the
15 direction of my table. Some years ago -- and it was
16 more sad than funny to tell you the truth -- some
17 years ago they did a skit, they did a skit on
18 "Saturday Night Live." And what they were doing is
19 they were making fun of a police lineup. And here's
20 who was in the lineup. I don't know if you remember
21 Garrett Mauz, he's a very fine black actor on the
22 original cast, and there was a duck and there was a
23 refrigerator. Who do you think they're going to
24 point at? So I'm sitting over there and what is it,
25 is that number two? He's over there. Well, there's

1 a white guy in a suit, there's a young lady and --
2 there's a young lady and there's a black guy sitting
3 there. You know, that is how casual and callous
4 that identification process is. And here's what
5 those people know. They know where he's sitting,
6 and they're so casual they know what they got to do,
7 and that's all they got to do. And that's what they
8 did.

9 Now, here's another problem with the
10 prosecutor's case. These aren't emotional issues.
11 Here's another problem. You know, in every case --
12 and this is true in both real life and on TV -- what
13 do they do? They want to know about ballistics, who
14 had the gun, what was the gun that shot it, and who
15 handled the weapon. So they want to do gun residue
16 and they want to do ballistics to find those things
17 out.

18 Well, do you remember at the beginning of the
19 case I asked you those many things, what if you knew
20 this and what if you knew that? Okay. Here are two
21 candidates. And I want to ask you if you think it's
22 possible, just possible that either of these
23 candidates could have done this. Okay? Here's a
24 guy, a convicted armed robber. And I found it
25 interesting when the solicitor said -- and this is

1 scary, ladies and gentlemen -- the solicitor said,
2 "We're here to protect you."

3 Well, let me tell you something. Here is a
4 convicted armed robber, he's one of these guys who
5 will go up to a person in the parking lot at
6 Northwoods Mall, put the gun to their head and rob
7 them. Okay? So here's a guy who -- and, my
8 goodness, he was only convicted a few years ago --
9 here's a guy who says I obtained the gun illegally
10 in the street. Okay? He brings it to the scene.
11 Okay? And I guess here we're talking about the
12 ballistics.

13 There is no gun because White Boy disposed of
14 it. Now, he brings it to the scene. And the funny
15 thing is, is he's got an excuse, an explanation for
16 everything. Now, so he brings it to the scene, all
17 right, that is -- that is -- they use the word
18 probative, meaning to suggest that that may be
19 relevant to the guilt issue. Okay? So -- so he --
20 he -- he has the gun illegally and he brings it
21 there and he has it immediately before the shooting,
22 he admits. He admitted that.

23 Sometimes on cross-examination it's a little
24 harder to plan your answer, you know, if it comes
25 rapid fire. Okay? And he had it immediately after

1 shooting. Okay? You think it's possible that White
2 Boy could have done this?

3 Now, here's the thing. You don't know yet
4 based on what I'm telling you whether or not he shot
5 the gun, you don't know about swabs and everything.
6 But he admits that he shot it. But, he's got an
7 excuse, he's got an answer for where he shot it.
8 Okay?

9 Now, he shot it in the car. So that would
10 explain the residue, there was no residue, but I'm
11 just making my point about ballistics, it was his
12 gun and he shot the gun. Okay? And he had it
13 immediately after the shooting. Okay? And he
14 disposed of it, and he stole shotgun. Well, he
15 denies he stole the shotgun. He was with whoever it
16 was that took the shotgun out, and they went and
17 disposed of that to hide it at Mookie's house.

18 Do you think it's possible that White Boy
19 shot this man? Is it possible? That's a strong
20 case. They make cases all the time on ballistics
21 and residue. It's his gun and he shot it and he had
22 it before and he had it afterwards. Do you think
23 there's a chance White Boy shot him?

24 Now, when White Boy was doing that statement
25 with the investigator, he wrote up the statement,

1 the investigator did, Pat Evans admitted that t
2 and that was that. And then later White Boy
3 admitted he talked to the solicitor and the
4 statement was changed. Why was the statement
5 changed? Because there was a question, because it
6 conflicted with what Mookie said, Alexander
7 Gaillard, with what happened to the gun. Because
8 White Boy said two or three times in his transcribed
9 statement, the one that I got to use to question,
10 that Mookie did it -- I mean, that he gave it to
11 Mookie. And then he said it again in his statement
12 statement that he gave it to Mookie. But, after
13 talking to the solicitor, he changed it to, Well,
14 I'm not sure. And that's objective testimony,
15 that's clinical.

16 Now, here's another problem with it. Maurice
17 Simmons, Poochie --- and please forgive me, I get
18 confused over these names -- but Poochie had gun
19 residue, Maurice Simmons, on his hand. Well, you
20 know, that is the beginning of a pretty good
21 criminal police investigation. Okay? But we are
22 doing back flips today to try to explain about how
23 if the wind blows and if this happens and if these
24 other ten things happen how Maurice Simmons, the
25 crack dealer, got residue on his left hand. White

1 Boy said it was five feet, maybe less.

2 And I tried to ask the question of the expert
3 that way, and it was his left arm. So he was
4 standing to the left. Of course, Alexander Gaillard
5 said that he was pointing to the right side of the
6 car for a while with White Boy up front, you know,
7 when he shot the tire. Then he got over to the left
8 side. Then he said he saw White Boy shoot into
9 the -- he said something about the gas pedal.

10 Well, the problem with lies is -- when you
11 become a parent you get to figure out these things
12 in a kind of minor way -- is that it's kind of hard
13 to remember them, you know, you got to -- it's hard
14 to remember what you're supposed to say. So here
15 they know where they're supposed to point, okay,
16 that's like the main thing.

17 Now, do you think that Maurice Simmons, who
18 is Julius Cuttino by alias that day -- I mean, these
19 people are such liars -- I'm not even talking about
20 yet what Dr. Cusack said -- these people are liars.
21 Is there anything that you would depend on them or
22 believe them about that's important in your life?

23 Now, I'm talking about the objective evidence
24 right now. So you got -- you got White Boy with all
25 that objective evidence in there that there is, you

1 got Maurice Simmons who has gun residue on his
2 hands. And that's -- those are two additional
3 problems. If you believe White Boy with what he
4 said at least in not his statement statement, but in
5 the transcribed statement, self-defense. Otherwise
6 looking at the objective testimony, now you got two
7 more candidates, you got two suspects, two good
8 suspects.

9 Now, you know, there was even testimony from
10 Mark O'Brien who was so utterly confused that -- on
11 the stand, but he admitted, yeah, I told the police
12 department that I saw White Boy shoot bullets into
13 Kenneth Washington. Okay? But yesterday --
14 whenever it was when he was on the stand -- but he
15 was explaining that away. Okay? These are all
16 things that become relevant in your consideration.

17 Now, you know, it's -- it's kind of a -- I
18 hadn't talked about deals yet, you know, but Mookie
19 and White Boy conflict on what happened with the
20 gun, they're all dealing crack I think. There was
21 no testimony that White Boy was dealing crack, he
22 testified that he was, I think, smoking some pot and
23 drinking all night. They have more aliases than I
24 can ever remember to go over with you today.

25 And, you know, it was funny, twice I got to

1 stand up before you in the prosecution's case
2 because the witnesses had denied deals existed when
3 I had the transcript of the proceeding in front of :
4 another judge, Judge Cottingham, that happened :
5 whenever it was, a month ago, that they had in fact
6 had a deal. These are liars.

7 Now, you know, I guess all of our lives, in
8 every aspect of life, you know, you can choose to
9 believe what you want to believe. You know, you can
10 choose to believe that it's nighttime and 20 degrees
11 outside but it doesn't make it so. You can pretend
12 that these people are worthy of belief, because if
13 you have an agenda, if you're on a mission, then you
14 kind of lose sight of what you're really doing.

15 You know, a few minutes ago I started a point
16 and I didn't really finish it. The solicitor's
17 office is out here to protect society. Let me tell
18 you how to protect society. Here's this guy, White
19 Boy, he's coming out of jail next week, whenever it
20 is, I'm not sure. Now, do you think that a man who
21 is going to go to life in prison without parole, do :
22 you think he'll give up a little information to the ,
23 solicitor? And what makes him so believable?

24 And I know everybody's sick about hearing
25 about race, but, well, what is this thing that White

1 Boy, the convicted armed robber, who would -- well,
2 who knows what he is capable of doing? He gets a
3 ticket out of a prison when you have all this
4 objective testimony against him. And, let me say
5 something else, even under the prosecutor's theory,
6 which we dispute wholly, but even under his theory
7 he is guilty.

8 The solicitor talked about desire to inflict
9 injury. You know, four out of the five witnesses he
10 presented are crack dealers. You want to talk about
11 some misery? You kind of got a flavor of it from
12 Dr. Cusack who told you a little bit about what he
13 does and what he deals with.

14 How about some more objective information
15 that may be relevant to this? You know, Mr. Harmon,
16 who was the last witness for the State before
17 Dr. Cusack, admitted that on the request for SLED
18 there were requested trace gun residue tests to be
19 made on some things. Well, some of the things were
20 the hands of the people whom you heard about, and
21 the other things were the shirts.

22 You know, the expert, he said, Well, that's a
23 hard test to do. You know, this is a serious thing
24 we're doing. It's a hard -- I said, Can it be done
25 or can it not be done? It can be done, it's a hard

1 test. He agreed with me. I showed him, I said,
2 Mr. -- I forget his name, but the expert, I said, I
3 showed you before we met, I showed him some little
4 internet research that I had done where it said that
5 it can get on the clothes of someone who shoots a
6 gun. And he said, yeah. Yeah, I agree with that.
7 You showed me that. Well, if it can get on -- and
8 he admitted this -- there must be a way to test it.
9 Okay?

10 Now, their theory is that the shirt in
11 question, who (sic) they say is Joe Holmes', was
12 what he had on at the time. Well, the test --
13 although he said, well, that was a different test --
14 was that there was no residue. Okay? So there was
15 no residue, and he didn't do the test for residue.
16 Okay? Nothing on it. And he said -- well, moving
17 on from that expert. And there was no DNA testing
18 on that shirt to see if that was in fact Joe Holmes'
19 shirt. Clinical objective information.

20 Now, basically -- well, let me get to
21 Dr. Cusack. He characterized people who are in this
22 drug culture, I think that what he said is that it
23 is a culture of lies. There are lies upon lies upon
24 lies. [And in this case it's as if, well, I want to
25 believe what is highly unbelievable in order to

1 promote the theory of my case. And there is great
2 evidence of crack use, cocaine, powder cocaine use,
3 alcohol use, marijuana use, even the deceased.] And,
4 you know -- and I'm almost finished. Here are a
5 couple of other concerns. You know, with all
6 that -- with everything that the deceased had in his
7 body, the solicitor is asking the pathologist who
8 really couldn't answer whether he could be straight
9 or what his condition could have been.

10 Are you kidding me? What's going to happen
11 tomorrow in the prosecution of a drug case? Are you
12 kidding me? The marijuana and the cocaine and the
13 alcohol and everything and you need to ask that
14 question, are you straight? White Boy's drinking
15 and smoking pot. You got to ask if you're straight?
16 The reason you had to ask is because it -- you know,
17 you need to have some reason to believe that someone
18 is lucid, is clear in order to testify. So you're
19 kind of like paying lip service to the need to,
20 well, if he says it maybe, you know, you know, maybe
21 if I say it, it will be true.

22 One of the great things about a court of law,
23 because it's a real scary process, it's scary for
24 the accused, it's scary for the lawyers because this
25 is serious business. And you have 12 jurors because

1 the solicitor is not the decider of issues like
2 this. And there is evidence in these ways to find
3 Joe Holmes not guilty: There is clinical
4 information, there is objective testimony, it could
5 have been other people, the witnesses are utterly
6 unbelievable, they were even defending criminal
7 domestic violence.

8 You know, it's funny, because you don't get a
9 lot of time on the criminal domestic violences, and
10 it's probably the biggest crime problem in this
11 country. And criminal domestic violence means a lot
12 of different things. And they're dismissing that.
13 Well, he was only doing whatever he was doing. It's
14 criminal domestic violence. And we are casual with
15 all the things that are going on.

16 So, ladies and gentlemen, the solicitor
17 doesn't decide how this case comes out. And there
18 is a great deal of doubt. And I would ask you to --
19 to deliberate and find Joe Holmes not guilty.

20 **MR. MARSHALL:** I'm just going to address
21 you one more time; I'm going to be much more brief
22 than I was before.

23 I want to respond to a few of the things that
24 Mr. Feldman said. He started out talking about
25 White Boy said something to the effect that the boys

1 might be going to get a gun. I want you to focus on
2 the fact that nobody saw Kenneth Washington with a
3 gun, nobody saw Antwan Venning with a gun. All the
4 testimony was that they did not have handguns, that
5 that shotgun, that unloaded -- it's not disputed
6 that the shotgun was unloaded, was in the far back
7 of that Jeep. It wasn't reasonable for him to shoot
8 Kenneth Washington because he was scared of that
9 shotgun. Neither Kenneth nor Antwan were close to
10 it, and everybody saw that clearly.

11 Antwan Venning told you we were scared, we
12 weren't on our turf, just had a little disagreement
13 with a tough-looking guy over there, we were
14 leaving. We didn't have any more crack to sell, we
15 were leaving. And that's what they were doing.
16 Kenneth Washington was murdered as he was trying to
17 go home.

18 Then he talked a little bit about this tape
19 and the statement. The solicitor's office didn't
20 have to tape that statement from White Boy, no law
21 requires that. That was taped on my own personal
22 recorder so that he could hear what the man had to
23 say. I wasn't required to do that. There's not any
24 cover-up here. I entire interview when I went in
25 and talked to William Phillips is on tape and the

1 defense has it. And there was no requirement that
2 that be done. If anybody was trying to get somebody
3 to say something in particular, sure wouldn't be
4 carrying a tape recorder in there and setting it
5 down on the table and saying to William Phillips,
6 "What happened?" That wouldn't happen.

7 This stuff about the statement, the written
8 statement, tried to make a big deal out of William
9 Phillips' written statement. And what is that all
10 about? Well, it's about what Mr. Feldman said it's
11 about. William Phillips first said that Mookie got
12 the shotgun and the pistol. After he gave that
13 statement, and he was asked to focus in on that
14 portion and think hard about it, he changed it. He
15 said, I'm not sure that Mookie got the handgun. I
16 don't know who got it, there were some other guys
17 there. Mookie may have gotten it, maybe Mookie
18 didn't get it. That's what that whole thing's
19 about. It's much ado about nothing.

20 And don't forget that Mr. Feldman's trying to
21 convince you that all that testimony was bought,
22 that three of those witnesses went into the police
23 the same day as the murder and told the police
24 exactly what they told you from the stand. And he
25 covered the fact that Alexander Gaillard, Mookie,

1 was confused about went on at the Jeep. That's
2 understandable, was there was a lot of excitement,
3 it happened in a hurry.

4 Well, what is the difference between what
5 he's got to say and what William Phillips and
6 Maurice Simmons tell you about the way this case
7 came together? Those witnesses aren't coached.
8 They were asked to come in here, get under oath, and
9 tell you what happened. Nobody told them what to
10 say. If we were going to tell them what to say, we
11 sure would get that straightened out.

12 He touched on the fact that Steven Mark
13 O'Brien said at one point that he thought maybe
14 William Phillips had shot at Kenneth Washington as
15 Kenneth was on the ground. Well, we know that
16 didn't happen. All the witnesses said, no, as soon
17 as Kenneth was shot he ran to the left, he got an
18 adrenaline burst. He died within a few seconds, at
19 most a couple of minutes. He wasn't lying there on
20 the ground and then later got up and run off.

21 The pathologist, Dr. Thorne, told you that
22 wasn't a close -- that wasn't a close shot, that was
23 a distant gunshot. It came from across that lot.

24 Mark O'Brien did not shoot Kenneth
25 Washington. Mark O'Brien was lying -- he was

1 scared, he was a laying down the street a hundred
2 yards away under the trailer in some pretty dark
3 conditions trying to look up there seeing what was
4 going on. Most probably what he was seeing was
5 Poochie right there next to William as William was
6 firing the gun. Again, explains why Maurice had
7 those deposits on him.

8 He talked -- Mr. Feldman talked a little bit
9 about the test on the shirt that Holmes was wearing
10 when he committed the murder and why it wasn't
11 tested. And you heard from SLED. SLED is a good
12 law enforcement agency. And if they don't even
13 perform that test, there's reasons. And he told you
14 what they are. It's ineffective and it's not
15 particularly telling. It wasn't performed in this
16 case. They don't even have the capacity to perform
17 that test.

18 And you heard what Mr. Harmon from North
19 Charleston had to say about their procedures. Then
20 you heard him, Mr. Feldman, talk a little bit about
21 the fact that maybe Kenneth Washington was under the
22 influence of some substances, maybe they were just
23 in his system because he had done them recently.
24 Maybe he was under the influence of some substances.
25 Does that matter at all, does that change things,

1 does that mean this wasn't a murder? If you shoot a
2 young man who's messed up, does that mean it's not
3 murder? If the man's messed up, that means he
4 probably couldn't shoot the broad side of a barn,
5 that means you got less to fear from him. Is that
6 some sort of excuse? Kenneth Washington did drugs,
7 he had it coming. Nobody deserves to be murdered.

8 Ladies and gentlemen, this is your community,
9 ultimately there is no law in this community without
10 the attention of juries. The legislators can go up
11 to Columbia and write all the laws they want and
12 hire as many police officers as you want to try to
13 enforce them, you can hire all the prosecutors you
14 want, all the judges to run the courtrooms and all
15 the court personnel. None of that matters unless
16 the juries do their job.

