STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

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S.C. SUPREME COURT

KEVIN J MERCER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-001419

APPENDIX

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STATE OF SOUTH CAROLINA — COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON — 2003-GS-32-409

THE STATE OF SOUTH CAROLINA :
:
-VS- : TRANSCRIPT OF RECORD
:
KEVIN J. MERCER :

JANUARY 13, 2006
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. FEW, JUDGE.

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

DONALD V. MYERS, ESQUIRE
S. RICK HUBBARD, III, ESQUIRE
D. SHAWN GRAHAM, ESQUIRE
ATTORNEYS FOR THE STATE

CAMERON B. LITTLEJOHN, JR., ESQUIRE
MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

THE COURT: BE SEATED. OKAY. WE ARE BACK IN STATE VERSUS KEVIN MERCER TO DEAL WITH A FEW ISSUES INCLUDING AN ISSUE REGARDING THE SUBSTITUTION OF COUNSEL. WE'LL TAKE THAT UP FIRST. FOR PERSONAL REASONS THAT RELATE TO THE TIMING OF THE SCHEDULING OF THE TRIAL, MS. MCPHERSON ASKED TO BE RELIEVED OR TO HAVE THE TRIAL DELAYED, AND IT'S MY UNDERSTANDING THAT THAT HAS BEEN WORKED OUT AND THAT MELISSA KIMBROUGH WHO IS HERE IS NOW GOING TO STEP IN AS SECOND CHAIR TO MR. LITTLEJOHN IN REPRESENTING MR. MERCER. IS THAT CORRECT?

MR. LITTLEJOHN: THAT'S OUR UNDERSTANDING, YOUR HONOR.

THE COURT: AND YOU HAVE -- YOU BOTH, I UNDERSTAND, HAVE DISCUSSED THIS WITH MR. MERCER?

MR. LITTLEJOHN: YES, YOUR HONOR.

THE COURT: AND -- AND---

MR. LITTLEJOHN: MR. MERCER HAS MET MS. KIMBROUGH THIS MORNING.

THE COURT: OKAY.

MR. LITTLEJOHN: AND HAD TIME TO TALK WITH HER CONCERNING HIS DEFENSE.

THE COURT: ALL RIGHT. ANYTHING YOU WANT TO ADD, MS. KIMBROUGH?

MS. KIMBROUGH: NONE, YOUR HONOR.

THE COURT: MR. MERCER, ARE YOU SATISFIED WITH THIS?

MR. MERCER: YES, SIR.

THE COURT: ALL RIGHT. AND, MR. LITTLEJOHN, YOU'VE HAD DISCUSSIONS WITH HIM ABOUT WHETHER OR NOT HE'S SATISFIED WITH THIS CHANGE AND...

MR. LITTLEJOHN: YES, SIR. WE TALKED ABOUT IT BRIEFLY THIS MORNING BEFORE WE CAME INTO THE HEARING, AND IT'S MY UNDERSTANDING THAT HE IS SATISFIED WITH THE SUBSTITUTION OF COUNSEL.

THE COURT: OKAY. AND YOU -- YOU EASILY MEET THE THREE-YEAR ADMISSION. IS THAT CORRECT?

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: ISN'T THAT THE ONLY REQUIREMENT FOR SECOND CHAIR?

MS. KIMBROUGH: IT IS, YOUR HONOR.

MR. LITTLEJOHN: I BELIEVE SO, YOUR HONOR.

MS. KIMBROUGH: I WAS ADMITTED IN '96.

THE COURT: OKAY. ALL RIGHT. NOW, THE ONE -- THE ONE QUESTION THAT I HAD - AND WE PROBABLY OUGHT TO PULL THE STATUTE OUT TO LOOK AT IT - IS WHETHER OR NOT IT IS NECESSARY TO HAVE A MEMBER OF THE PUBLIC DEFENDER'S OFFICE ASSIGNED IN THE DEFENSE OF EACH DEATH PENALTY CASE. THE STATUTE IS THOUGHT BY SOME, I BELIEVE, TO REQUIRE THAT, BUT IT'S HARD FOR ME TO IMAGINE THAT IT ACTUALLY DOES REQUIRE THAT. HAVE Y'ALL LOOKED AT THAT?

MR. LITTLEJOHN: YOUR HONOR, I CANNOT SAY THAT I

HAVE.

THE COURT: WHAT'S THE STATUTE NUMBER? WHO KNOWS?

MR. LITTLEJOHN: YOUR HONOR, IT'S GOING TO BE IN 16-3, SOMEWHERE IN THERE, 16 DASH 3.

MS. KIMBROUGH: I BELIEVE IT'S 26.

THE COURT: ALL RIGHT. YOU'RE RIGHT.

MS. KIMBROUGH: 16-26.

THE COURT: YEAH. I THINK THAT CLEARLY -- IT SAYS ONLY ONE OF THE ATTORNEYS SHALL BE THE PUBLIC DEFENDER OR A MEMBER OF THE STAFF. THE OBVIOUS PURPOSE OF THAT IS TO -- IS TO MAKE SURE THAT YOU DO -- THAT THE DEFENDANT DOES, IN FACT, GET TWO SEPARATE LAWYERS RATHER THAN JUST TWO PEOPLE WORKING OUT OF THE SAME OFFICE, SO -- ALL RIGHT. SO I DON'T SEE ANY PROBLEM WITH THAT. YOU HAVE PREPARED ME AN ORDER REGARDING THE SUBSTITUTION OF COUNSEL?

MS. KIMBROUGH: YES, YOUR HONOR. I HAD SENT IT TO YOU---

THE COURT: OKAY.

MS. KIMBROUGH: ---BY E-MAIL.

THE COURT: I'VE GOT IT. LET ME... WELL, I THOUGHT I DID. I'VE GOT IT ON HERE. I'LL PRINT IT OUT IN A FEW MINUTES. OKAY. NOW, THE OTHER ISSUES THAT I KNOW WE NEED TO ADDRESS ARE -- WE DID GET THE ORDER FROM COURT ADMINISTRATION ASSIGNING ME TO LEXINGTON FOR THE TWO WEEKS BEGINNING APRIL 10TH. THE ONE THING THAT WE DIDN'T THINK ABOUT WHEN WE

STARTED TALKING ABOUT THAT DATE IS THAT EASTER IS APRIL THE 16TH, AND SO WE OBVIOUSLY DON'T WANT TO SEQUESTER A JURY OVER THE EASTER WEEKEND. SO WHAT I THOUGHT - AND I'VE DISCUSSED THIS, I BELIEVE, WITH BOTH SIDES TOGETHER - IS THAT IF WE GO THROUGH THE QUALIFICATION PROCESS THE WEEK OF APRIL 10TH AND GET ENOUGH JURORS QUALIFIED TO WHERE WE FEEL WE'RE READY TO STRIKE A JURY WHICH IS PROBABLY GOING TO TAKE US AT LEAST 'TIL LATE THURSDAY AFTERNOON ANYWAY, PROBABLY ON INTO FRIDAY -- AND WE'LL JUST STOP RIGHT THERE, AND THEN WE'LL BREAK FOR THE WEEKEND. THEN WE'LL COME BACK ON MONDAY MORNING, STRIKE THE JURY, AND IF WE'RE GOING TO SEQUESTER THE JURY, SEQUESTER THE JURY AT THAT TIME. DOES THAT SUIT EVERYBODY?

MR. HUBBARD: YES, SIR.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: DOES ANYBODY SEE ANY PROBLEMS WITH THAT?

MR. LITTLEJOHN: NO, YOUR HONOR, NOT FROM THE DEFENSE.

MR. HUBBARD: JUDGE, DO YOU THINK WE'D GO INTO A THIRD WEEK IF WE STARTED---

THE COURT: WELL, WHAT DO YOU THINK? I MEAN, YOU TELL ME.

MR. HUBBARD: GENERALLY -- GENERALLY, JUDGE, WE'VE BEEN ABLE TO DO EVEN BOTH HALVES OF A TRIAL, ASSUMING WE GET INTO THAT SECOND STAGE -- WE'VE BEEN ABLE TO DO IT IN FIVE DAYS BEFORE, BUT I DIDN'T KNOW IF IN A PRECAUTION IF YOU WANT

TO AT LEAST LET COURT ADMINISTRATION KNOW WE MIGHT NEED -- IF WE SPILL INTO THAT WEEKEND, THAT FOLLOWING WEEKEND, AND MAYBE INTO THAT MONDAY OR TUESDAY---

THE COURT: OKAY. WELL---

MR. HUBBARD: ---I DIDN'T KNOW IF THAT WOULD LEAVE YOU IN A BIND OR ANYTHING.

THE COURT: I MEAN, IF WE WILL -- ONCE WE START, I MEAN, WE'LL FINISH.

MR. HUBBARD: OKAY.

THE COURT: AND IF I CAN'T GO TO MY NEXT ASSIGNMENT, I JUST CAN'T GO.

MR. HUBBARD: I THINK IT WOULD BE UNDERSTANDABLE.

THE COURT: ALL RIGHT. SO IN TERMS OF SCHEDULING, WE ALL AGREE THAT THAT IS THE WAY WE'RE GOING TO HANDLE THE SCHEDULING.

MR. LITTLEJOHN: YES, YOUR HONOR.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: OKAY. WE'RE GOING TO SOMETIME IN -- WHAT DID WE SAY? MID FEBRUARY? HOPE?

THE CLERK: YES, SIR. FEBRUARY THE 13TH WOULD GIVE US SEVEN WEEKS.

THE COURT: FEBRUARY 13TH SHE'S GOING TO SEND OUT THE SUMMONS TO THE JURORS, AND THAT'S ONLY FOUR WEEKS AWAY, SO WE'VE GOT TO GET CRACKING. WE'VE GOT TO HAVE AN AGREED UPON, HOPEFULLY, OR IF NOT AGREED UPON, A RULED UPON, JUROR

QUESTIONNAIRE. HAVE Y'ALL NORMALLY AGREED ON YOUR QUESTIONNAIRE WITH DEFENSE COUNSEL?

MR. MYERS: WE -- IF THEY HAVE ONE DIFFERENT THAN THE NORMAL ONE, THEY EITHER SUBMIT ONE AND THEN WE TRY TO WORK IT OUT ON WHAT'S SENT OUT...

THE COURT: OKAY. WELL, CAN Y'ALL TRY SOMETIME MAYBE EVEN TODAY OR EARLY NEXT WEEK TO---

MR. MYERS: DO Y'ALL HAVE ONE?

MR. LITTLEJOHN: JUDGE, WE DO NOT HAVE ONE AT THIS POINT.

THE COURT: WHY DON'T YOU GET THE ONE THAT THEY PROPOSE, SINCE THEY HAVE ONE PREPARED, AND THEN YOU LOOK -- Y'ALL LOOK AT IT AND TAKE YOUR TIME AND DECIDE WHAT ELSE YOU MIGHT WANT IN IT OR WHAT IN IT YOU MIGHT OBJECT TO. IF Y'ALL CAN'T WORK THAT OUT, LET ME KNOW VERY SOON ABOUT THE DISAGREEMENT.

MR. MYERS: MAY I ASK A QUESTION?

THE COURT: YES, SIR.

MR. MYERS: DO YOU HAVE A COPY OF THE LAST ONE WE USED?

THE CLERK: YES, SIR. IT'S THE STANDARD...

MR. MYERS: I WOULD PROPOSE THAT THE CLERK SHOW THE DEFENSE THE ONE WE USED IN THE LAST CASE, AND I HAVE NO OBJECTION TO THAT ONE, AND THEN I CAN GET WITH THEM AND WE CAN USE THAT AS A FOUNDATION.

THE COURT: OKAY.

THE CLERK: IT'S USUALLY THE STANDARD THAT WAS PASSED DOWN BY THE SUPREME COURT, YOUR HONOR.

THE COURT: OKAY. WHY DON'T YOU -- WHY DON'T Y'ALL TRY TO GET BACK IN TOUCH WITH ME BY, SAY, A WEEK FROM TODAY---

MR. LITTLEJOHN: YES, SIR.

THE COURT: ---TO REPORT EITHER THAT YOU HAVE AN AGREEMENT OR WHAT THE DISAGREEMENT IS AND I'LL GET IT RULED ON. WE'RE GOING TO DRAW -- SHE SAYS Y'ALL NORMALLY DRAW 300 TO 350. I FIGURED BECAUSE OF EASTER AND THE FACT THAT -- DO WE KNOW WHEN SPRING BREAK IS IN LEXINGTON PUBLIC SCHOOLS?

THE CLERK: I DO NOT KNOW IF IT'S THE WEEK OF THE 10TH OR THE WEEK OF THE 17TH AFTER EASTER. I'M NOT SURE.

MR. HUBBARD: APRIL 10TH IS WHAT...

THE COURT: APRIL 10TH?

MR. HUBBARD: YES, SIR, YOUR HONOR.

THE COURT: OKAY. WELL, WE'RE GOING TO HAVE TO CONTEND WITH THAT, AND THAT'S NOT GOING TO HURT US TOO BAD. I MEAN, WE CAN -- IF SOMEBODY'S GOING TO BE HERE FOR PART OF THE WEEK AND NOT SOME OTHER PART OF THE WEEK, WE CAN -- SINCE IT'S JURY QUALIFICATION, WE CAN WORK WITH THEM. BUT I FIGURED WE'D DRAW 350. AND THE OTHER ISSUE THAT I KNOW NEEDS TO BE ADDRESSED, I SUPPOSE BY DEFENSE COUNSEL, IS TO MAKE SURE THAT THE DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

HAS GOTTEN DELIVERED TO THEM ALL OF THE INFORMATION THAT THEY NEED IN ORDER TO BEGIN THEIR EVALUATION. AND CAN YOU CHECK ON THAT AND REPORT BACK TO ME AGAIN BY, LET'S SAY, THE MIDDLE OF NEXT WEEK---

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: ---THAT THAT'S BEEN DONE? I UNDERSTAND YOU THINK THERE'S AN APPOINTMENT SCHEDULED, SO MAYBE IT ALREADY HAS BEEN DONE.

MS. KIMBROUGH: YES, YOUR HONOR. I WILL LOOK INTO IT. IN FACT, I'VE PREPARED A TRANSPORT ORDER ON JANUARY 18TH BECAUSE THAT'S THE DATE AND TIME THAT IT'S BEEN SCHEDULED. IT'S BEEN SCHEDULED FOR 8:30 AT CRAFTS-FARROW.

THE COURT: OKAY. HAVE YOU GOT -- DO YOU HAVE THAT ORDER WITH YOU NOW?

MS. KIMBROUGH: I DO. YOUR HONOR, MAY I APPROACH?

THE COURT: SURE.

MS. KIMBROUGH: THIS IS A LETTER FROM THE DEPARTMENT OF MENTAL HEALTH. IT'S NOT D.D.S.N. IT'S THE FORENSIC EVALUATION OF CRIMINAL RESPONSIBILITY AND COMPETENCY.

THE COURT: OKAY.

MS. KIMBROUGH: AND I SUSPECT D.D.S.N. WILL NEED A SEPARATE TIME TO DO THEIR EVALUATION.

THE COURT: ALL RIGHT.

MS. KIMBROUGH: THANK YOU, SIR.

THE COURT: OKAY. THE ONLY OTHER THING THAT I CAN

THINK OF RIGHT NOW IS THAT THERE -- THAT MR. MERCER APPARENTLY FILED SOME SORT OF A MOTION EARLIER THIS MONTH ASKING AGAIN THAT NEW COUNSEL BE APPOINTED. WHERE DO WE STAND WITH THAT?

MR. LITTLEJOHN: YOUR HONOR, I ASKED MR. MERCER ABOUT THAT. APPARENTLY HE HAD PREPARED THAT BEFORE THE LAST HEARING, AND SO HE SENT IT IN THE MAIL AND SOMEHOW IT GOT HERE AFTER WE HAD THE LAST HEARING. I'VE DISCUSSED THAT WITH HIM. HE IS, I THINK, SATISFIED TO GO FORWARD WITHOUT THAT ARGUE -- WITHOUT THAT MOTION BEING HEARD. AM I RIGHT?

MR. MERCER: YES, SIR.

MR. LITTLEJOHN: OKAY.

THE COURT: THAT'S TRUE, MR. MERCER?

MR. MERCER: YES.

THE COURT: SIR?

MR. MERCER: YES.

THE COURT: OKAY. MS. KIMBROUGH, WITH REGARD TO THE ORDER SUBSTITUTING COUNSEL, I HAVE -- MY LAW CLERK SAYS WE CAN'T OPEN IT. SO DID YOU BRING -- YOU BROUGHT -- OH, YOU BROUGHT IT; RIGHT?

MS. KIMBROUGH: I BROUGHT SOME TRANSPORT ORDERS. WHAT I CAN DO IS GET A HARD COPY AND DELIVER IT TO YOU THIS AFTERNOON.

THE COURT: OKAY. ALL RIGHT. NOW, IN THE FUTURE -- AND, MR. MERCER, I WANT YOU TO LISTEN TO THIS. BECAUSE YOU

ARE REPRESENTED BY COUNSEL, ANYTHING THAT YOU WANT TO FILE WITH THE COURT NEEDS TO BE FILED BY YOUR LAWYERS. SO IF YOU WANT SOMETHING FILED, YOU TALK TO YOUR LAWYERS ABOUT GETTING THAT DONE. DON'T FILE ANYTHING ELSE DIRECTLY WITH THE COURT. DO YOU UNDERSTAND WHAT I MEAN? THE REASON FOR THAT IS BECAUSE, FIRST OF ALL, THAT'S THE WAY IT'S SUPPOSED TO BE DONE AND, SECOND OF ALL, I WANT TO MAKE SURE THAT NOTHING GETS LOST.

A COUPLE OF THINGS THAT YOU HAVE FILED WE WEREN'T SURE -- YOU KNOW, YOU SENT IT TO THE SOLICITOR ONE TIME; YOU SENT IT TO SOMEBODY OTHER THAN THE CLERK OF COURT. IF YOU'RE GOING TO FILE SOMETHING, WE WANT TO MAKE SURE IT GETS FILED PROPERLY. SO WORK THROUGH YOUR LAWYERS INSTEAD OF FILING THINGS DIRECTLY. ALL RIGHT. NOW, ANYTHING FURTHER WE NEED TO DISCUSS RIGHT NOW?

MR. HUBBARD: YES, SIR, YOUR HONOR. YOUR HONOR, MR. MERCER ALSO HAS A PENDING LYNCHING CHARGE, A CHARGE THAT HE GOT WHILE HE WAS OVER IN THE LEXINGTON COUNTY DETENTION CENTER AWAITING TRIAL ON THE UNDERLYING MURDER CHARGE. OBVIOUSLY THAT CAN HAVE AN IMPACT ON THE CAPITAL CASE. WE WOULD LIKE TO PROCEED ON THAT LYNCHING CHARGE AS EARLY AS NEXT MONTH, GO AHEAD AND TRY THIS LYNCHING CASE AND SEE WHERE WE STAND ON THAT, AND WE CAN BE PREPARED ON THAT FEBRUARY 13TH.

THE COURT: WHO REPRESENTS HIM?

MR. HUBBARD: THESE ARE THE ONLY TWO LAWYERS OF RECORD THAT I KNOW OF, YOUR HONOR.

THE COURT: DO Y'ALL KNOW IF YOU HAVE BEEN APPOINTED ON THE LYNCHING CHARGE?

MS. KIMBROUGH: YOUR HONOR, I THINK UNDER RULE 608 ANY NEW CHARGES THAT ARISE DURING THE COURSE OF AN ORIGINAL REPRESENTATION YOU'RE RESPONSIBLE FOR HANDLING. HOWEVER, WE WOULD OBVIOUSLY OBJECT TO TRYING THIS CASE THAT SOON. WE'RE GOING TO BE TRYING TO PREPARE FOR A CAPITAL CASE, AND WEDGING IN A LYNCHING TRIAL IN THE MIDST OF A LESS-THAN-HUNDRED-DAY TIME SPAN I THINK IS A LITTLE UNREALISTIC.

MR. HUBBARD: WHAT THE IRONY IS, YOUR HONOR: THEY'RE GOING TO HAVE TO BE PREPARED ON THE LYNCHING CASE TO PREPARE FOR THE CAPITAL CASE BECAUSE IT'S GOING TO BE PART AND PARCEL OF WHEN WE GET TO THAT PENALTY PHASE, OTHER ACTIVITIES, DANGEROUSNESS IN JAIL... ANY OF THOSE ISSUES THAT MIGHT BE THERE IN A TYPICAL CAPITAL CASE, THIS LYNCHING, THE ISSUES FROM THAT LYNCHING CASE, ARE GOING TO BE PART AND PARCEL OF THAT CAPITAL CASE. SO WE'RE NOT ASKING THEM TO DO ANYTHING MORE, AND THE INFORMATION, I THINK, HAS ALREADY BEEN GIVEN TO THEM. WE JUST WANT TO PROCEED TO TRIAL TO RESOLVE THAT ISSUE ONE WAY OR THE OTHER, AND IT COULD BE TO THE DEFENDANT'S BENEFIT IF THAT ISSUE IS RESOLVED. IF THAT TRIAL IS RESOLVED TO HIS FAVOR, THEN OBVIOUSLY IT HELPS HIM IN HIS CAPITAL CASE.

MS. KIMBROUGH: YOUR HONOR, JUST BRIEFLY. IT CERTAINLY DOES NOT INURE TO THE BENEFIT OF MR. MERCER TO HAVE HIS LAWYERS PREPARING FOR A LESSER TRIAL. I MEAN, LYNCHING IS VERY -- IS A VERY SERIOUS CHARGE. THERE ARE NUMEROUS WITNESSES. I JUST GOT ON THIS CASE OFFICIALLY, YOU KNOW, FIVE MINUTES AGO, UNOFFICIALLY ABOUT FOUR OR FIVE DAYS AGO. THERE ARE NUMEROUS WITNESSES. WE ARE IN THE PROCESS OF SEEKING FUNDING FOR A PRIVATE INVESTIGATOR, AS WE BROUGHT TO YOUR ATTENTION. THERE'S NO WAY WE CAN BE PREPARED TO TRY THIS CASE IN FEBRUARY, AND AS I BELIEVE I BROUGHT TO THE COURT'S ATTENTION, I AM GOING TO BE -- I AM LEAD COUNSEL IN A CAPITAL P.C.R. THAT A HEARING HAS BEEN SCHEDULED SEVERAL MONTHS AGO. IT'S SCHEDULED FOR FEBRUARY 20TH IN ORANGEBURG, AND THERE'S JUST SIMPLY NO WAY THAT WE ARE GOING TO BE PREPARED TO TRY A CASE WITH THAT LEVEL OF COMPLEXITY IN A MONTH. AND WE THINK IT'S UNREASONABLE, AND IT CERTAINLY WOULD HURT MR. MERCER BECAUSE WE HAVE TO GET OUR INVESTIGATION DONE AND TO PREPARE THE WHOLE CASE, NOT JUST SOME LITTLE PIECE OF IT, IN THE MIDDLE OF PREPARING FOR, YOU KNOW, A TRIAL THAT HAS HIS LIFE AT STAKE.

FURTHERMORE, WE DON'T KNOW IF WE'RE GOING TO GET TO THE PENALTY PHASE YET, AND I THINK THAT'S SORT OF PUTTING THE CART BEFORE THE HORSE, ASSUMING THAT WE'RE GOING TO GET THERE, AND THAT SOMEHOW THAT'S BENEFICIAL TO US.

MR. LITTLEJOHN: YOUR HONOR, I'D LIKE TO ECHO WHAT

MS. KIMBROUGH SAID. I DON'T HAVE THE FILE IN FRONT OF ME, AND I APOLOGIZE. I HAD A DOUBLE FLAT TIRE THIS MORNING WHEN I WAS GETTING READY TO LEAVE. MY SPARE WAS FLAT ALSO, SO I HAD TO GET HERE BEFORE I COULD GET TO THE OFFICE. BUT IT'S MY UNDERSTANDING I WAS APPOINTED TO REPRESENT MR. MERCER ON THIS PARTICULAR CHARGE, ON THE MURDER CHARGE THAT OCCURRED ON MAY 14TH, 2002.

YOUR HONOR, THE PUBLIC DEFENDER WAS ALSO REPRESENTING MR. MERCER WHEN I WAS APPOINTED. IT'S BEEN MY UNDERSTANDING ALL ALONG THAT THEY HAVE BEEN REPRESENTING HIM ON THE LYNCHING CHARGE AND ANOTHER CHARGE THAT HE HAS PENDING. I'VE DONE VERY LITTLE TO PREPARE FOR THAT BECAUSE I HAVEN'T BEEN APPOINTED.

YOUR HONOR, I'D ALSO ADD THAT I'M SCHEDULED TO TRY A MURDER/DRUG CASE IN FEDERAL COURT BEGINNING IN MARCH THAT'S GOING TO BE QUITE EXTENSIVE AND QUITE INVOLVED, AND TO SUDDENLY BE BROUGHT IN AND HAVE TO TRY A COMPLICATED LYNCHING CASE, I JUST THINK THAT'S COMPLETELY UNFAIR AND WOULD CERTAINLY WORK TO THE DETRIMENT OF MY CLIENT.

MR. HUBBARD: YOUR HONOR, OBVIOUSLY THIS IS AN ISSUE THAT SHOULD BE RESOLVED BEFORE THE CAPITAL CASE. EVEN IF WE DON'T GET INTO THE PENALTY PHASE OF THIS CAPITAL CASE, IT'S SOMETHING THEY'RE GOING TO HAVE TO BE PREPARED FOR, AND IF THEY HAVE A BETTER DATE BETWEEN NOW AND THE TIME WE TRY THIS CAPITAL CASE, WE'RE OPEN TO THAT. BUT, YOUR HONOR, IT'S AN

ISSUE THEY'RE GOING TO HAVE TO DEAL WITH FROM NOW UNTIL THAT CAPITAL CASE ANYWAY. IT IS SOMETHING---

MR. LITTLEJOHN: YOUR HONOR---

MR. HUBBARD: IT IS SOMETHING WHERE THERE ARE WITNESSES THEY'RE GOING TO HAVE TO TALK TO ANYWAY. WE'RE GOING TO BE TALKING TO THEM. IT'S JUST SOMETHING THAT EVERYBODY IN THIS ROOM IS GOING TO HAVE TO DEAL WITH BEFORE APRIL 10TH ANYWAY. AND, YOUR HONOR, IT CAN INURE TO HIS BENEFIT. IF HE IS FOUND NOT GUILTY---

THE COURT: YOU DON'T NEED TO REPEAT YOURSELF.

MR. HUBBARD: I'M SORRY. BUT JUST -- YOUR HONOR KNOWS WHAT I'M SAYING AND THAT'S -- AND OBVIOUSLY THE STATE FEELS LIKE WE NEED THAT ISSUE RESOLVED.

THE COURT: WELL, THINKING THROUGH THE THING HOPEFULLY IN LOGICAL ORDER, THE FIRST QUESTION IS: ON THE LYNCHING TRIAL, LYNCHING CASE, WHO IS GOING TO REPRESENT MR. MERCER? NOW, IT DOESN'T NECESSARILY HAVE TO BE Y'ALL. I'M NOT -- I MEAN, ORDINARILY IT WOULD BE SOMEBODY IN THE PUBLIC DEFENDER'S OFFICE UNLESS THERE WAS A CONFLICT. ARE THERE MULTIPLE DEFENDANTS?

MR. HUBBARD: THERE WAS A CO-DEFENDANT WHO HAS PLED TO THAT CHARGE.

THE COURT: WAS THAT CO-DEFENDANT REPRESENTED BY THE PUBLIC DEFENDER?

MR. HUBBARD: YOUR HONOR, RIGHT OFFHAND I CAN'T SAY.

WE WILL FIND OUT AND LET YOUR HONOR KNOW. DO YOU KNOW IF WE HAVE THAT FILE? IS THAT... WE'RE CHECKING RIGHT NOW, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, LET'S -- LET'S ASSUME THEN, JUST SO I CAN THINK THROUGH THE WHOLE SCENARIO BEFORE I MAKE UP MY MIND, FIRST OF ALL, EVEN AS TO WHETHER OR NOT THIS IS MY DECISION, BUT -- BUT ASSUME THERE WAS SOMEBODY ELSE AVAILABLE TO REPRESENT MR. MERCER ON THE LYNCHING CHARGE AND YOU ALL DID NOT HAVE TO BE DIRECTLY INVOLVED IN THE TRIAL OF THAT CASE. NOW, HOW DOES THAT AFFECT THE POSITION OF THE DEFENDANT IN TERMS OF WHETHER OR NOT IT SHOULD BE TRIED?

MR. LITTLEJOHN: YOUR HONOR, THE FIRST THING THAT COMES TO MY MIND IS THAT THEY'RE GOING TO SPEND PROBABLY A BETTER PORTION OF A WEEK TRYING ISSUES THAT THEY'RE GOING TO WANT TO PRESENT, ASSUMING WE GET TO THE SECOND PHASE OF A MURDER TRIAL, THAT'S GOING TO TAKE THE SAME AMOUNT OF TIME, THAT'S NOT GOING TO ADD ANYTHING TO THE STATE'S CASE OTHER THAN THEY'RE GOING TO HAVE A CONVICTION OR THEY'RE NOT. THEY'RE GOING TO PUT UP THE SAME EVIDENCE IN THE SECOND PHASE OF THE TRIAL, AND IT SEEMS TO ME ONLY THE -- OBVIOUSLY THEY JUST WANT A CONVICTION BUT---

THE COURT: WELL---

MR. LITTLEJOHN: ---IT'S GOING TO BE A WASTE OF THE COURT'S TIME BECAUSE THEY'RE GOING TO HAVE TO TRY IT TWICE ANYWAY.

THE COURT: OKAY. WELL, ALL RIGHT. SO WE GOT JUDICIAL ECONOMY AS ONE CONSIDERATION THAT GOES INTO THE DECISION ABOUT WHETHER OR NOT TO TRY THE CASE. BUT WOULDN'T IT BE -- I MEAN, HE'S GOING TO GET UP AND TELL ME THAT IF YOU DON'T TRY THE CASE THEN BEFORE THE DEATH PENALTY TRIAL, THEN HE'S GOING TO BE PUT TO THE TASK OF TRYING TO PROVE THE CASE DURING THE DEATH PENALTY TRIAL WHICH IS GOING TO LENGTHEN THE TRIAL. AND IF YOU DO TRY IT AND YOU GET A NOT GUILTY VERDICT, IT'S DONE. IF YOU TRY IT AND GET A GUILTY VERDICT, THEN ALL THAT HAS TO BE PRESENTED IN THE DEATH PENALTY CASE IS THE FACT OF THE CONVICTION AND THE -- AND THE BASIC FACTS SURROUNDING IT WHICH WILL BE A VERY SHORT PRESENTATION. I'M ASSUMING THAT'S WHAT HE'S GOING TO SAY IN TERMS OF JUDICIAL ECONOMY.

MS. KIMBROUGH: YOUR HONOR, I WOULD POINT OUT: THE STATE CAN INTRODUCE THIS EVIDENCE AS A PRIOR BAD ACT. THEY CAN BRING PEOPLE IN TO TESTIFY DURING THE PENALTY PHASE. IT DOESN'T HAVE TO BE TRIED PRIOR TO THIS CAPITAL CASE, IF WE GET TO THE PENALTY PHASE. THAT EVIDENCE CAN BE PRESENTED. IT'S PRESENTED ALL THE TIME IN DEATH PENALTY CASES WHERE SOMEONE HAS NOT ACTUALLY BEEN TRIED AND CONVICTED OF A PARTICULAR OFFENSE. THEY ARE PRIOR BAD ACTS. THEY CAN BRING THEIR WITNESSES IN THERE TO TALK ABOUT HOW HE'S A FUTURE DANGER OR HE DID THIS OR, YOU KNOW, HE'S UNCONTROLLABLE. THEY CAN DO ALL THAT.

THE COURT: WELL, I GUESS WHAT I WAS TRYING TO DO IS TO -- IF Y'ALL ARE NOT INVOLVED IN IT DIRECTLY, THEN---

MS. KIMBROUGH: I THINK I UNDERSTAND YOUR QUESTION. HOW DOES IT HURT US---

THE COURT: OBVIOUSLY -- OBVIOUSLY THIS -- THIS IS OBVIOUS, AND LET'S -- WE CAN SET THIS ASIDE. IT'S OBVIOUS THAT Y'ALL DON'T WANT IT TRIED FIRST AND THEY DO. THOSE ARE FOR STRATEGIC REASONS. NOW, SETTING THE STRATEGIC REASONS ASIDE AND THINKING ABOUT THE LEGAL REASONS THAT I MUST CONSIDER, WHAT -- IF Y'ALL ARE -- IF NEITHER OF Y'ALL ARE INVOLVED IN THE TRIAL OF THE LYNCHING CASE, WHAT DIFFERENCE DOES IT MAKE TO YOU EITHER IN TERMS OF TRIAL PREPARATION OR OTHER NON-STRATEGIC CONSIDERATIONS WHETHER IT'S TRIED BEFORE OR AFTER THE DEATH PENALTY CASE?

MR. LITTLEJOHN: WELL, YOUR HONOR, AT THE LEAST I WOULD THINK BASED ON THE MAGNITUDE OF WHAT WE'RE REPRESENTING THIS MAN ON, ONE OR BOTH OF US WOULD HAVE TO MONITOR OR KEEP UP WITH THE LYNCHING TRIAL JUST TO SEE WHAT WAS GOING ON, TO SEE WHAT EFFECT IT MIGHT HAVE ON THE -- ON THE FUTURE MURDER TRIAL. AND I PERSONALLY HATE TO HAND, GIVEN WHERE WE ARE IN THIS SITUATION, TO HAND MR. MERCER OVER TO OTHER ATTORNEYS TO HANDLE SUCH A THING THAT COULD BE SO DRAMATIC AND COULD HAVE SUCH AN EFFECT ON THE MURDER CASE.

THE COURT: OKAY. I WANT US TO BE VERY CAREFUL TO NOT FOCUS ON YOU ALL'S STRATEGIC REASONS WHY YOU MIGHT WANT

IT TRIED BEFORE OR AFTER AND -- BECAUSE REALLY IF -- IF -- IN ONE SENSE THIS IS NOT MY DECISION. THE SOLICITOR CONTROLS THE DOCKET. THEY CAN CALL THE CASE FOR TRIAL ANY TIME THEY WANT TO, AND THE ONLY PERSON WHO CAN STOP IT IS EITHER THE CHIEF ADMINISTRATIVE JUDGE OR THE TRIAL JUDGE BY CONTINUING THE CASE. NOW, AS A PRACTICAL MATTER, I CAN HAVE SOME -- I CAN CONTROL IT IF I CHOOSE TO.

MR. LITTLEJOHN: YES, SIR.

THE COURT: BUT THE QUESTION IS WHETHER OR NOT -- THE FIRST QUESTION IS WHETHER OR NOT I SHOULD AND IF -- THE SECOND QUESTION IS: IF I AM GOING TO GET INVOLVED IN IT, WHAT SHOULD I DO?

MR. LITTLEJOHN: YOUR HONOR---

THE COURT: AND I'M NOT GOING TO DECIDE IT BASED ON THE SOLICITOR'S STRATEGIC REASONS FOR WANTING IT TRIED NOR ON YOUR STRATEGIC REASONS FOR NOT WANTING IT TRIED.

MR. LITTLEJOHN: YOUR HONOR, STRATEGIC REASONS ASIDE, IT WOULD BE OUR POSITION THAT NOT ONLY WILL THEY BE WASTING THE COURT OR ANOTHER COURT'S TIME DOING THIS, THEY'RE GOING TO BE WASTING OUR TIME THAT COULD BE DEVOTED TO PREPARING THIS MURDER CASE. AS THE COURT HAS INDICATED, THIS THING IS COMING UP VERY FAST, AND IF WE HAVE TO TAKE A WEEK OUT TO MONITOR AND SEE WHAT'S GOING ON IN THE LYNCHING CASE, IT'S CERTAINLY GOING TO CUT INTO OUR---

THE COURT: LET ME ASK YOU---

MR. LITTLEJOHN: ---PREPARATION TIME.

THE COURT: LET ME ASK YOU A QUESTION. IF YOU WERE TO TRY THAT CASE AND IF YOU GOT A CONVICTION---

MR. HUBBARD: YES, SIR.

THE COURT: ---WOULD IT NOT BE TRUE THAT YOUR PRESENTATION OF EVIDENCE CONCERNING THAT CRIME WOULD BE AS I SUGGESTED?

MR. HUBBARD: YES, SIR.

THE COURT: LIMITED TO THE FACT OF THE CONVICTION AND THE BASIC FACTS SURROUNDING IT?

MR. HUBBARD: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND IT WOULD TAKE A RELATIVELY SHORT PERIOD OF TIME?

MR. HUBBARD: YES, SIR, YOUR HONOR. YES, SIR. AND TO ANSWER YOUR OTHER QUESTION, YOUR HONOR, AS TO WHO REPRESENTED THAT CO-DEFENDANT, IT WAS MURRY KINARD, A PRIVATE LAWYER. I BELIEVE HE WAS APPOINTED ON THAT CASE. I THINK THAT THE PUBLIC DEFENDER INITIALLY HAD MR. MERCER, AND SO MR. KINARD REPRESENTED THE CO-DEFENDANT ON THIS CASE, SO -- JUST FOR THAT INFORMATION, YOUR HONOR.

THE COURT: WELL, IT SEEMS TO ME THAT IF WE TRY THE CASE OR IF THEY TRY THE CASE, THEN THAT REMOVES FROM YOUR PLATE THE NECESSITY OF CONCERNING YOURSELVES WITH THE LYNCHING CASE BECAUSE SOMEBODY ELSE WILL BE DEFENDING HIM, AND WHEN IT COMES TIME FOR THE TRIAL OF THIS CASE, EITHER

THERE WILL BE A NOT GUILTY VERDICT IN WHICH CASE THERE WILL BE NO MENTION OF THE LYNCHING CHARGE OR THERE WILL BE A GUILTY VERDICT, IN WHICH CASE THE MENTION OF IT WILL BE VERY -- RELATIVELY BRIEF. BUT, ON THE OTHER HAND, IF THE CASE IS NOT TRIED, THEN YOUR LOAD WILL BE INCREASED BECAUSE YOU ARE GOING TO HAVE TO BE PREPARED FOR THAT LITTLE MINI TRIAL DURING THE COURSE OF THE PENALTY PHASE OF THE TRIAL IF, IN FACT, THE CASE GETS THAT FAR.

MR. LITTLEJOHN: YOUR HONOR, I UNDERSTAND THAT, AND IF I MAY BRING UP A SEPARATE ISSUE THAT I JUST THOUGHT OF -- BECAUSE I WAS TOTALLY SURPRISED BY THE SOLICITOR'S GRATUITOUS OFFER TO TRY THIS LYNCHING CASE. BUT, YOUR HONOR, AS YOU -- AS YOU WELL KNOW, BASED ON JOINT MOTION OF BOTH THE STATE AND THE DEFENSE, MR. MERCER IS GOING TO UNDERGO MENTAL EVALUATION HERE VERY SHORTLY. COUPLED WITH THAT MENTAL EVALUATION, WHICH I DON'T KNOW WHAT THE RESULTS OF THAT WILL BE, I DON'T KNOW WHAT RESULT -- WHAT THE RESULTS OF THAT WILL BE, WHAT THE EFFECT MIGHT BE ON THE LYNCHING TRIAL. BUT NOT ONLY THAT, WE'RE GOING TO HAVE TO ALSO MAKE PROVISION FOR MR. MERCER TO BE EVALUATED. THAT'S GOING TO TAKE SOME TIME; THAT'S GOING TO TAKE SCHEDULING. HIS PREPARATION FOR A LYNCHING TRIAL, HIS INVOLVEMENT IN A LYNCHING TRIAL, IS CERTAINLY GOING TO CUT INTO THAT, AND LIKE THE COURT SAID, WE HAVE A LIMITED AMOUNT OF TIME BETWEEN NOW AND WHEN THIS CASE STARTS.

THE COURT: ALL RIGHT.

MR. HUBBARD: YOUR HONOR, NOT TO JUMP IN BEFORE YOUR HONOR HAS A CHANCE TO ADDRESS THAT...

THE COURT: BUT JUMP IN ANYWAY.

MR. HUBBARD: OKAY. IF YOU WANT, I'LL SIT DOWN. I THINK WHAT WE COULD DO, YOUR HONOR, IS TAKE THE DATES OF THIS LYNCHING -- HE'S NOT BEEN EVALUATED YET. THEY'RE STILL SCHEDULING THAT. GO AHEAD AND ADD THESE. AMEND THE ORDER TO INCLUDE THESE DATES OF THE LYNCHING SO THAT THERE'S NO QUESTION THAT HE'S BEEN EVALUATED, AND THEN I BELIEVE YOUR HONOR HAD INDICATED THAT YOU WERE TRYING TO SEE THAT THIS EVALUATION IS EXPEDITED.

OBVIOUSLY IF HE HASN'T BEEN EVALUATED WE MIGHT HAVE TO SECOND -- STOP AND THINK ABOUT WHEN WE'RE TRYING THIS LYNCHING. BUT IF WE INCLUDE THOSE DATES ALONG WITH THE DATES OF THE -- THAT THEY'RE HAVING TO BE EVALUATED -- HE'S HAVING TO BE EVALUATED ON AS TO THE DEATH PENALTY CASE, GO AHEAD AND HANDLE ALL OF THAT AT ONE TIME, SINCE HE HASN'T BEEN EVALUATED YET. WE'RE NOT ASKING ANYBODY TO REDO ANYTHING AT THIS POINT. WE'VE CAUGHT IT EARLY ENOUGH. THAT WILL ANSWER THE QUESTION AS TO ANY EVALUATION, AND WE'LL PROCEED WHEN THAT'S DONE.

THE COURT: ALL RIGHT. I'M GOING TO -- HERE'S -- HERE'S WHAT I THINK MY ROLE IS HERE. THE SOLICITOR CAN CALL THE CASE WHENEVER THEY WANT TO. NOBODY HAS CONTROL OVER THAT

BUT THEM, AND THEN THE QUESTION BECOMES WHAT HAPPENS. MY CONCERN IS TO MAKE SURE THAT THE LYNCHING TRIAL AND ITS PREPARATION DOES NOT INTERFERE WITH DEFENSE COUNSEL IN THIS CASE'S ABILITY TO PREPARE FOR TRIAL NOR DOES IT INTERFERE WITH THE AVAILABILITY OF THE DEFENDANT TO Y'ALL -- TO COUNSEL TO PREPARE FOR THIS TRIAL NOR DOES IT INTERFERE IN ANY WAY THAT MIGHT BE RELATED TO THE EVALUATION OR ANYTHING LIKE THAT.

FAILING SOMETHING LIKE THAT, I THINK I'M GOING TO KEEP MY HANDS OFF OF IT. AND SO I'M GOING TO SAY THAT I AM NOT GOING TO REQUIRE YOU TWO TO REPRESENT HIM, AND I'M GOING TO ASK JUDGE KEESLEY TO APPOINT THE PUBLIC DEFENDER TO REPRESENT MR. MERCER IN THE LYNCHING CASE SO THAT YOU ALL ARE NOT SADDLED WITH THAT ADDITIONAL TIME CONSTRAINT. NOW, THAT DOESN'T -- IF EITHER OF YOU WANTS TO BE INVOLVED IN IT, YOU CERTAINLY ARE FREE TO. THEN IF THEY -- IF THERE IS A TIME IN WHICH THEY WANT TO CALL THE CASE FOR TRIAL, WE'LL TAKE IT UP AT THAT TIME.

AT THAT TIME I'LL ADDRESS WITH WHOEVER THE ADMINISTRATIVE -- WITH JUDGE KEESLEY WHO IS THE ADMINISTRATIVE JUDGE AND WITH WHOEVER IS THE TRIAL JUDGE THE CONCERNS THAT I JUST MENTIONED TO MAKE SURE THAT THE CALLING OF THAT CASE FOR TRIAL DOES NOT INTERFERE WITH WHAT YOU ALL ARE DOING TO PREPARE TO DEFEND MR. MERCER IN THIS CASE. AND THAT, I THINK, IS -- I THINK IF I DO MORE THAN THAT, I'M

GOING BEYOND MY BOUNDS WITH -- FOR MY APPOINTMENT TO THIS TRIAL.

MR. HUBBARD: YOUR HONOR, I HAVE ONE QUESTION. AS FAR AS AMENDING THE ORDER TO ADDRESS THE DATES IN THIS LYNCHING AS WELL FOR HIS EVALUATION, SHOULD WE ADDRESS THAT WITH JUDGE KEESLEY OR WITH YOU? I KNOW IF WE ADDRESS IT WITH JUDGE KEESLEY I KNOW HE'S GOING TO WANT TO TALK TO YOU, AND IT MAY SLOW EVERYTHING DOWN---

THE COURT: DO Y'ALL HAVE ANY OBJECTION TO EXPANDING THE TIME FRAME IN WHICH HIS EVALUATION WOULD COVER IN ORDER TO COVER THE DATES OF THE ALLEGED LYNCHING INCIDENT?

MS. KIMBROUGH: YOUR HONOR, OFF THE TOP OF MY HEAD I'M NOT SURE. I WOULD LIKE TO TALK TO OUR PSYCHIATRIST---

THE COURT: OKAY.

MS. KIMBROUGH: ---BEFORE WE TAKE ANY POSITION ON THAT.

THE COURT: ALL RIGHT.

MS. KIMBROUGH: I DON'T KNOW WHAT---

THE COURT: WELL, WHY DON'T YOU GO AHEAD AND PREPARE A PROPOSED ORDER FOR ME TO SIGN?

MR. HUBBARD: YES, SIR.

THE COURT: RUN IT BY DEFENSE COUNSEL IN THIS CASE---

MR. HUBBARD: YES, SIR.

THE COURT: ---AND IN THE OTHER CASE, AND WE'LL GO

FROM THERE.

MR. LITTLEJOHN: YOUR HONOR, I GUESS WE'D HAVE TO ALSO INCLUDE THE PUBLIC DEFENDER'S OFFICE. IF THEY'RE REPRESENTING HIM ON THE LYNCHING CHARGE, THEY SHOULD HAVE SOME INPUT AS TO---

THE COURT: RIGHT.

MR. LITTLEJOHN: ---WHETHER HE'S INCLUDED IN THAT EVALUATION ORDER.

THE COURT: RIGHT. SO I JUST TOLD MR. HUBBARD THAT HE'S TO RUN IT BY THE DEFENSE COUNSEL IN THE LYNCHING CASE. THAT'S WHAT I MEANT TO SAY.

MR. LITTLEJOHN: ALL RIGHT.

THE COURT: ALL RIGHT. ANYTHING ELSE?

MS. KIMBROUGH: JUST BRIEFLY, YOUR HONOR. I'D JUST LIKE TO MAKE SURE THAT MR. LITTLEJOHN AND I RECEIVE NOTICE OF ANY HEARINGS OR MOTIONS RELATED TO THE LYNCHING. IF THE PUBLIC DEFENDER'S OFFICE IS GOING TO TAKE OVER THAT, I STILL THINK THAT WE NEED TO BE APPRISED AS TO WHAT KIND OF EVALUATIONS ARE BEING DONE, WHAT KIND OF HEARINGS ARE GOING ON, AND WHETHER OR NOT THE TRIAL IS ACTUALLY GOING TO PROCEED, ESPECIALLY IF WE HAVE AN INVESTIGATOR, WHICH MAKES SENSE, AND CERTAINLY FROM AN ECONOMIC STANDPOINT IT WOULD MAKE SENSE FOR OUR INVESTIGATOR TO SHARE INFORMATION WITH THEM AND VICE VERSA. OBVIOUSLY ANY DISCOVERY IN THAT CASE IS GOING TO BE, WE BELIEVE, DISCOVERABLE IN OUR CASE. IF

THEY'RE GOING TO PRODUCE THE LYNCHING CONVICTION IN---

THE COURT: I'M SURE THEY DON'T -- YOU DON'T HAVE ANY OBJECTION TO THAT, DO YOU?

MR. HUBBARD: NO OBJECTION AT ALL. YOUR HONOR, I BELIEVE WE ALREADY HAVE GIVEN THEM THE INFORMATION ON THE LYNCHING. IF NOT, WE'LL GO BACK AND MAKE SURE THAT WE HAVE, BUT WE HAVE NO OBJECTION TO THAT AT ALL, YOUR HONOR. WE'LL NOTICE THEM OF EVERY HEARING IN EVERY MATTER.

MS. KIMBROUGH: THANK YOU.

THE COURT: ALL RIGHT. ANYTHING FURTHER?

MR. HUBBARD: I DON'T BELIEVE SO, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. LITTLEJOHN: NO, YOUR HONOR, NOT AT THIS TIME.

MS. KIMBROUGH: NO. WE DO HAVE SOME FUNDING MATTERS.

MR. MYERS: MAY I TALK TO YOU ABOUT ANOTHER CASE?

THE COURT: SIR?

MR. MYERS: MAY I TALK TO YOU ABOUT ANOTHER CASE?

THE COURT: YES, SIR.

(WHEREUPON, A BENCH CONFERENCE WAS HELD BETWEEN MR. MYERS AND THE COURT WITH REGARD TO A SEPARATE CASE.)

THE CLERK: YOUR HONOR, EARLIER THIS WEEK SOMEONE CAME TO THE CLERK OF COURT'S OFFICE AND EITHER TOOK THE FILE WITH THEM OR THE FILE HAS BEEN LOST, AND MS. KIMBROUGH SAID SOMETHING IN THE HALL EARLIER THAT SOMEBODY CAME TO MY OFFICE

EARLIER THIS WEEK AND DID HAVE THE FILE. I WANT THE NAME OF THAT PERSON BECAUSE I WANT TO TRACK DOWN WHAT THEY DID WITH THE FILE BECAUSE ALL OF MY ORIGINAL PAPERWORK IS MISSING. WE'VE BEEN LOOKING FOR IT ALL WEEK LONG.

THE COURT: OKAY.

THE CLERK: WHO WAS THAT PERSON, MS. KIMBROUGH?

MS. KIMBROUGH: THE LADY THAT'S WORKING ON MR. MERCER'S BEHALF IS PAIGE TARR. SHE CAN BE REACHED...

THE CLERK: YES, MA'AM?

MS. KIMBROUGH: I'M SORRY. LET ME PULL THAT NUMBER. SHE'S IN MY OFFICE.

THE CLERK: UH-HUH.

MS. KIMBROUGH: I CAN TRY TO TRACK HER DOWN AND GET HER TO CALL YOU. IF YOU'LL GIVE ME YOUR DIRECT NUMBER, I'LL GO AHEAD AND SEE IF I CAN FIND HER.

THE CLERK: YES, MA'AM. IT'S 785---

MS. KIMBROUGH: ALL RIGHT.

THE CLERK: ---8553. I NEED TO KNOW WHO SHE GAVE THAT FILE BACK TO AFTER SHE COPIED IT---

MS. KIMBROUGH: OKAY.

THE CLERK: ---BECAUSE THE ENTIRE FILE IS MISSING. ALL ORIGINAL DOCUMENTS ARE MISSING AT THIS TIME. THANK YOU, YOUR HONOR.

MS. KIMBROUGH: THANK YOU, YOUR HONOR.

THE CLERK: THANK YOU, MA'AM.

MS. KIMBROUGH: SURE.

THE COURT: ALL RIGHT. SO WE'RE DONE WITH THIS -- WITH THIS HEARING - AND WE'RE GOING TO BREAK FOR LUNCH - FOR ALL PURPOSES OTHER THAN MY HAVING AN EX PARTE HEARING WITH DEFENSE COUNSEL REGARDING FUNDING IN THE MERCER CASE. SO IF YOU'RE NOT INVOLVED IN THE MERCER CASE, CLEAR THE COURTROOM OR IF YOU'RE NOT INVOLVED WITH SECURITY FOR MR. MERCER OR -- OR GETTING A 403. YOU CAN STAY IF YOU'RE A 403.

(THE COURTROOM IS CLEARED, AS DIRECTED BY THE COURT.)

THE COURT: ALL RIGHT. Y'ALL READY?

MS. KIMBROUGH: YES, YOUR HONOR. MAY I APPROACH?

THE COURT: FIRST OF ALL, DOES IT SUIT YOU TO HAVE THE FOLKS GETTING 403'S IN HERE OR DO YOU WANT ME TO RUN THEM OUT, TOO?

MS. KIMBROUGH: SURE. OH, NO, THEY'RE FINE, TOO.

THE COURT: OKAY.

MR. LITTLEJOHN: I DON'T KNOW, JUDGE. THEY'RE SITTING ON THE STATE'S SIDE.

THE COURT: WOULD Y'ALL MOVE TO THE OTHER SIDE OF THE COURTROOM, PLEASE?

MS. KIMBROUGH: THAT IS A PROPOSED MOTION AND ORDER OF FUNDING. IT'S MY UNDERSTANDING IN LOOKING AT THE FILE THAT THERE HAD BEEN SOME PREVIOUS ORDERS THAT WERE PRESENTED TO AND SIGNED BY THE LATE JUDGE WESTBROOK WHEN HE WAS

ASSIGNED TO THIS CASE, AND THOSE ORDERS WERE NEVER FILED. CONSEQUENTLY, THE MONIES SOUGHT FOR HIRING EXPERTS WERE NEVER ACTUALLY DISBURSED OR EVEN FOR THAT MATTER PRESENTED FOR PAYMENT TO THE OFFICE OF INDIGENT DEFENSE.

BECAUSE OF THAT, AS WE SORT OF DISCUSSED THE LAST COUPLE OF DAYS, WE HAVE GONE AHEAD AND REDRAFTED A PROPOSED FUNDING MOTION, AND IT PROVIDES FOR SEVERAL EXPERTS THAT WE THINK ARE NECESSARY. OBVIOUSLY THE MOST IMPORTANT ARE THE MENTAL HEALTH EXPERTS THAT WE THINK ARE GOING TO PLAY A CRITICAL ROLE IF MR. MERCER IS FOUND GUILTY. THEY MAY ALSO PLAY A ROLE IN THE GUILT PHASE OF THE TRIAL, DEPENDING ON THE RESULTS OF THE TESTING.

WE HAVE SOUGHT EXPENSES FOR TRAVEL. MR. MERCER HAS FAMILY MEMBERS IN PHILADELPHIA. HE HAS NUMEROUS RECORDS, BACKGROUND RECORDS, MEDICAL RECORDS, DISABILITY RECORDS. HE GREW UP IN PHILADELPHIA, SO WE DID SEEK WHAT I THINK IS A FAIRLY REASONABLE AMOUNT OF EXPENSES FOR THAT TRAVEL WHICH WOULD BE FOR AN EXPERT AND PROBABLY AN ATTORNEY TO ASSESS WHETHER OR NOT THOSE FOLKS BEING INTERVIEWED WOULD NEED TO BE SUBPOENAED AS WITNESSES. AND WE HAVE SOUGHT FUNDING FOR VARIOUS FORENSIC EXPERTS, PATHOLOGISTS, AND A TRACE EVIDENCE EXPERT FOR THE REASONS THAT WE WERE -- WE HAD SET FORTH.

THE COURT: OKAY. NOW, YOU HAVE TAKEN, I BELIEVE, A COMPREHENSIVE LOOK AT NON-ATTORNEYS' FEES FUNDING FOR THE ENTIRETY OF THIS CASE.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: AND IS IT TRUE THAT WHAT YOU HAVE ASKED ME TO AUTHORIZE NOW YOU HAVE HOPE AND GOOD REASON TO BELIEVE WILL CARRY YOU THROUGH TO THE BEGINNING OF TRIAL?

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: AND THAT SO IF WHAT YOUR PLANNING REVEALS HOLDS TRUE, NO MORE FUNDS WILL HAVE TO BE AUTHORIZED EXCEPT WHEN WE GET AROUND TO ACTUALLY GETTING THESE WITNESSES HERE TO TESTIFY AT TRIAL.

MS. KIMBROUGH: THAT IS OUR INTENTION, AND WE BELIEVE IN GOOD FAITH THAT THE AMOUNT SET FORTH WILL DO THAT.

THE COURT: ALL RIGHT. BECAUSE THAT'S -- LET'S SEE. THIS IS $53,000, IF I ADDED IT UP CORRECTLY, WHICH IS TWICE THE NORMAL LIMIT FOR NON-ATTORNEYS' FEES FUNDING. YOU HAVE ARTICULATED A SOUND BASIS FOR IT, I THINK, BUT WHAT I WANT IS WHAT YOU JUST GAVE ME WHICH IS YOUR ASSURANCE THAT YOU BELIEVE THAT THIS WILL DO IT EXCEPT FOR, I GUESS, YOU DON'T KNOW HOW LONG EACH WITNESS IS GOING TO HAVE TO BE HERE TO ACTUALLY TESTIFY, BUT THAT SHOULD BE A RELATIVELY MINOR EXPENSE COMPARED TO THIS.

MS. KIMBROUGH: YES.

THE COURT: ALL RIGHT. SO IF AT SOME POINT YOU BECOME CONCERNED THAT WHAT I HAVE AUTHORIZED IN THIS ORDER IS NOT GOING TO GET YOU ALL THE WAY TO TRIAL, BRING THAT TO MY ATTENTION AS QUICKLY -- AS EARLY AS YOU CAN BECAUSE I THINK

IT'S MY RESPONSIBILITY TO KEEP MY HANDS ON THIS AND GET A GOOD -- KEEP A GOOD HANDLE ON THE EXPENSES AND SO... SO THAT I CAN DO THAT, THAT'S WHAT I'D LIKE FOR YOU TO DO FOR ME.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: ALL RIGHT. HERE'S THE ORDER.

MS. KIMBROUGH: THANK YOU. I ALSO HAVE TWO TRANSPORT ORDERS.

THE COURT: OKAY.

MS. KIMBROUGH: ONE OF WHICH MR. LITTLEJOHN AND I JUST FOUND OUT TODAY IS INCORRECT. I CAN STRIKE THROUGH IT. THE EVALUATION THAT'S BEING CONDUCTED AT CRAFTS-FARROW, THERE WAS A NOTICE THAT APPARENTLY MR. LITTLEJOHN SHOULD RECEIVE IN HIS MAIL TODAY SAYING THAT THEY HAD CHANGED THE DATE FROM THE 18TH OF JANUARY TO THE 25TH.

THE COURT: WAIT A MINUTE. WE'RE AT -- WE GOT A -- OH, THAT'S RIGHT.

MS. KIMBROUGH: THIS ISN'T EX PARTE, THE TRANSPORT ORDER.

THE COURT: DO WHAT?

MS. KIMBROUGH: I SAID THE TRANSPORT ORDER CONVERSATION...

THE COURT: OH, YEAH, YEAH, YEAH. WE'RE DONE WITH THAT. OKAY. YOU CAN -- YOU CAN -- Y'ALL CAN COME IN. WE'RE DONE WITH THE EX PARTE STUFF.

MS. KIMBROUGH: AND THEN THERE IS ANOTHER TRANSPORT

ORDER THAT WE PREPARED FOR PURPOSES OF HAVING MR. MERCER EVALUATED BY OUR EXPERTS. THAT WILL BE DONNA WATTS AND TORA BRAWLEY, IF I CAN LAY MY HANDS ON THEM. MAY I APPROACH, YOUR HONOR?

THE COURT: YES, YOU MAY.

MS. KIMBROUGH: THANK YOU. THESE ARE TRANSPORTATION ORDERS.

THE COURT: OKAY. ANYTHING ELSE?

MS. KIMBROUGH: THERE'S ONE CONCERN THAT MR. MERCER HAS, AND I THINK THIS MIGHT BE A GOOD TIME TO BRING IT UP. IT'S A CONCERN RELATED TO HIS HOUSING. HE'S CURRENTLY AT SAFE KEEPER.

THE COURT: WELL, NOW IS THIS SOMETHING THAT...

MS. KIMBROUGH: I'M NOT SURE IF YOUR HONOR CAN ADDRESS IT OR NOT.

THE COURT: I PROBABLY CAN'T, BUT IS IT -- IN THE FIRST PLACE, IS IT SOMETHING THAT NEEDS TO BE BROUGHT UP WITH THE SOLICITOR HERE? I MEAN, EVEN THOUGH -- EVEN THOUGH IT'S PROBABLY SOMETHING HE DOESN'T CARE ABOUT, SINCE IT'S NOT -- SINCE IT DOESN'T FIT INTO THE CATEGORY OF EX PARTE, IT PROBABLY NEEDS TO BE DONE WHEN THEY'RE PRESENT.

MS. KIMBROUGH: OKAY.

THE COURT: OR AT LEAST WITH AN OPPORTUNITY FOR THEM TO BE PRESENT.

MS. KIMBROUGH: THANK YOU.

THE COURT: IF YOU WANT TO RUN DOWN THE HALL AND GET THEM OR SEND SOMEBODY TO GET SOMEBODY FROM THE SOLICITOR'S OFFICE...

MS. KIMBROUGH: OKAY. AND PERHAPS WE COULD JUST CONTACT THEM AND SEE IF WE COULD WORK IT OUT WITH THEM BECAUSE IT WILL PROBABLY REQUIRE THEIR INVOLVEMENT SINCE---

THE COURT: OKAY.

MS. KIMBROUGH: ---IT PERTAINS TO HOUSING.

THE COURT: OKAY.

MS. KIMBROUGH: THANK YOU.

THE COURT: ALL RIGHT. WELL, I WILL -- Y'ALL KNOW HOW TO GET IN TOUCH WITH ME IF YOU NEED ME.

MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE WERE NO EXHIBITS INTRODUCED.)

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 13TH DAY OF JANUARY, 2006.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

OCTOBER 13, 2006

DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA | COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON | 2003-GS-32-409

THE STATE OF SOUTH CAROLINA :
:
-VS- : TRANSCRIPT OF RECORD
:
KEVIN J. MERCER :

FEBRUARY 23, 2006
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. FEW, JUDGE.

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

DONALD V. MYERS, ESQUIRE
D. SHAWN GRAHAM, ESQUIRE
ATTORNEYS FOR THE STATE

CAMERON B. LITTLEJOHN, JR., ESQUIRE
MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

ALSO PRESENT: ELIZABETH C. FULLWOOD, ESQUIRE
LISA MCPHERSON, ESQUIRE

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

THE COURT: BE SEATED, PLEASE. OKAY. LET'S -- LET ME MAKE SURE I UNDERSTAND WHAT ARE ALL THE ISSUES THAT WE NEED TO ADDRESS. I KNOW WE HAVE THE ONE QUESTION OF THE POTENTIAL CONFLICT THAT EXISTS BETWEEN MR. MERCER'S -- OR WITH MR. MERCER'S ATTORNEY IN THE LYNCHING CASE, AND I -- I -- I MEANT TO SAY THIS WHEN WE MET THIS MORNING, BUT I THINK IN ORDER TO DEAL WITH THAT, WE'RE GOING TO NEED THOSE TWO ATTORNEYS OVER HERE. AND SO APPARENTLY THEY HAVE -- SOMEBODY HAS CALLED THEM AND HAS GONE TO GET THEM?

MR. LITTLEJOHN: YOUR HONOR, I JUST LEFT A MESSAGE ON THE VOICE MAIL OVER THERE. APPARENTLY THEY BROKE FOR LUNCH BETWEEN 1 AND 2, AND I THINK IT WAS -- I THINK EVERYBODY THOUGHT SOMEBODY ELSE WAS GOING TO CALL THEM AND---

THE COURT: YEAH.

MR. LITTLEJOHN: ---AND IT SUDDENLY DAWNED ON US NOBODY HAD CALLED THEM.

THE COURT: OKAY. WHERE IS THEIR OFFICE?

MR. LITTLEJOHN: IT'S RIGHT ACROSS THE STREET.

