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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition of Writ of Certiorari to Orangeburg County
Court Of Common Pleas
The Honorable Craig D. Brown, Post-Conviction Relief Judge
The Honorable Edgar W. Dickson, Trial Judge

Appellate Case No.: 2020-000896

JULIAN YOUNG,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER

AMENDED APPENDIX

TARA DAWN SHURLING
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3614 Landmark Drive, Suite A
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(803) 738-8622

ALAN WILSON
Attorney General

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ATTORNEY FOR RESPONDENT

ATTORNEYS FOR PETITIONER

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- (b) The errors and omissions of Trial Counsel, both prior to and during Applicant's trial, violated Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, and were prejudicial to Applicant to a degree that they violated his right to a fair trial in that the result of his trial would likely have been different but for Trial Counsel's deficient representation.

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

- (a) Trial Counsel failed to object to improper testimony and jury arguments during Applicant's trial which were highly prejudicial to Applicant's ability to receive a fair trial.
- (b) Trial Counsel failed to adequately impeach the State's witnesses at trial, and thereby failed to challenge the credibility of witnesses whose testimony was crucial to the State's case.

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

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

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. N/A

ii. _____

iii. _____

iv. _____

- (c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - 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. N/A
 - 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) Allegations raised herein would not have been properly heard on direct appeal. Collateral review, through PCR, presents the first appropriate opportunity to address these claims.

- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? X
- (c) your sentencing? X
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? X
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? n/a
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. Virgin P. Johnson, P. O. Box 2107, Orangeburg, SC 29116
Korey L. Williams, P. O. Box 2107, Orangeburg, SC 29116
- ii. Tara Dawn Shurling, 3614 Landmark Road, Ste A, Columbia, SC 29204
- (b) the proceedings at which each such attorney represented you:
- i. Trial and sentencing
- ii. Direct Appeal.
- iii. _____
- iv. _____
19. State clearly the relief you seek in filing this application:
Reversal of Applicant's judgment and sentence and remand for a new trial.

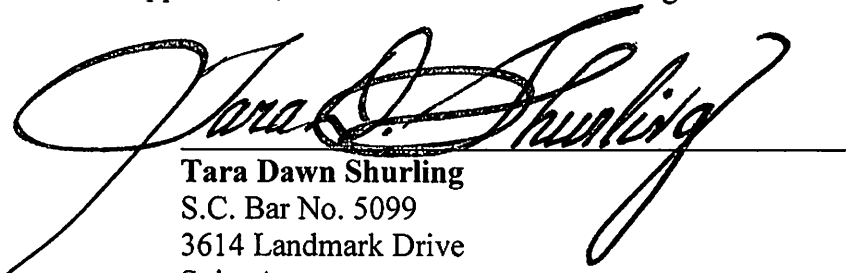
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

County of Orangeburg)

VERIFICATION

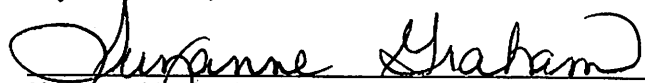
I, Tara Dawn Shurling, *retained* counsel for the Applicant, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



Tara Dawn Shurling
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 Suite A
 Columbia, SC 29204
 (803) 738-8622
 Fax (803) 738-1600
tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

SWORN to and subscribed before me this 3rd
 day of March, 2015.

 (L.S.)
Notary Public for the State of South Carolina

My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Julian Young, #352043,

2015-CP-38-00298

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed March 5, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the April 2014 term of the Court of General Sessions for Orangeburg County for Murder (2011-GS-38-1833). Applicant was represented by Virgin P. Johnson, Esq. and Corey L. Williams, Esq. On August 14, 2012, Applicant proceeded to trial before the Honorable Edgar W. Dickson. Applicant was found guilty on August 16, 2012. Judge Dickson sentenced Applicant to thirty-five (35) years' imprisonment for Murder.

Applicant filed a timely notice of appeal and filed a Final Brief of Appellant on December 17, 2013. On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction. He filed a Petition for Writ of Certiorari on September 24, 2014. The South Carolina Supreme Court denied the petition on December 18, 2014.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons verbatim:

1. Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteen Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated before and during his trial.
 - a. Trial Counsel failed to object to improper testimony and jury arguments during Applicant's trial which were highly prejudicial to Applicant's ability to receive a fair trial.
2. The errors and omissions of Trial Counsel, both prior to and during Applicant's trial, violated Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, and were prejudicial to Applicant to a degree that they violated his right to a fair trial in that result of his trial would likely have been different but for Trial Counsel's deficient representation.
 - a. Trial Counsel failed to adequately impeach the State's witnesses at trial, and thereby failed to challenge the credibility of witnesses whose testimony was crucial to the State's case.

III.

Applicant's claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR hearing. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

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

VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

(signature on following page)

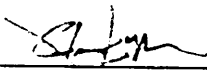
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

7/9, 2015

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

JULIAN YOUNG, #352043

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

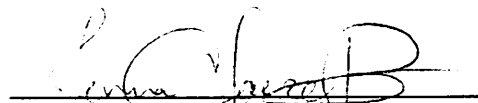
2015-CP-38-00298

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, SC 29204

DATED this 9th day of September, 2015.


 Jenna C. Brown, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
JULIAN YOUNG, #352043,	)	2015-CP-38-00298
Applicant,	)	
v.	)	
	)	AMENDED POST-CONVICTION
STATE OF SOUTH CAROLINA,	)	RELIEF APPLICATION
Respondent.	)	
_____	)	

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior to and during his trial hearing. The Post-Conviction Relief Application previously filed on March 5, 2015 under docket number 2015-CP-38-00298 is hereby amended to include the following additional allegations:

1. Trial Counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun.
2. Trial Counsel was ineffective for neglecting to adequately cross-examining co-defendant, Ricky Gipson, concerning what deals he had reached with law enforcement in the Solicitor's Office in exchange for his testimony.
3. Trial Counsel was ineffective for neglecting to question witness, Ricky Gipson, concerning the penalties for dealing in the quantity of drugs admittedly involved in the transaction he set up between Austin and the Victim.
4. Trial Counsel was ineffective for cross-examining witness, Ricky Gipson, concerning "felony murder" where said cross examination was inconsistent with South Carolina law and could readily have mislead the jury into believing that Applicant's involvement in a felony drug deal made him responsible for murder in connection with any death occurring in the course of said felony. [Tr. p. 159, l. 21- p. 160, l. 3.]
5. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his potential sentencing exposure for murder in connection with the

death of the Victim had the State elected to pursue the charge of murder against him under the concept of accomplice liability.

6. Trial Counsel was ineffective for failing to cross-examine witness, Ricky Gipson, concerning the amount of marijuana involved in the drug deal he allegedly set up between the Victim and Applicant and his friends.
7. Trial Counsel was ineffective for failing to adequately counsel Applicant concerning the potential advantages and disadvantages of testifying in his own defense.
8. Trial Counsel was ineffective for neglecting to advise Applicant concerning the law as it relates to the defense of self-defense.
9. Trial Counsel was ineffective for neglecting to advise the Applicant thoroughly concerning the law as it relates to the lesser included offense of voluntary manslaughter.
10. Trial Counsel was ineffective for neglecting to advise the Applicant adequately concerning the law in South Carolina concerning the defense of accident.
11. Trial Counsel was ineffective for neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged.
12. Trial Counsel was ineffective for failing to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions.
13. Trial Counsel was ineffective for neglecting adequately explain to the Applicant the fact that, absent testimony from him there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as the testimony presented during the State's case in chief did not provide evidence supporting those theories of the case.
14. Trial Counsel was ineffective for neglecting to cross-examine witness, Ricky Gipson, concerning what if any discussion he heard between Applicant and the Victim.
15. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that he could have been charged with attempted armed robbery and was not.

16. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he was not charged with murder when under the State's theory of the case he could have faced that charge under the theory of accomplice liability.
17. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he had not been charged with any drug crime in connection with his admitted involvement in the conspiracy to purchase marijuana from the deceased.
18. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could have been charged with attempted armed robbery under at least one interpretation of the evidence presented by the State.
19. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that the State's failure to charge him with certain potential offenses in connection with this case constituted a benefit in exchange for his testimony.
20. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could still be charged with a number of other serious offenses in connection with this incident if the State elected to prosecute him under a theory of accomplice liability.
21. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that the State had not charged him with a number of serious offenses for which he could have been prosecuted under a theory of accomplice liability.
22. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his knowledge that the State could still elect to prosecute him for multiple serious felonies at some future date should they elect to prosecute him under a theory of accomplice liability.
23. Trial Counsel was ineffective for continuing to cross-examine State witness, Ricky Gipson concerning whether he had seen Applicant with a weapon during the incident in question after this witness had clearly testified that he had not seen Applicant with a weapon on that date.
24. Trial Counsel was ineffective for continuing to cross-examine Ricky Gipson concerning whether or not he had ever informed law enforcement that he saw Applicant with a weapon on the day in question where in one statement given to law enforcement, which was available to Counsel in the discovery process, Gipson claimed that either Applicant or his friend with him had a gun, and consequently Counsel's continued cross-examination on this point resulted in publication of testimony and evidence that was prejudicial to Applicant.

25. Trial Counsel was ineffective for failing to object to the State's characterization of witness Ray Anthony Austin's prior criminal record as "just a little bit of trouble in the past" where said characterization was intended to minimize the impact of this witness's prior record on the jury's determination of his creditability.
26. Trial Counsel was ineffective for failing to cross-examine Ray Anthony Austin concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.
27. Trial Counsel was ineffective for neglecting to adequately cross-examine Ray Anthony Austin concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.
28. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Ray Anthony Austin concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.
29. Trial Counsel erred in neglecting to object to a portion of the State's closing argument in which the prosecution violated the Applicant's Sixth Amendment right to be fully heard in his defense by improperly commenting on the strategies employed by Defense Counsel. Tr. p. 406.
30. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution essentially argued that there was no legal basis for the position of defense that witness Gipson could have been charged with murder and other offenses. Tr. p. 406- p. 407.
31. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence by arguing that there was evidence that Applicant pulled the trigger and was trying to steal from Victim. Tr. p. 407.
32. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument in which the Solicitor stated that witness Gipson would not have taken "them" over there to buy marijuana if he had known Applicant had a gun where there was nothing in evidence establishing that Applicant in fact had a gun. Tr. p. 407.
33. Trial Counsel was ineffective for neglecting to object to the manner in which a law enforcement officer was questioned concerning the chronology between when other State's witnesses were arrested, cooperated with an interview and then gave statements where the method in which the officer was questioned concerning each of

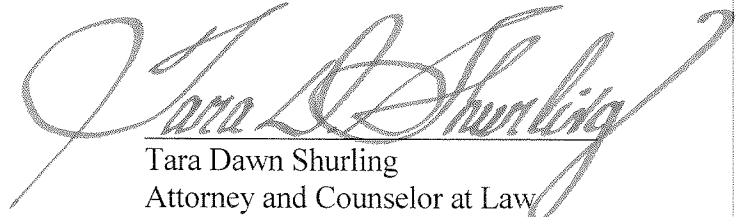
the State's witnesses, followed by the same testimony concerning Applicant which did not reference cooperation and the giving of a statement, amounted to an improper comment on Applicant's exercise of his right to remain silent.

34. Trial Counsel was ineffective for failing to cross-examine Maurice Thompson concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.
35. Trial Counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.
36. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Maurice Thompson concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.
37. Trial Counsel was ineffective for failing to object to a closing argument made by the State in which the prosecution argued that witness Gipson ran from the scene because he didn't have a gun on him where said argument addressed matters not in evidence and as such was highly improper. Tr. p. 410, ll. 7-10.
38. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the Solicitor argued that "we know it's not a contact" in arguing that any suggestion that the Victim shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's own expert witness, the pathologist, in this case. Tr.p. 421, 15-21.
39. Trial Counsel was ineffective for neglecting to use readily available evidence, disclosed to the defense in the discovery process, to impeach the State's witnesses and challenge the State's theory of the case.
40. Trial Counsel was ineffective for failing to clearly refute the State's position that a key witness for the State was Applicant's cousin.
41. Trial Counsel was ineffective for failing to adequately argue that the statements made by the deceased did not have the degree of reliability typically afforded a dying declaration where the evidence before the Court verified that the description of the circumstances under which he was shot as a robbery was in fact suggested to him by the law enforcement officer questioning him.
42. Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his

identity from law enforcement by lying about his name provided direct evidence that he was not operating under the belief that his demise was imminent.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his trial proceeding in the Court of General Sessions. Copy of these amendments has been served on opposing counsel, Christian Saville, Assistant Attorney General.