17 You all have the most important job, it's
18 more important than anybody in the criminal justice
19 system. More important than the people who write
20 the laws, more important than the cops, more
21 important than the prosecutors, more important than
22 the judges. Because it cannot, the laws cannot and
23 will not ever be enforced without juries enforcing
24 them. That's the way our democracy is set up. And
25 it's a good system.

1 So the State is asking you in this case to
2 enforce the law against murder, asking you not to
3 compromise this verdict, not to come back with
4 voluntary manslaughter. Call a murderer a murderer.
5 Stand up for your community and the law. If Joe
6 Holmes can't be convicted of murder based on this
7 evidence, this mountain of evidence, then let's get
8 rid of legislatures, let's quit making laws. Let's
9 get rid of the cops, let's get rid prosecutors,
10 let's get rid of the criminal judges, let's get rid
11 of the criminal courtrooms. Let's save a whole lot
12 of money. And let's just go back to whoever's got
13 the fastest gun rules. Because if there's not a
14 conviction in this case, then that's all we're going
15 to have.

16 We thank you very much for your time and
17 attention.

18 **MR. FELDMAN:** Your Honor, may we
19 approach?

20 **THE COURT:** Yes.

21 (Whereupon, a conference was held at
22 side bar.)

23 **THE COURT:** Ladies and gentlemen, it's
24 been a while since you came back from lunch. We'll
25 go ahead and take a short break before I give you

1 your final closing instructions. Please do not
2 discuss the case in any way. Thank you very much.

3 (Jury excused.)

4 THE COURT: All right. We'll take a
5 short break.

6 (Recess taken.)

7 THE COURT: Ready?

8 MR. MARSHALL: Yes, sir.

9 MR. FELDMAN: Yes, sir.

10 THE COURT: Bring the jury in, please.

11 (Jury present.)

12 THE BAILIFF: All present, your Honor.

13 THE COURT: Okay. Please be seated.

14 Okay. Ladies and gentlemen, the State of South
15 Carolina has charged the defendant with the offense
16 of murder. You will have the indictment with you in
17 the jury room during your deliberations. You should
18 distinctly understand that the indictment just
19 contains the allegations on the part of the State
20 and is in no way to be considered as evidence. The
21 only evidence in this case is the testimony from the
22 witness stand and any exhibits which have been
23 introduced during the course of the trial.
24 Remember, as I indicated, any closing arguments,
25 statements or suggestions by counsel are not to be

1 considered as evidence in this case. You are to
2 consider this case based upon the evidence presented
3 and the law that I give to you, nothing else.

4 Please pay close attention, because I'm often
5 asked if I can give you a copy of my instructions,
6 which I cannot do. As a remainder consistent with
7 what I told you at the beginning of the case, if you
8 have taken notes you should remember that your notes
9 are only intended to be a help to your memory. They
10 should not take precedence over your own independent
11 recollection of the evidence. Moreover, those
12 jurors who do not take notes should rely on their
13 own memory of the evidence and should not be
14 influenced by the fact that another juror has taken
15 notes, since the notes are only for the note-taker's
16 personal use in refreshing his or her memory of the
17 evidence.

18 Now, to the indictment the defendant has
19 plead not guilty which places upon the State the
20 duty of proving the defendant guilty. A person
21 charged with committing a criminal offense in South
22 Carolina is never required to prove innocence. The
23 burden is upon the State. I charge you that it is a
24 vitally important rule of law that a defendant in a
25 criminal trial must always be presumed innocent

1 until the defendant's guilt has been proven beyond a
2 reasonable doubt. This presumption of innocence
3 remains with the defendant at all times throughout
4 the trial, and is only removed when and if the State
5 has proven guilt beyond a reasonable doubt. For it
6 is your solemn duty, ladies and gentlemen, if not
7 convinced of guilt beyond a reasonable doubt, to
8 find the defendant not guilty.

9 What is a reasonable doubt in the law? A
10 reasonable doubt is a doubt that would cause a
11 reasonable person to hesitate to act. Ladies and
12 gentlemen, under the Constitution of South Carolina
13 you are the finders of the facts in this case. I do
14 not have a right to pass upon the facts or even to
15 express any opinion that I might have as to the
16 facts, nor may I indicate in any way what I may
17 think about this case in any way. You should form
18 no opinion in that regard from anything that I said
19 or any ruling that I've made during the course of
20 this trial.

21 You are also the judges, and the sole judges,
22 of the credibility or believability of the witnesses
23 who have testified in this case. In passing upon
24 their credibility, you may take into consideration
25 many things such as the demeanor or manner of

1 testifying, was the witness forthright or hesitant,
2 whether a witness's testimony was contradicted on
3 the one hand or supported and corroborated on the
4 other, whether a witness had reason to be biassed or
5 prejudiced, and what was the witness's opportunity
6 for observation and knowledge of the matters about
7 which the witness has testified. You may believe a
8 small portion of a witness's testimony and disregard
9 the larger, or vice-versa. You may believe one
10 witness against many, or many against one. You may
11 believe all, some, or none of a witness's testimony.

12 Now, the rules of evidence ordinarily do not
13 permit witnesses to testify as to opinions or
14 conclusions. An exception to this rule exists as to
15 those whom we call expert witnesses. Witnesses who,
16 by education and experience, have become expert in
17 some art, science, profession or calling may state
18 their opinions as to relevant and material matter in
19 which they profess to be an expert and may also
20 state their reasons for their opinions. You must
21 consider expert testimony in the same manner as you
22 do any other testimony and give it such weight as
23 you may believe it to be entitled when considered
24 with all the other evidence in the case. Such
25 testimony is given for the purpose of enlightening

1 you and not for the purpose of controlling your
2 judgment.

3 Now, there are two types of evidence which
4 are generally presented during a trial: Direct
5 evidence and circumstantial evidence. Direct
6 evidence is the testimony of a person who asserts or
7 claims to have actual knowledge of a fact, such as
8 an eyewitness. Circumstantial evidence is proof of
9 a chain of facts and circumstances indicating the
10 existence of a fact. The law makes absolutely no
11 distinction between the weight or value to be given
12 to either direct or circumstantial evidence, nor is
13 a greater degree of certainty required of
14 circumstantial evidence than of direct evidence.
15 You should weigh all the evidence in the case.
16 After weighing all the evidence, if you are not
17 convinced of the guilt of the defendant beyond a
18 reasonable doubt you must find the defendant not
19 guilty.

20 As I previously indicated, the law never
21 imposes upon a defendant in a criminal case the
22 burden or duty of calling any witnesses or producing
23 any evidence, and the defendant in a criminal case
24 has the right under the United States Constitution
25 and our constitution not to take the witness stand

1 and testify. The exercise by the defendant of the
2 right not to testify or present evidence should not
3 weigh in the slightest against the defendant and
4 should play no role in your discussion and
5 deliberations. No inference of any kind may be
6 drawn from the failure of a defendant to testify or
7 to present any other form of evidence. In
8 particular, no presumption or inference of guilt may
9 be drawn from the failure of a defendant to testify
10 or otherwise offer evidence. As I previously
11 indicated, the State has the burden of proof and
12 must prove the defendant's guilt beyond a reasonable
13 doubt.

14 Now, by the same constitution that makes you
15 the finders of the facts, I am made the sole and
16 only instructor in the law. You must accept as
17 correct the law which I charge, apply to the law the
18 facts as you find them to be and reach your verdict.
19 Put aside any conceptions you may have had as to the
20 law before coming here today and accept the law as I
21 instruct it to be. For purposes of your duty as
22 jurors here today, you should not be concerned about
23 what the law ought to be, but rather what I charge
24 you the law is at the present time in this state.

25 Now, as indicated, the defendant is charged

1 in the indictment with the offense of murder. First
2 I want to discuss with you the concept of criminal
3 intent. Criminal intent means an intention in the
4 defendant's mind at the time of the commission of an
5 act to violate the criminal law by the commission of
6 that act. In other words, criminal intent means the
7 intention to commit a crime at the time an act is
8 committed.

9 Murder is the unlawful killing of any person
10 with malice aforethought, either express or implied.
11 In order to convict of the murder, the State must
12 not only prove the killing of a victim was caused by
13 the defendant, but that it was done with criminal
14 intent as I have just defined that term to you and
15 with malice aforethought. Again, such proof must be
16 beyond a reasonable doubt.

17 I tell you while the law does not require
18 that malice shall exist for any particular length of
19 time before the commission of the act in question,
20 it must be aforethought, which means that malice
21 must have been conceived in the mind of the
22 defendant and must have accompanied the act of
23 killing.

24 Malice is defined in the law of homicide as a
25 term of art. That is a technical term importing

1 wickedness and excluding just cause or legal excuse.
2 It is something which springs from wickedness, from
3 depravity, from a deprived spirit, from a heart
4 devoid of social duty fatally bent on mischief. The
5 words "express or implied" do not mean different
6 kinds of malice, but merely the manner or way in
7 which the only kind of malice known to the law may
8 be shown to exist; that is, either by direct
9 evidence or inference. Malice may be expressed as
10 where previous threats of vengeance or lying in wait
11 or other circumstances show directly that an intent
12 to kill was really entertained.

13 Malice may also be implied as where though no
14 expressed intent to kill is proved by direct
15 evidence it is indirectly, but necessarily inferred,
16 from facts and circumstances which are proved.
17 Malice may be implied or inferred from the willful,
18 deliberate and intentional doing of an unlawful act
19 without just cause or legal excuse. If a person
20 using a deadly weapon deliberately and intentionally
21 and without just cause or legal excuse takes the
22 life of another, malice may be inferred.

23 If facts are proven beyond a reasonable doubt
24 sufficient to raise an inference of malice to your
25 satisfaction, this inference would be simply an

1 evidentiary fact to be taken into consideration by
2 you, the jury, along with the other evidence in the
3 case, and you may give it such weight as you
4 determine it should have. In any event, such an
5 implication or inference in no way lessens the
6 burden of the State to prove malice beyond a
7 reasonable doubt. In other words, the evidence of
8 malice from use of a deadly weapon is simply an
9 evidentiary fact to be considered by you along with
10 all the other evidence in the case and given such
11 weight as you determine it should have, including
12 the right to reject any such inference.

13 Now, based upon the principle that the
14 greater offense includes a lesser offense, an
15 indictment for murder includes the lesser crime of
16 unlawful homicide known as voluntary manslaughter.
17 In other words, a defendant indicted for murder may
18 be convicted of voluntary manslaughter if the
19 evidence warrants it.

20 Voluntary manslaughter is the unlawful
21 killing of another without malice, express or
22 implied. The State must also prove criminal intent
23 as I have defined that term beyond a reasonable
24 doubt. You will note that the absence of malice in
25 voluntary manslaughter is what distinguishes

1 voluntary manslaughter from murder. Voluntary
2 manslaughter is the felonious taking of the life of
3 another in sudden heat and passion upon sufficient
4 legal provocation.

5 The law recognizes the fact that sudden heat
6 and passion may temporarily affect one's self-
7 control, temporarily disturb the sway of reason, and
8 cause someone to lose self-control. Hence the law
9 reduces the crime to voluntary manslaughter where
10 the homicide was done in such sudden heat and
11 passion, provided there was sufficient legal
12 provocation.

13 What is sufficient legal provocation depends,
14 of course, in large measure on the circumstances of
15 each case. Sufficient legal provocation must be
16 such as would be expected to cause a person of
17 ordinary reason and prudence, sometimes described as
18 an average man, to become enraged; that is, to
19 experience sudden heat and passion and hence to lose
20 control of himself temporarily, and frequently
21 involves some physical aggression or assault.

22 Merely by way of illustration, and for that
23 purpose only, when an unjustifiable assault is made
24 with violence or with circumstances of indignity
25 upon a person and the party so assaulted kills the

1 aggressor, the crime may be reduced to manslaughter
2 if it appears that the assault was resented
3 immediately and the aggressor was killed in the heat
4 of blood. It should be noted that the killing must
5 be in the sudden heat and passion, and if passion in
6 fact had cooled or if there was sufficient time
7 between the provocation and the killing for passion
8 to cool, the killing would not be attributed to the
9 heat of passion but to malice, which malice is an
10 element of murder but not voluntary manslaughter.
11 Even if done in the heat of passion, a killing may
12 be considered murder if malice exists.

13 The sufficiency of cooling time would depend
14 upon whether there was time, all circumstances being
15 considered, for a person of ordinary reason to cool
16 down. In determining this question of the time of
17 cooling, the whole circumstances are to be taken in
18 consideration in deciding whether the time is
19 reasonable: The nature of the provocation, the
20 defendant's physical and mental condition, his
21 condition in life and particular situation at the
22 time of the incident, his education and habits, his
23 conduct, manner and conversation throughout the
24 transaction. In summary, all pertinent
25 circumstances may be considered in the time in which

1 an ordinary person in like circumstances would have
2 cooled is the reasonable time.

3 I instruct you, ladies and gentlemen, that
4 mere words standing alone, however insulting or
5 offensive, would not justify a person taking the
6 life of another so as to reduce the crime from
7 murder to manslaughter. But words of threatening
8 language accompanied by some act which indicates an
9 immediate intent to put such threats into execution
10 would be considered legal provocation, if such words
11 and acts taken together, or such acts alone, are
12 calculated to produce a degree of anger or rage or
13 resentment of passion sufficient to render one
14 incapable of cool reflection. The existence of such
15 legal provocation may mitigate a homicide from
16 murder to voluntary manslaughter.

17 Now, one cannot be convicted of any crime
18 which is defined in terms of a result, as in murder
19 or voluntary manslaughter, unless one's act is the
20 proximate cause of the result which in murder or
21 voluntary manslaughter is the death of the victim.
22 Proximate cause is that cause which in the natural
23 and continuing sequence, unbroken by an efficient
24 intervening cause which produces the death, and
25 without which the result would not have occurred.

1 Now, the mere presence of an accused at the
2 scene of a crime standing alone is not sufficient in
3 and of itself to establish guilt of that crime.

4 I also charge you that self-defense is a
5 complete defense. If established, you must find the
6 defendant not guilty. There are four elements
7 required by law to establish self-defense. First,
8 the defendant must be without fault in bringing on
9 the difficulty; second, the defendant must have
10 actually believed he was in a present imminent
11 danger of losing his life or sustaining serious
12 bodily injury or he actually was in such present
13 imminent danger; third, if his defense is based upon
14 his belief of present imminent danger, a reasonably
15 prudent man of ordinary firmness and courage would
16 have entertained the same belief; if the defendant
17 actually was in present imminent danger, the
18 circumstances were such as would warrant a man of
19 ordinary prudence, firmness and courage to strike
20 the fatal blow in order to save himself from
21 sustaining serious bodily harm or losing his own
22 life; fourth, the defendant had no other probable
23 means of avoiding the danger of losing his own life
24 or sustaining serious bodily injury than to act as
25 he did in this particular instance.

1 If you find that the defendant was entitled
2 to use deadly force and self-defense, a defendant
3 need not retreat in order to avoid the need for
4 deadly force if it is not possible or did not
5 reasonably appear possible to retreat without danger
6 of being killed or suffering serious bodily injury.

7 The law of self-defense encompasses
8 preventive taken prevent one's life -- I'm sorry,
9 taken to protect one's life if such action is taken
10 in anticipation of danger and in response to an
11 immediate threat. In determining whether the
12 defendant had a right to self-defense, you may
13 consider any threats made by the victim if you find
14 that such threats were made. One may act on
15 appearances; he may be mistaken. The law does not
16 hold someone to a refined assessment of the danger;
17 provided, of course, he acted as a person of
18 ordinary coolness and courage would have acted or
19 should have acted in meeting the appearance of
20 danger. He does not have to wait until his
21 assailant gets a drop on him, for he has a right to
22 act under the law of self-preservation and prevent
23 his assailant from getting the drop on him.

24 In determining the defendant's right to act
25 in self-defense, you may consider prior difficulties

1 between the defendant and the victim, should you
2 find such difficulties existed. In assessing the
3 reasonableness of the defendant's conduct, you may
4 consider the difference in ages between the
5 defendant and the deceased, any history of bad blood
6 between the two men, and any use or consumption of
7 alcohol or drugs. As was indicated in consideration
8 of reducing a killing from murder to manslaughter,
9 words accompanied by hostile acts in consideration
10 of all of the circumstances may be considered by you
11 on the issue of self-defense. All of these factors
12 are for your consideration of self-defense and the
13 defendant's guilt.

14 If you have a reasonable doubt of the
15 defendant's guilt after considering all of the
16 evidence, including the evidence of self-defense,
17 then you must find him not guilty. On the other
18 hand, if you have no reasonable doubt of the
19 defendant's guilt after considering all of the
20 evidence, including the evidence of self-defense,
21 then you must find him guilty.

22 Now, if you should find the defendant guilty
23 and there is a reasonable doubt as to whether he is
24 guilty of the greater offense of murder or guilty of
25 the lesser offense of voluntary manslaughter, you

1 should give him the benefit of that doubt and find
2 him guilty of the lesser offense of voluntary
3 manslaughter. But of course, ladies and gentlemen
4 of the jury, you should not convict him of either
5 murder or voluntary manslaughter unless his guilt
6 has been established beyond a reasonable doubt. If
7 you have a reasonable doubt as to whether the
8 defendant is guilty, then you should find him not
9 guilty.

10 Now, at this time I'm just going to briefly
11 overview the verdict form that we'll send back with
12 you to the jury room. There's no significance
13 whatsoever to the order in which they're listed on
14 this form, it's merely that one had to be listed
15 first. But the verdict form just says, we, the
16 jury, unanimously find the defendant, and it tells
17 you to choose one; not guilty, guilty of murder,
18 guilty of voluntary manslaughter. Once the jury's
19 made its decision, Madam Forelady, you would sign
20 your name on the line designated foreperson.