THE COURT: CAN Y'ALL SEND SOMEBODY OVER THERE TO VERY POLITELY LET THEM KNOW THAT WE NEED THOSE TWO LAWYERS OVER HERE RIGHT AWAY?

THE CLERK: I LEFT A VERY POLITE MESSAGE THAT SAID THEY NEEDED TO BE OVER HERE RIGHT AWAY.

THE COURT: WHO ARE THE TWO LAWYERS? LISA MCPHERSON AND?

THE CLERK: BETH FULLWOOD.

MR. LITTLEJOHN: BETH FULLWOOD---

THE COURT: BETH FULLWOOD.

MR. LITTLEJOHN: ---IS THE CHIEF PUBLIC DEFENDER.

THE COURT: AND ASK THEM, IF THEY DON'T MIND, TO TAKE WHATEVER STEPS THEY CAN REASONABLY TAKE TO GET THEM OVER HERE RIGHT NOW IF THEY -- IF THEY -- IF THEY CAN DO IT.

OFFICER: YES, SIR.

THE COURT: OKAY. WHAT ELSE BESIDES THAT CONFLICT QUESTION?

MR. LITTLEJOHN: YOUR HONOR, THE ONLY OTHER ISSUE I THINK WE HAVE IS WE WERE HANDED A DISCOVERY PACKAGE THIS MORNING THAT CONTAINS NUMEROUS DOCUMENTS AND PHOTOGRAPHS AND SOME VIDEOTAPES AND SOME OTHER THINGS. WE JUST HAVEN'T HAD A CHANCE TO GO THROUGH IT ALL, AND WE'D JUST LIKE TO BE ASSURED BY THE SOLICITOR'S OFFICE THAT THAT IS THE EXTENT OF THE DISCOVERY MATERIAL THAT WE'RE GOING TO BE PROVIDED. AND I GUESS MY CONCERN IS WE JUST DON'T WANT TO RECEIVE DISCOVERY AT THE LAST MINUTE IN THIS CASE THAT WOULD NECESSITATE FURTHER INVESTIGATION OR DELAYS OR ANYTHING OF THAT NATURE.

THE COURT: OKAY. ARE YOU AWARE OR, MS. KIMBROUGH, ARE Y'ALL AWARE OF ANY GAPS THAT THERE MAY BE THAT YOU HAVE BEEN ABLE TO SEE IN THE PRODUCTION?

MR. LITTLEJOHN: YOUR HONOR, I'M NOT AWARE OF ANY.

THE COURT: ALL RIGHT. ALL RIGHT.

MR. LITTLEJOHN: BUT I HAVEN'T BEEN THROUGH THIS MATERIAL WE GOT TODAY EITHER.

THE COURT: OKAY. ALL RIGHT. LET'S HEAR ABOUT IT.

MR. GRAHAM: YOUR HONOR, I CAN TELL YOU IT'S AN ONGOING PROCESS. WHEN WE GET SOMETHING, WE PUT IT TOGETHER AND GIVE IT TO THEM. WE -- I BELIEVE THAT WE'VE GOTTEN MOST EVERYTHING NOW, BUT I CAN'T PROMISE THAT WE'RE NOT GOING TO HAVE A FEW OTHER THINGS COME IN. THERE SHOULDN'T BE ANYTHING BIG LIKE THAT AGAIN.

THE COURT: WILL YOU -- YOU HAVE BEEN IN TOUCH WITH YOUR DIFFERENT LAW ENFORCEMENT AGENCIES THOUGH; RIGHT?

MR. GRAHAM: CORRECT.

THE COURT: AND YOU -- YOU -- YOU SHOULD BE ABLE TO HAVE SOME IDEA AS TO WHETHER OR NOT YOU HAVE EVERYTHING THEY HAVE.

MR. GRAHAM: I BELIEVE WE HAVE. I MEAN, AS FAR AS -- YOU KNOW, WE'VE CHECKED HIS RAP SHEET. WE'VE TRIED TO GET ALL THE PAST INCIDENT REPORTS. I THINK WE'VE GOT ALL OF THOSE.

THE COURT: RIGHT.

MR. GRAHAM: BUT THERE'S -- WHEN YOU WORK TOWARD THE PENALTY PHASE IN LOOKING AT CHARACTER EVIDENCE, THERE'S OTHER THINGS TO TRY TO TRACK DOWN. AND SO I DON'T KNOW -- RIGHT NOW I DON'T KNOW OF ANY PLACE THAT WE HAVEN'T CHECKED.

THE COURT: WELL, I'M NOT -- I DON'T THINK -- I

DON'T THINK THEY'RE -- THAT MR. LITTLEJOHN IS NECESSARILY SAYING THAT HE'S EXPECTING YOU TO TURN OVER EVERYTHING THAT YOU MIGHT ULTIMATELY COME INTO POSSESSION OF, BUT IF -- IF LAW ENFORCEMENT HAS SOMETHING THAT RELATES TO THIS CASE, THEN Y'ALL NEED TO BE ABLE TO TELL ME AND TELL THEM THAT YOU HAVE DONE YOUR DEAD-LEVEL BEST TO COME INTO POSSESSION OF THAT YOURSELVES SO THAT YOU CAN TURN IT OVER TO THEM NOW.

MR. GRAHAM: WHICH I BELIEVE WE HAVE DONE.

THE COURT: IF -- NOW, UNDERSTAND THAT -- I UNDERSTAND THIS IS -- THAT MR. MERCER IS -- HAS -- HAS LIVED OUT OF STATE. THERE ARE THINGS THAT MAY HAVE OCCURRED OUT OF STATE, OTHER THINGS THAT DON'T RELATE TO THIS CASE THAT YOU MAY BE CONTINUING TO INVESTIGATE, AND WHEN YOU COME INTO POSSESSION OF THOSE, YOU KNOW, YOU TURN THEM OVER AS QUICKLY AS YOU CAN. BUT IF IT'S SOMETHING THAT RELATES TO THE FACTS OF THIS INCIDENT, I NEED -- I THINK WE NEED TO ALL BE ASSURED THAT YOU ALL HAVE MADE A VERY COMPLETE INQUIRY WITH LAW ENFORCEMENT AND WITH WHOEVER ELSE TO MAKE SURE THAT YOU HAVE THAT AND YOU'VE TURNED IT OVER.

MR. GRAHAM: I BELIEVE THAT WE HAVE -- WE HAVE NOT MET WITH EVERY OFFICER WHO HAS BEEN INVOLVED IN THIS, SO I CAN'T TELL YOU THAT THEY DON'T HAVE SOMETHING -- I CAN TELL YOU THAT WE'VE CHECKED WITH THE SHERIFF'S DEPARTMENT WITH THEIR MAIN CASE FILE. WE'VE LOOKED THROUGH WHAT'S IN EVIDENCE AND MADE SURE THAT EVIDENCE SHEETS HAVE ALL BEEN

TURNED OVER. WE TRACKED DOWN S.L.E.D. TO MAKE SURE EVERYTHING THAT WAS SUPPOSED TO BE TESTED AT THIS POINT THAT WE KNOW OF THAT SHOULD BE TESTED HAS BEEN TESTED, THAT WE'VE GOTTEN RESULTS BACK AND WE'VE TURNED THOSE OVER.

THE COURT: ALL RIGHT. WELL, I'M SURE THAT IT'S NOT NECESSARY TO MAKE IT CLEAR THAT THAT'S THE NUMBER ONE LIKELIHOOD OF NOT TRYING THE CASE ON APRIL 10TH IS IF SOMETHING COMES UP THAT HASN'T BEEN PRODUCED.

MR. GRAHAM: NO QUESTION.

THE COURT: SO DO YOU FEEL LIKE THERE'S ANYTHING ELSE I NEED TO DO OTHER THAN SAY WHAT I JUST SAID?

MR. GRAHAM: NO, YOUR HONOR.

THE COURT: ALL RIGHT. IF -- IS THERE ANYTHING -- IS THERE ANYTHING THAT YOU HAVE -- THAT YOU KNOW ABOUT THAT YOU HAVE NOT PRODUCED BECAUSE OF PRIVILEGE OR WHATEVER?

MR. GRAHAM: ONE OF THE ISSUES I WAS GOING TO GET TO TODAY WAS DR. FRIERSON, WHEN I SPOKE WITH HIM TODAY, WANTED SOME INFORMATION, AND SO WE'RE TRYING TO TRACK DOWN THAT INFORMATION. IT'S ONE THAT WE DON'T HAVE IN OUR POSSESSION. THAT WAS FOR THE -- THE LAST PART OF MR. MERCER'S MENTAL HEALTH EVALUATION WAS SCHEDULED -- IT HAD BEEN SCHEDULED FOR THE 6TH. IT WAS CONTINUED UNTIL TODAY. AND WHEN MR. MERCER SHOWED OVER THERE TODAY, HE STATED THAT HE WANTED HIS ATTORNEYS, SO IT GOT POSTPONED AGAIN. I SPOKE WITH DR. FRIERSON, AND DR. FRIERSON GAVE ME SOME INFORMATION THAT HE

WANTED ME TO TRY TO GET TO HIM WHICH I'M GOING TO TRY TO GET TO HIM.

THE COURT: ALL RIGHT. LET'S TAKE THAT UP. WHEN IS IT GOING TO -- WHEN IS IT GOING TO RESUME?

MS. KIMBROUGH: TOMORROW.

MR. GRAHAM: IT'S BEEN RESCHEDULED FOR TOMORROW AT 1:00.

THE COURT: TOMORROW AT 1:00.

MS. KIMBROUGH: I HAVE A TRANSPORT ORDER HERE.

THE COURT: IS THERE -- IS IT -- ONCE THAT INTERVIEW OR THAT EVALUATION TAKES PLACE, WE'LL BE DONE, RIGHT, AT LEAST AS FAR AS WHAT I'VE ORDERED SO FAR?

MS. KIMBROUGH: CORRECT, YOUR HONOR.

THE COURT: AND THEN YOU ALL HAVE YOUR OWN WORK THAT YOU'RE DOING, BUT AS FAR AS WHAT I'VE ORDERED, IT'LL BE DONE.

MS. KIMBROUGH: YES.

THE COURT: OKAY. IS THERE ANY POSSIBILITY THAT WHAT IS SCHEDULED FOR TOMORROW WOULD NOT HAPPEN THAT YOU KNOW OF?

MS. KIMBROUGH: NOT -- NO, UNLESS THERE'S SOME BREAKDOWN IN THE TRANSPORTATION FOR MR. MERCER. I WILL BE THERE, AND MY UNDERSTANDING IS THAT'S ALL MR. MERCER WANTED WAS FOR US TO BE THERE. WE'VE ADVISED HIM. WE THOUGHT THAT HE WOULD BE ABLE TO GO THROUGH WITHOUT US THERE BUT...

THE COURT: IF YOU RUN INTO ANY DIFFICULTY TOMORROW,

CALL ME AND I WILL SEE WHAT I CAN DO TO STRAIGHTEN THAT OUT BECAUSE THAT DOES NEED TO TAKE PLACE RIGHT AWAY. ALL RIGHT?

MS. KIMBROUGH: YES, YOUR HONOR.

MR. GRAHAM: WHAT DR. FRIERSON ASKED FOR WHEN I SPOKE TO HIM WAS THAT THERE HAD BEEN SOME REFERENCES IN SOME OF THE DOCUMENTS THAT HE'D SEEN REGARDING THE FACT THAT MR. MERCER IS ON DISABILITY. WE'VE GIVEN HIM EVERYTHING WE HAVE ON THE DISABILITY, AND SHORT OF YOU ISSUING AN ORDER, WE CAN'T GET TO IT. I UNDERSTAND FROM SPEAKING WITH MS. KIMBROUGH THAT SHE HAS SOME INFORMATION ON THAT, AND I DON'T KNOW WHETHER SHE'S GOING TO GIVE THAT OVER TO DR. FRIERSON OR NOT, BUT THAT WAS ONE AREA THAT HE ASKED ABOUT.

THE COURT: WHO HAS THE DOCUMENTS THEN THAT CAN BE PRODUCED? NOT HER. YOU SAID---

MR. GRAHAM: I DON'T KNOW WHETHER IT'S---

THE COURT: IT'S NOT A STATE -- A SOUTH CAROLINA AGENCY OR ANYTHING, IS IT?

MR. GRAHAM: I DON'T KNOW WHO -- I DON'T KNOW WHERE HIS DISABILITY IS FROM. HE JUST -- IN SOME OF THE DOCUMENTS MR. MERCER HAD MADE REFERENCE THAT HE WAS ON DISABILITY AND HAS BEEN FOR YEARS, DOESN'T KNOW WHAT FOR, AND RECEIVES A CERTAIN AMOUNT OF MONEY.

THE COURT: OKAY.

MR. GRAHAM: AND DR. FRIERSON ASKED TO HAVE THAT INFORMATION IN THE COMPETENCY OR THE CRIMINAL EVALUATION/

CRIMINAL RESPONSIBILITY PART, AND HE ALSO ASKED FOR SOME OTHER DOCUMENTS WHICH IF YOU WANT TO -- I CAN TELL YOU NOW OR WE CAN GO GROUP BY GROUP AS WE TALK ABOUT IT.

THE COURT: DOES ANYBODY KNOW WHO HAS SUCH INFORMATION OR HOW I COULD ASSIST Y'ALL IN GETTING THAT TO DR. FRIERSON?

MS. KIMBROUGH: I CAN SPEAK TO THE DISABILITY RECORDS, YOUR HONOR. I REALIZE DR. FRIERSON WANTS THAT INFORMATION. I'M NOT SURE THAT WE SHOULD TURN IT OVER, I MEAN, QUITE FRANKLY. HE'S BEING EVALUATED FOR CRIMINAL RESPONSIBILITY AND COMPETENCY, BUT WE CERTAINLY HAVEN'T RAISED ANY AFFIRMATIVE DEFENSES OF INSANITY OR N.G.R.I. OR, YOU KNOW, LACK OF COMPETENCE TO PROCEED. I'M NOT REALLY SURE THAT HE IS ENTITLED TO ALL THE INFORMATION THAT MIGHT BE CONTAINED IN THE SOCIAL SECURITY FILE.

NOW, WE DO HAVE SOME OF THAT INFORMATION, BUT, AGAIN, UNTIL WE DETERMINE WHETHER OR NOT WE'RE GOING TO RELY ON IT, I DON'T THINK WE'RE OBLIGATED TO TURN THAT OVER. AND I'M NOT SURE THAT THE STATE IS ENTITLED TO HAVE PRIVATE MEDICAL INFORMATION UNDER THE NEW HIPAA LAWS. SO I WILL CERTAINLY CALL DR. FRIERSON AND SEE, YOU KNOW, WHAT HIS POSITION IS ON GETTING LESS THAN HE'S ASKING FOR, BUT I -- FRANKLY I'M NOT SURE, YOU KNOW, WE'RE OBLIGATED TO TURN THAT OVER OR THAT IT WOULD BE IN OUR CLIENT'S BEST INTEREST TO TURN IT OVER. I'M GOING TO TALK TO OUR EXPERT AND, YOU KNOW,

GET HER---

THE COURT: OKAY.

MS. KIMBROUGH: ---INPUT.

THE COURT: WELL, LET ME -- LET ME ASK YOU A QUESTION THEN. THAT'S -- IF THAT'S TRUE, IT'S TRUE ONLY SO LONG AS YOU'RE NOT CLAIMING ANY TYPE OF AFFIRMATIVE DEFENSE. HAVE YOU GOTTEN FAR ENOUGH ALONG IN YOUR WORK AND IN YOUR INQUIRY ON THAT SUBJECT TO BE ABLE TO SAY THAT YOU WON'T MAKE SUCH A CLAIM?

MS. KIMBROUGH: WE HAVE CERTAINLY STARTED OUR INDEPENDENT INVESTIGATION. AT THIS POINT I CAN TELL YOU THAT AS WE STAND HERE TODAY WE DON'T ANTICIPATE HAVING ONE OF THOSE TWO ISSUES ARISE. CERTAINLY IT COULD, AS THINGS DEVELOP, BUT AT THIS POINT I CAN SAY THAT WE'RE NOT ANTICIPATING RAISING EITHER OF THOSE ISSUES.

THE COURT: OKAY.

MS. KIMBROUGH: I MEAN, OBVIOUSLY TO SOME EXTENT IT'S STILL AN OPEN QUESTION BECAUSE WE'VE GOT A FEW MORE THINGS TO DO.

THE COURT: BUT NOW AS A FOLLOW-UP TO THAT -- AND YOU DON'T HAVE TO ANSWER IT NECESSARILY IN OPEN COURT. IT COULD BE A QUESTION THAT NEEDS TO BE ANSWERED IN AN EX PARTE HEARING. BUT THOSE EXPERTS THAT YOU WOULD HAVE WORK ON THE CASE RELATED TO THAT SUBJECT, THEY HAVE BEGUN AND ARE IN THE MIDDLE OF THEIR WORK; CORRECT?

MS. KIMBROUGH: YES.

THE COURT: AND THEY -- OKAY.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: SO IF THERE IS GOING TO BE SUCH A DEFENSE RAISED, WE SHOULD KNOW ABOUT IT FAIRLY SOON?

MS. KIMBROUGH: YES.

THE COURT: ANY IDEA ABOUT THE TIME FRAME IN WHICH YOU'LL BE ABLE TO SAY YES OR NO AS TO THAT?

MS. KIMBROUGH: I WILL CALL OUR INDEPENDENT PSYCHIATRIC EXPERT AS SOON AS WE LEAVE HERE AND SPEAK TO HER, AND IF THERE'S ANY SERIOUS QUESTION OR -- OR ANY DOUBT IN HER MIND, THEN, YOU KNOW, I CAN CERTAINLY GET A DATE AS TO WHEN THERE WILL BE AN ABSOLUTE DETERMINATION MADE AND I'LL TELL HER THAT WE ARE NEEDING TO EXPEDITE THAT BECAUSE, IF IT'S GOING TO BE RAISED, THEN WE NEED---

THE COURT: OKAY.

MS. KIMBROUGH: ---TO KNOW IT.

THE COURT: ALL RIGHT. AND IF THERE IS, YOU'LL GIVE ME -- YOU'LL CALL ME BACK AND GIVE ME A -- YOU'LL -- YOU'LL GIVE US A DATE.

MS. KIMBROUGH: YES. ABSOLUTELY.

THE COURT: OKAY.

MS. KIMBROUGH: I WILL E-MAIL EVERYONE WHO'S ON THE MERCER LIST IMMEDIATELY.

THE COURT: OKAY. ALL RIGHT. NOW, WITH THAT, ANY

RESPONSE?

MR. GRAHAM: YES, YOUR HONOR. MY UNDERSTANDING WAS THAT THE REASON WE WERE ORDERING THOSE EVALUATIONS WAS TO MAKE SURE THAT THERE WAS NO PROBLEM AND THAT THERE WOULDN'T BE ANY P.C.R. ISSUES LATER. IF THEY'RE GOING TO DECIDE NOW THAT THEY DON'T WANT TO DO SOMETHING, AREN'T WE LEAVING OURSELVES IN A POSITION WHERE WE'RE NOT GOING TO KNOW WHAT A DOCTOR SHOULD HAVE LOOKED AT AND THEN AFTER THE FACT MAYBE SOMETHING WILL COME UP THAT A DOCTOR SHOULD HAVE LOOKED AT AND THEN WE HAVE A P.C.R. PROBLEM WITH THE ATTORNEYS NOT DOING THEIR JOBS? THAT WAS MY UNDERSTANDING OF WHY WE WERE DOING THE MENTAL RETARDATION EVALUATION AND WHY WE WERE SENDING THINGS TO D.D.S.N. AND TO THE DEPARTMENT OF MENTAL HEALTH.

THE COURT: WELL, ALL THAT MAY BE TRUE ALTHOUGH IT -- BASED ON WHAT SHE JUST SAID, I DON'T HEAR ANY GAPS IN WHAT THE ATTORNEYS ARE DOING. SHE'S -- SHE'S GOT AN EXPERT. THEY'VE GOT AN EXPERT THEY'VE CONSULTED WITH. THAT'S -- IF THE EXPERT MAKES A MISTAKE, THAT'S NOT AN ATTORNEY ISSUE. BUT I DON'T -- I DON'T -- I DON'T SEE THE -- WELL, I DON'T SEE A PROBLEM BASED ON WHAT SHE JUST SAID.

(ATTORNEY BETH FULLWOOD ENTERS THE COURTROOM NOW.)

THE COURT: AND THE -- THE INVESTIGA -- THE -- THE EVALUATION THAT HAS TAKEN PLACE REGARDING CRIMINAL RESPONSIBILITY IS -- IS JUST AS YOU SAY. IT IS -- IT WAS A

PRECAUTIONARY EFFORT THAT EVERYBODY AGREED WAS -- WAS FAIR TO TAKE. IT CAN'T TURN INTO A DISCOVERY PROCEDURE FOR THE STATE. AND AS LONG AS I AM SATISFIED THAT THE DEFENSE IS DOING WHAT THEY NEED TO DO IN ORDER TO HANDLE THAT QUESTION FROM THEIR SIDE, I JUST -- I THINK IT'S NOT AN ISSUE AND I DON'T THINK THAT -- I SORT OF -- I TEND TO -- I'M INCLINED TO AGREE WITH MS. KIMBROUGH THAT IT WOULD BE INAPPROPRIATE FOR ME TO ORDER THAT THAT INFORMATION BE PRODUCED TO DR. FRIERSON AT THIS POINT. IF THEY -- IF THEY RAISE IT, I THINK WE'RE -- IF THEY'RE -- I THINK WE CAN BE SATISFIED THAT THEY'RE IN A POSITION TO RAISE THOSE ISSUES IN A TIMELY MANNER IF THEY'RE GOING TO BE RAISED, AND IF THEY RAISE IT, THEN THE OUTLOOK CHANGES, SO... ALL RIGHT? WAS THERE ANYTHING ELSE THAT DR. FRIERSON SAID HE WANTED?

MR. GRAHAM: EVERYTHING ELSE HE ASKED FOR I THINK I CAN PROVIDE HIM EXCEPT FOR HE ASKED SPECIFICALLY -- HE SAID THAT MR. MERCER WAS ON PROBATION, AND WHILE ON PROBATION, HE WAS ORDERED TO GO TO COUNSELING. THE ONLY THING I'M AWARE OF IS THAT HE, I BELIEVE, TESTED POSITIVE FOR DRUGS WHILE HE WAS ON PROBATION. HE WAS ORDERED INTO INSIGHTS. SO I HAVE PREPARED AN ORDER FOR YOUR SIGNATURE TO ORDER INSIGHTS TO RELEASE THAT INFORMATION TO -- I'VE GOT IT RELEASING IT TO US TO GIVE TO DR. FRIERSON, BUT HOW EVER THAT NEEDS TO BE DONE...

THE COURT: WHERE IS INSIGHTS?

MR. GRAHAM: IT'S AN ALCOHOL AND DRUG---

THE COURT: HERE?

MR. GRAHAM: IT'S IN LEXINGTON COUNTY.

MS. KIMBROUGH: PERHAPS IT'S BECAUSE I'M NOT A PSYCHIATRIST, BUT I THINK MR. LITTLEJOHN AND I ARE BOTH SOMEWHAT PUZZLED BY WHY -- WHEN THE ONLY QUESTIONS ARE CRIMINAL RESPONSIBILITY AND COMPETENCY WHY WE WOULD -- WHY DR. FRIERSON WOULD NEED PROBATION RECORDS. I MEAN---

THE COURT: HE'S -- I MEAN, HE'S THE DOCTOR THAT WAS -- THAT WAS CHOSEN TO MAKE WHAT WE AGREED UPON WAS THE -- WOULD BE A WORTHWHILE INQUIRY INTO CRIMINAL RESPONSIBILITY, AND HE'S TOLD US THAT HE WANTS SOMETHING. SO, I MEAN, THE QUESTION IS NOT WHY HE WANTS IT. THE QUESTION IS WHETHER OR NOT I HAVE THE AUTHORITY TO ORDER IT PRODUCED.

MS. KIMBROUGH: YES, YOUR HONOR. AGAIN, I FEEL LIKE WE'RE, YOU KNOW, PROVIDING THE STATE WITH DISCOVERY THEY MAY NOT BE ENTITLED TO, BUT, YOU KNOW, OBVIOUSLY IF DR. FRIERSON WANTS IT, WE OBVIOUSLY DON'T -- YOU KNOW, WOULDN'T CONSENT TO HIM HAVING IT. WE CERTAINLY THINK---

THE COURT: WELL, WHY DON'T YOU---

MS. KIMBROUGH: ---IT'S PRIVILEGED INFORMATION.

THE COURT: I MEAN, THE SOLICITOR AT THIS POINT IS JUST TRYING TO GET THE EVALUATION DONE SO THAT IT CAN BE FINALIZED. I DON'T -- I DON'T REALLY THINK THEY'RE INTERESTED IN THE INFORMATION FROM A DISCOVERY STANDPOINT,

ALTHOUGH IT COULD HAVE THAT COLLATERAL EFFECT, BUT WHY DON'T YOU JUST TAKE THOSE TWO INQUIRIES AND PASS THEM ALONG TO YOUR EXPERT AND MAKE SURE THAT -- THAT -- THAT SHE KNOWS ABOUT THAT AND... WELL, I GUESS THE FIRST QUESTION IS IS THERE SOME SORT OF -- IS THERE SOME SORT OF PRIVILEGE THAT IS ATTACHED TO THE RECORDS OF INSIGHTS?

MR. GRAHAM: IT'S A -- FROM MY UNDERSTANDING, I CAN TELL YOU THAT THERE'S A -- 44-22-100 DEALS WITH THE RELEASE OF MENTAL HEALTH AND I BELIEVE ADDICTION-TYPE COUNSELING, AND THAT'S PRIVILEGED. THAT'S NOT SOMETHING THAT CAN NORMALLY BE RELEASED, SHORT OF A COURT ORDER.

THE COURT: AND THE COURT -- AND DO YOU KNOW OF ANY BASIS FOR ORDERING IT RELEASED OTHER THAN -- OTHER THAN THAT THIS DOCTOR SAID HE WANTS TO LOOK AT IT?

MR. GRAHAM: NO, SIR.

THE COURT: OKAY. I'M GOING TO LET THAT SIT IN THE SAME CATEGORY AS THE DISABILITY RECORDS. I WOULD -- I WOULD LIKE FOR Y'ALL TO MAKE SURE THAT YOUR EXPERT IS AWARE OF THE INQUIRY THAT HAS BEEN MADE BY DR. FRIERSON, AND IF SHE WANTS THE RECORDS, WE CERTAINLY CAN GET THEM PRODUCED TO HER IMMEDIATELY AND THEN WE'LL WAIT AND SEE HOW THINGS GO IN TERMS OF WHETHER OR NOT Y'ALL RAISE ANY TYPE OF AFFIRMATIVE DEFENSE. IS THAT SATISFACTORY?

MR. GRAHAM: YES, YOUR HONOR. THE ONLY THING I WAS GOING TO ADD IS IF YOU DECIDE TO ORDER THEM, WE DON'T HAVE TO

SEE THEM, THAT IT COULD GO DIRECTLY TO DR. FRIERSON, AND THEN WHEN HE'S DONE WITH IT, HE COULD SEND IT BACK. HE JUST STATED THAT HE WANTED THAT INFORMATION FOR HIS OPINION.

MS. KIMBROUGH: YOUR HONOR, AS LONG AS THE DOCUMENTS ARE SIMPLY BEING USED TO CONDUCT THOSE TWO INQUIRIES, COMPETENCY AND CRIMINAL RESPONSIBILITY, AND THE DOCUMENTS WE'VE PROVIDED TO DR. FRIERSON ARE NOT SORT OF DISTRIBUTED FAR AND WIDE OR, SIMPLY PUT, HE USES THEM FOR HIS PURPOSES AND THEN RETURNS THEM TO US WITHOUT, YOU KNOW, ANY DISCLOSURE BEING MADE TO OTHER PARTIES, I'M NOT SURE WE WOULD HAVE ANY OBJECTION. I WOULD---

THE COURT: SO IF HE DRAFTS AN ORDER THAT SAYS THAT THE DISABILITY RECORDS AND THE INSIGHTS RECORDS ARE PRODUCED TO DR. FRIERSON AND THAT DR. FRIERSON IS TO MAKE WHATEVER USE OF THEM HE NEEDS TO MAKE IN ORDER TO DO HIS WORK AND THEN RETURN THEM TO YOU, Y'ALL WOULD HAVE NO PROBLEM WITH THAT?

MS. KIMBROUGH: I'D LIKE TO TALK TO OUR EXPERT FIRST, BUT, I MEAN, CERTAINLY WITHOUT, YOU KNOW---

THE COURT: ALL RIGHT.

MS. KIMBROUGH: ---THEM BEING DISTRIBUTED I DON'T -- I DON'T THINK WE WOULD BE OPPOSED TO THAT.

MR. GRAHAM: THE ONLY THING FOR CLARIFICATION, YOUR HONOR, IS IT IS MY UNDERSTANDING, ACCORDING TO THE ORDER, IS DR. FRIERSON IS NOT LOOKING AT COMPETENCY. HE'S LOOKING AT CRIMINAL RESPONSIBILITY AND CAPACITY TO CONFORM, JUST FOR THE

RECORD.

THE COURT: ALL RIGHT. ALL RIGHT. WELL, WHY DON'T YOU -- WHY DON'T YOU TALK TO YOUR EXPERT ABOUT THAT, AND IF Y'ALL CAN AGREE TO IT, LET THEM KNOW? YOU CAN DO AN ORDER AND I'LL -- I MEAN, THIS IS FOR -- COULD WE GET THE STUFF BY TOMORROW AND HAVE IT OVER THERE?

MR. GRAHAM: I DON'T KNOW. I KNOW THAT SHE HAD THE DISABILITY STUFF IN HER POSSESSION, SO THAT'S NOT AN ORDER FROM THEM. AS FAR AS INSIGHTS, I MEAN, I DON'T KNOW. I DON'T KNOW HOW LONG IT WOULD TAKE THEM TO GET THERE. WE COULD REQUEST IT.

THE COURT: WELL, HE MIGHT NOT NEED IT FOR THE ACTUAL INTERVIEW. HE COULD USE IT LATER. Y'ALL HAVE THAT -- Y'ALL HAVE THAT CONVERSATION AND LET HIM KNOW -- IF SHE AGREES TO THE ORDER, PREPARE IT, GET HER TO SIGN IT, GET IT TO ME. I'LL GET IT RIGHT BACK TO YOU.

MS. KIMBROUGH: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. WHAT ELSE?

MR. LITTLEJOHN: YOUR HONOR, ALONG THE SAME LINES OF DISCOVERY REQUESTS, YOUR HONOR, AS FAR AS I KNOW WE HAVE NOTHING THAT'S BEEN PRODUCED BY THE STATE INDICATING ANY SORT OF PLEA AGREEMENT OR OTHER COMPENSATION OR ANYTHING ELSE THAT'S BEEN GIVEN TO THE CO-DEFENDANT IN THIS CASE, MARCUS THOMPSON. IT'S MY UNDERSTANDING THAT MR. THOMPSON WILL BE A WITNESS FOR THE STATE IN THIS CASE, AND WE WOULD CERTAINLY

LIKE ANYTHING RELATING TO ANY PLEA AGREEMENT, ANY CONCESSIONS HE'S BEEN GIVEN, WHETHER IT'S FOR BOND OR ANY OTHER PURPOSE, REGARDING MARCUS THOMPSON. YOUR HONOR, I MIGHT JUST FOR -- AS AN ADD-ON, I WOULD LIKE TO APPLY THIS MOTION TO ANY OTHER WITNESS THAT THE STATE INTENDS TO CALL IN THIS CASE THAT HAS A PRIOR RECORD OR HAS HAD CHARGES HANDLED BY THE SOLICITOR'S OFFICE OR ANY OTHER SOLICITOR'S OFFICE.

THE COURT: OKAY.

MR. GRAHAM: YOUR HONOR, IT'S MY UNDERSTANDING AT THIS POINT NO PROMISES HAVE BEEN MADE TO THE CO-DEFENDANT IN THIS CASE OR ANY OTHER WITNESS IN THIS CASE.

THE COURT: DO YOU AGREE THOUGH THAT IF SUCH PROMISE HAS BEEN MADE OR IS MADE IN THE FUTURE THAT THAT -- THE SUBSTANCE OF THOSE PROMISES SHOULD BE DISCLOSED TO THE DEFENSE?

MR. GRAHAM: YES, YOUR HONOR.

THE COURT: ALL RIGHT. IS THAT SATISFACTORY?

MR. LITTLEJOHN: YOUR HONOR, WE WOULD -- BUT WE CERTAINLY WOULD NOT WANT TO GET THAT INFORMATION ON THE EVE OF MR. THOMPSON TESTIFYING. I MEAN, IF THEY'RE GOING TO -- IF THEY'VE BEEN IN DISCUSSIONS WITH HIS ATTORNEY ABOUT A POTENTIAL DEAL, THEN WE'D CERTAINLY LIKE TO KNOW THAT AS EARLY AS POSSIBLE SO THAT WE CAN HAVE THE ABILITY TO CROSS-EXAMINE MR. THOMPSON ABOUT ANY BIAS OR PREJUDICE ON HIS PART.

YOUR HONOR, ALSO IT'S MY UNDERSTANDING MR. THOMPSON

WAS CHARGED ALONG WITH OUR CLIENT AND WAS RELEASED ON BOND. WE'D LIKE TO KNOW WHAT CONCESSIONS, IF ANY, WERE GIVEN TO MR. THOMPSON OR ANY INPUT THAT THE SOLICITOR OR ANY LAW ENFORCEMENT HAD AS TO HIS BEING RELEASED ON BOND.

MR. GRAHAM: I CAN ONLY SPEAK FOR MYSELF, YOUR HONOR. I'M NOT AWARE OF ANY.

THE COURT: WELL, YOU CAN SPEAK FOR THE---

MR. GRAHAM: I KNOW I HAVE---

THE COURT: WELL, YOU CAN SPEAK FOR THE ENTIRE SOLICITOR'S OFFICE.

MR. GRAHAM: MR. HUBBARD SAYS HE'S NOT AWARE OF ANY, AND I THINK THE SOLICITOR IS LISTENING TO ME WHEN I SAY HE'S NOT AWARE OF ANY.

MR. MYERS: NOT AT ALL.

THE COURT: WELL, WAS THE -- WAS THE BOND ORDER DONE BY CONSENT OR WAS IT DONE BY ORDER OF A JUDGE?

MR. GRAHAM: I DON'T KNOW, YOUR HONOR.

THE COURT: Y'ALL CAN GET THE BOND ORDER. IF IT WAS DONE BY CONSENT, THEN YOU -- YOUR INQUIRY PERHAPS GOES ON, BUT IF IT WAS DONE ON A RULING OF THE JUDGE, THEN HOPEFULLY AT LEAST IT WAS -- EVERYTHING THAT WENT INTO THAT WAS DONE IN OPEN COURT AND THERE WOULD BE A RECORD OF IT, AND YOU CAN GET -- YOU WOULD HAVE NO TROUBLE GETTING THOSE RECORDS.

MR. LITTLEJOHN: YOUR HONOR, PERHAPS WE SHOULD ORDER THE TRANSCRIPT AND SEE WHAT TRANSPIRED AT THAT HEARING. IT'S

MY UNDERSTANDING HE APPEARED IN GENERAL SESSIONS COURT BECAUSE HE WAS CHARGED WITH ACCESSORY BEFORE THE FACT TO MURDER.

THE COURT: AND A CIRCUIT JUDGE SET BOND?

MR. LITTLEJOHN: YES, YOUR HONOR. BUT IF THERE WERE ANY SIDE DEALS OR ANYTHING ELSE THAT WAS INVOLVED IN THAT BOND SETTING OTHER THAN WHAT'S ON THE RECORD, WE CERTAINLY THINK WE'RE ENTITLED TO HAVE THAT INFORMATION.

THE COURT: I THINK YOU ARE, TOO, BUT IF IT'S -- IF IT WAS DONE BY CONSENT, THEN YOU'VE GOTTEN YOUR ANSWER. THERE WERE NO -- THERE WERE NO SIDE DEALS. IF IT WAS DONE BY -- WITHOUT CONSENT, THEN IT BETTER -- EVERYTHING, I'M SURE, IS ON THE PUBLIC RECORD.

MR. LITTLEJOHN: YOUR HONOR, I HOPE THAT'S A SAFE ASSUMPTION ON THE COURT'S PART, BUT IF IT'S NOT, THAT'S CERTAINLY INFORMATION WE THINK WE OUGHT TO HAVE. YOU KNOW, OFTENTIMES THESE THINGS ARE TAKEN UP AT SIDE BAR, BACK IN CHAMBERS OR WHATEVER, AND IF ANYTHING WAS DONE FOR THIS MAN BY THE STATE, WE CERTAINLY THINK WE'RE ENTITLED TO KNOW THAT.

MR. GRAHAM: YOUR HONOR, I AGREE THAT THAT'S IMPEACHMENT EVIDENCE; I UNDERSTAND THAT. I'LL GO BACK AND CHECK TO SEE HOW THAT BOND WAS HANDLED, WHO DID IT IN OUR OFFICE, AND IF I FIND OUT ANYTHING THAT NEEDS TO BE DISCLOSED, I'LL DISCLOSE IT.

THE COURT: ALL RIGHT. ANYTHING FURTHER OTHER THAN

THE CONFLICT QUESTION?

MR. LITTLEJOHN: YOUR HONOR, THE ONLY OTHER THING WE'RE -- WE WORKED THROUGH LUNCH TRYING TO PREPARE OUR EXEMPTION CONSENT OR DISSENT, AND I'M STILL GOING THROUGH IT. I DIDN'T REALIZE THERE WERE THAT MANY, BUT WE'LL GET IT TO MS. CARRIGG.

THE COURT: THAT'S NOT SOMETHING THAT ABSOLUTELY HAS TO BE DONE TODAY.

MR. LITTLEJOHN: ALL RIGHT.

THE COURT: I MEAN, YOU CAN -- YOU CAN GET THAT DONE. JUST LET ME KNOW WHEN YOU GET IT DONE, HOPEFULLY OVER THE NEXT DAY OR SO.

MR. LITTLEJOHN: THAT WOULD BE FINE. I UNDERSTOOD THE CLERK'S OFFICE WOULD LIKE TO GET IT BACK TODAY. WE'LL GET IT BACK AS SOON AS POSSIBLE.

THE COURT: I'M SURE THEY WOULD. AND I WOULD LIKE TO HELP YOU, BUT YOU NEED -- YOU'VE GOT TO HAVE THE APPROPRIATE AMOUNT OF TIME TO GET IT DONE.

MR. LITTLEJOHN: ALL RIGHT, SIR.

THE COURT: SO WE'RE NOT RUSHING YOU.

MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

MR. MYERS: ON THAT MATTER, WE GAVE OUR LIST TO THE CLERK, AND THE ONLY ONES THAT WE DIDN'T MARK CONSENT ON WAS SOME OF THEM THAT HAD MAYBE WORK PROBLEMS OR OTHER PROBLEMS WHICH IS A GRAY AREA. HOPE TOLD US THAT IF WE WOULD LOOK AT

THEIR EXCUSES MAYBE WE COULD CONSENT TO THOSE, TOO. SO WE'LL REVISIT THOSE. DEFENSE COUNSEL, IF THEY WANT TO LOOK AT OUR LIST - MAYBE THEY ALREADY HAD IT - TO SEE IF ANY WE AGREE ON... IF THERE'S QUESTIONS ABOUT OTHERS, IF THEY'LL TALK WITH US, WE MIGHT CAN AGREE ON THOSE, TOO.

THE COURT: ALL RIGHT. WHAT THEY'RE GOING TO -- WHAT HOPE IS GOING TO DO IS ANY OF THE -- ANY ONES THAT YOU DON'T BOTH AGREE TO RIGHT NOW WILL ALSO SHOW UP ON THE NEXT LIST WHICH IS GOING TO BE READY FOR YOU ALL TO VIEW STARTING MARCH 6TH. SO AFTER YOU ALL HAVE DONE THE CONSENT EXERCISE ON MARCH 6TH AND 7TH AND I'VE SIGNED THE ORDER ON MARCH 8TH, I WILL LOOK AT THOSE THAT YOU DID NOT CONSENT TO OR CONTINUE LOOKING AT THOSE YOU DID NOT CONSENT TO. WE MAY HAVE A PHONE CONFERENCE OR SOMETHING LIKE THAT OR MAYBE WE'LL TAKE IT UP ON THE 23RD OR WHATEVER. WE'LL TRY TO GET THOSE DONE, BUT WHATEVER ONES YOU CAN CONSENT TO, FINE.

THERE'S CERTAINLY NO PRESSURE ON YOU ALL TO CONSENT TO SOMETHING YOU DON'T WANT TO CONSENT TO. IF YOU JUST AGREE THAT THE PERSON IS ENTITLED TO BE EXCUSED, THEN MARK IT DOWN AND WE'LL GO AHEAD AND EXCUSE THEM. OTHERWISE, WE'LL DEAL WITH IT IN THE NORMAL -- AS WE NORMALLY DO.

MR. LITTLEJOHN: YOUR HONOR, THAT'S WHAT I'VE TRIED TO DO. THE ONES THAT HAVE ASKED FOR EXEMPTIONS BECAUSE OF AGE OR CHILDREN, OF COURSE, WE'RE CONSENTING TO THAT AND MOST OF THE MEDICAL EXCUSES, BUT SOME OF THE WORK EXCUSES, AS MR.

MYERS SAID, WE, QUOTE, PROBABLY WOULD WANT TO TAKE THOSE UP.

THE COURT: OKAY. ALL RIGHT.

MR. LITTLEJOHN: FOR THE TIME BEING, I'M IN AGREEMENT WITH THE SOLICITOR'S OFFICE ON ONE ISSUE.

THE COURT: ALL RIGHT. GOOD. ANYTHING ELSE THEN?

MR. GRAHAM: YES, YOUR HONOR. THE STATE HAS TWO ISSUES. FIRST, OCTOBER 12TH, 2005, THE STATE FILED A RECIPROCAL RULE 5. WE HAVE NOT RECEIVED ANYTHING FROM THE DEFENSE. I JUST WANT TO MAKE SURE THAT THEY HAVE NOTHING AT THIS TIME THAT NEEDS TO BE TURNED OVER TO US.

MS. KIMBROUGH: YOUR HONOR, WE HAVE NO REPORTS OR ANYTHING ELSE THAT WOULD FALL UNDER THE RECIPROCAL RULE 5 OBLIGATION BY DEFENSE COUNSEL TO DISCLOSE. IF WE DO, WE UNDERSTAND THAT WE'RE OBLIGATED TO TURN IT OVER AND WE'LL DO SO.

THE COURT: ALL RIGHT.

MR. GRAHAM: THE SECOND THING, YOUR HONOR, I WOULD ASK FOR IS I KNOW THAT THEY HAVE AT LEAST HAD AN INDEPENDENT PSYCHIATRIC EXAM; I'M NOT SURE WHAT ELSE. AND I WOULD ASK THAT YOUR HONOR ORDER THEM TO HAVE ALL OF THEIR EXPERTS WRITE AN OPINION, WRITE A REPORT. IT'S A COMMON DEFENSE PRACTICE NOT TO WRITE A REPORT AND THEN COME INTO TRIAL AND NOT HAVE ONE, AND WE WOULD ASK THAT YOU ORDER THEM TO HAVE ANY EXPERT WHO INTENDS TO TESTIFY TO WRITE A REPORT AND ALSO TO PRESERVE THEIR NOTES.

MS. KIMBROUGH: YOUR HONOR, THERE'S ABSOLUTELY NO BASIS FOR COMPELLING US TO PRODUCE REPORTS FROM OUR EXPERTS.

THE COURT: IF THEY'RE TESTIFYING EXPERTS.

MS. KIMBROUGH: WELL, IF -- IF WE DON'T WANT A REPORT FROM A PARTICULAR EXPERT, I DON'T THINK THERE'S ANY AUTHORITY FOR, YOU KNOW, THE POSITION THAT WE SHOULD HAVE TO GET THEM IN DISCOVERY---

THE COURT: WELL, I'VE GOT SEVERAL QUESTIONS BOUNCING AROUND IN HERE. ALL RIGHT. THE FIRST IS: IF THEY'RE A NON-TESTIFYING EXPERT, YOU CAN DO WHATEVER YOU WANT TO. YOU DON'T HAVE TO PRODUCE ANYTHING. IF THEY'RE A TESTIFYING EXPERT WHO DOES A REPORT, DO YOU CONCEDE THAT THAT REPORT MUST BE PRODUCED AS RECIPROCAL DISCOVERY?

MS. KIMBROUGH: YES. IF A REPORT IS REQUESTED AND IT IS PRODUCED---

THE COURT: ALL RIGHT.

MS. KIMBROUGH: ---IT WILL BE GIVEN TO YOU.

THE COURT: AND IF IT'S A TESTIFYING EXPERT AND THE EXPERT HAS NOTES, DO YOU AGREE THAT THOSE WOULD HAVE TO BE PRODUCED?

MS. KIMBROUGH: I BELIEVE IF THE EXPERT RELIES ON THOSE NOTES WHEN THEY TESTIFY, YES, THE STATE WOULD BE ENTITLED TO REVIEW THAT INFORMATION PRIOR TO CROSS-EXAMINATION.

THE COURT: WELL, WAIT A MINUTE NOW. LET'S -- IF

THE EXPERT IS GOING TO TESTIFY AND THE EXPERT HAS MADE NOTES ABOUT THE EXPERT'S WORK IN THE CASE, WOULD THOSE NOT ALL HAVE TO BE PRODUCED?

MS. KIMBROUGH: I THINK THAT'S WHAT I JUST AGREED TO.

THE COURT: YOU SAID IF THEY RELIED ON THEM.

MS. KIMBROUGH: RIGHT, IF THEY USED THEM, IF THEY HAVE THEM UP THERE WITH THEM ON THE STAND.

THE COURT: WELL, THAT'S AN EVIDENTIARY QUESTION. THAT'S -- THAT'S A REFRESHING RECOLLECTION UNDER WHATEVER RULE NUMBER IT IS. I CAN'T -- 612 OR SOMETHING. BUT HE'S TALKING ABOUT A DISCOVERY QUESTION. YOU HAVE ASKED FOR DISCOVERY FROM THEIR EXPERTS WHICH THEN TURNS -- WHICH THEN GIVES THEM THE RIGHT TO ASK FOR DISCOVERY FROM YOU, AND I'M ASKING... I MEAN, IF YOU HAVE AN EXPERT WHO'S GOING TO TESTIFY, ARE THEY NOT ENTITLED TO HAVE ANY REPORTS THAT THE EXPERT DOES PREPARE OR ANY NOTES THAT THE EXPERT DOES MAKE DURING THE COURSE OF THAT EXPERT'S WORK ON THE CASE?

MS. KIMBROUGH: I BELIEVE THEY WOULD HAVE -- THAT THEY WOULD BE CLEARLY ENTITLED TO A COPY OF ANY REPORTS THAT ARE GENERATED. HOWEVER, THE NOTES -- IT'S A LITTLE MORE PROBLEMATIC. YOU KNOW, THERE MAY BE SOME PRIVILEGED INFORMATION IN THERE. THERE MAY BE INFORMATION THAT DOESN'T HAVE ANYTHING TO DO WITH WHAT THEY ULTIMATELY TESTIFY TO.

THE COURT: ALL RIGHT. WELL, THEN YOU WOULD -- ALL

RIGHT. IF THAT'S TRUE THOUGH, YOU'VE GOT TO DISCLOSE IN A WAY OF SOME -- IN SOME TYPE OF PRIVILEGED LOG TYPE DISCLOSURE WHAT'S THERE AND WHAT'S THE BASIS FOR IT BEING WITHHELD.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: SO THEY CAN DECIDE WHETHER OR NOT TO CHALLENGE IT IF THEY -- IF THEY WANT TO.

MS. KIMBROUGH: YES, YOUR HONOR.

THE COURT: AND THE SAME GOES FOR THEM. ALL RIGHT. IS THAT SATISFACTORY?

MR. GRAHAM: YOUR HONOR, THE ONLY THING I WOULD SAY IS THE REASON WE ASKED FOR IT IS BECAUSE DURING THE TRIAL THEY'RE GOING TO PUT AN EXPERT UP, IF THEY DO. THEN WE HAVE TO TAKE A BREAK, AND WE NEED TIME TO GO THROUGH ALL THOSE NOTES BECAUSE THEY'RE NOT WRITING THE REPORT NOW, AND THAT JUST SLOWS DOWN THE TRIAL PROCESS. THAT'S WHY WE'RE ASKING... IF THEY WROTE A REPORT, THE PRIVILEGED INFORMATION THAT MS. KIMBROUGH IS REFERRING TO WOULDN'T BE IN THE REPORT. SO WHAT WE WOULD LIKE IS TO HAVE THEM WRITE A REPORT AND THEN PRESERVE THEIR NOTES, AND IF THEIR NOTES BECOME NECESSARY FOR US TO LOOK AT, WE COULD DO IT AT THAT TIME.

THE COURT: WELL, WE HAVEN'T GOTTEN TO THE QUESTION YET OF MAKING THE EXPERT WRITE A REPORT THE EXPERT WOULD NOT OTHERWISE WRITE, SO... BUT IN TERMS OF -- OF -- AND SHORT OF THAT QUESTION IS SHE'S AGREED TO PRODUCE THE REPORT THE EXPERT CHOOSES TO MAKE AND TO PRODUCE ALL NOTES THAT ARE NOT

PRIVILEGED AND TO MAKE A LOG OF THOSE NOTES THAT ARE WITHHELD BASED ON PRIVILEGE. IS THERE ANYTHING MORE SHE CAN DO?

MR. GRAHAM: ONLY WE JUST WOULD LIKE TO HAVE THOSE NOTES AS SOON AS POSSIBLE. WE ALSO WOULDN'T WANT TO WAIT UNTIL THE WITNESS TESTIFIED. WE'D LIKE TO HAVE AN OPPORTUNITY TO REVIEW THOSE NOTES BEFOREHAND SO THAT WE COULD PREPARE.

THE COURT: OKAY. I DON'T ANTICIPATE THAT BEING A PROBLEM. I MEAN, I -- I -- I DO NOT WANT DISCOVERY TO BE A PROBLEM EITHER WAY. I WANT TO BE VERY CLEAR ON THAT. WE'LL GET -- I WANT TO GET BACK ACTUALLY IN A MINUTE TO THE -- TO THE QUESTION OF DISCOVERY. I'D KIND OF LIKE FOR BOTH SIDES -- CERTAINLY THE STATE BECAUSE I JUST TALKED TO YOU ABOUT MAKING THAT INQUIRY OF YOUR LAW ENFORCEMENT AGENCIES. I'D LIKE FOR YOU TO BE IN A POSITION OF KNOWING IN ADVANCE OF THIS HEARING WE'RE GOING TO HAVE ON THE 23RD OF MARCH WHETHER OR NOT THERE IS ANYTHING THAT IS GOING TO BE WITHHELD SO THAT WE CAN LITIGATE IT AT THAT TIME AND THAT IF I RULE THAT IT'S TO BE PRODUCED, THERE WILL BE PLENTY OF TIME FOR IT TO BE PRODUCED AND FOR THEM TO DIGEST IT AND USE IT TO GET READY FOR TRIAL.

BUT AS FAR AS -- AND AS FAR AS Y'ALL'S STUFF, WE'VE SET UP THE SCHEDULE FOR THE WORK TO BE DONE BY YOUR EXPERTS IN PLENTY OF TIME FOR THEM TO BE READY FOR TRIAL. SO IF THERE IS ANYTHING THAT NEEDS TO BE PRODUCED, IT NEEDS TO BE

DONE IN A TIMELY MANNER, AND IF YOU'RE GOING TO WITHHOLD SOMETHING, THE LOG OF WHAT'S BEING WITHHELD NEEDS TO BE PRODUCED IN A TIMELY MANNER SO THAT WE CAN LITIGATE THAT. AND I WOULD ALSO EXPECT THAT THAT WOULD BE SOMETHING THAT WE WOULD BE ABLE TO HANDLE AND RESOLVE ON THE 23RD.

SO I'M THINKING IF THERE'S A DISCOVERY ISSUE OUT THERE ANYWHERE ON EITHER SIDE, WE'RE GOING TO RESOLVE IT ON THE 23RD, AND IF IT DOESN'T GET RESOLVED ON THE 23RD, I'M GOING TO HAVE SOME VERY DIFFICULT QUESTIONS AS TO WHY IT WASN'T, AND I DON'T ANTICIPATE THAT'S GOING TO BE A PROBLEM. OKAY.

MS. KIMBROUGH: YOUR HONOR, THERE IS ONE THING I'D LIKE TO NOTE IN THAT REGARD. ONE OF THE EXPERTS THAT WE WERE RECENTLY ADVISED WE NEEDED ON THIS CASE THAT WE BROUGHT UP WITH YOUR HONOR IN THE EX PARTE FUNDING MOTION, THIS PERSON IS NOT GOING TO BECOME INVOLVED OR CANNOT, IN FACT, DO THEIR WORK UNTIL VERY CLOSE TO THE TRIAL. IN FACT, I SUSPECT WE WON'T HAVE ANYTHING FROM THEM UNTIL THE BEGINNING OF JURY SELECTION. NOW, OBVIOUSLY THAT'S LIKE SEVEN DAYS BEFORE THE GUILT PHASE STARTS APPROXIMATELY, ASSUMING WE START ON THE 17TH, AND I WILL PROMISE THAT AS SOON AS WE HAVE SOMETHING THE STATE WILL HAVE IT.

THE COURT: OKAY. WELL, YOU ALSO IF YOU DON'T -- I WOULD REQUEST THAT YOU MAKE ABSOLUTELY SURE THAT THAT EXPERT IS GOING TO BE READY TO DO THE WORK BECAUSE IF YOU'RE NOT

ABSOLUTELY SURE OF IT, YOU CAN GO GET A DIFFERENT EXPERT, AND IF YOU COME TO ME ON THE MORNING OF JURY SELECTION AND SAY, "OOPS, THE EXPERT WAS NOT ABLE TO GET THE WORK DONE," I'M GOING TO BE INCLINED TO SAY, "TOUGH." AND SO YOU -- YOU KNOW, KNOWING THAT YOU FACE THAT PROBLEM, YOU MAKE SURE THAT'S NOT GOING TO BE A PROBLEM.

MS. KIMBROUGH: IT WILL NOT BE A PROBLEM. IF IT IS, WE'LL TAKE CARE OF IT IN THE NEXT WEEK.

THE COURT: OKAY. AND NOW WE GET TO THE QUESTION OF WHETHER OR NOT I HAVE THE AUTHORITY TO FORCE THE EXPERT TO WRITE A REPORT THAT THE EXPERT WOULD NOT OTHERWISE WRITE AND, IF I DO, SHOULD I EXERCISE IT? ANYTHING YOU WANT TO SAY?

MR. GRAHAM: I KNOW THAT THE LAST TRIAL WE HAD THE JUDGE ORDERED IT. I DON'T KNOW OF ANY STATUTE THAT GIVES YOU THE AUTHORITY. I BELIEVE THAT THERE'S REFERENCE TO IT IN SOME CASE LAW THAT SAYS THAT IT'S BEEN DONE, BUT I CAN'T CITE ANYTHING TO YOU AT THIS TIME.

MR. MYERS: STATE VERSUS HALL.

THE COURT: STATE VERSUS WHAT?

MR. MYERS: HALL. H-A-L-L.

THE COURT: ALL RIGHT. I WILL -- I'LL BE HAPPY TO READ STATE VERSUS HALL. WHY DON'T WE PUT THAT DOWN AS SOMETHING TO DEAL WITH? LET'S SEE. IF WE DID IT ON THE 23RD, THAT LEAVES TWO AND A HALF WEEKS BEFORE TRIAL -- BEFORE JURY SELECTION. AND YOUR CONCERN IS GETTING IT IN TIME TO --

TO UNDERSTAND WHAT IS THE SUBSTANCE OF THE EXPERT'S OPINION TO AVOID HAVING TO TAKE A BREAK IN THE MIDDLE OF TRIAL SO THAT IF YOU GOT IT -- IF YOU GOT IT OVER THE WEEKEND BEFORE, SAY, THE 14TH, 15TH, 16TH OF APRIL, THAT WOULD BE GOOD ENOUGH, WOULDN'T IT?

MR. GRAHAM: THE SOONER THE BETTER BUT, YES, YOUR HONOR. I THINK WE WOULD JUST NEED AN OPPORTUNITY SO THAT WE DON'T SLOW DOWN THE TRIAL SO WE DON'T HAVE TO MAKE -- SO THAT WE DON'T SEE SOMETHING THAT WE HAVE TO GO TALK TO OUR OWN EXPERT ON. SO OBVIOUSLY THE SOONER THE BETTER.

THE COURT: YEAH. I KEEP SAYING THE 23RD, AND THE CLERK JUST POINTED OUT TO ME THAT IT'S MARCH THE 30TH THAT WE HAVE ANOTHER SET OF HEARINGS SCHEDULED. NO, I DIDN'T CHANGE IT; I JUST WAS WRONG ABOUT THE DATE. THANK YOU.

MR. GRAHAM: YOUR HONOR, THE ONLY THING I COULD SUGGEST IS IF YOU WANT TO TRY TO DO THE CONFLICT, IF WE COULD TAKE A FEW-MINUTE BREAK, MAYBE WE COULD CALL BACK OVER TO THE PUBLIC DEFENDER'S OFFICE AND SEE IF WE COULD GET A HOLD OF MS. FULLWOOD AND MS. MCPHERSON---

THE COURT: SHE'S HERE.

MR. GRAHAM: ONE OF THEM IS. AND THEN IN THE MEANTIME, I CAN GO PULL THAT COPY OF THE CASE LAW FOR YOU.

THE COURT: THAT'S OKAY. WE'LL -- WE'LL -- I DON'T THINK THAT'S SOMETHING WE HAVE TO -- I THINK I HAVE TIME -- I WANT TIME TO THINK ABOUT THAT BEFORE I DECIDE WHAT TO DO

ABOUT THAT. SO ANYTHING FURTHER OTHER THAN THE CONFLICT QUESTION?

MR. GRAHAM: NO, YOUR HONOR.

THE COURT: OKAY. FROM THE DEFENSE?

MS. KIMBROUGH: NOT AT THIS TIME, YOUR HONOR.

THE COURT: OKAY. THEN LET'S DEAL WITH THE CONFLICT QUESTION. IS IT -- DO WE THINK EVERYBODY IS HERE? I MEAN, YOU REP -- YOU REPRESENT MR. MERCER, AND YOU'RE INVOLVED IN THE -- EVEN THOUGH YOU DON'T -- EVEN THOUGH YOU'RE NOT APPOINTED IN THE LYNCHING CASE, YOU -- YOU REPRESENT HIM HERE. CAN YOU -- CAN YOU REPRESENT HIM IN ALL RESPECTS THAT ARE NECESSARY IN ORDER TO DEAL WITH THIS NOW?

MS. KIMBROUGH: I'M NOT SURE I UNDERSTAND YOUR QUESTION EXACTLY.

THE COURT: ARE WE READY TO GO FORWARD WITHOUT MS. MCPHERSON?

MS. KIMBROUGH: I BELIEVE WE ARE. I MEAN, I'VE SPOKEN TO HER AND, YOU KNOW, EXPRESSED TO HER WHAT MY CONCERNS WERE ABOUT THE CONFLICT. I THINK MS. FULLWOOD CAN CERTAINLY ANSWER -- FILL IN ANY GAPS. SHE REPRESENTS A MAN WHO IS A WITNESS AGAINST MR. MERCER. OBVIOUSLY MS. FULLWOOD AND MS. MCPHERSON ARE IN THE SAME OFFICE.

THE COURT: SHE REPRESENTS -- YOU REPRESENT -- DO YOU KNOW WHAT WE'RE TALKING ABOUT, MS. FULLWOOD?

MS. FULLWOOD: NOT A THING, NO, SIR.

THE COURT: SOMEBODY EXPLAIN THE CONTEXT TO HER SO SHE'S UP TO SPEED REAL QUICKLY.

MR. GRAHAM: YOUR HONOR, THERE IS -- ONE OF THE INMATES WHO WAS IN JAIL WITH MR. MERCER AT THE TIME IS AN INDIVIDUAL NAMED DARRELL WILLIAMS. HE HAS PENDING CHARGES IN OUR OFFICE, AND MS. FULLWOOD REPRESENTS MR. WILLIAMS ON THE CHARGES THAT ARE PENDING IN OUR OFFICE, AND HE IS A POTENTIAL WITNESS IN MR. MERCER'S CASE.

THE COURT: ALL RIGHT. DOES THAT RING A BELL TO YOU?

MS. FULLWOOD: I DO REPRESENT DARRELL WILLIAMS. I WAS NOT AWARE THAT HE WAS A WITNESS IN THIS CASE.

THE COURT: I MEAN, IN THE COURSE OF YOUR REPRESENTATION OF DARRELL WILLIAMS HAVE YOU KEPT -- HAVE YOU BEEN GIVEN ANY INFORMATION AT ALL THAT RELATES TO HIS TESTIMONY IN THE LYNCHING AND ABWIK CASE THAT MR. MERCER HAS PENDING BEFORE THE COURT THAT'S EXPECTED TO BE TRIED ON MARCH 13TH?

MS. FULLWOOD: WITHOUT REVIEWING THE FILE, I CANNOT TELL YOUR HONOR FOR SURE. I DON'T RECOLLECT ANYTHING THOUGH.

THE COURT: ALL RIGHT. WHAT'S -- WHAT'S -- WHAT'S THE STATUS OF MR. WILLIAMS' CASES? ARE THEY UP FOR TRIAL RIGHT AWAY?

MR. GRAHAM: NO, YOUR HONOR. I DON'T KNOW HIS DATE OF ARREST EVEN. I CAN'T TELL YOU -- I KNOW THEY'RE NOT

PENDING FOR TRIAL AT THIS MOMENT.

MS. FULLWOOD: IT'S AN OLDER CASE. AT THIS TIME HE'S OUT ON BOND. I KNOW MS. AVINGER HAS LET ME KNOW SHE WANTS TO TRY TO DISPOSE OF THE MATTER IN THE FORESEEABLE FUTURE. I BELIEVE THERE'S AN OUTSTANDING MOTION TO ENFORCE A PLEA BARGAIN IN THE CASE.

THE CLERK: YOUR HONOR, LISA MCPHERSON IS ON HER WAY.

THE COURT: OKAY. OKAY. HAVE YOU HAD ANY -- ANY CONVERSATIONS WITH -- HAVE YOU BEEN INVOLVED IN ANY DISCUSSIONS WITH THE STATE ABOUT THE STATE VERSUS KEVIN MERCER, THE ABWIK AND LYNCHING CHARGES?

MS. FULLWOOD: NOT THAT I RECOLLECT, YOUR HONOR. THE REASON I'M HESITATING IS THAT I HAVEN'T REVIEWED THE FILE. MR. WILLIAMS' CASE IS AN OLD CASE. IT'S SEVERAL YEARS OLD, SO I CAN'T TELL YOU FOR SURE IF THREE OR FOUR YEARS BACK I DIDN'T, BUT NOTHING RECENTLY.

THE COURT: WELL, THIS -- THE LYNCHING CASE IS BRAND-NEW, ISN'T IT?

MR. GRAHAM: 2004, YOUR HONOR. IT'S APPROXIMATELY TWO YEARS OLD. JANUARY 14TH, I THINK, OF 2004.

MS. FULLWOOD: AND I THINK I CAN FAIRLY CONFIDENTLY SAY THAT I HAVE NOT.