Respectfully submitted,



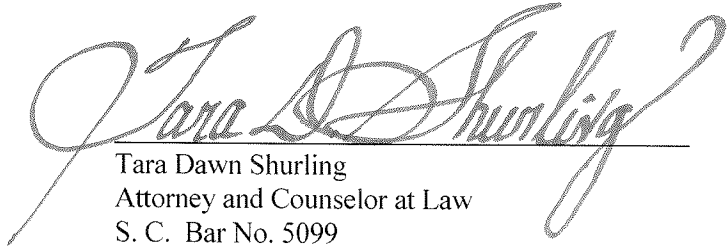
Tara Dawn Shurling
Attorney and Counselor at Law
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Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)
ATTORNEY FOR APPLICANT.

This 2nd day of October, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
JULIAN YOUNG, #352043,	)	2015-CP-38-0298
	)	
Applicant,	)	
	)	
v.	)	
	)	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

The undersigned attorney hereby certifies that one copy of the Amended Post-Conviction Relief Application in the above-entitled cause has been served upon opposing counsel, Christian Saville, Assistant Attorney General, by email and hard copy by U. S. Mail on this the 2nd day of October, 2018 to:

Christian Saville, Assistant Attorney General
 South Carolina Attorney General's Office
 P. O. Box 11549
 Columbia, SC 29211
CSaville@scag.gov

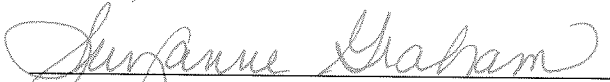

 Tara Dawn Shurling
 Attorney and Counselor at Law
 S. C. Bar No. 5099

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 Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 2nd day of

October, 2018.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 2/28/24

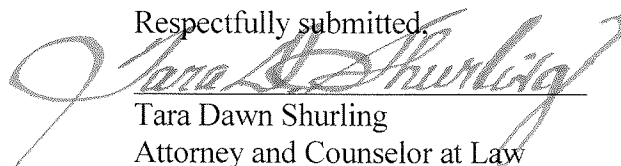
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
JULIAN YOUNG, #352043,	)	2015-CP-38-00298
Applicant,	)	
v.	)	
	)	SECOND AMENDED POST-CONVICTION
STATE OF SOUTH CAROLINA,	)	RELIEF APPLICATION
Respondent.	)	
_____	)	

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior to and during his trial hearing. The Post-Conviction Relief Application previously filed on March 5, 2015 under docket number 2015-CP-38-00298 is hereby amended to include the following additional allegations:

43. Trial Counsel was ineffective for failing to adequately investigate any plea negotiations between the State and witnesses appearing for the prosecution at Applicant's trial.
44. Trial Counsel was ineffective for neglecting to adequately discuss potential plea negotiations with the State prior to Applicant's trial.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his trial proceeding in the Court of General Sessions. Copy of these amendments has been served on opposing counsel, Christian Saville, Assistant Attorney General.

Respectfully submitted,



Tara Dawn Shurling
 Attorney and Counselor at Law
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 Columbia, SC 29204
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 803-738-1600 (Fax)

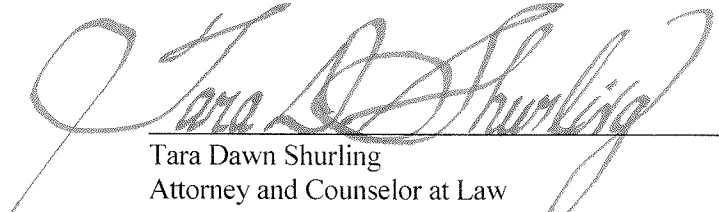
ATTORNEY FOR APPLICANT.

This 3rd day of October, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
JULIAN YOUNG, #352043,	)	2015-CP-38-0298
	)	
Applicant,	)	
	)	
v.	)	
	)	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

The undersigned attorney hereby certifies that one copy of the Second Amended Post-Conviction Relief Application in the above-entitled cause has been served upon opposing counsel, Christian Saville, Assistant Attorney General, by email and hard copy by U. S. Mail on this the 3rd day of October, 2018 to:

Christian Saville, Assistant Attorney General
 South Carolina Attorney General's Office
 P. O. Box 11549
 Columbia, SC 29211
CSaville@scag.gov

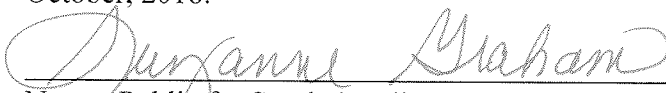

 Tara Dawn Shurling
 Attorney and Counselor at Law
 S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
 Columbia, SC 29204
 (803) 738-8622
 (803) 738-1600 (Fax)
 Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 3rd day of

October, 2018.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
JULIAN YOUNG, #352043,)

IN THE COURT OF COMMON PLEAS

2015-CP-38-00298

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)

THIRD AMENDED POST-CONVICTION
RELIEF APPLICATION

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior to and during his trial hearing. The Post-Conviction Relief Application previously filed on March 5, 2015 under docket number 2015-CP-38-00298. Allegation 42 as set forth in a previous application is hereby amended to state:

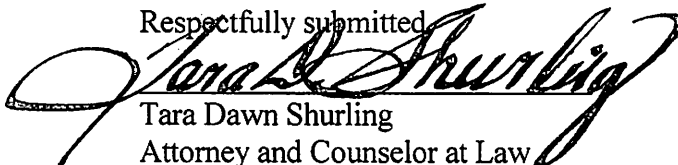
42(A). Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement, by refusing to provide his name, constituted direct evidence that he had the capacity for reflective thought at the time of the utterance.”

In addition to the above amendment, Applicant wishes to add the follow additional allegation.

45. Trial Counsel was in effective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation “everyone said he didn’t carry a weapon” in response to question concerning whether there was any evidence that the deceased carried a weapon for defense. Tr. p. 353,l. 23-p. 354, l. 8.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his trial proceeding in the Court of General Sessions. Copy of these amendments has been served on opposing counsel, Christian Saville, Assistant Attorney General.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)
ATTORNEY FOR APPLICANT.

This 4th day of October, 2018

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 JULIAN YOUNG, #352043,)

IN THE COURT OF COMMON PLEAS

2015-CP-38-0298

Applicant,)

v.)

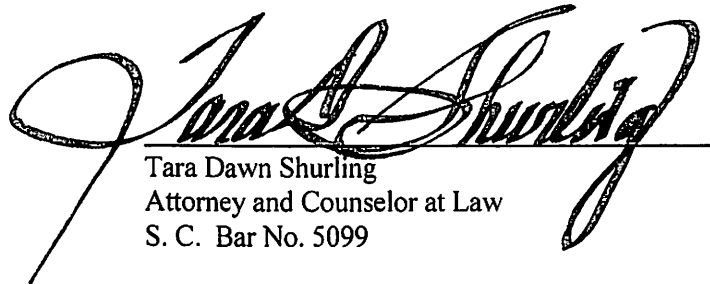
CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)

Respondent.)

The undersigned attorney hereby certifies that one copy of the Third Amended Post-Conviction Relief Application in the above-entitled cause has been served upon opposing counsel, Christian Saville, Assistant Attorney General, by email and hard copy by U. S. Mail on this the 4th day of October, 2018 to:

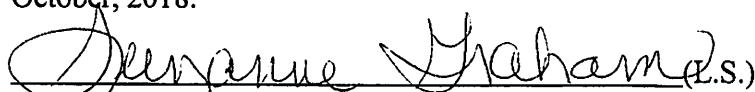
Christian Saville, Assistant Attorney General
 South Carolina Attorney General's Office
 P. O. Box 11549
 Columbia, SC 29211
CSaville@scag.gov


 Tara Dawn Shurling
 Attorney and Counselor at Law
 S. C. Bar No. 5099

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 Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 4th day of
 October, 2018.


 Notary Public for South Carolina
 My Commission Expires: 2/28/24

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Julian C. Young,
Plaintiff,
vs.
State of South Carolina,
Defendant.

October 4 - 5, 2018

St. George, South Carolina

B e f o r e:

The Honorable D. Craig Brown, Judge

A p p e a r a n c e s:

Christian Saville, Esquire
Attorney for the Plaintiff

Tara D. Shurling, Esquire
Attorneys for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

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1 (On the record at 1:19 p.m.)

2 THE COURT: All right. State ready to proceed?

3 MR. SAVILLE: Yes, Your Honor. The State would call
4 the case of *Julian Young vs the State of South Carolina*.
5 This is docket No. 2015-Common Pleas-38-0298.

6 Mr. Young was indicted at the April 2014 term of the
7 Orangeburg County Grand Jury for murder. He was
8 represented by Virgin P. Johnson, Esquire and Corey L.
9 Williams, Esquire.

10 On August 14, 2012, he proceeded to a trial before the
11 Honorable Edgar W. Dixon. Mr. Young was found guilty on
12 August 16, 2012, and sentenced by Judge Dixon to 35 years
13 imprisonment for murder.

14 A timely notice of appeal was filed and a final brief
15 of Appellant was filed on behalf of Mr. Young by Ms. Tara
16 Shurling on December 17, 2013.

17 On June 18, 2014, the South Carolina Court of Appeals
18 issued an unpublished opinion affirming the conviction. A
19 petition for writ of source -- certiorari was filed on
20 September 24, 2014. The Supreme Court denied the petition
21 on December 18, 2014.

22 Mr. Young filed an application for post conviction
23 relief on March 5, 2015, and has since filed subsequent
24 amendments. He is present here today, represented by Ms.
25 Tara D. Shurling, and I will turn it over to Ms. Shurling

1 at this time. Thank you, Your Honor.

2 THE COURT: All right.

3 MS. SHURLING: Thank you.

4 THE COURT: Ms. Shurling?

5 MS. SHURLING: Your Honor, one quick procedural matter
6 I'd like to put on the record since ---

7 THE COURT: All right.

8 MS. SHURLING: --- the Respondent has noted that I did
9 represent Julian Young on direct appeal.

10 I'd like the record to reflect that I did discuss with
11 him thoroughly the fact that, among the other claims that
12 could be raised on collateral review through post
13 conviction relief, was the question of ineffective
14 assistance of appellate counsel; and therefore, if he had
15 had any problems with the way I represented him on direct
16 appeal, I was not the appropriate person for his family and
17 my client to hire for a post conviction relief action.

18 I made very certain, Your Honor, that he understood
19 that I wasn't going to PCR myself. So if he had any
20 complaints about me, he needed to go elsewhere for a PCR
21 attorney, and I also explained to him the consequences of
22 not pursuing any issue he might have with regard to my
23 representation on appeal.

24 We -- we spent some time talking about the
25 contemporaneous objection rule and that he could go through

1 the record himself and look at what was preserved by
2 objection and argument and ruling by the Court; and he
3 subsequently indicated to me that he and his family were
4 satisfied that I had done my very best for him on direct
5 appeal; and that although they were certainly disappointed
6 that we didn't win, that they didn't have any complaints
7 about my performance on direct appeal; and therefore, wanted
8 to go forward with hiring me for the PCR. I just wanted the
9 record to clearly reflect that.

10 Your Honor, I anticipate my client testifying in
11 tomorrow's proceeding, and at that time I will ask him to
12 confirm that what I've just said on the record today was
13 accurate for the record. But we don't need to do that now
14 'cause he's -- he's gonna be sworn and put up tomorrow.

15 THE COURT: Okay. I'm just -- I'm kinda thinking out
16 loud here. Let -- let me ask this question.

17 MS. SHURLING: Yes, sir?

18 THE COURT: In a different context, for example, if a
19 lawyer commits what he or she believes to be malpractice,
20 okay --

21 MS. SHURLING: Yes, sir.

22 THE COURT: -- and you bring your client in, and the
23 rules, I think, require that you at least give them the
24 names -- advise them what's happened and give them the -- or
25 at least advise them that they have the right to other

1 counsel --

2 MS. SHURLING: Yes, sir.

3 THE COURT: -- and give them that opportunity.

4 I've known you a long time. I feel certain you did an
5 outstanding job for this young man on his appeal. But my
6 question, I guess, is: Is there any concerns on your part,
7 from an ethical standpoint, that would raise that flag that
8 would necessitate ---

9 MS. SHURLING: No, sir.

10 THE COURT: --- that you think would necessitate him
11 being advised to seek other counsel and PCR for appellate
12 purposes?

13 MS. SHURLING: And -- and I think that's a very valid
14 point, so let me elaborate a little bit more than I did.

15 What I explained to him is the limits of what I could
16 raise on direct appeal, that -- that it wasn't just any
17 issue that we thought we might want to talk about. It had
18 to be preserved, and I explained the rule to him.