21 Now, you've been selected as fair and
22 impartial jurors, sworn to impartially try and
23 determine the issues in this case. And when you
24 comply with your oath to do so, then no one will
25 have a right to criticize your verdict and you will

1 have fully discharged your duty as jurors. Whatever
2 your verdict may be, ladies and gentlemen of the
3 jury, it must be a unanimous verdict. Each and
4 every one of you must agree on the verdict. It must
5 be unanimous. Not a majority verdict, but a
6 unanimous verdict of each and every juror. As I
7 indicated, when the jury has reached a decision you
8 will mark the form accordingly and sign your name,
9 Madam Forelady. Knock on the door and tell the
10 bailiff that you have reached your decision.

11 Now, at this time I have to consult with
12 counsel to see if there are any final matters that
13 need to be brought to your attention. If I need to
14 bring you back out to accomplish something, I'll
15 bring you back out and we'll take care of whatever
16 needs to be taken care of. Do not begin your
17 deliberations at this point until the bailiff or the
18 clerk appears at your door with the indictment and
19 verdict form and the exhibits and directs you to
20 begin your deliberations. I'm going to send you
21 back at this time. Please do not begin your
22 deliberations until you're directed to do so. Thank
23 you very much.

24 (Jury excused.)

25 **THE COURT:** Okay. I read the charge

1 that you both read before we started. Any
2 additional matters other than what you originally
3 raised about the charge?

4 MR. FELDMAN: No, your Honor.

5 THE COURT: State?

6 MR. MARSHALL: Your Honor, I would just
7 ask that you consider charging them that a handgun
8 is a deadly weapon; they may have a question as to
9 that. I believe the statute defines a handgun as a
10 deadly weapon.

11 The other thing that's commonly done, and I
12 don't know if your Honor makes a practice of it or
13 not, is stating to the jury that they are to attach
14 no significance to the order in which you list the
15 possible verdicts.

16 THE COURT: I just said that.

17 MR. MARSHALL: You did, your Honor?

18 THE COURT: Yes, sir.

19 MR. MARSHALL: I'm sorry.

20 MR. FELDMAN: And I would object to that
21 change.

22 THE COURT: I'm not going to charge
23 anything further. But I did tell them that they're
24 not to -- I said that you're not to consider the
25 sequence in any way, that one had to be stated first

1 and that was the thing. But I do sometimes charge
2 the charge on guns, but I don't think there's any
3 confusion in this case about that, so I'm not going
4 to add anything further about the handgun. But
5 anything further other than that?

6 MR. FELDMAN: No, your Honor.

7 THE COURT: State?

8 MR. MARSHALL: No, sir.

9 THE COURT: Okay. Thank you. I want to
10 put on the record that you've each reviewed the
11 exhibits and nothing's going back to the jury room
12 that should not be going back. You can do that at
13 this time.

14 Earlier you said you had no objection to the
15 verdict form; I didn't asked you about the
16 indictment.

17 MR. FELDMAN: I don't think so.

18 THE COURT: Is that correct from the
19 State?

20 MR. MARSHALL: I didn't look at it, but
21 I don't think so, your Honor.

22 THE COURT: No objections on the verdict
23 form?

24 MR. FELDMAN: No, your Honor.

25 THE COURT: Any objection to the

1 indictment from anyone?

2 MR. MARSHALL: None from the State on
3 either, your Honor.

4 THE COURT: Defense on either?

5 MR. FELDMAN: No, your Honor. I'm
6 sorry.

7 THE COURT: Okay. If you would all go
8 over those exhibits, I wanted to put that on the
9 record first.

10 (Attorneys and court reporter
11 gather all exhibits together.)

12 THE COURT: Okay. Madam Clerk, if
13 you'll get the exhibits together and the verdict
14 form, the indictment, tell the jury they may begin
15 their deliberations.

16 THE CLERK: Yes, sir.

17 (Whereupon, the jury retired for
18 deliberation.)

19 THE COURT: Please be seated. Okay. I
20 understand the jury has reached a decision. I want
21 to take this opportunity to -- for all those who may
22 be in the courtroom at this time, I will not -- I
23 understand the emotions that have been flaring
24 throughout this case. The Court advises you now
25 there will be no outbursts in this courtroom as a

1 result of the verdict. If you cannot control any
2 outburst once the verdict is read, I ask that you
3 use this opportunity to leave at this time. And
4 once the sentence is imposed, if a sentence is
5 imposed or if the defendant is not convicted and he
6 is let go, then I ask that there be no emotional
7 response in any way whatsoever and everyone will be
8 asked to leave in the most orderly of fashions.

9 So if anyone has a problem with that at this
10 point, I use this opportunity to politely ask you to
11 leave because otherwise you may face some sanctions
12 from the Court if you violate this directive. Is
13 there anyone that wishes to leave at this time? If
14 so, please do so. Okay. Then bring the jury in.

15 (Whereupon, the jury returned to open
16 court to report their verdict.)

17 **THE BAILLIFF:** All seated, your Honor.

18 **THE COURT:** Thank you. Please be
19 seated. Okay. Madam Forelady, I understand the
20 jury's reached a decision?

21 **THE FOREPERSON:** Yes, your Honor, we
22 have.

23 **THE COURT:** Okay. If you'll give it to
24 the bailiff, please. Okay. It is -- it appears
25 that the verdict form has been properly executed.

1 If the clerk would please publish the verdict.

2 **THE CLERK:** Yes, your Honor. Verdict
3 form case number 97-GS-10-0606. We, the jury,
4 unanimously find defendant guilty of murder. Dated:
5 October 22nd, 1997. Foreperson, Marybeth J.
6 Fensterle. Madam Forelady, ladies and gentlemen of
7 the jury, if this is your verdict please verify by
8 raising your right hands.

9 (All jurors raise their right
10 hands.)

11 **THE CLERK:** Thank you.

12 **THE COURT:** Any request to poll before
13 the jury is discharged?

14 **MR. FELDMAN:** No, your Honor.

15 **THE COURT:** Okay. Ladies and gentlemen,
16 as I indicated at the beginning of the case, it was
17 your duty to decide the facts of the case and then
18 to apply those facts to the law as I instructed said
19 law to you. I am satisfied that you gave the
20 parties in this case your complete and utmost
21 attention. No one of you asked to come to court to
22 serve on the jury panel at-large, and certainly no
23 one of you asked or requested to serve on any
24 particular case. But having been called upon to do
25 so, you have met your responsibility.

1 The case was very professionally presented by
2 all the attorneys and it appears to me that you did
3 not turn your interest away from the presentation of
4 the case by counsel. For having rendered this
5 service, the County of Charleston and the State of
6 South Carolina are in your debt. Moreover, having
7 rendered the verdict in accordance with your
8 conscience, you have no one, and that means no one,
9 to whom to answer.

10 This will conclude your service in this case
11 at this time. You will be excused for the remainder
12 of the week. I want to thank you again for your
13 participation and I hope that all of you have a good
14 night. Thank you very much.

15 (Jury excused.)

16 **THE COURT:** Okay. Do you want to
17 approach and be heard on sentencing?

18 **MR. FELDMAN:** Your Honor, I'm not really
19 prepared. I would like to ask for the 30 year or
20 the lower of the two possibilities.

21 **THE COURT:** Does the State wish to be
22 heard on sentencing?

23 **MR. MARSHALL:** Yes, sir.

24 **THE COURT:** Go ahead.

25 **MR. MARSHALL:** Okay.

1 **THE COURT:** If you all want to all
2 approach, please approach.

3 **MR. MARSHALL:** Yeah. Your Honor, you're
4 well familiar with the facts in the case. It's the
5 State's position that this was a particularly, a
6 particularly egregious crime. This is a man that
7 was an unarmed man, with absolutely no legal
8 provocation was shot in the back. Murder to some
9 degree is murder, but they kind of -- there's
10 different types of murder and, your Honor, the
11 State's position is that this is a murder which
12 deserves the fullest punishment of the law and that
13 is the life without parole sentence.

14 We understand that it's in your discretion to
15 impose it, we believe that certainly if any case is
16 proper for that sentence that it's this one.

17 His record, your Honor, goes back to 1980.
18 He had a disorderly in '80, in '86 he was convicted
19 of obstruction of justice, that was -- the
20 particulars of that case were that he was -- he
21 was -- he lied, that was another murder case in
22 which he lied to the police about the trigger man.
23 He received a six-year active sentence for that. At
24 the same time in '86 he was convicted of possession
25 of heroin for distribution. In 1992 he was

1 convicted of criminal domestic violence. And those
2 are his convictions.

3 I don't know whether any of the family
4 members wish to be heard or not. Are there any
5 family members that would like to address the court?
6 You would? Ms. Hardee, come forward, please. This
7 is Sharon Hardee.

8 THE COURT: Yes, ma'am.

9 MS. HARDEE: On behalf of my family we
10 thank you and thank Cameron and his staff. And I do
11 have sympathy towards Mr. Holmes and towards his
12 family. Whatever decision you decide to make, our
13 family would stand 100 percent behind you. I
14 realize that we can't get our nephew back and it
15 really, really does hurt. And coming to this court
16 we have to relive everything all over again. But I
17 choose not to be the judge because there's a higher
18 judge that's going to judge us all. Thank you.

19 THE COURT: Okay. Anyone else?

20 MR. MARSHALL: I don't believe so, your
21 Honor. Thank you.

22 THE COURT: Anything you would like to
23 say, sir?

24 MR. FELDMAN: If I may, your Honor, I
25 think what Ms. Hardee is saying is that a lot of

1 unfortunate circumstances have caused us to be here
2 today. I would disagree on the characterization
3 about whether this is -- it's an awful thing that
4 comes before you, this is an awful charge. We've
5 all learned something on what comes of these kinds
6 of unfortunate things. And just because there were
7 bad activities that were going on and that what
8 happened may have been predictable, that doesn't
9 take away the hurt any -- doesn't take away the
10 hurt.

11 There's information on some of the other
12 sentences in this case. You know, the thing about
13 this case, Judge, is that up until an instant before
14 this happened -- I'm taking the conviction as a fact
15 at this time, that the facts support it -- there was
16 no -- he didn't come there with a gun, there was no
17 possession of a gun. And under the prosecutor's
18 theory had White Boy not handed it to him, this
19 wouldn't have happened. This is not a planned
20 I'm-gunning-for-you-case. And, you know, it's not
21 like the lower of the sentences is any walk in the
22 park, it's an extremely serious sentence. But I
23 think that that would be appropriate, I think that
24 that would -- Mr. Holmes would have a chance to be
25 released sometime during his lifetime and it would

1 be well into -- well, thank you very much, your
2 Honor.

3 THE COURT: Is there anything you would
4 like to say, sir?

5 THE DEFENDANT: No, sir.

6 THE COURT: Is there anybody who would
7 like to speak on his behalf? Anyone?

8 MR. FELDMAN: Your Honor, I don't know.
9 I'll ask. I'll tell you, it's hard to prepare trial
10 and sentencing at the same time. He's got loved
11 ones who care about him and who would tell you that
12 it would be appropriate, and of course the State
13 provides discretionary sentencing on this charge.
14 It's not greatly discretionary, but there is a
15 provision for it, and I think that the lower would
16 be an appropriate sentence in this case.

17 THE COURT: How old is your client?

18 MR. FELDMAN: Thirty-four, your Honor.

19 THE COURT: Is there anything further
20 from the State?

21 MR. FELDMAN: One minute.

22 UNIDENTIFIED WOMAN: Your Honor, the
23 family of the victim and to the lawyer and the
24 officers of the Court, I sympathize with the victim
25 and his family. I wasn't there, I don't know what

1 happened. And I just ask you to have sympathy upon
2 Joe Holmes and the family, well, our family. And I
3 can't say whether he did it or not because I was not
4 there, but deep down inside I don't think he did.
5 But I do sympathize with everyone that was involved
6 in this crime.

7 THE COURT: Okay. Anything further?

8 MR. FELDMAN: No, your Honor. Thank you
9 for hearing us.

10 THE COURT: Anything further from the
11 State?

12 MR. MARSHALL: No, sir.

13 THE COURT: These cases, of course, are
14 always difficult, and certainly the jury has passed
15 upon the issues presented and reached its conclusion
16 that the crime of murder did indeed take place. And
17 it's not for me to second-guess that decision at
18 this point. Having considered the record as it's
19 developed throughout this trial, I find that it
20 would be appropriate to sentence you to the
21 Department of Corrections for a period of life
22 without parole. Good luck to you, sir.

23 MR. FELDMAN: Your Honor, I have some
24 posttrial motions at the appropriate time.

25 THE COURT: Okay. I'll hear you out on

1 those. Probably should have taken those up. Go
2 ahead.

3 **MR. FELDMAN:** You asked us to come
4 forward. Your Honor, I would renew my motion for a
5 mistrial as had been requested, I think it was
6 yesterday, I'm getting a little bit cloudy on when
7 things happened. I would also move for a new trial
8 based on the evidence, and I would move for a
9 judgment of acquittal, a directed verdict of
10 acquittal.

11 **THE COURT:** Okay. As I indicated, there
12 was a sufficient basis based on the evidence, and
13 the evidence could very well have been conflicting
14 at some point as to the issues raised by the various
15 witnesses, but there was certainly evidence from
16 which a jury could conclude that the crime of murder
17 did, in fact, take place.

18 There was testimony that the victim was shot
19 and that they saw the defendant shoot the victim,
20 and the victim bowed over and et cetera. I mean,
21 there's just numerous references to the fact that
22 the offense took place. And although there may have
23 been some references to the contrary, certainly
24 there was a basis, a factual basis for the jury to
25 reach the conclusion that the jury reached. It

1 would be inappropriate for me to set aside the
2 jury's decision when those factual -- when that
3 factual basis did exist in the record; therefore,
4 your motions are all denied. Anything further?

5 MR. FELDMAN: No, your Honor. Thank
6 you.

7 THE COURT: Okay. Good luck to you.

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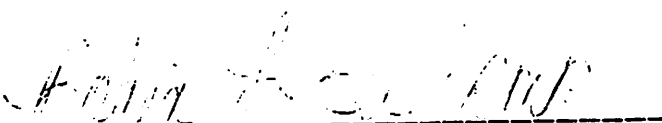
STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER) : C E R T I F I C A T E

I, Robin L. Keil, Registered Merit Reporter and Circuit Court Reporter, certify that the preceding pages are a true and correct transcript of the proceedings had at the aforesaid time and place.

I certify that the same was reduced to typewritten form from my original stenograph notes by computer-aided transcription.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand this the 14th day of May 1998.



Robin L. Keil, RMR
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Joe Lewis. Holmes, 244813)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

2016-CP-10-6293
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - 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 Ridgeville Correctional Institution, Ridgeville, SC
2. Name and location of Court which imposed sentence Court of General Sessions, Charleston, 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) 97-GS-10-0606
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 22, 1997

- (b) _____
- (c) _____
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 Supreme Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 25, 1999
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 99-M0-049
- 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) Applicant has recently discovered new evidence which should entitle him to a new trial

(b) Trial counsel and Post Conviction Relief Counsel failed to adequately investigate and prepare the case for trial and Post Conviction Relief hearing

(c) _____

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

(a) Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015.

(b) Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward through the aorta and into the fifth and sixth ribs. Appendix 470, ll 15-25. (Testimony Dr. Leigh Thorne) 702,(autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washinton was shot while running away from the assailant.

(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? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

i. Post Convictin Relief petitions 2000-CP-10-2042; 2004-CP-10-00560; 2006-CP-10-4461;

ii.

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Court of Common Pleas, Charleston, SC

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. All Post Conviction Relief Petitions were dismissed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. March 28, 2002; February 24, 2005; March 22, 2011

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None

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?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. Trial counsel was ineffective for the failure to obtain an expert as to the trajectory of the bullet.

ii. _____

iii. _____

- (b) the proceedings in which each ground was raised:
- i. At the Post Conviction relief hearing in case 2000-CP-10-2042
 - 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) Post Conviction Relief Counsel was ineffective in 2000-CP-10-2042 in that he failed to obtain the services of an expert to testify as to the trajectory of the bullet.
- (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? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. H. Stanley Feldman, 3691 Paramount Dr., North Charleston, SC 29405
 - ii. Joseph L. Savitz, III, 1825 St. Julian Place, Unit 15-D, Columbia, SC
 - iii. Daniel A. Beck, 15 Mid-Atlantic Warf, Suite 200, Charleston, SC
 - iv. Aileen P. Clare, U.S. Probation Office, 1835 assembly St., Room 611, Columbia, SC
 - v. Joseph C. Wilson, Pierce Hems Sloan & Mcleod, Llc P.O. Box 22437 Charleston SC 29413
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial

- ii. Direct appeal
- iii. Post Convction Relief case 2000-CP-2042
- iv. Appeal in Post Conviction Relief case 2000-CP-2042
- v. Post Conviction Relief case 2004-CP-00560

19. State clearly the relief you seek in filing this application:

I am seeking a new trial on my charges.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
 County of Dorchester)

VERIFICATION

I, Joe Lewis Holmes, 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.

Joe L Holmes

SWORN to and subscribed before me this 24th
 day of August, 2016.

Ludreen Bryant (L.S.)
 Notary Public

My Commission Expires: May 26, 2020

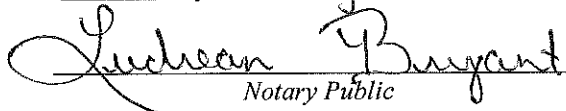
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
24th day of August, 2016.


Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joe Lewis Holmes, #244813,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2016-CP-10-6293

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application (PCR) filed November 21, 2016, Respondent would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Applicant was indicted at the January 1997 term of the Charleston County Grand Jury for murder (1997-GS-10-0606). H. Stanley Feldman, Esquire, represented Applicant on that charge. Cameron L. Marshall, prosecuted the case. Applicant proceeded to trial on October 20-22, 1997 before the Honorable Daniel F. Pieper, after which a jury found guilty as indicted. Judge Pieper sentenced him to confinement for life without parole (LWOP).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Holmes, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

2000-CP-10-2042

Applicant subsequently filed his first PCR application on May 30, 2000, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and relief from judgment order.

An evidentiary hearing into the matter was convened at the Charleston County Courthouse before the Honorable R. Markley Dennis, Jr. Applicant was present and represented by Daniel A. Beck. By written Order dated March 28, 2002, Judge Dennis denied and dismissed the application.

2004-CP-10-0560

Applicant then filed a *second* application for post-conviction relief on February 9, 2004 alleging that the trial court lacked subject matter jurisdiction. An evidentiary hearing into the matter was convened on January 18, 2005 at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and represented by Andrew Grimes, Esquire. Adrienne L. Turner of the South Carolina Attorney General's Office represented Respondent. On February 23, 2005, Judge Jefferson denied and dismissed the application with prejudice. A timely Notice of Appeal and a Johnson Petition for Writ of Certiorari was perfected by Robert Pachak of the South Carolina Office of Appellate Defense. On September 27, 2006, the South Carolina Court of Appeals denied the Petition and dismissed the case.

2006-CP-10-4461

Applicant filed a *third* PCR application on November 14, 2006, alleging ineffective assistance of PCR counsel. On April 10, 2008, the Honorable Roger M. Young, Sr. by written order dismissed the action with prejudice.

2010-CP-10-5612

Applicant subsequently filed a fourth application for post-conviction relief alleging:

1. "Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?"
2. "The State's Post Conviction Procedure process is an inadequate remedy for the hearing of federal constitutional claims."

3. Were the jury instructions given in the instant case unconstitutional and burden-shifting in violation of due process?"
4. "Is Petitioner's conviction unconstitutional under State v. Belcher?"

On March 17, 2011, by written Order the Honorable Kristi Harrington dismissed the Application with prejudice.

II.

In his *fifth* and current PCR action, Applicant is alleging the following grounds for relief:

1. Newly-discovered evidence.
 - a. Applicant has recently discovered new evidence which should entitle him to a new trial.
 - b. "Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015."
2. Ineffective assistance of trial counsel and post-conviction relief counsel.
 - a. Trial counsel and post-conviction relief counsel failed to adequately investigate and prepare the case for trial and post-conviction relief hearing.
 - b. "Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward through the aorta and into the fifth and sixth ribs. Appendix 470, 11 15-25. (Testimony Dr. Leigh Thorne) 702, (autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washington was shot while running away from assailant.

Attached and incorporated herein by reference are the records of the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the records from Applicant's Federal Habeas action, records from Applicant's prior post-conviction relief action, and the records from this post-conviction relief action. Respondent reserves the right to amend this Return upon receipt of any relevant information.

III.

The application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 ("the Act"). Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was found guilty to the offenses he now challenges on October 22, 1997. Accordingly, Applicant was required to file this Application on or before October 22, 1997. Applicant did not file this Application until November 21, 2016, which was well beyond the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ...that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, Respondent moves to dismiss this application for failure to file within the time mandated by the Act.

IV.

Similarly, this application for post-conviction relief should be summarily dismissed because it is successive to the previous application for post-conviction relief and fails to state a claim upon which relief can be granted. S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so

raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). “Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than ‘one bite at the apple’ as it were.” Id. The “burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application.” Id.

Applicant’s current allegations could have been raised in the proceedings based on Applicant’s prior application for post-conviction relief. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant’s previous PCR application.

V.

Applicant’s assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-

27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

In support of his claim, Applicant alleges that Alexander Gaillard contacted him after December 14, 2015 informing him of his willingness to testify that he did not see Applicant with a firearm, and that he was threatened into testifying against Applicant. Respondent submits that even if true these allegations are not sufficient to constitute newly discovered evidence. The evidence does not meet all five elements of the Hayden test, and thus Applicant has failed to make a *prima facie* showing of newly-discovered evidence that entitles him to a new trial. Therefore, because Applicant has failed to make a *prima facie* showing of newly discovered evidence under the Hayden test, this allegation should be dismissed with prejudice.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application as untimely successive, and fails to make a prima facie showing of newly-discovered evidence.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

RASHEEDA CLEVELAND
Assistant Attorney General

By: *Rasheeda Cleveland*
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

January 22, 2018

628
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joe Lewis Holmes, #244813,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2016-CP-10-6293

CONDITIONAL ORDER OF DISMISSAL

2016 FEB 22 11:11 9:51

This matter comes before the Court by way of the application post-conviction relief (PCR) filed November 21, 2016. Respondent made its Return requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Applicant was indicted at the January 1997 term of the Charleston County Grand Jury for murder (1997-GS-10-0606). H. Stanley Feldman, Esquire, represented Applicant on that charge. Cameron L. Marshall, prosecuted the case. Applicant proceeded to trial on October 20-22, 1997 before the Honorable Daniel F. Pieper, after which a jury found guilty as indicted. Judge Pieper sentenced him to confinement for life without parole (LWOP).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Holmes, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

2000-CP-10-2042

Applicant subsequently filed his first PCR application on May 30, 2000, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and relief from judgment order. An evidentiary hearing into the matter was convened at the Charleston County Courthouse before the Honorable R. Markley Dennis, Jr. Applicant was present and represented by Daniel A. Beck. By written Order dated March 28, 2002, Judge Dennis denied and dismissed the application.

2004-CP-10-0560

Applicant then filed a second application for post-conviction relief on February 9, 2004 alleging that the trial court lacked subject matter jurisdiction. An evidentiary hearing into the matter was convened on January 18, 2005 at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and represented by Andrew Grimes, Esquire. Adrienne L. Turner of the South Carolina Attorney General's Office represented Respondent. On February 23, 2005, Judge Jefferson denied and dismissed the application with prejudice. A timely Notice of Appeal and a Johnson Petition for Writ of Certiorari was perfected by Robert Pachak of the South Carolina Office of Appellate Defense. On September 27, 2006, the South Carolina Court of Appeals denied the Petition and dismissed the case.

Applicant filed a third PCR application on November 14, 2006, alleging ineffective assistance of PCR counsel. On April 10, 2008, the Honorable Roger M. Young, Sr. by written order dismissed the action with prejudice.

2010-CP-10-5612

Applicant subsequently filed a fourth application for post-conviction relief alleging:

1. "Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?"
2. "The State's Post Conviction Procedure process is an inadequate remedy for the hearing of federal constitutional claims."
3. Were the jury instructions given in the instant case unconstitutional and burden-shifting in violation of due process?"
4. "Is Petitioner's conviction unconstitutional under State v. Belcher?"

On March 17, 2011, by written Order the Honorable Kristi Harrington dismissed the Application with prejudice.

CURRENT APPLICATION

In his *fifth* and current PCR action, Applicant is alleging the following grounds for relief:

1. Newly-discovered evidence.
 - a. Applicant has recently discovered new evidence which should entitle him to a new trial.
 - b. "Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015."
2. Ineffective assistance of trial counsel and post-conviction relief counsel.
 - a. Trial counsel and post-conviction relief counsel failed to adequately investigate and prepare the case for trial and post-conviction relief hearing.
 - b. "Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward through the aorta and into the fifth and sixth ribs. Appendix 470, 11 15-25. (Testimony Dr. Leigh Thorne) 702, (autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washington was shot while running away from assailant.

Also, before the Court are the records of the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the records from Applicant's Federal Habeas action, records from Applicant's prior post-conviction relief action, and the records from this post-conviction relief action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

Statute of Limitations

The application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 (“the Act”). Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was found guilty to the offenses he now challenges on October 22, 1997. Accordingly, Applicant was required to file this Application on or before October 22, 1997. Applicant did not file this Application until November 21, 2016, which was well beyond the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ...that there

is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, this application is dismissed for failure to file within the time mandated by the Act.

Successive

Similarly, this application for post-conviction relief should be summarily dismissed because it is successive to the previous application for post-conviction relief and fails to state a claim upon which relief can be granted. S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). “Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than ‘one bite at the apple’ as it were.” Id. The “burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application.” Id.

Applicant’s current allegations of ineffective assistance of trial counsel could have been and were raised in the proceedings based on Applicant’s prior application for post-conviction relief. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed

to meet the burden imposed upon him, and the Court summarily dismisses the application as successive to Applicant's previous PCR application.

Newly-Discovered Evidence

Applicant's assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Here, Applicant asserts that former witness in his case, Alexander Gaillard, contacted him after December 14, 2015 informing him of his willingness to testify that he did not see Applicant with a firearm, and that he was threatened into testifying against Applicant. The Court finds that even if true these allegations are not sufficient to constitute newly discovered evidence.

The evidence does not meet all five elements of the Hayden test, and thus Applicant has failed to make a *prima facie* showing of newly-discovered evidence that entitles him to a new trial. Therefore, because Applicant has failed to make a *prima facie* showing of newly discovered evidence under the Hayden test, this allegation is dismissed with prejudice.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Rasheeda Cleveland, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Charleston County Clerk of Court and opposing counsel within twenty (20) days, and that that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 21st day of January, 2017.

DEADRA L. JEFFERSON
Chief Administrative Judge
Ninth Judicial Circuit

Kristi L. Harrington

Charleston

, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	2016-CP-10-06293
JOE LEWIS HOLMES,	)	
	)	
Applicant,	)	Transcript of Record
	)	Motion to Dismiss
vs.	)	
	)	October 5, 2018
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

B E F O R E:

Honorable Michael G. Nettles
Charleston County Courthouse
Charleston, South Carolina

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

C. Rauch Wise, Esquire
Attorney for Applicant

Benjamin Limbaugh, Esquire
Attorney for Respondent

Kay H. Richardson
Circuit Court Reporter

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No.IDEV

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(No exhibits were marked or admitted.)

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Holmes v. State - 2016-CP-10-06293
BY THE COURT

3

1 **OCTOBER 5, 2018**

2 BY THE COURT:

3 THE COURT: Yes, sir.

4 MR. LIMBAUGH: Next up, Your Honor, we have Mr. Joe Lewis
5 Holmes, 2012-CP -- I'm sorry -- it's 2016-CP-10-6293. I
6 apologize, Your Honor.

7 Applicant was indicated at the January 1997 term of the
8 Charleston County Grand Jury for murder. H. Stanley Feldman,
9 Esquire represented Applicant on that charge. Cameron L.
10 Marshall prosecuted the case. Applicant proceeded to trial on
11 October 20-22nd, 1997 before the Honorable Daniel F. Pieper.
12 After which, a jury found him guilty as indicted. Judge
13 Pieper sentenced him to confinement to life without parole. A
14 timely notice of appeal was filed on Applicant's behalf and an
15 appeal was perfected. South Carolina Court of Appeals
16 affirmed Applicant's conviction and sentence.

17 The applicant has four subsequent PCR applications prior
18 to this one. The first being 2000-CP-10-2042. Applicant was
19 subsequently filed -- Applicant subsequently filed his first
20 PCR application on May 30th, 2000 alleging ineffective
21 assistance of Trial Counsel, prosecutorial misconduct, and
22 relief from the order. An evidentiary hearing into the matter
23 was convened at the Charleston County Courthouse before the
24 Honorable R. Markley Dennis, Jr. Applicant was present and
25 represented by Daniel A. Beck. By written order dated March

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4

1 28, 2002, Judge Dennis denied and dismissed the application.

2 Applicant then filed a second application for post-
3 conviction relief on February 9th, 2004 alleging that the
4 Trial Court lacked subject matter jurisdiction. An
5 evidentiary hearing into the matter was convened on January
6 18th, 2005 in the Charleston County Courthouse before the
7 Honorable Deadra L. Jefferson. Applicant was present at the
8 hearing being represented by Andrew Grimes, Esquire.
9 Adrienne L. Turner, of the South Carolina Attorney General's
10 Office represented Respondent. On February 23rd, 2005, Judge
11 Jefferson denied and dismissed the application with prejudice.
12 A timely notice of appeal and *Johnson* petition for Writ of
13 Cert was perfected by Robert Pachak of the South Carolina
14 Office of Appellate Defense. On September 27th, 2006, South
15 Carolina Court of Appeals denied the petition and dismissed
16 the case.

17 Applicant filed a third PCR application on November 14th,
18 2006 alleging ineffective assistance of PCR counsel. On April
19 10th, 2008, the Honorable Roger M. Young, Sr., by written
20 order, dismissed the action with prejudice.

21 Applicant subsequently filed a fourth PCR application for
22 post-conviction relief alleging, it say, Petitioner having
23 created a liberty interest in statutory state-appointed PCR
24 counsel. The state's post-conviction procedure process is an
25 inadequate remedy for a hearing of federal constitutional

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BY THE COURT

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1 claims where the jury instructions given in the instant case
2 unconstitutional and the burden shifting in violation of due
3 process. Is -- the petitioner's conviction unconstitutional
4 under *State v. Belcher*. On March 17th, 2011, by written
5 order, the Honorable Kristi Harrington dismissed the
6 application with prejudice.

7 And this, Applicant's fifth post-conviction relief
8 application was filed on November 21, 2016 alleging newly
9 discovered evidence. Applicant has recently discovered new
10 evidence which should entitle him to a new trial. Alexander
11 Gaillard will testify that he did not see me with a firearm.
12 He will testify that he was threatened in order to get him to
13 testify against me. I received this information from Mr.
14 Gaillard shortly after December 14th, 2015. Also, ineffective
15 assistance -- ineffective assistance of trial counsel and
16 post-conviction relief counsel. Trial counsel and post-
17 conviction relief counsel failed to adequately investigate,
18 prepare the case for trial and post-conviction relief hearing.
19 Neither my trial counsel nor PCR counsel ever obtained an
20 expert on the issue of the trajectory of the bullet that
21 killed Kenneth Washington. The bullet that killed Mr.
22 Washington traveled from right shoulder blade downward through
23 the aorta into the fifth and sixth ribs. And the path
24 traveled by the bullet is inconsistent with testimony which
25 was that Mr. Washington was shot while running away from

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BY THE COURT

6

1 assailant. The state made its return and motion to dismiss on
2 January 22nd, 2018 asking the Court to dismiss the application
3 as successive, untimely, and for failing to make a prima facie
4 showing, he is entitled to relief based on newly discovered
5 evidence. On January 26th, 2018, the Honorable Kristi
6 Harrington, in her capacity as Chief Administrative Judge,
7 issued a conditional order of dismissal provisionally denying
8 and dismissing the application and giving Applicant 20 days to
9 show why the order should not become final. This conditional
10 Order was filed February 2nd, 2018. Thereafter on March 26th,
11 2018, through his counsel Rauch Wise, Applicant filed a
12 response to the conditional Order of dismissal. In this
13 response, Applicant attached affidavits of Alexander Gaillard
14 testified at this trial, and his mother Cindy Gaillard. In
15 his affidavit, Alexander Gaillard recants his trial testimony
16 and now states that he did not see Applicant shoot a gun,
17 never saw him with a gun, and did not know him to carry a gun.

18 We're here today on the state's Motion to Dismiss.
19 Applicant is represented by Rauch Wise and both he and
20 Applicant are present today.

21 THE COURT: Okay. Mr. Wise, I'll be glad to hear from
22 you.

23 MR. WISE: Your Honor, we're going under the provision of
24 the Post-Conviction Relief Act that says that the applicant
25 has one year within the time of newly discovered evidence to

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BY THE COURT

7

1 file a PCR and we believe that the newly discovered evidence
2 in this case would prove actual innocence of, you know, Mr.
3 Holmes in this case. And to understand that, I think we need
4 to go back over the facts a little bit.

5 First of all, Mr. Alexander Gaillard was a key witness in
6 this case in this respect. He said that he saw Mr. Williams,
7 known as White Boy, take the gun from Mr. Holmes right after
8 he heard the shots. The significance of that is this, on Page
9 115 and 130 of the transcript, on cross examination of Steve
10 O'Brien, Steven O'Brien admitted that he had at one time told
11 the police that he saw Mr. Williams, White Boy, shoot the
12 deceased while he was on the ground.

13 Also, Mr. -- excuse me -- William Phillip, White Boy. He
14 was charged with murder in this case. He got a deal to plead
15 to obstruction of justice and felon in possession of a
16 firearm. Mr. Phillips testified that he brought the gun to
17 this scene, he took the gun away, he fired the gun, and he
18 disposed of the gun. He said in his testimony he gave the gun
19 to Mr. Holmes, who shot the deceased. Now, the problem with
20 it is this, Mr. Gaillard is the only witness who really
21 connects, gives credibility to Mr. Phillips' testimony. Mr.
22 Phillips was impeached by Trial Counsel with having been pled
23 guilty earlier to armed robbery. He was impeached by Trial
24 Counsel showing that he cut a deal for probation in exchange
25 for having a murder charge dropped. He was impeached by Trial

1 Counsel with showing inconsistencies in his testimony. So,
2 they did an effective job of impeaching him with one
3 exception. That was this independent 16-year-old kid who said
4 he saw Mr. Holmes with the gun. Without that piece of
5 evidence, the credibility of Mr. Phillips is really
6 questionable because he was charged with murder. He was this
7 totally virtually -- they all kind of knew each other, but
8 basically an independent witness who gave credibility ---

9 THE COURT: Mr. Wise -- Mr. Wise, I'm sorry to interrupt
10 up. Of course, that really kind of goes to the merits of this
11 claim. And really, the first thing we need to address is the
12 motion to dismiss. And I understand what you're talking about
13 and I understand the theory of his request for leave.