THE COURT: YOU HAVE NOT?

MS. FULLWOOD: THAT'S CORRECT.

THE COURT: HAVE YOU HAD ANY CONVERSATION WITH MS. MCPHERSON THAT YOU KNOW OF ABOUT THE CASE OF STATE VERSUS KEVIN MERCER, THE LYNCHING AND ABWIK CASE?

MS. FULLWOOD: YES, SIR.

THE COURT: YOU HAVE?

MS. FULLWOOD: YES, SIR.

THE COURT: HAVE YOU TALKED ABOUT YOUR CLIENT'S TESTIMONY IN THAT CASE?

MS. FULLWOOD: NO. UP UNTIL I WAS HERE THIS AFTERNOON I HAD NO IDEA THAT HE WAS A WITNESS.

THE COURT: OKAY.

MS. FULLWOOD: WE JUST BASICALLY DISCUSSED THE GENERAL FACTUAL SCENARIO OF HIS CASE.

THE COURT: AND IN THOSE DISCUSSIONS THERE WAS OBVIOUSLY NO DISCUSSION ABOUT YOUR CLIENT BEING A WITNESS BECAUSE YOU DIDN'T KNOW IT.

MS. FULLWOOD: THAT'S RIGHT. WE DID NOT NAME THE INDIVIDUALS INVOLVED, JUST---

THE COURT: OKAY.

MS. FULLWOOD: ---GENERAL SPEAKING.

THE COURT: ALL RIGHT. MS. MCPHERSON, DO YOU HAVE SOMETHING YOU WANT TO SAY?

MS. MCPHERSON: YOUR HONOR, I APOLOGIZE. I WASN'T AWARE THAT THERE WAS A HEARING. I HAD JUST GONE TO LUNCH BUT---

THE COURT: IT'S OKAY.

MS. MCPHERSON: I DID BECOME AWARE FOR THE FIRST TIME WHEN MS. KIMBROUGH TOLD ME THIS MORNING - I SAW HER HERE JUST AT FIRST APPEARANCES - THAT THERE WAS A POSSIBLE CONFLICT WITHIN OUR OFFICE. I HAVE NOT HAD A CHANCE TO TALK TO MS. FULLWOOD ABOUT IT. I DID TALK TO THE SOLICITOR AND TELL HIM THAT THERE MAY BE SOME ISSUE ABOUT THAT.

THE COURT: NOW, BASED ON WHAT WE'VE HEARD, IS IT NOT TRUE THAT WHAT WE'RE DEALING WITH IS A POTENTIAL CONFLICT AT THIS MOMENT AND -- AND -- AND THAT CAN BE -- THAT COULD NOT -- THAT COULD BE RESOLVED BY -- THAT COULD BE RESOLVED AND KEEP MS. MCPHERSON ON THE CASE?

MS. KIMBROUGH: I AM NOT ABSOLUTELY CERTAIN OF THAT. I WILL TELL YOU THAT OUR INVESTIGATOR -- OBVIOUSLY MS. FULLWOOD HASN'T GOTTEN A COPY OF THE LETTER YET, BUT SHE HAS SENT A LETTER ASKING TO SPEAK TO MR. WILLIAMS, AND OBVIOUSLY MS. FULLWOOD IS GOING TO HAVE TO MAKE A DETERMINATION AS TO WHETHER OR NOT SHE'S GOING TO LET HER CLIENT SPEAK TO US. BUT, I MEAN, ESSENTIALLY WHAT YOU'RE GOING TO HAVE IS TWO ATTORNEYS IN THE SAME OFFICE REPRESENTING MUTUALLY-CONFLICTING INTERESTS. WE ARE GOING TO WANT TO TALK TO MR. WILLIAMS.

THE COURT: WELL---

MS. KIMBROUGH: MS. FULLWOOD IS GOING TO HAVE TO MAKE THE DETERMINATION---

THE COURT: ALL RIGHT. IF I RELIEVE MS. FULLWOOD AND APPOINT -- AND APPOINT COUNSEL TO REPRESENT MR. WILLIAMS OUTSIDE OF THE PUBLIC DEFENDER'S OFFICE, WOULD THAT NOT TAKE CARE OF ALL THE PROBLEMS?

MS. KIMBROUGH: ASSUMING THERE ARE NO WITNESSES REPRESENTED BY THE PUBLIC DEFENDER'S OFFICE. I MEAN, OBVIOUSLY---

THE COURT: THAT WOULD SOLVE THE PROBLEM.

MS. MCPHERSON: JUDGE, THERE'S ONE OTHER ISSUE. I APOLOGIZE. I DON'T KNOW WHETHER IT'S BEEN BROUGHT UP AT ALL. I WILL BE LEAVING THE PUBLIC DEFENDER'S OFFICE THE END OF MARCH, AND I'VE TALKED TO THE SOLICITOR. I MEAN, I CERTAINLY WOULD BE PREPARED TO GO FORWARD ON THE 13TH, YOU KNOW, IN A VACUUM. I'M NOT SURE WHAT ALL HAS OCCURRED HERE TODAY. I KNOW THERE IS A SITUATION -- I'VE TALKED TO THE SOLICITOR ABOUT THE FACT THAT HE'S BEING EVALUATED AND THAT THAT IS SOMETHING WE'RE GOING TO HAVE TO CONSIDER AND GET REPORTS BACK BEFORE WE CAN EVEN GO FORWARD ON THE LYNCHING WHICH IS SCHEDULED FOR THE 13TH OF MARCH.

I WILL BE LEAVING THE END OF MARCH. THE PUBLIC DEFENDER -- OF COURSE, WE'RE APPOINTED STILL ON THE LYNCHING. I JUST WANT TO BRING THAT TO THE COURT'S ATTENTION BECAUSE THAT'S -- WHETHER I WOULD TAKE THAT CASE WITH ME WHEN I LEAVE THE PUBLIC DEFENDER'S OFFICE IS AN ISSUE, IF IT ISN'T TRIED THE 13TH, OR WHETHER IT WOULD REMAIN IN THE PUBLIC DEFENDER'S

OFFICE, I DON'T KNOW. I'M CERTAINLY HAPPY TO---

THE COURT: OKAY.

MS. MCPHERSON: ---REMAIN ON IT.

THE COURT: I THINK THAT'S A SEPARATE QUESTION ALTOGETHER. THE QUESTION AT THIS POINT IS -- IS: IS THERE A CONFLICT? IS IT ACTUAL OR POTENTIAL? AND CAN IT BE RESOLVED IN THE MANNER THAT I JUST PROPOSED OR IN SOME OTHER WAY? YOU REPRESENT MR. MERCER NOW. DOES IT -- DOES WHAT I JUST PROPOSED RESOLVE THE CONFLICT?

MS. KIMBROUGH: BEG THE COURT'S INDULGENCE.

THE COURT: CERTAINLY.

(WHEREUPON, AN OFF-THE-RECORD DISCUSSION TOOK PLACE BETWEEN MR. LITTLEJOHN, MS. KIMBROUGH, MS. FULLWOOD, AND MS. MCPHERSON.)

MS. FULLWOOD: IF YOUR HONOR PLEASE, IF I COULD BE HEARD.

THE COURT: CERTAINLY.

MS. FULLWOOD: I HAVE PROBLEMS WITH MY OFFICE REPRESENTING MR. MERCER ON THIS CHARGE. EVEN IF YOU CONFLICT OUT DARRELL WILLIAMS AND HAVE SOMEONE FROM MY OFFICE REMAIN ON THE CASE, THE FACT REMAINS THAT THERE REMAINS IN MY OFFICE A FILE ON DARRELL WILLIAMS. THERE WILL BE THE APPEARANCE THAT THE LAWYER REPRESENTING MR. MERCER WOULD HAVE ACCESS TO THAT FILE TO DEVELOP CROSS-EXAMINATION, TO DEVELOP LINES OF IMPEACHMENT, AND TO GENERALLY DISCREDIT HIM THROUGH THE USE

OF CLIENT CONFIDENCES THAT ARE CONTAINED IN THAT FILE. IN ADDITION, JUDGE, I THINK THERE'S---

THE COURT: LET'S -- TAKING IT ONE STEP AT A TIME, I CERTAINLY ANTICIPATED THAT. THAT'S WHY I ASKED THE QUESTION -- THE QUESTIONS RELATED TO WHETHER YOU ALL HAD TALKED ABOUT IT, WHETHER OR NOT MS. MCPHERSON HAS IN THE PAST HAD ACCESS TO ANY OF THAT INFORMATION, AND APPARENTLY AS OF NOW THE ANSWER IS NO.

MS. FULLWOOD: THAT'S RIGHT.

THE COURT: ALL RIGHT. SO I -- I DON'T THINK THERE'S ANY PROBLEM WITH ME ORDERING THAT THOSE CONVERSATIONS NOT TAKE PLACE, THAT THAT FILE NOT BE AVAILABLE TO MS. MCPHERSON OR TO ANYONE ELSE THAT MIGHT REPRESENT MR. MERCER, AND TAKING WHATEVER OTHER STEPS ARE NECESSARY TO PREVENT THERE BEING ANY ACCESS TO THE CONFIDENCES THAT MR. WILLIAMS HAD AND ALSO TO MAKE IT CLEAR IN THE PUBLIC RECORD THAT THERE HAS NOT BEEN ANY SUCH ACCESS. THAT'S THE OLD CONCEPT OF A CHINESE WALL, I THINK.

MS. FULLWOOD: I UNDERSTAND THAT, YOUR HONOR. WHAT CONCERNS ME IS THAT THERE ARE GOING TO BE THOSE TYPE OF IMPLICATIONS PERHAPS IN THE MIND OF DARRELL WILLIAMS IF HE TESTIFIES AS A WITNESS IN THIS CASE. FURTHER, YOUR HONOR, IF A LAWYER IN MY OFFICE REPRESENTS MR. MERCER IN THE LYNCHING TRIAL, THAT LAWYER IS GOING TO BE PRECLUDED FROM DOING EVERYTHING THEY CAN TO DEVELOP CROSS-EXAMINATION AGAINST MR.

WILLIAMS BECAUSE, YOU KNOW, IF THEY DID EVERYTHING THEY COULD THEY WOULD GO IN THAT FILE. OF COURSE, THEY CAN'T GO IN THAT FILE. SO MR. MERCER IS GOING TO BE IN A POSITION OF SAYING, WELL, THAT---

THE COURT: I'M NOT -- I'M NOT -- I'M NOT GOING TO ALLOW YOU TO SPEAK ON MR. MERCER'S BEHALF. OKAY? LET'S STOP THAT RIGHT NOW. IF MS. MCPHERSON WANTS TO SPEAK ON MR. MERCER'S BEHALF, I'LL BE HAPPY TO HEAR FROM HER.

MS. FULLWOOD: I'M SORRY. I'M TRYING TO SPEAK THEORETICALLY. I GUESS I'M...

THE COURT: I UNDERSTAND.

MS. FULLWOOD: THAT THE CLIENT WHO IS GOING REPRESENTED BY THE LAW OFFICE THAT IS IN THE POSITION OF CROSS-EXAMINATION -- CROSS-EXAMINING A FORMER CLIENT, THAT TYPE OF A CLIENT MIGHT LATER SAY THAT THEY WERE NOT GIVEN A VIGOROUS DEFENSE BECAUSE OF THAT FACT. I THINK THAT COULD BE A PROBLEM IN THE FUTURE.

THE COURT: OKAY. ALL RIGHT.

MS. FULLWOOD: IF I COULD SAY ONE MORE THING.

THE COURT: ALL RIGHT.

MS. FULLWOOD: I THINK ANOTHER PROBLEM THAT MIGHT ARISE IN THAT GENERAL TYPE OF SITUATION---

THE COURT: WELL, THIS IS WHAT I WANT TO DO AND I -- IF YOU WANT -- ANYTHING YOU WANT TO SAY ON BEHALF OF MR. WILLIAMS, I WANT TO HEAR FROM YOU. ANYTHING THAT THE OFFICE

OF THE PUBLIC DEFENDER WANTS TO SAY ON BEHALF OF MR. MERCER, I WANT TO HEAR FROM MS. MCPHERSON.

MS. FULLWOOD: YES, SIR. THAT'S FINE. I THINK MR. WILLIAMS IS ENTITLED TO OUR COMPLETE LOYALTY, AND HE IS ALSO ENTITLED FOR US TO DO EVERYTHING WE CAN ON HIS BEHALF TO GET HIM A FAVORABLE RESOLUTION OF HIS CASE. IF WE REPRESENT BOTH OF THEM SIMULTANEOUSLY, WE CANNOT DO THAT ON BEHALF OF MR. WILLIAMS.

THE COURT: AND FROM -- CAN I ASK YOU A QUESTION? FROM THE STANDPOINT OF MR. WILLIAMS, WOULD -- AND YOUR -- IF I SAY THAT I BELIEVE THAT THE PUBLIC DEFENDER SHOULD BE RELIEVED OF REPRESENTATION OF MR. WILLIAMS IN ORDER TO INSURE THAT HE GETS JUST WHAT YOU SAID HE IS ENTITLED TO, WOULD YOU HAVE ANY RESPONSE TO THAT?

MS. FULLWOOD: NO, SIR. I THINK THAT WOULD BE A MATTER WITHIN -- WITHIN YOUR DISCRETION---

THE COURT: ALL RIGHT.

MS. FULLWOOD: ---OBVIOUSLY.

THE COURT: ALL RIGHT. WELL, I THINK -- I THINK THAT'S WHAT I'M GOING TO DO. I THINK I'M GOING TO RELIEVE THE PUBLIC DEFENDER, RELIEVE YOU, RELIEVE YOUR OFFICE, FROM REPRESENTING MR. WILLIAMS AND INSTRUCT THE CLERK OF COURT TO APPOINT COUNSEL FROM OUTSIDE YOUR OFFICE, AND THEN THAT -- THEN IT BECOMES A QUESTION NOW OF HEARING ON BEHALF OF MR. MERCER AS TO WHAT ELSE---

MS. FULLWOOD: YES, SIR.

THE COURT: ---AS TO WHAT ELSE WE DO.

MS. FULLWOOD: ALL RIGHT. THANK YOU, SIR.

THE COURT: AND NOW -- NOW THAT WE'VE CLEARED UP THE FACT THAT THERE HAS NOT BEEN ANY TYPE OF COMMUNICATION BETWEEN YOU AND MS. MCPHERSON ABOUT MR. WILLIAMS' INVOLVEMENT IN MR. MERCER'S CASE, I THINK YOU'RE FREE TO DO WHATEVER YOU -- YOU KNOW, YOU CAN SAY WHATEVER YOU WANT NOW ON BEHALF OF MR. MERCER OR I'LL HEAR FROM MS. MCPHERSON OR FROM MS. KIMBROUGH OR MR. LITTLEJOHN OR WHATEVER, WHOEVER.

MS. FULLWOOD: WELL, IF I COULD BEG THE COURT'S INDULGENCE AND---

THE COURT: SURE.

MS. FULLWOOD: ---CONSULT WITH THOSE FOLKS.

THE COURT: ALL RIGHT. I'M GOING TO STEP OFF THE BENCH FOR ONE SECOND AND BE RIGHT BACK.

(PAUSE IN PROCEEDINGS.)

THE COURT: KEEP YOUR SEATS. OKAY. LET ME -- LET ME SAY BEFORE Y'ALL -- BEFORE YOU NEXT GO TO SPEAK ON BEHALF OF MR. MERCER, LET ME -- LET ME SAY WHAT I THINK HAS JUST HAPPENED AND SEE IF ANYBODY DISAGREES. THERE WAS A -- BECAUSE OF THE REPRESENTATION BY THE PUBLIC DEFENDER'S OFFICE OF MR. MERCER ON THE LYNCHING AND -- IS IT ABWIK?

MR. LITTLEJOHN: YES, YOUR HONOR.

THE COURT: ALL RIGHT. ON THE LYNCHING AND ABWIK

CHARGE AND BECAUSE OF THE REPRESENTATION BY THE PUBLIC DEFENDER'S OFFICE OF SOMEONE NAMED WILLIAMS -- MARCUS WILLIAMS?

MS. FULLWOOD: DARRELL WILLIAMS.

THE COURT: DARRELL WILLIAMS? WHO IS A POTENTIAL WITNESS IN THAT CASE, IN THE LYNCHING AND ABWIK CASE, THERE EXISTED A POTENTIAL CONFLICT OF INTEREST. THAT CONFLICT NEVER BECAME AN ACTUAL CONFLICT BECAUSE Y'ALL NEVER KNEW ABOUT IT REALLY AND YOU NEVER REPRESENTED -- YOU NEVER ACTIVELY REPRESENTED THOSE CONFLICTING INTERESTS. BY RELIEVING MS. FULLWOOD OF HER REPRESENTATION OF DARRELL WILLIAMS AND NOW APPOINTING SOMEONE NAMED THERESA JOHNS WHICH THE CLERK IS GOING TO ISSUE AN ORDER THIS AFTERNOON APPOINTING THERESA JOHNS, THAT CONFLICT IS RESOLVED AND IS NO LONGER AN ISSUE IN THE -- IN THE KEVIN MERCER CASE. IS THAT TRUE OR NOT? IS THAT -- AM I RIGHT OR WRONG?

MR. LITTLEJOHN: YOUR HONOR, TWO THINGS. I DON'T KNOW THAT WE'RE IN A POSITION, BASED ON MS. KIMBROUGH AND MY REPRESENTATION OF MR. MERCER, TO CONCEDE THAT THERE IS -- THAT THAT COMPLETELY OBVIATES THE CONFLICT. I UNDERSTAND THE COURT'S RULING, BUT I DON'T KNOW THAT WE CAN CONCEDE THAT. THE SECOND ISSUE: I NOTICE THE CLERK HAS APPOINTED THERESA JOHNS TO REPRESENT MR. WILLIAMS. IN ORDER TO AVOID ANY OTHER CONFLICTS, MS. JOHNS AND I SHARE OFFICE SPACE. WE ARE NOT PARTNERS, BUT WE'VE GOT ENOUGH CONFLICTS AND I WOULD ASK

MAYBE IF THE CLERK---

THE COURT: ALL RIGHT. WHO IS NEXT?

MR. LITTLEJOHN: ---COULD GET SOMEBODY -- GIVE MS. JOHNS THE NEXT CASE.

THE CLERK: YOUR HONOR, I APOLOGIZE. I FORGOT ALL ABOUT HIM AND THERESA JOHNS SHARING OFFICE SPACE---

THE COURT: THAT'S OKAY.

THE CLERK: ---UNTIL HE LOOKED AT ME SORT OF FUNNY.

THE COURT: NO PROBLEM. WHO IS NEXT?

THE CLERK: CHARLIE JOHNSON.

THE COURT: CHARLIE JOHNSON. ANY PROBLEM WITH CHARLIE JOHNSON?

MR. LITTLEJOHN: NO, YOUR HONOR.

THE COURT: ALL RIGHT. CHARLIE JOHNSON WILL BE THE---

MR. LITTLEJOHN: AS FAR AS I KNOW, WE DON'T SHARE OFFICE SPACE.

THE COURT: CHARLIE JOHNSON WILL REPRESENT DARRELL WILLIAMS. OKAY. BUT NOW THE CONFLICT EXISTED, THE POTENTIAL CONFLICT EXISTED, IN THE LYNCHING AND ABWIK CASE, NOT IN THIS CASE, AND BECAUSE -- BECAUSE DARRELL WILLIAMS IS NOT A WITNESS IN THIS CASE. SO THE CONFLICT EXISTED IN THE OTHER CASE.

MR. LITTLEJOHN: TRUE, YOUR HONOR, BUT INSOFAR AS THIS -- THIS CASE, THE LYNCHING AND ABWIK MIGHT BE USED IN

THE PENALTY PHASE OF THE MURDER CASE.

THE COURT: THAT WOULDN'T MAKE IT A CONFLICT THOUGH.

MR. LITTLEJOHN: IT MAY NOT. I JUST DON'T KNOW THAT I'M IN A POSITION TO CONCEDE FOR THE RECORD THAT THAT IS NOT AN ISSUE THAT -- THAT -- THAT MIGHT BE POTENTIALLY RAISED SOMEWHERE DOWN THE ROAD---

THE COURT: ALL RIGHT.

MR. LITTLEJOHN: ---IF YOU UNDERSTAND WHAT I'M TALKING ABOUT.

THE COURT: RIGHT NOW WHERE WE ARE IS WE'RE IN A HEARING IN THE CASE OF STATE VERSUS KEVIN MERCER; ABWIK AND LYNCHING CASE NUMBERS I'M NOT SURE. BUT THAT'S THE HEARING WE'RE IN RIGHT NOW. AND THE QUESTION IS: IS THERE ANY REASON THAT I SHOULD CONSIDER RIGHT NOW TO DO ANYTHING FURTHER WITH REGARD TO COUNSEL IN THAT CASE BECAUSE OF A CONFLICT OF INTEREST REGARDING MR. DARRELL WILLIAMS?

MR. LITTLEJOHN: YOUR HONOR, I THINK MS. MCPHERSON WOULD HAVE TO ADDRESS THAT.

THE COURT: OKAY.

MS. MCPHERSON: THANK YOU, YOUR HONOR. AND I WILL BE PICKING UP ON SOME OF THE POINTS THAT MS. FULLWOOD WAS BEGINNING TO MAKE OR ALLUDED TO WHEN SHE WAS BEFORE YOU.

THE COURT: AND I'M -- WELL, ALL RIGHT. I'M GOING TO SAY I WANT THAT FILE CLOSED AND -- AND -- AND SENT ON TO MR. CHARLIE JOHNSON WHO CAN RETAIN CUSTODY OF IT. IF THE

PUBLIC DEFENDER'S OFFICE NEEDS TO RETAIN ANYTHING, THEN THE PUBLIC DEFENDER SHALL MAKE SURE THAT THAT FILE IS CLOSED AND SEALED AND THAT THERE'S NOBODY ELSE INSIDE THE PUBLIC DEFENDER'S OFFICE WHO HAS ANY ACCESS TO WHAT'S INSIDE IT. OBVIOUSLY ANYBODY WHO WORKED ON THE DARRELL WILLIAMS CASE SHALL HAVE NO COMMUNICATION WITH ANYONE WHO'S WORKING ON THE KEVIN MERCER CASE ABOUT IT, AND THERE IS ESSENTIALLY A COMPLETE AND IMPENETRABLE CHINESE WALL THAT IS SET UP BETWEEN THOSE TWO REPRESENTATIONS AND SO THAT -- WITH THAT NOW, WHAT ELSE?

MS. MCPHERSON: YOUR HONOR, I WOULD SAY, OF COURSE -- AND I UNDERSTAND THE COURT'S RULING ON THAT. WE ARE A SMALL OFFICE, AND I WILL TELL YOU THAT WITH FOUR ATTORNEYS AND MS. FULLWOOD THERE, IT IS VERY COMMON. I WOULD SAY IT PROBABLY HAPPENS ON ANY CASE, ESPECIALLY THIS ONE BEING PARTICULARLY SIGNIFICANT IN THE CONTEXT OF A DEATH PENALTY CASE, THAT I OR ANYBODY IN THE OFFICE WOULD GO TO MS. FULLWOOD TO BOUNCE THINGS OFF OF HER ESSENTIALLY AND TO TALK ABOUT ANY RESEARCH SHE'S BEEN AWARE OF OR OTHER CASES SHE'S BEEN INVOLVED IN. SO---

THE COURT: ARE YOU TALKING ABOUT IN THE -- IN THE FUTURE?

MS. MCPHERSON: IN THE LYNCHING CASE.

THE COURT: WELL, THAT'S NOT A CONFLICT QUESTION.

MS. MCPHERSON: NO, SIR.

THE COURT: THAT'S GOT -- THAT'S GOT NOTHING TO DO WITH CONFLICT BECAUSE YOU CAN'T DO THAT.

MS. MCPHERSON: I AGREE.

THE COURT: YOU CAN'T GO TO MS. FULLWOOD RIGHT NOW AND TALK TO HER ABOUT ANYTHING THAT SHE MAY KNOW ABOUT DARRELL WILLIAMS.

MS. MCPHERSON: AND, JUDGE, I UNDERSTAND THAT. IN THE CONTEXT THAT GENERALLY I MAY GO OR SOMEBODY MAY GO TO HER AND SAY, "WHAT DO YOU THINK ABOUT THIS?" I THINK IT ELIMINATES SOME RESOURCE OF WHOEVER IS HANDLING IT. IT CERTAINLY APPEARS THAT IT'S GOING TO BE ME AND I'M HAPPY TO DO THAT, BUT IT DOES ELIMINATE A RESOURCE WITHIN THE OFFICE THAT WE RELY ON REGULARLY, THAT BEING---

THE COURT: I UNDERSTAND THAT, BUT WE'RE NOT TALKING ABOUT THAT RIGHT NOW BECAUSE THAT'S NOT A CONFLICT QUESTION. THAT IS A WILL-YOU-RELIEVE-ME-FOR-SOME-OTHER-REASON QUESTION. THAT IS -- THAT HAS NOTHING TO DO WITH CONFLICT OF INTEREST SO -- AND I DON'T MEAN TO BE CUTTING YOU OFF, BUT LET'S FOCUS ON THE CONFLICT QUESTION AND LET'S GET THAT RESOLVED. THEN WE'LL MOVE ON TO WHATEVER ELSE WE MIGHT NEED TO MOVE ON TO. YES, MA'AM.

MS. FULLWOOD: A CONCERN I HAVE THAT I THINK DOES RELATE TO THE CONFLICT IS I AM THE SUPERVISOR OF ALL OF THE ATTORNEYS IN THE OFFICE. IF ANY ATTORNEY IN MY OFFICE REPRESENTS MR. MERCER ON THIS CHARGE, IN EFFECT, BECAUSE I

HAVE AN ACTUAL CONFLICT, THERE IS GOING TO BE ABSOLUTELY NO ONE SUPERVISING---

THE COURT: WHOA, WHOA, WHOA. I'M GOING TO -- I'M GOING TO BACK UP BECAUSE I DON'T THINK YOU HAVE AN ACTUAL CONFLICT. IF YOU THINK YOU DO, LET'S GO BACK AND RESOLVE THAT. I THINK IT WAS A POTENTIAL CONFLICT BECAUSE YOU TWO NEVER EVEN KNEW THAT YOU REPRESENTED THESE COMPETING INTERESTS.

MS. FULLWOOD: BUT I HAVE A CONFLICT IN THE SENSE THAT BY VIRTUE OF HAVING REPRESENTED MR. WILLIAMS I CANNOT HAVE ANY INPUT INTO MR. MERCER'S DEFENSE.

THE COURT: THAT'S -- RESPECTFULLY, THAT'S NOT A CONFLICT ISSUE. THE CONFLICT ISSUE IS RESOLVED ONCE YOUR REPRESENTATION OF MR. WILLIAMS IS TERMINATED UNLESS IN THE PAST YOU OR MS. MCPHERSON ACTIVELY REPRESENTED THE COMPETING INTERESTS THAT YOU USED TO REPRESENT, AND IF MS. MCPHERSON CAME TO YOU AND GOT INFORMATION FROM YOU ABOUT DARRELL WILLIAMS IN ORDER TO ASSIST HER IN REPRESENTING KEVIN MERCER, THAT WAS AN ACTUAL CONFLICT. UNTIL THAT CONVERSATION TOOK PLACE, THE CONFLICT WAS POTENTIAL. AM I RIGHT ABOUT THAT?

MS. FULLWOOD: JUDGE, THAT'S NOT THE WAY I UNDERSTAND IT. THE WAY I UNDERSTAND IT AND I MIGHT BE COMPLETELY OFF TRACK, BUT I HAVE AN ACTUAL CONFLICT OF INTEREST WITH KEVIN MERCER SIMPLY BY VIRTUE OF HAVING REPRESENTED A WITNESS IN A CASE AGAINST HIM.

THE COURT: BUT YOU DON'T REPRESENT KEVIN MERCER.

MS. FULLWOOD: NO, I DO NOT. WHAT I'M TRYING TO TELL YOUR HONOR IS THAT I SUPERVISE ANY ATTORNEY IN MY OFFICE THAT REPRESENTS KEVIN MERCER. BECAUSE OF MY PRIOR REPRESENTATION OF DARRELL WILLIAMS AND ANY CONFIDENCES OR COMMUNICATIONS THAT I MIGHT HAVE HAD WITH HIM ON ANY SUBJECT, I CANNOT SUPERVISE THE REPRESENTATION OF MR. MERCER IN THE LYNCHING CASE.

THE COURT: I AGREE WITH THAT, BUT THAT DOES NOT -- I RESPECTFULLY THINK THAT'S NOT A CONFLICT QUESTION. THAT IS A QUESTION ABOUT HOW YOU RUN YOUR OFFICE WHICH IS NOT A QUESTION OF CONFLICT OF INTEREST. IF SHE NEEDS A SUPERVISOR WHICH I RESPECTFULLY DON'T THINK SHE NEEDS, THEN SHE CAN GO TO SOME PRIVATE ATTORNEY AND GET THAT ASSISTANCE OR THAT CONSULTATION OR THAT -- OR THAT ADVICE AND NOT COME TO YOU.

SO I BELIEVE THAT WHAT WE'RE TALKING ABOUT NOW IS NOT RELATED TO THE CONFLICT OF INTEREST THAT DID EXIST. WE'RE NOT TALKING ABOUT YOUR CONFLICT WITH REPRESENTATION OF MR. WILLIAMS. THAT'S BEEN RESOLVED. WE'RE TALKING ABOUT WHETHER OR NOT MS. MCPHERSON HAS A CONFLICT AT THIS POINT IN TIME IN HER REPRESENTATION OF MR. MERCER.

MS. FULLWOOD: AND I WAS MERELY -- I REALLY WANTED TO BRING TO THE COURT'S ATTENTION THAT DUE TO MY CONFLICT THAT HAS TO DO WITH MR. WILLIAMS AND THE FACT THAT I SUPERVISE EVERY ATTORNEY IN THE OFFICE, IT COULD WELL BE

UNDER THE LAW THAT MY ENTIRE OFFICE HAS A CONFLICT IN REPRESENTING MR. MERCER AND I -- I JUST WANTED TO HAVE THAT ON THE RECORD SO THAT EVERYTHING HAS BEEN TAKEN INTO CONSIDERATION.

THE COURT: BUT NOW IN YOUR OFFICE YOU COME ACROSS THIS ON A DAILY BASIS.

MS. FULLWOOD: UNTIL THE SUPREME COURT IN THE PAST FEW MONTHS AMENDED THE CONFLICT RULE, WHAT WE NORMALLY DID WHEN WE WERE APPOINTED TO REPRESENT CO-DEFENDANTS IS WE ROUTINELY GOT OUTSIDE COUNSEL APPOINTED FOR ALL BUT ONE. NOW WE DO IT ON A CASE-BY-CASE BASIS, AND WE SET UP A PRETTY COMPLICATED PROCEDURE ABOUT CHINESE WALLING AND MAKING SURE THERE'S NO CROSS-ACCESS TO FILES BY PARALEGALS. IN OTHER WORDS, ATTORNEYS WHO SHARE -- WHO SHARE A PARALLEL DO NOT REPRESENT CO-DEFENDANTS, THINGS OF THAT NATURE.

THOSE TYPE OF PROCEDURES WERE NOT IN PLACE AT THE TIME WE BEGAN REPRESENTING MR. WILLIAMS AND AT THE TIME WE BEGAN REPRESENTING MR. MERCER. SO WHILE I GUESS THE ANSWER TO THE QUESTION IS, "YES, SIR. THAT'S RIGHT. WE DO ALL THE TIME," IN THE PAST WE -- WE RESOLVED THOSE PROBLEMS IN A DIFFERENT WAY WHEN THEY CAME TO OUR ATTENTION.

THE COURT: OKAY. ANYTHING FURTHER ON THE QUESTION OF WHETHER OR NOT MS. MCPHERSON HAS A CONFLICT OF INTEREST IN THE -- IN HER REPRESENTATION OF MR. MERCER ON THE LYNCHING AND ABWIK CHARGES?

MS. MCPHERSON: YOUR HONOR, NOTHING OTHER THAN I WOULD JUST BASICALLY INCORPORATE MS. FULLWOOD'S ARGUMENT ON BEHALF OF MR. MERCER IN THE LYNCHING BUT NOTHING ADDITIONAL; NO, YOUR HONOR.

THE COURT: I DON'T THINK THERE'S A CONFLICT. DOES ANYBODY -- ANYBODY ELSE HAVE ANYTHING TO SAY? I DON'T THINK THERE'S A CONFLICT, AND WITH THE INSTRUCTIONS THAT I HAVE GIVEN WHICH I DIDN'T NEED TO GIVE BECAUSE MS. FULLWOOD ARTICULATED THE SAME CONCEPTS HERSELF JUST NOW AS PART OF THE WAY THE PUBLIC DEFENDER'S OFFICE DOES ITS BUSINESS, AS LONG AS THAT CHINESE WALL IS NOT CROSSED, THERE ISN'T A CONFLICT. ALL RIGHT. ANYTHING FURTHER ON THAT SUBJECT?

MS. KIMBROUGH: NO, YOUR HONOR.

MR. LITTLEJOHN: NO, YOUR HONOR.

THE COURT: ALL RIGHT. ANYTHING FURTHER ON ANY SUBJECT?

MR. GRAHAM: NOT FROM THE STATE, YOUR HONOR.

THE COURT: I HAVE REVIEWED THE -- FROM THE DEFENSE?

MS. KIMBROUGH: NO, YOUR HONOR.

THE COURT: ALL RIGHT. I REVIEWED THE FILE OF MARCUS THOMPSON. THERE WAS A $50,000 BOND ORDER SIGNED BY JUDGE JEFFCOAT, AND THAT APPEARS TO BE THE BOND THAT HE POSTED AND SO Y'ALL CAN MAKE -- HERE'S THE FILE. Y'ALL CAN LOOK AT IT YOURSELVES AND MAKE WHATEVER OTHER INQUIRY YOU WANT, AND IF ANYTHING EVER -- IF I EVER NEED TO DEAL WITH

ANYTHING ON THAT, LET ME KNOW. OKAY?

MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

THE COURT: I'LL SEE Y'ALL ON THE 30TH OF MARCH IF I DON'T HEAR FROM YOU BEFORE THEN.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE WERE NO EXHIBITS INTRODUCED.)

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 23RD DAY OF FEBRUARY, 2006.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

OCTOBER 13, 2006

Daphne D. Helms

DAPHNE D. HELMS, COURT REPORTER

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

COURT OF GENERAL SESSIONS

STATE	)	
	)	
V.	)	TRANSCRIPT OF RECORD
	)	
KEVIN J. MERCER	)	04-GS-32-3096
	)	06-GS-32-0553
DEFENDANT.	)	

MARCH 13, 2006
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE LARRY R. PATTERSON, JUDGE; AND A JURY.

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

SAMUEL R. HUBBARD, III, ASSIST. SOLICITOR
DAVID SHAWN GRAHAM, ASSIST. SOLICITOR
ATTORNEYS FOR THE STATE

ORIGINAL

MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEY FOR THE DEFENDANT

STACY L. SHEPPARD
CIRCUIT COURT REPORTER

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Date: 3-13-06

County: Lexington

VOIR DIRE

...e: 04-95-32-3076, 3077 Judge: Patterson

...tate: — State Atty: Rick Hubbard

Shawn Graham

...dent: Kevin Mercer Defense Atty: Melissa Kimbrough

...t Reporter: Stacy L. Sheppard

...r No.	Name	Sex	Race	Court	Strikes STATE	Defense	Accept
67	Yuvema Henstock	F	W				1
36	Donna Coyle	F	W				2
53	Detra Farnacci	F	W				3
79	Jennie James	F	B		1		
95	Marthaann Lake	F	W			1	
60	Jeremiah Hall	M	W			1	4
89	Carl Kastner	M	W				5
27	Maurice Cauley	M	W			2	6
180	Nancy Lloyd	F	W				6
12	Sherrill Blankenship Brown	F	W				7
98	Stacey Lankam	F	B				8
149	Peggy Snipes					3	
75	Shelley Hucks	F	W				9
133	John Ruishton						10
124	Cynthia Clary					4	
87	Stanley Jones	M	W			5	
22	Caroline Burleson	F	W				11
114	Janice Middleton	F	W				12

For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for Court, "P" for Plaintiff or "D" for Defense.

Date: 3-13-06

County: Livingston

VOIR DIRE

o: 04-95-52-3026 Judge: Patterson

ate: — State/ Atty: Rick Hubbard

Shawn Graham

dant: Kevin Moore Defense Atty: Melissa Kimbrough

t Reporter: Stacy L. Sheppard

r No.	Name	Sex	Race	Court	Strikes STATE	Defense	Accept
18	Russell Brown	M	W				H

For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for Court, "P" for Plaintiff or "D" for Defense.

(The following proceedings were held on March 13, 2006.)

MR. HUBBARD: Your Honor, the State calls the State versus Kevin Jermaine Mercer for trial. Indictment 06-GS-32-553, an indictment for assault and battery with intent to kill, indictment 04-GS-32-3097 an indictment for lynching second degree, indictment 04-GS-32-3096 an indictment for carrying or concealing a weapon by an inmate. Your Honor, all indictments have been true billed. And I do have a witness list for Your Honor.

THE COURT: Ladies and gentlemen, the first case is the State and Kevin Jermaine Mercer. The indictment was just published. They are allegations of assault and battery with intent to kill, lynching in the second degree, carrying a concealed weapon. Now, to these indictments, Mr. Mercer's pled not guilty so that's the reason we're here this morning.

I'd ask Mr. Mercer if you would stand up please and turn around and face the jury panel, just stand up and face these ladies and gentlemen out here, Mr. Mercer.

Do any of you know Mr. Mercer here who is the defendant in this case? If you know him, would you please stand.

(There was no response.)

THE COURT: Okay, thank you.

Ms. Kimbrough will be defending Mr. Mercer. Do any of you know Melissa Kimbrough?

Is that the way you pronounce that, ma'am?

MS. KIMBROUGH: Yes, Your Honor.

THE COURT: Do any of you know the lawyer in this case?

(There was no response.)

THE COURT: Of course, representing the State will be the Circuit Solicitor's Office, Mr. Hubbard and Mr. Graham I believe. Do any of you know Mr. Hubbard or Mr. Graham?

(There was no response.)

THE COURT: Are any of you close friends -- do you have any close friends or relatives who are employed or work in the Circuit Solicitor's Office; if you do, would you please stand?

(There was no response.)

THE COURT: Ladies and gentlemen, have any of you heard anything about this case? The allegations are that on or about January the 14th of 2004, the State alleges assault and battery with intent to kill or commit a violent injury upon Terry Brown. Now, is Mr. Brown present in the courtroom now?

MR. HUBBARD: No, sir, Your Honor. None of our witnesses are present in the courtroom.

THE COURT: Okay. So Terry Brown, do any of you know anything about an alleged assault and battery with intent to kill in regard to Terry Brown?

Also, they allege that Mr. Mercer and Marcus A. Robinson, as a member of a mob, committed an act of violence upon Terry Brown and Mr. Mercer pleads not guilty to this charge. And, also, they say he was carrying a concealed weapon at that particular time.

Do any of you know anything about this alleged incident on January the 14th of 2004 where the alleged victim is Terry Brown? If you know anything about this case, if you've read about it or heard anything about it, would you please stand.

(There was no response.)

THE COURT: Okay. Now, ladies and gentlemen, it's absolutely essential that we have a jury that will be fair and impartial, that will decide this case on the evidence and the testimony presented in this courtroom. You determine the facts as citizens and residents of Lexington County. If you've had any experiences with law enforcement or experiences with the court in any way and you could not be a

friend's brother was killed.

(A conversation was held off the record.)

THE COURT: I'm going to excuse her from criminal court, but I'll transfer her to civil court for some other time down the road. Her daughter was molested and somebody was killed by three people. I'm going to excuse her.

BAILIFF: Juror 153, Your Honor.

JUROR: It's troubling me, my son was...

(A conversation was held off the record.)

THE COURT: I'm going to excuse you just from this case.

His son was attacked a year ago Halloween 2005, black people he thinks. And he says it's troubling him right now. So I'm going to excuse him just for this case.

BAILIFF: Juror 176, Your Honor.

JUROR: I had a brother-in-law killed in the line of duty.

THE COURT: Recently?

JUROR: Yes, sir.

THE COURT: I don't know, what do you think? Could you be fair?

JUROR: I don't know. I don't know. Honestly, I do not know.

THE COURT: Your brother-in-law was killed in the line of duty?

JUROR: Uh-huh, in Mississippi.

THE COURT: How long ago?

JUROR: Seven years ago.

THE COURT: I'm going to excuse you just for this case, just stay with us.

BAILIFF: Juror number 73, Your Honor.

JUROR: There might be a problem with me.

(A conference was held off the record.)

THE COURT: She had transportation problems, but I'm going to let her stay.

(The bench conferences were concluded)

THE COURT: All right. The jury's qualified. Are we ready, Madame clerk?

THE CLERK: Yes, sir.

THE COURT: All right. We're going to select a jury now for the first case. It will be five preemptory challenges for the State, if you would like to use them, five for the defense.

MR. HUBBARD: I believe it's ten for her.

(Whereupon, a bench conference was held off the record, in the presence of the jury, but out of the hearing of the jury.)

THE COURT: It's five and five.

As your name is called, I'm just going to let them stand because it's so much trouble for them to come out, it just takes twice as long, if y'all would just stand in place where you are, you will either be seated or they can excuse you. Each one gets five preemptory challenges and that's it. So if your name is called, just stand in place and if you're seated, bring your personal items and come take a seat in the jury box. And we'll select one alternate.

Okay. Madame clerk.

(During the jury selection process, the jurors were called forward and peremptory strikes were exercised as reflected by the attached voir dire sheet made a part of this record at page 4.)

THE COURT: Ladies and gentlemen, you have a number where you can call in. Your names are chosen out of this barrel up here where they're mixed up. It's just like a drawing. That's the way it's done to get a cross section of the community at random and that's the way we will draw the jurors in every case that we try this week.

I can't tell you how long this case will go, it may go longer than today, but we never know what can happen, you know, sometimes mistrials, we don't like

to have that happen, but sometimes it happens. I need for you to call in the number that you have after --

THE CLERK: Excuse me, Your Honor, may I?

(Pause.)

THE COURT: You don't have to call in. Solicitor -- we've got two other cases for another court. Y'all come back at 2:30 tomorrow.

Mondays take a little bit longer, but I can get you in and out pretty quick and I believe other judges can, too, but Mondays we have to do the qualification and everything, we won't have to do that anymore. So, hopefully, we can get you in and out a lot quicker than they do over in Richland County and places like that. Just be here at 2:30 tomorrow, we'll be ready to go forward. Thank you. I'll see you then.

(The remaining jury panel was excused.)

THE COURT: Ladies and gentlemen, you, the jury, I know have been in here for a while, I'm going to let y'all step back to the jury room back here. The bailiff will show you where that is. That's where you will deliberate, where you'll be taking your breaks and it's where you'll come back to when we come back in the morning if we don't

finish today. He's going to show you the jury room now. And if y'all will just go out there and we'll take about a 15 minute recess.

When you come back, we'll work for about an hour, an hour and 20 minutes. If any of you ever need to take a break, we don't want you to be uncomfortable, do not hesitate to raise your hand during the trial and we can take a break.

Okay. If y'all will just step out for a few minutes. Do not discuss this case at any time until the case is over.

(The jury retires to the jury room.)

THE COURT: Do y'all have any serious legal issues before we start?

MS. KIMBROUGH: Your Honor, I believe there will be a few issues that I would like to go ahead and address if we could before the witnesses start taking the stand.

Based on the discovery, it appears that there are references, one witness references that he believes -- I believe it's Mr. Brown referred to some sort of gang affiliation with Mr. Mercer. And we would ask that that not be injected into this trial. We think it's prejudicial. We also think it's pure speculation and that it would certainly

like I killed that other guy. That raises some serious problems. It brings up the whole issue of the pending murder charge.

Certainly, if his story is that my client threatened to kill him, I guess he could bring that in without prejudicing us if that's what he's saying happens, but to allude to a pending murder charge, would seem to me to open up a whole can of worms and we would ask that he not be allowed to make references to things that are not before this jury. I believe it's clearly prejudicial. It's not probative as to whether or not he was assaulting Mr. Brown with intent to kill him, it's only relevant to what may have happened in the past.

MR. HUBBARD: Your Honor, again, we've instructed Mr. Brown we're not going to talk about murder charges. If there's a threat, we've told him he can express the threat, but he can't go into statements made about --

THE COURT: Tell him specifically he can say he made the threat that I'll kill you, but tell him not to put that in there about the other guy.

MR. HUBBARD: Yes, sir.

THE COURT: Make sure you cover that with both of them.

MS. KIMBROUGH: Thank you, Your Honor.

MR. GRAHAM: Your Honor, we have a few issues, too. One of the indictments, the assault and battery with intent to kill, went to the grand jury today, Your Honor, this morning. I've provided and served on Ms. Kimbrough and on Mr. Mercer a certified true copy this morning. I just needed that reflected in the record. We went ahead and called it for trial. She had notice that it was going to the grand jury back on February 21st, I believe.

THE COURT: There's nothing to prohibit you from calling it for trial, I don't think.

Okay. Anything else?

MR. GRAHAM: Your Honor, the State filed a reciprocal Rule Five request on this and we have not received anything. And I just wanted to make sure that there's nothing the defense needs to provide to us on that.

THE COURT: Well, if she hadn't provided it to you, it will be a little bit late now.

MR. GRAHAM: And the last thing, Your Honor, for the record, just to make it part of the record, Your Honor, he has been evaluated by the Department of Mental Health and also the Department of

Disability and Special Needs. And I would like to make these reports part of the record showing -- it's evaluations for both this case and the pending murder case regarding his competency to stand trial, criminal responsibility, capacity to conform and the presence of any mental retardation.

MS. KIMBROUGH: Your Honor, we've raised no mental health defenses at all. We're not contesting competency, criminal responsibility, if there is any, and certainly we're not raising any mental health defenses.

THE COURT: Okay. He's competent to stand trial, I can tell by looking at him. But you can put those in if you want to, but as court's exhibits, they would not go back to the jury.

Do not send those back to the jury, Madame court reporter.

Is that it?

MR. GRAHAM: The only other thing, Your Honor, that I know of is that obviously several of our witnesses are going to have criminal records and I would like to set the records -- what they're going to be cross-examined on as their prior convictions. I don't know whether you want to have them testify and have the jury go out or whether you want to try

and do that now before we call any witnesses.

THE COURT: I just don't want to waste time by doing that. I mean, we all know basically what they can be impeached on. They're going to be wearing uniforms when they come in here anyway, right? I just saw one come in the back of the courtroom, I assume, one of them that's going to be a witness. Are they all going to be dressed in prison garb? The witnesses can, the defendant cannot.

MR. GRAHAM: I guess, the only thing that I would ask then, Your Honor, is I know that when we do our questioning, we're planning on saying that these are the convictions. If she thinks there's something else, I would ask her to notify the Court so that the jury can go out if she plans on bringing up something that we don't mention because we have gone through the record and said we believe --

THE COURT: Well, you ought to know, is she going to have something that's a lot more serious than what you're going to ask them about -- it just goes to their credibility, anyway. So if they -- are you going to ask anything different than what he's got?

MS. KIMBROUGH: I'm going to base my questions on the rap sheets, as well as any, you know,

information I have about the person, but it's certainly --

THE COURT: Well, you can't just base it on information, you've got to have convictions.

MS. KIMBROUGH: No, I'm not referring to other crimes. I mean, I'm going to have questions to these witnesses, some of them will be based --

THE COURT: Anything you're going to ask them about crimes, they provided you with that information, right?

MS. KIMBROUGH: Absolutely, Your Honor.

THE COURT: All right. You provided it to her, so you know what she's got, Solicitor. Do you got a problem with that?

MR. GRAHAM: No, Your Honor.

THE COURT: Are you ready to go?

MR. HUBBARD: Your Honor, I could use a bathroom break.

THE COURT: I'm going to give y'all a break. In fact, I might take a break myself. Okay, we'll take ten or 15 minutes and we'll kick this thing off. Are y'all ready?

MS. KIMBROUGH: Yes, Your Honor.

THE COURT: All right.

(Court's Exhibit Numbers 1 and 2 were marked

for identification purposes.)

(Brief recess.)

MR. HUBBARD: Your Honor, before we bring the jury out, would you like for us to go ahead and premark some of the stuff that we're offering? We've shown it to Ms. Kimbrough.

THE COURT: If y'all were going to premark it, y'all should have done it a few minutes ago.

MR. HUBBARD: Well, we were going over it with Ms. Kimbrough to make sure we're okay.

THE COURT: Bring the jury in.

(The jury returns to the courtroom.)

THE COURT: All right. Ladies and gentlemen, if you would, stand and raise your right hand please. The clerk will swear you to try this case. Please respond by saying I will when you take the oath.

(The jury was duly sworn by the Clerk of Court at 11:25 a.m.)

THE COURT: Ladies and gentlemen of the jury, this is a criminal case we're about to begin brought by the State of South Carolina against the defendant on these three indictments alleging lynching in the second degree, assault and battery with intent to kill and carrying or concealing a weapon.

Now, ladies and gentlemen, these indictments are not evidence in the case. These are just pieces of paper that brings this case to court and it allows the court to keep up with it. And, eventually, you'll write your verdicts on the back of these papers and we'll file them and just have that as a court record.

To these indictments, the defendant has pled not guilty. His plea of not guilty places the burden of proof upon the State of South Carolina, represented by the Circuit Solicitor's Office, to prove him guilty beyond a reasonable doubt of any charge.

Now, a defendant in a criminal trial is presumed to be innocent of the crime charged until you, the jury, hears evidence that satisfies you of his guilt beyond a reasonable doubt. No matter what the charges are, a defendant is always presumed to be innocent until you hear evidence satisfying you of his guilt. A defendant in a criminal case does not have to prove himself innocent. The burden of proof is on the State to prove him guilty.

Now, ladies and gentlemen, you are the sole judges of the facts of this case. You're citizens of Lexington County. You bring into the courtroom

your good judgment, your common sense, your everyday experiences in life and you determine the facts of this case, if you can, based on the evidence and testimony presented in the courtroom. And you, ladies and gentlemen, pass upon the credibility and the believability of each and every witness that testifies regardless of who that witness is.

Now, we'll begin this trial with opening statements, if the attorneys would like to make opening statements. They can introduce themselves to you, tell you their theory of the case without making arguments. After the opening statements, you will then hear the evidence and testimony from which you will determine the facts if you can.

After all of the evidence and testimony is in, the attorneys may stand up and make their closing statements. After that, I'll go over the law with you that applies to the case and then you'll go back and deliberate until you reach a unanimous verdict.

I know you'll pay close attention to the case. This is an important case to the State and it's an important case to the defendant. We'll begin this trial with opening statements, first, by the State.

Yes, sir.

MR. GRAHAM: Thank you, Your Honor.

These charges stem from an incident that happened on January 14th, 2004 here in Lexington County over at the sheriff's department of the Lexington County Detention Center on the third floor. The defendant, along with others, were inmates at the Lexington County Detention Center at that time. Darrell Williams, Terry Brown, the victim in this case, and the defendant, Kevin Mercer, were cell mates on the A-Wing on that floor.

The detention center jail was different than the outside world. In jail, you're going to have people that follow, don't want to get in trouble, they just want to go along and get along. So you have followers. You have people who want to be in charge, that's Kevin Mercer. And you have some people who just want to be left alone, but they also don't want to be told what to do. That's the victim in this case, Terry Brown.

The night before this incident, those three cell mates, Mr. Williams, Mr. Brown and the defendant, Mr. Mercer, were playing cards like they normally did. Mr. Mercer accused Mr. Brown of cheating. Although they didn't get into a physical altercation that night, they got into a verbal altercation. Mr. Mercer threatened Mr. Brown, the

victim. Mr. Brown responded back, It's going to take more than you. And that's exactly what Kevin Mercer did.

The next day, there's a time in jail called rec time when they get out of their cells, get to go in a day room and also a rec yard. And we have a diagram that you all will be able to picture this. Out on the rec yard that day, Mr. Williams, Mr. Brown and other inmates were out there. Prior to going out there, Mr. Brown goes up to an inmate, who you'll hear from today named Marcus Robinson, and he pulled Marcus Robinson aside and Mr. Mercer told Mr. Robinson, Your roommates are going to jump you, Darrell Williams and Terry Brown are going to jump you. And then Kevin Mercer told Marcus Robinson, I've got your back, setting the events in motion using Mr. Robinson so it will be more than just him.

Marcus Robinson goes out into the rec yard and confronts Darrell Williams. Terry Brown goes outside, Marcus Robinson turns to him and says, I hear you've been talking about me, what's up with that?

While those two, Mr. Brown and Mr. Robinson, are squared off against each other, the master mind,

Kevin Mercer, had been leaning against the wall and when those two were squared off against each other, he launched himself from the blind side of Mr. Brown, coming at him with a fist. And you're going to hear witnesses tell you that he had what are called shanks, weapons, toothbrushes that are filed down or pens that have razor blades in them and started attacking Terry Brown. You're going to see pictures showing the razor slashes on Terry Brown's face. You're going to hear that Mr. Mercer said, I'm going to kill you, as he was attacking him.

Mr. Brown rushes back inside and Mr. Mercer goes right back after him. You're going to hear that there was an additional struggle inside. And then, eventually, the correctional officers come and everybody's subdued.

Those are the facts that lead up to Mr. Mercer being charged with assault and battery with intent to kill, lynching in the second degree, which is a mob, two or more people combining together for the purpose of causing injury, and also possession of a deadly weapon, a shank, by an inmate. Those are the charges that he faces. You're going to hear testimony that fits those facts, but it's all about

Mr. Mercer wanting to be in charge.

THE COURT: Ms. Kimbrough.

MS. KIMBROUGH: Thank you, Your Honor. May it please the Court. Solicitors.

Ladies and gentlemen, there's no question that there was a fight on January 14th, 2004 in the Lexington County Detention Center. And there's no question that Mr. Mercer was involved in it. The question is, why did the fight start?

Now, there are going to be differing views, differing versions of what happened, but make no mistake about it, the portrayal of Terry Brown as a victim will be something that I'm going to ask you to question and you're going to have a good basis for questioning him as a victim by the end of the evidence in this case, make no mistake about it.

Terry Brown does not come here with clean hands. Terry Brown is a criminal. Terry Brown is not only a criminal, but he's a criminal with a violent history and that's very important, ladies and gentlemen. It's important because he -- it relates to many things, number one, how much stock you put in his version of events, and, number two, what a reasonable response would be to Mr. Brown when he made threats against Mr. Mercer.

I agree with the Solicitor, the Lexington County Detention Center is a different place. You know, it certainly isn't Mayberry. And in fact, it's not even -- it has no semblance to the world on the outside and it is not a place that anybody should want to be or certainly, under these circumstances, should have to live in. However, when you're charged with a crime, you end up in the detention center and that's what happened.

Now, being charged with a crime, as the Judge has instructed you, doesn't mean anything. It's a piece of paper. Somebody says you did something, you get charged with it. And we're not asking you, Kevin is not asking you to consider the credibility of Mr. Brown and all of the other witnesses who are going to come in here based on anything that they were charged with. Rather, we're going to ask you to consider their criminal history, the documented evidence, that these folks are not reliable.

Now, you'll have to make that determination on your own, but there's going to be plenty of evidence to cause you to question whether or not to believe the version of events of Mr. Brown and any other sort of witnesses who will come in.

Just briefly I'd like to share what Kevin

Mercer's version of events is. It's very simple. Mr. Mercer's version of events is that Terry Brown, in fact, threatened him. That's his version.

There's going to be evidence presented to you that not only did Mr. Brown threaten Mr. Mercer, but Mr. Mercer was so afraid that he actually sent word to the folks in charge of the Lexington County Detention Center. There's going to be evidence, on January 11th, three days before this happened, that Mr. Mercer was afraid for his own physical safety. There's going to be evidence that by sending in that report, he was trying to do the right thing, he was trying to protect himself because being accused of a crime doesn't mean that you should be left prey to other people in the detention center. He tried to do what was right, he sent in that letter.

Now, nothing happened. He's still in the cell with Mr. Brown and events unfolded as they did. I submit to you that Kevin Mercer's actions were not criminal in their intent, that Mr. Mercer's actions in engaging Terry Brown in a fight were reasonable under the circumstances. And you're going to hear what all of those circumstances are.

It's certainly impossible to predict what all's going to come from that witness stand, but you're

going to hear that Mr. Brown threatened Mr. Mercer. And in deciding who you believe and whether or not there was criminal intent, there are a few guiding principles that I think we can all rely on. The first is common sense.

Now, we all assess credibility in our daily lives. We know that nothing happens in a vacuum. You didn't just land in the jury box, you were summoned, you came here, you were selected. There was a series of events that led up to you sitting here today to be the jurors in Mr. Mercer's case. So please remember, none of this happened in a vacuum, there is a background. We dispute what that background is. We dispute -- Mr. Mercer disputes that it was a card game gone bad.

Next, there are some legal principles that we would ask that you will follow and the Judge will instruct you you should follow. First and foremost, the State has the burden of proof in this case. And it's not a small burden. It's the highest burden that the law imposes on any party in a courtroom. Beyond a reasonable doubt, it's the strongest, most powerful burden that the State has to meet.

And I submit to you, we submit to you, they can't meet it. Given the credibility problems of

their witnesses and the reasonableness of Mr. Mercer's action, I submit to you that beyond a reasonable doubt, the State cannot prove criminal intent on Mr. Mercer's part.

And always remember that the reasonable doubt standard goes hand in hand with the presumption of innocence and please hold the State to its burden. And we believe that when you do that, you will find that Mr. Mercer's actions were not criminal, but that, in fact, he is innocent of all charges. Thank you.

THE COURT: All right. Solicitor, call your first witness.

MR. HUBBARD: The State calls Terry Brown.

TERRY LAMONT BROWN,

having been duly sworn, testified as follows:

THE CLERK: Have a seat up there. I need you to speak up loud and clear and state your full name for the record.

THE WITNESS: Terry Lamont Brown.

DIRECT EXAMINATION

BY MR. HUBBARD:

Q Mr. Brown, do you mind if I just call you Terry?

A No, sir.

Q Make it a little easier.

THE COURT: Speak up, Mr. Brown. All of those jurors have got to hear you and we've got one that's a little bit hard of hearing, okay?

THE WITNESS: All right.

BY MR. HUBBARD:

Q Mr. Brown, how old are you?

A Thirty-two years old.

Q Where are you from?

A Sandy Run -- well, Calhoun County.

Q Calhoun County?

A Yes, sir.

Q You don't have to put your mouth right on that microphone, just speak up and we'll hear you.

A All right.

Q Mr. Brown, you're dressed in a uniform today. Where are you living right now?

A SCDC, Department of Corrections.

Q South Carolina Department of Corrections?

A Yes, sir.

Q And where are you located right now? Which facility are you being held at?

A Allendale.

Q Terry, I want to do this, I want to get right into your past, okay?

A Yes, sir.

Q Let's talk about your prior convictions. 1994, you had a conviction for burglary third, correct?

A Yes, sir.

Q '96, failure to stop for a blue light?

A Yes, sir.

Q 2001, you had two convictions for possession of crack cocaine?

A Yes, sir.

Q And then in 2005, you had a burglary second, an aggravated assault and a robbery charge?

A Yes, sir.

Q Now, back in January, January 14th of 2004, where were you being held?

A Lexington County Detention Center on A-Wing, third floor.

Q Third floor, A-Wing. And the detention center where -- is it right here in -- right outside the town of Lexington?

A Yes, sir.

Q Near the sheriff's department?

A Yes, sir.

Q Obviously, that's where?

A Jail.

Q Is it Lexington County --

A Lexington County, yes, sir.

Q Now, when you were on that third floor in the A-Wing, were you by yourself in that room or did you have roommates?

A Two other roommates, sir.

Q Who were they?

A Darrell Williams and Kevin Mercer.

Q I'm going to show you a chart. Have you seen this diagram before, Terry?

A Yes, sir.

Q And what does this chart show us?

A That represents the third floor, Lexington County Jail.

Q Does it accurately depict the cells, the control room where the guard was, the day room and the rec room?

A Yes, it does.

MR. HUBBARD: Your Honor, I offer it into evidence at this time.

THE COURT: Ms. Kimbrough?

MS. KIMBROUGH: No objection, Your Honor.

THE COURT: Without objection, it's in evidence.

(State's Exhibit Number 1, diagram, admitted into evidence.)

BY MR. HUBBARD:

Q Terry, I may get you to step down in just a second. Now, you say you had two other roommates, Mr. Mercer --

A And Darrell Williams.

Q Darrell Williams. Who was in that room first?

A Darrell Williams, then I came and then Kevin came.

Q Okay. How long had you been in that cell before Mr. Mercer came; do you remember?

A About two months.

Q Mr. Brown, if you will, with the Court's permission, step on down and come show us and explain to us what we're looking at here.

A (Witness leaves the witness stand.)

THE COURT: You've got to speak so the court reporter can hear what you say and all the jurors, okay?

BY MR. HUBBARD:

Q I want you to stand over here so the court reporter can hear you and just talk loud. Just stand back so everybody can see. Now, let me walk you through this. These hallways that we see right here, what are those?

A Those are wings.

Q Wings, okay. And what's located on those wings?

A Inmates.

Q Step back just a little bit just so these folks can see. All right, so these are cells?

A Yes, sir.

Q This area here (indicating) where you see some benches, what is this area?

A That's a rec area, T.V., day room.

Q When you say the rec area, is that recreational?

A Yes, sir.

Q Does this depict where the T.V. set is?

A Yes, sir.

Q This area right here, what is this?

A That's where the officer is at.

Q Okay. When you say officers, is that one of the jail guards?

A One of the jail guards, yeah.

Q How many officers were usually out and about on a normal day in this tower?

A One.

Q Just one?

A Yes, sir.

Q Now, you see it's boxed in here. Is he

surrounded by glass and walls?

A Yes, sir.

Q And does this depict that?

A Yes, sir.

Q Right here, what are we looking at right here?

A That's the day room area, bathroom.

Q So if you're out, that's where you can go to the bathroom?

A Yes.

Q Which cell were you in?

A Ten on A-Wing.

Q This is A-Wing and ten?

A Yes, sir.

Q That's where you're being housed. All right, go ahead and have a seat right now.

A (Witness resumes the witness stand.)

Q Now, Terry, when y'all would get out and go to this rec area, would they leave your cell doors open?

A No, sir.

Q What was your choice?

A You can use the bathroom for 30 minutes or come on outside and rec and you lock your doors, that keeps other inmates from stealing your stuff when the guard's not on the hall.

Q So if you were out in this rec area, all of the cell doors would be locked?

A Yes, sir.

Q Let me ask you this. There's an A-Wing, a B-Wing and a C-Wing. When they would let you out in that day area, would they let all wings out?

A No, just one wing at a time for three point five hours a day.

Q A-Wing would get out for three point five hours a day, the same with B-Wing and the same with C-Wing?

A Yes.

Q But not at the same time?

A Correct.

Q And you're telling us that you had a choice to either stay in your cell or be out in the rec room area?

A Yes.

Q Now, off to the side of the rec room, this big area, what is that area?

A Exercise area, basically outside rec, just catch some fresh air.

Q When we say outside, is it surrounded by --

A Brick wall and fence over the top.

Q Okay. So are there any windows?

A No.

Q So you can basically see sky?

A The sky that's it.

Q But it's a chance for you to be able to get fresh air?

A Yes.

Q Are there any weights or anything like that out there?

A No.

Q Is there anything out there?

A No.

Q If an inmate wanted to work out or get some exercise, where would he go?

A That area, outside rec area.

Q And then what would he do?