19 I also explained to him that if he had any question
20 about any issues that he thinks maybe were preserved that
21 maybe he wishes I had argued and didn't, that he might want
22 think about talking to another lawyer about it --

23 THE COURT: Okay.

24 MS. SHURLING: -- you know, and made it -- made him
25 very aware -- I went out of my way to make sure he

1 understood that we're talking about ineffective assistance
2 of counsel against me.

3 THE COURT: Right.

4 MS. SHURLING: So obviously, I'm not gonna think I was
5 ineffective, but if -- you know, if you have any complaints,
6 if you have any concerns about anything I did, then you
7 either might want to get a different PCR lawyer or you and
8 your family might want to think about talking to another
9 lawyer about the issues that were raised on appeal versus
10 the ones that you might've thought that I should've raised,
11 and no further concerns were brought to my attention.

12 THE COURT: Okay. Well, I just wanted to get that out
13 there, and just ---

14 MS. SHURLING: I appreciate it. Your Honor, would you
15 like to just go ahead and swear him and ask him questions
16 about that now since we're ---

17 THE COURT: We can do that.

18 Sir, if you'd stand and raise your right hand, please.

19 (The Applicant complies.)

20 JULIAN C. YOUNG, having been first
21 duly sworn, testifies as follows:

22 DIRECT EXAMINATION

23 BY THE COURT:

24 Q All right. You can put your hand down. You're Julian
25 Young?

1 A Yes, sir.

2 Q All right. You've been present there seated by your
3 attorney, Ms. Tara Dawn Shurling, and she has put on the
4 record the fact that she represented you on your direct
5 appeal; is that correct?

6 A Yes, sir.

7 Q Now, you understand that you have a right to file a
8 post conviction relief action pertaining to appellate
9 counsel if there were some issues there. You understand
10 that?

11 A Yes, sir.

12 Q Ms. Shurling has advised me that -- that she, in open
13 court here, in your presence, has advised me that she has
14 advised you of that; is that correct?

15 A Yes, sir.

16 Q And you understand that you have a right to seek other
17 counsel, to investigate that, and look into that on your
18 behalf. You understand that?

19 A Yes, sir.

20 Q Ms. Shurling has advised me that she has advised you
21 of that as well, and that you have on -- not -- at least in
22 your perspective, do not believe there are any issues out
23 there that you might want the final post conviction relief
24 action on. You understand that?

25 A Yes, sir.

1 Q But you understand you have a right to have another
2 lawyer look at it, and -- and look and see if there are any
3 issues there?

4 A Yes, sir.

5 Q But you -- you're waiving that right -- or giving up
6 that right?

7 A I'll waive that. I want Ms. Tara.

8 MS. SHURLING: Okay.

9 Q Sir?

10 A I said I'm waiving. I want Ms. Tara.

11 Q Okay. Do you have any questions you want to ask me?

12 A No, sir.

13 Q Okay. You understand just like in a -- this post
14 conviction relief action that you filed against trial -- or
15 against the State as it relates to your representation at
16 trial, there is applicable statute of limitation, which, if
17 it's not filed within a certain period of time, you're
18 forever barred in pursuing that. You understand that?

19 A Yes, sir.

20 Q And you still want to go forward?

21 A Yes, sir.

22 Q All right. Again, do you have any questions you want
23 to ask me?

24 A No, sir.

25 Q All right. Sir, you may be seated. Thank you.

1 (The witness complies.)

2 THE COURT: All right. Anything else, Ms. Shurling?

3 MS. SHURLING: No, sir.

4 THE COURT: All right. I'll turn it over to you. You
5 may proceed accordingly.

6 MS. SHURLING: Thank you, Your Honor. I would call as
7 our first witness Mr. Virgin Johnson; and I'd note that I'm
8 going to try, to the best of my ability, to stick with going
9 through the three amended applications which set forth with
10 more specificity the issues that we're going to present in
11 this proceeding.

12 THE COURT: Okay.

13 MS. SHURLING: I'll try to do them sequentially so
14 that it's easy to follow and make sure that we're not
15 missing anything.

16 THE COURT: Very well. Thank you.

17 VIRGIN JOHNSON, JR., having been
18 first duly sworn, testifies as follows:

19 MS. SHURLING: Your Honor, is it acceptable for me to
20 set up my questioning here?

21 THE COURT: You can stand and question him wherever
22 you so desire.

23 MS. SHURLING: Thank you.

24 THE COURT: I won't let you come up here and sit by me
25 and do it, though.

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 12

1 MS. SHURLING: I wish, but I might not better do that.

2 DIRECT EXAMINATION

3 BY MS. SHURLING:

4 Q Good morning. Would you state your full name for the
5 record?

6 A Virgin Johnson, Jr.

7 Q And Mr. Johnson, do you recall representing Julian
8 Young?

9 A Very much so.

10 Q And as a matter of fact, you had known his family for
11 a very long time prior to this incident ---

12 A Very ---

13 Q --- ever coming about, correct?

14 A Very close relationship with that family.

15 Q Okay. Now, if I slip and call you "Virgin" --

16 A That's fine.

17 Q -- just -- we've known each other a long time. I'm
18 not being disrespectful. You know that.

19 A Uh-huh.

20 Q I have a bad habit of getting into the excitement of
21 the moment and talking when I think you're through and
22 you're not, and then Ms. Bonnie here will get mad at us
23 both. So I'm gonna make a real effort to make real sure
24 you're through answering before I open my mouth again. But
25 you help me out with that. Okay?

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 13

1 A Okay.

2 Q All right. Let's go through -- first off, for the
3 record, you were kind enough to offer me access to your
4 trial file in this matter, correct?

5 A Yes, ma'am.

6 Q And -- but you had recently moved your office not long
7 before I came to visit you, correct?

8 A Correct.

9 Q And in fairness, in the midst of a move, you were
10 unable to assure me that all of the discovery that had been
11 given to you by the State was necessarily in the boxes that
12 you'd been able to discover, correct?

13 A In fairness, we -- you -- you're right. I thought it
14 was all, but you're right. In fairness, we went ---

15 Q Okay.

16 A --- further and went to the solicitor and got his
17 file.

18 Q I understand.

19 A Okay.

20 Q Just wanted to make sure we -- we were on the same
21 page about that.

22 A Uh-huh.

23 Q Okay. And I understand prior to this morning, you had
24 an opportunity to see the amended application for post
25 conviction relief and my second amended application, but not

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 14

1 the third one that I gave the State this morning, correct?

2 A It was given to me after I got to court.

3 Q Okay. So you've had a -- you have a copy of the third
4 one as well.

5 A Yes, ma'am.

6 Q Correct? All right.

7 Let's go through -- I'm going to start with the -- the
8 first amended application and try to go through them
9 sequentially so that we can stay in order here. All right?

10 A Yes, ma'am.

11 Q First things first: During the opening argument by
12 the State, you recall them informing the jury that there
13 were two kinds of evidence of malice, one was direct and the
14 one was implied. And that there were certain circumstances
15 where they could imply malice, including the use of a
16 weapon. And I direct your attention to page 72, line 6
17 through 9.

18 A Yes.

19 Q Okay. Now, you made a motion for a mistrial at that
20 juncture, I assume based on the fairly recent decision at
21 that time of the Supreme Court in the *Belcher* case, correct?

22 A It was *Belcher* and one other one. I don't remember
23 the name of it.

24 Q Okay. Okay. And at which point, Don Sorenson
25 responded to your motion by noting that -- that in the

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 15

1 opinion itself, actually in a footnote, the Court had noted
2 that the opinion that day saying that an instruction on the
3 inference of malice from the use of a deadly weapon would
4 not be appropriate where a lesser included offense or a
5 defense -- like accident or self-defense -- was being
6 asserted that; but that in a footnote it said that nothing
7 about that ruling was intended to say that the State
8 couldn't argue the inference of malice from the use of a
9 deadly weapon, right?

10 A I don't remember in detail like you're saying, but
11 yes, we discussed that.

12 Q Okay. Now, after that argument by the State, if I
13 could get you to look at page 79, line 20, and going over to
14 the top of page 80. You say (as read): "There is no
15 testimony and we believe from the evidence we have seen
16 there is no testimony that you, Julian, had a gun there.
17 You may be able to infer it, but no testimony." You see
18 that?

19 A Looking right now. Yes, I say that.

20 Q If you were aware of the Supreme Court's ruling in
21 *Belcher* and its early progeny and were concerned about the
22 jury being encouraged from any quarter to infer malice just
23 because a gun was involved in this case, why would you
24 yourself repeat essentially the same type of language that
25 you had just made a motion for a mistrial over in the

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 16

1 State's opening?

2 A Okay. I don't -- only thing I can tell you is I
3 started my defense from trying to make sure Julian had
4 nothing to do with the gun. The gun was the -- the -- the
5 focal issue in this case, and what I was saying that Julian
6 didn't have the gun and I -- if they infer that -- they may
7 do that, but my position was he -- you can't show the
8 inflections on my word, but my position was, look, I want
9 you to you in start Julian didn't have this gun.

10 Q I understand, and I'm trying to be respectful ---

11 A Uh-huh.

12 Q --- and direct.

13 A Uh-huh.

14 Q But you could say, in your opening argument, could you
15 not, that as this case unfolds, you will see that they have
16 zero evidence that my client had the gun.

17 A Oh, if you ask me could I have said that, yes. I --
18 that wasn't the way I said it. I said ---

19 Q I understand

20 A Yeah.

21 Q And my point is you were afraid of the whole notion of
22 inferring malice from the use of a deadly weapon, right?

23 A I was afraid of the weapon being anywhere near Julian.
24 That was my -- that was my intent.

25 Now, if I used -- in the -- in the record, I used the

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 17

1 word. I can't -- I can't change that, but the ---

2 Q I understand.

3 A --- intent of what I was saying was trying to make
4 sure I start out front with Julian not having anything to do
5 with that weapon.

6 Q I understand.

7 A I'm telling you my intent. Now, the words are the
8 words.

9 Q And -- and I guess my question to you is: If you felt
10 strongly enough about that and the danger of the jury
11 potentially inferring malice ---

12 A Uh-huh.

13 Q --- from testimony about a weapon, wouldn't it have
14 been best for you not to parrot that language in your own
15 opening?

16 A Hindsight, you know, maybe you're right; but now,
17 remember, the case didn't clearly say that. We -- that was
18 something you had to deal with further in the trial because
19 the judge -- you -- at the end of the trial, you know, I
20 made that argument again, and the judge overruled it.

21 So I guess what I was trying to do is prepare -- and
22 I'm thinking back five years what was going through my mind.
23 I'm assuming I was trying to prepare for anything that might
24 come down the road.

25 Q I understand.

DIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 18

1 A But I did say the words "inferred." And we did -- had
2 already talked about it. Yes.

3 Q Okay. Let's talk about Ricky Gibson, and just for the
4 sake of clarity in this proceeding, Ricky would be the
5 person we would sort of call "the middle man," right?

6 A Right. Right.

7 Q According to the State's theory of the case, he was a
8 drug dealer, but he was not the person that was directly
9 selling to these boys on this occasion. He was taking them
10 and hooking them up with the gentleman that ended up being
11 the deceased.

12 A I -- I don't know if that was the State's theory, but
13 I was trying to show he was a drug dealer.

14 Q Well, I mean, he testified ---

15 A That's right.

16 Q --- that he called and set up the hook up, didn't he?

17 A He did. He did.

18 Q Okay. Now, he admitted --

19 Your Honor, if you -- if you look at page 129.

20 He admitted that -- that he was selling pot back then,
21 but as it happened that particular day, he was setting up
22 these young men, named by him by street names, with Jonathan
23 Bailey, the deceased in this case, right?

24 A Yes, ma'am.

25 Q Okay. Then ultimately, if you go to page 159, during

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1 your cross, you're questioning them -- and I specifically am
2 looking at lines 14 through 15 (as read): "And don't you
3 take the load, Big Daddy, for what you didn't do. Didn't he
4 tell you that?"

5 And his response is (as read): "He said that if I
6 kept -- keep it honest, that I'll be released and that's
7 what happened."

8 A Yes, ma'am.

9 Q Right?

10 A That's what he said.

11 Q Now, there was no further discussion, was there, about
12 why he didn't end up charged with homicide and attempted
13 robbery and -- and any other charges that could've stemmed
14 from this incident?

15 A Not right there, but if you go to page 160, I said (as
16 read): "And you didn't spend one day in jail. You weren't
17 even locked up. Do you even know how long he had been in
18 jail? Do you care?"

19 So, no, I didn't say it right there, but I -- I got on
20 him about -- I -- I approached the issue about him not doing
21 one day in jail.