14 Let's hear from the state about the threshold question of
15 dismissal.

16 MR. WISE: Okay.

17 MR. LIMBAUGH: May it please the Court, Your Honor?

18 THE COURT: Yes.

19 ARGUMENT BY LIMBAUGH:

20 MR. LIMBAUGH: So, the state would contend is that Mr.
21 Holmes' claims of newly discovered evidence and his -- well,
22 specifically the new discovered evidence won't meet either
23 prong of the newly discovered evidence standard. He -- it's
24 not enough for him to be -- for him to be actually innocent at
25 trial. The standard ---

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ARGUMENT BY LIMBAUGH

9

1 THE COURT: Say that again?

2 MR. LIMBAUGH: For it to be -- it isn't material to his
3 -- an issue of guilt or innocence at trial. I believe that
4 there's enough evidence or the state could bring enough
5 evidence from the other witnesses that saw Mr. Holmes with a
6 weapon that this newly discovered evidence of recanted
7 testimony would not be material at a new trial.

8 The standard for newly discovered evidence under -- is it
9 would probably change the result if a new trial was had; it
10 had been discovered since the trial, which I concede; could
11 not have been an exercise of due diligence in the discovery
12 before the trial; is material to the issue of guilt or
13 innocence; and is not merely cumulative or impeaching. Mr.
14 Wise also just stated that it was merely impeaching, which
15 here it says it cannot be merely impeaching. So, the state
16 contends, at least to the newly discovered evidence, that not
17 only is it non-material to the result if a new trial were to
18 be had because of the three other witnesses who state -- Mr.
19 O'Brien specifically stated, he said, you got that thing on
20 you, yeah, which he handed him a .38. Joe stepped back and
21 shot him. Antoine Benning, another witness -- I'm sorry, that
22 was on Page 87 of the trial transcript. Page 156, Mr. Benning
23 states, and when I looked up, getting ready to press the
24 unlock bottom, I saw him, referring to Mr. Holmes, shoot and
25 he started firing the gun. And then as Mr. Wise stated, Mr.

ARGUMENT BY WISE

1 Phillips, on Page 318 of the transcript, states, and well, the
2 argument transpired. I gave Joe Lewis the gun, you know, and
3 which after a few seconds, he started shooting.

4 Also, I believe in the transcript that Mr. Wise is
5 referring to that Mr. O'Brien tries to correct the line of
6 questioning and state that, no, he was not shooting bullets at
7 Mr. Washing, he was shooting at the chief, referring to Mr.
8 William Phillips.

9 So, in regards to the ineffective assistance of counsel
10 claims, the state contends that both of those should be
11 dismissed as being successive. This very easily could've been
12 raised in either of the four previous PCR applications as we
13 recited to Your Honor in the procedural history.

14 THE COURT: So, all of the issues, with exception of
15 after-discovered evidence should be dismissed for successive
16 application?

17 MR. LIMBAUGH: Yes, sir, Your Honor.

18 THE COURT: And you're saying that based on the
19 transcript itself that the testimony of this particular
20 witness would've been cumulative and would not be dispositive?

21 MR. LIMBAUGH: Yes, sir, Your Honor.

22 THE COURT: What do you have to say about that, Mr. Wise?

23 ARGUMENT BY WISE:

24 MR. WISE: Your Honor, there were some other witnesses
25 that -- everybody in this case is flawed, so to speak. But,

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ARGUMENT BY WISE

11

1 this was the youngest witness, I think -- I still think he was
2 a critical witness because he wasn't that close to any of the
3 parties.

4 THE COURT: Would you agree that what he had to say was
5 cumulative and there were other people who put him as the
6 shooter?

7 MR. WISE: It is cumulative, but that doesn't change the
8 fact that the jury easily in this case could've rejected the
9 testimony of the other people simply because of their pending
10 charges, and agreed that this 16-year-old kid is probably
11 telling the truth. And I think in a situation like this, a
12 jury would be frankly more inclined to do it that way. And,
13 if you take -- you know, I really think they would because the
14 16-year-old, youth, everything that you want to add to it, he
15 was -- he was the youngest one out there. The others were --
16 to be frank with you, more seasoned criminals. So, I think it
17 is an important factor in this case that this -- this is the
18 kid that did -- that did say it. And, I think at the very
19 least, the credibility of this kid, and -- well, he's not a
20 kid anymore, the credibility of Mr. Gaillard should be judged
21 by a hearing where a judge can actually look at it and see if
22 what he's saying today is the truth or was he telling the
23 truth back then. But I -- on the face, we do have a credible
24 case. And I think -- I agree the trajectory of the bullet and
25 all that could've been brought up before, there's no question

1 about that; it's been there forever. But, we're dealing with
2 a man that I think could make more than just a plausible claim
3 of actual innocence. When you realize the trajectory of the
4 bullet -- the testimony was that the deceased was running away
5 and Mr. Holmes got a gun from Mr. Phillips and shot him once
6 -- once at least. If that's true and he's running from here
7 to that wall, the bullet is gonna go in the back and basically
8 come out the front. This bullet traveled downward, downward
9 to the rib area. And the only way that could possibly have
10 happened, if the deceased was running away is literally for
11 him to be bent over and running backwards. That would give
12 you a trajectory of downward. Not a scintilla of testimony
13 about that. And also, when you look at the trajectory of the
14 bullet, it is very, very consistent with the testimony that
15 Steve O'Brien gave at one point to some officer that the
16 deceased was on the ground when Mr. Phillips shot him. And if
17 someone is on the ground with their head toward you and you
18 shot them in the back, it would follow that trajectory. So,
19 we've got more than a speculative argument of actual
20 innocence. I think we have a plausible argument of actual
21 innocence. And a witness who is significant to the state's
22 case, and he is the youngest and would have more credibility
23 with the jury, has now come forward and saying, no, I was
24 pressured into saying that; that's not true.

25 RULING OF THE COURT:

RULING OF THE COURT

1 THE COURT: All right. All of the issues with regard --
2 with the exception of after-discovered evidence, I'm gonna
3 dismiss for successive applications. He's filed, what, five
4 of them?

5 MR. LIMBAUGH: This -- Your Honor, this is the fifth.

6 MR. WISE: This is the fifth.

7 THE COURT: Four previous to this. I think I'm gonna --
8 I think the appropriate thing to do is dismiss that for
9 successive application and we'll hear from the after-
10 discovered witness.

11 MR. WISE: Excuse me?

12 THE COURT: I'll be glad to hear any testimony that you
13 might have?

14 MR. WISE: Well, I thought we were here on a motion.

15 THE COURT: Okay. Well, I thought you were prepared to
16 go forward on those ---

17 MR. WISE: No, it was given to me as just a motion, no
18 testimony.

19 THE COURT: Okay.

20 MR. WISE: I apologize if I was mistaken, but ---

21 THE COURT: All right. Well, I am indeed gonna order
22 that there be a factual hearing to determine -- first of all,
23 to hear what the witness has to say, hear his recanted
24 testimony, then the PCR Judge can have an opportunity to
25 listen to the arguments of the attorney general, take a look

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RULING OF THE COURT

14

1 at all the other evidence and whether or not his cumulative
2 and deal with it in that fashion.

3 I'm gonna ask the attorney general to prepare an order to
4 that effect.

5 MR. LIMBAUGH: Yes, sir, Your Honor.

6 THE COURT: The only issue that's gonna be addressed is
7 after-discovered evidence.

8 MR. LIMBAUGH: Thank you, Your Honor.

9 THE COURT: Very good.

10 MR. WISE: Thank you.

11 **ADJOURNED - 12:07 P.M.**

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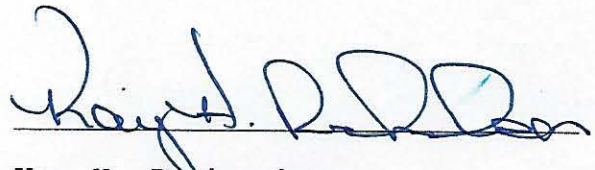
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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the motion hearing held in the case of Joe Lewis Homes v. State of South Carolina, held in the Court of Common Pleas for Charleston County, Charleston County Courthouse, Charleston, South Carolina, on October 5, 2018.

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

A handwritten signature in blue ink, appearing to read "Kay H. Richardson", is written over a horizontal line.

Kay H. Richardson

Official Court Reporter

March 20, 2020.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Joe Lewis Holmes,	)	CASE NO. 2016-CP-10-06293
	)	
APPLICANT,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	ORIGINAL
The State of South Carolina,	)	
	)	
RESPONDENT.	)	
	)	

March 18, 2019

Charleston, South Carolina

B E F O R E:

The Honorable Jennifer McCoy

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

Clarence Rauch Wise, Esquire
For the Applicant

Benjamin Limbaugh, Esquire
For the Respondent

I N D E X

(AW) - DENOTES APPLICANT'S WITNESS

(RW) - DENOTES RESPONDENT'S WITNESS

EXHIBIT LIST -- 03

POST-CONVICTION RELIEF HEARING -- 04

WITNESSES

(AW) Keith Gregory:

Direct Examination by Mr. Wise -- 05

(AW) Alexander Gillard:

Direct Examination by Mr. Wise -- 08

Cross-Examination by Mr. Limbaugh -- 18

(AW) Joe Holmes:

Direct Examination by Mr. Wise -- 20

Cross-Examination by Mr. Limbaugh -- 34

Redirect Examination by Mr. Wise -- 37

Recross-Examination by Mr. Limbaugh -- 38

CERTIFICATION OF TRANSCRIPT -- 42

C O U R T E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>
1	Affidavit of Gillard	10
2	Diagram of Skeletal System	25

Joe Lewis Holmes
2016-CP-10-06293

1 THE COURT: I am ready to proceed when you are, sir.

2 MR. WISE: Do you want a brief introduction ---

3 THE COURT: Who do we have; is this Mr. Joe Lewis Holmes?

4 MR. WISE: Excuse me?

5 THE COURT: Are you Mr. Joe Lewis Holmes?

6 DEFENDANT HOLMES: Yes, ma'am.

7 THE COURT: All right. Mr. Holmes, we are here on your
8 post-conviction relief proceeding.

9 DEFENDANT HOLMES: Yes, ma'am.

10 THE COURT: All right. I am happy to hear from you, Mr.
11 Wise.

12 MR. WISE: Your Honor, just briefly. This is a very old
13 post-conviction relief petition. We obtained an affidavit
14 from a witness that changed his testimony from the previous
15 trial.

16 THE COURT: Okay.

17 MR. WISE: And it is pretty much down to that issue.

18 THE COURT: Okay.

19 MR. WISE: All right.

20 THE COURT: I appreciate you doing that for me.

21 All right. If you want to call your first witness feel
22 free to do so now.

23 MR. WISE: Call Mr. Keith Gregory.

24 (WHEREUPON, the witness was duly sworn.)

25 THE CLERK: Please state your full name and spell your

1 last name for the court reporter.

2 THE WITNESS: Keith M. Gregory. Gregory, G-R-E-G-O-R-Y.

3 THE COURT: Okay.

4 **DIRECT EXAMINATION BY MR. WISE OF KEITH GREGORY:**

5 Q. Mr. Gregory, where do you live?

6 A. Up in North Charleston, 526 and Rivers.

7 Q. Say again.

8 A. In North Charleston, the City of North Charleston, 526
9 and Rivers.

10 Q. All right. And you know Joe Holmes?

11 A. Yes, sir.

12 Q. And what kin are you to Joe Holmes?

13 A. That is my sister's son, which is my nephew.

14 Q. That is your nephew, right?

15 A. Right.

16 Q. You are aware he got convicted of murder back in I
17 believe 1996 or so?

18 A. Right, somewhere around in there.

19 Q. Okay. Did you have occasion over the ensuing years to
20 run across Alexander Gillard?

21 A. From time to time I did.

22 Q. And did you know he testified against Mr. Holmes at the
23 trial?

24 A. I had no idea of that, none, until as of late.

25 Q. Excuse me?

1 A. I had no idea of that, as of late ---

2 Q. Okay.

3 A. Years later.

4 Q. All right. So did you run across Mr. Gillard later?

5 A. Right.

6 Q. And did you have a conversation with him about his
7 testimony at the trial?

8 A. No. When I did speak to him he was like how is your
9 nephew doing or cousin. And I said, Joe? I said, he is all
10 right. He said, Joe Holmes. I was like Holmes; I said, no,
11 he is still locked up.

12 Q. Uh-huh, he is still locked up?

13 A. Uh-huh.

14 Q. All right. Now what did Mr. Gillard say?

15 A. He was like, man, Joe should have been freed up a long
16 time ago because it didn't even happen like that.

17 Q. He said it didn't happen like that?

18 A. Right.

19 Q. Did he tell you about his testimony at the trial not
20 being correct?

21 A. No, he didn't elaborate on anything.

22 Q. All right. Did you later get in touch with somebody to
23 talk to Mr. Gillard about it?

24 A. Right.

25 Q. Who was that?

1 A. I talked to Mr. Dale Carter at one point in time, ---

2 Q. Uh-huh.

3 A. --- who was a previous attorney. And, you know, talking
4 back to Joe back and forth.

5 Q. So Mr. Gillard contacted -- how did you run across him?

6 A. The local gas station.

7 Q. Just happened to run across him?

8 A. Right.

9 Q. And started a conversation with him?

10 A. Started a conversation and just out the blue.

11 Q. And from that Mr. Gillard got in touch with some
12 individual to give a statement to -- for Mr. Holmes?

13 A. Right.

14 Q. Okay. Thank you.

15 MR. LIMBAUGH: Nothing for this witness, Your Honor.

16 THE COURT: All right, sir, you may step down from the
17 witness stand. Thank you so much.

18 THE WITNESS: All right. Yes.

19 (WHEREUPON, witness steps down.)

20 THE COURT: All right. Mr. Wise?

21 MR. WISE: I will call Alexander Gillard.

22 THE COURT: All right.

23 (WHEREUPON, the witness was duly sworn.)

24 THE CLERK: State your full name for the record and spell
25 your last name.

1 THE WITNESS: All right. Alexander Gillard.

2 G-A-I-L-L-A-R-D.

3 **DIRECT EXAMINATION BY MR. WISE OF ALEXANDER GILLARD:**

4 Q. Mr. Gillard, where were you raised?

5 A. Right here in at Liberty Park.

6 Q. In where?

7 A. Liberty Park.

8 Q. Where is that?

9 A. Off 526 and Rivers Avenue.

10 Q. Okay. And you are a resident of Charleston?

11 A. Yes, sir.

12 Q. And you have a good Charleston Lowcountry accent?

13 A. Yes, sir.

14 Q. All right. Do you know -- let me back up a little bit.

15 You know Joe Holmes?

16 A. Yes, sir.

17 Q. Did you testify in his trial?

18 A. Yes, sir.

19 Q. All right. After you testified in his trial did you have
20 a conversation with Mr. -- a Keith Gregory?

21 A. I mean -- I mean do you mean like -- like right after or
22 just like, you know -- I'm trying to figure out what you are
23 trying to say.

24 Q. Years later.

25 A. Oh, years later, yeah.

1 Q. Years later you did?

2 A. Yeah.

3 Q. And what did you tell Mr. Gregory about your testimony at
4 the trial?

5 A. I mean that, you know, that it was, you know, wrong or
6 whatever. And, you know, that even though I got words put in
7 my mouth that -- you know, there was things that wasn't
8 accurate. You know, like basically in some ways like right
9 off from what they said ---

10 Q. You said ---

11 A. --- just to go along with it, yeah, basically.

12 Q. You said something wasn't accurate?

13 A. Yeah.

14 Q. Okay. And after that conversation with Mr. Gregory did
15 some individual contact you about giving an affidavit?

16 A. Yes, a previous attorney. It is Cobbs, I belief.

17 THE COURT REPORTER: What is the name of the attorney
18 again?

19 THE WITNESS: I think Cobbs or something like that.

20 THE COURT: Cobbs?

21 THE WITNESS: Cobbs or something like -- Cobbs or
22 something like that.

23 Q. And I ask you is that a copy of the affidavit that you
24 subsequently gave?

25 (WHEREUPON, document provided to witness.)

1 A. Yeah, that is about right.

2 Q. Okay.

3 MR. WISE: I would like to move this as an applicant's
4 exhibit.

5 THE COURT: Make it a court's exhibit. It will be
6 Court's Exhibit 1.

7 (WHEREUPON, affidavit of Gillard, marked as Court's Exhibit
8 Number 1.)

9 MR. WISE: Okay. I have got to show it to counsel.
10 (WHEREUPON, counselors confer.)

11 MR. WISE: It was attached to the motion earlier.

12 THE COURT: Okay.

13 Q. How old were you when this case was -- when this event
14 occurred?

15 A. I was 16 years old.

16 Q. Sixteen?

17 A. Yes, sir.

18 Q. How old were you when you testified?

19 A. Seventeen.

20 Q. Were you in some trouble back then too?

21 A. Yeah; somewhat, yeah.

22 Q. All right. Since this incident have you been in anymore
23 trouble?

24 A. Maybe like a couple; but after that, you know, I just
25 went straight.

- 1 Q. You have gone straight?
- 2 A. Yes, sir.
- 3 Q. Are you married?
- 4 A. Yes, sir.
- 5 Q. Do you have children?
- 6 A. Yes, sir.
- 7 Q. How many?
- 8 A. Six.
- 9 Q. Do you -- they live with you?
- 10 A. Yes, sir.
- 11 Q. All six?
- 12 A. Yes, sir.
- 13 Q. And you are living where now?
- 14 A. In Summerville.
- 15 Q. All right. And what is your occupation?
- 16 A. A certified welder.
- 17 Q. Certified welder?
- 18 A. Yes, sir.
- 19 Q. Are you still going to school for it?
- 20 A. Yes, sir.
- 21 Q. And you have good employment now?
- 22 A. Yes, sir.
- 23 Q. And certainly not in jail now?
- 24 A. No.
- 25 Q. And do you have any intent of even remotely going that

1 way?