A Pushups. Basically, that's all you can do is pushups.

Q Okay. And you only have three and a half hours a day when you can have a chance to get some fresh air?

A That's right.

Q All right. Now, you say you have two inmates, Mr. Mercer and Mr. Williams, in cell ten?

A Yes.

Q Did you get to know other inmates as well on

your wing during these breaks?

A Yes.

Q How did you get along with most everybody on your cell?

A Pretty good.

Q How did you get along with Darrell Williams?

A Pretty good.

Q Did you ever have a problem with him?

A Yeah. You know, you have your, you know, room -- being confined in a room with, you know, a different attitude within your cell, you always can get into some kind of conflict.

Q What about Mr. Mercer?

A Yeah, we had our ups and downs.

Q Did y'all ever get in a fist fight?

A No.

Q There was never any struggling or grappling or wrestling?

A No.

Q Now, when you say you had differences of attitude or opinion, are you just talking about arguments?

A Yeah, just arguments, yeah.

Q These cells that we see drawn on this board, how big are these cells that you three guys were

living in at that time?

A I'd say about ten feet, ten by eight. I want to say about ten by eight, not much room.

Q How many beds did you have?

A Two.

Q Two beds. But you got three people, how did that work?

A One man sleep in the middle of the floor.

Q Okay. So you'd have --

A A bed on each side and a man in the middle of the floor.

Q Okay. And he had just like...

A A mat.

Q A mat to sleep on. Okay, who was on the floor?

A Mr. Mercer.

Q What would y'all often do to pass the time in that cell?

A Just play cards, talk.

Q Now, let me ask you, when y'all would play cards, you and Mr. Mercer and Mr. Williams, did you ever have an occasion to have a disagreement?

A Everyday.

Q Okay. But y'all played cards anyway?

A Yeah.

Q What was the general root of the problems when

y'all would have a disagreement?

A Somebody cheat, basically.

Q Would it be an accusation someone's cheating?

A Yeah.

Q Who was usually the person that would get mad in these card games?

A Mr. Mercer.

Q And who would he an accuse of cheating?

A Me.

Q And would y'all get in an argument?

A Yeah.

Q And, typically, what would happen after that argument?

A Just an argument, a lot of wolfing going on, which mean dry threatening, you know, about what to do, what you'll do to me, what I'll do to you back and forth.

Q Now, this incident occurred January 14th of 2004. The night before, on January the 13th, did y'all play cards?

A Yes.

Q And how did that go?

A Well, typical night playing cards. You know, I got accused of cheating and he made a statement about what he'll do to me. And I let him know it

ain't going to be that easy. It will take more than you. Basically, I -- it will take you and your Army to do it. That's exactly what I said.

Q So y'all got in another argument playing cards?

A Yeah.

Q And you say he accused you of cheating. You're talking about Mr. Mercer?

A Yeah.

Q Accused you of cheating playing cards. And then what did he say to you that made you respond that way?

A Tell me he kick my, you know, my behind, hurt me in some kind of way. I let him know it wasn't going down like -- like the way he said. And I said, basically, it's going to take more than you to do what you say you're going to do.

Q Were you afraid of Mr. Mercer?

A No.

Q And, at this point, y'all had never been in a fight before?

A No.

Q A fist fight?

A No.

Q There had never been anything physical?

A No.

Q All right. January 14th, 2004, I want to talk about when y'all had time to go out into this rec area. Can you tell me -- did you go out when they said you could go out into the rec area?

A No. I stayed in 30 minutes to use the bathroom in some privacy. So they was out 30 minutes before I was.

Q Each of these cells has its own little commode, doesn't it?

A Yes, sir.

Q And there's nothing hiding you using that bathroom when you have other people in that room, right?

A That's right.

Q So that was a good time to get a little privacy if you needed to use the restroom?

A Yes, when the rec area -- rec time.

Q And how long was it before you actually came out to this rec area?

A About 30 minutes.

Q Did you have to -- now, since your door's locked, does a guard have to let you out or how does that work?

A The guard come back down every 30 minutes, he'll make a run, and he'll come open your door and

let you out.

Q Okay. Now, I'll tell you what, I want you to step down again.

A (Witness leaves the witness stand.)

Q Just stand right here again. Speak up for this court reporter. You're in cell ten. Where did you -- where were you heading when you went out that day, January the 14th?

A The exercise room, exercise area.

Q Okay. So through the day room into the exercise area?

A Yes.

Q Which is the area that's outside?

A Yes, sir.

Q Did you have anything with you?

A My towel, soap, rag.

Q Okay. Now, why did you have that with you?

A Because after I go outside and exercise, I get in the shower.

Q I want to show you an area right here next to the guard room and next to the C-Wing. Is that where the showers were?

A Yes.

Q Is that what y'all would do before you go back to your cell after exercise?

A Yeah.

Q Where do you go? Can you just point out for the jury the best you can?

A Over here (indicating), we'll work out in this area.

Q And you say there's no weights?

A No weights.

Q Do you remember who was out there that day working out?

A It was Darrell Williams --

Q Who was your roommate?

A Roommate. Dragon down on that wing and a guy called Unc, he was out there working out. All of them off the A-Wing.

Q Is Dragon Richard Adams?

A Richard Adams, yeah.

Q And Unc, is that Nathaniel Culbreath?

A Yes.

Q Do you remember if -- was there anybody else out there?

A There was Mike Moulder, Kevin Mercer and Black, Marcus Robinson.

Q All of those guys were already out there when you walked out there?

A Yeah.

Q Okay. As you come out to this exercise area, can you tell us what happened?

A I came outside. As soon as I came outside, put my stuff in the window, fixing to start working out, Marcus Robinson told me I was talking about him, asking me what was I saying about him in the room. And I let him know nothing. I didn't have nothing to say to you. I'm a man in -- I tell you in your face what I got to say to you.

So he -- when I went to turn, I called him fake. I said, Man, you fake anyway, you know what I'm saying. So I went to turn around, he made another statement. So I turned around to square off with him.

As I was squaring off with him, in this area, Kevin Mercer was on the wall right here (indicating), and he jumped off the wall when I'm squaring off with Mr. Robinson and he started hitting me, cutting me. I thought he was hitting me, but he was cutting my face.

Q Okay. Well, let's do this. How far out would you say you got out into that exercise area?

A About right here (indicating).

Q The first person you're talking to was who?

A Mr. Robinson, Black.

Q And Mr. Robinson's accusing you?
A Accusing me of talking about him in the room with Mr. Williams, with Darrell Williams, my other roommate.
Q And then what do you do? Do you stand to fight him right then or what's your first reaction?
A To turn around because I knew he ain't nothing, you know. So I was just fixing to turn around and let it go.
Q Where were you going to go when you turned around?
A Back in the inside.
Q So you were going to walk away?
A Yeah.
Q What prompted you to turn around?
A When he said he'd kick my behind anyway, you know what I'm saying. So that's when I turn -- fixing to turn back around, that's when Mercer jumped off the wall and hit me.
Q Okay. Now, did you get hit on the front, the side, in the back or do you remember?
A The back and the side.
Q Do you remember who hit you first?
A I can't really recall who hit me first.
Q At any time, did Marcus Robinson hit you?

A Yeah.

Q And you say Kevin Mercer hit you?

A Yeah.

Q Where was Mr. Mercer standing during this incident?

A Right here on this wall as soon as you come out (indicating).

Q Okay. So you're coming out here and you're about out in this area?

A Yeah.

Q Mr. Mercer's on the wall?

A Uh-huh. And Marcus is right here.

Q Okay. When Kevin Mercer starts hitting you, what, if anything -- what were you seeing at that point?

A I didn't even see noth -- it was a hit. And then I was protecting my face, a lot of blood, I was bleeding. So when I looked up, he got two shanks in his hand, you know what I'm saying.

Q What are shanks?

A They are jail made knives. You can make them out of toothbrush, pens, combs, anything, just file them down, get you a razor, stick it in the end and melt it down in a hole, just a knife.

Q So he had how many?

A Two.
Q What happened when he started striking you? Where did you end up?
A I was forced in this corner over here and that's when --
Q Up in this area?
A Yeah.
Q Okay. Now, let me ask you this. You have Mr. Mercer, who else is striking you?
A Mr. Robinson.
Q Did Mr. Robinson -- who's known as Black?
A Uh-huh.
Q Did he have any weapons?
A No.
Q Who was the only person you saw with shanks?
A Mr. Mercer.
Q Did anybody else have any weapons?
A No, sir.
Q Did you have any weapons?
A No, sir.
Q You put your bathroom stuff down?
A Yes.
Q Did you have any toothbrushes on you?
A No, sir.
Q No one else out there attacked you?

A Yeah.
Q So you had a cut on your face?
A Uh-huh.
Q The left side of your face?
A Yes, sir.
Q A cut behind your ear, behind your left ear?
A Yes, sir.
Q A nick on your left ear?
A Yes, sir.
Q You had a cut --
A Under my right eye.
Q Under your right eye and a nick on your left?
A Yeah.
Q These cuts -- were these cuts made by hand or by one of those weapons you were describing?
A By the shanks.
Q Who had those shanks?
A Kevin Mercer.
Q At any other time during this struggle, did anybody else have these shanks?
A No, sir.
Q Did Marcus Robinson have these shanks?
A No, sir.
Q While Kevin Mercer was fighting you, what was he using?

A The shanks.

Q Was he going for any other part of your body?

A Face area.

Q Face area. Now, I want you to look at some more photographs for me because we need to talk about this outside area again. This photograph here -- let me just show you these. Do you recognize these?

A Yes, sir.

Q The rec area and the inside area?

A Yes, sir.

Q Do these accurately depict the area that you were living in at that time?

A Exactly.

Q And the area that you were attacked?

A Yes, sir.

MR. HUBBARD: Your Honor, I offer these into evidence.

MS. KIMBROUGH: Without objection.

THE COURT: Okay. Without objection.

(State's Exhibit Numbers 8 through 12, photographs, admitted into evidence.)

BY MR. HUBBARD:

Q All right. Terry, I want you to look at two more photographs, State's Exhibit Number 8 and

Number 9. Number 8, what is this a photograph showing us?

A That's the rec area door, the door I came out.

Q Okay. Walk on down here, if you will, for me. This is the door out to that area?

A Yes, sir.

Q That has no ceiling?

A Yes, sir.

Q You see some shadows here and some wire, is that what was above you?

A Yes, sir.

Q Block walls all the way around?

A Yes, sir.

Q Concrete floor?

A Yes, sir.

Q And that's the door you came out?

A Yes, sir.

Q Any other door out into that area?

A No, sir.

Q That is the door depicted right here?

A Exactly.

Q State's Number 9, is this the other wall down from the door?

A Yeah.

Q This wall?

A Yes, sir.

Q All right. If you would, step back where you were. I know it's kind of hard. So it's kind of like -- like this, Mr. --

A Exactly.

Q Which wall was Mr. Mercer on?

A That wall.

Q Okay. In State's Exhibit Number 8, where the door opens?

A Yeah, right here (indicating).

Q That is right here on this chart?

A Yes, sir.

Q When you came out -- when you came out, where was Marcus Robinson?

A Over in this corner over here (indicating).

Q Okay. In the area you can't see right here?

A That's right.

Q When you turned around, which way were you heading?

A Back into this door area.

Q And that's when Mr. Robinson made another comment?

A Yeah.

Q And what did you do?

A Went to turn back around and that's when I got

hit.

Q Mr. Mercer came off of this wall?

A Yeah.

Q Now, if you would, step back and just again -- you say you ended up in this area of the rec yard?

A Yes, sir.

Q What happened to allow you to get away?

A This inmate run-around, people who clean up everyday, basically cleans up the area when we're locked down, named Mike Moulder, he basically pushed Black off me. He stepped in between me and Mr. Mercer with a knife.

Q Okay. Let's back up a little bit. Mike Moulder, you say he's a run-around?

A A run-around, he cleans the area.

Q Now, he's an inmate, too, right?

A Yeah.

Q And he lives somewhere on A-Wing?

A Yeah.

Q But he's got the job of cleaning up?

A Yes.

Q Was he out in this exercise area before this fight?

A Yes, he was.

Q Do you remember where he was or do you even

recall?

A I don't really recall where he was at.

Q And you mentioned Black?

A Uh-huh.

Q Are you talking about Marcus Robinson?

A Marcus Robinson.

Q Is that his nickname?

A Yeah, Black.

Q Is he the guy with Mr. Mercer that you were fighting?

A Yes, sir.

Q Mike Moulder, this guy that's the run-around, what did he do when you were in this area?

A When I was being attacked over in this area, Mike Moulder, basically, saved my life. He pulled Black off of me, right, because both of them was beating me at the time. And he stepped in between me and Mr. Mercer, basically shoved his shoulder, shoved my shoulder like that (indicating), because we was locked -- hooked up like this. I was trying to keep him from cutting me, so I grabbed him, tried to grab him. So Mr. Moulder, basically, pulled us apart, told Kevin to drop the knife, you know what I'm saying, you don't need it, you know what I'm saying. And that's when he say, I'm going to kill

him, I'm going to kill him.

Q All right. So who was saying, I'm going to kill you, I'm going to kill you?

A Mr. Mercer saying he was going to kill me.

Q Okay. When he said that, when you got separated by Mike Moulder, what did you do?

A I went behind -- I used Mike as a shield to get in the door.

Q So you came back into the day room area?

A Yeah.

Q And where did you go?

A To the bathroom area.

Q Depicted right here?

A Uh-huh.

Q When you're in the bathroom, what are you doing in the bathroom?

A Looking at my wound, washing my face.

Q Okay. Now, there's one guard here?

A Uh-huh.

Q Where is he at this time?

A As far as I -- I don't even see him. I don't even see no officer.

Q You're not paying attention to anything else?

A No, just trying to -- really trying to see what's up with my face.

Q Okay. What else happens while you're in this bathroom area?

A When I'm washing my face and trying to take my thing, then all of a sudden I look back, he's coming again, you know what I'm saying.

Q Who is he?

A Mr. Mercer, Kevin.

Q And now you're in the day room and in the bathroom?

A In the day room, yeah, in the bathroom area.

Q When he comes again, who's he coming for?

A Coming for me.

Q He's not going anywhere else?

A No, sir.

Q Do y'all fight again?

A Yeah. We fight in the bathroom area.

Q At this point, do you see anything in his hands?

A I don't see nothing at that time.

Q When you're out in the rec yard, the exercise area, you talked about shanks. Were there one or two?

A There's two.

Q Can you describe them?

A One was a pen with a razor on the end.

Q What color was it?

A Black. And it was cream color -- the next one was a cream color toothbrush, that's all we're issued is a kind of cream colored toothbrush, with a razor on the end.

Q Now, let me ask you, how do you get a razor on the toothbrush?

A Well, melt it down. You can get a lighter come through every now and then. You melt it all the way down. And, basically, you want to get it hot enough so you can plaster the razor on the end of the toothbrush.

Q Have you seen these before?

A Oh, yeah, thousands of them.

Q And this sounds like a stupid question. Are y'all allowed to have any type of weapon?

A No.

Q When y'all shave, can you tell us how that process is when y'all go about shaving?

A We sign out a razor. You sign a piece of paper to get a razor. They give you a razor. When you get finished, you hand the officer back the razor. He's supposed to check to make sure the razor is still inside the shaving thing and he dispose -- the officer supposed to dispose of the razor.

Q So if you were to keep a razor or to take a blade out, the guard is supposed to be able to tell, whoa, y'all checked one out and you've --

A You took the razor out of this one, yeah.

Q And that's what?

A That's contraband.

Q Okay. And you're fighting in here, what happens next?

A When we're fighting in here, that's where the fight ended at. We're fighting in here (indicating) and then the guards came in, you know. They broke us up. And then they handcuffed me. I'm the only one that got handcuffed and I went downstairs. They took me out to the elevator, took me to medical.

Q Let me ask you this. When they take y'all downstairs like that, it's not uncommon to be handcuffed at that point, right?

A No, sir.

Q And they took you where?

A To medical.

Q And did you get treated there or did they take you somewhere else?

A They took me in the ambulance to the hospital because they couldn't really tell -- there was a lot of blood, they couldn't really tell how serious the

wound was.

Q What were other inmates doing or were you even paying attention?

A Everybody broke out fighting after that. There was a bunch of fights going on and chaos broke out on the third floor after that went on.

Q You say the guards came and broke you up. Do you remember how many guards came?

A About four or five.

Q Okay. Go ahead and have a seat again.

A (Witness resumes the witness stand.)

MR. HUBBARD: Terry, I believe that's all of the questions I have for you right now. Please answer any questions Ms. Kimbrough has for you.

THE WITNESS: Yes, sir.

THE COURT: Ms. Kimbrough.

MS. KIMBROUGH: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Good afternoon, Mr. Brown. How are you?

A I'm fine.

Q Good. Now, Mr. Mercer was your cell mate on January 14th; is that correct?

A Yes, ma'am.

Q Okay. And how long had y'all been cell mates?
A About three weeks, a month. Right at a month.
Q All right. I believe you testified on direct that y'all didn't get along so well, that there were frequent disputes?
A Yes, ma'am.
Q And some angry words?
A Yes, ma'am.
Q Sounds like there were some threats?
A Basically, between both of us.
Q Now, as a result of the difficulties you had with Mr. Mercer, you never made a request to be moved, did you?
A No.
Q Okay. Were you aware that he had?
A Yeah.
Q Okay. Were you aware that he took your threats seriously?
A I don't know what threat. You got to tell me what threat -- what threat I was supposed to make.
Q Your threat to hurt him?
A Well, both of them made the same threat, but it never happened. Just like it was going on for that whole month, nobody acted on it. I mean, it was, basically, just dry wolfing just like what I said it

was.

Q All right. This card game that y'all had on January 13th, you said that was pretty common that y'all would have card games every night?

A Every night.

Q And every night somebody would accuse somebody else of cheating?

A And quitting.

Q Okay. Take your ball and go home?

A Yeah.

Q Okay.

MS. KIMBROUGH: Beg the Court's indulgence.

(Pause.)

Q What was your relationship like with -- if I understand correctly, you were saying your relationship with Marcus Robinson was perfectly fine?

A We never had no -- we never had no disagreements or nothing at all.

Q Okay. So you deny threatening to hurt Marcus Robinson?

A No, I did not.

Q It's your story that when Marcus Robinson came and confronted you about the threats he believed you had made, that you called him a name and turned

around is that your story?

A Yes, ma'am.

Q Okay. Is it also your version of events that Kevin Mercer made stuff up for no apparent reason and told Mr. Marcus Robinson, that he just made it up out of whole cloth (ph)?

A I don't know. I wasn't there. I don't know what he told -- I assume that's what he did.

Q Okay. Let's talk a little bit about your history, specifically your criminal history. How long have you been involved in the criminal justice system, Mr. Brown?

MR. HUBBARD: Your Honor, I object to the form of the question. That's an improper question.

THE COURT: Okay. You can ask him about his prior convictions and that's it.

MS. KIMBROUGH: Yes, Your Honor.

BY MS. KIMBROUGH:

Q In 1994, you committed a burglary third?

MR. HUBBARD: Your Honor, again, I object to the form of the question. She can say you were convicted of a particular charge. I think that's what she's going to have to do. That's the technical way to do it. Your Honor, that's how I did it.

MS. KIMBROUGH: I believe that's what I just did.

THE COURT: I thought that's what she did. She can designate the time so that we'll know when it was. All right, go ahead.

MS. KIMBROUGH: Thank you, Your Honor.

BY MS. KIMBROUGH:

Q In 1994, you were convicted of a burglary third; isn't that correct?

A Yes, ma'am.

Q Okay. And in 1996, you were convicted of a failure to stop?

A Yes, ma'am.

Q In 2001, you were convicted of crack, two separate counts of crack possession; is that correct?

A Yes, ma'am.

Q Okay. And in 2005, you were convicted of at least two violent crimes, an armed robbery and an assault and battery with intent to kill and a burglary; is that also correct?

MR. HUBBARD: Your Honor, I object to her designation as violent crimes. Those are statutory terms. These don't apply in this case. These are not statutory or -- violent crimes. And if she

needs to address that, I think we need to do that as a matter of law if she needs to go into that.

THE COURT: Just ask him what he was convicted of.

MS. KIMBROUGH: Thank you, Your Honor.

BY MS. KIMBROUGH:

Q Were you convicted of armed robbery, burglary and assault and battery with intent to kill?

A No, it wasn't armed robbery. It was strong armed robbery, which is nonviolent, without a weapon; burglary second, which we went into someone's house in the daytime, nonviolent; and assault and battery of a high and aggravated nature, which actually is a misdemeanor, nonviolent. I'm doing a nonviolent three year sentence right now for everything.

Q All right. Do you recall when you were at the Lexington County Medical Center receiving some paperwork as a result of your treatment there?

A Yes, ma'am.

MS. KIMBROUGH: Beg the Court's indulgence.

(Pause.)

MS. KIMBROUGH: May I approach the witness? Thank you, Your Honor.

Q Do you recall seeing this emergency department

note?

A Yes, ma'am. Yeah.

Q Okay. If you would please, can you read where it says diagnosis?

MR. HUBBARD: Your Honor, I object. First of all, I don't know what she's showing him. And second of all, it's not in evidence.

THE COURT: All right. I'll sustain the objection as to that.

MS. KIMBROUGH: Your Honor, this was provided in discovery.

THE COURT: It's got to be admissible in evidence even though it was provided in discovery. You can ask him --

MS. KIMBROUGH: I believe the witness has identified it. I mean, he understands what it is.

THE COURT: Well, it's still not admitted in evidence. It's not admissible right now, so you can't publish from it unless it's admitted into evidence.

MS. KIMBROUGH: Thank you, Your Honor.

BY MS. KIMBROUGH:

Q As a result of the assault -- of the fight with Mr. Mercer, did you receive any follow-up medical treatment?

the time the bathroom incident occurred?

A I came in the inside. They was still in the outside rec area. I ran in and went into the bathroom.

Q Okay. So you deny that y'all were fighting all the way into the bathroom?

A What you mean -- no -- yeah. We wasn't fighting all the -- the fight was -- I ran in. So there was no more fight. I went in the bathroom, that's when the fight recurred while I was in the bathroom in the mirror.

Q Do you deny that you were engaged in a fight when officers came and broke it up?

A Yeah, I was fighting in the bathroom.

Q Okay. And if I understand your testimony correctly, at that point, there were punches being thrown, but there were no shanks?

A That's correct.

Q And do you recall making a statement saying that you think the shanks were flushed down the toilet and that that's why none were found?

A Yeah.

Q Okay. But your testimony here isn't that you saw that happen, correct?

A That's right. I didn't see him flush them.

Q Once again, you deny making any threats against Mr. Mercer or Mr. Robinson?

A Mr. Robinson -- just like I said, me and Kevin were threatening each other, wolfing in the room at each other, so.

Q But as to Mr. Robinson, you deny making any threats against him or threatening to jump him?

A Correct.

MS. KIMBROUGH: Excuse me, Your Honor.

(Pause.)

MS. KIMBROUGH: No further questions, Your Honor.

MR. HUBBARD: Nothing else from this witness, Your Honor.

THE COURT: All right. Thank you, sir. You may step down.

MR. HUBBARD: The State calls Marcus Robinson.

Your Honor, with the Court's permission, I would like to go ahead and excuse Terry, if that's okay.

MS. KIMBROUGH: No objection.

THE COURT: All right. Without objection.

MARCUS ROBINSON,

having been duly sworn, testified as follows:

THE CLERK: Have a seat right up there please,

sir. Speak up loud and clear and state your name for the record, please.

THE WITNESS: Marcus Robinson.

DIRECT EXAMINATION

BY MR. HUBBARD:

Q Marcus, how old are you?

A Twenty-one.

Q Where are you from?

A You mean where I was born?

Q Yes, sir.

A Fairfield County.

Q Where were you living?

A Off Broad River.

Q In the Columbia area?

A Yes, sir.

Q I notice you're wearing a blue uniform?

A Yeah.

Q Where are you living right now?

A Where I'm living right now?

Q Yes, sir.

A Where I'm being held at, Richland County Detention Center.

Q You have a charge on you over there?

A Yes, sir.

Q What is that charge?

A Unlawful possession of a firearm and some other little charges.

Q Those are out of Richland County or out of Lexington County?

A Richland County, sir.

Q And that's where you're being held?

A Yes, sir.

Q I want to ask you about your prior record. Do you remember coming into court and pleading guilty to a failure to stop for a blue light?

A Yes, sir.

Q That was in 2004?

A Yes, sir.

Q You also remember being charged and pleading guilty that same day to lynching second degree?

A Yes, sir.

Q Again, that's 2004?

A Yes, sir.

Q July 21st, 2004?

A Somewhere around there.

Q That sounds right?

A Yeah.

Q Now, that lynching charge that I just mentioned, was that an incident that occurred in Lexington County?

A Yes, sir.

Q At the detention center?

A Yes, sir.

Q Was that a charge that you got along with Mr. Mercer?

MS. KIMBROUGH: Objection, Your Honor. May we approach?

(Whereupon, a bench conference was held off the record, in the presence of the jury, but out of the hearing of the jury.)

BY MR. HUBBARD:

Q Marcus, just speak up for me. You don't have to lean into that microphone.

A All right.

Q You don't want to be here today, do you?

A No.

Q In your prior convictions, you had dealt with me?

A I mean, you're the Solicitor, right?

Q Yes, sir.

A Yeah.

Q So there's no love lost. You're not somebody that loves me, are you?

A I mean, I love you, you know what I'm saying, but I don't...

Q But just in a general sense?
A Yeah.
Q As one of your fellow man?
A Yeah.
Q I want to talk to you about what happened January 14th, 2004. You were in the Lexington County Detention Center, correct?
A Yes, sir.
Q Do you remember who your roommates were or who your cell mates were?
A I had numerous cell mates, you know what I'm saying.
Q People came and people went?
A Yeah.
Q Do you remember Kevin Mercer?
A Do I remember him?
Q Yes, sir.
A Yes, sir, I remember him.
Q Were you on the third floor, A-Wing?
A Yes, sir.
Q I'm going to show you what's already been marked into evidence, State's Exhibit Number 1. Does this look like a drawing and a depiction of the third floor with the day room, A-Wing, B-Wing, C-Wing? Does that look right?

A Yes, sir.

Q The rec area or exercise area are right off the side?

A Yes, sir.

Q Okay. Now, you're going to need to speak up a little bit. I know I'm kind of standing behind you, but -- you were on this hall?

A I was on A-Wing.

Q Okay. Do you remember where on A-Wing? Do you remember which cell was yours? If Kevin Mercer was in cell ten, you were in room nine?

A Yeah.

Q You were a neighbor?

A I was next door to him, yeah.

Q January 14th, do you remember you had a time when you got to come out of your cell into the day area?

A Well, when they let us out for rec.

Q So that was something that would happen everyday?

A Yeah, if you're not locked down.

Q When you're not locked down?

A Yeah.

Q Lock down would occur if something were to happen in the jail?

A Uh-huh.
Q They wouldn't let anybody come out?
A Yeah.
Q Is that what lock down means?
A Uh-huh.
Q This day, did y'all get to come out?
A We was out.
Q Okay. Now, do you recall talking to Kevin Mercer on that day before a fight broke out?
A Yeah. Yes, sir.
Q Can you point out -- and I'm going to tell you what, I'm going to have you step down with the Court's permission, and I want you to step down and point it out to the jury on this chart where you were when you talked to Mr. Mercer. Come on down here with me.
A (Witness leaves the witness stand.)
Q I want you to stand on this side of the chart.
A Where I was at?
Q Yes, sir. You're going to have to speak up because you've got to speak through me to this court reporter, all right? You and Mr. Mercer, did y'all have a conversation before this fight broke out?
A Yeah.
Q Was it just you two?

A Yeah, just us two.
Q Where did that conversation take place?
A Approximately, up in here.
Q In the day room area?
A In the day room area, yes.
Q Right near C-Wing?
A Yeah, on the wall right there.
Q Back up, and I'm going to have you talk up a little bit. Was C-Wing still locked down?
A Yeah, they was locked down.
Q B-Wing still locked down?
A Yeah. We was the only one out for rec, A-Wing.
Q A-Wing. So you and Kevin Mercer are out here somewhere in the day room area?
A Yeah.
Q Just you and him?
A Well, not just me and him, you know what I'm saying. We was the only ones standing right there.
Q The only ones talking right there?
A Yeah.
Q Now, the guard, is he in the control tower at this point or is he out and about?
A You know what I'm saying, I can't really remember.
Q Where are the guards usually?

A Probably be in the control room.
Q The control room?
A Yeah.
Q When Mr. Mercer talks to you, do you come up to him or does he come up to you?
A He approached me.
Q He approached you?
A Yeah.
Q What, if anything, did he tell you or say to you?
A Oh, he was telling me that his roommate, Darrell Williams and Terry --
Q Terry Brown?
A Had a problem with me, that they wanted to jump me or something like that.
Q Okay. Now, let me ask you this. Had you ever had a problem with Darrell Williams?
A No, no, I didn't have a problem with nobody.
Q You never had a problem with Terry Brown?
A No.
Q And so this day, Kevin Mercer comes up to you and says these guys are going to jump you?
A Yeah. He's like they plan on jumping you or something. They got an animosity against you.
Q Okay. Did he ever say anything to you about

his life being in jeopardy?

A No, he ain't never tell me about his life being in jeopardy.

Q Did he say that anybody wanted to jump him?

MS. KIMBROUGH: Objection to leading.

THE COURT: I'll sustain the objection. Solicitor, you can't lead him that way.

MR. HUBBARD: Yes, sir.

BY MR. HUBBARD:

Q What, if anything, did he say about his safety?

A He didn't say nothing about his safety.

Q His safety never came up in this talk?

A Well, he was telling me really like, you know what I'm saying, watch yourself because they plan on jumping you or something like that.

Q Okay. So you were the one that was going to get jumped is that what you're saying?

A Yeah, that's what I just said.

Q Okay. What did Kevin Mercer -- what, if anything, did he say he would do for you?

A He was like, I ain't going to let nobody, you know what I'm saying, jump you or hurt you or nothing like that.

Q Okay. He was going to protect you?

A Well, yeah. He wasn't going to let it get too

far out of hand, I guess.

Q All right. Go ahead and have a seat again, if you will, Mr. Robinson.

A (Witness resumes the witness stand.)

Q Now, Mr. Robinson, what did you do after that conversation? Did you stay in the day room or did you go out to the rec area?

A I went out to the rec area to approach Darrell Williams, ask him, you know what I'm saying, what the business is, why he got a beef with me or whatnot.

Q Okay. So you went to confront Darrell Williams?

A Yes, sir.

Q Who else do you recall being out in that exercise area?

A Like I say, it's been a long time ago, you know what I mean.

Q Right. Let me ask you this --

A I don't remember everybody.

Q Was Kevin Mercer out there?

A Kevin Mercer?

Q Yeah.

A Yeah, he was out there.

Q Do you remember a guy named Richard Adams, also

known as Dragon?

A Yeah.

Q Exercising?

A I mean, he was out there. I think he was talking to Darrell.

Q Okay. A guy named Unc or Mr. Culbreath, Nathaniel Culbreath, Nathaniel Padgett?

A Yeah. I remember him.

Q What were these guys doing out here; do you remember?

A They was talking to Darrell. They was over there in the little rec area with it being blind to the control room. They was over there conversating (sic) or whatnot.

Q So you approached Darrell Williams?

A Uh-huh.

Q And what did you say to Darrell Williams?

A I just told you.

Q I know you just told me. I want to make it clear.

A I was like, What, you got a beef with me, you know what I'm saying. Why you -- why you feel like you got to jump me, or something like that.

Q Terry Brown, was he out there at that time?

A No. I think Terry was in the shower. He came

out to the rec yard, though, when I was confronting Darrell.

Q When you say he was in the shower, is there a reason why you were saying that?

A Because he came out with his shower stuff, towel, you know what I'm saying, laid it out so it could get dry on the rec yard.

Q What happened when Terry came out?

A When Terry came out, I was like, Terry, you got a problem with me, too. And I was asking him, you know what I'm saying, the question. And he was like, if I got a problem with you, you know what I'm saying, I would confront you. So he went to put his stuff down, you know what I'm saying, and threw up his guards so that's when I threw up my guard.

Q Then what happened?

A Then what's when Mercer hit him, you know what I'm saying.

Q Mercer, Kevin Mercer?

A Yeah.

Q Who did he hit?

A He hit Terry.

Q Had you hit Terry at this point?

A No, I didn't hit Terry. I went and hit Darrell.

Q Okay. Where did Darrell go?

A I mean, he ran in the rec room -- in the rec area -- I mean, in the day room.

Q So he ran to get away?

A Yeah.

Q Or away from the fight?

A You can say that, yeah.

Q Mr. Mercer and Terry Brown were still out in the exercise area?

A Well, we was fighting, you know what I'm saying. And when, you know what I'm saying, the fight got close to ours, that's when, I mean, I hit Terry. Then my man went in the inside, so I chased him, you know what I'm saying. What they was doing out there, I don't know, you know what I'm saying, after that point, after I went in the inside chasing Darrell.

Q So, at one point, both you and Kevin Mercer hit Terry Brown?

A I can't say we hit him at the same time.

Q I'm not saying at the same time, but both of y'all hit Terry Brown?

A I hit him because their fight was, you know what I mean, coming towards my way. I felt as if I hit him before he hit me, you know what I'm saying,

so I hit him.

Q Who threw the first punch?

A Who threw the first punch?

Q Right.

A As in what initiated the fight?

Q Correct.

A Well, Mercer hit Terry.

Q Nobody had done anything to you at this point?

A Well, no, ain't nobody touch me physically.

Q Now, you said something about you followed your man. Who are you talking about?

A Darrell.

Q What were you going to do?

A What I was going to do? You know, I still wanted to fight.

Q Okay. So you were still looking to fight?

A Yeah.

Q Darrell Williams, did he stay in the exercise area or did he go in the day room?

A Darrell Williams?

Q Yes.

A He went in the day room, started running around in the day room. I mean, I was chasing him around in the day room.

Q Do you remember the benches or the picnic

tables that y'all had bolted to the floors in there?

A Yeah.

Q Were y'all in that area or did y'all run into another area of the day room?

A We was over there by the two benches.

Q By the two benches?

A Yeah.

Q You're talking about these two benches here?

A Yeah. The one closest to B-Wing that's where we was.

Q When you started fighting Darrell in there, you obviously couldn't see Kevin Mercer at that point, could you?

A I mean, for a little moment, then I know that Kevin and Mercer (sic) was in the bathroom area tussling. They was fighting right there.

Q Kevin Mercer and who?

A And Terry Brown.

Q They were in the bathroom area?

A Yeah, in the day room.

Q Was anybody else fighting besides you and Darrell and Kevin and Terry?

A Not that I can recall.

Q Okay. And did y'all just stop fighting or were y'all broken up?

A No, he -- Darrell, he jumped up on a picnic table and that's when the C.O. slammed him, broke up everything.

Q Did one guard come out or do you remember more guards?

A I mean, there was more guards. It was a fight.

Q And then what happened?

A Then they broke the fight up.

Q They lock y'all down?

A They locked me and Mercer down. They sent us to the first floor lockup.

Q Is that how they separate everybody?

A Well, usually when a fight break out, everyone goes to lockup, you know what I'm saying, but they just locked me and Mercer up.

Q Let me ask you this. There are other people fighting as well?

A There could have been, you know what I'm saying. I think, you know...

Q That's okay. I'm just going from your memory.

A Yeah.

Q I want to go back to one other thing. The conversation you had out here with Mercer, with Kevin Mercer before you went into that exercise area, is that the first time you had heard that

somebody was going to jump you?

A What you mean, in my life or --

Q Is that the first time you heard that Darrell Williams and Terry Brown were going to jump you?

A Yeah -- well, yes. Yes, sir.

Q Did you have any reason to believe these guys were going to jump you before this or had y'all gotten along?

A Yeah, I did, because like I say, my room and their room was next door and you can hear a conversation through the vent, you know what I'm saying. And I heard my name brought up a couple of times and a little laughter behind it, you know what I'm saying, so.

Q Let me ask you, you heard your name, but did you ever hear a threat?

A No, but, you know, you -- well, you probably don't know.

Q Did Terry Brown ever come up and say anything in a threatening manner to you or did you two get along for the most part?

A Yeah. We was all cool on the wing so that's why I asked him what the business is, why you...

Q That's what you were asking him out in the rec yard?

A Yeah.

Q At any time, did Darrell Williams or Terry Brown jump you?

A No, they didn't jump me.

Q At any time during this fight, did anybody else jump you?

A No.

Q The first punch in this fight was broken by who?

A By Kevin.

Q Did you, at any time, see shanks or blades?

A No.

Q Your attention -- when you struck Terry, you mentioned something about following Darrell Williams into the day room?

A Uh-huh.

Q Did you ever have any shanks?

A No. I don't need no shanks.

Q You never had any razors or pens or toothbrushes?

A Huh-huh.

Q No weapons?

A No weapons.

Q Just your hands?

A Yeah.

Q If Terry Brown got cut, did you cut him?

A No, I ain't cut him. I just told you I didn't have no shanks.

Q Just making it clear. Did you cut Mr. Brown?

A No.

MR. HUBBARD: Mr. Robinson, I know you don't want to be here today. Thank you for answering my questions. Please answer any questions defense counsel has.

MS. KIMBROUGH: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Good afternoon, Mr. Robinson.

A How are you doing, ma'am?

Q Good. How about you?

A I'm all right.

Q If I understand you correctly, on January 14th, 2004, your cell was right next door to the cell occupied by Kevin Mercer, Darrell Williams and Terry Brown?

A Yes, ma'am.

Q Okay. And prior to January 14th, if I understand, again, your testimony correctly, you had heard your name being spoken of through the vent?

A Yes, ma'am.

Q And your name was spoken by Terry Brown?

A Well, it was by Terry and Darrell, you know what I mean, like in -- like in a mocking, you know what I'm saying, tone.

Q Okay. Did you get -- what was your impression as to what your name was -- as to how they were talking about you? Did you have an impression?

MR. HUBBARD: Your Honor, I will object to speculation.

THE COURT: I will sustain the objection as to the form of the question about his impression.

MS. KIMBROUGH: I'll rephrase the question.

BY MS. KIMBROUGH:

Q Do you recall anything specific?

A Well, I ain't recall anybody like saying they're going to jump on me or nothing like that, if that's the question you're asking me. I just heard my name like -- like they used to call me Bird in the jail cell or whatever, you know what I mean. They was -- I didn't have, you know what I mean, nobody to take care of me when I was behind there, you know what I'm saying, so I felt as if they was mocking me like, you know what I mean, you around here free loading or whatnot and I hear a little

laughter. So I couldn't really say that they had a little animosity towards me, so, therefore, I didn't confront them. Then when Mercer came with the little information, I like put two and two together. So that's why I went and confronted the dude, you know what I'm saying.

Q So your relationship with Terry Brown and Darrell Williams before January 14th, y'all weren't buddies?

A I mean, we all was cool on the wing. Everybody was tight. I mean, I remember helping Mr. Brown, Terry, he had a little plax (ph) something similar to mine, they had locken (sic) up. He wanted me to help him take them out so he could get his hair cut. I mean, I helped him take his hair out and whatnot.

Q Okay. So you just tried to get along with everybody?

A Yeah. I get along with everybody.

Q But you did have some indication that you were being mocked by Mr. Brown and Mr. Williams?

A Yes, ma'am.

Q Okay. Now, on January 14th, if I understand correctly, Mr. Mercer came and said -- or came and warned you that Mr. Brown and Mr. Williams were planning some sort of assault. They were planning

to jump you?

A Yes, ma'am.

Q Okay. And so Kevin Mercer says he would defend you if that happened. Is that what you meant by got your back?

A Yes, ma'am.

Q And as a result of that, you went out, and I believe you had testified previously that you confronted Darrell Williams?

A Yes, ma'am.

Q Okay. And then Terry Brown came out and you had a discussion with him?

A Yes, ma'am.

Q Okay. And if I understand correctly, Mr. Brown took a very physically confrontational stance, though he did not hit you. I believe you said he squared off?

A Yes, ma'am.

Q So did you, at that point, believe that a fight was imminent?

A Yes, ma'am.

Q Okay. Were you afraid that Mr. Brown was going to make good on those threats to jump you?

A I mean, that's why I approached him, you know what I mean, so, yes, ma'am.

Q Okay. But you like getting along with your other cell mates and your other block mates, so the purpose in confronting Mr. Brown wasn't a fight, was it?

A It was really just trying to get the understanding of what was going on, you know what I'm saying.

Q Okay. So sort of to diffuse the situation?

A Yes, ma'am.

Q Okay. So you went out as a peace keeper or a peace maker?

A Well, really with the intention of like whatever could have happen. I'm doubtful it would peace it out or --

Q You just wanted to get the situation resolved?

A Yes, ma'am.

Q All right. And so -- but Mr. Brown's response was to put his items down and to square off?

A Yes, ma'am.

Q Okay. And so Mr. Mercer, if I understand you correctly, he struck Mr. Brown before Mr. Brown was able to strike you?

A Yes, ma'am.

Q And in all of this squaring off and fighting, you never saw any shanks?

A No, ma'am.

Q You saw fists?

A Yes, ma'am.

Q Did you see scratching?

A I don't recall no scratching.

Q Okay. You just remember fists?

A Yes, ma'am.

Q Okay. And I take it this happened pretty quickly?

A The fight didn't last that long, more than about -- I want to say two minutes.

Q So it was real fast?

A Yes, ma'am.

MS. KIMBROUGH: Beg the Court's indulgence.

(Pause.)

MS. KIMBROUGH: No further questions.

MR. HUBBARD: Quick follow up, Your Honor.

REDIRECT EXAMINATION

BY MR. HUBBARD:

Q Mr. Robinson, when you walk out there to confront Darrell Williams, then Terry Brown comes out and you confront him, did you know going into this, there's a good chance you guys were going to be fighting?

A I'm saying it was a possibility, you know what

I'm saying.

Q Do you remember saying at one time you knew there would be a confrontation?

A I mean, yeah, there was going to be a confrontation, you know what I'm saying, between Terry and Mercer because Terry told me like a couple days previously that --

Q No, I'm not asking you what --

A Oh, not that.

Q -- what somebody else may have said to you.

A I'm telling you what Terry told me.

Q Listen to my question. Mr. Mercer comes up to you, tells you these guys are going to jump you, you go out and confront them?

A Yeah.

Q He's telling you that he's going to cover your back?

A Uh-huh.

Q Does that tell you in your mind as you go out there, that you're prepared for a fight?

A Yeah. Like I just told -- anything could have happened, a fight could have broke out or everything could have been resolved, you know what I'm saying.

Q And so when we talked about settling this matter, it's either going to be settled by talk or

by fight?

MS. KIMBROUGH: Objection, Your Honor. He's testifying.

THE COURT: I will sustain the objection as to the leading question.

BY MR. HUBBARD:

Q When you went outside --

A I'm saying --

Q Hang on, let's get a question. What, if anything, can you say about a fight or a conversation resolving this matter?

A Like...

Q I tell you what, let me rephrase it. If you wanted to settle things with Terry Brown and Darrell Williams, you could have done it peacefully?

A I mean, we could have done it peacefully, yeah, but that wasn't the case.

Q That's not what happened?

A No.

Q And Kevin Mercer was supposed to be by your side?

A Well, he was like, I'm not going to let nobody jump you, you know what I'm saying. I'm not going to let them jump you.

Q And no one did?

A Ain't nobody jump me. It was really a two on two fight, you know what I'm saying, to be honest with you.

Q But Terry Brown and Darrell Williams didn't start this? They didn't throw the first punch?

A Well, no, but once you throw your guard up, that's initiating a fight.

Q Correct. And that's what I was getting at when I first stood up to ask you these questions. Your guard's up, their guard's up, right?

A He threw his guard up first.

Q And, in your mind, that's a fight?

A Well, that's get ready or get swung on.

MR. HUBBARD: Nothing else, Your Honor.

MS. KIMBROUGH: Briefly, Your Honor.

RECROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Mr. Robinson?

A Yeah.

Q I don't want to put words in your mouth, but is your testimony that when you went out to speak to Terry Brown, you were just simply trying to resolve whatever the conflict was that he had with you, was that your intention?

MR. HUBBARD: Your Honor, at this point, I'm

going to say asked and answered. I brought that up in response to her cross, Your Honor, because I did not go into this in direct the way she went into it.

THE COURT: I'll overrule the objection. Go ahead.

MS. KIMBROUGH: Thank you, Your Honor.

BY MS. KIMBROUGH:

Q Was there a plan to have a physical altercation with Terry Brown when you went to speak with him on the rec yard?

A It was never a plan, you know what I'm saying.

Q Thank you. You didn't know which way the conversation was going to go, did you?

A No. Like I said, I went out there to confront, to see what was the matter, what's going on, you know what I'm saying. And there was the outcome of a fight.

Q Okay. And you didn't set anything down or try to square off, did you?

A No. He squared off at me first.

Q So you were anticipating that a fight was imminent, meaning it was just about to happen?

A Just about to happen, yeah.

Q Yes, sir. Now, after Mr. Mercer warned you about Mr. Brown, did he -- after he warned you about

Mr. Brown, was it your action to go straight out there and ask him what the problem was?

MR. HUBBARD: Your Honor, this is beyond redirect.

THE COURT: I'll overrule the objection. Go ahead.

THE WITNESS: When he asked me -- when he told me about the little thing, about them wanting to jump me and whatnot, I was like, I'm going to go out here and confront them, you know what I mean, see what was going on and that's what I did.

BY MS. KIMBROUGH:

Q You didn't wait for Mr. Mercer to respond to that, did you, you just went out?

A I just went out the door.

Q Y'all weren't scheming or planning?

A No, ma'am. There wasn't no plan in my --

Q You were mad?

A I mean, like -- no, there wasn't no plan. We didn't plan nothing.

Q Okay. Now, I believe in response to Mr. Hubbard's question, you were discussing hearing something Mr. Brown said two days before --

MR. HUBBARD: Objection, Your Honor, hearsay.

THE COURT: Anything Brown told him would be

hearsay.

MS. KIMBROUGH: Your Honor, I believe if he heard it, then he could testify to what he heard.

THE COURT: If Brown said it, it will be hearsay.

BY MS. KIMBROUGH:

Q Without going into anything specifically that he said, Mr. Brown --

A Yes, ma'am.

Q -- do you recall, two days prior to this event, hearing Mr. Brown make any threats against --

MR. HUBBARD: Your Honor, I object to hearsay again.

THE COURT: I'll sustain the objection.

THE WITNESS: Yes, ma'am.

THE COURT: I sustained the objection. You can't answer that question.

You have to ask Brown about that when he's on the witness stand, Ms. Kimbrough. Listen to my objections.

MS. KIMBROUGH: Thank you, Your Honor. I have no further questions.

Thank you, Mr. Robinson.

MR. HUBBARD: One quick follow up, Your Honor.

****

REDIRECT EXAMINATION

BY MR. HUBBARD:

Q When Mr. Mercer told you these guys were going to jump you, did I understand you, just answering the question while ago, that you told Mr. Mercer you were going to go confront these guys?

A I'm going to see what's going on, I mean, yeah.

Q You're going to go confront them with this accusation?

A Well, really ask them why y'all have a problem with me, you know what I'm saying. Yeah, so you can say that.

Q Mr. Mercer knew you were going to do that?

A If I told him.

Q That's what I'm asking you. You told him or did you? I'm following up on what you said to Ms. Kimbrough just a second ago.

A Yeah, but you're trying to get at is if we planned it, it wasn't a plan.

Q I'm not asking you to figure out my mind. I'm asking you a simple question.

A I'm just trying to get an understanding --

Q Listen to me --

THE COURT: Wait a minute, both of you. You ask the questions. Don't go into a lot of detail,

just ask him a question. You listen to it and you answer the question, okay.

All right. Go ahead, Solicitor.

BY MR. HUBBARD:

Q When Mr. Mercer told you these things, did you say, at that point, in his presence, that you were going to go see about that and confront these guys about what he said? I'm just asking from your memory, do you remember?

A What you asking -- you're asking if when he asked me -- when he told me about the situation, I told him that I'm going to go confront him, you know what I'm saying?

Q Right.

A Ask him why -- yeah, that's what I said.

MR. HUBBARD: That's all I needed to know. Thank you.

MS. KIMBROUGH: Just one question, Your Honor.

RECROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Mr. Robinson, when you said you were going to confront Mr. Brown, did you say you were going to physically confront him?

A No, I ain't -- when I said confront, I meant by asking him, you know what I'm saying, why you got a

beef with me. It ain't no -- it wasn't no matter as like we're going to go fight or nothing like that, you know what I'm saying.

MS. KIMBROUGH: Thank you.

THE COURT: All right. Come down, sir.

THE WITNESS: I can get down?

THE COURT: Yes, sir.

MR. HUBBARD: Your Honor, we ask that this witness be excused.

MS. KIMBROUGH: Without objection.

THE COURT: All right. Ladies and gentlemen, we're going to break for lunch at this time. I'm going to let y'all go out. And do not discuss the case with anyone or let anybody talk to you about the case. I'm sure they won't, but if they did, report that to me. And be back at 2:30 and we'll continue and maybe finish, okay. 2:30 this afternoon. Thank you. The bailiff will show you how to get out and get back in.

(The jury was excused for lunch.)

THE COURT: See y'all back at 2:30.

(Whereupon, there was a luncheon recess.)

MR. HUBBARD: The next person we're putting up is a man with a record, also. And we just wanted to make sure we're on the same page with Ms. Kimbrough

on what we can and cannot go into. The two that I think I see within that ten year window is a possession of crack charge from 1995 and then five counts of fraudulent check from 2003. I don't see anything else that falls within that window or that involves dishonesty. He has other stuff, but -- but it carries a year or more.

MS. KIMBROUGH: I believe I should be able to ask him about the lewd act on a minor charge that was disposed of in '93, but he had an active, let's see, YOA five years, which will put it in the ten year window. So I believe I should be able to ask him about that lewd act on a minor.

MR. HUBBARD: Your Honor, actually, it was suspended and he got a three area probationary sentence. And I don't know if probation -- how long that actually -- if he ran the whole three years or not, but that was from -- charge from '93.

MS. KIMBROUGH: May of '93.

MR. HUBBARD: We're saying it's too remote.

MS. KIMBROUGH: Your Honor, I believe if there's an active sentence, whether it's a suspended sentence or it's incarceration, it's a ten year window. May 28th of '93 for three years will be May 28th of '96.

THE COURT: That falls within the ten year window.

MS. KIMBROUGH: Thank you, Your Honor.

MR. HUBBARD: That's lewd act?

MS. KIMBROUGH: With a minor, yes.

(The jury returns to the courtroom.)

THE COURT: All right. Solicitor, call your next witness.

MR. HUBBARD: Yes, sir. The State calls Richard Adams to the stand.

RICHARD ADAMS,

having been duly sworn, testified as follows:

THE CLERK: Speak up loud and clear please and state your name on the record.

THE WITNESS: My name is Richard Adams.

DIRECT EXAMINATION

BY MR. HUBBARD:

Q Mr. Adams, where are you from?

A I'm originally from everywhere. My father was in the military, but I grew up in Batesburg for a little while. Then I went to Greenville, South Carolina for the remainder of my years.

Q Right now I see you're in a Lexington County Detention Center jumpsuit?

A Correct.

Q But are you being housed somewhere else?
A I'm being housed in Greenville County Detention Center for a violation of probation which resulted because I was driving under suspension.
Q And we're the ones that brought you down here?
A Correct.
Q So that's where they're keeping you?
A Correct.
Q I want to go ahead and get this out of the way. I want to talk about your prior convictions before we talk about what happened in this case, okay? 1993, you were convicted of a lewd act on a minor, right?
A Correct.
Q 1995, you were convicted of possession of crack cocaine?
A Correct.
Q And in 2003, you were convicted of five counts of fraudulent check?
A Correct.
Q You were convicted of fraudulent check, it's just how many, that's the question?
A Right.
Q All right. Back in January of 2004, were you being housed in the Lexington County Detention

Center?

A Correct.

Q Do you remember what part of the jail you were being housed in?

A We refer to it as the third floor mainly, that's where I was at. They call it the third floor A-Wing, I guess, I want to say it was.

Q I'm going to show you a diagram. And I realize you're in restraints, but if you would, just look at this diagram. Does this look like the general layout of the third floor?

A Yeah, that's pretty much the way it is.

Q A-Wing?

A A-Wing, C-Wing and D-Wing.

Q Okay. You were on A-Wing?

A Correct.

Q Do you remember what cell you were in? And let me just, as a reference point, if Mr. Mercer was in cell ten --

A I was in the cell before him.

Q You were in cell 11?

A Yes.

Q When y'all were in those cells, how did y'all communicate back and forth?

A I guess, you know, it ain't no secret, it's

pretty boring in jail. We try to amuse ourselves in many different ways. We beat on the walls making music. We play cards. We yell and talk crazy to each other all day, all night. Sometimes we do a lot of things just to get on the officers' nerves, just to get on his nerves because it passes our time away.

Q And did you get along with most everybody on A-Wing?

A I got along with everyone. I mean, if I didn't, I mean, I wouldn't have known anyway because I never really bothered anyone.

Q Were you someone that just wanted to be left alone?

A I just worked out most of the time, that's all I did.

Q When you worked out, did you work out in this exercise yard?

A I worked out in two areas, in the exercise yard and in the back of A-Wing.

Q Okay. In the back of the A-Wing?

A Correct.

Q When you worked out, what would you do to work out?

A We do push-ups. We do sit-ups, crunches, dips,

a lot of abdominals, a lot of upper body -- I mean, strenuous workout for about an hour or two hour workout.

Q That's how you would pass your free time when you were out of the cell?

A Correct.

Q Now, would other guys work out with you?

A Yes.

Q And let me ask you, did everybody have their own routine or did -- were you somebody that kind of set a routine?

A Everybody fell under my routine because, you know, mine was more consistent.

Q Are you somebody that's worked out pretty much all of your life?

A Yeah, all the way through -- since I was a kid.

Q Okay. January 14th, 2004, at some point, you're out on the exercise yard?

A Correct.

Q Do you remember the fight that broke out?

A Yes, I do.

Q Before that fight, is this where you were out on the exercise yard?

A Yes, I was.

Q I'm going to ask you to step down, if you don't

mind, and come over to this chart. Be careful stepping down.

A (Witness leaves the witness stand.)

Q If you would, just step on this side over here. Since you don't have a microphone, you need to speak up. And I want these folks to be able to see, so if you can just stand right here. Can you see the chart okay?

A Yes.

Q Can you tell me where about in the exercise yard or the rec yard you were?

A Normally, we start out in the back area right here, but since it was already crowded, I went to start to work out right here so I wouldn't be distracted.

Q Over on this part of the wall?

A Right.

Q Now, do you remember who all was with you?

A Me, Terry, B.G., Black, Unc.

Q Okay. Let me go through those names. Terry is Terry Brown?

A Right.

Q The guy that ended up getting cut?

A Right.

Q B.G., is that also Darrell Williams?

A Right.

Q Unc, is that Nathaniel Culbreath or Nathaniel Padgett?

A I never knew his real name.

Q You just knew him as Unc?

A Right.

Q You guys were out working out?

A Well, we were just -- we was getting ready to get started.

Q So you had not even started?

A Yeah, couldn't get it started.

Q Okay. Do you remember if Kevin Mercer was out there?

A I never noticed Kevin Mercer until the incident started.

Q Okay. And when you first saw him, where was he?

A When I first saw him, he had a towel on his head.

Q He had a what on his head?

A A towel on his head.

Q Towel?

A Uh-huh.

Q Okay.

A I want to say he was coming out from somewhere

in this area right here.

Q In this area?

A Yes. But I never really noticed it.

Q Okay. You weren't paying attention?

A Yeah.

Q All right. Do you remember, at some point, when Marcus Robinson came out there?

A Yeah, just -- he was -- uh-huh.

Q Do you remember anything, and you don't have to go into words or anything like that, do you remember any conversation or confrontation between Marcus Robinson and Darrell Williams?

A (No response.)

Q Do you remember them talking?

A I remember them talking, but I never knew what it was about. It was -- you could hear the tension, but you -- I mean, there's tension always in there, you know, I never really paid attention.

Q Tension?

A Yeah.

Q Now, was this -- I'm going to get you to describe that. Were they talking just like you and I are talking right now or was it more serious?

A It was serious. It was serious, but, you know, these -- I mean, this particular group -- this

particular group, it was -- for an altercation to break out, wasn't a surprise because it went on every night. I mean, everything was a competition, you know. You come out, hey, look, you guys all right. They come out laughing, shaking hands, all right.

Q So violent talk was normal?

A Yeah, it was normal.

Q But fighting wasn't normal for this crowd?

A No.

Q And that's just during your time there?

A Yeah, just during my time. I mean, I was only there for, it was 70, 80 days, if that long. I'm not sure exactly how long.

COURT REPORTER: Can you slow down just a little bit?

MR. HUBBARD: Okay. I'm sorry.

BY MR. HUBBARD:

Q If you'll speak very clearly for the court reporter, she's having to type every word you say.

A I apologize.

Q Let's do this. When you see Marcus Robinson outside and he and Darrell are talking --

A Having words.

Q Are having words, what happens next to the best

of your memory?

A The best of memory, Terry comes out -- I guess, he pulls --

Q Hang on. Who?

A Terry, Terry pulls B.G. to the side, you know. It appears to be, hey, look, you know, y'all need to go ahead and cut this out, you know, this ain't worth it.

Q Let me stop you there. Terry pulls B.J. (sic) aside?

A B.G., yeah, pulls him to the side --

Q B.J. is Darrell Williams?

A B.G., yeah, that's Darrell Williams.

Q B.G. is Darrell Williams?

A Correct.

Q And Terry is breaking them up from talking with --

A Either he's breaking them up or he's -- I know he says something in the nature that refers to, hey, look, you know, we need to cut all of this out or something. And then Darrell -- everything just happened so simultaneous, so quickly, it looked simultaneous to me. It's either Mercer or Brown, whichever one put hands first, it don't matter in my book, there was hands placed on Terry Brown.

Q Mercer or Brown, you mean --

A Mercer struck Brown, also along with -- Robinson also struck Brown, also.

Q Did Brown strike anybody first?

A No, the only person that Brown put his hands on first was B.G.

Q To pull him away?

A Right.

Q Terry Brown and Darrell Williams, or B.G., they weren't fighting?

A Terry Brown and B.G., no. Terry Brown, his sole purpose was to get B.G. out of the mix up.

Q And then you don't know who actually swings first from what you're saying? I don't want to put words in your mouth.

A No, I don't know exactly who hit first, but I know both parties did put their hands on him.

Q But you know it wasn't Terry Brown?

A No. Terry Brown never had a chance to react.

Q And it wasn't Darrell Williams?

A No. Darrell Williams ran inside to get an officer.

Q Marcus Robinson and Kevin Mercer are the ones that do the hitting?

A Correct.

Q Okay. At some point, did you realize somebody had something other than their fists?

A Yeah, I did notice that.

Q Who did you notice?

A Kevin Mercer.

Q Kevin Mercer?

A Uh-huh.

Q What did you notice -- what, if anything, did you notice he --

A Two sharp objects.

Q Two sharp objects?

A Correct.

Q Did he have them both in one hand or --

A One in each hand.

Q One in each hand. Could you tell what they looked like or can you describe them or did you get a good enough look?

A I wasn't able to get a good enough look. And, you know, from me being incarcerated before, I didn't want to get that close of a look at it.

Q What went through your mind as to what they were right then and there?

A The first thing went through my mind it was either razors or pencils or pens, a pencil jammed into a pen.

MS. KIMBROUGH: Objection, calls for speculation.

MR. HUBBARD: He's saying what went through his mind, the reason why he didn't act.

THE COURT: You can ask him what they had in their hands.

BY MR. HUBBARD:

Q Objects like that, do they have a term, a slang term everybody uses?

A We call them P-38's or we call them shanks.

Q Shanks?

A Right.

Q And that's like a homemade knife or a weapon?

A Yeah.

Q All right. Did you see Marcus Robinson with shanks?

A No.

Q Kevin Mercer is the only one you saw with shanks?

A Correct.

Q Did you ever see Terry Brown with shanks?

A No.

Q Did you ever see Darrell Williams with shanks?

A No.

Q Anybody else out there, did you ever see

anybody else with shanks?

A There was nobody with shanks except Kevin Mercer.

Q Prior to Kevin Mercer getting involved, had anybody said anything to -- direct anything to Kevin Mercer to get him to come off the wall?

A No. Like I said, the conversation, the actual conversation, as far as words being said, I never -- I couldn't tell you word for word what the conversation was about. The only conversation I -- the only conversation I knew -- that wasn't even a conversation. It's just those guys, Terry Brown, B.G. and Mercer, they shared a cell together. Those guys are always in a constant competition over a game of cards, which, you know, it sounds like they're going to get, you know, real rowdy or whatever, but come to find out, they're joking the whole time, you know.

Q Had you ever known them to get into a fist fight while they were in their cell?

A No.

Q But being next door -- you say you're in cell nine or 11?

A I'm in the cell before you get to -- if you're coming from this side right here, I'm in that cell,

so that would have to be 11.

Q You can hear them --

A I'm next door to them. I can talk to them. I used to beat on the walls and make music.

Q Could you hear when they were playing cards?

A Uh-huh.

Q Could you hear when they would argue?

A Correct.

Q And was that a normal thing or an unusual thing?

A That was normal. If they were quiet, it was not normal.

Q But did you ever know them to get in a big fight?

A Not physically, no. I mean, verbally, yes, but they were just talking to each other.

Q And the next day, after you had heard that, how would things be?

A I mean, the next day, just they come out -- I would come out laughing, hey, you guys all right, because, you know, I mean, if I wanted to go to sleep, I wasn't going to sleep that night, you know what I mean, each night they were playing, but, you know, they come out, hey, look, we all good, you know. Mercer came out with a great attitude, you

know.

Q So everybody would be fine?

A Yeah, everybody would be fine.

Q The night before this, on January 13th, did you hear them playing cards?

A Yeah.

Q Did you hear another argument?

A Yeah.

Q Was that when -- like the others or was this louder?

A It was a little louder. I was like, hey, you know, y'all need to cut it. That's when, you know, I said the next thing I normally say, y'all supposed to be cutting that out, y'all ain't going to do nothing.

Q Did you expect there was going to be a fight after this?

A I had no idea.

Q Did it surprise you when you were out on the rec yard and a fight actually did break out?

A Yes.

Q When you saw shanks, did that surprise you?

A Yeah, that surprised me. In the detention center, yeah, that surprised me a whole lot. It's not something you see very often.

Q When Terry Brown is being hit by Mercer and by Marcus Robinson, what part of this rec yard did they end up moving towards?

A Terry -- when he realizes he's being hit with shanks, Terry first, you know, balls up into a, you know, it's like, okay, something ain't right here, you know, those are not fists hitting me. So he runs -- B.G. had already beat him to the punch going to tell the officer, hey, look, you know, Terry's being shanked. From that point on --

Q Let me ask you -- let me go through that again. B.G., also Darrell Williams, runs in to talk to the officer -- to tell the officer what's going on?

A Uh-huh.

Q Terry, is he still out there?

A No, Terry -- finally, after he's getting hit with the shank, he's trying to run behind B.G., too.

Q But, at some point, is it Terry, Kevin Mercer and Marcus Robinson?

A Right. And that's when Mike Moulder comes in and gets -- when Mike Moulder comes in between them, that's when Terry comes out the door.

Q And Mike Moulder?

A Yeah, Mike Moulder comes in between to break it up.

Q Is Mike Moulder involved in the fight at all?

A No, he's not. Michael Moulder is a Christian. He was the one that did...