22 Q Okay. I understand that, Virgin, but my question is
23 this: All the witnesses in this case that were present were
24 all people that -- there five young men, supposedly, all in
25 the car with one another, meeting up in a parking lot with

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Jonathan Bailey.

A Uh-huh. Yes, ma'am.

Q Correct? And according to Gibson, he was taking them there to buy a little weed from Jonathan Bailey. And he walks Alston and the Defendant over to the car, and Alston doesn't like the weed. He thinks it looks like cheap weed or bad weed, and he's disgusted and says he's not buying that and he walks off. And so he starts to walk off, at which point he realizes that the Defendant's hanging out the door and hears a popping sound basically. That was his story, right?

A Correct.

Q And the other young men that were involved in this case testified essentially consistently with that, right?

A All of them, yeah.

Q And they all -- the other four, the ones that were compadres of the Defendant, supposedly, they said they didn't see him with a gun. They didn't see a gun before or after the incident, right?

A Right.

Q So -- but it's the State's theory of the case, as articulated throughout this record, that your client tried to rob the drug dealer ---

A Correct.

Q --- an attempted robbery gone bad --

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1 A Uh-huh.

2 Q -- and the deceased was shot, right?

3 A Right.

4 Q Every single one of the witnesses, Alston, Thompson,
5 Pinckney, they -- Gibson, they all got the potential for the
6 State to have developed a different theory, which was that
7 they all came there with the intention all along to rob this
8 drug dealer, right?

9 A Okay. I -- I'm -- I'm not understanding what you
10 asked me.

11 Q Okay. You don't have any -- they don't have anybody's
12 word from any discovery or the trial transcript other than
13 people who themselves, under a theory of accomplice
14 liability, could have been charged under a theory of a hand
15 of one, hand of all ---

16 A True.

17 Q --- if the State had wanted to take the position that
18 they were all there to rob Jonathan Bailey ---

19 A That's true.

20 Q --- not just your client.

21 A Yes.

22 Q And so under sound principles of accomplice liability,
23 Gibson could have been charged with murder and attempted
24 armed robbery, Alston -- all of them could have.

25 A Yes.

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1 Q And yet, Alston was the only one that was charged with
2 murder, correct?

3 A You mean -- my client was the only one charged with
4 murder.

5 Q Well, according to the transcript as of the time of
6 the trial, Alston had a pending charge for murder.

7 A Oh, yeah. Alston, was -- was he the one that was in
8 jail? I -- one of them was in jail for something else. It
9 -- it -- okay. It might have been Alston.

10 Q Okay.

11 A Okay.

12 Q My point is why didn't you ask these young men, each
13 of them? I -- I've laid out individual application
14 allegations on each one of them. But why didn't you ask
15 them, "Did law enforcement or the prosecution at any point
16 tell you that, you know, you better cooperate with us
17 because you could end up charged with this murder yourself?"

18 A Uh-huh. I didn't ask them that because it -- it was
19 simple. Each one -- couple of those guys I had an
20 opportunity to talk to. All of them were good friends with
21 Julian, and they said nothing -- I didn't need to antagonize
22 them. They said nothing to hurt -- matter of fact,
23 everything they said helped our case. I was banking on that
24 because each one of them said he wouldn't -- he left the car
25 with no gun, he didn't come back with a gun. We didn't

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1 intend to rob. So I didn't see a need to do that.

2 Q Well, my point being --

3 A Uh-huh.

4 Q -- that all the people that put your client hanging
5 out of the car with his legs twitching like a cockroach, you
6 know, were all people that wanted to distance themselves
7 from the State's theory that it -- it was an attempted armed
8 robbery just sort of out of the blue by Julian Young, right?

9 A None of those guys -- none of the ones that were in
10 the car with Julian said he was trying to rob the -- rob
11 him. Even Gibson said he didn't know whether he was robbing
12 him or not, that the -- the State wanted that theory, but
13 none of them testified to that theory.

14 Q I understand.

15 A I'm telling you why I didn't -- I didn't ---

16 Q Okay.

17 A --- see a need to cross-examine on that. These guys
18 are already leaning Julian's way. The -- the highlight for
19 me was to -- to establish that Julian did not take that gun
20 to that car. So therefore, he couldn't have been the man
21 who did the shooting.

22 Q Okay. Well, that raises a point. I'm gonna jump just
23 for a minute. If -- if -- if you didn't ask Mr. Gibson --
24 and -- and we'll go ---

25 A Uh-huh.

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1 Q --- over this with other people ---

2 A Uh-huh.

3 Q --- in less detail later, but you know, you also
4 didn't cover with him the, you know, potential sentences,
5 what kind of exposure he would have had if he'd been charged
6 with attempted murder or murder or any of that.

7 A You saying I didn't go through that with Julian?

8 Q With -- no. With Gibson or Thompson or Alston. Any
9 of them.

10 A I did not go through with it. I told you my reason.
11 It's in the transcript.

12 Q Okay.

13 A At that time, I didn't see the need to do that. The
14 testimony helped my theory of the case. I didn't see the
15 need to do it.

16 Q Well, if you look with me at page 141, lines 9 through
17 11.

18 THE COURT: What page is that again?

19 MS. SHURLING: Sir?

20 THE COURT: What's the page number again. I'm sorry.

21 MS. SHURLING: 141.

22 A Okay. I'm looking at it.

23 Q Okay. And he's asked and says he didn't see a gun
24 anywhere in the deceased's car. You recall that?

25 A Yes.

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1 Q Okay.

2 A It's in the transcripts, I can't help but -- yes.

3 Q Okay. But then later, at some juncture, he is asked
4 flat out if he ever saw anyone with a gun that day. And I
5 believe that is on page 155.

6 Excuse me, Your Honor. I'm sorry.

7 THE COURT: You're fine.

8 MS. SHURLING: Can't read my own handwriting.

9 (Brief pause.)

10 MS. SHURLING: Your Honor, I'll supply the Court the
11 page site. I, for some reason, am having difficulty
12 spotting the exact location.

13 Q But there is a point during Gibson's testimony when he
14 is asked if he saw anybody with a gun that day, and he says
15 no. Remember that?

16 A Okay. I -- I don't see it in here, but if you said I
17 said it, I know you ---

18 Q Okay.

19 A --- read the transcript, so yeah.

20 Q And I --

21 Your Honor, if you give me just a second, I can locate
22 it I'm sure.

23 THE COURT: Okay.

24 A But I have no reason to disbelieve it if you say it's
25 in there.

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1 (Brief pause.)

2 Q My question is: Once he said on the record -- and Mr.
3 Johnson, you know me. I wouldn't tell you it's in here if
4 it weren't. I just -- my flag's apparently fallen off or
5 something, but I'll find it in a moment.

6 Once he said he didn't see anybody with a gun period,
7 he did not see a gun --

8 A Right.

9 Q -- moving forward, you begin a series of cross --
10 questions on cross-examination where you are keeping at him
11 about whether or not he's ever said that he saw your client
12 with a gun.

13 A Right.

14 Q Until he finally clarifies and says, "Well, I -- I did
15 say -- I did say at one point that either -- in one of my
16 statements he -- that he -- he said, "I said it was either
17 your client of his friend --

18 A Uh-huh.

19 Q -- that had a gun earlier that day -- had a gun." And
20 it was in reference to a statement in which he said earlier
21 that day, when he had seen Julian and his friend, one of
22 them had a gun. He couldn't remember which one, right?

23 A If you say it's in there, it's in there. The only
24 thing I can respond to that is that I wanted -- my theory of
25 the case was to show that Julian wasn't -- didn't have a

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1 gun, noone saw him with a gun, and I would go through -- and
2 I went through with each one of them clearly because I
3 wanted that on the record.

4 From what you're saying from the transcript, it looks
5 like I did exactly what I said. The only reason I could do
6 that is with the -- with -- a lot of times these transcripts
7 don't have the inflection or the attitude of the person
8 doing that, and he may have said it in a way that I thought
9 didn't come across like it should. And I tried to follow up
10 because when I sat down, the most important thing to me was
11 that Julian -- he said Julian did not have a gun. I don't
12 care if nobody else in the car had it or not. I wanted
13 Julian -- I wanted the jury to hear Julian didn't have a
14 gun.

15 Q Okay. But would you agree with me that one of the
16 most important components of your defense was the fact that
17 they didn't have any evidence putting a gun in Julian's
18 hand?

19 A Oh, yes, ma'am.

20 Q Okay.

21 A I agree with you 100 percent.

22 Q And that there was no evidence -- nobody talked about
23 seeing anybody that arrived in that car with a gun that day.

24 A Correct.

25 Q And that was established prior to you engaging in a

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1 line of cross-examination where you kept pressing that point
2 until he finally said, "Well, in one of my statements, I
3 said one of them, either him or his friend, had a gun,"
4 right?

5 A Uh-huh.

6 Q Now, here's my question --

7 MR. SAVILLE: Excuse me, Your Honor. I understand
8 that we're a little bit pressed for time, but could we -- if
9 we could just lead a little bit less.

10 MS. SHURLING: I'll try, Your Honor. I'm sorry. I'm
11 -- I'm trying to speed up.

12 Q That statement that he's addressing was in the
13 discovery package, was it not?

14 A I would feel sure if you said that it was. I don't
15 remember, but if you said it, you've been through it I
16 believe.

17 Q And so you knew before you pressed Gibson that you'd
18 sort of skated through the direct testimony because in the -
19 - you know, they -- they don't introduce any testimony about
20 Gibson having ever said he saw Julian or his buddy with a
21 gun.

22 But then you opened the top of that box back up by
23 pressing him on the point 'til he finally reminds you that,
24 yeah, my statement says one of them had a gun. I just
25 didn't remember which one it was.

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1 A My only response for that is -- is gonna be like I
2 wanted everybody to say -- I wanted every witness that
3 testified -- and I knew that everyone gonna testify because
4 I'd read every statement and I wanted the jury to hear each
5 and every one -- everybody that had anything to do with that
6 shooting that day to say Julian Young -- I wasn't concerned
7 about the other guy -- Julian Young did not have a gun, and
8 I got that from everyone of them.

9 Now, if I asked the question too much or -- I guess
10 that's an interpretation, but after the fact now.

11 Q Yeah.

12 A I'm just telling you about what was going on in my
13 head while I was at the trial.

14 Q Well, I'm going to clarify real quickly --

15 A Okay.

16 Q -- and then we're going to move on.

17 A Okay.

18 Q But my point is when you have a portion of the
19 testimony where he admits that he didn't see ---

20 MR. SAVILLE: Objection. Asked and answered.

21 THE COURT: Well, let her finish the question.

22 A Yeah.

23 MS. SHURLING: I -- I'll rephrase.

24 Q Once you've got that in the record and you know that
25 in the discovery there's a statement that references seeing

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1 either your client or his friend with a gun, did you not
2 consider the fact that you might be opening the door for
3 something to come out on cross that you were lucky didn't
4 come out on direct?

5 A All I can say is at the point in time then, I -- I
6 didn't see it. I was trying to establish my theory.

7 Q I'll move on. Let's go back for a minute. Make sure
8 we're covering things as we go along.

9 A Okay.

10 Q You -- you did not see the need to question Mr. Gibson
11 about whether or not he'd been threatened with prosecution
12 for the more serious crimes, whether they had talked to him
13 about accomplice liability or attempted arm robbery, any of
14 that. You just simply didn't see any point in that.

15 A I -- I made the decision not to do it. You're
16 correct.

17 Q And -- and the why was -- why did you think it was --
18 that was beneficial to your client?

19 A Because my theory of the case -- there was nobody --
20 all of the testimony in this case centered around a shooting
21 with the gun. Everybody in the car, even the guy, Ricky
22 Gibson did the running, the four guys in the car, everybody
23 said Julian -- and -- and I cross-examined to get this:
24 Julian left the car without a gun.

25 I said, "Did Julian come back with a gun?" "Julian

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1 didn't have a gun." "Did you see Julian with a gun that
2 day?" "Julian didn't have the gun that day."

3 What I wanted to establish -- if I overdid it or if I
4 under-did it, what I wanted to establish was that -- Julian
5 was the only person in there on trial for murder. What I
6 wanted to establish was he did not have that gun.

7 Q Well -- and isn't it true that the discovery material
8 also indicated that a search warrant had been executed for
9 the home of your client's brother --

10 A Yeah.

11 Q -- and a pistol had been seized which was tested
12 ballistically --

13 And Your Honor, I -- I know I'm leading, but it's in
14 the record.

15 Q The ballistics witness testified that it was
16 inconclusive. They couldn't say whether or not it was the
17 murder weapon or not.