2 A. No, sir.

3 Q. Okay. What did you testify to in the trial that was not
4 correct?

5 A. Basically, like I say, you know, me saying things that
6 wasn't accurate, like -- like, you know, I saying that I seen
7 him with a gun or whatever with me, which it wasn't right.
8 And, you know, so.

9 Q. You said -- you said what now?

10 A. Like I say -- like I say, get in touch -- they say --
11 that I said that he had a gun when they say, when really he
12 didn't have a gun on, ---

13 Q. All right.

14 A. --- you know, in his possession.

15 Q. You are talking about Joe Holmes?

16 A. Yes, sir.

17 Q. All right. Refer to the -- you have had a chance to
18 review your testimony from that trial prior to today, haven't
19 you?

20 A. A little bit.

21 Q. I sent it to you?

22 A. Yeah.

23 Q. All right. And on Page 265 of the transcript beginning
24 at Line 6, the question was asked: Now you stated you saw Joe
25 Holmes with a gun in his hand. Can you describe the gun that

1 you saw in his hand?

2 And you answered: A black 38 with a brown handle.

3 If you want to refresh your memory there. Over here on
4 this page (indicating).

5 A. All right.

6 Q. And that was not correct?

7 A. No, sir.

8 Q. You never saw Joe Holmes with a gun?

9 A. No, sir.

10 Q. In his hand?

11 A. No, sir.

12 Q. You were at the Amoco station that night?

13 A. Uh-huh.

14 Q. Correct?

15 A. That's right.

16 Q. With -- who were you with?

17 A. A couple -- I mean it was me, Joe -- a couple of more
18 people been out there. A little white boy and a couple other
19 fellows out there.

20 Q. And White Boy is a guy named Phillips?

21 A. I would guess his real name was. I am not sure.

22 Q. You are not -- you know his nickname?

23 A. Yeah, White Boy.

24 Q. You don't know his real name, ---

25 A. No.

1 Q. --- right? For the record, Your Honor, Phillips is
2 frequently referred to in the transcript as White Boy.

3 THE COURT: Okay.

4 Q. All right. And then on Page 264 of the transcript I have
5 highlighted at the bottom, you say that you saw Joe with a
6 gun?

7 A. Uh-huh, that is what it says right here.

8 Q. All right. And is that accurate?

9 A. No, sir.

10 Q. All right. Were you encouraged in any way to give an
11 inaccurate statement?

12 A. Sir?

13 Q. Were you encouraged in any way to give an inaccurate
14 statement?

15 A. Yes, sir.

16 Q. And how was that?

17 A. I mean, like I say, I mean, like I say, basically just
18 kind of went on and right when they mean like talked to me,
19 you know what I'm saying, and just and basically, like I say,
20 putting it in their own words and getting me to agree with it
21 like, yeah, you know, because I am kind of -- I am kind of
22 already frustrated by being down there. And I was yeah, yeah,
23 yeah. You understand what I am saying? So ---

24 Q. All right. And you were 16 when you were first
25 interviewed?

1 A. Yes, sir.

2 Q. And you were living at home?

3 A. Yes, sir.

4 Q. Okay. You -- did you hear the shots go off that night?

5 A. Yeah, I heard.

6 Q. You heard the shots?

7 A. Yeah.

8 Q. But you never saw Joe with a gun?

9 A. No, when I heard ---

10 Q. And that's ---

11 A. --- I ran myself so.

12 Q. Excuse me?

13 A. I say when I heard it I -- like I say, I had ran myself,

14 you know.

15 Q. You ran yourself?

16 A. Yeah, just took off and ran myself, yeah.

17 Q. Okay. So you were trying to get out of trouble too, ---

18 A. Yeah.

19 Q. --- out of danger?

20 A. Yeah. I had my back to him actually.

21 Q. Okay.

22 A. Yeah.

23 Q. All right. And in -- back then, because it is reflecting

24 the transcript, you were there involved in some drug dealing?

25 A. Yeah. Yes, sir.

1 Q. Something you don't do anymore?

2 A. No, sir.

3 Q. All right. Totally got a good job?

4 A. Yes, sir.

5 Q. Okay. And -- was when you talked to Mr. Gregory the
6 first time you have talked about the fact your testimony was
7 inaccurate?

8 A. Say that again.

9 Q. When you saw Mr. Gregory, Keith Gregory, was that the
10 first time you had talked to somebody about your testimony
11 being inaccurate?

12 A. Yes, sir.

13 Q. Did he encourage you to say that in any way?

14 A. No, sir.

15 Q. Has anyone ever encouraged you to say that in any way?

16 A. No, sir.

17 Q. Has anyone coerced you into coming in here and saying
18 this?

19 A. No, sir.

20 Q. I believe you and I met, oh, a couple of months ago one
21 evening and talked about it; ---

22 A. Uh-huh.

23 Q. --- is that correct?

24 A. Yes, sir.

25 Q. All right. Anyone pay you anything to come in here?

1 A. No, sir.

2 Q. It this truly your decision?

3 A. Yes, sir.

4 Q. And it is your decision why?

5 A. I mean because -- it is really the -- a right thing to
6 do, you know.

7 Q. Excuse me?

8 A. I say it is the right thing to do, you know.

9 Q. It is the right thing to do?

10 A. Yes.

11 Q. Thank you. Answer any questions Mr. Limbaugh may have.

12 MR. LIMBAUGH: Thank you. May it please the Court, Your
13 Honor.

14 THE COURT: Uh-huh.

15 **CROSS-EXAMINATION BY MR. LIMBAUGH OF ALEXANDER GILLARD:**

16 Q. Where were you when this incident occurred, Mr. Gillard?

17 A. On side of the gas station.

18 Q. So when you heard the shots did you have a direct line of
19 sight to Mr. Holmes?

20 A. No, I had my head turned towards the store, outside of
21 the building.

22 Q. Okay. So when the incident happened you didn't have any
23 way of knowing who was holding a gun or not?

24 A. No. I ran. And, like I say, he -- like -- and, like I
25 say, Mr. Holmes ran too. Like -- like kind of side-by-side.

1 So, you know.

2 Q. So you had -- you have no idea who shot that night?

3 A. No. I mean I know it wasn't him because I know he --
4 but, like I say, there was no gun in his hand. That is why I
5 know that. You know what I am saying? But I didn't know who
6 shoot though.

7 Q. Because you weren't in a position to see anybody with a
8 gun; is that correct?

9 A. No.

10 Q. Okay.

11 MR. LIMBAUGH: That is all I have of this witness, Your
12 Honor.

13 THE COURT: Okay.

14 MR. WISE: You may come down.

15 THE WITNESS: All right.

16 THE COURT: All right.

17 MR. WISE: And, Your Honor, can this witness be excused?
18 I think he has to get to work eventually.

19 THE COURT: Fine with me. Does the State have an
20 opposition to that?

21 MR. LIMBAUGH: No objection, Your Honor.

22 THE COURT: Yes, sir, you are excused. Thank you very
23 much.

24 (WHEREUPON, witness steps down.)

25 THE COURT: You can call your next witness.

1 MR. WISE: I appreciate it. I had told him we were going
2 to be out of here by 1:00, and we didn't quite make it.

3 THE COURT: I'm sorry about that.

4 MR. WISE: I would like to call Joe Holmes.

5 (WHEREUPON, the witness was duly sworn.)

6 THE CLERK: State your full name and spell your last name for
7 the record.

8 THE WITNESS: Joe Lewis Holmes. H-O-L-M-E-S.

9 **DIRECT EXAMINATION BY MR. WISE OF JOE HOLMES:**

10 Q. All right. Mr. Holmes, back in I believe 1996 you were
11 convicted of this murder?

12 A. 1997.

13 Q. '97?

14 A. Yes, sir.

15 Q. All right. And the murder -- or the shooting allegedly
16 occurred in 19 ...?

17 A. '96.

18 Q. '96?

19 A. Yes, sir.

20 Q. Okay. When did you first learn that Alexander Gillard
21 might change his testimony; ---

22 A. Well ---

23 Q. --- and how did you learn? And you are going to have to
24 speak into this microphone a little bit.

25 (WHEREUPON, microphone adjusted.)

1 Q. There we go.

2 A. Well, my uncle told me that he had saw him at the gas
3 station.

4 Q. Who -- your uncle did?

5 A. Yes, Keith Gregory.

6 Q. Uh-huh.

7 A. Right. And he is saying that. And I said, well, if he's
8 going to change his statement he needs to get in touch with
9 Dale Collins, my lawyer at the time. And the thing -- put --
10 somebody else had took a statement -- a sworn affidavit from
11 him.

12 Q. And that was the statement that was obtained in December
13 of 2015?

14 A. Yes, sir.

15 Q. All right. And that was the first time you had
16 definitive proof that he testified incorrectly at your trial?

17 A. I know he test- --

18 Q. Well, excuse me. Let me rephrase that.

19 A. Okay.

20 Q. Let me rephrase it. The first time you knew he was going
21 to admit he testified incorrectly?

22 A. Yes, sir.

23 Q. Okay. Now do you think that his testimony hurt you at
24 the trial?

25 A. I know it hurt me.

1 Q. All right. Why is that?

2 A. Well, at the time he was a juvenile. He was the only one
3 that had the clean record, to my knowledge, at the time.

4 Q. He what?

5 A. He is the only one I knew had a clean record, at my time.

6 Q. All right. Well, I don't think he had a clean record,
7 just ---

8 A. Well, I am saying to my knowledge.

9 Q. Okay. It wasn't as bad as a bunch of the others?

10 A. William Wade Phillip, Mark O'Brien, Antwan Venning,
11 Maurice Simmons.

12 Q. Now this is -- this was a strange trial, wasn't it, in
13 some respects?

14 A. Yes, sir.

15 Q. All right. Didn't your attorney cross-examine Mr.
16 O'Brien about - all right, the State did too - about a
17 statement that Mr. O'Brien had made about how this shooting
18 occurred?

19 A. Yes, sir. Yes, sir.

20 Q. All right. And for the record, on Page 115 -- let me get
21 the transcript. Page 115 of the transcript at Line 12 through
22 23.

23 A. Okay.

24 Q. Find it? And what does the State ask Mr. O'Brien that is
25 relevant to this case?

- 1 A. You state previously when you talked to the detective,
2 Higgins, that Wade William, White Boy Phillip, went over to
3 the Jeep - yes, sir - and you thought you saw him fire at
4 Kenneth Washington who you said thought was on the ground.
- 5 Q. All right. Fire at who?
- 6 A. Kenneth Washington.
- 7 Q. Kenneth Washington was the deceased?
- 8 A. Yes, sir.
- 9 Q. He was the person that was killed that night?
- 10 A. Yes, sir.
- 11 Q. And so the solicitor is asking Mr. O'Brien if he
12 previously said he saw White Boy shoot Kenneth Washington
13 while Kenneth Washington was on the ground; ---
- 14 A. Yes, sir.
- 15 Q. --- all right, is that correct?
- 16 A. Yes, sir.
- 17 Q. Okay. Now whose gun did it turn out was used in this
18 murder?
- 19 A. Well, he stated that it was his gun and he got rid of the
20 gun.
- 21 Q. Whose gun?
- 22 A. Mr. Phillip. William Wade Phillip.
- 23 Q. Phillip.
- 24 A. Which is known as White Boy.
- 25 Q. All right. Phillip has testified it was his gun,

1 correct?

2 A. Yes, sir.

3 Q. Did he get the gun after the shooting?

4 A. Did he get it? Did he get it from who?

5 Q. Correct. Did he -- he had the gun both before Washington
6 was shot and afterwards?

7 A. That was his statement.

8 Q. Okay. Did he fire -- did he admit firing the gun
9 afterwards?

10 A. He claimed he shot. He shot -- he claimed he shot at the
11 Jeep.

12 Q. All right. And did -- was there any reason for Phillips
13 to be shooting at the Jeep that you know of from the
14 testimony?

15 A. Not to my knowledge.

16 Q. Okay. Now also the trajectory of the bullet is
17 interesting in this case, isn't it?

18 A. Amen.

19 Q. And why is that?

20 A. Well, you know, through the years -- through the years of
21 going back and forth with this transcript, you know, ---

22 Q. And you have lived with this transcript now for 20 years?

23 A. Twenty-plus years.

24 MR. LIMBAUGH: Objection, Your Honor. I am not sure what
25 this has to do with the recantation of the testimony of the

1 witness which is specifically what this evidentiary hearing
2 has been moving forward on.

3 MR. WISE: Well, I think it is in this respect, Your
4 Honor: In order to determine prejudice from the recanting of
5 the testimony I think the Court has to look at the overall
6 evidence presented to the jury.

7 THE COURT: I will allow it. Thank you.

8 MR. WISE: Thank you.

9 Q. Go ahead.

10 A. All I was saying, by me going over this transcript over
11 the years, you know, I prayed and fast with it and dealt with
12 it, you know, and asked for guidance, you know.

13 Q. All right.

14 A. And I wake up one morning with trajectory on my mind.

15 Q. All right.

16 A. The bullet, you know. If you look at my transcript over
17 there on the back of the envelope you have got a bullet and
18 you have got ---

19 Q. All right. I want you to look at the testimony on Page
20 470. Doctor Thorne was the pathologist in this case, wasn't
21 she?

22 A. I'm not sure. Dr. -- what page?

23 Q. Four -- 470. I should have gotten it for you. I'm
24 sorry. Let me get it. No, it is in this one (motioning). It
25 is not in this one (motioning). Excuse me.

1 A. Yes, sir.

2 Q. Okay. What is -- what did Dr. Thorne say about the
3 wound?

4 A. Well, she said on 470 that the path of the bullet was
5 ballistic through soft -- call it soft layer tissues and into
6 an upper right limb and went through corollary scap (ph).

7 Q. So it went through the soft tissue?

8 A. Yes, sir.

9 Q. She didn't talk about it hitting any bone and deflecting?

10 A. No, sir.

11 Q. All right. I would like to mark this for identification.
12 (WHEREUPON, Court's Exhibit Number 2, diagram of skeletal
13 system, was marked for identification.)

14 Q. All right. If you could stand up, please, and point --
15 the Court can see you over from over here. The shoulder --
16 over here now where did the bullet end up being lodged?

17 A. In between the fifth and sixth ---

18 Q. In between the fifth and sixth ribs?

19 A. Right.

20 Q. Down here (motioning)?

21 A. Yes, sir.

22 Q. And entered up here (motioning)?

23 A. Yes, sir.

24 Q. All right. Now is that from your observation consistent
25 with somebody running away from you?

1 A. No, sir.

2 Q. Excuse me?

3 A. No, sir, it said it sliced through thin layers of tissue,
4 from a downward angle.

5 Q. Did someone testify that -- I believe the -- was the
6 testimony generally that Mr. Washington was running away from
7 you when he was shot?

8 A. Yes, sir.

9 Q. All right. Is that consistent with someone being shot on
10 the ground?

11 A. Yeah, downward mo- -- downward angle.

12 Q. All right. Come and demonstrate for me. All right. Lie
13 down on the ground.

14 (WHEREUPON, complied.)

15 Q. And the entry wound was where?

16 A. (Motioning).

17 Q. Right shoulder?

18 A. Yes, sir.

19 Q. All right. And the bullet was found between the fifth
20 and sixth ribs?

21 A. Yes, sir.

22 Q. Approximately where on your body?

23 A. It would be over here [pointing].

24 Q. All right. Would that be consistent with somebody
25 standing at this angle (motioning)?

1 A. You would see that a little higher.

2 Q. Excuse me?

3 A. A little higher. Somebody over -- coming ---

4 Q. Okay. All right. So it entered -- it entered about here
5 [motioning]?

6 A. Yes, sir.

7 MR. LIMBAUGH: Your Honor, the applicant is not an
8 accident reconstructionist. He doesn't have -- I mean ---

9 THE COURT: The court understands that.

10 MR. WISE: Yeah.

11 THE COURT: This is -- this is a bench --

12 MR. WISE: I'm not ---

13 THE COURT: --- proceeding.

14 MR. WISE: I hope I am not ---

15 THE COURT: And I understand that we are not obviously in
16 front of a jury, so I mean I -- but I ---

17 MR. LIMBAUGH: Just for -- just for the record, Your
18 Honor.

19 THE COURT: Your objection is noted for the record.

20 MR. WISE: This is for demonstrative purposes only.

21 Q. The bullet entered roughly here [pointing]?

22 A. Yes, sir.

23 Q. And was on the bottom side here [pointing]?

24 A. Yes, sir.

25 Q. Okay. Thank you. You can step back up there.

1 (WHEREUPON, witness returns to witness stand)

2 Q. Now Mr. O'Brien was impeached at the trial, wasn't he?

3 A. Well, we tried to impeach -- we had Judge Cunningham when
4 we first started this trial. We tried to get all of it
5 impeached then.

6 Q. All right. Well, let me ask you this: Mr. O'Brien
7 testified at the trial that he had no deal?

8 A. Yes, sir.

9 Q. That is correct?

10 A. Yes, sir.

11 Q. Did the State enter into a stipulation at your trial that
12 that testimony was inaccurate?

13 A. Well, I think -- I know -- I think it was ---

14 Q. Turn -- turn to Page 149, Line 10.

15 A. Line 10, 149. Yes, sir.

16 Q. All right. Is that a stipulation that was entered into?

17 A. You have got -- Mr. Marvin O'Brien, there is an agreement
18 that he is on probation now and failure to stop for a blue
19 light.