Q Was he out there -- do you remember seeing him out there before --

A Mike Moulder is at this bench right here in front of --

COURT REPORTER: I'm still having trouble understanding him.

BY MR. HUBBARD:

Q Okay. Mike Moulder was in the day room when you last saw him?

A When I last saw him, he was in the day room, but then when I -- when I last saw Mike Moulder the last time -- let me correct this, the last time I saw Mike Moulder, he was breaking up the fight. The first time I saw Mike Moulder, he was in the day room.

Q Okay. So he breaks -- he steps in between Mercer, Robinson and Terry Brown?

A Correct. And Terry makes no -- he makes no hesitation of just going ahead and get off the rec field.

Q So Terry Brown runs back in through the day room?

A Right. And everything gets started back up again.

Q Where do you go and what do you do?

A I come behind Terry, make sure, see if he's okay, you know, because like I said, all three of those guys was cool with me, you know what I mean. I come in there and see if he's all right and everything, you know, all -- everything just got hysterical again.

Q Let me ask you this. Where was Terry Brown when you came in to see him? In the day room or --

A In the day room. Terry was in the day room. Then him and Black was getting ready to go at it again, then him and Mercer -- then Mercer come in again and that's when I snatched Black out of the way and I pulled Mercer out the way and everything got crazy, that's when -- by me pulling Mercer out of the way, Terry took full advantage of it, said okay, you know, now -- now, B.G. starts calling for the guard. And when B.G.'s calling for the guard, you can hear when they come in, they got these little shields got electricity on them and, you know, when they hit it, you can hear it. You know, my instincts, along with everybody else instincts, if you're smart, you go ahead and move on out the

way.

Q The guard, when they -- more than one guard comes in?

A Yeah, and that's when Mercer starts disposing the shanks into the toilet.

Q Okay. You see him in the bathroom area?

A Uh-huh. And then Terry jumps back, he doesn't care, he jumps back on top of Mercer again.

Q Okay. And they're fighting right here in the bathroom area?

A Uh-huh.

Q Guards come in with what you call electric shields?

A Uh-huh.

Q These shields that if they hit an inmate, it zaps you?

A You probably won't feel it because you're going to be unconscious.

Q All right. Everybody starts breaking up at that point?

A Uh-huh.

Q And, at that point, the guards take control?

A Correct. And -- yeah, that's about it, you know, outside of the fact that he tried to push me out of the way because I got a little excited about

the whole situation.

Q You can go ahead and take your seat again.

A (Witness resumes the witness stand.)

Q Let me ask you this, Mr. Brown --

A Adams.

Q Mr. Adams, I'm sorry. When you saw Mr. Mercer hitting Mr. Brown, did he have the objects that you were describing in his hands?

A Correct.

MR. HUBBARD: No further questions right now Mr...

THE WITNESS: Adams.

MR. HUBBARD: Adams. Please answer any questions the defense counsel has for you.

MS. KIMBROUGH: Beg the Court's indulgence briefly.

(Pause.)

CROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Good afternoon. How are you doing?

A All right. How are you doing?

Q Good. So you were in cell 11 during the January time period in which this event occurred? Cell 11 being next to cell ten?

A Yes, that's my assigned cell, correct.

Q And so you would hear arguments going on in cell ten?

A I mean -- I mean, after my first two or three nights there, that was not even considered an argument to me anymore.

Q Did you not testify on direct that you would hear arguments?

A Yes, I did, but I also stated it was a lot of competition.

Q Okay. So competition or not, you heard arguments?

A Okay. I repeat once again, I said there was a lot of -- after my third night, after the first few nights, it was -- it sounded like arguments, but after I got used to it, it was just a bunch of competition, I mean, just a lot of wolfing.

Q So after your first three nights, you kind of tuned it out?

A Yes.

Q It was just kind of part of the environment?

A It wasn't serious. The guys were just playing.

Q Now, you weren't there when these conversations took place, were you? You weren't in the cell?

A (No response.)

Q You were in cell 11, correct?

A Correct.

Q Okay. You certainly, from cell 11, couldn't see any gestures or any expressions of someone's face, their demeanor when these conversations were going on? You didn't have any special way of looking into cell ten, did you?

A No.

Q Okay. It was just your impression that they were just fooling around?

A I wouldn't call it an impression, I would call it statements coming from all three mouths.

Q I'm sorry? I didn't understand.

A I was saying they were not impressions, they were statements that came out of all three inmates' mouths. They were just fooling around the next day.

Q Okay. But my question is you weren't there and you don't know specifically what was said, correct, you just heard arguments?

A I mean, if you want to say argument, that's fine.

Q Well, I think that's what you said on direct.

A I mean, they were competing against -- guys were playing cards. This was an every night thing.

Q But you weren't in the cell and you don't know exactly what the dynamic was between the cell mates,

would that be fair to say?

A Okay. Yeah, that's fair to say.

Q And I think you also said that on the day of this fight, you didn't notice Kevin Mercer until the incident erupted. You had seen him with a towel on his head?

A Yes.

Q And I also believe you testified, you didn't see Terry Brown drop his shower belongings and square off, you did not see that?

A No, that's the first time I've heard about it. I had, you know what I mean, as far as all of the little things with each other, I had no intention of paying attention to everyone's every single move. My main focus was to work out that day. All -- as far as the altercation, the physical conflict that you're talking about, yes, I did witness the whole thing.

Q Okay. But your testimony was it erupted very quickly?

A Yes.

Q And you saw two objects in Mercer's hand, but you could not say what they were?

A Correct.

Q And you do not recall seeing a shank on any

other person, but you certainly can't say for certain, can you, whether someone had a shank?

A I can say for certain no one had a shank except Mercer.

Q You were paying close enough attention to each and every individual out there on the rec yard that you could know for certain whether or not they had a weapon is that your testimony?

A Ma'am, I don't know if you've been incarcerated before, but if anyone had a shank and that shank is being used on another man, including yourself would have pulled that shank out and used it yourself. There was no shanks on that yard except besides what Mercer had.

Q Would you agree with me that if there were, you simply didn't see it?

A No, I would not. I mean, if there was another shank, it would have been used.

Q So you know every weapon that was possibly out on that rec yard, is that what you're saying?

A Ma'am, what I'm trying to tell you is if a guy -- if there's a guy, he sticks a knife in your back and you got a knife in your pocket, what are you going to do? You're going to pull it out and stab him, right, out of self-defense. I've been around

these guys long enough to know, I've been locked up long enough to know that if there's another shank out there, there would be another shank on that rec yard. I seen no one with shanks --

Q But the fact that no shank was found --

A -- and we came -- our purpose was to come out there and work out. Those guys were coming to work out with me.

Q That's fine. I'm not questioning your purpose. My question is do you believe that you were capable of knowing whether or not a shank could have been possessed by another person?

A When it comes to an altercation, yes. When it comes to without an altercation, if we're just standing there talking about, hey, we're just shooting a -- no, I couldn't tell you if they had a shank, but if there's an altercation about to erupt, and this man has a shank in his pocket and this man here, a guy also has a shank, this guy --

Q So your answer is, yes, if there was another shank, you, somehow in the middle of all of this, would have seen it?

A Correct.

Q Fair enough. But you didn't see the squaring off between Terry Brown and Marcus Robinson, you

didn't see that?

A Ma'am, I repeat to you the same thing I said to the prosecutor just now.

Q It's a yes or no question, sir.

MR. HUBBARD: Your Honor, he is trying to answer it.

THE COURT: The question is, did you see the squaring off between --

THE WITNESS: What exactly do you call squaring off, ma'am?

BY MS. KIMBROUGH:

Q What Mr. Brown called it, dropping his belongings -- excuse me -- Mr. Robinson, dropping his belongings and preparing for a physical confrontation?

A Okay. Once again, I think I answered that question earlier. I did not pay attention to seeing Terry come out there with the towel, shower stuff or whatever. The only thing I saw happen immediately was the fact that there was a physical contact, that's the only thing I saw.

Q Fair enough. Now, I believe you said that, at some point, you entered the bathroom and personally observed Mr. Mercer flushing shanks down a toilet?

A I didn't say I entered the bathroom, I said I

seen him.

Q I'm sorry. I must have misunderstood your response.

A I didn't say I entered the bathroom. I mean, you really can't enter the bathroom, it's just an area, bathroom area. I'm standing -- from what I told the guy earlier, if you'd pull up the chart again.

Q All right. Maybe this will help you. Okay, let's locate the restroom.

A Come down a little more.

Q Right there (indicating)?

A No, that's not the bathroom area. It's right there.

Q Okay. So Mercer runs in, Brown and Mercer are in there together?

A Uh-huh.

Q And where were you?

A I'm sitting, go back up, up, up, up, about right in that area, no, come over, about right in that area right there.

Q Okay. Sort of at the corner of the bench?

A Uh-huh, correct.

Q And Brown and Mercer are fighting?

A Uh-huh.

Q In the bathroom?

A Brown was on top of Mercer.

Q Brown was on top of Mercer?

A Uh-huh. And when the officers come in with the thing, you can hear it when they make a noise with it, all motion stops, but, you know, when Terry comes to realize, he really doesn't care anymore. Mercer throws the objects away, Terry doesn't care anymore. He goes back to Mercer again.

Q Okay. So the officers are in there?

A They physically pulled Terry Brown off of Mercer, yes.

Q And so when the officers are in there, you're saying that's when Mr. Mercer flushed the shanks, is that your testimony?

A All right. You see the control room area right there (indicating), you can hear the officers when they come in before you can see them. It's a blind side right there. You can hear them before they even come in. They do the thing, the electrical shield. They do that to make other inmates move out of their way to get their attention, move or you will be stunned. Everyone can hear it. Terry gets up off of Mercer. In between that time, I personally witnessed Mercer throw the shanks into

the toilet and flush them. Terry no longer cares anymore. He jumps back on to Mercer again. And the officers, from that point on, come around the corner and grab Terry Brown physically off of Mercer themselves.

Q Did you offer a statement when the investigation started in this matter?

A Ma'am, that's two years ago, I can't even remember that far. Did I offer a statement? No, I don't remember.

Q Do you remember providing a written statement to law enforcement?

A I do remember telling them what happened.

Q Would it surprise you to learn that you never mentioned at that time observing --

MR. HUBBARD: Your Honor, I object unless she's got something to show that. If she's got a statement or something that -- or if she puts a witness up to say what his statement was, but otherwise I think I'm going to have to object.

MS. KIMBROUGH: Okay. I'll rephrase the question.

BY MS. KIMBROUGH:

Q Did you provide a statement to law enforcement?

A Did I provide a statement? Yes. When they

came to speak -- when they came and spoke to me, yes, I spoke to them.

Q Did you provide a written statement?

A I don't know, ma'am, that's been -- I didn't even think I was coming to court for this, ma'am. I had no idea about this. The only thing I remember is the altercation.

MS. KIMBROUGH: Briefly, Your Honor, beg the Court's indulgence.

THE WITNESS: I only watched out for one guy in there, that's it. That's how I became involved.

BY MS. KIMBROUGH:

Q Do you recall when the first time is that you informed either the Solicitor's office or law enforcement that you personally observed shanks being flushed by my client down the toilet? Can you recall when the first time is that you said that?

A I've said that many times.

Q Do you recall saying it to law enforcement?

A I'm sure I said it, yeah. I'm positive I said it.

Q So if somebody didn't note that, it's not because you didn't say it?

A Okay. I repeat once again, I'm positive that I've said it.

MS. KIMBROUGH: Beg the Court's indulgence.

(Pause.)

Q Just one last question. I want to make sure I understand your testimony correctly, correct me if I'm wrong. You're here in the bench. In this little cubby area, there's a toilet and a sink presumably. Brown and Mercer are fighting. And you're saying -- your testimony is that Mr. Brown disengaged briefly giving Mr. Mercer time to flush the shanks, that he just stops so Mr. Mercer can have the opportunity to flush weapons that were being used to assault him?

A Ma'am, I repeat to you once again. When you --

Q It's a yes or no question, sir.

A When you're in there, you hear -- when inmates here the static on the shields, their first instinct is to move out of the way, your first instinct, because you don't want to get hit by it. Terry came to the point, after he thought about it, he didn't care no more. Yes, he got off Mercer briefly because he heard the --

Q So you're capable of reading Terry Brown's mind? I mean, is that what you're saying? After he thought about it, he decided that he would just back off and allow Mercer to flush these shanks when he

had been violently assaulted. I mean, is that your testimony?

A Ma'am, my testimony is not that I read his mind. My testimony is the reason why he reacted the way he did.

Q You can't say that for certain, can you?

A Can't say what for certain?

Q Why Terry Brown did what he did. Do you have personal knowledge of that?

A He did -- the reason why he got up off the man --

Q I withdraw the question. Just to verify, I believe your prior record includes a 1993 lewd act on a minor?

A Correct.

Q There were some fraudulent checks?

A Correct.

MS. KIMBROUGH: Your Honor, may we approach?

(Whereupon, a bench conference was held off the record, in the presence of the jury, but out of the hearing of the jury.)

MS. KIMBROUGH: No further questions.

MR. HUBBARD: No questions from the State, Your Honor.

THE COURT: Thank you, sir.

MR. HUBBARD: Your Honor, we ask that this gentleman be excused.

MS. KIMBROUGH: No objection.

MR. GRAHAM: Michael Moulder.

MICHAEL MOULDER,

having been duly sworn, testified as follows:

THE CLERK: State your full name for the record.

THE WITNESS: Michael Moulder.

DIRECT EXAMINATION

BY MR. GRAHAM:

Q Mr. Moulder, where are you from originally?

A Originally from Buffalo, New York.

Q Right now, you're in the department of corrections?

A Correct.

Q And that's because you were convicted of a burglary in the first degree?

A Correct.

Q Back in January 14th, 2004, were you at the Lexington County Detention Center?

A Yes.

Q If I asked you what a run around is, could you tell the jury what that is?

A Basically, I'm allowed out during any time that

people are out and I do the clean up, clean the showers, sweep. Anything that the officers need done, they ask me to do it within reason that they're allowed, I do it.

Q You were on the third floor as well?

A Yes.

Q What wing were you on?

A I was on C-Wing.

Q Have you had a chance to look at this before?

A Yes.

Q So if I said C-Wing was over here (indicating), would that be correct?

A Correct. I was in room nine.

Q Right there. As part of your job as a run around, did you come in contact with people from other wings?

A Yes, all the time.

Q So you would have had contact with people from A-Wing?

A Yes.

Q Did you really know any of them?

A When you say know, I mean, I knew who everybody was.

Q Did you have any relationships really with anybody?

A No.

Q January 14th, 2004, A-Wing had rec time that afternoon. Where were you when they were having their rec time?

A I was out on the rec yard preparing for the Bible study.

MR. GRAHAM: Your Honor, with your permission, I'd ask Mr. Moulder to step down.

THE COURT: Okay.

(Witness leaves the witness stand.)

BY MR. GRAHAM:

Q Where on the rec yard were you?

A I was right behind the door right around here (indicating). The door wasn't open, so -- I mean, it's right around here.

Q And who else do you remember -- do you remember who else was with you at the time out there?

A I was basically by myself.

Q And what were you doing?

A I was preparing -- I do the Bible study for the A-Wing, so I was just preparing for when they came out, reading the Bible.

Q So you were reading and making notes?

A Just reading.

Q Just reading. What was the first thing that

caught your attention that day?

A Really, the only thing I saw was when I saw two people back in this back corner here (indicating). I saw -- there were three people, but I saw two people with their back to me hitting somebody and that's when I stood up.

Q Were you able to recognize who those two people were?

A Not at first, no. I just saw some backs and I saw two on one.

Q And did you eventually realize who those two people were?

A Yes.

Q And who were they?

A One that we call Black, I'm not even sure, and then Mr. Mercer.

Q That's Mr. Mercer over there?

A Yes.

Q After you saw two people on one, did you even know who the one was at that time?

A No, I did not.

Q Later on did you figure out who the --

A Yeah, later on I was told, but I did not know at that time, no.

Q And who was the person --

MS. KIMBROUGH: Objection. What he was told by somebody else would be hearsay.

THE WITNESS: I saw him later on. I did see him later on.

MS. KIMBROUGH: Withdraw the objection.

BY MR. GRAHAM:

Q You saw that one person who you knew later on was Terry Brown?

A Yes.

Q After you saw the two people, one of them being Mr. Mercer and the other one being Black, on who you later found out to be Terry Brown, what did you do?

A I saw actually Black taking a swing, so I grabbed and threw him off and said that I'm not going to allow two on one. And that's when Kevin, I just basically pushed him away.

Q When you took -- the one person was back here and the two people that are with their backs to you and you were here, you see the two people up, which is the person closest to the --

A To the wall, it was Black.

Q And the person farthest away, that way, is?

A Would have been Kevin Mercer.

Q You say you went off the wall and you did what?

A I grabbed Black and basically threw him against

the wall to stop him from hitting.

Q From hitting Terry Brown?

A Right, from swinging.

Q After you threw Black up against the wall, what was the next thing you remember happening?

A Just I then turned and saw Mercer and he had a couple of things in his hand and I just pushed him and said the same thing that I'm not going to allow two on one.

Q You said when you turned around, you saw Kevin Mercer with two things in his hand, what did you see in his hands?

A He had a shank and then a pen with a razor hooked on to the top of it.

Q Were you able to tell the colors of them?

A It was a black pen and a white toothbrush.

Q And you say a shank, what is a shank?

A Basically, it's a toothbrush that's sharpened down to a sharp point.

Q After you saw those two objects in Kevin Mercer's hands, what did you do?

A I just pushed him back and then Terry ran behind me. And then everybody went into the building and I followed them in.

Q When you say you pushed Mr. Mercer back, which

way did you push Mr. Mercer?

A Towards this wall here (indicating).

Q Toward that wall, that way?

A Yeah.

Q As you were pushing Mr. Mercer, what did Mr. Brown do?

A Ran in.

Q So he would have ran in behind you?

A Correct.

Q After Mr. Brown ran in, what happened next? What did Mr. Mercer do next?

A He just went in also. He followed in the building and then I came in later.

Q When you came in later, what did you see?

A I saw --

Q Where were you at?

A I came through the door here and I started coming this way. And by this time, Kevin was over here. I didn't see Terry anymore. And then another fight broke out over here, so I tried to go over there and tried to break it up. And then I finally gave up because everything just went crazy. So I came back and just stood on the wall and waited for people to come.

Q Did you ever see anybody else other than Kevin

Mercer with shanks in their hands?

A No.

Q When was the last time that you saw Kevin Mercer that day? I mean, as far as -- you said you placed him over here up against this wall?

A Correct, by where the microwave would have been.

Q And then you said a fight broke out over here?

A Correct.

Q Did you ever see Kevin Mercer again?

A No.

MR. GRAHAM: Please answer any questions that Ms. Kimbrough has. You can have a seat.

(Witness resumes the witness stand.)

CROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Good afternoon, Mr. Moulder. I just have a couple of questions?

A Okay.

Q The cell block that you were residing on at the time, that wasn't anywhere close to Mr. Mercer's cell block?

A No.

Q So any conversations or difficulties that may have occurred in cell number ten, you would not have

any knowledge of?

A Correct.

Q And it sounds like you were clearly involved in a book, in studying at the time that the incident occurred?

A Correct.

Q And it also stands to reason that you didn't observe what happened just prior to the fight?

A Correct.

Q And you're not aware of any prior difficulties or the -- anything like that between the parties?

A No.

Q You were simply there on the scene?

A I was in the wrong place at the right time.

Q All right. So -- did you hear -- maybe I missed it in your testimony. Did you hear any words exchanged between Mr. Mercer and Mr. Brown during the fight?

A No, I did not.

Q Okay. Do you think you were close enough that you might have heard?

A To be honest, I don't remember. I mean, I was from here to probably where you are away from them when it broke out and I just saw the action, so then I jumped up.

Q Okay. And it sounds like, at some point, you tried to break -- help decompress the situation and you were standing between Mr. Mercer and Terry Brown; is that fair to say?

A Yes.

Q Okay. And at that moment when they were -- when you were sort of sandwiched in between them, did you -- you don't recall hearing any words being spoken?

A I do not, no.

Q You didn't hear anything?

A No.

MS. KIMBROUGH: All right. Fair enough. I think that's all I have. Thank you, Mr. Moulder.

MR. GRAHAM: Your Honor, I'd ask that the witness be excused.

THE COURT: Thank you.

MR. GRAHAM: Russell Jackson.

RUSSELL JACKSON,

having been duly sworn, testified as follows:

THE CLERK: Have a seat up there please, sir. Please speak up loud and clear and state your full name.

THE WITNESS: My name is Officer Russell Jackson.

DIRECT EXAMINATION

BY MR. GRAHAM:

Q Officer Jackson, where do you work?

A I'm currently working at the Lexington County Detention Center.

Q And how long have you worked at the Lexington County Detention Center?

A Four years.

Q And how long have you been a correctional officer?

A Seven.

Q Where were you working January 14th of 2004?

A I was working at the Lexington County Detention Center.

Q At some point -- what was your regular job that day?

A I was a booking officer and I was going to relieve one of the housing officers for a short break.

Q So at some point in the early afternoon on that day, did you find yourself up on the third floor?

A That's correct.

Q Have you had an opportunity to look at this diagram?

A Yes, I have.

Q Does that fairly and accurately depict the layout of the third floor wings in the control room, day room and rec yard?

A Yes, it is.

Q I'd ask that you step down.

A (Witness leaves the witness stand.)

Q Can you describe to the jury, using this chart, what you were doing and where you were at the first time you knew that something was wrong?

A Yes. I was entering the third floor and I was going into the tower to relieve Officer Eisenhower. And, at that time, I was typing in some entries to, you know, to make sure that I was on the floor -- I was putting in some entries to let everybody know where I was positioned at, you know, logging in, I was logging in.

Q When you say control tower, is that right here?

A Yes, sir.

Q And is that glass all the way around there so you can see out -- if the wing doors are open, you can see down into the wings and also into the day room?

A Yes, sir.

Q How about the rec yard? Can you see out there?

A You can see the door, but you can't see outside

there, you can just see the door.

Q How long had you been there before something caught your attention?

A I'd say, approximately, five minutes.

Q And what was it that you first noticed?

A Well, as I was making my entries, you know, the inmates, they were out on recreation, watching T.V., playing cards and I was typing my entry in the computer and someone came running in, he was later identified as Darrell Williams, came running in to the -- around the side of the bathroom. There's a little open area there where you could, you know, talk to the officer from an open space there.

Q What was Mr. Williams' mannerisms at that time?

A He was kind of agitated. He was agitated.

Q Did he walk up or was he running or how did he approach --

A I would say he was walking very fast.

Q Did he say some words to you?

A Yes, he did.

Q Did he say those words in a normal tone of voice?

A No.

Q How did he say them?

A He was agitated. He ran to the little port

hole and said, Jackson, they're out on the rec yard fighting.

Q After he said that, what did you do next?

A I stopped what I was doing and I got up and I proceeded to go and investigate what was going on.

Q Using the diagram, can you show the -- where you went? You were in the control room, how do you get over there?

A Okay. Well, I turned around and I was going out of this door right here (indicating) to gain entry to the rec area.

Q That goes back to the --

A That goes behind the tower and it leads to the door right here (indicating) where I can come out on to the wing.

Q Once you came out on to the wing, what did you see?

A I noticed -- when I got up and I was walking down to the rec -- to the day room area, I noticed a crowd, a whole bunch of inmates, standing in front of the door which gave me an indication that there was something going on.

Q When you say a door, what door are you talking about?

A The rec yard door.

Q This door up here?

A Yes, sir.

Q So now you're coming out here and you can see inmates standing --

A Standing around.

Q What's the next thing that you remember happening?

A When I came out, I was approaching the rec door, at that time, they had separated, meaning that I was -- I was about to go out there and then someone ran in.

Q Do you know who that person was?

A He was later identified as Terry Brown.

Q After Terry Brown came running in by you, how was he acting? What was he doing?

A He was very agitated as well.

Q Which way did he run?

A He ran past me around the bench and was running towards the bathroom.

Q What -- after he ran by, what did you do?

A I observed him running towards the bathroom. And, at that time, I saw Mr. Kevin Mercer running after him.

Q Okay. What, if anything, did you notice about Kevin Mercer? What was he doing?

A He ran in from the rec yard area and he was kind of hunched down a little bit.

Q Okay. What, if anything, did you see in his hands?

A I saw what appeared to be a white object in his right hand. His hand was clutched -- his hand was clinched like this (indicating). And he ran over this bench right here. He ran over the top of the bench and ran after Terry Brown.

Q So you saw something in his hand, but you don't know what it was?

A I don't know what it was.

Q After he ran over this way -- so you -- you saw Mr. Brown run this way, then you saw Mr. Mercer run this way, what happened next?

A Then both of them ended up in the bathroom area, which is right down here. They ran across the day room in towards the bathroom area. And from there, they got into a physical altercation.

Q And where were you at at this time?

A I was standing right here and I was watching them as they ran into the bathroom. So I was positioned right around this area right here (indicating).

Q Did you ever move this way?

A I started to and then I stopped right around this area.

Q Could you tell what was going on in the bathroom?

A No. I couldn't -- at first, I saw a whole lot of movement and bumping and arms going up and swinging and so, you know, they were fighting. And I called -- at that time, I called for assistance. And then I told them to stop and they continued.

Q After you called for back up, you told them to stop, they continued to fight, what happened next?

A At that time, I positioned myself right here, because all of the rest of the inmates were getting very agitated and then several fights broke out after that.

Q And so several fights had broke out in parts of the day room up here?

A Uh-huh.

Q And then how long, approximately, was it before your backup came?

A It was a few minutes.

Q How many officers do you remember responding to back you up?

A I remember it was three officers.

Q And do you remember whether a shield was

brought up, an electric shield?

A No, I don't recall.

Q After the other officers came up, what, if anything, happened as far as --

A Well, by the time they came up, everything was -- the fight was broke up. And I remember cuffing Terry Brown and escorting him out into the short hallway where the elevator was.

Q And what, if anything, did you notice about Terry Brown?

A I noticed that he was bleeding from his face and he had blood on his shirt.

Q Where is the last place in the room you remember seeing Kevin Mercer?

A In the day room area.

Q And what was he doing?

A He was sitting on the -- he was sitting on the bench over here (indicating) adjacent from the bathroom.

Q And how was he acting?

A He was acting, I would say, in a calm manner, blending in with the rest of the inmates.

Q And do you know if a search was ever conducted, a shake down of the day room, rec yard and the A-Wing?

A Yes, it was.

Q And were any shanks ever found?

A No, sir, not to my knowledge.

Q Are the toilets that are -- the toilet in that bathroom area out in the day room, is that a normal toilet like you have in your house?

A It has a sink and just a regular commode. No, it's not like one in your house, no.

Q What's it made out of?

A Metal.

Q And is the flush the same that you have at your house?

A Its suction is more powerful.

Q And is there a reason that it's more powerful?

A Yeah. A lot of inmates try to put stuff in there to block it up.

Q So it's got enough suction to stop it from being able to be blocked up with anything?

A Yes.

Q You can have a seat.

A (Witness resumes the witness stand.)

MR. GRAHAM: Please answer any questions that Ms. Kimbrough has.

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CROSS-EXAMINATION

BY MS. KIMBROUGH:

Q Good afternoon, Officer. How are you?

A I'm all right.

Q Good. So you've been a correction officer for seven years?

A Yes, ma'am, that's correct.

Q And, at this particular time, you were with the Lexington County Detention Center?

A Yes, ma'am.

Q And you were the booking officer?

A Yes, ma'am.

Q Okay. And you didn't have any observations about what was going on between the inmates prior to the fight erupting would that be fair to say?

A No, ma'am.

Q I take it that your presence on this particular wing was it infrequent or were you there often? My sense is you were filling in for somebody?

A Yes. I was giving -- I was relieving an officer for a short break.

Q So booking officers are at the booking desk?

A Yes.

Q All right. So based on your own personal knowledge, you have no idea or would not have any

idea as to whether or not there would have been conflicts between Terry Brown and Kevin Mercer?

A No knowledge.

Q Now, after the fight broke out, I believe you said Darrell Williams came and reported that a fight had occurred?

A That's correct.

Q And he was agitated?

A Yes.

Q And Mr. Brown was agitated?

A That's correct.

Q Okay. And you observed Mr. Mercer and Mr. Brown involved in a, basically, a fist fight?

A That's correct.

Q Okay. And you saw something white in Mr. Mercer's hand, but you don't know what -- necessarily, what that was?

A No, ma'am, I don't.

Q Okay. And so Mercer and Brown were in the bathroom together fighting?

A That's correct.

Q Okay. And officers came, you don't recall if a shield was used by those officers?

A Not to my -- there might have been one brought up there, but I don't recall seeing one. Not to my

knowledge, no.

Q Okay. And I believe Mr. -- the Solicitor had asked you about the flushing capacity of the toilet on the -- in the detention center. Is it one of the ones that -- would you describe it as one of the ones that has sort of like a really loud noise when it pulls whatever's in it down?

A Yes, ma'am.

Q I think I've heard people describe it as almost like a sonic boom?

A Yeah, some of them sound like that, yes.

Q Okay. Do you recall hearing that toilet?

A No. There was so much commotion going on, I -- it was -- I can't recall whether I heard it or not.

Q Okay. When the fight moved from here to here (indicating), and, originally, you were here until somebody came and said, Hey, there's chaos, come help?

A That's correct.

Q And when the fight moved from here to here, where were you located?

A I was in this vicinity right here. And it's glass right here, so I could kind of see through the glass around to towards the toilet.

Q Okay. So sort of at that trajectory, you saw

these two figures going at it?

A Uh-huh.

Q Did you ever notice -- during that time, was there ever a break in the fighting until the backup came or was that constant fighting?

A It was constant. It was pretty constant.

Q Okay. So no breaks in the action?

A Not that I can recall.

MS. KIMBROUGH: Okay. Thank you.

Beg the Court's indulgence.

(Pause.)

MS. KIMBROUGH: No further questions. Thank you.

MR. GRAHAM: Nothing further from the State, Your Honor.

THE COURT: Okay. Thank you, Officer.

MR. GRAHAM: I'd ask that he be excused as well.

MS. KIMBROUGH: Without objection.

MR. HUBBARD: Your Honor, the State rests at this time.

MS. KIMBROUGH: Your Honor, I believe we have some matters of law to take up.

THE COURT: Okay. I'll let y'all take a short recess and I'll go over the issues of law with them

and bring you back in, okay? Y'all just take a short break.

(The jury retires to the jury room.)

MS. KIMBROUGH: Thank you, Your Honor. May it please the Court.

At this time, Your Honor, we would make a directed verdict motion as to all charges. I would specifically like to start with the lynching second.

I don't think there's been any testimony here today, any, that there was an agreement between Mr. Mercer and Mr. Robinson. There hasn't even been any testimony from, well, for lack of a better word, ear witnesses that would establish some sort of plan to work together as confederates to attack Mr. Brown.

I believe Mr. Robinson's testimony was that Mr. Mercer told him, hey, they're going to jump you, and that without any planning, without any conniving on the part of the two of them together, Mr. Robinson, being very upset with this, ran out and confronted whoever you believe it was, either Mr. Brown or Mr. Williams, but he confronted someone.

The bottom line is there's been absolutely no evidence whatsoever that these two folks got

together and planned an attack on Terry Brown. All the evidence establishes, that it was kind of a spontaneous eruption.

Certainly, Mr. Mercer informed Mr. Robinson of what had been said and so there is that, but that's not enough to show some sort of plan to assault, you know, with concerted action to assault Terry Brown. So in that regard, I think the evidence is pretty clear that the State can't meet its burden and, in fact, has produced insufficient evidence as to lynching second.

THE COURT: All right. What about the other two?

MS. KIMBROUGH: The assault and battery with intent to kill, I don't think there's been any testimony that the victim, the purported victim, Terry Brown, suffered anything other than, basically, minor scrapes and cuts. There's been no testimony that these wounds could have led to his death, could have come close to leading to his death.

My understanding of assault and battery with intent to kill is that it's sort of the South Carolina equivalent of attempted murder. In other words, if the person died, then it would have been

murder rather than an intent to kill. And, here, there's been absolutely no testimony that the injuries incurred were anything but superficial, they were lacerations, they were cuts. And, you know, I would simply point out that, at most, it was an ABHAN. I mean, that would certainly be our position based on the evidence that's been presented by the State here today.

Now, as for the possession of a weapon, I think it's pretty clear that while there's no direct evidence, we would have to concede that if the witnesses who have been brought up here are believed, then, obviously, we would not be entitled to a directed verdict motion as to that charge.

MR. HUBBARD: Yes, sir, Your Honor. As to the lynching second, obviously, it's evidence has to be viewed in the light most favorable to the State. The evidence presented by the State on lynching was, Marcus Robinson said immediately prior to going into that rec area, he was confronted by Kevin Mercer. Kevin Mercer tells him this story about these guys are going to jump him. And that's how he labeled Terry Brown and Darrell Williams as guys that were going to inflict harm on Marcus Robinson. He tells Marcus Robinson, When you confront them, I've got

your back.

What we would argue, Your Honor, is that, at that point, Marcus Robinson knows that if he does, in fact, get in a confrontation or a fight, Mercer's involved with him, he's on his side. He knew when that fight broke out, if a fight broke out, he had Kevin Mercer there to protect him.

And what happened was, as Your Honor heard from the testimony, before anyone else threw the first punch, Mr. Mercer jumps in. Well, Mr. Robinson follows through on his part of the agreement and it's not a planned agreement where they sit down and say you take this role and I take this role. There's nothing in the law that requires that. There just has to be some form of communication saying if you do this, I'm doing this. That's pretty much what we have right here, Your Honor.

Your Honor, this isn't an incident where Marcus Robinson went and tried to get in a fight and Kevin Mercer just jumps in. You have this meeting beforehand. And this is what the State put up with Marcus Robinson, the codefendant, saying, He said he was going to cover my back when I went out there. So that's what we have on that, Your Honor.

Your Honor, I think there's also evidence of

premeditation on the part of Kevin Mercer, even more so on him. One, he gets Mr. Robinson involved, but, two, he's prepared, he's got shanks, not just one, but two in his hands out in the rec area. He's got them with a towel over his head so no one can see them, he's waiting. He's waiting for Mr. Robinson to confront Darrell Williams and then Terry Brown. And that's exactly what happens just like they talked about. And when that confrontation took place, Mr. Mercer jumped in. That's all we need. We don't need an agreement from the night before, long discussions, it can be very quick.

As to the assault and battery with intent to kill, Your Honor, obviously, you can infer malice, which is a requirement of assault and battery with intent to kill, by the use of a deadly weapon. We've got testimony there's not one but two.

Your Honor, the nature of the infliction of the wounds, that's irrelevant. A man can be charged with assault and battery with intent to kill for shooting somebody in the foot even if that person doesn't die or isn't going to die. It's the intent in bringing a deadly weapon to the act and trying to complete that act. Deadly weapon plus intent that's what you've got, plus Mr. Mercer, according to Terry

Brown, expressed his intent to kill Mr. Brown.

So, Your Honor, viewing this case in the light most favorable to the State, all we have to do is present some evidence, any evidence and that's what we've done.

MS. KIMBROUGH: May I respond briefly, Your Honor?

THE COURT: Okay.

MS. KIMBROUGH: Thank you. Lynching is more than multiple people involved in a fight. And there's been absolutely no evidence presented by any witness that Mr. Mercer and Mr. Robinson had some sort of plan to act together. And I don't think it's a fair construction under the lynching statute to say, well, he spoke to him before the fight broke out, ergo it's a mob, ergo it's lynching second.

And, in fact, I would cite, and I apologize, but I do not have this case to distribute, but I would cite State versus Smith. It's a 2002 Court of Appeals opinion at 352 S.C. 133. Multiple people were together when a fight broke out and that was not sufficient enough to establish a mob.

And so, Your Honor, I believe this case is analogous to that. There's simply no evidence that these two folks got together and planned for the

fight to erupt.

And I would agree with Mr. Hubbard that you don't have to have some long, drawn out plan with lots of meetings and have to be sort of like a conspiracy, but there has to be some evidence that these two folks intended to do one thing to one or more people and there's just no evidence of that.

The ABIK, the possession, the weapons possession, you know, perhaps we lose on that, but the lynching second, there's just -- there's absolutely no showing of the mob element.

MR. HUBBARD: Your Honor, one quick response. State v. Smith does involve multiple people fighting one person. What is missing in that case is what we have here in this case. There was no prior talk, no discussion, no meeting of people prior to the assault. We do have that meeting here, short and brief, that's true, right outside the door, the additional premeditation and the shanks in Mr. Mercer's hands. He employed Mr. Robinson to go out there and confront these people, said he was going to cover him and that he's ready with shanks. And, Your Honor, I think State v. Smith just doesn't apply.

THE COURT: I'm familiar with the case law.

And the statutory definition of a mob is defined, for the purpose of this article, as the assemblage of two or more persons without color or authority of law for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another.

The evidence falls far short of establishing a mob. This was a fight out in the jail. And I'm going to deny the motion on assault and battery with intent to kill and carrying a weapon. I'll grant it on the lynching.

Thank you. I'll see y'all back here in just a few minutes. Are you going to present anything?

MS. KIMBROUGH: Yes, Your Honor. Given the potential witness list from the State, I had not realized I would need my witness this afternoon. However, our witness is at the Lexington County Detention Center, it's the keeper of records. We need to introduce one document unless the State is willing to stipulate that it's a record kept in the normal course of business. It did come through discovery. If they're not, then I'm going to need to get this person over here. They're under subpoena.

THE COURT: What kind of record is it?

MS. KIMBROUGH: Your Honor, it is a report filed by my client. I believe it was subpoenaed by the State in his file, his detention center file. And it reports on January 11th that he was having trouble with his roommate, that he wanted to be transferred as soon as possible, that he had been threatened and that if he had to, he would act in self-defense, but he needed to be moved immediately. So it's a report.

THE COURT: You just can't introduce that. You can let him testify -- he has to testify about it. You can't get his testimony in through that document.

MS. KIMBROUGH: Well, Your Honor, I believe it's a record that's -- it's a business record.

THE COURT: Every record is not admissible because it's some kind of record. If it's hearsay within hearsay, both of them have to meet the exceptions of the hearsay rule before they can be admitted, that's the last hearsay exception rule.

If it's hearsay within hearsay, they both have to meet exceptions to the hearsay rule before they can come in. You can't get his testimony in through a statement he previously made without him taking the witness stand and then being cross-examined.

So what else have you got?

MS. KIMBROUGH: I need to confer with my client about whether or not to put up one of --

THE COURT: Has he got impeachment --

MS. KIMBROUGH: He has a burglary second nonviolent and a common law robbery within the ten years. If the State has more, I definitely would like to hear that before I advise my client.

THE COURT: Well, if they've got more, I hope you've heard about it before today.

MS. KIMBROUGH: Well, I hope so, too.

MR. GRAHAM: He has a burglary second degree A section, strong armed robbery, possession with intent to distribute marijuana and unlawful carrying of a pistol.

THE COURT: All right. You got those?

MS. KIMBROUGH: Yes, Your Honor.

THE COURT: You've discussed with him about whether he's going to testify or not before today, right?

MS. KIMBROUGH: I have, but I would like to have another follow-up discussion to make sure that we're very clear he hasn't changed his mind in response to the testimony. And I think he would benefit from discussing it one last time. Then we

can put it on the record.

THE COURT: All right. Mr. Mercer, it's often said that the most important decision that you have to make during the trial is whether or not to take the witness stand and testify under oath in the presence of this jury. And you have a constitutional right, you can testify in front of the jury or you don't have to testify. You have a constitutional right to remain silent. If you exercise your constitutional right to remain silent, I will tell the jury they couldn't hold that against you in any way or even consider that in the jury room.

The burden of proof is always on the State to prove you guilty beyond a reasonable doubt. You do not have to prove yourself innocent. And as I said, they cannot consider that against you in any way. And I would instruct them in that regard.

If -- just like these other witnesses, the only reason any evidence of prior convictions comes in, as to how it would bear on your credibility or believability. And I'm going to tell the jury that about the witnesses. And then, specifically, as to you, they couldn't use any prior convictions that you may have for any other reason other than it

would -- as it would bear on your credibility and believability in this case. It should not bear. And I will instruct the jury specifically, they cannot let it bear on your guilt or innocence in this case.

Now, you have to make that decision yourself as to whether to take this witness stand and testify or to exercise your constitutional right to remain silent with the burden being always on the State to prove you guilty beyond a reasonable doubt.

Do you understand your constitutional right to either testify or not to testify?

DEFENDANT MERCER: Yes, Your Honor.

THE COURT: Do you understand how important it is that you make this decision yourself after conferring with your lawyer?

DEFENDANT MERCER: Yes, Your Honor.

THE COURT: You've talked to her about that before today and you're going to talk to her a little bit more now; is that correct?

DEFENDANT MERCER: Yes, Your Honor.

THE COURT: And then you'll inform me as to what your decision is after we come back in.

DEFENDANT MERCER: Yes, sir, Your Honor.

THE COURT: All right. We'll take about a ten

or 15 minute recess.

Ms. Kimbrough, I'm not saying that that might not be admissible subsequent after he's cross-examined about it or something to -- but you just can't put it in on direct -- I mean, just nakedly throw it in.

MS. KIMBROUGH: Okay. Thank you.

(Brief Recess.)

THE COURT: Okay.

MS. KIMBROUGH: Thank you, Your Honor. After speaking with Mr. Mercer, and if you want to ask him for the record --

THE COURT: All right. Mr. Mercer, have you had time to decide whether or not you're going to take the witness stand?

DEFENDANT MERCER: Yes, sir, Your Honor.

THE COURT: And what's your decision?

DEFENDANT MERCER: I do not wish to take the stand.

THE COURT: You're not going to testify?

DEFENDANT MERCER: No, sir.

THE COURT: Do you have any questions at all about your constitutional rights to testify or not testify?

DEFENDANT MERCER: No, sir.

THE COURT: All right. You've fully discussed it with your attorney and that's your decision?

DEFENDANT MERCER: Yes, sir.

THE COURT: All right. Thank you.

MS. KIMBROUGH: Thank you, Your Honor. We would, at this time, ask Diane Mercer to come and testify concerning some statements made by Mr. Mercer that we believe fall under the exception of excited utterance. I understand that Your Honor is disinclined to allow this testimony, however, I would simply like to proffer it for the record.

THE COURT: Okay. You can do that.

MS. KIMBROUGH: Thank you, Your Honor. Diane Mercer.

(Whereupon, the following proceedings were reported in camera.)

DIANE MERCER,

having been duly sworn, testified as follows:

THE CLERK: Have a seat up there, ma'am. Please speak up loud and clear and state your name for the record.

THE WITNESS: Diane Mercer.

DIRECT EXAMINATION

BY MS. KIMBROUGH:

Q Good afternoon, Ms. Mercer.

A I'm fine.

Q How are you related to Kevin?

A I'm his mother.

Q Have you stayed in contact with Kevin during his incarceration?

A Yes, I have.

Q How often?

A Quite often. Kevin would either call or write quite often.

Q So two forms of communication, writing and calling?

A Oh, yeah.

Q Do you recall --

A And visiting, I'm sorry, and visiting. I visit him.

Q Okay. Sorry to interrupt. Did you have a conversation with Kevin prior to this assault in jail?

A Yes, I did. Kevin had called me very upset because there were some sexual things going on in the cell he was in, not with him, but with another person, and I don't know the guy's name who was in there. But he was saying that, Mom, they're in there disrespecting me, this guy's messing with this young guy, this smaller guy, he's a smaller guy.

And he said that he would tell the guy, Man, why don't you just leave him alone, why don't you just leave him alone. You know, trying to be the protector.

So the guy said -- well, I guess it was like, no. Anyway, he was saying, no, I'm not going to, whatever, whatever. The bottom line Kevin said, he was like, man, I'll take you. And so Kevin said, he said, Mom, I'm not going out like that.

So I said, Kev, I tell you what you do, just let the C.O. know what's going on and just stay cool. I said, You don't want to get in any trouble, you know, I said, Just stay cool. And he said, Mom, I already called the C.O.'s and I let them know. And I said, Okay, well, I'll call them.

So I called. And I called the C.O., and I don't remember their name right now, but I told them, I said, My son is in there, you know, and he's trying to stay out of trouble, but there's a lot of stuff going on, this guy said he's going to take him, you know. And he said, Well, ma'am, I'm sorry, there's nothing we can do. All we can do is like put him in further lockup until his trial and that was it.

But he was very upset because he said, I'm not

going to let him take me like that.

Q So he was in an emotional state?

A Oh, yeah.

MS. KIMBROUGH: That would be all we would have, Your Honor.

THE COURT: Do y'all object or not?

MR. HUBBARD: Yes, sir, Your Honor.

THE COURT: I sustain the objection. It's not an excited utterance.

MS. KIMBROUGH: Thank you, Your Honor.

THE COURT: All right. You can come down. Do you have any other witnesses at all?

MS. KIMBROUGH: No, Your Honor.

THE COURT: Since we don't have a jury coming back until 2:30 tomorrow, I will let y'all argue and charge in the morning, unless y'all totally object to that.

MR. HUBBARD: That's fine, Your Honor. What time would you like to start, Your Honor?

THE COURT: The only thing is by the time y'all argued and I charged them, it would be five o'clock anyway. What are you going to argue, about ten or 15 minutes?

MR. HUBBARD: I'm, hopefully, not going to be longer than that.

THE COURT: I'm not putting any heat on you, but 30 minutes or something?

MR. HUBBARD: No, sir, Your Honor. It's going to be in the ten to 15 minute range.

THE COURT: All right. We'll reconvene at nine o'clock in the morning. Let me call the jury in.

MS. KIMBROUGH: I'm sorry. Did you say nine o'clock, Your Honor?

THE COURT: Yeah, nine o'clock.

MS. KIMBROUGH: Okay. I thought you said 2:30. I just wanted to make sure.

THE COURT: No, nine o'clock in the morning, because we mistakenly told the jury to come back at 2:30 because I thought this was going to be a long trial.

MS. KIMBROUGH: Your Honor, in the interest of time for tomorrow, would you like the defense to go ahead and rest today?

THE COURT: You can, that will be good.

MS. KIMBROUGH: All right.

(The jury returns to the courtroom.)

MS. KIMBROUGH: Your Honor, the defense rests.

THE COURT: Ladies and gentlemen, instead of having arguments and charge and everything tonight, I'm going to let y'all come back in the morning and

we'll finish. The jury's not coming back until 2:30 anyway, the other panel, and so we'll go ahead and select a jury for the next case from them. So we've got some time in the morning.

Do not discuss the case at all tonight with anyone, just tell them you're on jury duty. Now, once the case is over, you can talk to anybody you want to about it or you can write a book about it or whatever you want to do, but we trust you to go home and come back tomorrow and don't discuss it with anybody because if you did, you'd be talking to somebody that hadn't seen the witnesses and heard the testimony. So wait till y'all finish in the morning tomorrow before you talk to anybody about it.

Don't talk to each other. You can only discuss it with each other. We can't keep you locked in motels. We only do that in death penalty cases. So just go home and come back and tell whoever you see you're on jury duty. You can talk to them if you want to after it's over or you don't have to talk to them about it, okay. Thank you so much. I'll see y'all in the morning. At nine o'clock, we'll start back. Thank you.

(The jury was excused for the day.)

THE COURT: I'll see y'all back here at nine o'clock in the morning. Thank you.

(Whereupon, the proceedings were concluded for March 13, 2006.)

(The following proceedings were held on March 14, 2006.)

THE COURT: Are y'all ready?

MR. HUBBARD: Yes, sir.

MS. KIMBROUGH: Yes, sir, Your Honor. However, before the jury comes in, I'd like to bring up a couple matters that I think may bear on the -- sort of the nature of my closing argument. I don't want to draw objection from either party, so if we can discuss the possible defense charges in advance. I just want to make sure I don't cross any lines or do anything that would cause this trial to get derailed at this point.

THE COURT: Discuss what?

MS. KIMBROUGH: Possible jury charges, specifically defense charges for Mr. Mercer.

THE COURT: Like what?

MS. KIMBROUGH: Well, Your Honor, I think based on the testimony, Mr. Mercer would be entitled to a charge on defense of others. Under the law, in order to defend another person, that person, you

essentially are under sort of an alter ego theory where if they have the right to defend themselves, then you can defend them.

And so, Your Honor, I think, assuming that the jury finds the facts that they could find, that that verdict could be supported. And I would point out, first, of course, is the fact that there's been testimony --

THE COURT: How can it be a defense of others if he chased him into the restroom and continued the fight?

MS. KIMBROUGH: Well, I think initially...

THE COURT: I mean, that's the evidence. I'm not saying it's true or false.

MS. KIMBROUGH: Well, the evidence is, if I understood the testimony correctly, Marcus Robinson said, I went to ask Terry Brown, you know, what gives. He didn't go there to start a fight, he went there to try to essentially resolve the situation. And, at that point, Mr. Brown, quote, squared off. He was ready to attack. And Mr. Mercer came in and essentially kept Mr. Brown from getting the drop on Mr. Robinson, which he was allowed to do. He was allowed to act on appearances.

I believe State versus Starnes discusses the

fact that when you have a self-defense charge, you don't have to let the person get off the first punch or the first shot.

Now, at some point, the fight spilled over into the bathroom; however, I would argue that it was just a continuation of the act of defending Terry Brown -- excuse me -- Marcus Robinson. And even the use of the weapon, even if that weapon is unlawful, the case law in self-defense says if it's used for self-defense, then it's excused.

I guess, you know, at heart, what we're arguing is the jury could believe facts that would support a verdict of defense of others. They may reject it and say, no, you know, he stepped over the line, he didn't act reasonably under that circumstance.

I'd also point that Mr. -- well, that all of the parties essentially were residing in the Lexington County Detention Center and in your own home, there's no duty to retreat. Now, granted they didn't want to be in that home, but that's where they reside. And so we would respectfully request a defense of others charge.

MR. HUBBARD: Your Honor, my response is several fold, one, in self-defense, you cannot create the situation that brings about the problem.

That's what Kevin Mercer did. That's the only testimony is that he went to Marcus Robinson, planted this bug in his head that these two guys were going to jump him.

But it goes on from there, Your Honor. He's standing against the wall, no one is striking blows at this point. This may be another case of what these inmates are calling wolfing or just big talk. The testimony is Kevin Mercer is the one that strikes the blow. He comes out before there is a fight and strikes a blow.

The only other evidence that could possibly conflict with that is Adams who says Marcus Robinson may have pushed Terry away, but it wasn't a strike, it was a push. No one's life was in jeopardy.

Your Honor, self-defense just does not apply. It would be inappropriate in this case. That's the only evidence.

MS. KIMBROUGH: Your Honor, may I respond briefly?

THE COURT: Yes.

MS. KIMBROUGH: I think what the State has put forth is their version of events. Their version of events is that Marcus Robinson was in the wrong for going and asking Terry Brown, Why are you making

threats against me? That's their version. The jury can accept it or they can reject it.

On the other hand, there isn't just only evidence that there wasn't a fight going on, there's plenty of evidence that Mr. Brown was squaring off. He was preparing to attack. And under State versus Starnes and other case law, you don't have to let somebody get the drop on you. If it's a self-defense claim, if you're feeling threatened, you've got -- you're entitled to act on appearances, the jury can accept it or they can reject it, but the evidence is there and it would support a verdict of defense of others and a charge of defense of others.

THE COURT: Well, you've got to be without fault in bringing on the difficulty. The law of self-defense has to apply to the defense of another. And one who goes to the assistance of another stands in the same position with regard to the right of defense as the person assisted.

He went out, it's undisputed, and made a statement. He admits that himself to the other fellow and brought on the difficulty.

And the defense of another is justifiable or excusable when committed by one who has reasonable

cause or reasonable grounds to believe in good faith that the person in whose behalf he acts is in imminent danger of death or serious bodily injury. There was no evidence of imminent danger of death or serious bodily injury.

I don't think defense of another can be charged under these facts. I would deny the motion to charge that.

MS. KIMBROUGH: Would you note our objection?

THE COURT: Okay.

MS. KIMBROUGH: Thank you.

THE COURT: What else do we have?

MR. HUBBARD: Your Honor, I guess one question for clarification --

THE COURT: Plus, the undisputed evidence, there's no contradicted evidence that he didn't follow him, he had a chance to withdraw, which he has to do when he can or retreat on self-defense, and he followed him in the bathroom and attacked him based on testimony of the police officer, all of the witnesses who testified.

MS. KIMBROUGH: Well, there's no question that the fight spilled into the bathroom. However, I would argue that he was essentially in his home.

THE COURT: The person he was protecting wasn't

there. He wasn't defending him at that particular time.

MS. KIMBROUGH: Well, at that point, Mr. Brown was fighting back, so we feel like he had a right to defend himself as well.

THE COURT: Okay. Anything else?

MR. HUBBARD: Your Honor, I was going to ask as to your charge, are you going to just charge assault and battery with intent to kill or are you going to charge a lesser included?

THE COURT: I'm going to charge ABHAN.

MR. HUBBARD: Okay. That's all I need to know for my closing, Your Honor. Thank you.

THE COURT: I'm not sure that -- they could easily find assault and battery of a high and aggravated nature.

MR. HUBBARD: Yes, sir.

THE COURT: I don't really see any reason to charge simple assault and battery.

MS. KIMBROUGH: I would agree, Your Honor.

THE COURT: Okay. Are y'all ready?

MR. HUBBARD: Yes, sir, Your Honor.

MS. KIMBROUGH: Yes, Your Honor.

(The jury enters the courtroom at 9:10 a.m.)

THE COURT: Ladies and gentlemen, we're ready

to conclude this matter with the closing statements.

Mr. Hubbard.

MR. HUBBARD: Thank you, Your Honor.

Why should you care? Why should you care if one inmate attacks and slashes another? Why should you care? Why should that be at the top of your list of things to worry about?

You know, if you were at home reading a newspaper and you read about this incident or if you're at work at lunch and you're talking with your friends about this incident, that would be a valid question because it wouldn't be your problem to worry about. It wouldn't be a matter on your list of things to do.

Now, ladies and gentlemen, I know you've heard some strange things in this courtroom. You've heard about this life of inmates, about leaders and followers, about inmates that want to be left alone. It's another world. It's a whole nother world.

But you entered into another world the other day when you walked into those doors. You entered into the world of law, law and order. When you raised your right hand, you became part of this world. And you have to set aside all of your cares from outside and this becomes your concern.

And each of you has listened to this case. You've listened to the testimony and you've looked at the evidence because that's what you're here to do.

All of us have taken oaths. You took an oath and that oath is really to care, to find the truth, to do justice. The lawyers, both Ms. Kimbrough and the prosecutors, have taken oaths. She's taken an oath to represent her client and zealously. And she's done a good job. The prosecutors like ourselves, Mr. Graham and I, have taken an oath to be ministers of justice, to bring cases to court that we think need to be prosecuted. The Judge has taken on oath to be fair and impartial and he has. He's also the judge of the law and he's going to give you the law in this case.

There's two charges that are going to be presented to you. We've narrowed this down, only two charges are going to be given to you, assault and battery with intent to kill and then the carrying or concealing of a weapon by an inmate. Let's deal with that one first.

It might surprise you there is a law that says if you're in jail, you can't have a weapon. It sounds silly that you have to have a law on that,

but you've got to remember who you're dealing with, inmates. And that law says that weapon can be any kind of weapon, including, and the law says, the homemade variety like the kind you heard about yesterday, shanks, homemade knives.

The meat of this case, the real reason why you're here is the assault and battery with intent to kill. The Judge is going to tell you there's two different types of assaults. There's assault and battery with intent to kill, the most serious assault that one could commit upon another, and there's a lesser charge, assault and battery of a high and aggravated nature. The difference between the two is malice.

You say, what's malice? The law uses some funny terms. It talks about a malignant heart, a heart devoid of social duty, a heart bent on evil, a heart bent on mischief. That's a malignant heart.

What are the signs of a malignant heart? The law says when somebody attacks or assaults another person and they use a deadly weapon, you, the jury, may infer from that act alone that that's malice. And, therefore, it's not assault and battery of a high and aggravated nature, it's assault and battery with intent to kill. Here, you have two weapons,

two weapons, not one.

But there's more evidence of malice. The Judge is going to say, it's not just malice, it's malice aforethought, that malice had to be in the heart and mind at the time of the attack or preceding the attack. A more modern way of saying that is it has to be premeditated. It has to be thought, planning.

Now, ladies and gentlemen, there's planning in this case. Kevin Mercer is angry at his roommate. He wants to be the leader. He can't take this man standing up to him. That last card match they had resulted in the biggest argument they had had, no blows were struck, but he's angry. That's not acceptable to Kevin Mercer so he plans. And he does it well.

Remember the man with the attitude, Marcus Robinson? That's who he recruits. You can tell that's a man with a short fuse, perfect for this role. He concocts this story, Marcus, my roommates are going to jump you. I don't know why they're going to jump you, but I've got your back, I'll protect you.

Now, you saw that man. If you go up there and tell him that, do you think he's just going to sit back and say, I wonder why they want to jump me?

No. The first thing he does is he goes in and confronts Darrell Williams because he's the only one out in the rec yard at that time. What is this about you're going to jump me? What is this? I thought we were tight.

And while he's confronting him, Terry Brown walks in. And he says, And you, too, Terry. Terry sees he's all up and he's, Oh, you're a fake. He starts to walk away, but Marcus Robinson doesn't drop it there, exchanges some more words with Terry Brown.

What category does he fall in? He's never sought to be a leader, otherwise, he'd be beating people up including that man. He's not a follower. He'd rather be left alone. But, ladies and gentlemen, in jail or prison, weakness is not something you want to show. He puts his stuff down and he bows up.

Now, at this point, we don't know if this is another case of what these inmates call wolfing, loud talk, but what we do know is that the first blow was struck by that man. The only evidence that might suggest otherwise was Richard Adams saying, Marcus Robinson may have pushed Terry back. That wasn't a strike, that wasn't a blow. This man

struck. It's malice, premeditation. He knew Marcus Robinson was going to confront these two people.

And what did he do? What did Kevin Mercer do? He was ready. He sat and he watched. He leaned against the wall with a towel on his head, shanks in his hands. He brought shanks, that's planning, that's malice, premeditation. And he waits and here comes his prey. And when he sees he's vulnerable, does he attack him face-to-face, man-to-man? No. That's malice.

You see Richard Adams, he's wearing chains, but he said how Kevin Mercer was striking, he was striking like this (indicating). And look at the blows, you see almost a penetrating blow and it glances. Remember, this is a moving object right here. Then a strike to the face. And that brings up the next point.

What is this close to? What are these blows close to? Ladies and gentlemen, what is up here (indicating) that is so vital that if you strike it with a blade, if you cut it, you've got seconds to live? Major vein, major artery.

Now, the Judge is going to tell you that with aggravated assault or assault and battery of a high and aggravated nature, you can use a weapon and that

may be a sign of aggravation, but let me give you an example of that. A man takes a baseball bat and turns it into a weapon, he's angry at somebody and he attacks him. He doesn't want to kill him, he strikes him at the legs, he just wants to hurt him, breaks the man's legs, hardly breaks them, assault and battery of a high and aggravated nature, didn't intend to kill him, and he used a weapon.

This case, though, where did he strike? If he just wanted to hurt Terry Brown, he could have struck him in the back. He could have scraped his back. He could have hit him in the legs. He could have used another object, something other than what he used, which were shanks. Malice, ladies and gentlemen, not aggravated assault, this is malice.

He did something else, though. He let us know what was in his mind because he looked at Terry and said, I'm going to kill you. He didn't say it to Mike Moulder. He didn't say it to Richard Adams. He said it to his target, Terry Brown, I'm going to kill you.

And you heard these inmates. And Terry Brown's one who's been around the block. Richard Adams, who testified, he 's been around the block. These guys know what prison life is like. And they struck you,

I'm sure, as people who don't back down from a fight. They don't go looking for them, but they don't back down. But they said when they saw the shanks, they knew it was a different kind of fight.

Terry Brown said he was in fear for his life. He wasn't afraid of this man in his cell. He wasn't afraid going toe-to-toe, one-on-one. But inmates know what most of us on the street don't even think about, when you bring shanks, you change the whole tenure of the fight. Malice, malice, malice.

Now, Ms. Kimbrough, I can only think about what she might address with you, so I have to kind of guess, but she might hold the same picture up and say, well, ladies and gentlemen of the jury, these are superficial cuts. He wasn't going to die from these cuts. These are scrapes.

Well, first of all, they're not scrapes, they're cuts, cuts at the hands of her man. But, second of all, it doesn't matter. It doesn't matter. If I want to kill a man and I pull out a gun, a loaded gun, aim it and I fire this loaded gun and I intend to kill that man and I'm aiming for his chest, but he moves or I'm a bad shot and I hit him in the arm or shoot him in the foot, does that mean it's not assault and battery with intent to kill?

No. The intent was there, the malice was there and he acted on it.

Kevin Mercer had the intent and he planned it. The malice, the premeditation, the hatred and he acted on it, that is malice. That is why it can't be assault and battery of a high and aggravated nature, that's why it's got to be assault and battery with intent to kill.

Now, she might get up and say, well, ladies and gentlemen, these were inmates. Terry Brown, he's got a long record. So what? So what? How did that affect what was said here? No one questions Terry Brown was attacked. No one questions the only person with shanks is that man. How did Terry Brown's record have anything to do with this? It wasn't the source of their disputes or their fights.

He's got a record, that's why he's in prison and that's why he was being held over in the jail, he had done something, but so what? And other inmates testified, they have records, so what?

Mike Moulder, what did he have to gain from coming in here? He's in prison. His case is done. He's serving his time. And he intervened in this fight. He did the right thing. An inmate did the right thing.

He pulled Marcus Robinson off, threw him against the wall, then he pushed Kevin Mercer back and realized he had those shanks, because, at first, he said what? It's not going to be two against one, that's not fair. And then when he realized this man had shanks, he's like, You don't need those. And you know what, if he wanted to commit an assault, he wouldn't need those, but his intent was much more deadly.

Richard Adams, he intervened, too. He's an inmate and he told you, I've been around the block, I know the way this world is. But so what? He did the right thing, too. He tried to pull the attackers off. They knew this wasn't fair. They knew this wasn't a just act. Inmates.

I'm afraid, ladies and gentlemen, that when there's talk of inmates, talk of criminal records and it's all couched in terms of why should you believe these people, I'm afraid the implication's going to be, why should you care. Then we're back to where we started.

You do care. You've taken an oath. You're now part of this world of justice. You do care. You've listened. You know why you're here and you know what's on the top of your list of things to do

today. Justice.

THE COURT: Ms. Kimbrough.

MS. KIMBROUGH: Thank you, Your Honor. May it please the Court. Solicitor.

Ladies and gentlemen, Mr. Mercer did not choose me as his lawyer. I was appointed to represent him. And I have to say that this is one of those cases that makes me glad that I'm a lawyer. I represent a lot of people who are charged with crimes. I've represented a lot of Terry Browns, a lot of Richard Adamses and a lot of other people who are clearly guilty and are clearly -- have a state of mind where they don't care about other people. They wouldn't get somebody's back if that person was threatened, they'd turn their back. They'd walk away. They'd care about themselves and only about themselves.

It is my pleasure to represent Kevin Mercer because I believe, and I think the evidence will show, that his intent was anything but criminal.

Now, I realize the Solicitor's done a good job to sort of pre-empting some of my arguments about these folks who came up on the stand, but let me refocus that lens a little bit. It's not about the fact that they have criminal records. Yeah, they're charged with crimes, everybody that's in there.

Mr. Mercer was charged with a crime. Yeah, they're all on equal footing at that point.