18 A It was either inconclusive or it didn't match. It was
19 one of the two, yes.

20 Q Okay.

21 A Uh-huh.

22 Q So again, when you say nobody saw anybody with a gun
23 that day, but you got two things hanging out there: You've
24 got a statement that so far hasn't come in that he saw
25 either your client or a friend with a gun that day, and

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1 you've got the fact that they're going to introduce the fact
2 that a weapon that couldn't be ruled out as the murder
3 weapon was found in your client's brother's home, right?

4 A Okay. But it wasn't my client, and the fact that it
5 was in his brother's home and it wasn't conclusive and it
6 wasn't -- didn't substantiate with Julian ...

7 Q Okay. I will move on.

8 Same goes -- I assume same answer applies to
9 sentencing exposure as the charges, right?

10 A On each and every one of them. You're right.

11 Q Okay. Now, with regard to fail -- did you consider
12 cross-examining Ricky Gibson about the amount of marijuana
13 these young men were trying to guy that day?

14 A It was in the -- it was -- I don't remember who did
15 it, but it was an ounce. It's -- it's something about an
16 ounce. I remember an ounce. So that was the amount that
17 day, an ounce.

18 Q Well, and -- and that did come out in the testimony
19 with someone else later but ---

20 A Right.

21 Q --- but did you not consider it important to try to
22 set up through the first of these witnesses, Gibson, the
23 fact that -- of the quantity of drugs involved? No?

24 A No. If -- this case narrowed down -- let's -- let's -
25 - this case narrowed down to just Julian -- I forgot which

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1 other one went to the guy -- and the guy that got out,
2 Gibson, one of the boys went back to the car. Julian was at
3 the car with the young man that was killed.

4 All of those para -- all those -- those were
5 peripheral stuff that would have no bearing on getting
6 Julian away from that gun. To me, my focus on -- was
7 getting him away from that gun, and I thought I did a pretty
8 good job of establishing the fact that he didn't take the
9 gun to the car. So there was only one place for the gun to
10 come from: The fellow in the car who was a drug dealer.

11 Q Did you discuss the potential for a defense of self-
12 defense with your client?

13 A Yes. Now -- and -- and let me tell you -- and you and
14 I had this discussion and I think this has a lot to play
15 with. I told you when we talked -- when Julian and I
16 talked, I asked Julian this question: I said, "Julian, are
17 we going to find this gun?" He said, "No." I said, "Are we
18 ever going to find this gun?" He said, "No."

19 And the reason that concerned me so much was because
20 if they could never find the gun, then there was no was to -
21 - to connect Julian with the shooting at all. The gun had
22 to come from the car. There was no way to connect Julian to
23 the gun.

24 So my whole case was Julian didn't want to testify.
25 When I asked him that, I immediately realized that Julian

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1 knew what happened to the gun, and I wasn't going to say,
2 "Did you have the gun," because once I said did you have the
3 gun, he put me in the position where I would have been
4 limited in the testimony if I put him up or if I let him say
5 something, then I would have got put in the position of
6 allowing him to do a fraud on the Court.

7 So once I realized that -- from his conversation, I
8 inferred that Julian had the gun, from then on, I tried to
9 keep Julian out of harm [sic] way because if Julian took the
10 stand -- and Julian had the opportunity whether he wanted to
11 take the stand or not. The judge asked him, I talked with
12 him about it, and Julian said he was real nervous. And if
13 I'm not mistaken, his aunt, the minister, I think in one of
14 the times I talked with him, she might have been in the
15 room. He said, "Look, I don't want to take the stand. I'm
16 nervous."

17 I didn't want to put him up there because if he got up
18 there and the solicitor asked him, "Did you have the gun,"
19 and he came out and said, "Yes, I had that gun," I would
20 have been in terrible shape as his lawyer. I was trying to
21 protect Julian and I was trying to protect the record and
22 not do any lying and any fraud on the Court.

23 So -- so there was the reasoning behind, once we
24 discussed it, why Julian didn't take the stand. It wasn't
25 from not explaining, it wasn't from not knowing. It was we

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1 couldn't put Julian up.

2 Q Well, that depends on at what point in time he gained
3 possession of the gun, doesn't it?

4 A Whatever time -- whatever time he gained possession of
5 the gun, it had to be -- it would have had to been before
6 Julian got back into the car, and they said there was no
7 gun. There would be -- the only way for Julian to have
8 gotten the gun is he would have had gotten it out of the car
9 after the shooting.

10 He didn't come back to the car with a gun. My theory
11 was Julian had nothing to do with this gun.

12 Now, what happened to the gun out the car, I don't
13 know. The -- after the shooting, the guy drove off.
14 Somebody could have take [sic] the gun, somebody could have
15 moved the gun, but I can tell you who I know didn't touch
16 the gun. Julian Young didn't touch the gun. That was my
17 theory.

18 Q Okay. But --

19 A Go ahead. I'm sorry.

20 Q What if -- hypothetically, the angry drug dealer, who
21 was mad 'cause the deal wasn't going through and they'd
22 insulted the quality of his product, reached for a gun and
23 your client tussled with him for it, it went off, what if he
24 took it away from the scene because he was afraid his
25 fingerprints would be on it from wrestling with the guy for

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1 the gun?

2 MR. SAVILLE: Objection. Calls for speculation.

3 THE COURT: I'll allow it. Go ahead.

4 A I don't even -- I don't even know how to answer that.
5 If Julian -- I knew, from my conversation with Julian, that
6 the gun would never be found. There was not gonna be one
7 found in that car -- there's not gonna be one found in that
8 car or anyplace else. You got to understand, when I asked
9 Julian that question -- and I asked him like I did
10 intentionally 'cause I didn't want him to tell me, "Yes, I
11 took the gun to the car" because, I mean, we would have been
12 shot in the foot for sure.

13 When I asked, "Do you know if we'll ever see this
14 gun," he said, "No," that left me the room to ask the
15 questions I asked of everybody else, "Was there a gun in the
16 car?"

17 If Julian had of told me he had that gun, then I
18 wouldn't even been able to cross-examine some of the
19 questions I did. Now, that's what was going through my mind
20 at the time.

21 Q I understand, but is it not true that there are other
22 explanations for why a frightened teenage man, with no prior
23 criminal record, might would get scared and remove a gun
24 from the scene for fear that his fingerprints were on it? I
25 mean ---

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1 A If -- if you ---

2 Q --- isn't that a reasonable hypothetical?

3 A If you ask me if that's possible, I would have to say
4 now, after the fact, that that is probably possible. But I
5 -- I -- what I think you need to know is my relationship
6 with Julian at that time, my relationship with the family --
7 if you want to ask me if that's a possible theory, I guess
8 anything was possible at the time. I -- I took a strategy,
9 I took an approach, I stuck with it.

10 Q I'm gonna try to think of a way to say this
11 diplomatically.

12 A Okay.

13 Q But your client -- our mutual client ---

14 A Uh-huh.

15 Q --- is a man of very few words, isn't he?

16 A No. Julian doesn't talk a lot.

17 Q He doesn't talk much at all ---

18 A He doesn't ---

19 Q --- does he?

20 A --- talk a lot. No, he doesn't.

21 Q And he speaks very simply. He's not one of these
22 clients that tries to, you know, elaborate and go into great
23 prose about the circumstances. He just answers your
24 questions kinda simple, doesn't he?

25 A I would even have to agree with that.

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1 Q Okay. So if you asked him, "Are they ever gonna find
2 that gun," and ---

3 A Uh-huh.

4 Q --- he says, "No" --

5 A Uh-huh.

6 Q -- you -- you sure? No.

7 A Uh-huh.

8 Q Did you consider the possibility that he was saying no
9 because he meant that it wasn't gonna be at his house or in
10 his car or anywhere that he knew about because he's not the
11 one that got rid of it?

12 A Everything you said is true, but you left out one fact
13 that -- the relationship I had to Julian and the
14 relationship I had to the family. I -- as far as lying to
15 me, I don't think Julian thought I would lie to him, and I
16 certainly didn't think he would lie to me. I think Julian
17 knew that I had his best interest at heart, and even though
18 he wasn't a big talker, our relationship -- I just don't
19 think he would tell me something that wasn't true.

20 Q And I'm afraid you misunderstand me.

21 A Okay.

22 Q I'm not suggesting he was lying to you. I'm
23 suggesting that when he said, "No, sir, no," that -- that
24 what he meant was not -- could -- is it not very plausible
25 that he interpreted your question to me, "Are they gonna get

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1 a search warrant and search your mama's car or -- or
2 somewhere and find this gun ---

3 A Uh-huh.

4 Q --- that you know about?" And he's saying, "No, not
5 that I know of." I mean, I -- I don't --

6 A From us being in that room, no, I didn't think that.

7 Q Okay.

8 A No.

9 Q And you didn't ---

10 A Not -- could ---

11 (Ms. Shurling and the witness speak simultaneously.)

12 Q You didn't have that ---

13 A Could it be possible ---

14 Q --- you didn't narrow it ---

15 THE COURT: Hold on.

16 MS. SHURLING: Sir?

17 THE COURT: Let him finish.

18 MS. SHURLING: Sorry.

19 A Could it be possible that was in his head? I don't
20 know. But from the -- from -- from talking to Julian and
21 from talking to Julian many times, no, I -- I think Julian
22 said what he meant to say.

23 Q Okay. Now, your client had no prior criminal record.

24 A None.

25 Q Correct?

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1 A Not that I remember, no.

2 Q And was very soft spoken.

3 A He was.

4 Q Nice, polite young man.

5 A Very nice young man. Come from a good family.

6 Q So other than what you've already said, the only other
7 reason for not calling him is that he was nervous?

8 A I -- he said he didn't want to take the stand. We
9 went through the discussion. We talked about all of the
10 issues. We talked about last argument if you don't put no
11 evidence up. We talked about you can get up and testify.
12 He said, "I'm nervous."

13 We went through all of that. He did not want to take
14 the stand. He also ---

15 Q Well, let's ---

16 A He didn't want to take the stand.

17 Q Okay. And I -- I don't mean to interrupt you. I'm
18 trying ---

19 A Uh-huh. I know you don't.

20 Q --- to stick to the question so we can try to get
21 done.

22 A Okay.

23 Q Did you ever explain to him that if he didn't testify,
24 there was going to be no basis for asking for a lesser
25 included instruction on voluntary manslaughter. There would

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1 be no factual basis for arguing this was potentially an
2 accident or -- you know, no lesser included, no defenses
3 because there was gonna be no factual basis for it if he
4 didn't get up and tell his side.

5 A I don't know how much detail I put in that because we
6 had come to the conclusion about if he took the stand, he
7 could have possibly -- they could have possibly asked him if
8 he had the gun. But we -- we talked about it. I -- I can't
9 remember how much detail, but everything that could be
10 discussed was discussed.

11 Now, whether Julian understand it 100 percent, I -- I
12 don't know, but I thought he understood it.

13 Q Well, did you discuss voluntary manslaughter with him?

14 A Oh. Voluntary manslaughter? I discussed -- I didn't
15 discuss accident with him. I discussed murder, voluntary
16 manslaughter. The -- the one that you did put in there that
17 we really didn't discuss was -- was I think accident. The
18 others we discussed.

19 Q Okay. Well, did you make it very clear to him that
20 unless there was some evidence that this happened in a
21 sudden heat of passion upon sufficient legal provocation
22 that there'd be no basis for asking for the lesser included
23 of voluntary manslaughter?

24 A I certainly -- I certainly think I did.

25 Q But you can't swear to it, can ---

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1 A I'm not gonna ---

2 Q --- you?

3 A --- 100 percent swear. I'm not gonna ---

4 Q Okay.

5 A --- lie, not with Julian's future involved.

6 Q Okay.

7 A But I -- I would believe I did. I hope I did. There
8 was not an "I" in this case or a "T" that was dot -- not dot
9 or not crossed and I didn't discuss with Julian. We -- we
10 talked a lot.

11 Q Well, did you ever ask your client if he had struggled
12 with the gentleman in the car for the gun?

13 A Did I ask him? Yes, I think I did. I think that had
14 a lot with my bearing not -- I think that had a lot to do
15 with my bearing not to want to put him up on the stand. I'm
16 pretty sure I did.