20 Q. Right. And if you go toward the end of that, the
21 government had agreed to use their full power to keep him out
22 of jail basically; didn't they?

23 A. Yes, sir.

24 Q. Okay. Now William Phillips was at one time charged with
25 murder, ---

1 A. He was charged with ---
2 Q. --- correct?
3 A. Yes, sir.
4 Q. The same murder you were?
5 A. Yes, sir.
6 Q. All right. And the State reduced his charge down to --
7 do you know what they reduced it down to?
8 A. It was just ---
9 Q. Obstruction of justice.
10 A. Of justice. That is what it is. Five years.
11 Q. Obstruction of justice?
12 A. For five years.
13 Q. And that is on Page 315 of the transcript, correct? You
14 don't have to read ---
15 A. All right.
16 Q. Now the other so-called witness to this was Antwan
17 Venning, ---
18 A. Yes, sir.
19 Q. --- correct?
20 A. Yes, sir.
21 Q. All right. Did Mr. Venning testify that after the shots
22 were fired he saw Mr. Washington running away?
23 A. Yes, sir.
24 Q. All right. And did Mr. Venning testify he had been given
25 immunity from prosecution?

1 A. Yes, sir.

2 Q. Excuse me?

3 A. Yes, sir.

4 Q. All right. And that is on Page 189 of the transcript?

5 A. Yes, sir.

6 Q. All right. And Mr. Venning later said, I believe on Page
7 161, that he didn't know that Mr. Washington had been shot ---

8 A. Yes, sir.

9 Q. --- until hours later?

10 A. Hours later. I mean that is what he said. Because he
11 said -- he stated that when the shot happened he say he stated
12 that during the course of the argument and everything before
13 it took place he walked away from the Jeep and he was -- he
14 tell let's go. Antwan Venning was coming by. And he watched
15 him come behind him, ---

16 Q. Uh-huh.

17 A. --- right.

18 Q. Yeah.

19 A. And that is on Page -- Page 173. They asked him -- 183
20 they asked him, well, how did I -- shooting a gun and did he
21 see him with a gun. He said no.

22 Q. Okay.

23 A. He didn't see him with no gun. You know.

24 Q. All right. And he also was able to pick you up out of a
25 photo lineup; ---

1 A. No, sir.

2 Q. --- is that correct?

3 A. He didn't see -- he didn't pick me out of a photo lineup.

4 Q. Let me rephrase the question. At the trial did he
5 testify about picking you up out of a photo lineup?

6 A. He stated that he -- he didn't -- he couldn't pick me up
7 out of no photo lineup.

8 Q. He couldn't pick it up?

9 A. Right.

10 Q. Okay.

11 A. Like I say, he wasn't sure.

12 Q. All right. Now did you know Alexander Gillard back then?

13 A. I knew him as a child, yeah.

14 Q. You knew him as a child, not as ---

15 A. I seen him. You know, he

16 Q. He wasn't a running buddy of yours or anything like that?

17 A. That's -- I've got kids older than him.

18 Q. Okay. So did -- was Mr. Gillard in your opinion a key
19 witness?

20 A. Yes, sir.

21 Q. In what respect?

22 A. Like I told you long before I first started this here ---

23 Q. You what?

24 A. So I first -- first started, to my knowledge he was the
25 only one that didn't have a record that I know of. You know

1 what I mean?

2 Q. Right.

3 A. He was like innocent and everybody else was like

4 Q. And was his testimony severely impeached in any way
5 through any deals or anything?

6 A. He said he didn't have -- he said tell them you ain't had
7 no deal.

8 Q. I understand that. But, you know, Mr. Venning had a deal
9 for immunity?

10 A. Right

11 Q. All right. Mr. O'Brien was impeached for contradictory
12 statement by the State, ---

13 A. Right.

14 Q. --- correct? Mr. Phillips who is the owner of the gun
15 was -- cut a deal for obstruction of justice down from murder,
16 correct?

17 A. Yes, sir.

18 Q. And probation?

19 A. Yes, sir.

20 Q. All right. But Mr. Gillard had none of that?

21 A. Yes.

22 Q. All right. Now just briefly, tell us what the testimony
23 was about -- excuse me, in the trial what was the testimony
24 about what Mr. Phillips did with the gun after the shooting?

25 A. Mr. Phillips?

1 Q. Right.

2 A. He said he got rid of it.

3 Q. He got rid of it. Did he carry it over to somebody's
4 house?

5 A. Well, they said they had met up at Mr. Gillard's house.

6 Q. Excuse me?

7 A. They met up at Mr. Gillard's house.

8 Q. Okay. And he carried the gun over there?

9 A. Yes, sir.

10 Q. All right. And hid it?

11 A. He got -- he got rid of it.

12 Q. Okay. And Mr. Phillips brought the gun to the ---

13 A. Yes, sir.

14 Q. --- to the scene ---

15 A. Yes, sir.

16 Q. --- and left with it?

17 A. Yes, sir.

18 Q. And I believe gunshot residue established he had fired a
19 gun too?

20 A. Yes, sir. He fired a gun. It was in an other hand -- it
21 was in the palm and other hand.

22 Q. Okay.

23 A. Him and Mr. Maurice Simmons had gun residue ---

24 Q. Excuse me?

25 A. Him and Mr. Maurice Simmons had gun residue in their

1 hand.

2 Q. Okay.

3 A. Yes, sir.

4 Q. All right. Thank you very much. Answer any questions
5 Mr. Limbaugh might have.

6 MR. LIMBAUGH: May it please the Court, Your Honor.

7 THE COURT: Uh-huh.

8 **CROSS-EXAMINATION BY MR. LIMBAUGH OF JOE HOLMES:**

9 Q. So there has been some talk of the record at your trial
10 and the witnesses being impeached. That did all come out at
11 the trial, right, with their immunity and the records and all
12 of that, that has already come out at the trial; is that
13 correct?

14 A. Did it came out at the trial?

15 Q. Yes.

16 A. I wouldn't say it really did, because we had a lot of
17 sidebars that I really didn't really hear. But later on
18 reading in the transcript I deter- -- detect that they
19 mentioned something like that.

20 Because a matter of fact Mr. Feldman and Mr. Marshall and
21 Your Honor Pieper had a sidebar stating that they wanted to
22 bring Mr. Marshall as a witness. But he said he didn't want
23 to be a witness. To elaborate that there was deals being
24 made.

25 If you look at Page I think 228 in the transcript I think

1 it talks about the deal being made.

2 Q. Okay. But the deals were talked about on the record,
3 correct?

4 A. (No answer).

5 Q. Okay.

6 THE COURT: I'm sorry, did he answer?

7 What did you say?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Okay.

10 A. But three of the deals.

11 Q. And who do you remember being around you when the
12 incident occurred?

13 A. It was -- okay, like -- I was out here. We had William
14 Wade Phillip, Mark O'Brien, Harvey Simmonds. I think it was
15 Peter -- Paul -- whatever his name is. There was quite a few
16 guys out there at the time.

17 Q. Okay. And the people that were directly with you when
18 the incident occurred testified that they saw you with the
19 gun; is that correct?

20 A. Yeah, in the -- a deal that they said that.

21 Q. Okay. And Mr. Gillard was not directly with you when the
22 incident occurred; is that correct?

23 A. None of them -- none of them was really with me, if that
24 is what you stated. Because if you look at the transcript,
25 right, the guys who had the deal, one of them said they

1 came -- it was Antoine Venning came up and he left. And he
2 stated in the transcript that he didn't see me with no gun.
3 You had Mark O'Brien state that he saw William Wade Phillip
4 shot down at the man on the ground, right. And William Wade
5 Phillip didn't give a statement until fourteen months later,
6 fourteen-and-a-half months later when he got his deal.

7 Q. I guess my question is Mr. Gillard was not in a position
8 that you know of to see you with a gun or to see you without a
9 gun?

10 A. Well, I can't -- I can't speak for he -- what he could
11 see and he can't see, ---

12 Q. Okay.

13 A. --- to be honest with you.

14 Q. Fair enough.

15 MR. LIMBAUGH: A moment's indulgence, Your Honor.

16 THE COURT: Uh-huh.

17 Q. So the jury here did hear the testimony of O'Brien
18 Phillips and Venning saying -- well, they said that either at
19 one point -- I don't know if O'Brien said you had the gun,
20 Phillips did. Venning may have flip-flopped a little. But
21 they heard all of that testimony and you were convicted; so
22 they must have --

23 MR. LIMBAUGH: Let me rephrase, Your Honor.

24 Q. They heard all of that testimony; is that correct, okay,
25 and they heard Mr. Gillard's testimony; is that correct?

1 A. Yes, sir.

2 Q. Okay. That's all I have for this witness, Your Honor.

3 THE COURT: All right. Anything in redirect?

4 **REDIRECT EXAMINATION BY MR. WISE OF JOE HOLMES:**

5 Q. Let me ask you one quick question; because I thought it
6 was in his notes, and I didn't find it. You mentioned Venning
7 saying that he didn't see you with a gun?

8 A. Right.

9 Q. What page was that on? Because I think we are confusing
10 171 and 161.

11 A. I think it is one eighty (pause to refer to
12 document).

13 THE COURT: I think it is Page 183, Line 19.

14 [Reading by witness as follows:]

15 A. Did -- did you know from your previous observation how it
16 was Joe Holmes came to possess a handgun?

17 No, sir.

18 At the time that you walk off and said man let's go, did
19 you see him holding the gun at any time?

20 No, sir.

21 Q. Okay. So that -- right before the shooting he didn't see
22 you with a gun?

23 A. He ---

24 Q. And that is on what page?

25 A. That is on two -- 183.

1 Q. One eighty-three. Okay. Thank you.

2 MR. WISE: That's all, Your Honor.

3 THE COURT: Okay. You may step down, sir. Well,
4 anything else from the State on that note? I'm sorry. Give
5 you the opportunity.

6 MR. LIMBAUGH: Just one, Your Honor.

7 THE COURT: Sure. Go ahead.

8 **RECROSS-EXAMINATION BY MR. LIMBAUGH OF JOE HOLMES:**

9 Q. So the jury heard testimony from someone that was with
10 you that you didn't have a gun; is that correct?

11 A. You are back saying what -- you are acting like we had
12 been together and committed this crime together that they
13 allege that I committed. So I can't say, you know, with me.

14 Q. They heard testimony from someone who was allegedly with
15 you that said that you did not have a gun; is that correct?

16 A. Yes, sir.

17 MR. LIMBAUGH: That is all I have, Your Honor.

18 MR. WISE: Now you can come back.

19 THE COURT: Step on down, sir. Thank you, Mr. Holmes.
20 You can have a seat back at counsel table.

21 MR. WISE: Your Honor, in an effort to keep the Court
22 from reading a lengthy transcript -- and I have given a copy
23 of this to the government.

24 THE COURT: Okay.

25 MR. WISE: I had a cheat sheet.

1 THE COURT: Okay. Thank you.

2 MR. WISE: And it is the relevant portions that -- it's
3 the relevant portions of the transcript that he talked about
4 where we felt that the witnesses were severely impeached to
5 the extent that without the testimony of Mr. Gillard a jury
6 would have had a great deal of difficulty convicting Mr.
7 Holmes of this charge. At least I think it is sufficient to
8 call it into a realistic doubt.

9 Because they were, as you will see when you read that,
10 that it is pretty -- they were effectively impeached. Mr.
11 Gillard was not.

12 THE COURT: Okay. And just because I had a little bit of
13 trouble understanding Mr. Gillard, is the argument that Mr.
14 Gillard was sort of threatened into the testimony that he gave
15 or was made to feel afraid; is that the gist of the argument
16 from ---

17 MR. WISE: Sixteen-year-old kid, basically pushed into
18 it; that is correct.

19 THE COURT: Okay.

20 MR. WISE: I don't think it would be accurate to say
21 they -- threat, threat. But, you know, encouraged what --
22 that is basically his testimony, he was encouraged to say
23 that.

24 THE COURT: Right, encouraged. Okay. Okay. And I mean
25 I will ask -- I can get that portion of the transcript from

1 the court reporter. But I just wanted ---

2 MR. WISE: All right. And of course it is in his
3 affidavit that he submitted too.

4 THE COURT: Right. Right. Okay. Okay. Okay. All
5 right.

6 MR. WISE: Thank you.

7 THE COURT: What would the State like to say? Anything?

8 MR. LIMBAUGH: Just briefly, Your Honor. This is newly
9 discovered evidence that he is alleging here. The State would
10 argue that this is merely cumulative or impeaching as
11 solicited Mr. Venning. The jury heard from someone who was
12 allegedly with Mr. Holmes that he didn't have a gun. So it is
13 not new information that somebody who he was with says he
14 didn't have a gun.

15 They -- the jury heard Mr. Phillips and Mr. O'Brien
16 testify that he did have a gun. And were also as applicant's
17 counsel -- or as applicant says, they were impeached and the
18 jury heard that information and they heard the testimony and
19 convicted Mr. Holmes.

20 The State would just like for the record to site to
21 Johnson v. Cato which refers to recantation testimony which is
22 moreover inconsistency in statements, undermines the
23 possibility that the result of a new trial would be different.
24 So looking at the standard for review.

25 And then State v. Wright where the ground for a new trial

1 is the recantation of the testimony, the closest scrutiny
2 should be applied as this type of testimony is ordinarily
3 unreliable.

4 So the State would offer that this recantation by Mr.
5 Gillard would not change the result of a new trial and that it
6 is merely cumulative or impeaching and the result in a trial
7 would be the same, Your Honor.

8 THE COURT: All right. All right. I'm going to ask you
9 to do the same thing as I did for the last case which is that
10 both parties submit within 30 days. Or if that needs to be
11 extended, that is fine. Just let me know. Proposed order,
12 all right, stating your positions. Okay.

13 MR. WISE: All right.

14 MR. LIMBAUGH: Thank you, Your Honor.

15 THE COURT: Thank you very much. Appreciate that.
16 Appreciate your time.

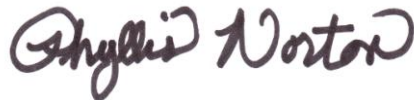
17 (WHEREUPON, the PCR hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth 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 proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on March 18, 2019.

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

A handwritten signature in dark ink that reads "Phyllis Norton". The signature is written in a cursive, flowing style.

PHYLLIS NORTON, CVR

Date: March 25, 2020

Certified Transcript Provided For: SCCID
Certification Reference #2020-0325

COPY

STATE OF SOUTH CAROLINA)

~~AFFIDAVIT OF ALEXANDER GAILLARD~~

COUNTY OF CHARLESTON)

Personally appeared before me, Alexander Gaillard, who being duly sworn does depose of say:

That I am 35 years of age and that I live at North Charleston, SC.

That on July 18, 1996, I was sixteen years of age.

That on that date above, I was with friends at the Amoco Station on Rivers Avenue in North Charleston.

That while I was in the Amoco Station, I heard shots and ran behind the station. I saw Joe Holmes, White Boy, Poochie, and other people running around.

That White Boy walked to the Jeep and fired shots into the Jeep with a pistol.

That the police questioned me later that night and they kept telling me that Joe Holmes had fired the gun also, and that I had to put that in my statement as well.

That I had been drinking that night, was confused, and kept asking to speak to my mother before I made any statement, but was never allowed to make any calls to her that night until I agreed to sign the statement the Police wanted me to make, the next day. I had been questioned continuously for over eight hours.

That before trial the Solicitor reduced a Strong Armed Robbery charge I had pending to an Assault and Battery of a High and Aggravated Nature and recommended probation for me, and I was told once again, I had to testify that Joe Holmes had a gun that night, and that he gave it back to White Boy.



COPY

That while I was out on bond I missed a Roll Call date and a bench warrant was issued for my arrest and I was picked up and detained at Leeds Ave.

That I called the Solicitor to ask for his help and wanted to make sure that I was still going to testify for the State against Joe Holmes.

That once I acknowledged I would still be a witness for the State and testify that Joe Holmes had a pistol the night of the murder, the Solicitor, Cameron Marshall agreed to rescind the bench warrant and to arrange for my release from the jail at Leeds Ave.

That after eighteen years, I want to set the record straight and let the Court know that I never saw Joe Holmes with a gun, never saw him shoot a gun, and never knew him to carry a gun.

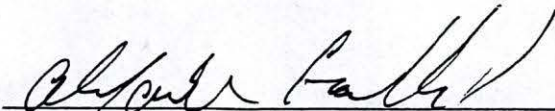
That the only person I saw that night possess and shoot a gun was Wade Phillips, who we all know as "White Boy".

That the only reason I testified as I did at the trial was because of the pressure placed on me to do so, by the police and the Solicitor, and the fact that I was only sixteen years old at the time, and did not know I could have stopped the interrogation that night at the police station or at the Solicitor's Office.

That I have not been threatened, forced, coerced, or offered any reward to make this statement and I do so willingly, intelligently, and of my own free will and accord.

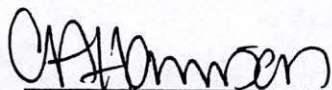
Further your deponent saith naught.

COPY



Alexander Gaillard

SWORN to before me this
14th day of December, 2015.



(L.S.)