What speaks volumes about Terry Brown and about Richard Adams is the length and the commitment that they've shown to be criminals. Terry Brown and Richard Adams are career criminals. And it's not just a question of writing a few bad checks or stealing or doing drugs, they have histories of violent crime. They've committed acts against other people.

And, yeah, they may have been -- there may be wolfing in the prison, but whether it's wolfing or not, it's subject to interpretation. And Terry Brown got up there and told you, Yeah, I threatened him, but it didn't mean anything.

I mean, I am convinced that you all paid close attention to these witnesses. And I would ask you to consider his demeanor. I mean, at one point, I think he almost laughed. He smirked that somehow this was all a big game and it didn't really mean anything that he could threaten people and it meant nothing.

I mean, that's schoolyard bully stuff, ladies and gentlemen. I mean, I have kids and it's the type of thing that goes on there except people

aren't incarcerated. These are little kids. They've got people to intervene.

So let's look at the testimony. Terry Brown, Yes, I threatened him, but I didn't really mean it. It was a card game.

Well, ladies and gentlemen, I ask you to use common sense. The card game and the threats are two separate incidents. If this was really about cards, there would have been absolutely no reason why things wouldn't have gone on as they had before. They had plenty of arguments about cards. There was no involvement of someone else. There was no assault. I submit to you that Terry Brown made threats against Kevin Mercer and he made fun -- well, made threats against Marcus Robinson.

Now, Marcus Robinson was in the cell next to him, so he obviously didn't hear it one-on-one, but he did hear things being whispered, things being spoken about by Terry Brown and his roommate, Darrell Williams, whom I will come to in a moment.

We haven't heard from him. He was there. He was in the room. There were three of them. The State could have brought him up here. If he could verify something or, you know, dispel the myth that these threats actually happened, he could have been

brought up here.

The State has the burden and they clearly have the power to troop in all of these people in their chains from these different institutions. He didn't come here. I ask you to consider that. It speaks volumes. He could have verified that there were no threats made. He could have verified that it was all just one big joke. He isn't here and he didn't do it.

Now, let's talk about Marcus Robinson. Marcus Robinson, if I recall correctly, is about 20 years old. And to describe him as an aggressive person or someone who is going to fly off the handle, doesn't comport with what I saw up there. He seemed like a fairly lethargic person. He didn't seem like somebody who was going to fly off the handle.

He was mad that he was being threatened as anybody would be. No matter how timid or meek you might be ordinarily, if somebody's threatening you, it's human nature, it's instinctual to want to protect yourself, self-preservation.

Yeah, he went out there. He went out there and said, you know, what gives? But to describe him as someone who is like a time bomb waiting to be set loose by Kevin Mercer, I'll submit to you that's

absurd. He isn't the one who assaults people. His record was brought out. He's not the one committing robbery from people or committing lewd acts on children like Richard Adams. He's not doing that.

I ask you who the time bomb is. Is the time bomb the person who's going to come up and physically take something from another person, commit a strong armed robbery? Is the time bomb the person who has a ten year criminal history? He's committed (sic) to it. That's the time bomb, ladies and gentlemen.

Let's move on to Michael Moulder. You know, it's hard to fault Michael Moulder for anything. He was trying to do the right thing. He was trying to intervene. He was out there reading the Bible. Bless him for it. It's pretty clear that he has one criminal conviction in his life and he was taking steps to do better. Good for him. He was clearly -- had no wrongdoing. He was trying to do the right thing. And he was, in my view, deserving of your attention and deserving of your positive assessment of his credibility.

And what did he say? He doesn't know what happened. He didn't live on that wing. He didn't have a dog in this fight. He doesn't know what was

said in that cell room between Darrell Williams, Terry Brown and Kevin Mercer. He has no idea. He just saw the fight after it had broken out. He didn't know who squared off. He saw something in Mr. Mercer's hands, but he didn't know what it was, maybe it was a toothbrush, maybe it was a pencil, he didn't know and he was honest about it. I submit to you, he was honest about it.

Now, let's talk about Officer Jackson, the only person brought up here not in chains or a jumpsuit. You know, that's got to be the toughest job in the world. They're in a -- these officers, they're in that control room and they're there for a reason, because it's protection. They need protection on the job. That's got to be frightening and I'm sure it's tough, the hardest job in the world.

And what did Jackson say? What did officer Jackson say? He said he saw the fight after it erupted. He said he saw Mr. Brown and Mr. Mercer engaged in fist to cuffs. He doesn't know if there was a weapon or not.

He was, however, in the general vicinity of the bathroom. There's been a lot made about how this thing has a phenomenal flush and that's why these weapons or these instruments or toothbrushes or

whatever they were, that's why they weren't found. Well, nobody heard the toilet flush and I guarantee you if it's got that much power, somebody would have heard it. You have to decide that for yourself.

So I think it's fair to say that Officer Jackson and Mr. Moulder can't contribute much to the question of the prior dealings or the threats. They weren't there. They were honest about it. They didn't see it.

So that leaves us with three people, Terry Brown, Richard Adams and Marcus Robinson. Those are the fact witnesses. Those are the folks who can tell you what went on and why.

And, of course, we have our mystery missing witness, Darrell Williams, the roommate. The person who could have been brought up here to either confirm or deny that threats were made and how those threats made him a target.

Richard Adams, he didn't see the demeanor of the conversation. He didn't get the tenure of the conversation in the next cell. He doesn't know that. Although, he's willing to stand up there and say that, somehow through a brick wall, he knew that it was just a big joke, that it didn't mean anything. Ladies and gentlemen, does that make

sense to you, through a brick wall?

It's clear, he was here as a show of support for Terry Brown, that's why he was here. He doesn't know what happened. He has no idea. Terry Brown and Marcus Robinson, those folks know what happened and they gave conflicting accounts.

Although, Terry Brown was the first person to admit, Yeah, I threatened him, yeah. I didn't mean anything by it. Well, I ask you how you would interpret a threat by someone who is a career criminal.

And again, these aren't from check-kiting. This isn't for bank fraud. It's for assault. It's for going up to somebody and taking something from them by force.

And, yeah, here are the pictures. Let's talk about those. Yes, Terry Brown got cut. No question. We didn't deny that. He got cut. He was in a fight, a fight that I contend is a result of his own threats. Here's the pictures. He got cuts.

So let's talk about what these cuts mean. The State's talked about malice, a heart bent on evilness or wickedness. And that's all true, the Judge will tell you. He'll tell you what malice means.

He'll also tell you that you can infer malice. But bear in mind, an inference is something that is a permissive thing. You can infer that it was there or you can infer that it wasn't. The only way to figure out which inference is correct, which inference is reasonable is to look at the surrounding facts and ask yourself, what was really going on here?

Now, Terry Brown, Terry Brown said, He threatened to kill me, I'm going to kill you. Well, when did that allegedly happen? When did he allegedly say that? By his testimony, it was when he was stopped, when Michael Moulder was in between Brown and Kevin, Kevin allegedly said, I'm going to kill you. Well, you heard Michael Moulder, he didn't hear that. That's what's called puffing up your story.

It's astounding that Terry Brown's going to come in here and make himself out to be a victim. He's tired of always being a bridesmaid, but never a bride, always the criminal, but never the victim. Here's his chance.

All right. So let's talk some about the charges, the charges that the Judge will give you. There are going to be three. One is possession of a

weapon. One is assault and battery with intent to kill, which is requiring malice in addition to an assault. The other one is assault and battery of a high and aggravated nature.

Now, in order to find the defendant guilty, a person guilty in a court of law, you have to find criminal intent in every crime. There is no crime in this country, short of perhaps speeding, that doesn't require criminal intent.

Criminal intent is always required, always. It must be proved beyond a reasonable doubt, which the Judge will remind you is the highest burden of proof, very high. They have to prove that Mr. Mercer went out there and intended to kill, to injure Terry Brown, not that he acted on appearances, not that he was acting without intent, they have to prove intent, that he intended to kill Terry Brown. I submit to you they can't do that. They cannot do that. You heard the facts and circumstances around this case.

Possession of a weapon. Well, we know Mr. Mercer had something in his hands. Was it a toothbrush? Was it a pencil? Was it a pen? You have to decide whether or not that's a weapon. You also have to decide whether or not he actually had

it. We have no evidence -- we have this toilet theory that it was somehow flushed, but, again, that crime also requires a showing of criminal intent. It has to be proven beyond a reasonable doubt. Did he have those weapons with criminal intent?

MR. HUBBARD: Your Honor, I object. The law says just possessing them is a crime. I'm going to have to object on that. It's not intent there, just possessing the weapon is a crime.

THE COURT: On the concealed weapon, it's just having possession.

MS. KIMBROUGH: Fair enough.

THE COURT: It cannot be accidentally. He's got to know that he has possession of it, knowingly.

MS. KIMBROUGH: So to that extent, if he knew he had something and was going to use it as a weapon, then criminal intent can be found. But I ask you to consider the evidence, as well as the lack of evidence in this case, especially as it goes to the assault charges.

If you believe the testimony that Mr. Mercer had something in his hand and that that something was a weapon, then you'll have to find him guilty. If you believe the State has not produced sufficient evidence that he had a weapon or that what he had

was, in fact, a weapon, then you have to find him not guilty.

Remember, reasonable doubt standard is very high. My client doesn't have to prove anything.

All I know is that there was a lot of conflicting testimony about what was in his hand, where it went, what it looked like, but, obviously, there was something that caused those marks, we're not going to deny that. There was an assault. It happened.

Going back to assault and battery with intent to kill in the ABHAN however, criminal intent is at the heart of those charges. And I submit to you that based on the facts, based on the testimony of Terry Brown and the facts adduced in this trial, that the State has failed in its burden.

Terry Brown threatened Kevin Mercer. Kevin Mercer, I submit to you, acted the way that a reasonable person would under those circumstances. I would like to think if somebody threatened me, I'd have somebody who cared enough to say, I'm not going to let anything bad happen to you. That's the kind of neighbor I'd like to have in an environment like that when the fights break out, people get hurt and people get killed. I would like to think somebody

would care enough about me to do that.

So I ask you to consider his actions. I ask you to consider the character of Terry Brown and Richard Adams. I ask you to consider what their motives might be. Obviously, people square off against each other in detention centers. It's a rough world and that's an especially great example of how rough the world can be.

And, finally, I ask you to consider that the one person, the one person who could have corroborated what happened in that cell and whether or not there were threats made was never called, Darrell Williams. Where is Darrell Williams? He was there. He would have known. He's not there.

I submit to you that the proof submitted by the State does not reach the reasonable doubt standard. It's just not there. There's plenty of evidence from their own witnesses, I mean, that's the thing about this case, we didn't even have to call any witnesses, not only was it not our burden, but the people they called established our case, Marcus Robinson.

Ladies and gentlemen, I ask you to deliberate and hold the State to its burden. Always remember, each and every one of you took an oath. You're not

just a group of 12, you're 12 individuals who act together. Please remember the reasonable doubt standard, the burden of proof, presumption of innocence and use good common sense. Thank you.

THE COURT: Okay. Ladies and gentlemen of the jury, you've heard the evidence and testimony. Now I'll go over the law and you'll go back and deliberate until you reach a verdict in this case.

This case comes to us on two indictments now, assault and battery with intent to kill and carrying or concealing a weapon by inmates. I have dismissed the lynching because I found that there was no proof that there was a mob involved with a premeditated intent or a premeditated purpose by a mob to inflict injury upon someone.

But, ladies and gentlemen, to these indictments, the defendant pleads not guilty. And his plea places the burden of proof upon the State of South Carolina to prove him guilty beyond a reasonable doubt.

The fact that someone has been arrested and charged is not any evidence of their guilt. And you should not consider that. You have to decide this case on the evidence and testimony that you've heard in the courtroom.

Now, as I said, the defendant has pled not guilty. A person charged with committing a criminal offense is never required to prove themselves innocent, that is a cardinal and an important rule of the law of evidence in a criminal case no matter what the seriousness of the charges are. A defendant is always presumed to be innocent until you, the jury, are satisfied of his guilt beyond a reasonable doubt.

Now, that's not a mere legal theory or a legal phrase, but a substantial right which all of us are entitled to, that is a presumption of innocence until a jury hears evidence of guilt beyond a reasonable doubt.

Now, ladies and gentlemen, as jurors in this case, you have functions and responsibilities that are different from everyone else. The lawyers, they ask the questions and present the evidence in the case that you need to hear to decide this case.

The -- I am prohibited by the Constitution from discussing the facts with you and I would not do that. If you've gotten the impression during this trial that I have a feeling about this case either for the State or for the defendant, you disregard that. If I did anything, I didn't mean to. I

appreciate you being there more than any person and I wouldn't do anything to infringe upon your responsibility to find the facts, if you can, apply those facts to the law and write a verdict in this case that speaks the truth.

Now, just as you're the judges of the facts, you have to accept the law as I explain it to you, apply the facts that you find to the law and write a verdict in this case.

Now, in determining the facts, ladies and gentlemen, you have to weigh all of the testimony and evidence that's been presented. In that regard, these witnesses testified in your presence under oath. And I know you wouldn't do it lightly, but you could believe everything a witness told you or you could disbelieve everything a witness told you. You can believe part of what a witness told you and disbelieve part of what a witness told you. You can believe one witness as against several or several witnesses as against one.

You observe the demeanor of the witnesses, their facial expressions. You can ask yourself, were they forthright; how did they come to know the facts about which they testify; was there other evidence and testimony to make the testimony of that

witness stronger or weaker; was there any reason for the witnesses to be biased or prejudiced in the case.

I just mentioned a few things that you may consider in determining the credibility and believability of the witnesses and the evidence in this case. Now, that is for your sole determination.

Now, ladies and gentlemen, the State has the burden of proving each and every element of a crime charged beyond a reasonable doubt. Any reasonable doubt that you have should be resolved in favor of the defendant. A defendant is entitled to any reasonable doubt.

A reasonable doubt may exist because of the evidence and testimony you've heard or the lack of evidence and testimony in the case. If you have a reasonable doubt as to the guilt of the defendant as to any charge, he is entitled to that doubt and would be entitled to an acquittal. If you have a reasonable doubt as to whether he is guilty of the greater offense or a lesser included offense, you have to give him the benefit of the doubt and find him guilty of the lesser offense.

Now, what is a reasonable doubt? A reasonable

doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

You may have served on juries in civil cases and you would have been told that the burden of proof is by the greater weight or preponderance of the evidence or a fact is more likely true than not true. In a criminal case, the State's proof is more powerful than that, it is beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

Now, there are very few things in this world that we can know with absolute certainty and the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced of the defendant's guilt of the crime charged, then you must find him guilty. On the other hand, if you believe there is a real possibility that he is not guilty of the crime charged, you must give him the benefit of the doubt and find him not guilty. That's the definition of reasonable doubt.

Now, there are two types of evidence generally presented in a criminal case, there's direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who has direct

knowledge of something, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Now, the law makes absolutely no distinction between the weight to be given to direct evidence or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

Now, ladies and gentlemen, the criminal records of an individual is not relevant in the case as to what occurred on the date and time in question. The criminal record of the witness only comes in for one reason and one reason only and you give it whatever weight you think it deserves. A criminal record of a witness is admitted for the sole purpose as it may bear upon his credibility or believability. That's the only relevance it has. It is for you to determine what weight you should give to the credibility and believability of that witness.

Now, ladies and gentlemen, the fact that a

defendant does not testify in his own behalf cannot and must not be considered against him under any circumstances or in any manner whatsoever. The fact that a defendant does not take the witness stand in his own behalf does not create any presumption against him. And I charge you that you must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussions or deliberations of the jury in the jury room in any way.

Why? Because under the Constitution of South Carolina and under the Constitution of the United States, it is the prerogative of the defendant to testify or to remain silent. And the burden of proof is always upon the State of South Carolina to establish his guilt by competent testimony beyond a reasonable doubt.

Now, ladies and gentlemen, there is an indictment of assault and battery with intent to kill. In order to prove assault and battery with intent to kill, the State must prove beyond a reasonable doubt that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought.

Now, I'll define those terms for you.

Generally, an assault occurs when a person unlawfully attempts or offers to commit a violent injury upon another person and had the present ability to complete the attempted injury. An assault is the intentional creation of a reasonable fear of immediate bodily harm.

It is not necessary that the attempted injury or harm actually take place. It could be charging someone to knock them down and not doing it, missing them. It could be swinging and missing or it could be firing a pistol at someone and missing them without it actually making contact. That's just examples of assault.

Now, a battery is the actual contact or the touching of another person, hitting them with your fist and making contact or shooting or firing a weapon at them and making contact, that's a battery, assault and battery. So the State must prove to you beyond a reasonable doubt an assault by this defendant, a battery by this defendant upon the person of another, the victim. A battery is the completion of an assault by using or applying force to another person.

Now, assault and battery with intent to kill must be accompanied with malice aforethought.

Malice is the wrongful intent to injure another and indicates a wicked or a depraved spirit intent on doing wrong. It is the intentional doing of a wrongful act without just cause or excuse.

Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before the act committed and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be expressed or inferred. The terms expressed and inferred do not mean different kinds of malice, but the only manner in which malice may be shown to exist, that is, by direct evidence or by an inference from the facts and circumstances which are proved.

Expressed malice is when a person speaks words that express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. Malice may be inferred from conduct showing a total disregard for human life.

Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to

cause death or great bodily harm. When an instrument has been used as a deadly weapon, depends on the facts and circumstances of each case.

Now, a deadly weapon can be a pistol, a shotgun, a rifle, dirk, dagger, knife, slingshot, metal knuckles, razor or any other instruments that may be used to cause death or serious bodily injury upon someone.

If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you along with other evidence in the case and you may give it such weight as you think it deserves.

Assault and battery with intent to kill requires a general intent to kill rather than a specific intent. Intent means intending the result that actually occurs, not accidental or voluntarily. A general intent to kill may be demonstrated by acts and conduct of a defendant from which you, the jury, may naturally and reasonably infer intent to commit serious bodily injury.

Now, evidence of the character of the assault, the character of the means, the character of the instrument used, the manner in which it was used,

the purpose to be accomplished and the resulting wounds or injuries may be considered in determining the intent with which the assault was committed. Intent may be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act, the natural tendency of which is to destroy another's life.

Now, if you find that the State has proven the defendant is guilty of assault and battery with intent to kill, then your verdict would be guilty. If you find that the State has failed to prove each and every element of assault and battery with intent to kill, you may consider a lesser included offense of assault and battery of a high and aggravated nature or aggravated assault and battery.

Now, assault and battery of a high and aggravated nature includes all of the elements of assault and battery with intent to kill except malice aforethought. In addition, the State must prove an aggravating circumstance. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, the infliction of serious bodily injury, a great disparity between the ages or physical conditions of the parties, a difference in the genders. Now, these are just some examples of

circumstances of aggravation.

Now, ladies and gentlemen, you have to determine if the State has proven all of the elements of assault and battery of a high and aggravated nature. And if they have, your verdict would be guilty of the lesser included offense of assault and battery of a high and aggravated nature. If they fail to prove any element of assault and battery of a high and aggravated nature, your verdict would be not guilty.

So there are three possible verdicts, guilty of assault and battery with intent to kill, guilty of assault and battery of a high and aggravated nature or not guilty. Those are the three possible verdicts on this indictment. If you have a reasonable doubt as to whether the defendant is guilty of the greater offense or the lesser offense, you have to give him the benefit of the doubt and find him guilty of the lesser offense.

Now, I'm not indicating what you should find. Whatever you find, you apply the facts of the law and you write the verdict. I'm not indicating what your verdict should be. I'm just telling you what your three possible verdicts are.

Now, whatever verdict you reach has to be

unanimous. All of you, all 12 of you have to agree on the verdict.

Now, under our law, it is unlawful for an inmate of a state correctional facility or a city or county jail or public works of a county to carry on his person a dirk, slingshot, metal knuckles, razor, firearm or any other deadly weapon homemade or otherwise which usually is used for the infliction of personal injury upon another person or to willfully conceal any weapon within a correctional facility.

Now, therefore, the State has got to prove beyond a reasonable doubt that the defendant had in his possession a weapon, as I've defined that for you, and that he was confined in a correctional facility.

Now, the weapon couldn't have been hidden on him by someone else. He must willfully -- or he must have known it was in his possession and carried it or concealed it, either one.

Now, if the State's proven each and every element of that offense, your verdict would be guilty on that indictment. If they have failed to prove each and every element of the crime charged, your verdict would be not guilty on that indictment.

I would ask you to consider both indictments separately. And when you reach a unanimous verdict as to each charge, notify the bailiff and we'll bring you back in and take the verdict.

Every person has an equal vote and an equal voice into this verdict, but someone has to preside. And, Mr. Foreman, I ask you to do that. You preside in the jury room, okay?

If y'all would just step out and I'll see if the lawyers have anything else they want me to say. If nothing, you can begin your deliberations.

(The jury retires to the jury room.)

THE COURT: She wants you to go first.

MR. HUBBARD: No exceptions to your charge, Your Honor.

MS. KIMBROUGH: Your Honor, I have no exception to the charge. However, we would, again, just simply renew our objection to the lack of self-defense, defense of others charge.

THE COURT: Okay. I'll note that.

MS. KIMBROUGH: Thank you.

THE COURT: All right. We'll be in recess until they reach a verdict.

(The jury commences its deliberations at 10:05 a.m.)

(Juror Russell Brown enters the courtroom.)

THE COURT: I appreciate you being the alternate. But you be back at 2:30 today, okay?

JUROR: Okay.

THE COURT: Thank you so much.

(The alternate was excused.)

(Brief Recess.)

(The following occurred during jury deliberations at 10:40 a.m.)

(A bench conference was held off the record.)

THE COURT: The attorneys have agreed to my writing the answer to the questions. I'm sending it back to the jury.

(Court's Exhibit Number 3, jury note, was marked for identification purposes.)

(A recess transpired.)

THE COURT: My understanding is they've got a verdict in this case.

(The jury returns to open court to report its verdict at 11:15 a.m.)

THE COURT: Mr. Foreman, you've reached a verdict?

FOREMAN: Yes, we have, Your Honor.

(The clerk hands the verdict to the Judge.)

THE CLERK: Indictment 2004-GS-32-3096, the State versus Kevin Jermaine Mercer, indictment for carrying or concealing a weapon by an inmate, verdict, guilty.

Indictment 2006-GS-32-0553, the State versus Kevin Jermaine Mercer, indicted for assault and battery with intent to kill, verdict, guilty. And they are so signed.

Mr. Foreman, ladies and gentlemen, if this so be your verdicts, please indicate each of you by raising your right hand.

All hands are raised, Your Honor.

THE COURT: Any questions in regard to the form of the verdict, Ms. Kimbrough?

MS. KIMBROUGH: None, Your Honor.

THE COURT: Mr. Hubbard?

MR. HUBBARD: No, sir, Your Honor.

THE COURT: Thank you very much, ladies and gentlemen. I appreciate your service and I know the lawyers do.

I'm going to have to ask you to be back at 2:30 this afternoon. We're going to select a jury in another case. Thank you so much.

(The jury was excused.)

THE COURT: All right. Are y'all ready for

sentencing?

MS. KIMBROUGH: Yes, Your Honor.

THE COURT: Solicitor, are you ready?

MR. HUBBARD: Yes, sir, Your Honor.

THE COURT: All right. Do you got any other -- any prior convictions or anything like that?

MR. HUBBARD: Your Honor, if he had taken the stand, we would have impeached him on several priors. From April 11th of 2001, he has a burglary second nonviolent. He has a strong armed robbery and a possession with intent to distribute marijuana. From July 11th of 2002, he has an unlawful carrying of a pistol. He also, from some time in the mid 90's, I think it was '95, he was arrested and then convicted of auto tampering, but, Your Honor, that one's not important.

THE COURT: Is he serving time now?

MR. HUBBARD: No, sir. He's awaiting trial on a murder charge on the case that we're calling next month, Your Honor.

THE COURT: But he's not serving a sentence?

MR. HUBBARD: No, sir.

THE COURT: Okay. The statute reads on carrying a concealed weapon or concealing a weapon, that it be served consecutive to anything he is

presently serving.

MR. HUBBARD: Correct.

THE COURT: I read that and I just talked to my law clerk about it, I don't think that applies to anything that's he's not serving time for.

MR. HUBBARD: We have no objection. Your Honor, I think that's probably correct.

THE COURT: Ms. Kimbrough, what do y'all have to say?

MS. KIMBROUGH: Thank you, Your Honor. You've heard the facts of this case. You know, our take from day one is that Mr. Mercer essentially had no intent to kill Terry Brown. I believe -- I honestly believe, in his own mind, he was simply trying to protect another inmate. He and Mr. Brown had bad blood. You've heard all of that.

However, I would note that, you know, this is a very hostile environment. I don't think his actions were extremely aggravated under the circumstances. Obviously, the jury disagreed with us on our defense and we take no issue with that, but I would ask for a reasonable sentence in light of the facts and circumstances of the case.

THE COURT: All right. Mr. Mercer, what do you have to say?

DEFENDANT MERCER: I still feel that, you know, it's still more than a reasonable doubt. I feel like, you know, should have took a little more time, but now that they've come out with a verdict, I'm just asking for, you know, leniency on the Court's, you know, for the time.

THE COURT: Okay. I heard all of the evidence and testimony. And I think your attorney did an excellent job for you. I cannot believe that you were protecting that guy. He went out, he kind of instigated the whole thing and it didn't meet the legal requirements for defense of another person. You were the only person armed unfortunately. And those shanks are just -- they're bad things and they found that you're guilty of that.

So for assault and battery with intent to kill, I'm going to sentence you to the State Department of Corrections for a period of 12 years. And I'm going to give you five years on the other concurrent. Thank you.

MS. KIMBROUGH: Thank you, Your Honor.

END OF PROCEEDINGS

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Lexington County, South Carolina, on the 13th of March, 2006.

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

December 11, 2006

Stacy L. Sheppard
Circuit Court Reporter

DOCKET NO. 04 -GS-32- 3096

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

AUGUST TERM 2004

THE STATE
vs.

Kevin Jermaine Mercer

WITNESSES

LCSD
Fossum, L

A-2004-32-00724 7/16/2004 10:04 AM

ARREST WARRANT NUMBER

H499388

ACTION OF GRAND JURY

TRUE BILL

William Williams

Foreperson of Grand Jury
Date: 7/20/04

VERDICT

GUILTY

Foreperson of Petit Jury Date: 3/14/06

CDR# 0441

Indictment for

Carrying or concealing weapon by inmates

§24-13-440

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR
Carrying or concealing weapon by inmates

§24-13-440

At a Court of General Sessions, convened on AUGUST, 2004, the Grand Jurors of Lexington County present upon their oath:

That Kevin Jermaine Mercer, an inmate of the Lexington County Detention Center, did on or about January 14, 2004, carry on his person a dirk, slingshot, metal knuckles, razor, firearm, or any other deadly weapon, homemade or otherwise, which usually is used for the infliction of personal injury upon another person, or did willfully conceal any weapon within the Lexington County Detention Center facility, in violation of §24-13-440 of the Code of Laws of South Carolina, 1976, as amended.

A TRUE COPY
Lex. Co. C.C.C.P., G.S. & F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

LCSD Major Crimes Division
Fossum, L

A-2005-32-03170 2/13/2006 8:33 AM

ARREST WARRANT NUMBER

STRAIGHT INDICTMENT

ACTION OF GRAND JURY

TRUE BILL

Barry A Lucas

Foreperson of Grand Jury
Date: 13 March 06

VERDICT

GUILTY

Foreperson of ~~Petit~~ Jury *Date:* 3/14/06

DOCKET NO. 2006-GS-32-0553

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

MARCH TERM 2006

THE STATE
vs.
Kevin Jermaine Mercer

CDR# 0014

Indictment for

Assault and Battery with Intent to Kill

§16-3-620

DONALD V. MYERS, SOLICITOR

316

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR
Assault and Battery with Intent to Kill

§16-3-620

At a Court of General Sessions, convened on March 2006, the Grand Jurors of Lexington County present upon their oath:

That Kevin Jermaine Mercer did in Lexington County on or about January 14, 2004, with malice aforethought, willfully and unlawfully commit a violent injury to the person of another, Terry Brown, in that the defendant, Kevin Jermaine Mercer, did strike and slash the victim Terry Brown, about the head, neck and face with one or more sharp, knife-like objects, inflicting serious bodily injury upon the victim and causing the victim to seek medical attention, in violation of the 16-3-620 of the South Carolina Code of Laws, 1976, as amended.

A TRUE COPY
Lex. Co. C.C.C.P., G.S. & F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF Lexington)
STATE VS)
Kevin J. Mercer)
AKA:)
Race: B Sex: M Age: 29)
DOB: [redacted] S#: [redacted])
Address:)
City, State, Zip)
DL# SID# SC0107581 3)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2004 -GS- 32 - 3096
A/W#: H499388
Date of Offense: January 14, 2004
S.C. Code §: 24-13-440
CDR Code #: 0 / 4 / 4 / 1
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Carrying or Concealing Weapon by Inmates
in violation of § 24-13-440 of the S.C. Code of Laws, bearing CDR Code # 0 / 4 / 4 / 1
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

A TRUE COPY
Lex. Co. C.C.C.P., G.S. & F.C.

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State:
ATTEST:

Solicitor | Defendant | Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 5 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: with ABWIK on March 14 2006
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS
Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$100 ✓
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25 ✓
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$125 ✓

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Beth A Carrigan
Clerk of Court/ Deputy Clerk
Court Reporter: S Sheppard

PRESIDING JUDGE
Judge Code: 0 1 1 0 1 3 1 5
Sentence Date: March 14, 2006

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

318

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Kevin J. Mercer)
AKA:)
Race: B Sex: M Age: 29)
DOB: [redacted] SS#: [redacted])
Address:)
City, State, Zip)
DL# SID# SC0107583)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006 -GS- 32 - 553
A/W#: Straight Indictment
Date of Offense: January
S.C. Code §: 16-3-620
CDR Code #: 0 / 0 / 1 / 4
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Assault & Battery with intent to kill
in violation of §16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0 / 0 / 1 / 4
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

A TRUE COPY
Lex. Co. C.C.C.E., G.S. & F.C.

Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 12 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS

Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$125

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Beth A Carrison
Clerk of Court/ Deputy Clerk
Court Reporter: S Shepard

PRESIDING JUDGE
Judge Code: 0 1 0 1 3 5
Sentence Date: March 14, 2006

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN J. MERCER,

APPELLANT

FINAL BRIEF OF APPELLANT

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South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to instruct the jury on the defense of others where there was evidence appellant came to the aid of another inmate who was being assaulted, since appellant was entitled to that instruction under the facts of this case?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County grand jury for the offenses of lynching in the second degree, assault and battery with intent to kill (ABIK), and carrying or concealing a weapon by an inmate. R.189 - 192. His case was called to trial on March 13, 2006 before the Honorable Larry R. Patterson, and a jury. Melissa J. Kimbrough represented appellant. The solicitors were Samuel R. Hubbard, III and David Shawn Graham. R. 1.

At the conclusion of the state's case the judge granted a directed verdict on the charge of lynching in the second degree. "The evidence falls far short of establishing a mob. This was a fight out in the jail." R. 138, l. 9 – 140, l. 11.

The jury found appellant guilty of ABIK and carrying or concealing a weapon by an inmate. R. 185, ll. 1 – 8. Judge Patterson sentenced appellant to twelve years imprisonment for ABIK and five years imprisonment on the weapons charge. R. 188, ll. 16 – 20.

This appeal follows.

ARGUMENT

Defense counsel correctly argued there was evidence appellant intervened in the prison fight to prevent another inmate from being injured. That evidence entitled appellant to a jury instruction on the defense of others.

Relevant Facts

Thirty-two year old Terry Brown was an inmate at the Lexington County Detention Center on January 14, 2004. He had burglary, aggravated assault, robbery, and drug convictions. R. 3, l. 7 – 4, l. 13. Brown was roommates with appellant and Darrell Williams at the detention center. R. 5, ll. 2 – 7. Since the jail was overcrowded appellant slept on the floor. R. 12, ll. 6 – 15. The men were allowed out of their cells for three and a half hours everyday. R. 8, l. 3 – 11, l. 16.

Brown testified the men largely passed the time by playing cards. Brown said there would often be disagreements during the card games, and someone would be accused of cheating. R. 12, l. 19 – 13, l. 17. That happened again on the night of January 13, 2004. R. 13, l. 18 – 14, l. 3. Brown maintained appellant threatened to "kick my . . . behind" as a result of the card game. R. 14, ll. 9 – 16. Regardless, Brown said he was not afraid of appellant.[1] R. 14, ll. 17 – 18.

Brown testified that the following day -- on January 14, 2004 -- he went outside for recreation. R. 15, l. 1 – 17, l. 7. He remembered seeing his roommate Darrell Williams and Richard Adams outside on the yard. R. 17, ll. 8 – 18.

[1] On cross-examination Brown admitted appellant had requested prison officials to move him away from Brown because of their problems. R. 35, l. 11 – 36, l. 8.

Inmate Marcus Robinson came up to Brown and confronted him about talking about him behind his back. Brown said he told Robinson: "Man, you fake anyway, you know what I'm saying. . . so I turned around to square off with him." R. 18, ll. 1 – 14. Brown said at this point appellant "jumped off the wall when I'm squaring off with Mr. Robinson and he started hitting me, cutting me . . ." R. 18, ll. 1 – 20.

There would be other evidence the confrontation was much more complex than this depiction of it. Marcus Robinson testified he was warned by appellant that Darrell Williams and Terry Brown were planning on "jumping him." R. 51, ll. 9 – 24. Robinson confronted Darrell Williams about that on the prison yard. R. 53, ll. 12 – 14; R. 54, ll. 19 – 23. When Terry Brown came onto the yard Robinson approached him also. He said "Terry, you got a problem with me, too. Brown "threw up his guards so that's when I threw up my guard." R. 55, ll. 8 – 18. At that point appellant intervened and "he hit Terry." Robinson said "I went and hit Darrell." R. 55, ll. 16 – 25.

Robinson admitted he was tired of being mocked by Brown and Williams prior to his confronting them on the prison yard. R. 64, ll. 19 – 21. Robinson also testified he did not see any shanks during the confrontation. R. 61, ll. 17 – 18. Brown claimed appellant had two shanks in his hand at the time he intervened between Brown and Robinson. R. 20, ll. 13 – 19.

Inmate Mike Moulder then became involved and broke up the fight. Brown said he told appellant "to drop the knife," and he claimed appellant said "I'm going to kill him." R. 29, l. 5 – 30, l. 3. Brown remembered at that point "everybody broke out fighting after that. There was a bunch of fights going on and chaos broke off on the third floor after that when on." R. 34, ll. 2 – 6.

Richard Adams, another inmate, testified there was no plan for a fight that day. He testified the arguments about the card games were largely in jest. R. 90, ll. 4 – 18; R. 92, ll. 16 – 25. Adams remembered seeing Marcus Robinson and Darrell Williams and Terry Brown on the yard that day. Adams remembered the fight and he also claimed shanks were involved. R. 85, l. 19 – 88, l. 14.

Michael Moulder testified he grabbed Marcus Robinson during the fight to keep him from hitting Terry Brown. Moulder said he pushed appellant away to keep him from intervening. R. 114, l. 10 – 115, l. 13. Moulder also said appellant had a shank when he attempted to intervene on Robinson's behalf. R. 115, ll. 4 – 14.

Correctional Officer Russell Jackson testified that several fights broke out on the prison yard that day. R. 126, ll. 16 – 18. Jackson said he remembered at some point appellant and Brown were involved in a fist fight. R. 130, ll. 12 – 14.

Request to Charge

Defense counsel requested a jury instruction on the defense of others. She reminded the judge that Robinson confronted Terry Brown about his statements and that appellant came to the defense of Robinson when the fight began. Counsel argued appellant was entitled to keep Brown "from getting the drop on Mr. Robinson." She also argued appellant was allowed to act on appearances. R. 142, l. 15 – 145, l. 14.

The judge stated under the principle of "self-defense," which the judge reasoned "has to apply to the defense of another," that appellant had to be without fault for the difficulty and he had to reasonably believe the person on whose behalf he was intervening was an imminent danger of serious bodily harm or death. The judge stated that he would not charge the defense of others under the facts of this case, and he did not explain why he

apparently thought he was not without fault for the fight between Robinson and Brown. R. 142, l. 15 – 147, l. 11.

After appellant was convicted defense counsel Kimbrough told the judge "I honestly believe, in his own mind, he was simply trying to protect another inmate. He and Mr. Brown had bad blood. You've heard all that." R. 187, ll. 10 – 16. The judge in sentencing appellant said "I cannot believe that you were protecting that guy. He went out, he kind of instigated the whole thing and it didn't meet the legal requirements for defense of another person." R. 188, ll. 7 – 12.

Discussion

As seen, Marcus Robinson testified appellant warned him he was in danger because Darrell Williams and Terry Brown planned to jump him on the prison yard. R. 51, ll. 4 – 24. Appellant's awareness of the likely confrontation between Brown and Robinson was relevant to his claim of the defense of others. See State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App.2005).[2] Although this is not a murder case, our Supreme Court has held that in order for the trial judge to give a defense of others instruction, there must be some evidence adduced at trial that the defendant was defending someone else. See State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000).

In Starnes, a death penalty case, our Supreme Court held Starnes was not entitled to a defense of others instruction because his testimony showed he was only defending himself. The court noted that a defendant is entitled to a defense of others instruction if the person whom he is seeking to protect would likewise have the right to act in self-defense. State v. Long, 325 S.C. 359, 480 S.E.2d 62 (1997). As long as there is some

evidence introduced at trial that the defendant was lawfully defending someone else, he is entitled to a charge on the defense of others. Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); McAninch and Fairey, The Criminal Law of South Carolina (3rd Ed. 1996).

It is elementary that the law to be charged is determined from the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). If there is any evidence supporting the requested jury instruction the trial judge is obligated to charge it.

Here, defense counsel correctly argued there was evidence appellant intervened to protect Robinson from the harm he had warned him about previously. The judge consequently erred by refusing to give the requested instruction on the defense of others.

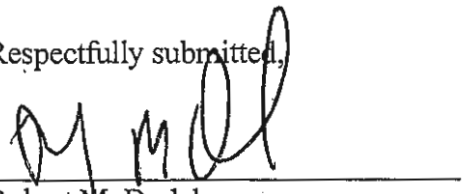
---

[2] Certiorari granted March 22, 2007.

CONCLUSION

By reason of the foregoing argument, appellant convictions should be reversed and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

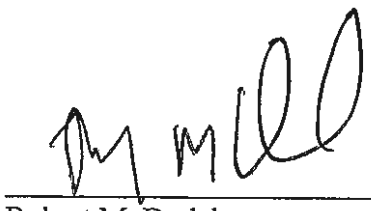
ATTORNEY FOR APPELLANT.

May 12, 2008

CERTIFICATE OF COUNSEL

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

May 12, 2008



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN J. MERCER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 12th day of May, 2008.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2008.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2008 .

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly refused to give a defense of others jury charge because the evidence established Appellant instigated the entire incident, the person he was allegedly defending initiated the confrontation with the victim, and both Appellant and the person he was allegedly defending could have avoided the danger.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

After an incident at the Lexington County Detention Center on January 14, 2004, the Lexington County Grand Jury indicted Appellant Kevin J. Mercer ("Mercer') on one count of second degree lynching, and one count of carrying and concealing a weapon by an inmate. (Indictment No. 2004-GS-11-3096; Record on Appeal [R.], pp. 191-192). The Grand Jury subsequently indicted him on one count of assault and battery with intent to kill (ABWIK). (Indictment No. 2006-GS-11-553; R., pp. 189-190). The case was called for a jury trial on March 13, 2006, before the Honorable Larry R. Patterson, Circuit Court Judge.

Terry Brown ("Brown") testified he was incarcerated in the Lexington County Detention Center in January 2004, and shared a cell with Mercer and Darrell Williams ("Williams"). On January 13, 2004, he was playing cards in the cell with Mercer and Williams when Mercer accused him of cheating and threatened to physically harm him. They argued, but there was no physical altercation at that time. (Trial Testimony [TT], pp. 38-39, 45-47; R., pp. 38-39, 12-14).

On January 14, 2004, the inmates in Brown's cell block went into the outside recreation area, but Brown stayed inside for approximately thirty minutes. When he walked outside, another inmate, Marcus Robinson ("Robinson"), confronted him and asked what Brown had been saying about him. Brown told Robinson he had not said anything about him and started to turn around. Robinson then said he would "kick [Brown's] behind anyway," and Brown turned back around to "square off with [Robinson]." (TT, pp. 48-51; R., pp. 15-18).

As Brown was facing off with Robinson, Mercer jumped on Brown from a nearby

wall and started hitting him in the face with two shanks (jail made knives). Robinson started hitting Brown with his fists. Mercer cut Brown's face multiple times before someone got between them to break it up. Mercer then said he was going to kill Brown, and Brown ran back inside the building. (TT, pp. 51-55, 57-58, 60-63; R., pp. 18-22, 24-25, 27-30).

Brown went to the cell block bathroom to check his face, and Mercer followed him. They started fighting again, which continued until the guards arrived, broke up the fight and took Brown to the infirmary. He was ultimately transported to the hospital for treatment. (TT, pp. 63-67; R., pp. 30-34).

Robinson testified that on the day of the fight, Mercer approached him and said Brown and Williams were planning to "jump" Robinson, but he would not "let it get too far out of hand." (TT, pp. 80-86; R., pp. 47-53). Robinson confronted Williams and asked why he wanted to jump him, and then confronted Brown when he came out of the building. When Brown "threw up his guards," Mercer jumped on him, and Robinson admitted he then hit Brown as well. Robinson testified that after Mercer jumped on Brown, Williams ran into the building and he chased Williams to fight with him inside. (TT, pp. 86-91; R., pp. 53-58).

Robinson stated that prior to the incident on January 14, Brown never did or said anything to him in a threatening manner, and they got along well for the most part. He said neither Brown nor Williams jumped on him when he confronted them about what Mercer said, and Mercer threw the first punch that day. (TT, pp. 92-98; R., pp. 59-65).

Richard Adams ("Adams") testified he was in the same cell block with Mercer, Robinson, Brown and Williams in January 2004, and he was in the recreation area when the incident occurred on January 14. He stated he saw Mercer and Robinson hitting Brown, and

Brown never had a chance to react. He testified Mercer had two shanks in his hands when he was hitting Brown, and after Mercer went into the bathroom after Brown, he saw Mercer flush the shanks down the toilet. (TT, pp. 112-113, 115-127,138-140; R., pp. 78-79, 81-93, 104-106).

Michael Moulder ("Moulder") testified he was incarcerated in the Lexington County Detention Center on January 14, 2004, and was sitting in the recreation area when he saw Mercer and Robinson hitting Brown. He grabbed Robinson and threw him off of Brown. He then saw shanks in Mercer's hands, and he pushed Mercer away. Brown ran behind him into the building and Mercer followed Brown inside. (TT, pp. 144-150; R., pp. 110-116).

Officer Russell Jackson of the Lexington County Detention Center testified he was working on January 14, 2004, when Williams come in from the recreation yard and told him there was a fight in the yard. Officer Jackson went to investigate and saw Brown run in from the yard toward the bathroom with Mercer running after him. He saw a white object in Mercer's right hand. (TT, pp. 154-162; R., pp. 120-128).

Mercer requested a jury instruction on defense of others, contending the evidence indicated he was acting in defense of Robinson. The circuit court denied the requested charge, finding it was undisputed Mercer was at fault in bringing about the confrontation, there was no evidence Robinson was in imminent danger of death or serious bodily injury, and rather than retreating when Brown ran into the bathroom, Mercer followed him in the bathroom and attacked him. (TT, pp. 186-192; R., pp. 141-147).

The jury convicted Mercer of ABWIK and carrying or concealing a weapon by an

inmate.[1] (TT, p. 231; R., p. 185). The circuit court sentenced him to concurrent terms of twelve years and five years, respectively. (TT, p. 234; R., p. 188). This appeal followed.

[1]The circuit court directed a verdict of not guilty on the second degree lynching charge. (TT, pp. 169-174; R., pp. 135-140).

ARGUMENT

The circuit court properly refused to give a defense of others jury charge because the evidence established Appellant instigated the entire incident, the person he was allegedly defending initiated the confrontation with the victim, and both Appellant and the person he was allegedly defending could have avoided the danger.

Mercer contends the circuit court erred in denying his request for a defense of others jury instruction, asserting there was evidence he intervened to protect Robinson from Brown. On the contrary, undisputed evidence established Mercer instigated the incident, actually started the fight by throwing the first punch, and then chased Brown inside the building when Brown ran away. In light of that evidence, a defense of others instruction was inappropriate as a matter of law.

The law to be charged is determined from the evidence presented at trial. State v. Long, 325 S.C. 59, 480 S.E.2d 62, 64 (1997). The purpose of a jury instruction is to aid the jury in arriving at a correct verdict, and only the law applicable to the case should be charged. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802, 804 (2002). It is error to give instructions which are calculated to confuse or mislead the jury, and instructions that do not fit the facts of the case may serve only to confuse the jury. *Id.*

Under the defense of others theory, the defendant is not guilty if he acts in defense of a friend, relative or bystander if that friend, relative or bystander would likewise have the right to act in self-defense. State v. Starnes, 340 S.C. 213, 531 S.E.2d 907, 913 (2000). To warrant a jury charge on defense of others, there must be evidence the defendant was lawfully defending others. *Id.*

Self-defense in South Carolina requires evidence of four elements: 1) the defendant

was without fault in bring on the difficulty; 2) the defendant was in actual imminent danger of death or serious bodily injury, or actually believed he was; 3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief and the circumstances were such as would warrant the person to act in order to save himself; and 4) the defendant had no other probable means of avoiding the danger. State v. Slater, 373 S.C. 66, 644 S.E.2d 50, 52 (2007). The defense of others falls under the rubric of self-defense, and a defendant asserting he acted in defense of another steps into the shoes of the person he is defending, and may only do what that person might lawfully do in his own defense. 40 C.J.S. Homicide §161 (2007).

Thus, to warrant a defense of others jury instruction in this case, there had to be evidence establishing Robinson had a right to do what Mercer did when he attacked Brown. The undisputed evidence established, however, that: 1) there were no problems or threats of harm between Robinson and Brown prior to January 14, 2004; 2) Mercer instigated the confrontation between Robinson and Brown by telling Robinson that Brown wanted to jump him, and Robinson confronted Brown only because of what Mercer told him; 3) Mercer brought shanks into the recreation area that day and then struck the first blow of the fight; and 4) Mercer chased Brown when he tried to run away, and he continued the fight inside the bathroom. (TT, pp. 55-67, 80-98, 112-127, 138-140, 144-150, 154-162; R., pp. 22-34, 47-65, 78-93, 104-106, 110-116, 120-128). Since Mercer was personally responsible for instigating the confrontation and Robinson was the initial aggressor when he confronted Brown, Mercer could not show he and Robinson were "without fault" in bringing on the situation. Therefore, Mercer could not meet the first requirement for a defense of others

assertion.

In addition, even assuming Mercer's claim that Brown was planning to attack Robinson was true, both Mercer and Robinson could have avoided the potential danger by simply reporting the alleged threat to jail officials. Rather than try to avoid the danger, however, Mercer was instrumental in creating it and continuing then it after Brown ran away. Since Robinson and Mercer were both at fault in bringing on the difficulty, and they had other means to avoid the danger, Mercer's defense of others claim was specious on its face.

The undisputed evidence at trial conclusively established Mercer was directly responsible for the confrontation between Robinson and Brown, and actually started the fight that followed. Further, the fact that he threatened Brown the night before, and then brought shanks to the yard and used them when he attacked Brown, indicates Mercer instigated the confrontation as an opportunity for him to carry out his own threats against Brown. Therefore, the evidence did not support a defense of others jury instruction as a matter of law, and the circuit court's refusal to give such a charge should be affirmed.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DEBORAH R.J. SHUPE
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Solicitor, Eleventh Judicial Circuit

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May 12, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Larry R. Patterson, Circuit Court Judge

THE STATE,

Respondent,

vs.

KEVIN J. MERCER,

Appellant.

CERTIFICATE OF COUNSEL

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

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ATTORNEYS FOR RESPONDENT

May 12, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Larry R. Patterson, Circuit Court Judge

THE STATE,

Respondent,

vs.

KEVIN J. MERCER,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M Dudek, Esquire
Deputy Chief Appellate Defender for Capital Appeals
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589

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

This 12th day of May, 2008.

Ellen R. DuBois

ELLEN R. DUBOIS
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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FINAL REPLY BRIEF OF APPELLANT

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Columbia, S. C. 29211-1589
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ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

The state incorrectly asserts the evidence was "undisputed" that appellant started the difficulty between the other two inmates on the prison yard. The evidence was not undisputed, and the state wrongfully assumes appellant was acting in bad faith by warning one inmate that another inmate planned to "jump him. Further, "any evidence" of the defense of others entitled appellant to that jury instruction. There was evidence appellant intervened in a prison fight, and he had the right to "act on appearances," and he did not have to wait for the other inmate "to get the drop" on his friend.

The state claims "undisputed evidence established Mercer instigated the incident . . . [and] "the defense of others falls under the rubic of self-defense . . . [and] "Mercer instigated the confrontation between Robinson and Brown by telling Robinson that Brown wanted to jump him, and Robinson confronted Brown only because of what Mercer told him." Respondent's brief at 7-8. The evidence in this case was far from undisputed.

For example, Robinson admitted he was *tired of being mocked* by Brown and Williams *prior to his confronting them* on the prison yard. R. 64, ll. 19 – 21. Robinson also testified he did not see any shanks during the confrontation. R. 61, ll. 17 – 18.

Brown testified he told Robinson, when he was confronted that: "Man, you fake anyway, you know what I'm saying. . . so I turned around to square off with him." R. 18, ll. 1 – 14. Brown conversely claimed appellant had two shanks in his hand at the time he intervened between Brown and Robinson. R. 20, ll. 13 – 19.

Further, Michael Moulder testified he grabbed Robinson during the fight to keep him from hitting Brown. Moulder said he pushed appellant away *to keep him from*

intervening. R. 114, l. 10 – 115, l. 13. Moulder also said appellant had a shank when he attempted to intervene on Robinson's behalf. R. 115, ll. 4 – 14.

Moreover, the state assumes appellant was acting in bad faith in warning Robinson that Brown and Williams intended to "jump him." Marcus Robinson testified at trial appellant warned him he was in danger because Darrell Williams and Terry Brown planned to jump him on the prison yard. R. 51, ll. 4 – 24. Again, appellant's awareness of the likely confrontation between Brown and Robinson was relevant to his claim of the defense of others. See State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App.2005).[1]

As long as there is evidence introduced at trial that the defendant was lawfully defending someone else, he is entitled to a charge on the defense of others. Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); McAninch and Fairey, The Criminal Law of South Carolina (5th ed. 2007), at pp. 556-558. The jury is rightly entitled to make inferences from the evidence where the evidence is in dispute. Further, it would appear where there is evidence of the defense of others the state would have the burden of disproving it beyond a reasonable doubt. See McAninch and Fairey, The Criminal Law of South Carolina (5th ed. 2007), at pp. 556.

Appellant was intervening to defend another inmate, and that is what distinguishes his case from State v. Long, 325 S.C. 359, 480 S.E.2d 62 (1997) and State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000) in which the defendants only maintained they were attempting to protect themselves. Appellant recognizes that intervening in a prison fight is not the normal manner in which a defense of others instruction becomes requested.

[1] Certiorari granted March 22, 2007.

However, the Court in State v. Hayes, 121 S.C. 163, 168, 113 S.E. 362, 364 (1922) held that this defense can even extend to the defense of a bystander.

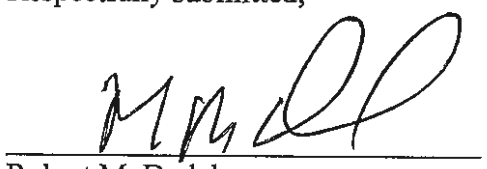
Defense counsel, when requesting a jury instruction on the defense of others, reminded the judge that Robinson confronted Brown about his statements and that appellant came to the defense of Robinson when the fight began. Counsel argued appellant was entitled to keep Brown "from getting the drop on Mr. Robinson." She also argued appellant was allowed "to act on appearances." R. 142, l. 15 – 145, l. 14. Those are recognized principles of self-defense, and appellant was not obligated to wait until the person on whose behalf he intervened was hit or hurt before he attempted to prevent harm.

The standard was "any evidence" made the defense of others a jury issue, and while a fight on a prison yard is distasteful, the unusual facts of this case made the "defense of others" a jury issue.

CONCLUSION

By reason of the arguments in appellants brief, and in this reply brief, appellant's convictions should be reversed and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

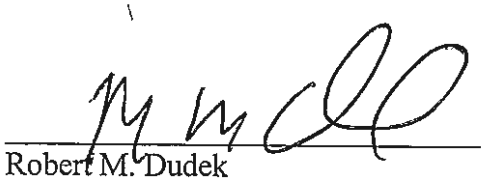
ATTORNEY FOR APPELLANT.

May 12, 2008

CERTIFICATE OF COUNSEL

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

May 12, 2008



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN J. MERCER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Deborah R. J. Shupre, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 12th day of May, 2008.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2008.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

2009-UP-093 - State v. Mercer

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kevin J. Mercer, Appellant.

Appeal From Lexington County
Larry R. Patterson, Circuit Court Judge

Unpublished Opinion No. 2009-UP-093
Submitted February 2, 2009 – Filed February 23, 2009

AFFIRMED

Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,

Assistant Attorney General Deborah R.J. Shupe, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

PER CURIAM: Kevin Mercer appeals his convictions and sentences for assault and battery with intent to kill (ABWIK) and carrying a weapon by an inmate, arguing the trial court erred in refusing to instruct the jury on the defense of others. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities: Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 473 (2004) (holding a trial court is required to charge only the current and correct law of South Carolina); State v. Starnes, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000) ("[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others."); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (explaining jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error); State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997) (explaining under the theory of defense of others, "one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense."); State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (stating the law to be charged to the jury is determined by the evidence presented at trial, and if any evidence supports a jury charge, the trial court should grant the request).

AFFIRMED.

HEARN, C.J., PIEPER and LOCKEMY, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Larry R. Patterson, Circuit Court Judge

Opinion No. 2009-UP-093 (S.C. Ct. App. filed 2/23/2009)

06-GS-32-553

THE STATE,

RESPONDENT,

V.

KEVIN J. MERCER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 5, 2009.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding there was no evidence entitling petitioner to an instruction on the defense of others where there was evidence petitioner came to the aid of another inmate, whom petitioner had previously informed his cellmates planned to attack, since petitioner was entitled to a defense of others instruction given the facts of this case?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Lexington County grand jury for the offenses of lynching in the second degree, assault and battery with intent to kill (ABIK), and carrying or concealing a weapon by an inmate. R.189 - 192. His case was called to trial on March 13, 2006 before the Honorable Larry R. Patterson, and a jury. Melissa J. Kimbrough represented petitioner. The solicitors were Samuel R. Hubbard, III and David Shawn Graham. R. 1.

At the conclusion of the state's case the judge granted a directed verdict on the charge of lynching in the second degree. "The evidence falls far short of establishing a mob. This was a fight out in the jail." R. 138, l. 9 – 140, l. 11.

The jury found petitioner guilty of ABIK and carrying or concealing a weapon by an inmate. R. 185, ll. 1 – 8. Judge Patterson sentenced petitioner to twelve years imprisonment for ABIK and five years imprisonment on the weapons charge. R. 188, ll. 16 – 20.

The Court of Appeals affirmed petitioner's convictions in State v. Kevin J. Mercer, 2009-UP-093 (February 23, 2009). App. 1-2. Petitioner sought rehearing. App. 3-6. The Court of Appeals denied rehearing. App. 7-8. This petition for a writ of certiorari follows.

Relevant facts

Terry Brown was an inmate at the Lexington County Detention Center on January 14, 2004. His criminal record included convictions for burglary, aggravated assault, robbery, and drugs. R. 3, l. 7 – 4, l. 13.

The detention center was overcrowded so there were three men in a two-man cell. Brown shared a cell with petitioner and Darrell Williams . R. 5, ll. 2 – 7. Petitioner slept on the floor in

that cell. R. 12, ll. 6 – 15. The men were allowed out of their cells for three and a half hours everyday. R. 8, l. 3 – 11, l. 16.

Brown testified the men largely passed the time by playing cards. Brown said there would often be disagreements during the card games, and accusations of cheating. R. 12, l. 19 – 13, l. 17. That happened again on the night of January 13, 2004. R. 13, l. 18 – 14, l. 3. Brown maintained petitioner threatened to "kick my . . . behind" as a result of that card game. R. 14, ll. 9 – 16. Regardless, Brown said he was not afraid of petitioner.[1] R. 14, ll. 17 – 18. On cross-examination, Brown admitted petitioner had requested detention center management to move him away from Brown because of their problems. R. 35, l. 11 – 36, l. 8.

Brown testified that the following day -- on January 14, 2004 -- he went outside for recreation. R. 15, l. 1 – 17, l. 7. He remembered seeing his roommate Darrell Williams with Richard Adams outside on the yard. R. 17, ll. 8 – 18.

Inmate Marcus Robinson came up to Brown and confronted him about talking about him behind his back. Brown said he told Robinson: "Man, you fake anyway, you know what I'm saying. . . so I turned around to square off with him." R. 18, ll. 1 – 14. Brown said at this point petitioner "jumped off the wall when I'm squaring off with Mr. Robinson and he started hitting me, cutting me . . ." R. 18, ll. 1 – 20.

There would be other evidence the confrontation was much more complex than this simple depiction of it. Marcus Robinson testified he was warned by petitioner that his roommates Darrell Williams and Terry Brown were planning on "jumping him." R. 51, ll. 9 – 24. Robinson confronted Darrell Williams about that plan on the prison yard. R. 53, ll. 12 – 14; R. 54, ll. 19 – 23. When Terry Brown came onto the yard Robinson approached him also. He said "Terry, you got a

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problem with me, too. Brown "threw up his guards so that's when I threw up my guard." R. 55, ll. 8 – 18. At that point petitioner intervened and "he hit Terry." Robinson said: "I went and hit Darrell." R. 55, ll. 16 – 25.

Robinson admitted he was tired of being mocked by petitioner's cellmates -- Brown and Williams -- prior to his confronting them on the prison yard. R. 64, ll. 19 – 21. Robinson also testified he did not see any shanks during the confrontation. R. 61, ll. 17 – 18.

Brown conversely claimed petitioner had two shanks in his hand at the time he intervened between Brown and Robinson. R. 20, ll. 13 – 19. The evidence, as almost always, was disputed. Inmate Mike Moulder then became involved and broke up the fight. Brown said he told petitioner "to drop the knife," and he claimed petitioner said "I'm going to kill him." R. 29, l. 5 – 30, l. 3. Brown remembered at that point "everybody broke out fighting after that. There was a bunch of fights going on and chaos broke off on the third floor after that when on." R. 34, ll. 2 – 6.

Richard Adams, another inmate, testified there was no plan for a fight that day. He testified the arguments about the card games were largely in jest. R. 90, ll. 4 – 18; R. 92, ll. 16 – 25. Adams remembered seeing Marcus Robinson and Darrell Williams and Terry Brown on the yard that day. Adams remembered the fight and he also claimed shanks were involved. R. 85, l. 19 – 88, l. 14.

Michael Moulder testified he grabbed Marcus Robinson during the fight to keep him from hitting Terry Brown. Moulder said he pushed petitioner away to keep him from intervening. R. 114, l. 10 – 115, l. 13. Moulder also said petitioner had a shank when he attempted to intervene on Robinson's behalf. R. 115, ll. 4 – 14.

Correctional Officer Russell Jackson testified that several fights broke out on the prison yard that day. R. 126, ll. 16 – 18. Jackson said he remembered at some point petitioner and Brown were involved in a fistfight. R. 130, ll. 12 – 14.

Request to Charge

Defense counsel requested a jury instruction on the defense of others. She reminded the judge that Robinson confronted Terry Brown about his statements and that petitioner came to the defense of Robinson when the fight began. Counsel argued petitioner was entitled to keep Brown "from getting the drop on Mr. Robinson." She also argued petitioner was allowed to act on appearances. R. 142, l. 15 – 145, l. 14.

The judge stated under the principle of "self-defense," which the judge reasoned "has to apply to the defense of another," that petitioner had to be without fault for the difficulty and he had to reasonably believe the person on whose behalf he was intervening was an imminent danger of serious bodily harm or death. The judge stated that he would not charge the defense of others under the facts of this case, and he did not explain why he apparently thought petitioner was not without fault for the fight between Robinson and Brown. R. 142, l. 15 – 147, l. 11.

After petitioner was convicted defense counsel Kimbrough told the judge: "I honestly believe, in his own mind, he was simply trying to protect another inmate. He and Mr. Brown had bad blood. You've heard all that." R. 187, ll. 10 – 16. The judge in sentencing petitioner said "I cannot believe that you were protecting that guy. He went out, he kind of instigated the whole thing and it didn't meet the legal requirements for defense of another person." R. 188, ll. 7 – 12.

Court of Appeals

In a memorandum opinion the Court of Appeals held that "in order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." State v. Starnes, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000). The Court also wrote that "[j]ury instructions should be considered as a whole, and if as a whole

they are free from error, any isolated portions which may be misleading do not constitute reversible error." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).

ARGUMENT

The Court of Appeals erred by holding there was no evidence entitling petitioner to a jury instruction on the defense of others. There was evidence petitioner intervened in the prison fight to prevent another inmate from being injured. That evidence entitled petitioner to a jury instruction on the defense of others.

First, petitioner understands it is highly unusual for a "defense of others" issue to arise in the context of a prison fight. Petitioner also understands the human tendency to think inmates were just looking for trouble as the trial judge clearly thought by his sentencing remarks in this case. Regardless, Marcus Robinson testified petitioner warned him he was in danger because his roommates, Darrell Williams and Terry Brown, planned to attack him on the prison yard. R. 51, ll. 4 – 24. Petitioner's awareness of the likely confrontation between Brown and Robinson was relevant to his claim of the defense of others. See State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App.2005).[2]

This Court has held that in order for the trial judge to give a defense of others instruction, there must be some evidence adduced at trial that the defendant was defending someone else. See State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000). In Starnes, this Court held Starnes was not entitled to a defense of others instruction because his testimony showed he was only defending himself. This Court noted that a defendant is entitled to a defense of others instruction

[2] Affirmed in State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008). This Court declined to address the issue of whether the Court of Appeals also erred by reversing Mekler's conviction based on the trial judge's denial of Mekler's request to introduce specific details of a prior domestic violence incident between Mekler's friend, who Mekler said she was protecting, and her decedent husband. Mekler involved the failure to give an involuntary manslaughter instruction where there was evidence of that lesser-included offense. Here, there was evidence petitioner had warned Robinson that he may be attacked in the future, and there was evidence petitioner acted when that attack occurred.

if the person whom he is seeking to protect would likewise have the right to act in self-defense. State v. Long, 325 S.C. 359, 480 S.E.2d 62 (1997).

Further, as long as there is some evidence introduced at trial that the defendant was lawfully defending someone else, he is entitled to a charge on the defense of others. Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); McAninch and Fairey, The Criminal Law of South Carolina (3rd Ed. 1996). This is respectfully a case where the trial judge substituted his view of the evidence for the "any evidence" of the lesser-included offense standard. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct.App. 2003). The judge showed that at sentencing by telling petitioner – in light of his attorneys continuing protest that she thought petitioner was defending Robinson -- that "I cannot believe that you were protecting that guy. He went out, he kind of instigated the whole thing and it didn't meet the legal requirements for defense of another person." R. 188, ll. 7 – 12.