17 Q Well, I mean, that's really important. So are you
18 positive you discussed that ---

19 A No.

20 Q --- with him?

21 A No, ma'am. Again, I'm not gonna tell anything ---

22 Q Okay.

23 A If -- Julian's future is the most important thing to
24 me.

25 Q Now, let's -- let's talk about the elephant in the

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1 room. Ordinarily, when you start talking about self-defense
2 and ---

3 A Uh-huh.

4 Q --- you're involved in a crime, you run into problems,
5 don't you?

6 A (No audible response.)

7 Q But in this particular case, the deceased was
8 admittedly a drug dealer looking to sell them ---

9 A Yes, ma'am.

10 Q --- drugs, right?

11 A Yes, ma'am.

12 Q And they were young men looking to buy a little reefer
13 and party --

14 A Yes, ma'am.

15 Q -- right?

16 A Yes, ma'am.

17 Q So they were on equal footing in terms of doing
18 something they shouldn't have been doing, correct?

19 MR. SAVILLE: Objection. Leading.

20 A No. I mean, that's a good ---

21 THE COURT: Hold on a minute. Say it again?

22 (No response.)

23 THE COURT: Listen, I'm gonna -- I understand it's
24 leading. I'm gonna allow it to some extent to try to move
25 this ball down the road. Okay.

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1 MR. SAVILLE: Understood, Your Honor. I just ---

2 THE COURT: The rules certainly allow me to allow you
3 or whomever's questioning to do so to move the ball down the
4 road. I -- I'm gonna allow it, but if you feel like at some
5 point you do need to object, I'll let you do that. Okay.

6 MR. SAVILLE: That's ---

7 THE COURT: But I'm gonna allow it.

8 MR. SAVILLE: Thank you, Your Honor. I should have
9 articulated that it was inappropriate what the victim did
10 was on the same footing as --

11 THE COURT: Restate your question, Ms. Shurling.

12 MS. SHURLING: I've forgotten what I was saying when
13 he -- when he objected at this point.

14 Madam Court Reporter, can you tell -- read back my
15 last question.

16 (Brief pause.)

17 Q My point being that as it would regard voluntary
18 manslaughter or accident, they were both engaged in some
19 degree of illegal activity involving drugs --

20 A Yes.

21 Q -- marijuana.

22 A Yes.

23 Q And so they were -- I'm not gonna try engage in a --
24 and Respondent's correct. I mean, frankly, I don't know
25 that they were on equal footing 'cause one of them was a

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1 professional drug dealer and one of them was just buying
2 drugs for partying that night. So I'm not gonna call them
3 equal.

4 THE COURT: Okay.

5 Q But they were both involved with the -- buying and
6 selling marijuana, right?

7 A Correct.

8 Q Okay. So --

9 THE COURT: There's no evidence, unless it's in that
10 transcript, that the seller was a professional drug dealer.
11 Now, it may be in the record and I don't see it. It hadn't
12 been pointed out in the transcript ---

13 MS. SHURLING: I apologize. It -- it ---

14 THE COURT: One was selling, like you said, and one
15 was buying period.

16 MS. SHURLING: Yes, sir. One was selling and one was
17 buying.

18 Q And there were, in fact, drugs and a fairly large
19 amount of money found in the car, right?

20 A Correct.

21 Q Okay. Now, if your client, hypothetically, had seen
22 this gentleman reaching for a gun and in a panic tried to
23 tussle with him to get control of it and it went off, might
24 that, under one reasonable view of the evidence, be
25 characterized as an accident?

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1 A Yes, ma'am.

2 Q And it was your earlier testimony that you never
3 considered that, right?

4 A Yes, ma'am.

5 Q And did you -- you, therefore, I assume did not
6 discuss with your client that reason on the ledger for
7 should you testify or should you not, you -- that's one more
8 thing that you didn't discuss with him affirmatively about
9 making the decision.

10 A I did not discuss that with him and the reason I
11 didn't discuss it with him because the gun -- from
12 everything I understood about the case, it wouldn't have
13 been accident unless he had to struggle with the other guy
14 for pulling the gun. If he took the gun with him, there
15 never would have been an accident.

16 I keep telling you -- what I'm trying to get you to
17 see is I have no question in my mind the gun didn't come
18 from the other guy. The gun didn't come -- the deceased guy
19 didn't bring the gun to the rodeo. The gun came to the
20 rodeo from my client.

21 Q Now, I'm gonna have to stop you right there because --

22 A I can explain why I tell you that. Based upon the
23 fact I asked ---

24 MS. SHURLING: I -- Your Honor, I would ask that he --
25 me be allowed to clarify the question because I remind you -

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1 --

2 THE COURT: Hold on a minute. Hold on a minute. Let
3 him explain -- I'm gonna let him answer the question and
4 then you can clarify it.

5 A Based upon the fact that my client told me
6 specifically after thorough questioning because of our
7 relationship because I trust him, he trust me. I knew -- I
8 knew that gun was not in that car and I can tell you, no, I
9 did not ask him did he bring the gun to the car. I did not.
10 All I asked him was, "Do you think this gun will ever be
11 found?"

12 I was in the room with him, I saw his reflection. We
13 talked. I knew what he meant. I knew from talking to
14 Julian how the gun got to the car, but I was not gonna ask
15 him and take away my ability to cross-examine. I wasn't
16 gonna do that.

17 And -- and when you -- when you put Julian up, you can
18 ask him. You can -- I told -- you can ask him did we talk
19 about that, and if he will tell you, he'll tell you where
20 the gun came from.

21 Q And Mr. Johnson, I want to move on --

22 A Okay.

23 Q -- but I gotta -- there's a disconnect here that I'm
24 failing to convey to you.

25 A Okay.

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1 Q How does your client expressing the view that the gun
2 would never be found establish that he's the one that
3 brought it to the car to begin with? Doesn't that only
4 logically go to whether or not he may have had some
5 involvement in removing it from the premises?

6 A If you ask me could he -- could it have been another
7 possible way, yes, ma'am. I've admitted that already. I'm
8 telling you what I thought, the belief I got from my
9 discussions and my talking with him, the inferences I drew
10 from our conversation, I'm telling you what I thought.
11 Julian never did tell me any different. So, yes, your
12 hypothetical could have happened. I can't get away from
13 that.

14 Q Well, I just -- pardon me. I have to make very sure
15 this record is clear because you stated under oath a moment
16 ago that that gun did not come from the deceased, that it
17 was brought there by your client. And you have -- the only
18 thing you have said under oath here today is that your
19 client told you, no, that gun was not going to be found
20 after the fact.

21 A That is all he told me. I'm telling you in ---

22 Q I'll move on.

23 A --- forming his defense what I believe ---

24 THE COURT: Well, let me say this. That questions
25 been asked and answered ---

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1 MS. SHURLING: Yes, sir.

2 THE COURT: --- in the same manner over and over and
3 over. Now, you've made your point, I think, Ms. Shurling --
4 -

5 MS. SHURLING: I'll move on.

6 THE COURT: --- as to where or what conclusions were -
7 - whether they were proper or improper.

8 MS. SHURLING: Yes, sir. In -- in ---

9 THE COURT: And this witness has -- has -- I think has
10 clearly as he can explained on the record what his
11 conclusions were based upon his discussions with this
12 gentleman. Right or wrong -- whether or not those
13 conclusions were right or wrong, that's what his conclusions
14 were. I think that's -- that's a fair assessment. Okay.

15 MS. SHURLING: Thank you.

16 THE COURT: Let's move on the line of questioning to
17 the next --

18 Q With regard to the ruling in the *Belcher* decision, did
19 you explain to your client that if he did not testify and
20 provide some basis for the assertion of a lesser included or
21 some affirmative defense, that you were not going to have a
22 basis to object to the Court charging that malice could be
23 inferred from the use of a deadly weapon?

24 A Not only did I think I explained it -- I thought I --
25 and I might have been wrong, but I thought I did a brief on

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1 it. I thought I handed up something to the judge on it. I
2 might have -- yes. Yes, I thought I explained that, yes.

3 Q Well, I understand that you explained what *Belcher*
4 said --

5 A Uh-huh.

6 Q -- and you did do a memo on it.

7 A Uh-huh.

8 Q But my point being the State's rested, it's your turn
9 to decide whether or not your client's gonna put up any
10 evidence. Did you discuss with him, "Okay. None of these
11 other people have testified to anything that's gonna give me
12 a basis for asking for voluntary manslaughter, asking for
13 accident, asking for self-defense. So if I'm going to be
14 able to ask for a charge on either one of those defenses
15 with a lesser included, you've gotta tell your side of the
16 story. And if you don't do that, then the *Belcher* decision
17 is no help to us because *Belcher* says that the Court should
18 not give this inference of malice from the used of a deadly
19 weapon charge, but only in a case where the defendant's
20 asserting one of those defenses or asserting the lesser
21 included is a more appropriate verdict. Did you have that
22 discussion with him?

23 A As to the accident, again, no. As to the others, yes.

24 THE COURT: Can I ask this question?

25 THE WITNESS: Yes, sir.

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1 THE COURT: Based upon the testimony I've heard here -
2 - I don't want to float the boat so to speak -- and I
3 haven't read the -- was just given to me when I walked in
4 the courtroom today this almost 500 page transcript -- but -
5 - but certainly these issues of manslaughter, etcetera, that
6 you're raising here, could they not be brought to fruition,
7 so to speak, through the light of these witnesses that did
8 testify?

9 MS. SHURLING: Unfortunate ---

10 THE COURT: I don't know if they were or not, but to -
11 - to imply ---

12 MS. SHURLING: And I can ---

13 THE COURT: --- that he was the only one that could
14 bring that evidence in, I don't know that that's right.

15 MS. SHURLING: I'm prepared to answer it.

16 THE COURT: Okay.

17 MS. SHURLING: Went back through all of the witnesses
18 testimony and although they -- they talk about Alston not
19 liking the crappy weed, you know, bad weed ---

20 THE COURT: Right.

21 MS. SHURLING: --- didn't want to buy it and stomping
22 off. And they talk about hearing male -- you know, the
23 voices -- raised voiced in the car. But when they are --
24 the only one or two that were asked if they could hear what
25 the discussion was said no. All -- they just heard voices

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1 and then heard a pop.

2 And they said ---

3 THE COURT: And I heard -- I heard testimony a minute
4 ago that -- and -- and I'm quoting you, I think, was that
5 his legs were hanging out the car, kicking around like a
6 cockroach. Now -- which would certainly bring evidence of
7 possibly some struggle. I don't know.

8 But whether or not -- and I don't want to get off on a
9 tangent here.

10 MS. SHURLING: Yes, sir.

11 THE COURT: Does that make sense?

12 MS. SHURLING: And I will -- let me be less prosaic
13 and more direct.

14 What -- what one witness described is that after
15 hearing voices and the driver of the car -- the deceased
16 threw the car in reverse.

17 THE COURT: Okay.

18 MS. SHURLING: And that as he threw it in reverse,
19 poor Mr. Young's upper body is leaning in the car and his
20 legs are hanging out.

21 THE COURT: Right.

22 MS. SHURLING: And that -- that's the only testimony.
23 There's no --

24 THE COURT: And I mean -- and that could -- could
25 infer or imply some type of struggle, period. I don't know.

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1 I don't know what was requested at the end, what -- what all
2 was charged. It sounds to me, based upon your line of
3 questioning, that it was straight-up murder.

4 MS. SHURLING: Which is a different angle to the same
5 allegation which is, you know, why he has said he never even
6 considered --

7 THE COURT: Well, and the other ---

8 MS. SHURLING: -- asking ---

9 THE COURT: --- issue is is this gentleman's theory of
10 the whole case was, one, he never had a gun; and two,
11 because he never had a gun, he didn't shoot this guy which -
12 --

13 MS. SHURLING: I understand.

14 THE COURT: I don't want to --

15 MS. SHURLING: I understand.

16 THE COURT: -- jump in your way, but I'm just trying
17 to get all of my facts ---

18 MS. SHURLING: Yes, sir.

19 THE COURT: --- as we're going through here because
20 I've got to decide whether or not this gentleman's failure
21 to recognize or bring out potential for manslaughter --

22 MS. SHURLING: Yes, sir.

23 THE COURT: --- self-defense, whether or not that was
24 ineffective assistance of counsel.

25 But what I'm hearing from him is his theory all along

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1 was this gentleman never had a gun, so he couldn't have shot
2 the guy, didn't bring it to the --- bring -- didn't bring
3 the gun to the fight, so to speak, separate and apart from
4 what he just said based upon his discussions with his client
5 and his decision not to put him on the stand.

6 MS. SHURLING: Yes, sir.

7 THE COURT: But his theory of the case went a -- went
8 a different route from what he has conveyed here on the
9 record today as to what he learned or what he implied --
10 whether it was by implication --

11 MS. SHURLING: Yes, sir.

12 THE COURT: -- or what in his discussions with his
13 client.

14 MS. SHURLING: And Your ---

15 THE COURT: I just want to make sure. I'm not trying
16 to get in y'all's way. I want to make sure I'm in line with
17 what's going on here.