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 5/6/2025

cc
A 696
AG
SOL
G's

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joe Lewis Holmes, #244813,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2016-CP-10-6293

ORDER OF DISMISSAL

FILED
2019 JUN 24 AM 11:17
JULIE J. ARNETT
CLERK OF COURT

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Applicant was indicted at the January 1997 term of the Charleston County Grand Jury for murder (1997-GS-10-0606). H. Stanley Feldman, Esquire, represented Applicant on that charge. Cameron L. Marshall, prosecuted the case. Applicant proceeded to trial on October 20-22, 1997 before the Honorable Daniel F. Pieper, after which a jury found guilty as indicted. Judge Pieper sentenced him to confinement for life without parole (LWOP).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Holmes, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

2000-CP-10-2042

Applicant subsequently filed his first PCR application on May 30, 2000, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and relief from judgment order. An evidentiary hearing into the matter was convened at the Charleston County Courthouse before

JBM/1

the Honorable R. Markley Dennis, Jr. Applicant was present and represented by Daniel A. Beck. By written Order dated March 28, 2002, Judge Dennis denied and dismissed the application.

2004-CP-10-0560

Applicant then filed a *second* application for post-conviction relief on February 9, 2004 alleging that the trial court lacked subject matter jurisdiction. An evidentiary hearing into the matter was convened on January 18, 2005 at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and represented by Andrew Grimes, Esquire. Adrienne L. Turner of the South Carolina Attorney General's Office represented Respondent. On February 23, 2005, Judge Jefferson denied and dismissed the application with prejudice. A timely Notice of Appeal and a Johnson Petition for Writ of Certiorari was perfected by Robert Pachak of the South Carolina Office of Appellate Defense. On September 27, 2006, the South Carolina Court of Appeals denied the Petition and dismissed the case.

2006-CP-10-4461

Applicant filed a *third* PCR application on November 14, 2006, alleging ineffective assistance of PCR counsel. On April 10, 2008, the Honorable Roger M. Young, Sr., by written order dismissed the action with prejudice.

2010-CP-10-5612

Applicant subsequently filed a fourth application for post-conviction relief alleging:

1. "Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?"
2. "The State's Post Conviction Procedure process is an inadequate remedy for the hearing of federal constitutional claims."
3. "Were the jury instructions given in the instant case unconstitutional and burden-shifting in violation of due process?"
4. "Is Petitioner's conviction unconstitutional under State v. Belcher?"

JBM/2

On March 17, 2011, by written Order, the Honorable Kristi Harrington dismissed the Application with prejudice.

II.

In his *fifth* and current PCR action, Applicant is alleging the following grounds for relief:

1. Newly-discovered evidence.
 - a. Applicant has recently discovered new evidence which should entitle him to a new trial.
 - b. "Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015."
2. Ineffective assistance of trial counsel and post-conviction relief counsel.
 - a. Trial counsel and post-conviction relief counsel failed to adequately investigate and prepare the case for trial and post-conviction relief hearing.
 - b. "Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward through the aorta and into the fifth and sixth ribs. Appendix 470, 11 15-25. (Testimony Dr. Leigh Thorne) 702, (autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washington was shot while running away from assailant.

On October 5, 2018 a hearing was held in Charleston County in front of Honorable Michael G. Nettles on the State's motion to dismiss the application. The Court dismissed Applicant's ineffective assistance of counsel allegations and allowed him to proceed on the newly-discovered evidence grounds, specifically, on the recanted testimony of Alexander Galliard.

Statement of Facts

This case involves the murder of Kenneth Washington in Charleston County in the morning hours of July 19, 1996. At approximately 6:00 am that morning, Applicant and Steven Mark O'Brian approached a group of people "hanging out" in hopes of buying crack cocaine. Washington sold Applicant crack cocaine. An argument immediately ensued between Applicant and Washington about whether the crack was real or fake. Washington and his friend, Antwan Venning attempted to leave the scene and began walking toward Venning's jeep. Applicant was

handed a gun from another bystander, William Phillips. Applicant fired at least two shots at Washington as he was walking away. Washington was shot below the right shoulder blade, lacerating the aorta and causing him to bleed to death. Applicant and the group of onlookers who witnessed the argument and shooting fled.

Before fleeing, Phillips retrieved his gun from Applicant and shot one of the jeeps tires. Simultaneously, Alexander Gaillard took an unloaded shotgun from the back of the jeep. Phillips, Gaillard, and Maurice Simmons proceeded to Gaillard's home to stash the shotgun. The three were stopped and questioned by police on their way back to the crime scene. Shortly after the incident, Venning and O'Brian voluntarily gave statements to police, identifying Applicant as shooting the victim.

During an intensive search of almost two weeks by the North Charleston Police Department, Applicant turned himself in on July 31, 1996.

Findings of Facts 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 presented, which allowed the Court to scrutinize the credibility presented. 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 has alleged numerous instances of ineffective assistance of counsel against trial counsel, William Brunson. Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a “‘reasonably competent attorney.’ ” 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. 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, 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 an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. “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). The 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 the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must

be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant’s allegation is addressed fully below:

JBM/7

Newly Discovered Evidence

This Court finds Applicant has wholly failed to set forth a *prima facie* case, which would permit this application based on newly discovered evidence. The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

As an initial matter, this Court finds the testimony of Alexander Gaillard and Joe Holmes is not credible. The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, “our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.” *State v. Mercer*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009) (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643). “When testimony is in direct conflict and depends

JBW/10

largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence.” *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)). Moreover, where the ground for a new trial is the recantation of testimony, the closest scrutiny should be applied, as this type of testimony is ordinarily unreliable. *State v. Wright*, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977). Additionally, inconsistency in statements undermines the possibility that the result of a new trial would be different. *See Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001) (holding the petitioner failed to meet the requirement for a new trial such that the evidence would probably change the result if a new trial were granted when the witnesses upon which the newly discovered evidence was based made prior inconsistent statements and, therefore, was not credible).

At the evidentiary hearing, Alexander Gaillard testified that he was pressured into his testimony at the original trial. Mr. Gaillard testified at the evidentiary hearing that he did not see Applicant with a gun, as he was at the front of the gas station when the shooting occurred. Mr. Gaillard testified that he was never in a position to see anyone with a gun that night and that he did not have a line of sight to the incident location. Applicant testified that he never had a gun that night and that the gun was William Phillips’. Applicant testified that Mr. Phillips was originally charged with murder in this case. Applicant testified that Mr. Phillips had possession of the gun before and after the shooting. The record indicates that both Antwan Venning and William Phillips both testified at trial that Applicant was the shooter. The testimony of Mr. Venning and Mr. Phillips both place the gun in Applicant’s hands during the shooting. The recantation of Mr. Gaillard does not have a probability of changing the result of a new trial and is merely cumulative to the testimony of Mr. Venning and Mr. Phillips.

This Court finds Applicant has failed to make a *prima facie* showing he is entitled to relief

Jan 19

based on the information set forth above. Specifically, this Court finds Applicant has wholly failed to establish the information presented at the evidentiary hearing would: (1) change the result if a new trial were had; (2) is not merely cumulative or impeaching. This Court further finds the inconsistency in Gaillard's statements are unreliable and undermine the possibility the result of a new trial would be different. Accordingly, this application must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

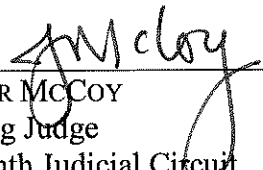
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has 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 Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

JBM/10

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 21st day of June, 2019.



JENNIFER MCCOY
Presiding Judge
Fourteenth Judicial Circuit

Charleston, South Carolina

JBa/11

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Joe Lewis Holmes, #244813,	)	2016-CP-10-6293
	)	
Applicant,	)	
	)	
v.	)	Motion to Alter or Amend Judgment
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Joe Lewis Holmes, the applicant above named, hereby moves the Court to alter or amend the judgment entered in this matter in the following particulars:

1. The Order failed to consider or rule upon the issues raised by the Applicant that the facts of the case are such that the shooting could not have occurred in the manner described by the State and, therefore, the recanting or changing of any testimony would probably have caused a different result.

2. In making the determination that the testimony of Alexander Gaillard not to be credible, the Order made no factual findings to support such a determination. The Order makes no reference to inconsistent statements by Mr. Gaillard. His present testimony was not impeached by others. He also has had no criminal record in over 20 years with which his testimony could be impeached. In full filling the role as gatekeeper, this Court failed to articulate a basis for finding Mr. Gaillard not to be credible.

3. In the Order, this Court also found the testimony of Joe Holmes not to be credible but failed to state which part of his testimony was not credible. From a review of his testimony, obviously part of his testimony is in fact credible. When Mr. Holmes demonstrated the path of

the bullet, the testimony was in keeping with the laws of physics and had to be credible.

4. The Order of the Court refers to the “inconsistency in Gaillard’s statements are unreliable and undermine the possibility the result of a new trial would be different.” Order at 10. The Court failed to list any alleged inconsistencies upon which this finding could be made.

Therefore, the Applicant moves that this Court reconsider this matter and issue an Order granting the relief requested by the Applicant.

July 2, 2019



C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 6188

Attorney for Joe L. Holmes

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Joe Lewis Holmes, #244813,	)	Case No. 2016-CP-10-6293
Applicant,	)	
	)	RETURN TO APPLICANT'S "MOTION
	)	TO ALTER OR AMEND JUDGEMENT"
v.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

Respondent, by and through undersigned counsel, making its Return to Applicant's "Motion to Alter or Amend Judgement," would respectfully show unto this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Applicant was indicted at the January 1997 term of the Charleston County Grand Jury for murder (1997-GS-10-0606). H. Stanley Feldman, Esquire, represented Applicant on that charge. Cameron L. Marshall, prosecuted the case. Applicant proceeded to trial on October 20-22, 1997 before the Honorable Daniel F. Pieper, after which a jury found guilty as indicted. Judge Pieper sentenced him to confinement for life without parole (LWOP).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Holmes, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

2000-CP-10-2042

Applicant subsequently filed his first PCR application on May 30, 2000, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and relief from judgment order. An evidentiary hearing into the matter was convened at the Charleston County Courthouse before

the Honorable R. Markley Dennis, Jr. Applicant was present and represented by Daniel A. Beck. By written Order dated March 28, 2002, Judge Dennis denied and dismissed the application.

2004-CP-10-0560

Applicant then filed a *second* application for post-conviction relief on February 9, 2004 alleging that the trial court lacked subject matter jurisdiction. An evidentiary hearing into the matter was convened on January 18, 2005 at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and represented by Andrew Grimes, Esquire. Adrienne L. Turner of the South Carolina Attorney General's Office represented Respondent. On February 23, 2005, Judge Jefferson denied and dismissed the application with prejudice. A timely Notice of Appeal and a Johnson Petition for Writ of Certiorari was perfected by Robert Pachak of the South Carolina Office of Appellate Defense. On September 27, 2006, the South Carolina Court of Appeals denied the Petition and dismissed the case.

2006-CP-10-4461

Applicant filed a *third* PCR application on November 14, 2006, alleging ineffective assistance of PCR counsel. On April 10, 2008, the Honorable Roger M. Young, Sr., by written order dismissed the action with prejudice.

2010-CP-10-5612

Applicant subsequently filed a fourth application for post-conviction relief alleging:

1. "Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?"
2. "The State's Post Conviction Procedure process is an inadequate remedy for the hearing of federal constitutional claims."
3. Were the jury instructions given in the instant case unconstitutional and burden-shifting in violation of due process?"
4. "Is Petitioner's conviction unconstitutional under State v. Belcher?"

On March 17, 2011, by written Order, the Honorable Kristi Harrington dismissed the Application with prejudice.

II.

In his *fifth* and current PCR action, Applicant is alleging the following grounds for relief:

1. Newly-discovered evidence.
 - a. Applicant has recently discovered new evidence which should entitle him to a new trial.
 - b. “Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015.”
2. Ineffective assistance of trial counsel and post-conviction relief counsel.
 - a. Trial counsel and post-conviction relief counsel failed to adequately investigate and prepare the case for trial and post-conviction relief hearing.
 - b. “Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward through the aorta and into the fifth and sixth ribs. Appendix 470, 11 15-25. (Testimony Dr. Leigh Thorne) 702, (autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washington was shot while running away from assailant.

On October 5, 2018 a hearing was held in Charleston County in front of Honorable Michael G. Nettles on the State’s motion to dismiss the application. The Court dismissed Applicant’s ineffective assistance of counsel allegations and allowed him to proceed on the newly-discovered evidence grounds, specifically, on the recanted testimony of Alexander Galliard.

On March 18, 2019 a hearing was held in Charleston County in front of the Honorable Jennifer McCoy on Applicant’s newly-discovered evidence grounds. Judge McCoy dismissed the application. The Order of Dismissal was signed by Judge McCoy on June 21, 2019 and was filed on June 24, 2019.

Subsequently, on July 2, 2019, Applicant, through his counsel submitted a “Motion to Alter or Amend Judgement.”

III.

In his “Motion to Alter or Amend Judgement,” Applicant asserts the facts of the case are such that the shooting could not have occurred in the manner described so recanting testimony would have changed the outcome, there were no factual findings to support Alexander Gaillard being found not to be credible, not specific as to which part of Joe Holmes’ testimony was not credible, and not explicitly listing inconsistencies in Gaillard’s statements.

Respondent submits this Court’s order of dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRPC. *See also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits this Court fully ruled on all issues properly presented through Applicant’s post-conviction relief application, and amendment thereto, and Applicant’s “Motion to Alter or Amend Judgment” should be denied. As each properly raised allegation was addressed fully in the order, Respondent submits Applicant’s assertions are without merit.

IV.

WHEREFORE, having made its Return to the motion, the State requests the relief requested in the motion be denied and that said motion be dismissed.

[signature on following page]

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

BY: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

July 15, 2019.

714
AG
AT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Joe Lewis Holmes, #244813,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
C/A NO.: 2016-CP-07-6293
10

ORDER

**DENYING APPLICANT'S MOTION
TO ALTER OR AMEND THE COURT'S
FINAL ORDER OF JUNE 24, 2019**

FILED
2019 AUG -6 PM 4:04
JULIE J. ARMSTRONG
CLERK OF COURT

THIS MATTER came before the court by way of Applicant's fifth post-conviction relief (PCR) application on the grounds of newly discovered evidence. An evidentiary hearing into the matter was convened on March 18, 2019, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by C. Rauch Wise, Esquire. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office.

Before this court were the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, the State's return, and Applicant's PCR application.

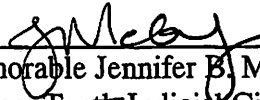
By written order dated June 21, 2019, and filed on June 24, 2019, this court determined that the Applicant failed to prove he is entitled to post-conviction relief based on his allegation of newly discovered evidence, specifically the recanted testimony of Alexander Galliard. The Applicant timely filed a Motion to Alter or Amend pursuant to Rule 59(e) SCRPC on July 2, 2019.

After considering the record in this matter, the arguments of counsel, and the applicable legal authorities, this court respectfully **DENIES** the Applicant's Motion to Alter or Amend and reaffirms its decision in the Order entered on June 24, 2019.

IBM/1

IT IS, THEREFORE, ORDERED that the Applicant's Motion to Alter or Amend the court's June 24, 2019 Order is hereby denied.

July 23, 2019
Charleston, South Carolina



Honorable Jennifer B. McCoy
Judge, Tenth Judicial Circuit
Ninth

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on JANUARY 7, 1997,
the Grand Jurors of CHARLESTON County present upon their oath:

THAT JOE LEWIS HOLMES DID IN CHARLESTON COUNTY ON OR ABOUT THE
19TH DAY OF JULY, 1996, while at [REDACTED], located in the city of North
Charleston, South Carolina, with malice aforethought kill Kenneth Washington by
shooting him with a handgun. This is in violation of Section 16-3-10 of the South
Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.


ASSISTANT SOLICITOR

96-07-MAR-2597

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

NCPD/ROPER

OCA#: 96-0018141

Myers

ARREST WARRANT NO.

ACTION OF GRAND JURY

TRUE BILL

K. Thomas
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 97-GS-10-0606

The State of South Carolina,

County of CHARLESTON

COURT OF GENERAL SESSIONS
JANUARY 1997

TERM

THE STATE

JOE LEWIS HOLMES

DOA: JULY 30, 1996

AW #: E275040

Indictment for

MURDER

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

NEGOTIATED SENTENCE ☐RECOMMENDATION BY THE STATE ☐TRIAL
SENTENCE

GENERAL SESSIONS COURT

Murder

CASE NO. 97-GS-10-0606TICKET/WARRANT NO. E275040Date of Incident: 7-19-96

Statute No. _____

The defendant, Joe Lewis Holmes is committed to the State Dept. of
~~Corrections/County Detention Center/Under Youthful Offender Act~~ for a term of Life days/months
w/o parole
 years and/or to pay a fine of \$ _____; provided the sentence be suspended upon the service of
 _____ days/months/years and/or pay a fine of \$ _____ plus pay/waive costs and assessment as
 applicable*, the balance suspended with probation for _____ months/years.

Special Conditions: ☐ PTUP☐ _____ days/hours Public Service Employment☐ Obtain GED☐ Attend Voc. Rehab or Job Corps.☐ Substance Abuse Counseling☐ Random Drug/Alcohol testing

Other: _____

Concurrent with: _____

Consecutive to: _____

Restitution total x 3% \$ _____

Amount Weekly/Monthly \$ _____

Public Defender Fund \$ _____

Date October 22, 1997

Samuel Roper
 Resident/Presiding Judge, Ninth Judicial Circuit

Fine \$ _____
 Cost & Assessment(62%) \$ _____
 Total \$ _____
 County(3%) \$ _____
 Grand Total \$ _____

INFORMATION ON DEFENDANT

Age: 34 Race: B

S.S. No. _____

Date of Births _____ M ☒ FAttorney: Feldman, StanleySolicitor: Cameron, MarshallCourt Reporter: Rubin, Neil

ALL PAYMENTS MUST BE MADE BY CASH, MONEY
 ORDER OR CASHIER CHECK. WE CANNOT ACCEPT
 PERSONAL CHECKS.

CLERK OF COURT
 2144 MELBOURNE AVE.
 CHARLESTON, SC 29405