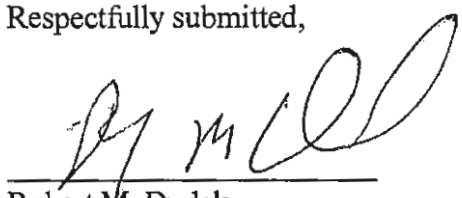
The evidence was disputed, but is elementary that the law to be charged is determined from the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). If there is any evidence supporting the requested jury instruction the trial judge is obligated to charge it. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). Further, this Court held in State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), that it is error to refuse to charge involuntary manslaughter merely because there is evidence the shooting was intentional.

Here, defense counsel correctly argued there was evidence petitioner intervened to protect Robinson from the harm he had warned him about previously. The judge consequently erred by refusing to give the requested instruction on the defense of others given the highly unusual facts of this case. The Court of Appeals erred by holding otherwise.

CONCLUSION

Based on the foregoing argument, a writ of certiorari should be granted in order to allow full briefing on the issue.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER.

This 4th day of August, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Larry R. Patterson, Circuit Court Judge

Opinion No. 2009-UP-093 (S.C. Ct. App. filed 2/23/2009)
06-GS-32-553

THE STATE,

RESPONDENT,

V.

KEVIN J. MERCER,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Deborah R.J. Shupe, Esquire, and the S.C. Court of Appeals this 4th day of August, 2009.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of August, 2009.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
Larry R. Patterson, Circuit Court Judge

THE STATE,

Respondent,

vs.

KEVIN J. MERCER,

Petitioner.

RETURN TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals properly conclude Petitioner was not entitled to a defense of others jury instruction since there was no evidence Petitioner was indeed lawfully defending others?

STATEMENT OF THE CASE

Respondent concurs with Petitioner's procedural history of the case.

STATEMENT OF FACTS

After an incident at the Lexington County Detention Center on January 14, 2004, the Lexington County Grand Jury indicted Appellant Kevin J. Mercer ("Mercer') on one count of second degree lynching, and one count of carrying and concealing a weapon by an inmate. (Record on Appeal [R.], pp. 191-192). The Grand Jury subsequently indicted him on one count of assault and battery with intent to kill (ABWIK). (R., pp. 189-190). The case was called for a jury trial on March 13, 2006, before the Honorable Larry R. Patterson, Circuit Court Judge.

Terry Brown ("Brown") testified he was incarcerated in the Lexington County Detention Center in January 2004, and shared a cell with Mercer and Darrell Williams ("Williams"). On January 13, 2004, he was playing cards in the cell with Mercer and Williams when Mercer accused him of cheating and threatened to physically harm him. They argued, but there was no physical altercation at that time. (R., pp. 38-39, 12-14).

On January 14, 2004, the inmates in Brown's cell block went into the outside recreation area, but Brown stayed inside for approximately thirty minutes. When he walked outside, another inmate, Marcus Robinson ("Robinson"), confronted him and asked what Brown had been saying about him. Brown told Robinson he had not said anything about him and started to turn around. Robinson then said he would "kick [Brown's] behind anyway," and Brown turned back around to "square off with [Robinson]." (R., pp. 15-18).

As Brown was facing off with Robinson, Mercer jumped on Brown from a nearby wall and started hitting him in the face with two shanks (jail made knives). Robinson started hitting Brown with his fists. Mercer cut Brown's face multiple times before someone got

between them to break it up. Mercer then said he was going to kill Brown, and Brown ran back inside the building. (R., pp. 18-22, 24-25, 27-30).

Brown went to the cell block bathroom to check his face, and Mercer followed him. They started fighting again, which continued until the guards arrived, broke up the fight and took Brown to the infirmary. He was ultimately transported to the hospital for treatment. (R., pp. 30-34).

Robinson testified that on the day of the fight, Mercer approached him and said Brown and Williams were planning to "jump" Robinson, but he would not "let it get too far out of hand." (R., pp. 47-53). Robinson confronted Williams and asked why he wanted to jump him, and then confronted Brown when he came out of the building. When Brown "threw up his guards," Mercer jumped on him, and Robinson admitted he then hit Brown as well. Robinson testified that after Mercer jumped on Brown, Williams ran into the building and he chased Williams to fight with him inside. (R., pp. 53-58).

Robinson stated that prior to the incident on January 14, Brown never did or said anything to him in a threatening manner, and they got along well for the most part. He said neither Brown nor Williams jumped on him when he confronted them about what Mercer said, and Mercer threw the first punch that day. (R., pp. 59-65).

Richard Adams ("Adams") testified he was in the same cell block with Mercer, Robinson, Brown and Williams in January 2004, and he was in the recreation area when the incident occurred on January 14. He stated he saw Mercer and Robinson hitting Brown, and Brown never had a chance to react. He testified Mercer had two shanks in his hands when he was hitting Brown, and after Mercer went into the bathroom after Brown, he saw Mercer flush the shanks down the toilet. (R., pp. 78-79, 81-93, 104-106).

Michael Moulder ("Moulder") testified he was incarcerated in the Lexington County Detention Center on January 14, 2004, and was sitting in the recreation area when he saw Mercer and Robinson hitting Brown. He grabbed Robinson and threw him off of Brown. He then saw shanks in Mercer's hands, and he pushed Mercer away. Brown ran behind him into the building and Mercer followed Brown inside. (R., pp. 110-116).

Officer Russell Jackson of the Lexington County Detention Center testified he was working on January 14, 2004, when Williams come in from the recreation yard and told him there was a fight in the yard. Officer Jackson went to investigate and saw Brown run in from the yard toward the bathroom with Mercer running after him. He saw a white object in Mercer's right hand. (R., pp. 120-128).

Mercer requested a jury instruction on defense of others, contending the evidence indicated he was acting in defense of Robinson. The circuit court denied the requested charge, finding it was undisputed Mercer was at fault in bringing about the confrontation, there was no evidence Robinson was in imminent danger of death or serious bodily injury, and rather than retreating when Brown ran into the bathroom, Mercer followed him in the bathroom and attacked him. (R., pp. 141-147).

The jury convicted Mercer of ABWIK and carrying or concealing a weapon by an inmate.[1] (R., p. 185). The circuit court sentenced him to concurrent terms of twelve years and five years, respectively. (R., p. 188). This appeal followed.

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[1]The circuit court directed a verdict of not guilty on the second degree lynching charge. (R., pp. 135-140).

The Court of Appeals affirmed Mercer's convictions in an unpublished opinion filed February 23, 2009. (App. pp. 1-2). By Order dated May 5, 2009, the Court denied Mercer's Petition for Rehearing. Mercer now seeks review of the Court of Appeals decision.

ARGUMENT

The Court of Appeals properly concluded Petitioner was not entitled to a defense of others jury instruction since the evidence established Petitioner instigated the fight rather than attempt to avoid it, struck the first blow, and continued the fight when the victim attempted to get away.

Mercer contends the Court of Appeals erred in affirming the circuit court's denial of his request for a defense of others jury instruction, asserting there was evidence he intervened to protect Robinson from Brown. On the contrary, undisputed evidence established Mercer instigated the incident, actually started the fight by throwing the first punch, and then chased Brown inside the building when Brown ran away. In light of that evidence, a defense of others instruction was inappropriate as a matter of law.

The law to be charged is determined from the evidence presented at trial. State v. Long, 325 S.C. 59, 480 S.E.2d 62, 64 (1997). The purpose of a jury instruction is to aid the jury in arriving at a correct verdict, and only the law applicable to the case should be charged. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802, 804 (2002). It is error to give instructions which are calculated to confuse or mislead the jury, and instructions that do not fit the facts of the case may serve only to confuse the jury. *Id.*

Under the defense of others theory, the defendant is not guilty if he acts in defense of a friend, relative or bystander if that friend, relative or bystander would likewise have the right to act in self-defense. State v. Starnes, 340 S.C. 213, 531 S.E.2d 907, 913 (2000). To warrant a jury charge on defense of others, there must be evidence the defendant was lawfully defending others. *Id.*

Self-defense in South Carolina requires evidence of four elements: 1) the defendant was without fault in bring on the difficulty; 2) the defendant was in actual imminent danger

of death or serious bodily injury, or actually believed he was; 3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief and the circumstances were such as would warrant the person to act in order to save himself; and 4) the defendant had no other probable means of avoiding the danger. State v. Slater, 373 S.C. 66, 644 S.E.2d 50, 52 (2007). The defense of others falls under the rubric of self-defense, and a defendant asserting he acted in defense of another steps into the shoes of the person he is defending, and may only do what that person might lawfully do in his own defense. 40 C.J.S. Homicide §161 (2007).

Thus, to warrant a defense of others jury instruction in this case, there had to be evidence establishing Robinson had a right to do what Mercer did when he attacked Brown. The undisputed evidence established, however, that: 1) there were no problems or threats of harm between Robinson and Brown prior to January 14, 2004; 2) Mercer instigated the confrontation between Robinson and Brown by telling Robinson that Brown wanted to jump him, and Robinson confronted Brown only because of what Mercer told him; 3) Mercer brought shanks into the recreation area that day and then struck the first blow of the fight; and 4) Mercer chased Brown when he tried to run away, and he continued the fight inside the bathroom. (R., pp. 22-34, 47-65, 78-93, 104-106, 110-116, 120-128). Since Mercer was personally responsible for instigating the confrontation and Robinson was the initial aggressor when he confronted Brown, Mercer could not show he and Robinson were "without fault" in bringing on the situation. Therefore, Mercer could not meet the first requirement for a defense of others assertion.

In addition, even assuming Mercer's claim that Brown was planning to attack Robinson was true, both Mercer and Robinson could have avoided the potential danger by

simply reporting the alleged threat to jail officials. Rather than try to avoid the danger, however, Mercer was instrumental in creating it and continuing then it after Brown ran away. Since Robinson and Mercer were both at fault in bringing on the difficulty, and they had other means to avoid the danger, Mercer's defense of others claim was specious on its face.

The undisputed evidence at trial conclusively established Mercer was directly responsible for the confrontation between Robinson and Brown, and actually started the fight that followed. Further, the fact that he threatened Brown the night before, and then brought shanks to the yard and used them when he attacked Brown, indicates Mercer instigated the confrontation as an opportunity for him to carry out his own threats against Brown. Therefore, the evidence did not support a defense of others jury instruction as a matter of law, and the Court of Appeals properly affirmed the circuit court's refusal to give such a charge.

CONCLUSION

Based on the foregoing, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DEBORAH R.J. SHUPE
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Fifth Judicial Circuit

BY: Deborah R.J. Shupe
DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

August 31, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
Larry R. Patterson, Circuit Court Judge

THE STATE,

Respondent,

vs.

KEVIN J. MERCER,

Petitioner.

PROOF OF SERVICE

I, ELLEN R. DUBOIS, certify that I served Respondent's **Return to Petitioner's Petition for Writ of Certiorari** on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

Robert M Dudek, Esquire
Deputy Chief Appellate Defender for Capital Appeals
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 31st day of August, 2009.

Ellen R. DuBois

ELLEN R. DUBOIS
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

RS ORIGINAL 385

SCANNED

FORM 5

FILED

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

2010 APR 21 A 11:28

A TRUE COPY
BETH A. CARROLL
CLERK OF COURT
LEXINGTON CO. S.C.C.P., G.S. & P.C.

Kevin J. Mercer #6021)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2010CP3201668

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Correctional Institution

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

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) Assault and battery with intent to kill (indictment number unknown)

   (b) Carrying or concealing a weapon by an inmate (indictment number unknown)

   (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

   (a) March 13, 2006 - 12 years

Revised 3/2003

VW

(b) March 13, 2006 - 5 years, concurrent

(c) _____

2010CP3201668

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. The South Carolina Court of Appeals

ii. The South Carolnia Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. Certiorari denied

iii. _____

(c) the date of each such result:

i. February 23, 2009

ii. ~~Unknown~~ Jan. 22, 2010

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion No. 2009-UP-093

ii. unknown

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) Ineffective assistance of counsel

2010CP3201668

(b) _____

(c) _____

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

(a) Failure to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? none other than direct appeal

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no

(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. n/a

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

2010CP3201668

i. ____
ii. ____
iii. ____
iv. ____

(d) the date of each such disposition:

i. ____
ii. ____
iii. ____
iv. ____

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

i. ____
ii. ____
iii. ____
iv. ____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

no

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

(a) which grounds have been presented:

i. n/a
ii. ____
iii. ____

(b) the proceedings in which each ground was raised:

i. ____
ii. ____
iii. ____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

(b) _____

(c) _____

2010CP3201668

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. Melissa J. Kimbrough, 1720 Main Street, Suite 106, Columbia, SC 29201

ii. Robert M. Dudek, P.O. Box 11589, Columbia, SC 29211

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial

ii. Appeal

iii. _____

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

New trial

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

no

390

2010CP3201668

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of)

I, , 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.

Kevin L Mercer

SWORN to and subscribed before me this 15th day of April, 2010.

Jill A. Rider (L.S.)
Notary Public

My Commission Expires: 10-19-16

FILED
2010 APR 21 A 11:27
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2010CP3201668

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

I, Kevin Mercer, 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.

Kevin D Mercer
Applicant

SWORN or affirmed to and subscribed before me this 15th day of April, 2010.

Jill A. Rider
Notary Public

My Commission Expires: 10-19-16

FILED
IN
2010 APR 21 A 11:27
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

COPY

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	
	)	
Kevin Mercer, #6021,	)	C/A No. 2010-CP-32-1668
	)	
Applicant,	)	
v.	)	**RETURN**
	)	
The State of South Carolina,	)	
	)	
Respondent.	)	
	)	

NE

Respondent, above-named, here by make a Return to the application for post-conviction relief ("APCR"), filed by Kevin Mercer ("Applicant") on April 21, 2010. This APCR stems from a conviction for Assault and Battery with Intent to Kill ("ABWIK").

I. Procedural History

The Applicant is currently confined at the Lieber Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Lexington County. Applicant was indicted by the Lexington County Grand Jury during the August 2004 Term for Carrying or Concealing Weapon by Inmate (2004-GS-32-3096), and during the March 2006 Term for Assault and Battery with Intent to Kill (2006-GS-32-0553).[1] Applicant was represented by Melissa J. Kimbrough, Esquire. The State was represented by Assistant Solicitors Samuel R. Hubbard, III, Esquire and David Shawn Graham, Esquire, of the Eleventh Judicial Circuit. On March 13 ,2006, Applicant proceeded to a trial by a jury and was found guilty of both charges. (Tr. 231). The Honorable Larry R. Patterson, Circuit Court Judge, sentenced Applicant to twelve (12) years confinement on the ABWIK

[1]Applicant was also indicted for Lynching, Second Degree. This charge was dismissed at trial when the trial judge granted Applicant's directed verdict motion on the charge. (Tr. 174).

(Copy)

conviction and five (5) years confinement on the Carrying/Concealing Weapon by Inmate conviction. (Tr. 234).

Applicant timely filed a Motion for a New Trial Pursuant to Rule 29 on March 17, 2006. In the Motion, counsel Applicant argued he was entitled to a new trial due to the trial court's denial of his request for a self-defense and defense of other charges, along with other charges reelvant to his right to act on appearances and to possess a weapon for the purposes of self-defense. This Motion was denied by an Order filed on March 30, 2006. In the Order, the trial court stated the evidence in Applicant's case did not warrant a self defense or defense of others charge. The testimony revealed that Applicant chased the victim and assaulted him with a weapon known as a shank. The charge as given was appropriate in this case, and the motion for a new trial was DENIED.

Direct Appeal

A timely Notice of Appeal was filed and served with the South Carolina Court of Appeals on April 25, 2006.[2] On appeal, Applicant was represented by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

Applicant's appeal was perfected with the filing of a Final Brief of Appellant on May 12, 2008. In his Brief, Applicant asserted that defense counsel correctly argued there was evidence Applicant intervened in the prison fight to prevent another inmate from being injured. That evidence entitled Applicant to a jury instruction on the defense of others. The State, through Assistant Attorney Deborah R.J. Shupe, Esquire, filed its Final Brief of

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[2]The Notice of Appeal indicates that counsel received notice of the ruling on the Motion for a New Trial on April 24, 2006.

Respondent on May 12, 2008. Applicant, through Mr. Dudek, also filed his Final Reply Brief of Appellant on May 12, 2008.

The South Carolina Court of Appeals issued an opinion affirming the convictions on February 23, 2009. (App. 1-2). Counsel for Applicant filed a Petition for Rehearing on March 10, 2009. (App. 3-6). The petition for rehearing was denied by the South Carolina Court of Appeals on May 5, 2009. Applicant subsequently filed a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court on August 4, 2009. In the Petition for Writ of Certiorari, Applicant argued the Court of Appeals erred by holding there was no evidence entitling Applicant to a jury instruction on the defense of others. There was evidence Applicant intervened in the prison fight to prevent another inmate from being injured. That evidence entitled Applicant to a jury instruction on the defense of others. The State filed its Return to the Petition for Writ of Certiorari on August 31, 2009. In a letter Order dated January 22, 2010, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on March 24, 2010.

Attached herewith and incorporated herein by reference are the following documents:[3]

1. Trial Transcript;
2. Post trial motions and orders
3. Notice of Appeal
4. Record on Appeal;
5. Final Brief of Appellant;

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[3] Respondent is only sending the attachments to the Clerk of Court. Counsel for Applicant were mailed copies of these attachments on January 20, 2010.

6. Final Brief of Respondent;

7. Final Reply Brief of Appellant;

8. Petition for Writ of Certiorari;

9. Appendix to Petition for Writ of Certiorari;

10. Return to Petition for Writ of Certiorari;

11. South Carolina Supreme Court Letter Order dated January 22, 2010;

12. Remittitur;

13. Records of the Lexington County Clerk of Court regarding subject convictions;

14. Applicant's records from the South Carolina Department of Corrections.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel. Specifically, Applicant asserts that counsel failed to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident.

III.

Pursuant to the doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner

bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial conclusively demonstrate that counsel was not deficient in her performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record demonstrates that Applicant's attorney was diligent in her representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). However, the allegation of ineffective assistance of counsel possibly raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed, or in the alternative that its motion for a more definite statement be granted.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

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

By: _____
ATTORNEYS FOR RESPONDENT

August 6, 2010.

COPY

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Return*** by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Kevin Mercer, #6021
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

This 6th day of August, 2010.

ALPHONSO SIMON, JR.

COPY

STATE OF SOUTH CAROLINA **COUNTY OF LEXINGTON**	**IN THE COURT OF COMMON PLEAS** **11TH JUDICIAL CIRCUIT**
Kevin Mercer, #360547 **Applicant,** **v.** **The State of South Carolina,** **Respondent.**	**C/A No. 2010-CP-32-1668**

2017 JUN 29 PM 2:09
IER
OURT
SC

Amended Application for Post-Conviction Relief

1. Place of Detention: Broad River Correctional Institution, 4460 Broad River Rd, Columbia, SC 29210

2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions

3. Name of co-defendant if any: Marcus A. Robinson

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
   a. 06-GS-32-0553 (assault & battery with intent to kill);
   b. 04-GS-32-3096 (carrying or concealing a weapon by inmate)

5. The date upon which sentence was imposed and the terms of the sentence:
   a. March 13, 2006- 12 years
   b. March 13, 2006- 5 years

6. A finding of guilty was made after a plea of not guilty.

7. The applicant did appeal from judgment of conviction and sentence.

8. The Courts to which applicant appealed:

   a. The South Carolina Court of Appeals
   b. The South Carolina Supreme Court

   The result in each Court to which applicant appealed:

   a. Affirmed

b. Petition for Writ of Certiorari Denied

The date of each result:

a. February 23, 2009

b. January 22, 2010

Citations of any written opinion or orders entered pursuant to such results:

a. Unpublished Opinion No. 2009-UP-093

9. Not Applicable

10 & 11. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I §§ 3 and 14 of the South Carolina Constitution when:

(1) Counsel was conflicted. Counsel was preoccupied with applicant's capital case and failed to provide the best possible representation for applicant's assault and battery with intent to kill case. When the allegation of conflicted counsel is raised as a basis for a claim of ineffective assistance of counsel, a finding that an attorney operated under an actual conflict of interest that adversely affected the attorney's performance may modify the two-pronged standard for ineffective assistance of counsel found in *Strickland v. Washington* by presuming prejudice in certain situations. *Williams v. Moody*, 287 Ga. 665, 692, (2010). Applicant did not testify in his own defense regarding his self-defense or defense of other claim, due to pending death penalty case. When conflicts are alleged to have impaired counsel's performance, the defendant's burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done. *United States v. Taylor,* 139 F.3d 924, 930 (D.C.Cir.1998).

(2) Counsel failed to thoroughly investigate and counsel's conduct fell short of the standards for capital defense work articulated by the American Bar Association standards. At every stage of proceedings, counsel has a duty to investigate the case thoroughly. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.7 p. 1016-1019, 1021 (2003). It is important for defense counsel to take seriously the possibility of the client's innocence, to scrutinize carefully the quality if the state's case and to investigate and re-investigate all possible defenses. *Id. at 1018.* Counsel failed to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident

(3) Counsel was not afforded ample time for investigation and preparation. The *Cronic* test for ineffective counsel has five criteria: "'(1) [The] time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. 466 U.S. 648, 652 (1984). Counsel was appointed to this case officially on or after February 23, 2006. Trial for this case was set for March 13, 2006, while counsel was preparing for applicant's death penalty case set for April 17, 2006. Applicant's case was complex legally and factually and required thorough investigation and preparation.

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

a. Any petition in a State Court under South Carolina? Yes

b. Any petition in State of Federal Courts for habeas corpus or post-conviction relief? Yes

c. Any petition in the United State Supreme Court for certiorari other than petitions, if ant already specified in (8)? No

d. Any other petitions, motions, or applications in this court or any other Court? No

13. The specific nature:

a. Application of Post-Conviction Relief

b. The Court of Common Pleas, Lexington County

c. Denied

d. August 6, 2010

14. Yes.

15. a. ineffective assistance of counsel

b. failure to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident.

16. Applicant was previously represented by counsel.

17. & 18. Applicant was represented at trial by Melissa J. Kimbrough, Esquire, 1720 Main Street, Suite 106, Columbia, SC 29201

Applicant was represented on appeal by Robert M. Dudek, Esquire, 1330 Lady Street, Columbia , SC 29201

19. Applicant seeks a new trial

20. No

Dated this 29 day of June, 2017.

Respectfully Submitted,

S. Boyd Young, Esq.
SCCID – Capital Trial Division
1330 Lady St., Suite 401
Columbia, SC 29201

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
	)	2010-CP-32-1668
Kevin Mercer, #6021,	)	
	)	
Applicant,	)	
	)	**RETURN TO AMENDED**
v.	)	**APPLICATION FOR POST-**
	)	**CONVICTION RELIEF**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Comes now Respondent, above named, by and through the Office of the South Carolina Attorney General, and hereby files its Return to the Amended Application for Post-Conviction Relief filed by Applicant on June 29, 2017. In support of this response, Respondent would show this Court:

I. PROCEDURAL HISTORY/BACKGROUND

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lexington County Clerk of Court's orders of commitment. Applicant was indicted by the Lexington County Grand Jury during the August 2004 Term for Lynching, Second Degree (2004-GS-32-3097) and Carrying or Concealing Weapon by Inmate (2004-GS-32-3096); and during the March 2006 Term for Assault and Battery with Intent to Kill (2006-GS-32-0553). Applicant was represented by Melissa J. Kimbrough, Esquire. The State was represented by Assistant Solicitors Samuel R. Hubbard, III, Esquire and David Shawn Graham, Esquire, of the Eleventh Judicial Circuit. On March 13, 2006, Applicant proceeded to a trial by a jury before the Honorable Larry R. Patterson, Circuit Court Judge. Judge Patterson granted a motion for a directed verdict on the lynching charge after the State rested its case. (Tr. 174). Applicant was found guilty of the other two charges. (Tr. 231). Judge Patterson sentenced Applicant to twelve

(12) years confinement on the ABWIK conviction and five (5) years confinement on the Carrying/Concealing Weapon by Inmate conviction. (Tr. 234).

Applicant timely filed a Motion for a New Trial Pursuant to Rule 29 on March 17, 2006. In the Motion, Applicant argued he was entitled to a new trial due to the trial court's denial of his request for a self-defense and defense of other charges, along with other charges relevant to his right to act on appearances and to possess a weapon for the purposes of self-defense. This Motion was denied by an Order filed on March 30, 2006. In the Order, the trial court stated the evidence in Applicant's case did not warrant a self-defense or defense of others charge. The testimony revealed that Applicant chased the victim and assaulted him with a weapon known as a shank. The charge as given was appropriate in this case, and the motion for a new trial was DENIED.

Applicant timely served and filed a Notice of Appeal. On appeal, Applicant was represented by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

Applicant's appeal was perfected with the filing of a Final Brief of Appellant on May 12, 2008. In his Brief, Applicant asserted that defense counsel correctly argued there was evidence Applicant intervened in the prison fight to prevent another inmate from being injured. That evidence entitled Applicant to a jury instruction on the defense of others. The State, through Assistant Attorney Deborah R.J. Shupe, Esquire, filed its Final Brief of Respondent on May 12, 2008. Applicant, through Mr. Dudek, also filed his Final Reply Brief of Appellant on May 12, 2008.

The South Carolina Court of Appeals issued an opinion affirming the convictions on February 23, 2009. (App. 1-2). Counsel for Applicant filed a Petition for Rehearing on March 10, 2009. (App. 3-6). The petition for rehearing was denied by the South Carolina Court of

Appeals on May 5, 2009. Applicant subsequently filed a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court on August 4, 2009. In the Petition for Writ of Certiorari, Applicant argued the Court of Appeals erred by holding there was no evidence entitling Applicant to a jury instruction on the defense of others. There was evidence Applicant intervened in the prison fight to prevent another inmate from being injured. That evidence entitled Applicant to a jury instruction on the defense of others. The State filed its Return to the Petition for Writ of Certiorari on August 31, 2009. In a letter Order dated January 22, 2010, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on March 24, 2010.

II. ATTACHMENTS[1]

For the purpose of this Return, the Respondent incorporates the following records:

1. Trial Transcript;
2. Post trial motions and orders
3. Notice of Appeal
4. Record on Appeal;
5. Final Brief of Appellant;
6. Final Brief of Respondent;
7. Final Reply Brief of Appellant;
8. Petition for Writ of Certiorari;
9. Appendix to Petition for Writ of Certiorari;
10. Return to Petition for Writ of Certiorari;
11. South Carolina Supreme Court Letter Order dated January 22, 2010;

[1] Attachment Nos. 1-14 were filed and served with the Return to the original Application for Post-Conviction Relief. These documents are referred to by reference in this Return. Attachment No. 15 is included with this filing.

12. Remittitur;

13. Records of the Lexington County Clerk of Court regarding subject convictions;

14. Applicant's records from the South Carolina Department of Corrections.

15. Affidavit from South Carolina Department of Corrections

The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III. CLAIMS RAISED IN AMENDED APPLICATION

In his application for post conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

> 10(1) Counsel was conflicted. Counsel was preoccupied with applicant's capital case and failed to provide the best possible representation for applicant's assault and battery with intent to kill case. When the allegation of conflicted counsel is raised as a basis for a claim of ineffective assistance of counsel, a finding that an attorney operated under an actual conflict of interest that adversely affected the attorney's performance may modify the two-pronged standard for ineffective assistance of counsel found in Strickland v. Washington by presuming prejudice in certain situations. Williams v. Moody, 287 Ga. 665, 692, (2010). Applicant did not testify in his own defense regarding his self-defense or defense of other claim, due to pending death penalty case. When conflicts are alleged to have impaired counsel's performance, the defendant's burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done. United States v. Taylor, 139 F.3d 924, 930 (D.C.Cir.1998).
>
> 10(2) Counsel failed to thoroughly investigate and counsel's conduct fell short of the standards for capital defense work articulated by the American Bar Association standards. At every stage of proceedings, counsel has a duty to investigate the case thoroughly. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.7 p. 1016-1019, 1021 (2003). It is important for defense counsel to take seriously the possibility of the client's innocence, to scrutinize carefully the quality if the state's case and to investigate and re-investigate all possible defenses. Id. at 1018. Counsel failed to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident.
>
> 10(3) Counsel was not afforded ample time for investigation and preparation. The Cronic test for ineffective counsel has five criteria: "'(1) [The] time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. 466 U.S. 648, 652 (1984). Counsel was appointed to this case officially on or after February 23, 2006. Trial for this case was set for March 13, 2006, while counsel was

preparing for applicant's death penalty case set for April 17, 2006. Applicant's case was complex legally and factually and required thorough investigation and preparation.

IV.

The State denies the allegations for relief presented in this application.

In Applicant's first allegation, he asserts trial counsel was ineffective because she had a conflict of interest as a result of counsel's preparation for Applicant's death penalty trial when appointed to this criminal trial. This allegation is without merit. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

"[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted).

Respondent submits Applicant is not entitled to relief upon this claim. Applicant has failed to establish there was an actual conflict of interest. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants. State v.

Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. Gregory, 364 S.C. at 152-53, 612 S.E.2d at 450; see Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993)(citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). However, a defendant need not demonstrate prejudice if there is an actual conflict of interest. Gregory, 364 S.C. at 153, 612 S.E.2d at 450; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)(citing Cuyler, 446 U.S. at 348-350, 100 S. Ct. at 1718-19).

[A]n actual conflict of interest occurs:

> ... when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)). Here, Applicant cannot show trial counsel had divided loyalties. Applicant's allegation fails to reflect that trial counsel owed duties to a party whose interests were adverse to Applicant's interests. Since there was no conflict of interest, this claim for relief should be denied and dismissed with prejudice. The State submits it is entitled to summary dismissal of the application.

Should this Court disagree, our Supreme Court has determined that if an issue of ineffective assistance of counsel raises a question of fact that may not be completely refuted by the record, it will require an evidentiary hearing. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983). Therefore, if this Court does not grant summary dismissal as requested above, the State will request an evidentiary hearing on this issue.

V.

In Applicant's second allegation, he asserts a claim ineffective assistance of trial counsel. In explanation of his allegation, Applicant contends counsel "failed to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident." This allegation is without merit. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. Respondent submits that Petitioner's second allegation of ineffective assistance is without merit. This second allegation of error is too vague for Respondent to offer anything more than a general denial. Based upon the allegation presented, it is not clear what additional investigation should have been done, and it fails to assert what additional information could have been obtained with additional investigation. Applicant is obligated to state his allegations with specificity, including supporting facts. S.C. Code § 17-27-50 (1976). The State submits it is entitled to summary dismissal of the application based on Applicant's default in this regard.[2]

[2] Respondent would also note that the reference to the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases is not applicable in this action as this was not a capital case.

Should this Court disagree, our Supreme Court has determined that if an issue of ineffective assistance of counsel raises a question of fact that may not be completely refuted by the record, it will require an evidentiary hearing. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983). Therefore, if this Court does not grant summary dismissal as requested above, the State will request an evidentiary hearing on this issue.

VI.

In Applicant's third allegation, he asserts trial counsel was not afforded ample time for investigation and preparation. This allegation is without merit. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. Respondent submits that Petitioner's third allegation of ineffective assistance is without merit. The transcript of the trial reflects that counsel did a more than reasonable job of defending Applicant at trial. Further, trial counsel was able to obtain a directed verdict upon one of the charges, and vigorously defended throughout the trial. Our Supreme Court has determined that if an issue of ineffective assistance of counsel raises a

question of fact that may not be completely refuted by the record, it will require an evidentiary hearing. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983). Therefore, if this Court does not grant summary dismissal as requested above, the State will request an evidentiary hearing on this issue.

VII.

This Application may be moot because Applicant has completed service of the sentences of the two convictions challenged in this action. As noted above, Applicant received a five year sentence for the Carrying/Concealing Weapon by Inmate conviction and a twelve year sentence for the ABWIK conviction, both to be served concurrently. (Tr. 234). Applicant completed service of the ABWIK conviction on December 3, 2016.[3] (Attachment No. 15). A "'petitioner has standing to petition for PCR if he is in custody or the results of his prior conviction still persist.'" Jackson v. State, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997) (quoting Jones v. State, 322 S.C. 101, 102, 470 S.E.2d 110, 110 (1996); see also McDuffie v. State, 276 S.C. 229, 277 S.E.2d 595 (1981). For an applicant to maintain an action when the applicant is no longer incarcerated on the conviction(s) challenged, the applicant must demonstrate he is prejudiced by persistent results of his conviction. Jackson, 331 S.C. at 489, 489 S.E.2d at 916. Petitioner did not present any argument in the Amended Application asserting he is prejudiced by persistent results of his conviction.[4] Thus, this action may be moot.

VIII.

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

---

[3] Applicant continues to serve a sentence on an armed robbery conviction, and he is awaiting resentencing on a murder conviction.

[4] Respondent acknowledges that Applicant may have an argument to demonstrate the prejudice needed to allow this action to go forward. Respondent submits any argument should be placed on the record at the scheduled hearing.

IX.

WHEREFORE, premises considered, the Respondent requests a more definite statement regarding each of the allegations presented in this Application. Respondent further requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-6305

July 31, 2017

ATTACHMENT NO. 15

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Candice Cannon, who appeared personally before me, affirms and states the following:

1. I am employed by the South Carolina Department of Corrections in the Division of Institution Records.

2. I was asked to review the records the convictions and sentences of Kevin Mercer, SCDC #360547.

3. A review of Mr. Mercer's records show he is currently incarcerated for a sentence for thirty years confinement for an Armed Robbery conviction he received on April 22, 2006. The indictment number for that conviction is 2003-GS-32-409.

4. Mr. Mercer had a prior conviction for Assault and Battery with Intent to Kill. That convictions was upon indictment number 2006-GS-32-553. Our records show that he received a twelve year sentence for the Assault and Battery with Intent to Kill conviction. Mr. Mercer completed service of his sentence for the Assault and Battery with Intent to Kill conviction on December 3, 2016. A copy of the conviction summary reflecting the completion of his service of his sentence for this conviction is attached hereto as Exhibit A.

Further affiant sayeth naught.

Candice Cannon
Candice Cannon

Sworn to and subscribed before me
This 17th day of July, 2017.

Angel Boyd
Notary Public for the State of South Carolina

My commission expires: 9/24/2021

EXHIBIT A

CMTI100D SCDC OFFENDER MANAGEMENT SYSTEM 07/14/17
OMCOMITA COMMITMENT APPLICATION C057846
CONVICTION SUMMARY

SCDC# > 360547 CURR LOC: MCCORMIC
MERCER, KEVIN JERMAINE SCDC CLASSIFICATION..: VIOLENT
OFFENDER TYPE: ADULT-STRAIGHT SENTENCE

	NUM	CONVICTION OFFENSE	INCARC SENT YRS	MO	DYS	SENT DATE	SENT START	PROJ COMP	CONV STAT	VIO IND
_ *	S00003	FIREARMS PROVISION	005	00	000	04/22/06	04/22/06	03/09/2049	ACT	N N
_	S00002	ARMED ROBBERY	030	00	000	04/22/06	04/22/06	03/10/2044	ACT	V V
_	S00001	ASSLT & BATT W/INTNT	012	00	000	03/14/06	03/14/06	12/03/2016	ACT	V V

PAGE: 0001

MAKE A SELECTION AND PRESS <ENTER>...
PF3-ADD PF4-MODIFY/REVOKE PF6-DISPLAY CONSEC PF9-DETAIN PF12-SUMREPT

```
CMTI200D                SCDC OFFENDER MANAGEMENT SYSTEM                 07/14/17
OMCOMITA                    COMMITMENT APPLICATION                      C057846
SCDC #: 360547                      INQUIRY                  CURR LOC: MCCORMIC
MERCER, KEVIN JERMAINE                    NONCONFORM SENT: N   RTRN TO COURT: N
OFFENDER TYPE: ADULT-STRAIGHT SENTENCE
CONVICTION NUM: S00001  INDICT NUM: 06-GS-32553    WARRANT NUM:
DATE SENTENCED..: 03/14/2006 JUDGE LAST..: PATTERSON          FI: L
STATUTE: 16-3-620                  CDR CODE.: 0014  GPS IND: N
OFFENSE: 1399  ASSLT & BATT W/INTNT KILL      OFFENSE DATE: 01/31/2006
CHARACT: F  FACILITATION OF   COUNTS: 01      OFFENSE CNTY: 32   LEXINGTON
PLEA...: G  GUILTY                        TYPE OF COURT....: 01   GENERAL SESSIO
TYPE SENTENCE... : S  ADULT-STRAIGHT      SCDC JURIS DATE..: 03/14/2006
TOTAL SENTENCE...: 012 00 000             MAND SERV REQMT..: 010 02 012
INCARC SENTENCE..: 012 00 000             PAROLE FACTOR....: 2  1/3 SENT. REQ.
PROBATION SENT...: 000 00 000             PAROLE SERV REQMT: 999 99 999
HIP SENT.........: 000 00 000
RESTITUTION REQMT: N  AMT:            .00 JAIL CRED: 00000   EXTRA CRED: 00000
CONVICTION STATUS: AC   ACTIVE            SENT START DATE: 03/14/2006 DOM.IND:
CONSECUTIVE IND..: N   SPOUSE ABUSE:      STATUTE CLASSIFICATION...: VIOLENT
DNA OFFENSE IND..: Y   EEC ELIG: Y        SCDC CLASSIFICATION......: VIOLENT
SEX REG: N  PRED OFF: N     LAST UPDATE:                          DATE: 00/00/00
NO PAROLE: NO PAROLE        CREATED BY.: D BOWMAN                 DATE: 07/03/14

 PF8-NEXT CONVICTION        PF9-DETAIN       PF4-RESTITUTION PAID(FA ONLY)
```

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
	)	2010-CP-32-1668
Kevin Mercer, #6021,	)	
	)	
Applicant,	)	
	)	AFFIDAVIT OF SERVICE BY MAIL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return to Amended Application for Post-Conviction Relief,** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

S. Boyd Young, Esq.
Capital Trial Division
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

DATED this 31st day of July, 2017.

Donna D'Alessio
Legal Assistant to Alphonso Simon, Jr.
Assistant Attorney General

State of South Carolina County of Lexington Kevin Mercer, Applicant/Plaintiff, vs. State of South Carolina, Respondent/Defendant.	)	In the Court Of Common Pleas Case No.: 2010-CP-32-01668 Transcript of Record

February 22, 2018

Lexington, South Carolina

BEFORE:

The Honorable J. Derham Cole, Judge

APPEARANCES:

S. Boyd Young, Esquire
Attorney for the Applicant/Plaintiff

Al Simon, Assistant Attorney General
Attorney for the Responsdent/Defendant

ALSO PRESENT:

Kevin Mercer

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PCR HEARING

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EXHIBITS

NO.	DESCRIPTION	ID	EVDS.
1	1/13/06 Transcript copy	3	15
2	2/23/06 Transcript copy	3	15
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Thereupon, the following proceedings were had,

(Whereupon, Applicant/Plaintiff Exhibit #1, #2, #3 marked for identification.)

THE COURT: All right. This is Kevin Mercer.

MR. YOUNG: We are without Mr. Mercer again this morning, Your Honor.

THE COURT: What happened?

MR. YOUNG: I don't know. He's not here yet from Lee.

THE COURT: But he's being transported?

MR. YOUNG: Yes, sir. I haven't heard like I did yesterday that he was refusing or anything like that.

MR. SIMON: Yes, sir. We contacted SCDC yesterday to let them know to get him here. As far as we know he's supposed to be here.

DEPUTY: He's not here.

THE COURT: Let's go to the next one.

MR. YOUNG: I don't know if the Court wants to take Ms. Armstrong's testimony.

THE COURT: Do you want to go ahead?

MR. YOUNG: We can.

THE COURT: Are you calling her?

MR. YOUNG: The State has asked permission to call her out of order.

THE COURT: Okay. That's fine. I don't care how

you do it.

MR. SIMON: Okay. Your Honor, this case is Kevin Mercer versus State of South Carolina. It's a Lexington County case. The case number is 2010-CP-32-1668. These convictions -- He's challenging his convictions for assault and battery with intent to kill and carrying and concealing a weapon by an inmate. These convictions stem from an assault that occurred in the Lexington County Detention Center that occurred while Mr. Mercer was awaiting trial for capital murder and for armed robbery. This case was tried one month before that.

Just to give a little bit of it, he was tried on March 13th through 14th, 2006 before Judge Patterson. He was represented by Lisa Armstrong who was then Lisa Kimbrough and actually with those charges he also had a charge for lynching in the second degree. The lynching charge was dismissed after the State's case on a directed verdict motion. He was sentenced to 12 years for the assault and battery with intent to kill and five years for the carrying and concealing of a weapon by an inmate.

There was a motion for a new trial filed shortly after the trial and that motion was denied on March 30th, 2006. It was appealed to the South Carolina Court of Appeals. The convictions were affirmed on appeal. He did seek certiori from the South Carolina Supreme Court

and the South Carolina Supreme Court denied cert. He filed this application, the original application on April 20th, 2010. An amendment was filed June 29th, 2017 and my understanding there are, in the amended application there are three claims that are raised. I do have a judge's packet here if I may approach, Your Honor.

THE COURT: Please.

MR. SIMON: In the judge's packet we have the original application, the return to that. Along with that the amended application and a return to the amended application along with attachments which include the trial transcript, the appellate briefing, the record on appeal so that the transcript is actually in that box twice, along with other state court records, indictments and so forth.

Also, just so it's on the record, this was set for hearing in December and the reason I'm addressing the fact that it was set for hearing in December, in the return to the amended application the State did argue that this case could be moot because of the fact he's already served the sentences for these convictions but on the record opposing counsel set forth that these convictions could still have an impact on his capital resentencing because in the capital trial it was, the sentencing in that case was reversed on PCR and that was

upheld on appeal and he's awaiting resentencing for the capital case. Judge Maddox did find that it was not moot in light of that and therefore we're just going forward on the evidentiary hearing.

THE COURT: All right. Mr. Young, Mr. Mercer is not here presently but this matter was also, for the record, scheduled for yesterday and Mr. Mercer was not present then but that was not due to the fault of his transportation officers yesterday. Mr. Young, please give us the information regarding Mr. Mercer's failure to appear yesterday for the benefit of the record.

MR. YOUNG: Yes, sir. Mr. Mercer, part of his, the reason for his reversal of his capital sentence is that he was found to be intellectually disabled. I believe that has bearing on his failure to appear yesterday. He didn't understand how these charges would in any way impact or have effect on his current capital resentencing so he said it's not going to affect that. I'm not coming. I have already served the sentence. They can't do anything more to me. This is despite having sat through a hearing with myself, the State and a judge where we went through and explained how these charges do have an impact on his capital case. Once I explained that these charges are a strike and are relevant to his capital resentencing case, he said, oh, I do want to be

there.

THE COURT: And that was the result of me allowing this matter to be continued until today to give you that opportunity to go Lee Correctional to talk to Mr. Mercer to explain to him the ramifications of coming and participating or refusing to appear.

MR. YOUNG: Yes, sir.

THE COURT: Okay. So that's why it's been delayed and rescheduled for this morning.

MR. YOUNG: For the record, I drove straight from here to Lee, met with Mr. Mercer and came straight back here and met with the Court and informed the Court of what his decision was in the afternoon.

THE COURT: So Mr. Mercer is not here presently. That's not because he refuses to appear. It's because his transportation officers have not arrived yet; is that fair?

MR. YOUNG: That's correct.

THE COURT: But in any event, you and the Attorney General are agreeing to go forward now with the testimony of Ms. Armstrong in the absence of Mr. Mercer?

MR. YOUNG: That's correct.

THE COURT: You don't need Mr. Mercer here to hear Ms. Armstrong's testimony?

MR. YOUNG: No, sir.

THE COURT: Okay.

MR. SIMON: And, Your Honor, I just wanted to correct one thing regarding what happened in the capital post conviction relief action. Judge Barber did not find that he was intellectually disabled. He found that the investigation into intellectual disability was deficient and found that there was some prejudice but he did not find that Mr. Mercer was intellectually disabled. I just wanted to clarify that for the record.

MR. YOUNG: The sentence was reversed for failure to present the intellectual disability claim.

MR. SIMON: Yes. I just wanted to clarify it.

THE COURT: But the claims that have been made in no way affect his competency?

MR. YOUNG: No, sir.

THE COURT: Okay.

MR. SIMON: So, Your Honor, at this time the respondent would like to call Lisa Armstrong.

Thereupon,

MELISSA JANE ARMSTRONG

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. Once you're seated, state your full name for the record.

THE WITNESS: My name is Melissa Jane Armstrong.

MR. SIMON: May it please the Court.

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. SIMON:

Q. Ms. Armstrong, how are you currently employed?

A. I'm self employed. I'm a business owner.

Q. When did you stop practicing law?

A. I quit practicing law in 2014 when my husband and I bought a small retail business in Columbia.

Q. Can you tell us a little bit about your background as an attorney?

A. Yes. I practiced for basically 19 years and I started out doing mitigation work as a law clerk for John Glenn and the Death Penalty Resource Center and then I worked for the Office of Appellate Defense for about 18 months. I quit working in appellate defense when I was on the verge of giving birth to my second son. I stayed home and did varied part-time legal work for a number of years, five or six, and then I went into private practice. I did a lot of criminal defense and capital work. Then I ended up doing some family court work. Did some guardian cases and then three and a half year ago decided to go into a small business.

Q. Okay. And how did you come to be - how did you come to represent Mr. Mercer?

A. My recollection is that Mr. Mercer had a lawyer who was leaving the Lexington County Public Defender's Office. I

think it was Lisa McPherson maybe and so he needed another lawyer. I think she was going to do civil work and I may be confusing it because there were a couple of cases. There was the capital case and then there's the case that we're here for today and so they needed somebody to come in and be the second chair and so I wanted to do it. I thought it would be interesting. It was certainly what I was doing at the time so I was appointed.

Q. Okay. And do you recall when you were -- First, let's take a step back. When you said that you were appointed, was that to the murder case?

A. Correct. I was appointed to the capital case first and then later was appointed to the lynching case. I'm sorry. It's been so long I'm kind of confused on some of the steps here. I got appointed to Mr. Mercer's murder case and then I was appointed on this case that we're here for now.

Q. Do you recall when you were appointed on the murder case?

A. Only because I spoke to Mr. Young yesterday and I think my order of appointment was in January of 2006 maybe.

Q. Okay. Do you recall when you were appointed to this case?

A. It was very close to the time, prior to the time that it was tried, like a matter of weeks.

Q. Okay. Now, during your representation I guess when

you're working on the murder case, did you have any involvement in doing any investigation into the assault and battery, the lynching case?

A. Right. I mean, I think that, to me it made sense that I could possibly try the case that we're here for today because those facts were gonna come into play if we got to the sentencing phase in the capital murder and it was my strong suspicion that we were headed to a penalty phase. I did not think we would prevail, you know, the guilt or innocence phase which meant all of this additional information could potentially come out. So, yes. I was aware of those charges. I knew that they had happened pending, you know, between the time of his arrest and the point that led up to my being appointed. So, yes.

Q. Okay. Let's take a step back. When you were appointed on the murder case, do you recall if there were any discussions about when the lynching case was going to be tried at that point in time?

A. No. Because I wasn't appointed to the lynching at the time I was appointed to the murder. I was appointed to the lynching after I was appointed to the murder. When I was appointed to the murder, I don't recall specifically somebody saying, oh, by the way, they're gonna try this case on a certain date.

Q. Okay.

A. I will say this: I'm sorry to interrupt. It's been a long time. But at a certain point it became very clear that they wanted to try this case, the one we're here for before the capital trial.

Q. Okay. And let me just ask you this: In preparing for this hearing you haven't had the opportunity to review any of the transcripts from the murder case; is that correct?

A. No. It's been a long time.

Q. And so if there were some transcripts that indicated some discussions about when the lynching/assault and battery case was gonna be tried, you have not had an opportunity to review those, would that be --

A. No. No. Not in detail. I spoke to Mr. Young yesterday. It's very clear that at some point we had a hearing where it was discussed that, oh, by the way, the State wants to try this before they go to the capital trial. So, yes, I became aware of it.

Q. During your investigation into the facts regarding the assault and battery, did you have an investigator assisting you?

A. I'm sure we did.

Q. And were you able to speak with all of the witnesses you needed to speak with in preparation for that trial?

A. I thought so.

Q. Did you receive discovery from the State?

A. Yes.
Q. Did you have any issues with discovery?
A. I was not aware of anything that made me think, you know, there's a Brady violation or there's something. No. I mean, I thought I had all the information.
Q. And along with that within the discovery to your knowledge where you and co-counsel in the murder case, were y'all provided with the discovery that was given to the attorneys that were on the ABWIK case when they received it?
A. I believe so and I would tell you that once I was appointed to the ABWIK case, I got the discovery. I believe the ABWIK attorney provided me with their information as well so I may have had cross over. There may have been duplicate information.
Q. Okay. Did you have any issues in communicating with Mr. Mercer about any of the facts regarding the ABWIK case?
A. I didn't think so. I mean, it's pretty, you know. His version of events was very clear to me. He felt threatened. This was - it wasn't successful but his version was that it was essentially a self defense or defense of others case. I didn't feel like he had some other version that he wasn't sharing with me. I felt like he was forthcoming.
Q. In your opinion, was this a complicated case?
A. Really the only thing that makes it complicated and

maybe this is getting too bogged down in the minutia, but when you have a self defense case, typically you're talking about somebody who is just kind of out in the world, you know. They're at their house or they're in their yard or they're in somebody else's yard and so getting away, staying away, that sort of thing I think is a much easier thing to do. In a prison setting you're locked down, you know. You're there. So to me that made it a little more complicated.

Q. In terms of preparation for trial did you have any issues with -- Was there anybody that you wanted to talk to that you didn't have an opportunity to talk to?

A. I don't recall that, sir.

Q. And when it was called for trial, were you ready to go to trial?

A. I thought so at the time.

MR. SIMON: No further questions, Your Honor.

MR. YOUNG: May it please the Court.

THE COURT: Yes.

MR. YOUNG: Your Honor, I think we have agreed on these exhibits which I previously provided to the State. This is that January 13th transcript and February 23rd transcript and the March appointment order.

MR. SIMON: Yes. That actually reminds me. I forgot to note, Your Honor, in the judge's packet are also the January 13th and the February 23rd, 2006

transcripts from the murder trial.

MR. YOUNG: These are transcripts that I provided to the State in anticipation of using them as part of my PCR. I believe without objection I would move these three documents into evidence.

MR. SIMON: Yes. No objection.

MR. YOUNG: Petitioner's number 1 is a copy of the January 13th, 2006 transcript in front of now Justice Few regarding the capital case. Petitioner's Exhibit 2 is the February 23rd, 2006 transcript, again, on the capital case in front of Justice Few, and Petitioner's Exhibit number 3 is an appointment order signed by Judge Patterson on March the 8th and filed on March the 9th, 2006.

THE COURT: Have those already been marked?

MR. YOUNG: Yes, sir.

THE COURT: Are you going to be asking the witness about these transcripts?

MR. YOUNG: Yes, Your Honor. I have a copy for her to follow.

THE COURT: Okay. They're in.

MR. YOUNG: Okay.

CROSS EXAMINATION

BY MR. YOUNG:

Q. Ms. Armstrong, I'm gonna start by asking you some

questions about the hearing on January 13th, 2006 --

A. Okay.

Q. -- the day you got appointed.

A. All right.

Q. If I could get you to direct your attention to page 2, line 17. Can you tell me based on this transcript when you met Mr. Mercer?

A. Clearly I met him that morning.

Q. On the morning of January 13th --

A. Correct.

Q. -- the day that you were appointed to his capital murder trial?

A. Correct.

Q. And at that point in time at that hearing if you will flip to page 11, line 16, I believe that's when the lynching trial first came up. Can you tell us what that was, if that refreshes your recollection as to what happened?

A. Sure. Mr. Hubbard, line 16, page 11, says that Mr. Mercer has a pending lynching charge; that he received this charge subsequent to the underlying murder charge, and Mr. Hubbard says obviously it can have an impact on the capital case and they would like to proceed on the lynching charge as early as next month.

Q. On page 12 what was your response to Mr. Hubbard? Your response starts on line 5. I'm interested in line 8.

A. Sure. Okay. I'll go to that. Uhm, it says, any new charges that arise during the course we'll be responsible for handling. Uhm, we object to trying it so quickly and because we were trying to prepare for the capital case --

THE COURT: Pull that microphone toward you.

BY THE WITNESS:

A. I'm sorry. Anyway, we're going to be trying to prepare for a capital case and wedging in a lynching trial in the midsts of a less than a hundred day time span I think is a little unrealistic.

BY MR. YOUNG:

Q. So you said that you couldn't try the lynching case before the capital case?

A. Correct. I asked for more time. Right. At that time that was our position.

Q. And then I think halfway down the page starting on line 22, Mr. Hubbard said, well, it could be to the defendant's benefit to have a trial then and you had some response to that which is most of page 13. Can you tell us what your response was?

A. Yes. I said, no, it doesn't inure to the benefit of my client to try this case. Let's see. There are numerous witnesses.

Q. You said, I mean, lynching is a very serious charge, right?

A. Exactly.
Q. You said there were numerous witnesses?
A. Yep.
Q. You said I just got on the case five minutes ago.
A. Mm-hmm.
Q. You said there's no way we can prepare to try this case in February and as I believe I brought to the Court's attention I am lead in a capital PCR that has a hearing scheduled several months ago is scheduled to go February 20th in Orangeburg so there's no way that we are gonna be prepared to try the case with that level of complexity in a month.
A. Correct.
Q. You said, I think it's unreasonable and certainly would hurt Mr. Mercer because we have to get our investigation done, prepare the whole case, not just some little piece of it in the middle of, you know, preparing for a trial that has his life at stake.
A. Right. Exactly.
Q. Then your co-counsel, Mr. Littlejohn, sort of echoed what you had said to the court --
A. Yes, sir.
Q. -- along those same lines about being ready?
A. Yes, sir.
Q. Then skipping forward to page 17, line 9, at the time Judge, now Justice Few came up with a proposal, or I call

it a proposal, I don't know how you refer to it. Can you tell us what he said?

A. Uhm, he, well, I mean, the transcript speaks for itself, but what he says, I mean fundamentally what he says is, listen, if you try it and you get whatever verdict, it may be to your benefit because then at the penalty phase of the capital trial when you get there, instead of the jury essentially having to hear all this stuff, they're just gonna hear that he was convicted of something and therefore you kind of, you get to bypass the gory details essentially.

Q. That was your understanding of what his offer was?

A. Page 17.

Q. Yep. He said if you try it and get a guilty verdict, then all that has to be presented in the death penalty case is the fact of the conviction and the basic facts surrounding it which would be a very short presentation.

A. Correct. In other words, we get to kind of water it down.

Q. If you'll agree to try it in the short amount of time, it's gonna be to your benefit because I'm gonna limit what they can put in in the penalty phase of the capital case?

A. That was my understanding.

Q. Skipping over to page 20, he brought in the State to say that that was correct, right? That they could agree to

that?

A. Correct. Mr. Hubbard, I believe it's line 14 on page 20 is where he says, yes, sir, Your Honor. Yes, sir. As he represented that the co-defendant -- Okay. I'm sorry.

Q. On line 5 the court says, would it not be true that your presentation of the evidence concerning that crime would be as I suggested and Mr. Hubbard said yes, sir?

A. Yes, sir. I'm sorry. I was reading too far down. That's right.

Q. Limited to the fact of the conviction and the basic facts?

A. Correct.

Q. And Mr. Hubbard said that's correct, Your Honor.

A. Yes, sir.

Q. Right?

A. Yes, sir.

Q. But at the end of all of this, at the end of this hearing had you been appointed to the lynching trial?

A. I think that's what happened.

Q. Let's see. I think it's page 23, line 11 where the judge ends up appointing the Public Defender to represent Mr. Mercer in the lynching case so that you are not saddled with that additional time constraint?

A. That's correct. I'm sorry. Correct.

Q. So at that point in time you were not appointed to

the lynching case at that point in time?

A. Obviously. Yes. So I don't recall when thereafter I was appointed.

Q. I'll show you.

A. Okay.

Q. After this hearing, you next had a hearing with Justice Few on February the 23rd; is that right?

A. Yes.

Q. And at the February 23rd hearing the lynching trial came up again?

A. Can you direct me to a page?

Q. I can't. I'm gonna -- Some things happened and ultimately the Public Defender realized that they had a conflict in the representation of Mr. Mercer. Do you recall that?

A. Yes. Clearly.

Q. If you flip to page 31, line 6.

A. Yep. The judge says, okay, let's deal with the conflict question and this was Judge Few.

Q. Right. And Judge Few asked you on line 10, he says, you represent him here. Can you represent him in all respects that are necessary in order to deal with this now and he's talking about the lynching charge not the murder charge.

A. Right.

Q. And you point out to the Court, I have spoken to

her, meaning Ms. McPherson, and expressed to her what my concerns are about the conflict. Ms. Fullwood was there who was the Public Defender for Lexington at the time and she represents a man who is a witness and that witness gets new counsel. There's a Chinese wall --

A. Right.

Q. -- formed for the protection of Mr. Mercer and the Public Defender continues in their representation of Mr. Mercer on the lynching case which is now scheduled for trial in March?

A. Okay.

Q. Is that right?

A. That's what it -- Yes.

Q. Does that all sound right?

A. That sounds right to me. Yes.

Q. Okay. In the middle of, on page 36 there were some scheduling problems with the lynching trial because Ms. McPherson was having problems with access to Mr. Mercer because he was undergoing evaluations and meeting with experts --

A. Mm-hmm.

Q. -- in preparation for the capital case; is that right?

A. Yes.

Q. Is that your understanding?

A. Yes. It is.
Q. But at the end of the hearing you were still not appointed to Mr. Mercer's lynching charge; is that right?
A. I'll have to read it.
Q. Okay.
A. It would appear not.
Q. I think on page 50 which is the next to last page is Ms. McPherson talking to the Court about whether or not the Chinese wall would be satisfactory regarding the conflict?
A. Satisfactory. Right.
Q. But it appears that she's still on the case?
A. Yes. There was some mention of appointing outside counsel.
Q. Okay. Now I'm gonna go to Plaintiff's Exhibit number 3 which is the appointment order. This is the appointment order for you on the lynching indictment.
A. Okay.
Q. How many indictments are there up there?
A. Two. Lynching and ABWIK.
Q. Lynching and possession of a weapon?
A. Let's see. 3096 and 3097.
Q. Right.
A. It's the set of facts that we're here for today. I don't have --
Q. It is. And 96 and 97 were possession of a weapon

and lynching. I'll talk about the ABWIK here in just one second.

A. Okay.

Q. The Court has the indictments in there. They can look at those numbers to make sure.

A. All right.

Q. This order says, the first line of the order says that a hearing on March 7th in front of Judge Patterson. You appeared and said that you would be ready for a trial that was scheduled to start March 14th?

A. Okay.

Q. Is that right?

A. Yes.

Q. Can you tell us what happened? All I have from that hearing is this order. Can you tell us what happened at that hearing or what had changed?

A. It was 12 years ago but essentially what it boiled down to is we were gonna have to deal with these facts and they were gonna push this case to get it tried before our capital trial and wisely or unwisely I figured I would be in as good or better a position as anybody else to try this case so I said I would do it.

Q. Was there anything else? I mean, did you think that Judge Few had made you an offer that would be of value to you in the capital case?

A. Well, sure. I mean, we had him on the record saying that.

Q. Right.

A. And, I mean, I was hoping, you know, I had a tendency to get into facts and feel like my client was in a good position whether that was, you know, whether that panned out or not. I mean, my hope was for an ABHAN. So I thought -- I mean, Judge Few said what he said. He made that comment. I mean, I had no reason to question it and in my mind I was as well positioned as anybody was gonna be to try this case and I wanted an ABHAN and the reason I wanted an ABHAN is because in my view the only reason the State was trying this case is so they could get, they would have the ability to knock out any mitigating circumstances. No prior history of prior violent crime. There was some mitigating circumstance that a lynching or an ABWIK conviction would completely knock out. I mean, I saw it for what it was. I mean, in my opinion it was docket manipulation. We take the second case and we try it first so that when the first case comes around, we've got a better, stronger case to get death. That's the way I saw it.

Q. Sure.

A. So, yeah, to me at the time it almost seemed like what did we really have to lose. I knew more than some random person that could be appointed.

Q. The Public Defender who had been on it?

A. And who was no longer going to be on it. I mean, Lisa McPherson was gone.

Q. She was gone by the time you had the hearing on the 7th?

A. She was going to be gone from the case because of the conflict. Was she not? I mean, that was my understanding.

Q. They appointed the co-defendant outside counsel.

A. To take away the conflict?

Q. And Chinese wall with Ms. McPherson is what Judge Few did on the 23rd.

A. Okay. But I thought there was some, my recollection was that there was a discussion of bringing in outside counsel.

Q. There was. I mean, two people, a co-defendant in the lynching charge and another witness were both provided new attorneys.

A. Well, I'm sorry. I'm clearly not remembering that one correctly. But the bottom line is as far as this case was concerned I felt like I was in as good a position or better to try to at least get it reduced to an ABHAN because ABHAN at the time was a misdemeanor and I think we could have argued that we should still get that mitigating circumstance that he didn't have a prior history of violent crime.

Q. Okay. And he had a criminal history at that time?

A. Yeah. He had a criminal history.
Q. There was a burg second non violent?
A. Correct.
Q. And a strong armed robbery?
A. Correct. I mean, he had a history. We just wanted to limit that obviously because the worse it gets, it's not a good thing.
Q. This order, Plaintiff's Exhibit number 3, in the third paragraph down asked that Ms. Kimbrough, counsel for the defendant in the death penalty case has asked to be appointed in the lynching case as first chair substituting Lisa McPherson who was previously appointed to Mr. Mercer on this case?
A. Yep.
Q. So Ms. McPherson was still appointed up until this order?
A. Yes. Clearly. Yes. Because I think you pointed out nothing really changed at the prior hearing.
Q. Right. Just making sure the record is clear on that. And then this lynching case was called to trial on March the 13th. And I want to ask you some questions about some stuff that happened during the trial but I don't have an extra copy of the trial transcript because I knew that that would be part of the record so can I borrow Your Honor's?
THE COURT: (Proffering.)

BY MR. YOUNG:

Q. I believe I'll start with the trial transcript.

A. All right.

Q. The first thing that happened in the trial that I would like to talk about is on page 21. You were starting with the trial and at that point in time you were presented with a new indictment; is that correct? Page 21, lines 2 through 7.

A. I'm reading. Yes. Correct.

Q. So you -- At that point in time Mr. Mercer was indicted for assault and battery with intent to kill that morning?

A. Correct.

Q. The morning of March 13th, the morning that you are starting the trial?

A. Correct.

Q. They added a most serious strike charge from the Grand Jury?

A. That's correct.

Q. And you did not object? You didn't say I need a continuance, any more time?

A. No.

Q. At that point in time y'all started the trial, you picked a jury, you started the trial?

A. Yes.

Q. And I believe your opening statement begins on page 31.

A. All right.

Q. And then your theory of defense as you told the jury during your opening statement was that there was no criminal intent?

A. Okay.

Q. That this was a self defense case?

A. Yes.

Q. Or a defense of others case?

A. Correct.

Q. You did not say he's charged with assault and battery with intent to kill now but it is really just an ABHAN?

A. Obviously not.

Q. Okay.

A. But ABHAN was a lesser included offense.

Q. Of assault and battery with intent to kill?

A. Yes.

Q. Right. That was indicted that morning?

A. Correct.

Q. But your theory of defense as you went through the trial was self defense and defense of others?

A. Correct.

Q. And basically Mr. Mercer despite the victim of this

fight they were cellmates?