18 MS. SHURLING: Yes, sir.

19 THE COURT: Okay.

20 MS. SHURLING: And -- and this is one of those cases,
21 Your Honor, where I am -- am going to ask the Court for its
22 consideration in allowing us to do bench briefs or proposed
23 orders because of the complexity of the issues.

24 DIRECT EXAMINATION

25 BY MS. SHURLING:

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1 Q But the bottom line is without your client's testimony
2 about exactly what did transpire, you've got -- the State
3 has asked Gibson and he has affirmatively stated he sat in
4 the car with the deceased and that he didn't see a gun in
5 the console area of the car. So they've got ---

6 THE COURT: Well, but Gibson -- according to what I've
7 heard here today, Gibson got out and left -- left the car.

8 MS. SHURLING: Correct.

9 THE COURT: And left this gentleman there at the car.

10 MS. SHURLING: And Alston walked off.

11 THE COURT: Right.

12 MS. SHURLING: And then you've also got --

13 THE COURT: Who -- let me ask you this before you go.
14 I'm sorry.

15 MS. SHURLING: That's okay.

16 THE COURT: Who else was in the car?

17 MS. SHURLING: Maurice Thomas, Mr. Alston, Mr.
18 Pinckney.

19 THE COURT: So there were three or four other guys in
20 the car.

21 MS. SHURLING: There were four others --

22 THE COURT: Okay.

23 MS. SHURLING: -- in addition -- there was -- make
24 sure I've got it right: Maurice Thompson, Mr. Pinckney, Mr.
25 Alston, you, and Gibson --

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1 THE DEFENDANT: Yes.

2 MS. SHURLING: -- for a total of five.

3 THE COURT: Okay. And the Defendant and Gibson were
4 the only two that didn't come in that car where the victim
5 got shot.

6 MR. SAVILLE: Your Honor, I --

7 MS. SHURLING: Pardon me? That last part threw me.

8 THE COURT: The Defendant and Gibson were the two that
9 were -- did not come in the car where the victim was that
10 got shot. They were in two separate automobiles, right?
11 Young -- yeah. Mr. Young ---

12 MS. SHURLING: The deceased was the only that didn't -
13 - Gibson was in the car with them.

14 THE COURT: Okay. All right. So -- so the victim
15 came up in the car.

16 MS. SHURLING: All by himself.

17 THE COURT: Was it then he got shot?

18 MS. SHURLING: Yes.

19 THE COURT: He came by himself.

20 MS. SHURLING: He came by himself.

21 THE COURT: There were four others in the -- three
22 others in the car with the victim.

23 MS. SHURLING: There were a total of five people in
24 the car with -- it was Gibson -- who was the middle man --
25 and then the four young men that were friends that were

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1 together, one of which was the Applicant.

2 THE COURT: All right. I'm sorry. Were you going to
3 say something, Mr. Saville?

4 MR. SAVILLE: Your Honor, if I -- if it would just
5 help everybody if I could clarify. Mr. Thompson, Mr. Young,
6 Mr. Gibson, and Mr. Alston all arrived in a Buick ---

7 THE COURT: Thompson, Young, Gibson ---

8 MR. SAVILLE: Thompson, Young, Gibson and Alston --

9 THE COURT: And Alston.

10 MR. SAVILLE: -- arrived together in a Buick at the
11 location.

12 THE COURT: Okay.

13 MR. SAVILLE: After which point the victim arrived by
14 himself in a green Monte Carlo.

15 And the testimony at trial reflected that Mr. Gibson,
16 Mr. Alston, and Mr. Young originally got out of the Buick
17 and went to the Monte Carlo with the victim, at which point
18 there is some discussion/argument about the marijuana.

19 And Mr. Gibson was leaving the car, Mr. Alston had
20 returned to the Buick, leaving just Mr. Young there at the
21 passenger side of the green Monte Carlo.

22 MS. SHURLING: And Your Honor, I would agree with that
23 being -- and I believe it's consistent with what I said.

24 The only point of interest after that really doesn't
25 have much bearing on the ultimate question is that once the

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1 sound of the "pop" was heard, Alston had -- I mean, Gibson
2 had walked away from the car after he made the introduction,
3 and I believe the record reflects that he is the one that
4 did not ride away in the car; isn't that correct?

5 THE APPLICANT: Yes, ma'am.

6 MR. SAVILLE: That's correct. Mr. Gibson ran away.

7 MS. SHURLING: He -- but -- the five arrived together
8 in the car; but Gibson, after making the introduction, ran
9 off and did not get back in the car with them as they
10 departed.

11 THE COURT: All right. But the victim in this case
12 came by himself, period.

13 MS. SAVILLE: Yes, Your Honor.

14 THE COURT: Thank you.

15 MS. SHURLING: Left by himself. He didn't come by
16 himself.

17 THE COURT: Who came with the victim?

18 MS. SHURLING: He -- nobody came with the victim.

19 THE COURT: Okay. That's all I needed to know. You
20 can go to your next question.

21 MS. SHURLING: Okay. Thank you.

22 THE COURT: Let's don't let it out the water anymore.

23 MS. SHURLING: Okay. I won't. All right.

24 DIRECT EXAMINATION

25 BY MS. SHURLING:

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1 Q Was there any particular reason why you did not cross-
2 examine Rippy -- Ricky Gibson concerning what discussion he
3 overheard between the Applicant and the deceased?

4 A Other than the fact that Ricky Gibson got out the car,
5 walked away, the Alston boy been in the other car and it was
6 just he and Julian -- it was Julian and the deceased at the
7 car -- I don't think anybody heard any discussion, but no,
8 I did not.

9 Q Okay. My -- my point being you were very careful to
10 get all of them to say they didn't see your client with a
11 gun, right?

12 And why would you not have the two that had been at
13 the car, the three actually, Gibson, Alston and your client,
14 why did you not cross-examine Gibson about, you know, you
15 never heard anything about, "Give it up" or "Give me the
16 weed or I'm gonna shoot you" or you know, what -- you ---

17 A Well, Gibson -- Gibson said he didn't know anything,
18 and Gibson left the car and when he heard the "pops" he ran.
19 Gibson didn't know it. He didn't hear or know anything if
20 you go through the transcript.

21 Q But you didn't ask him what, if any, conversation he
22 heard between the deceased and your client.

23 A If ---

24 Q Was there a tactical reason for that?

25 A The only thing I can say is he had left the car.

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1 There was no reason to ask him that. There was no testimony
2 of anybody hearing -- I read all those statements. Gibson
3 left the car -- they left the car and then there was a
4 period of time where Julian and the victim was in the car.
5 These other people had left the car. But no, I did not ask
6 him.

7 Q Well, isn't it also true that actually nobody put your
8 client in the car in the sense of he didn't get in the car
9 and sit down in the deceased car. He was just leaning in
10 the car, right?

11 A Honestly, I don't know if he was leaning in or sitting
12 in. That was -- there was a methodology for a struggle. I
13 did not ask whether he was leaning or sitting.

14 Q Okay. We'll move along.

15 A Uh-huh.

16 Q We've -- we've gone over ---

17 THE COURT: What number you on, Ms. Shurling?

18 MS. SHURLING: Sir?

19 THE COURT: What number are you on?

20 MS. SHURLING: I am hopping over to 16 and beginning
21 to start with a series of questions, 16 through 20 on -- and
22 actually 21 --

23 Q -- that all relate to your decision not to cross-
24 examine Hillard Pinckney concerning what charges he could've
25 been facing under a theory or accomplice liability what

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1 those various charges, including murder -- what kind of
2 sentencing exposure they would've covered, all of that.

3 A Okay. I've already said why I didn't ---

4 Q But I want ---

5 A That applied for all -- that -- for every one of them,
6 all four.

7 Q Just want to make a clear record.

8 A Okay.

9 MS. SHURLING: And the record will reflect, Your
10 Honor, that -- that Pinckney was charged with accessory
11 after the fact to murder, but their -- and indicated that he
12 was looking to help himself.

13 But beyond that, there was no discussion of whether he
14 was aware, under a theory of accomplice liability, that he
15 could've been charged just part of conspiracy to commit
16 attempted arm robbery and murder under *Lowery* and other
17 cases. So I -- that puts us down to twenty ---

18 THE WITNESS: I know, but may I respond to that,
19 please?

20 THE COURT: Yes, sir, you may.

21 A Okay. The fact that Pinckney testified that Julian --
22 all of Pinckney [sic] testimony helped Julian. No gun in
23 the car. Matter of fact, Pinckney was defiant almost with
24 the -- with the -- with the Solicitor. Why would I have to
25 do that and cross-examine him when he gave the testimony we

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1 needed for the case? He helped Julian. There was no reason
2 to go after Pinckney.

3 THE COURT: Next question, please.

4 MS. SHURLING: Yes, sir. Your Honor, I'm -- I'm
5 quickly reading through to see what we can ---

6 THE COURT: Take your time.

7 MS. SHURLING: -- kinda --

8 THE COURT: Take your time.

9 MS. SHURLING: -- skip over.

10 THE COURT: Take your time.

11 Q Covered that. There was a point in the record, if
12 you'll look at page 194, line 25 through 195, line 3.

13 THE COURT: 194?

14 MS. SHURLING: 94, line 25 through 95, line 3 -- where
15 the State's examining Ray Anthony Alston.

16 And Your Honor, I believe there are a couple of places
17 where my paralegal has referred to him as "Austin." It's
18 Alston. I apologize for that.

19 THE COURT: Again, that's 194 or 94?

20 MS. SHURLING: 194, line 25 --

21 THE COURT: Okay. I'm sorry.

22 MS. SHURLING: -- is what my notes say. I hope that's
23 accurate.

24 THE COURT: You're right.

25 Q And -- and the State characterizes his record saying

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1 that he's been in a -- I believe the word -- exact word's
2 (as read): "Just a little bit of trouble in the past,"
3 right? You see that?

4 A I'm looking at 194, line 5 ---

5 Q One ninety-four --

6 A --- line 25 said (as read): "And you just kinda
7 looking at -- you were just, you know, a little bit of
8 trouble in the past; is that right? A couple of marijuana
9 convictions." Yes, that's what's said.

10 Q Okay. And do you know what his prior marijuana
11 convictions were for? Were they simple possession? Were
12 they distribution? What -- what kind of marijuana charges
13 were they? Do you know?

14 A I don't remember what they are today, no.

15 Q Okay. Did you consider objecting to the State's
16 characterization of -- of that being a little bit of
17 trouble?

18 A No, I did not. I did not object. I don't -- at the
19 time in the trial, while I had the -- I don't know. I did
20 not object, no.

21 Q Okay. And did you consider the possibility that that
22 was an effort by the prosecution to, by analogy, if you
23 will, minimize the misconduct of the deceased in this case
24 as well? Because if they would characterize the marijuana
25 charges of -- of Mr. Alston as just a little bit of trouble,

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1 then it would somewhat minimize the activity the deceased
2 had been involved in as well, correct?

3 A No. I -- I didn't see it like that because the
4 deceased ---

5 Q Okay.

6 A --- admit that he was a -- not only did he sell drugs
7 that day, he sold -- he admitted that he sold drugs all the
8 time. So did Gibson. So I didn't think it played it down
9 at all.

10 Q Okay.

11 A Matter of fact, if you -- I called him a drug dealer
12 in my cross.

13 Q I'm going to skip over 25 through 28 because it's --
14 all of this has to do with *Giglio* examination, their failure
15 to point out charges that could have been brought by the
16 State to question him, and sort of what other charges he was
17 facing and what kind of sentencing exposure he had. And I'd
18 take your answer to be the same for this witness as for the
19 previous witnesses, correct?

20 A Now, which witness is this? Give me the name.

21 Q Now we're talking about Ray Anthony Alston.

22 A Yes, ma'am.

23 Q Okay. In the State's closing argument, if I can get
24 you to look at page 406, lines 5 through 12.

25 A Okay. 406?

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1 Q 406, lines 5 through 12.

2 A Okay.

3 Q Do you see where the State is arguing that they think
4 that you, defense counsel, were probably a little shocked
5 when he, meaning Gibson, said he felt responsible for what
6 happened? You see that?

7 A Yes.

8 Q Did -- did you consider objecting to that as an
9 improper comment on your strategy as a defense attorney?

10 A No, because I mean, they inferred that I was shocked.
11 Everybody in the jury could see I wasn't shocked.

12 Q I'll move along. How 'bout if you look -- look
13 generally at 406 and 407 where the State is arguing -- and
14 I'm sort of paraphrasing here -- that there's no legal
15 basis for the defense to be arguing that Gibson could've
16 been charged with murder and other offenses. Did you
17 consider objecting to that?