A. Right.

Q. They lived in the same cell?

A. Yes.

Q. And you had evidence that Mr. Mercer had made complaints about Mr. Brown, that he had threatened him before, that he had filed documentation with the Lexington County Sheriff's Department at the jail?

A. Right. There was a history.

Q. And then this fight happened?

A. Correct.

Q. And you went through, on page 33 you went through your version of events which is basically that Mr. Mercer's cellmate who had threatened him before had also made threats towards another inmate. Mr. Mercer had told that inmate about these threats. They confronted each other. Mr. Mercer thought Mr. Brown was getting ready to strike. He hit him and they had a fight?

A. Correct.

Q. Now, the State presented a number of witnesses and evidence. There were some witnesses who said that Mr. Mercer had a weapon. There were some cuts on Mr. Brown's face and neck. There was testimony that Mr. Brown fled to the bathroom and Mr. Mercer gave chase and supposedly that's where Mr. Mercer flushed the weapon that he had.

A. Okay.
Q. Does that sound --
A. Yes. It sounds vaguely familiar.
Q. Okay. At the end of the State's case, I'm skipping ahead to about page 174, and I may have passed it, but at the end of the State's case you made a motion for a directed verdict?
A. Yes. I did.
Q. And the judge in that trial directed a verdict in Mr. Mercer's favor as to the lynching charge, right?
A. That's right.
Q. He said that there was no evidence of any collusion between two or more people to beat up Mr. Brown and he directed a verdict for the defense on lynching?
A. Yes.
Q. But he let the assault and battery with intent to kill and the possession of weapon charge go to the jury?
A. Yes.
Q. And at this point in time your defense is still self defense, defense of others?
A. Correct.
Q. And had you ever tried a prison assault or a prison murder case prior to that?
A. At this time?
Q. Yes, ma'am.

A. In 2006?
Q. Yes, ma'am.
A. I don't believe so.
Q. And you were working with a prison adaptability expert in the capital case; is that true?
A. Sure. Sure.
Q. You had Jim Aiken?
A. Yes.
Q. And he had met with Mr. Mercer and reviewed all of Mr. Mercer's records?
A. I would believe so at that point. Right. Because it was so far along.
Q. The capital trial was less than a month away?
A. Right. Exactly.
Q. But you did not call Mr. Aiken in the ABWIK trial to talk about prison fights?
A. No. I didn't.
Q. And then your first witness that you went to call was somebody from the Lexington County Sheriff's Department; is that right? Page 175 at the top.
A. All right. 175?
Q. Yes, ma'am. That's what I had.
A. 175 is me talking.
Q. Yes, ma'am.
A. Okay. I'm sorry.

Q. And you had a document from Mr. Mercer's father?
A. Okay. I'm sorry. Yes, sir.
Q. And it was a complaint against Mr. Brown?
A. Yes.
Q. And you wanted to introduce that as a business record?
A. Yes.
Q. And the judge said that's hearsay on hearsay and you can't just introduce the record?
A. Correct.
Q. He told you if you wanted to get in the fact that Mr. Mercer had made a prior complaint about Mr. Brown threatening him, you would have to call Mr. Mercer to the stand?
A. Correct.
Q. And you did not call Mr. Mercer to the stand?
A. No.
Q. Why not?
A. Didn't think it was smart.
Q. Can you elaborate on that?
A. Well, I mean, as you have pointed out, Mr. Mercer, even though I did not have those records at the time, he is someone who has been identified as having intellectual limitations. Even though I did not know that that record existed because we never got it I certainly was aware that

Kevin had certain --

Q. Difficulties?

A. -- difficulties.

Q. It was not easy to explain things to him?

A. No. And I think that he would have been a very easy mark --

Q. For a Solicitor?

A. -- for a sophisticated prosecutor like Rick Hubbard. He would have made him mincemeat. He would have said things in such a way that I think Kevin might have been provoked into saying something unwise or getting frustrated and making a bad impression. Even if he wasn't really, you know, wasn't trying to be aggressive he might have come off that way.

Q. Why was that a concern to you?

A. Because I didn't want the jury to see Kevin as someone who might have been out there provoking fights in the prison.

Q. This jury or another jury?

A. Either of them. Both of them.

Q. Okay. So was the capital case on your mind --

A. Always.

Q. -- in deciding whether or not to put Mr. Mercer up?

A. There's no question from start to finish. This all sort of bleeds in together. Certainly I didn't think Kevin

was a maniac but if he got on the stand and somebody provoked him and he said something that didn't come out right, you know, the jury they hold it against him. They just would.

Q. Sure. And correct me if I'm wrong. You thought that there was a danger that you could make a record that could be used against Mr. Mercer in his capital trial?

A. There's no question.

Q. That those statements would come in against him --

A. Sure.

Q. -- in front of a jury that was ultimately deciding whether or not he lived or died?

A. Right. And Kevin is not someone who would know how to avoid opening the door to certain subjects once you put him on the stand, you know.

Q. Right. Even if you had gotten the court to limit, say you can't ask him questions about the murder, he has a Fifth Amendment right about that and it's still pending?

A. People open the door all the time by just saying something just inadvertent.

Q. Sure. Right. And you had that conversation with Mr. Mercer?

A. Yeah. We spoke about --

Q. On page 179, I think line 18, 19, is where the Court after a discussion with you asked Mr. Mercer if he wished to testify and he said no?

A. Correct.
Q. But that was at your advice?
A. There's no question that was my advice. Yes.
Q. And then on page 180 you called Kevin Mercer's mother?
A. Correct.
Q. And your purpose of calling her was to try and introduce a telephone call that Mr. Mercer had made to his mother wherein which he said it was self defense?
A. An excited utterance.
Q. Right. Your thought was that it was an excited utterance after the event in a phone call to his mother?
A. Right.
Q. You proffered that testimony and it did not come into evidence?
A. Right.
Q. Can you tell me what your thoughts are? I'm assuming that you knew it was a long shot. Tell me what your thoughts are in introducing the call to mom?
A. Well, I'll say this: Kevin's mother is very supportive. I'm a mother of two sons. I get it. Something happens to your child like any mother, you know, she wants to be protective of him and so she was very involved in this and she made her interactions with her son and her thoughts about all of this known and if I could have gotten that in, I think

that would have been helpful but if the judge says no, you don't argue with them. Proffering at least preserved it for the record and, you know, I tried it. It didn't work.

Q. So that was the second piece of evidence that you had tried to introduce that did not come in?

A. That's correct.

Q. So after that you rested without calling any other witnesses; is that correct?

A. Yes.

Q. And at that point in time y'all had a charging conference?

A. Yes, sir.

Q. And you had requested the charge of self defense and defense of others?

A. Yes, sir.

Q. And the court said I'm not gonna charge either one of those?

A. That's right.

Q. The Court's already directed a verdict on lynching but as to the charge of the self defense or defense of others the Court had a particular problem and on page 187, lines 9 through 11, the Court's feeling was, okay, maybe everything was self defense but once Mr. Brown broke away and ran for the bathroom and Mr. Mercer pursued him, there's no longer could it be in any fair consideration considered self defense?

A. That's right.

Q. Is that right?

A. That's correct. That was my understanding of what he was saying. Yes.

Q. And you said, well, the fight just sort of spilled over into the bathroom. They kept fighting the whole time but everybody else, the Court was clear that said no, the undisputed, on page 191 after some argument lines 15 through 21 was, no, no, it's undisputed the fight didn't spill into the bathroom. Mr. Brown made a break for the bathroom. Mr. Mercer gave chase. He can no longer claim self defense.

A. That's correct. My only response which is on page 188 is that you don't have to let somebody get the drop on you.

Q. Right. On self defense you can hit somebody first once they've squared off and that was your case, right? Once Mr. Brown and I believe the other guy's name is Marcus Robinson, once they squared off and Mercer knew Brown intimately because they were cellmates, he had made a prior complaint about Brown, he was entitled to act on appearances he believed --

A. The follow him is what -- Yeah.

Q. And it was the follow part that caused everybody a problem not to get --

A. Right. That was the linchpin I think of the judge's

reasoning that he's just not gonna, yeah, he's not entitled to. You can't chase him.

Q. Right. And did you ever talk to Jim Aiken, the expert that you had in the other case about --

A. I did not.

Q. -- what he thought about these --

A. No. No. I didn't. I think it's interesting. I mean, I'm sure he would have opinions about prisoners and the conditions. I mean, he's an adaptability expert. I just don't know how -- I'm not sure how he could have been used from a testimonial perspective. I mean, he could certainly give us his opinions but you have to be qualified to give an opinion as an expert and I'm not really sure how you get an adaptability expert. Maybe it could have worked.

Q. Sure. Did you talk to Mr. Mercer about the bathroom and going into the bathroom?

A. I don't recall specifically. I mean, we talked about the incident but I don't recall specifically saying, well, why did you, you know --

Q. Right.

A. I did not probe him on that.

Q. Did anybody ever talk about the fact that inmates might store weapons in the bathroom for access later?

A. Well, the jury certainly never heard it.

Q. Right. And you didn't know it to present it?

A. Correct.
Q. If that's a thing?
A. No. I certainly am not as knowledgeable about prison conditions as some others. In 2006 that certainly would have been true.
MR. YOUNG: Thank you, Ms. Armstrong. Appreciate it. No further questions.
THE COURT: Before you do that, let's have the record reflect that Mr. Mercer did arrive during the testimony of Ms. Armstrong and he's present now.
MR. YOUNG: I forgot one question. Could I ask one final question?
THE COURT: Sure.
BY MR. YOUNG:
Q. Ms. Armstrong, in the trial of the capital murder, did Judge Few limit the State in what they presented regarding the ABWIK lynching trial?
A. No.
Q. Did you object? Say I thought you were going to limit?
A. Yes.
Q. And he said I'm not gonna limit what they put in?
A. He said he couldn't do it.
MR. YOUNG: Thank you.

REDIRECT EXAMINATION

BY MR. SIMON:

Q. Okay. Ms. Armstrong, first I want to go back to the January 13th, 2006 transcript.

A. Yes, sir.

Q. Your appointment of counsel hearing. Just to make sure that we're all on the same page, you were not appointed to represent Mr. Mercer at that hearing; is that correct?

A. January 13th?

Q. January 13th, 2006, you were not appointed to represent him on the ABWIK case?

A. That's correct. That's correct. This was solely for the capital case.

Q. And the discussion that you had on the record at that hearing, that was when you were first being appointed to the murder case, correct?

A. Yes, sir.

Q. And you had basically no knowledge of what was going on in regards to the lynching case, would that be correct?

A. Oh, absolutely.

Q. So your argument about that, that would have been based on not having any information regarding the lynching case?

A. I'm getting confused.

Q. Okay. Go back to, I believe it was on page 11 and 12 of that transcript. Yes. On page 12 starting on line 5.

This is part of the discussion you had during the cross examination. At that point you're talking about how it would be difficult to be prepared for the lynching case?

A. Correct.

Q. And that was with you not knowing what information was out there regarding the lynching case, correct?

A. Well, I think I had two concerns. One is that I'm preparing for a capital case that's coming right at us and then there's this other case that I don't know all the details about but I have a general idea that he's gotten into some sort of fight in the prison and so it seemed a bit unfair to stick the second case in front of the first one and then cram it all through the system in a very quick fashion.

Q. But when you're making the argument regarding whether the lynching case should go first, this is before you have actually seen any of the discovery regarding that case, correct?

A. On January 13th I think I had probably had had a conversation - I know I had spoken to Kam. Hey, what's going on with his case. And he gave me an overview but I certainly would not have gone through all of the discovery before being appointed. That wouldn't make sense.

Q. And also at that hearing, I'm gonna ask you to turn to page 25, and I want to direct you to review lines 14 through 25 and a little bit on the next page through line 1 on

the next page.

A. Okay.

Q. In that part, at that part of the hearing you were asking that the State provide discovery for the lynching charge to be provided to you on the murder case at the same time it was provided to whoever was appointed on the lynching case, correct?

A. Right. Because we anticipated that that information -- Again, it's gonna bleed over into the capital murder.

Q. And you were receiving that information from the Solicitor's Office as it was being provided to --

A. I should have been. Yes. And I don't have any reason to think that they withheld it. I was not surprised by any evidence that came out. I mean, not to my knowledge. I don't remember being shocked by anything.

Q. Okay. Now, I'm gonna move onto the February 23rd, 2006 hearing.

A. Yes, sir.

Q. And with that I'm gonna ask you to turn to page 35.

A. All right.

Q. And I'm gonna ask you to start with looking at lines 13 through 22.

A. All right. Okay. Yes, sir.

Q. And I just have a few questions about that. In preparation for the capital trial you, again you were

investigating the facts regarding the lynching case, correct?

A. Yes. As part of the penalty phase preparation we had known what happened.

Q. And the conflict of interest that ended up arising in regards to the Public Defender's Office, that became apparent because of your investigator going and trying to talk with some of the witnesses; is that correct?

A. According to -- I don't have independent recollection but clearly that's what I believed at the time. Yes. That was the case at the time.

Q. So at that time you were investigating? You had an investigator looking into everything helping you in preparation --

A. Exactly.

Q. -- in looking into the facts of that case?

A. Right. Because we knew this was coming. One way or another we were gonna have to deal with it in the penalty phase. Whether it came in as just a conviction or all the gory details, it was coming.

Q. Now, I'm gonna ask that you turn page -- Now I'm gonna go to the trial transcript and ask you to again look at, I believe you looked at it before during the cross, page 21. And I'm just gonna ask you to look at lines 9 through 11. Really lines 2 through 11.

A. Okay. 2 through 11?

Q. Yes.

A. Mr. Graham is advising the Court that he had given us notice or a heads up that they were going to, they were gonna seek an ABWIK, excuse me, assault and battery with intent to kill indictment; that we were given notice that they were going to try to do that on February 21st.

Q. So when it got to the point of the day of trial beforehand you knew that they were going to attempt to present an assault and battery with intent to kill charge; is that correct?

A. He told me they were going to the Grand Jury. I certainly didn't know that he had actually been indicted for that until the day of the trial. But correct. He said we're going to try to get this indicted for assault and battery with intent to kill.

Q. Okay. I want to see exhibit number 3. I have one quick question regarding that regarding the third paragraph. The order reflects that you requested to be appointed on the case; is that correct?

A. That's correct.

Q. And that order reflects what -- You did ask to be appointed?

A. Oh, absolutely. Yeah.

Q. And again, you felt like you were prepared for trial

and had all the information you needed for the lynching and ABWIK trial, correct?

A. I reviewed everything I had that was provided to me. We had an investigator so I tried to prepare as well as I could. Yes.

Q. If you did not feel prepared, you would have asked for a continuance, correct?

A. I would think so. Yes.

Q. But you did not feel like you needed one in this case, correct?

A. By the time I got to the trial, no.

Q. And in regards to the questions that you had that were asked of you regarding what Judge Few said about limiting what would be presented at the capital trial based off of what occurred in this trial, if you had any argument in terms of whether or not it should have been limited, that would have been something you would have raised at the capital trial, correct?

A. And we did.

MR. SIMON: No further questions, Your Honor.

MR. YOUNG: Just a couple follow up.

RECROSS EXAMINATION

BY MR. YOUNG:

Q. Ms. Armstrong, you have tried self defense cases before?

A. Yes.
Q. Successfully sometimes? Not successfully sometimes?
A. They're hard.
Q. They are hard because it's the defendant's state of mind that's at issue?
A. Right.
Q. Were they were acting - were they fearful. Were they acting reasonable?
A. Right.
Q. And usually the best way to present that is through the defendant?
A. Yes.
Q. Generally on a self defense case in order to be successful in a self defense case you have to put the defendant on the stand?
A. That is under -- Yes. That's ideal.
Q. And you couldn't do that because of the risk of what it would cause in the capital case?
A. Yes. Right. Exactly. Kevin was not an ideal witness for a number of reasons.
Q. Mainly of which if he came across bad, that gets introduced in the capital case and they kill him because you put him on the stand and he looks bad in an ABWIK case, right?

A. Yes. Right. No question. Yes.

MR. YOUNG: Thank you.

THE COURT: You may step down. We'll take a short break.

(Short break.)

BAILIFF: Keep your seats please. Court's now in session.

MR. YOUNG: Your Honor, at this time the Petitioner would call Kevin Mercer.

Thereupon,

KEVIN MERCER

after having been first duly sworn, testified as follows,

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Good morning, Mr. Mercer.

A. Good morning.

Q. Speak into the microphone and make sure the court reporter hears you, okay?

A. Yes.

Q. You okay?

A. Yeah. Maintaining.

Q. Okay. We're talking about the lynching/ABWIK/possession of a weapon trial that you had prior to your capital trial. Do you remember that?

A. Sort of. Yeah.

Q. Well, do you remember your time at the Lexington County Detention Center?

A. Yeah.

Q. And who was your roommate/cellmate when you first got to the Lexington County Detention Center?

A. I had a few. I remember Terry Brown, I think.

Q. Terry Brown?

A. Mm-hmm.

Q. How did y'all get along?

A. Kind of seemed different, you know, but we didn't really get along.

Q. At one point in time did you make a complaint about Mr. Brown to the jail staff?

A. Yes. I did.

Q. Can you tell us about that?

A. Uhm, well, you know, just, you know, we had our, you know, times where, you know, we didn't see eye to eye and so, you know, I would complain to try to, you know, have us removed from one another, you know.

Q. Did you tell the jail staff that he had made threats against you?

A. Yes.

Q. Was there a fight about a card game?

A. Yes.

Q. Did he make threats against anybody else?

A. Yeah. The guy, I think it's Robert Thompson or Thomas.

Q. Marcus Robinson?

A. Marcus Robinson.

Q. Does that sound right?

A. Yeah.

Q. All right. So one day something happened. Can you tell us what happened?

A. Well, one day he - I was told that my roommate, you know, was upset, you know, because he was talking behind my back or something like that and he wanted to fight.

Q. This is Mr. Brown you're talking about?

A. Yeah. Brown. You know, so we went to the rec field and I wanted to see what was going on so I approached him and I asked him, you know, was this true and he got aggressive and, you know, he said he don't mind fighting and stuff like that and wanted to fight, you know, I think it was Robinson, too. He threatened him also so we begin to fight, you know. The whole rec field broke out in a fight.

Q. Everybody started fighting?

A. Everybody starting fighting.

Q. But you started fighting first, right?

A. Well, yeah. The way he, you know, looked at me and he squared off on me and I just, you know --

Q. You thought he was getting ready to hit you?

A. Yeah. The way he was in the stance, you know, boxing, fighting position.
Q. Did you have a weapon?
A. No.
Q. You know that Mr. Brown got some cuts on his face. Do you have any idea how he might have gotten those cuts?
A. Well, the only way I can say because, you know, I used to grow long nails and so if it was cuts like that, then, you know, it had to come from that but other than anything else I don't have any recollection of that.
Q. Okay. At some point in time Mr. Brown went for the bathroom --
A. Yes.
Q. -- is that right?
A. Correct.
Q. And what did you think when he went for the bathroom?
A. Well, I thought he was gonna go and get a weapon.
Q. Why would you think that, that he was going for a weapon?
A. Because normally that's where a lot of people, you know, hide, you know, have things, you know, stored outside their rooms so I figure that's where he had something stored there.
Q. In your experience, and you have been in prison for

--

A. 15 years.

Q. -- 15 years now --

A. Mm-hmm.

Q. -- is it your experience that people hide weapons in bathrooms?

A. Yes.

Q. And what is it known by inmates when a fight starts and somebody goes for the bathroom?

A. Could you repeat that?

Q. Sure. What do inmates know when there's a fight and another inmate starts heading for the bathroom?

A. Oh, that he's going to get a weapon.

Q. A bathroom is not where you go for safety?

A. No.

Q. A bathroom is where you go to get a weapon?

A. Mm-hmm.

Q. You store weapons in the bathroom because if they were in your room, you would get caught with them?

A. Yes.

Q. And if you have them on your person on the yard you might get caught with it --

A. Mm-hmm.

Q. -- so you keep it somewhere that you can get to it?

A. Mm-hmm.
Q. Is that right?
A. Yes.
Q. You and Ms. Armstrong, Ms. Kimbrough at the time, you sat through the trial with her?
A. Mm-hmm.
Q. At one point in time y'all talked about your testifying, whether or not you were going to testify or not testify --
A. Mm-hmm.
Q. -- is that right?
A. Yes.
Q. What did she tell you?
A. Not to testify.
Q. Did she tell you why?
A. No.
Q. Okay. She didn't tell you you couldn't testify because of the capital case?
A. Oh, well, pertaining to that, yes. But she said this isn't that case situation. Don't testify.
Q. That it could affect the other case? Did she tell you that?
A. Yes.
Q. Okay.
A. Yeah.

MR. YOUNG: All right. Thank you very much, Mr. Mercer. That's all the questions I have right now.

CROSS EXAMINATION

BY MR. SIMON:

Q. Good morning, Mr. Mercer.

A. Mm-hmm.

Q. I have a few questions for you. First, before this trial, tell me if I'm correct in stating that these were convictions that you already had on your record. At that time you had a 2001 conviction for a burglary second non violent?

A. I don't recall but maybe. Yeah.

Q. And do you recall if you had a strong armed robbery conviction?

A. I don't recall.

Q. You don't recall. Do you recall if you had a possession with intent to distribute marijuana conviction?

A. Maybe so I think.

Q. And I guess do you recall if you had a conviction in 2002 for unlawful carrying of a pistol?

A. I think maybe so. Yeah.

Q. Now, in preparation for your lynching trial you had conversations with Ms. then Kimbrough now Armstrong regarding that case, correct?

A. Yes.

Q. And you talked about the facts of that case, about

what happened at the detention center?

A. Mm-hmm.

Q. And you told her your version of the events, correct? What you just testified to --

A. Yes.

Q. -- on the stand?

A. Yes.

Q. And you told her like the folks that you knew at the Detention Center that observed the fight, correct? Did y'all talk about that?

A. Who?

Q. You and Ms. --

A. Yes.

Q. Okay. And you were able to look, she shared the discovery that she received from the State on the case; is that correct? Did she go over the discovery with you?

A. Yeah. I think she showed me some paperwork, you know. I don't know about all the discovery but she showed me some paperwork.

Q. Y'all had those discussions before she was even appointed to represent you on the lynching case, correct?

A. Yeah.

Q. And just now you said that you didn't have any weapons during the fight?

A. No.

Q. But there were weapons found where you were found in the end, correct? Do you recall that?

A. Not to my recall.

Q. You had some discussions, I guess, during your direct examination you talked about the discussions you had with Ms. Armstrong about whether or not you should testify?

A. Mm-hmm.

Q. And what you're saying now is she advised you not to testify, right?

A. Yes.

Q. But it was your decision whether or not to testify?

A. According to her. Yes. Right.

Q. She advised you it was up to you whether or not you would but she was advising you not to?

A. Mm-hmm. She said that would be the safest way.

Q. And also there was a little bit of discussion. The trial judge also asked you whether or not you wanted to testify, correct?

A. From my remembering I think. Yeah.

Q. All right. Just a few more questions for you. You have been incarcerated for more than 15 years. That's what you said earlier, correct?

A. Yeah. About 15.

Q. And you said that inmates will hide weapons in the

bathroom to avoid detection?
A. Yeah. That's normally what we go on.
Q. What kind of weapons are you talking about?
A. I mean, any kind of weapon that, you know, could harm someone.
Q. Like shanks?
A. Could be. Yeah.
Q. And shanks can be like sharpened toothbrushes or something?
A. I guess. Razors or something like that.
Q. And I guess, I think this will be my last question. Can you just explain why did you decide not to testify at trial?
A. Well, I didn't want anything -- I didn't want to do anything that would jeopardize, you know, my case.
MR. SIMON: No further questions, Your Honor.
MR. YOUNG: Just one thing I wanted to clear up.

REDIRECT EXAMINATION

BY MR. YOUNG:
Q. Mr. Mercer, were there any weapons found in the bathroom?
A. No.
Q. There were no weapons?
A. No weapons.
Q. I believe there was testimony from Mr. Brown on page

75, line 19 through 21, that he said that he thought that you might have flushed the weapons; is that right?

A. From what I remember, yeah.

Q. But there were no weapons?

A. No weapons.

MR. YOUNG: Thank you. That's all the questions I have.

MR. SIMON: No further questions, Your Honor.

THE COURT: Step down.

MR. YOUNG: Your Honor, brief argument if I may. This is my first PCR. I don't know the exact order of procedure. I believe I argue now; is that right?

THE COURT: You do.

MR. YOUNG: Your Honor, the way that the Petitioner sees his case is that Justice Few, first off to start with, the Sixth Amendment Right to counsel and effective counsel is offense specific. We all know that a person is entitled to effective representation on each offense that they have representation on and we know from a lot of cases where the State has talked to people who were represented by counsel and saying, well, we were talking about a different issue and the Supreme Court ruled, well, the Sixth Amendment is offense specific so you can have counsel on one case and still be questioned in another case without violating that right to counsel.

The same thing applies here where Mr. Mercer has two different sets of charges and he has attorneys appointed to each one of those sets of charges. He has Ms. Kimbrough and Mr. Littlejohn on his capital murder charges and he has Ms. McPherson all the way up until the week before trial on his lynching and possession of a weapon charge which became an ABWIK possession of a weapon charge. Justice Few when he said if y'all will try it, if you, Ms. Kimbrough, and you, Mr. Littlejohn, will try the ABWIK case, I will limit what the State can introduce in the capital case, he created a conflict. He told them that if they would agree to try this lynching case with one hand tied behind your back because you can't try a self defense case when you can't put up your client and you can't put up your client because he's in one month is gonna be on trial for his life, that created a conflict. That was a conflict for the counsel for the new charges. It tied her hand behind her back and the trying of the lynching case and that conflicted representation can't stand. That's why these charges must be reversed on that ground, and for her ineffective assistance of counsel without needing a showing of prejudice because there was a conflict that was created by the judge.

And even if it was some sort of contractual

agreement, the judge ultimately did not follow through. She followed through on her part and did the trial. At the capital sentencing case when she objected to the presentation of Mr. Brown's testimony and the other witnesses regarding the fight at the jail her objection was overruled and that testimony did come in at the capital trial. That would be the first ground.

The second ground is that Ms. Armstrong's trial strategy of self defense was unreasonable and itself deficient. The two pieces of evidence that she tried to get in were a complaint that Mr. Mercer had made about Mr. Brown to the jail staff which was denied under hearsay and Mr. Mercer's mother saying that she had gotten a phone call from Mr. Mercer in which he claimed self defense which was also correctly denied as inadmissible under hearsay. Ms. Armstrong's trial strategy was totally unreasonable if she had a self defense case and presented no evidence of self defense or defense of others.

In fact, the judge said there's nothing here. I can't even charge the jury so her testimony was that her trial strategy was self defense, defense of others but she didn't even offer a mustard seed of evidence in which to get a jury charge. The only person who could have gotten that evidence in, she had two available means to

her, one was through Mr. Mercer himself and the second would be through an expert that she had who was working with her in the capital case. Neither one of those did she call. Her trial strategy was unreasonable and prejudiced Mr. Mercer in his defense. We believe that it was a denial of his Fourteenth Amendment and fundamental fairness in the trial of these charges and would ask that they be set aside. Thank you.

THE COURT: Yes, sir.

MR. SIMON: Your Honor, in regards to the conflict issue, the State admits there was no conflict of interest in this case. Ms. Armstrong was not representing any competing interest at all. She was representing Mr. Mercer on two different cases both working towards his best interest in both cases. In regards to their argument about Judge Few and his statements in the January 13th, 2006 hearing, I just want to note a couple points.

First, Ms. Armstrong and Mr. Littlejohn did not take the case at that point in time. They did not -- And they were not appointed to the lynching and the ABWIK case by Judge Few. They later requested to be appointed in front of Judge Patterson. Whatever Judge Few may have said regarding anything he may have limited in regards to that they didn't follow through with that at that point in

time. They were appointed later by a different judge and any issue they would have had that would - any reliance they would have had on Judge Few's statements at that point in time, that was something that they would have to take up during the capital trial when that information was coming in during the capital trial which they did. That is not reflective of any conflict of interest in this case. They have indicated, well, Ms. Armstrong did indicate that that was just something he said and that was something that they argued at the capital trial. That has no effect on whether or not there was a conflict in this case.

In regards to the claim of ineffective assistance regarding the trial strategy, we believe that that transcript reflects that counsel did, and her testimony reflects that she did the best she could with the circumstances she had. She knew, and this would have been the case whether or not she was representing Mr. Mercer, there was always going to be an issue of whether or not he should testify because he still had the pending capital case going. She did attempt to argue through cross examination of the witnesses at trial and tried to present the evidence to support the self defense and defense of others and we believe that based on - the transcript reflects she did attempt to present a solid

case on self defense.

And also we would submit that the testimony that was presented here today would not have done much to assist in getting a self defense charge or proving self defense. Based on what Mr. Mercer said today it was at the very least mutual combat. They were both squaring up to fight. And based on the testimony that was presented here today and based on the records the State submits that Mr. Mercer has failed to meet his burden of showing that trial counsel was ineffective and we request that this application be denied.

MR. YOUNG: May I respond briefly?

THE COURT: You may.

MR. YOUNG: Your Honor, on January 13th Ms. Kimbrough is appointed to a capital murder case scheduled for trial in April. They ask her about the lynching charges. She says no way. I can't be ready. Not gonna do it. The judge says, well, if you do it, I'll help you out. I'll limit what they put in and she says no. 40 days later February 23rd another hearing in front of Judge Few. Don't y'all want to try the lynching case? Y'all can be counsel for a lynching case. No. We can't be ready. We have to prepare for the capital trial in April. March 7th is when she substituted in for counsel on the lynching case knowing that if she does it she's

got a promise from Judge Few that win, lose or draw it's gonna help him in the capital case because they won't be able to elicit all the details. Just gonna tell the jury this is a jail fight. He got convicted of a fight in jail. They have Jim Aiken. He can explain that. So she does it. But that's why it was a conflict. She does it because she knows it's gonna help in the capital case. She believes it's gonna help in the capital case otherwise nobody would try a self defense case on a prison case without putting up the defendant. You can't try it. You couldn't even get in any evidence without putting up Mr. Mercer and the only reason she couldn't put him up is because of the capital case. That's why it's a conflict and that's why her trial strategy was unreasonable because she couldn't try this case with one hand tied behind her back and that's where the prejudice is and that's why the conviction should be overturned.

THE COURT: All right. I'll review it and issue an order.

MR. YOUNG: Thank you.

WHEREUPON, THE HEARING WAS CONCLUDED.

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 22nd day of February, 2018.

I FURTHER CERTIFY that the forgoing 64 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 14th day of March, 2019.

By:s/ Steven E. LeBlanc
_____
Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

ORIGINAL

FILED

2006 MAR -9 A 9:52

BETH B. HARRIS
CLERK OF COURT
LEXINGTON S.C.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON)

STATE OF SOUTH CAROLINA,) 2004-GS-32-3096, 97

vs.)

ORDER

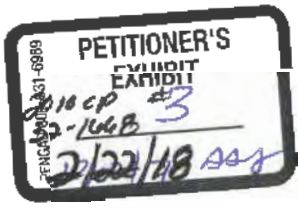
KEVIN J. MERCER,)

Defendant.)

A hearing was held before the Honorable Larry R. Patterson on March 7, 2006. Present was the Defendant, Kevin J. Mercer, his attorney Melisa Kimbrough, Rick Hubbard, Deputy Solicitor, and Shawn Graham, Senior Assistant Solicitor.

It appears that Mr. Mercer has been previously provided notice of the State's intent to seek the Death Penalty in an unrelated matter. The Honorable John C. Few will preside over that trial scheduled for the weeks of April 10 and 17, 2006. Additionally, the State intends to call a lynching/assault case in which Mr. Mercer is the Defendant for trial next week, March 13, 2006 over which I will preside.

Melissa Kimbrough, counsel for the Defendant in the death penalty case, has asked to be appointed in the lynching case as first chair substituting Lisa McPherson who was previously appointed to represent Mr. Mercer on this case. Ms. Kimbrough has represented to the Court that she has time to fully prepare for the trial in hoth cases and wishes to be appointed in both. Finally, Mr. Mercer consented to the substitution of Ms. Kimbrough as his attorney in place of Lisa McPherson and stated that this was what he wanted.



Additionally, the State served a certified true copy of the State's Notice of Evidence in Aggravation of the Punishment on Mr. Mercer and his attorney, Ms. Kimbrough.

IT IS HEREBY ORDERED THAT Ms. Kimbrough be substituted for Ms. McPherson as counsel for Kevin J. Mercer on the lynching/assault charge.

IT IS SO ORDERED.

The Honorable Larry R. Patterson
Circuit Court Judge

Lexington, South Carolina

March 8, 2006

FILED
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LISA M. COMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**ELEVENTH JUDICIAL CIRCUIT**
COUNTY OF LEXINGTON	)	
	)	
Kevin Mercer, #6021,	)	**C/A: 2010-CP-32-1668**
	)	
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter came before this Court on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-10 et. seq.* The original application was filed on April 21, 2010, and subsequently amended on June 29, 2017. An evidentiary hearing was held on February 22, 2018 at the Lexington County Courthouse.[1] S. Boyd Young, Esq., represented Applicant. Applicant was present for a portion of the hearing.[2] Assistant Attorney General Al Simon represented the State. Applicant proceeded on the grounds of "Ineffective Assistance of Counsel" in that (1) "counsel was conflicted" (*Williams v. Moody*, 287 Ga. 665 (2010)); (2) "counsel failed to thoroughly investigate... and present evidence that the applicant was acting to protect others from harm at the time of the incident" ; and, (3) "counsel

[1] This case was called on August 8, 2017, but continued as a dental procedure affected Applicant's ability to testify. (See Order of Continuance filed August 10, 2017). The case was then set for December 2018; however, the PCR judge for that term determined that he had a possible conflict and the case was continued again. The case was again set for February 21, 2018, at which time the Court was informed that Applicant had declined transportation to the hearing. The case was continued within the same term to the next day, February 22, 2018, to allow counsel for Applicant the opportunity to discuss and advise Applicant on the possible effect(s) of the failure to participate in the hearing. (PCR Tr. pp. 6-7). Applicant was not present at the time the case was called on the 22nd, not due to a refusal to attend, but a mere delay in transportation. (PCR Tr. p. 7). Applicant eventually arrived at the courthouse and gave testimony in the case. (See PCR Tr. p. 40 and p. 48).

[2] As noted, Applicant was delayed in arriving at the courthouse; however, Applicant's counsel agreed to begin the hearing without Applicant. (PCR Tr. p. 7).

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ATTORNEY GENERAL'S OFFICE

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was not afforded ample time for investigation and preparation" for the trial. At the conclusion of the hearing, this Court took the matter under advisement. On August 13, 2019, this Court ruled that post-conviction relief must be denied and issued a short form order advising the parties of the ruling. The undersigned also directed counsel for respondent to submit a proposed order. The Court now issues this order with its findings of facts and conclusions of law as required under S.C. Code § 17-27-80. Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of counsel, and consideration of the applicable statutory and case law, this Court finds that the application's request for post-conviction relief should be and is DENIED and the APPLICATION IS DISMISSED WITH PREJUDICE for failure of the applicant to establish any deficient performance on the part of counsel and/or any prejudice resulting from counsel's performance. *Strickland v. Washington*, 466 U.S. 668 (1984) and *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

PROCEDURAL HISTORY/BACKGROUND

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was indicted by the Lexington County Grand Jury during August 2004 for Lynching, Second Degree (2004-GS-32-3097), and Carrying or Concealing Weapon by Inmate (2004-GS-32-3096). He was subsequently indicted in March 2006 for Assault and Battery with Intent to Kill (2006-GS-32-0553). All three charges resulted from acts within the Lexington County Detention Center while Petitioner was awaiting trial on a murder charge in which the State had given notice of its intent to seek the death penalty. (PCR Tr. p. 4). Melissa J. Kimbrough, Esq., who also represented Applicant in the capital case, represented Applicant on these charges. The State was represented by Eleventh Circuit Assistant Solicitors Samuel R. Hubbard, III, and David Shawn Graham. On March 13, 2006, Applicant proceeded to a trial by a jury before the Honorable Larry R. Patterson. Judge

Patterson granted a motion for a directed verdict on the lynching charge after the State rested its case. (Return Attachment, Trial Transcript at 174). The jury found Applicant guilty of the other two charges. (Return Attachment, Trial Transcript at 231). Judge Patterson sentenced Applicant to twelve (12) years confinement on the ABWIK conviction and five (5) years confinement on the Carrying/Concealing Weapon by Inmate conviction. (Return Attachment, Trial Transcript at 234).

Applicant timely filed a motion for a new trial on March 17, 2006. In the motion, Applicant argued he was entitled to a new trial due to the trial court's denial of his request for a self-defense charge, and defense of others charge, along with other charges relevant to his right to act on appearances and to possess a weapon for the purposes of self-defense. Judge Patterson denied the motion by order filed on March 30, 2006, finding the evidence in Applicant's case did not warrant a self-defense or defense of others charge. He noted that the testimony revealed that Applicant chased the victim and assaulted him with a weapon known as a shank.

Applicant timely served and filed a Notice of Appeal. Robert M. Dudek, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. Appellate counsel filed a Final Brief of Appellant on May 12, 2008. In his Brief, Applicant asserted that defense counsel correctly argued there was evidence Applicant intervened in the prison fight to prevent another inmate from being injured, and that evidence entitled Applicant to a jury instruction on the defense of others. The State filed its final brief in opposition to the appeal issue on May 12, 2008. Applicant filed his reply brief on May 12, 2008.

The South Carolina Court of Appeals issued an opinion affirming the convictions on February 23, 2009. (Return Attachment, Direct Appeal Petition for Writ of Certiorari Appendix at 1-2). Applicant filed a Petition for Rehearing on March 10, 2009, (Return Attachment, Direct

Appeal Petition for Writ of Certiorari Appendix at 3-6), which was denied on May 5, 2009. Applicant subsequently filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina on August 4, 2009. In the Petition, Applicant argued the Court of Appeals erred by holding there was no evidence entitling Applicant to a jury instruction on the defense of others, again asserting there was evidence Applicant intervened in the prison fight to prevent another inmate from being injured that supported the charge. The State filed its return to the petition on August 31, 2009. In a letter Order dated January 22, 2010, the Supreme Court of South Carolina denied Applicant's petition. The South Carolina Court of Appeals issued the remittitur on March 24, 2010.

On April 21, 2010, Applicant filed the instant action seeking post-conviction relief. After a series of delays, this matter was eventually heard on February 22, 2018 by the undersigned.

CLAIMS RAISED

In his amended application, which this Court deems controlling, Applicant alleges that his conviction "was in violation of the United States Constitution," *see* S.C. Code § 17-27-20(A)(1), as counsel was ineffective in the following ways:

> 10(1) Counsel was conflicted. Counsel was preoccupied with applicant's capital case and failed to provide the best possible representation for applicant's assault and battery with intent to kill case. When the allegation of conflicted counsel is raised as a basis for a claim of ineffective assistance of counsel, a finding that an attorney operated under an actual conflict of interest that adversely affected the attorney's performance may modify the two-pronged standard for ineffective assistance of counsel found in Strickland v. Washington by presuming prejudice in certain situations. Williams v. Moody, 287 Ga. 665, 692, (2010). Applicant did not testify in his own defense regarding his self-defense or defense of other claim, due to pending death penalty case. When conflicts are alleged to have impaired counsel's performance, the defendant's burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done. United States v. Taylor, 139 F.3d 924, 930 (D.C.Cir.1998).
>
> 10(2) Counsel failed to thoroughly investigate and counsel's conduct fell short of the standards for capital defense work articulated by the American Bar

> Association standards. At every stage of proceedings, counsel has a duty to investigate the case thoroughly. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.7 p. 1016-1019, 1021 (2003). It is important for defense counsel to take seriously the possibility of the client's innocence, to scrutinize carefully the quality if the state's case and to investigate and re-investigate all possible defenses. Id. at 1018. Counsel failed to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident.
>
> 10(3) Counsel was not afforded ample time for investigation and preparation. The Cronic test for ineffective counsel has five criteria: "'(1) [The] time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. 466 U.S. 648, 652 (1984). Counsel was appointed to this case officially on or after February 23, 2006. Trial for this case was set for March 13, 2006, while counsel was preparing for applicant's death penalty case set for April 17, 2006. Applicant's case was complex legally and factually and required thorough investigation and preparation.

(Amended Application [unnumbered] pp. 2-4). Applicant also only pursued these three claims at the evidentiary hearing on February 22, 2018. (See PCR Tr. pp. 5 and 58-61). Therefore, the only claims before the Court are those raised in the amended application as set out above.

DISCUSSION

As an initial matter, this Court addresses Respondent's allegation that the action may have become moot as Applicant has completed service of the sentences of the two convictions challenged in this action.[3] (Return to Amended Application, p. 9). Respondent relied upon the holding in *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997), to make that argument.

[3] At the time the case was called during the December 2017 PCR term, the presiding judge, the Honorable J. Cordell Maddox, apparently addressed the issue, though he later recused himself to avoid an appearance of conflict. (See PCR Tr. p. 5). Respondent reported at the February 22, 2018 hearing that Judge Maddox ruled that Applicant had presented sufficient argument that the convictions, though the sentence had expired, could have continuing effects on Applicant given his re-sentencing in the capital charge was still pending. (PCR Tr. pp. 5-6). It is unclear, in light of the subsequent recusal, that Judge Maddox intended for that ruling to be dispositive of the issue. At any rate, the undersigned agrees that the position should be rejected, though for different reasons than those forwarded by Judge Maddox. The result is the same – the expiration of the sentence is no bar to the consideration of these allegations.

However, after making that argument in 2017, the Supreme Court of South Carolina revisited and modified the *Jackson* holding in 2018. That position is no longer supported by the case law.

The *Jackson* Court held that, absent a showing of custody, an applicant may present evidence that he has "continuing prejudice as a result of the challenged conviction," in order to pursue post-conviction relief. 331 S.C. at 490, 489 S.E.2d at 917. However, our Supreme Court clarified and modified the application of *Jackson* in *Brown v. State*, 423 S.C. 56, 814 S.E.2d 146 (2018). *Brown* supports that neither an active sentence nor assertion of other consequences of conviction is necessary to continue with an action in post-conviction relief. 423 S.C. at 60, 814 S.E.2d at 147. Therefore, this Court does not find the action moot. This Court denies relief on the merits after having considered the pleadings and attachments including the trial transcript,[4] along with the testimony and other evidence[5] before the Court, and having also considered argument of counsel. Further, at the evidentiary hearing, this Court had the opportunity to observe the witnesses, consider their demeanor, listen to their testimony, and judge their credibility accordingly. As a result of this Court's review of records and other evidence, and in light of its credibility determinations, this Court finds and concludes Applicant has failed to carry his burden of proof. As such, Applicant is not entitled to post-conviction relief. The Court denies and dismisses this application with prejudice.

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[4] A complete listing of the documents presented by attachment to the return is included in the return to the amended application at pp. 3-4 and includes: the trial transcript, post-trial matters, appeal records including the briefs, petition and return; clerk's records from Lexington County, and documents from the South Carolina Department of Corrections.

[5] In particular, along with the testimony, this Court has considered the transcript of January 13, 2006, the transcript from February 23, 2006, and the order of appointment signed by Judge Patterson on March 8, 2006, filed March 9, 2006, as offered by Applicant in the PCR hearing. (PCR Tr. p. 15).

Standard of Review

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Courts reviewing claim of ineffective assistance will "strongly presume" that counsel "rendered adequate assistance and" used "reasonable professional judgment." *Strickland v. Washington*, 466 U.S. at 690; *see also Burt v. Titlow*, 571 U.S. 12, 23 (2013) (applicant must present sufficient evidence to overcome the presumption; "It should go without saying the absence of evidence cannot overcome the " 'strong presumption' ") (quoting *Strickland*); *Cherry,* 300 S.C. at 118, 386 S.E.2d at 625 ("The defendant is required to overcome the presumption that counsel was effective in order to receive relief.").

Facts from the Trial

The State summarized the facts from trial in its "Statement of Facts" in the Final Brief of Respondent submitted to the South Carolina Court of Appeals. The following is a relevant excerpt from that section:

> Terry Brown ("Brown") testified he was incarcerated in the Lexington County Detention Center in January 2004, and shared a cell with Mercer and Darrell Williams ("Williams"). On January 13, 2004, he was playing cards in the cell with Mercer and Williams when Mercer accused him of cheating and threatened to physically harm him. They argued, but there was no physical altercation at that time. (Trial Testimony [TT], pp. 38-39, 45·47; R., pp. 38-39, 12-14).
>
> On January 14, 2004, the inmates in Brown's cell block went into the outside recreation area, but Brown stayed inside for approximately thirty minutes. When he walked outside, another inmate, Marcus Robinson ("Robinson"), confronted him and asked what Brown had been saying about him. Brown told Robinson he had not said anything about him and started to turn around. Robinson then said he would "kick [Brown's] behind anyway," and Brown turned back around to "square off with [Robinson]." (TT, pp. 48-51; R., pp. 15- 18).

As Brown was facing off with Robinson, Mercer jumped on Brown from a nearby wall and started hitting him in the face with two shanks (jail made knives). Robinson started hitting Brown with his fists. Mercer cut Brown's face multiple times before someone got between them to break it up. Mercer then said he was going to kill Brown, and Brown ran back inside the building. (TT, pp. 51-55, 57-58, 60-63; R., pp. 18-22, 24-25, 27-30).

Brown went to the cell block bathroom to check his face, and Mercer followed him. They started fighting again, which continued until the guards arrived, broke up the fight and took Brown to the infirmary. He was ultimately transported to the hospital for treatment. (TT, pp. 63-67; R., pp. 30-34).

Robinson testified that on the day of the fight, Mercer approached him and said Brown and Williams were planning to "jump" Robinson, but he would not "let it get too far out of hand." (TT, pp. 80-86; R., pp. 47-53). Robinson confronted Williams and asked why he wanted to jump him, and then confronted Brown when he came out of the building. When Brown "threw up his guards," Mercer jumped on him, and Robinson admitted he then hit Brown as well. Robinson testified that after Mercer jumped on Brown, Williams ran into the building and he chased Williams to fight with him inside. (TT, pp. 86-91; R., pp. 53-58).

Robinson stated that prior to the incident on January 14, Brown never did or said anything to him in a threatening manner, and they got along well for the most part. He said neither Brown nor Williams jumped on him when he confronted them about what Mercer said, and Mercer threw the first punch that day. (TT, pp. 92-98; R., pp. 59-65).

Richard Adams ("Adams") testified he was in the same cell block with Mercer, Robinson, Brown and Williams in January 2004, and he was in the recreation area when the incident occurred on January 14. He stated be saw Mercer and Robinson hitting Brown, and Brown never had a chance to react. He testified Mercer had two shanks in his hands when he was hitting Brown, and after Mercer went into the bathroom after Brown, he saw Mercer flush the shanks down the toilet. (TT, pp. 112-113, 115-127, 138-140; R., pp. 78-79, 81-93, 104-106).

Michael Moulder ("Moulder") testified he was incarcerated in the Lexington County Detention Center on January 14, 2004, and was sitting in the recreation area when he saw Mercer and Robinson hitting Brown. He grabbed Robinson and threw him off of Brown. He then saw shanks in Mercer's hands, and he pushed Mercer away. Brown ran behind him into the building and Mercer followed Brown inside. (TT, pp. 144-150; R., pp. 110-116).

Officer Russell Jackson of the Lexington County Detention Center testified he was working on January 14, 2004, when Williams come in from the recreation yard and told him there was a fight in the yard. Officer Jackson went to investigate and saw

> Brown run in from the yard toward the bathroom with Mercer running after him. He saw a white object in Mercer's right hand. (TT, pp. 154-162; R., pp. 120-128).
>
> Mercer requested a jury instruction on defense of others, contending the evidence indicated he was acting in defense of Robinson. The circuit court denied the requested charge, finding it was undisputed Mercer was at fault in bringing about the confrontation, there was no evidence Robinson was in imminent danger of death or serious bodily injury, and rather than retreating when Brown ran into the bathroom, Mercer followed him in the bathroom and attacked him. (TT, pp. 186-192; R., pp. 141-147).

(Return Attachment, Final Brief of Respondent at pp. 3-5).

Testimony at the PCR Hearing

At the hearing, this Court heard testimony from former trial counsel, Melissa Jane Armstrong (formerly Kimbrough), and Applicant, Kevin Mercer.

Ms. Armstrong testified that she was counsel in the capital matter at the time she was appointed to represent Applicant on these charges. She testified that a conflict had arose in the Public Defender Office, which initially had the charges, due to simultaneous representation of a witness adverse to Applicant, and noted that the Public Defender assigned to Applicant's case was having trouble with consulting with him based on continuing evaluations in connection with the capital case. (See PCR Tr. pp. 21-23). Ms. Armstrong testified that in her opinion, "it made sense" for her to be appointed on these charges "because those facts were gonna come into play if we got to the sentencing phase in the capital murder and it was my strong suspicion that we were headed to a penalty phase." (PCR Tr. pp. 11 and 24). She explained that she was familiar with the facts of the charges as she had received notice of them, and investigated those facts, as part of the capital matter. (PCR Tr. pp. 11-13 and 42). She testified that Applicant, in discussing these charges, had maintained that he had "felt threatened" and that "it was essentially a self defense or defense of others case." (PCR Tr. p. 13). However, she advised Applicant to not testify for fear that he would not make a good witness and that there would be more harm to his

pp. 32 and 39). She recalled that the trial judge rejected her request for self-defense and defense of others was the evidence that Applicant had chased Brown into the bathroom. (PCR Tr. pp. 37-39).

Ms. Armstrong credibly testified that though she expressed initial hesitation in accepting the matter and preparing the case for trial before the capital charge in the January 13, 2006 hearing, that was due primarily due to "preparing for a capital case that's coming right at us" and not knowing all the "details" of the detention center fight at the time of the hearing. (See PCR Tr. pp. 41-43). Ultimately, she was prepared and was not taken by surprise as to any detail of the event. (PCR Tr. pp. 43-46). She testified that she did ask to be appointed even after that initial hesitancy – a fact supported by the contemporaneously issued order. (PCR Tr. p. 45).

Applicant testified that while in the detention center, the victim, Terry Brown, became his cellmate but the two did not get along. He and Brown had a prior fight, and Brown had threated another inmate, Marcus Robinson (though Applicant did not have the right name and counsel offered the name in questioning). Applicant indicated Brown had been "talking behind [his] back" about fighting Applicant. Applicant approached Brown on the recreation yard, the exchange became hostile, and "[e]verybody started fighting." (PCR Tr. p. 50). Brown had taken a "fighting position" or "stance" immediately before the violence began, but did not have a weapon. (PCR Tr. p. 51). When questioned about how Brown received the cuts to his face, Applicant vaguely responded he had long fingernails at the time, and "so if it was cuts like that, then, you know, it had to come from that other than anything else I don't have any recollection of that." (PCR Tr. p. 51). Applicant testified that Brown broke and ran toward a restroom, and Applicant followed because he "figure[d] that's where he had something stored" such as a weapon because that is where some people will hide weapons in prison. (PCR Tr. pp. 51-53). He testified that Ms. Armstrong advised him not to testify for fear his testimony may be used

against him in the capital case. (PCR Tr. p. 53). On cross-examination, Applicant at first testified he did not recall a prior burglary charge, but then agreed "yeah" that he had that prior charge. (PCR Tr. p. 54). He was similarly guarded in his testimony confirming other convictions for strong arm robbery, possession with intent to distribute marijuana, and unlawful carrying of a pistol. (PCR Tr. p. 54). He recalled discussing the detention center charges with Ms. Armstrong and reviewing his version of the events and the evidence with her, even before her appointment as counsel for these charges, and denied having a weapon in the fight. (PCR Tr. pp. 54-56). Applicant testified that Ms. Armstrong advised him not to testify, and that it would be "safest" not to testify, so he ultimately did not testify because he "didn't want to do anything that would jeopardize, you know, my case." (PCR Tr. p. 57).

Conflict Allegation

In Applicant's first allegation, he asserts trial counsel was ineffective because she had a conflict of interest as a result of counsel's preparation for Applicant's death penalty trial when appointed to this criminal trial. (Amended Application [unnumbered] p. 2). In summation, counsel for Applicant argued that there as a "conflict that was created by the judge" and Applicant is relieved from showing specific prejudice. (PCR Tr. p. 58-59). This Court disagrees.

It is true that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan,* 446 U.S. 335, 349-50 (1980) (citing *Holloway v. Arkansas*, 435 U.S. 475, 487-491 (1978)). *See Strickland*, 466 U.S. at, 693 (actual conflict exempt from the prejudice requirement). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350 (citation omitted).

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) (citing *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001)). To determine conflict, the reviewing court must consider whether it is shown that:

> ... a defense attorney place[d] himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties ***to a party whose interests are adverse*** to those of the defendant, then an actual conflict exists. ***The interests of the other client a***nd the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5th Cir.1979)) (emphasis added).

Applicant failed to show trial counsel had divided loyalties. The very allegation undermines his legal position as the competing interest he relies upon actually shows strategic considerations for the separate proceedings that followed the separate crimes *he* committed, not conflicts between duties of loyalty or personal interests. Applicant's interest remained paramount in the representation, as indicated in Ms. Armstrong's testimony that she was in a "better" position to protect his interest that someone not involved in the capital case. (PCR Tr. p. 26). There was no evidence presented of a divided loyalty. Applicant failed in his burden of proof to establish a conflict that would relieve him of demonstrating prejudice.

Applicant's reliance on *Williams v. Moody*, 287 Ga. 665, 697 S.E.2d 199 (2010), is misplaced. The nub of the conflict reasoning was that counsel who continued in litigation would be placed in conflict having to allege or refrain from alleging a claim of ineffective assistance against himself. This is not a new concept. *See Juniper v. Davis*, 737 F.3d 288, 289–90 (4th Cir. 2013) (recognizing conflict of interest if counsel is obligated to pursue ineffective assistance errors counsel personally made in prior representation of defendant). It is simply not applicable

here. The same is true of Applicant's reliance on *United States v. Taylor*, 139 F.3d 924 (D.C. Cir. 1998). The *Taylor* Court wrote, "In order for there to be an 'actual conflict,' an attorney must be forced to make a choice advancing his own interest at the expense of his client's." 139 F.3d at 930. In *Taylor*, the discussion focused on counsel's efforts to conceal his incorrect advice omitted a defense, which placed counsel's personal interest and the client's interest at odds. 139 F.3d at 933. Again, the type of personal interest contrasting with client's interest is neither alleged nor shown in this case. Applicant has failed to show facts that would entitled him to relief.

Failure to Investigate/Present Defense Evidence
ABA Guidelines

In Applicant's second allegation, he asserts counsel failed to investigate sufficiently and "counsel's conduct fell short of the standards for capital defense work articulated by the American Bar Association standard." (Amended Application [unnumbered] p. 3).

Applicant's reference to the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases is not applicable even for general guidance purposes in this action as this action does not challenge counsel's representation in Applicant's capital trial. At any rate, the guidelines, even in capital cases, are not mandates. The United States Supreme Court has consistently maintained that the guidelines are just that – "'only guides' to what reasonableness means, not its definition" or "inexorable commands" defense counsel must follow. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 17 (2009) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065). In complement, our courts have found the guidelines "may be useful or may offer assistance in the analysis of an issue," but "are not controlling or dispositive." *State v. Blakely*, 402 S.C. 650, 664-65, 742 S.E.2d 29, 36-37 (Ct. App. 2013). Thus, the allegation counsel's investigation "fell short of the standards" in the guidelines lacks persuasive weight.

Moreover, this Court rejects the factual basis for the underlying argument for deficient performance and prejudice.

Applicant asserts counsel "failed to adequately investigate and present evidence that the applicant was acting to protect others from harm at the time of the incident." (Amended Application [unnumbered] p. 3). In summation at the PCR hearing, counsel argued trial counsel's strategy of self-defense was unreasonable" as "[t]he two pieces of evidence that she tried to get in were a complaint that Mr. Mercer had made about Mr. Brown to the jail staff that was denied under hearsay and Mr. Mercer's mother saying that she had gotten a phone call from Mr. Mercer in which he claimed self defense which was also correctly denied as inadmissible under hearsay." (PCR Tr. p. 60). Applicant argued counsel "didn't even offer a mustard seed of evidence in which to get a jury charge," and "she had two available means to her," either presenting Applicant or her expert from the capital case concerning prison adaptability. (PCR Tr. pp. 60-61).

In contrast, however, counsel's PCR testimony supports that she, along with investigative support, did develop evidence of this position and had a cogent strategy. She not only attempted to develop evidence of self-defense through cross-examination, but also offered evidence (though it was ultimately rejected). It was, nonetheless, developed and offered. It was not missed. *Strickland,* 466 U.S. at 691 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). Of note, appellate counsel consistently argued to both the South Carolina Court of Appeals and the Supreme Court of South Carolina that there was enough evidence to warrant a charge on the defense of others. (See Return Attachments, Appellate Briefs, Petition, and Petition Appendix). An unsuccessful strategy should not be confused with an unreasonable strategy. *See Bell v. Evatt,* 72 F.3d 421, 429 (4th

Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel."). This Court will not fault counsel on well-investigated strategic decisions. *Strickland,* 466 U.S. at 681 ("If counsel conducts such substantial investigations, the strategic choices made as a result 'will seldom if ever, be found wanting.'") (quotations in original).

The major issue with the argument forward in this claim is that Applicant cannot show a missed avenue of reasonable investigation or any missed evidence that this Court may consider in either determining deficient performance or prejudice. *Id.* ("Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense."). The testimony presented by Applicant at the hearing does not convince the Court that Applicant has shown either deficient performance or prejudice. In fact, Applicant admitted at the PCR hearing to confronting Brown on the recreation yard, not on viewing some threatening action from him, but because of purported "talk" concerning Applicant. (PCR Tr. 50). He cannot show he is without fault in bringing on the difficulty. That is the first element for the defense and a necessary to establishing the defense. *See, e.g, State v. Davis,* 282 S.C.45, 317 S.E.2d 452 (1984). "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." *State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). Thus, Applicant's testimony fails to support a reasonable probability of a different result. *Strickland, supra.*

Applicant's other suggestion – that an expert could have testified as to storing weapons in the bathroom – remained speculative because an expert was not presented at the PCR hearing. The speculation is fatal to his burden of proof. *Bassette v. Thompson*, 915 F.2d 932, 940 (4th Cir. 1990) ("The great failing of the appellant on his claim that other evidence should have been

presented during the sentencing phase of his trial is the absence of a proffer of testimony from a witness or witnesses he claims his attorney should have called."); *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). Even assuming an expert could be located and would similarly opine about weapon access and storage, construing the speculation to his favor for the sake of argument, the allegation lacks merit.

If an expert should testify to the fact that weapons are kept in the bathroom, it would not necessarily benefit Applicant when he chased Brown into the bathroom and Brown was the only individual cut. It could be Applicant steered Brown to where Applicant had better access to more weapons. Further, reference to Applicant's knowledge of prison customs would show Applicant's more extensive criminal knowledge, in particular about access to weapons. While true that the fact of being in the detention center would certainly be before the jury in this case as a matter of necessity, a comfortable familiarity with general prison customs concerning weaponry would not be beneficial to Applicant. An additional problem, if Applicant testified, would be that Applicant's testimony could be seen as lacking credibility. This Court finds Applicant was not credible, or his credibility was certainly questionable, in much of his testimony because he was evasive on matters of record such as his prior criminal convictions, unsure of who was threatened by Brown, and offered that perhaps the cuts on Brown's face (which required treatment) came from Applicant's long fingernails. The lack of credible testimony supports counsel's assessment that Applicant could only do more harm than good by testifying before a jury. But for purposes of the weapons-in-prison-bathrooms testimony, there is little gain shown to be available. Again, Applicant has failed in his burden of proof.

Applicant further fails in showing prejudice where the trial transcript shows that there was testimony not only that the fight occurred, but that Applicant had a weapon, then chased Brown into the bathroom. (See, for example, Tr. pp. 51-55, 57-58, 60-63; 112-13; 144-150; see also full statement of facts recited above). Additionally, Brown had actual cuts on his face. (Tr. pp. 63-67). Applicant's self-defense theory has significant and serious credibility issues which this Court must consider in a *Strickland* analysis. *Jackson v. State*, 355 S.C. 568, 573, 586 S.E.2d 562, 564 (2003) ("Our confidence in the outcome of Jackson's trial is not undermined by his failure to receive a self-defense charge. Jackson's testimony was unsupported by the physical evidence and highly incredible."). Again, Applicant has failed to carry his burden of proof for either deficient performance or prejudice.

Insufficient Time to Investigate and Prepare/Cronic Test

To the extent counsel also argues that Ms. Armstrong expressed that she did not have sufficient time, (PCR Tr. p. 63), thus *Cronic* rather than *Strickland* should apply, this Court credits Ms. Armstrong's explanation that the prior assertions before appointment during the January 2006 hearing were made without contemplation of the specifics of this case and more with an eye to preserving her time and efforts for the capital case. (PCR Tr. pp. 41-43). Further, Ms. Armstrong testified she was prepared for trial when the trial began, and because of the representation in the capital case, perhaps was in a "better" position than most to represent Applicant in this action. (PCR Tr. pp. 14, 26, and 43-45). The fact that she even requested appointment after initial hesitancy is also supported by the appointment order. (PCR Tr. p. 45). All this credible and supported testimony shows Ms. Armstrong eventually requested appointment to further Applicant's interest, not that she was pushed into representation, or lacked time, resources or failed to conduct an adequate investigation to prepare a defense. Applicant's claim fails factually.

Additionally, the transcript of the trial reflects that counsel did a very reasonable job of defending Applicant at trial. Trial counsel was able to obtain a directed verdict upon one of the charges, (on the lynching charge), and vigorously defended throughout the trial. The mere fact that trial counsel's strategy was unsuccessful on the remaining counts does not render counsel's assistance unconstitutionally ineffective. *Bell v. Evatt, supra.*

Applicant's suggestion *Cronic* should apply is incorrect. To rely on *United States v. Cronic*, 466 U.S. 648 (1984) to excuse the showing of prejudice, an applicant must demonstrate one of three rare circumstances: (1) an absence at a critical stage; (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," or (3) a situation existed such that no counsel could provide adequate representation. *Nance v. Ozmint*, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006) (quotations in original) (citations omitted). Applicant cannot show anything more than ordinary complaints – failure to obtain an expert witness, failure to adequately pursue a defense – and these do not rise to a *Cronic* level. *Lorenzen v. State*, 376 S.C. 521, 530, 657 S.E.2d 771, 776 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (rejecting *Cronic* analysis and applying *Strickland* test to allegation of failure to call an expert witness). Therefore, *Strickland* controls. *Id.*; *see also Nance*, 367 S.C. at 552, 626 S.E.2d at 880 ("Absent these narrow circumstances of presumed prejudice under *Cronic*, defendants must show actual prejudice under *Strickland.*).

When the claim of deficient representation is analyzed under *Strickland*, as it must be, Applicant has failed to show either deficient performance or prejudice.

[Conclusion on following page]

CONCLUSION

For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof in showing a constitutional violation that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR, Rule 71.1(g) SCRCP; *see also Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) ("counsel is required to advise an applicant of the right to appellate review of the denial of PCR"). Applicant's attention is also directed to South Carolina Appellate Court Rules 203 and 243 for appropriate procedures for filing and serving the notice, and required actions after notice of intent to appeal has been filed.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of Respondent for completion of his presently existing sentence.

AND IT IS SO ORDERED this 14 day of May, 2020

THE HONORABLE J. DERHAM COLE
Presiding Judge

_____, South Carolina

A TRUE COPY
Lex. Cty. C.C.C.P., G.S. & F.C.