18 Q I'm trying to understand really the issue what you
19 asking if I'm object -- I'm objecting to.

20 Here's what I can say: Some people believe that you
21 do a bunch of objections in closing argument, some people
22 don't. I had a young man that was accused with murder. I
23 was gonna have the last argument. You know, on major
24 things you object, but I mean, things like this that you
25 can go back and explain or talk about or if your theory of

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1 the case is gonna deal with it another way, I -- I didn't
2 see that like you seeing it now. So no, I didn't see it
3 like that.

4 Q Well, how 'bout the fact that at one juncture --

5 MS. SHURLING: And Your Honor, I'm sorry. I had the
6 line marked.

7 Q -- but somewhere in this section the prosecution
8 states outright that the Defendant pulled the trigger. Did
9 you consider arguing -- objecting on the ground that he was
10 stating facts not in evidence?

11 A And -- and -- I did not object to that; however, in my
12 closing arguments, I sure addressed it.

13 Q Okay. On page 407, there's a portion of the argument
14 as well where the State says that they've basically heard
15 that Gibson wouldn't have taken them over there to buy
16 marijuana if he had known that Applicant had a gun. As you
17 have said repeatedly, there was no evidence really that
18 your client had a gun, was there?

19 A Correct.

20 Q And did you consider the potential benefit of
21 objecting to that being arguing matters not in evidence?

22 A Okay. I took that as the State's characterization of
23 the case. If you go to my closing argument, I said he
24 didn't have the gun. I argued last.

25 Q Okay. Let's talk about when the State's going through

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1 their witnesses, the law enforcement witnesses, about how
2 they interviewed each of these young men and met up with
3 them. They talked with them and then they say, you know,
4 "They cooperated with you, didn't they?" And -- and,
5 "Yes."

6 And then they gave a statement, didn't they, and they
7 go through every one of them like that. You talked to
8 them.

9 A Uh-huh.

10 Q They cooperated, they gave a statement, and then when
11 they get to Julian, they say, you know, you -- you talked
12 to him and then they move on and they don't say anything
13 about cooperating. They don't say he gave a statement.
14 Did you consider objecting to that as going through the
15 backdoor, that which you're not allowed under *Doyle* and
16 other cases, to do directly, which is comment on the fact
17 that the Defendant didn't cooperate and give a statement?

18 A I -- I did not object to it. I didn't see it like
19 that at the time, and I certainly hope they didn't talk to
20 him because Julian had a lawyer when the rest of them
21 didn't.

22 Q Well, there was a Miranda waiver form in the discovery
23 signed by your client, was there not?

24 A I mean, if you say there's one. I don't remember it.

25 Q Okay.

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1 A If it's there, it's there.

2 MS. SHURLING: Your Honor, I'll line all those
3 exhibits up ---

4 A Okay.

5 MS. SHURLING: --- for tomorrow's proceeding.

6 THE COURT: Okay.

7 Q But -- so you didn't consider that as -- as an
8 indirect way of doing what we all know they're not allowed
9 to do, which is highlight the fact that he's the only one
10 that didn't give a statement.

11 A I -- I --

12 Q Or that he didn't give a statement, period. He
13 wouldn't have to be the only one. They -- they just flat
14 can't say he wouldn't talk to them, wouldn't give a
15 statement, right?

16 A I did not object to that.

17 Q Okay. Let's move along. Again, we're gonna have a
18 series of questions about Maurice Thompson that once again
19 go to what else he could've been charged with; what his
20 sentencing exposure would've been; what, if any, deals were
21 struck with him in exchange for his cooperation in the fact
22 that he was not cross-examined about that *Giglio*
23 information. Same answer as for earlier witnesses?

24 A Same answer as for the others.

25 Q Okay. If I can get you to look at page 421, lines 15

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1 through 21.

2 A (The witness complies.)

3 Q You see where he says (as read): "We know it's not a
4 contact?"

5 A Yes, I see that.

6 Q All right. Arguing any suggestion that the victim
7 shot himself with his own gun makes no sense. Okay? Was
8 anybody arguing that the man had shot himself, deliberately
9 shot himself?

10 A No, nobody argued that.

11 Q Okay. And -- and absent some testimony from your
12 client, there was no evidence concerning a tussle, right?

13 A There was evidence concerning a tussle.

14 Q Pardon?

15 A There was evidence of a tussle.

16 Q Well, there was evidence of the man throwing the car
17 in reverse with your client still leaning in the car.

18 A I don't remember what it was, but if you go through
19 the transcripts, I think there was one or two people said
20 that they saw a tussle.

21 Q Sure about that?

22 A Well, I'm -- I'm -- I haven't read the transcript ---

23 Q Okay.

24 A --- but I think that's something you can check. I
25 think you had one or two people that said they saw a

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1 tussle.

2 Q Well, would it be fair to say that noone testified
3 that they could see their hands ---

4 A During -- during the ---

5 Q --- during that interaction?

6 A Yes, ma'am.

7 Q Okay. Let's move along.

8 MS. SHURLING: Your Honor, allegation No. 20, I will
9 formally withdraw that in all probability tomorrow. In my
10 notes, I had a reference to Mr. Pinckney being referred to
11 as "Cuz" or "Cousin" to the Applicant.

12 In reviewing my notes, I discovered that there was a
13 familial relationship of cousin relationship between
14 Maurice Thompson and Gib -- and Pinckney, and I'm afraid
15 that I may have confused that. I need to go back through
16 and see if I find any other reference, but I'm gonna skip
17 over that one for the moment.

18 THE COURT: Okay.

19 Q Let's talk about what the dying guy said to the campus
20 cop. Okay?

21 A Yes, ma'am.

22 Q You -- you argued that -- understandably, that the
23 fact that the man declined to answer a question about his
24 name was evidence that he was forward thinking, that he was
25 looking toward possible use of his situation at a later

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1 date. And -- and you argued that in the context of why
2 this should not be a dying declaration, correct?

3 A I argued it and I did a brief. I don't remember the
4 context off the top of my head what that is ---

5 Q Okay.

6 A --- but whatever the brief says, that's what I argued.

7 Q And you, in fact, convinced Judge Dickson of that. He
8 ruled that he just wasn't gonna find that it was a dying
9 declaration, but he was going to find that it was part of
10 the *res gestae*, that it was an excited utterance.

11 A I think I covered that in my brief also.

12 Q Okay.

13 MR. SAVILLE: Objection, Your Honor. Just to note
14 that Judge Dickson did not specifically deny that it was a
15 dying declaration. I believe he just said he's not going
16 to rule on whether it was a dying declaration because he
17 was ordering it was an excited utterance.

18 MS. SHURLING: A moment, Your Honor.

19 (Brief pause.)

20 MS. SHURLING: I apologize. I got my analysis
21 confused for a moment.

22 Q There were two questions. One is whether under
23 *Crawford* it would be testimonial; and then, even if it
24 wasn't testimonial -- if it -- if it were found to be
25 testimonial, then even if it fit in some other exception,

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1 it would be inadmissible, correct?

2 A That -- whatever's in the brief. I don't ---

3 Q Okay.

4 A --- remember the details.

5 Q And -- but then, once the judge said -- and I'm
6 quoting (as read): "I will say it will be non-testimonial.
7 I will let it in. It's just part of the excited
8 utterance."

9 MS. SHURLING: And Your Honor, that's looking to what
10 was in the record on appeal, on page 30 through 31. I'll
11 have to look and see in the original transcript what page
12 that really was on.

13 Q But once he said it was not testimonial, then it fell
14 back to traditional analysis of the standard exceptions to
15 the hearsay rule, right, excited utterance being among
16 them.

17 A Yes. But didn't I object to that, and -- and the
18 judge overruled me and went on and did that anyhow?

19 Q I understand. My -- my question was, in terms of
20 analysis -- analyzing those two very separate issues --
21 whether it was testimonial and then once that's off the
22 table, whether it was an excited utterance -- you had
23 argued previously that the fact that he declined to provide
24 his name was evidence of the fact that he didn't think he
25 was about to die, and -- and wasn't -- you know, that he

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1 was thinking about possible prosecution or he wouldn't have
2 been trying to hide his name, right?

3 A I -- I would say yes. It it's in the brief ---

4 Q Okay.

5 A --- that's what I did.

6 Q And all I'm asking you is -- is with regard to
7 standard -- for the standard for an excited utterance, did
8 you consider highlighting the fact that -- that the same
9 went, that -- that with regard to an excited utterance, the
10 Court has -- has said that the statement and the
11 circumstances under which it's given need to reflect the
12 lack of capacity for contemplative thought in that setting?
13 I'm paraphrasing, but did you consider arguing that
14 separately with regard to the excited utterance?

15 A I guess I would have to say no. If Judge Dickson says
16 I'm overruling it, I am gonna allow the excited utterance
17 in, I object to the excited utterance. He said, "Your --
18 your motion is noted." He let it in. What else could I
19 do?

20 Q Well, before he ruled --

21 A Uh-huh.

22 Q -- could -- would you -- would it not have been
23 advantageous to say, "Your Honor, the same logic that I
24 applied in arguing in favor of this being found to be a
25 testimonial, I would assert supports this not being an

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1 excited utterance, where he certainly had the ability for
2 sufficient contemplative thought, that he knew to withhold
3 his name?"

4 A Okay. Did I not put "excited utterance" in the brief?
5 Did Judge Dickson not consider all of that?

6 Q I -- I'll move on. I'm just going by what arguments
7 are -- are ---

8 A Okay.

9 Q --- on the record.

10 A I didn't make that -- I didn't make that argument.

11 Q Okay. Let's move on.

12 MS. SHURLING: Your Honor, with the -- within the
13 testimony of Maurice Thompson is a good description of his
14 description of the fact that the victim had backed up with
15 the Defendant hanging out of the car (as read): "... sped
16 away after bang." And that's on page 252, line 15 through
17 253, line 7.

18 And Maurice Thompson, as the others, said he never saw
19 a gun. That's 262, line 17 through 20.

20 But there's -- again, and he's already addressed this
21 and explained that there's no *Giglio* examination of the
22 witness with regard to potential charges and sentences.

23 Q Let's see. Let's go to my second amended application
24 and talk about plea negotiations for just a few minutes.
25 Had the State engaged in any plea negotiations with you on

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1 this charge?

2 A I honestly don't remember.

3 Q Does your file reflect that any written offers were
4 made to you for a plea to anything other than murder for
5 this client?

6 A I'd have to check. I don't remember. I don't think
7 so. They could've, but I don't think so. And they might
8 have. I don't -- I don't remember.

9 Q Okay. Well, if they did, did you go over any offers
10 that were made with ---

11 A If -- if they ---

12 Q --- your client?

13 A If they gave me an offer, I mean, that's basic
14 practice. I'd have -- I'd had to tell Julian what the
15 offer was.

16 Q Okay. But you just don't know.

17 A I -- I -- I don't remember, and I'll try to go back
18 and look. I don't -- it's been five years. I don't
19 remember whether we did or not.

20 Q Well, did you ever -- I assume you discussed with your
21 client what the elements of murder were that the State
22 would have to prove, right?

23 A Malice. Yes, ma'am.

24 Q Okay.

25 A We discussed that.

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1 Q Did you -- did you also discuss with him that the
2 sentence for murder was 30 to life, and that it was a day-
3 for-day sentence?

4 A Yes, ma'am.

5 Q Did you ask him to authorize you to at least explore
6 the possibility of a plea to some other offense?

7 A From all I can remember right now, our conversation
8 with Julian was he didn't wanna deal with anything where he
9 would have to go to jail.

10 Q In your practice as a defense lawyer, is it fairly
11 typical for people to start out saying that they will not
12 plead under any circumstances, only to ultimately end up
13 entering a plea?

14 A That happens all the time, but it's also fairly
15 typical that you can push your client to do something you
16 don't wanna do, and you would be doing just what I'm doing
17 right now, PCR.

18 Q Well, there are ways around that, aren't there? I
19 mean, can't you document your file?

20 A Yeah.

21 Q And -- and -- and ask your client to -- to sign I
22 either do wish my client to explore -- my lawyer to explore
23 a possible plea bargain or I do not --

24 A Right.

25 Q -- and sign it?

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1 A Those are -- those are possibilities. Yes, ma'am.

2 Q Okay. But you just have no recollection of any plea
3 negotiations, any offers, or any discussions with your
4 client about pleading other than that he said he didn't
5 wanna go to jail.

6 A And I'm telling you right now, I don't remember; but
7 the good thing about it, Julian will. He can tell you.

8 Q Pardon?

9 A I said -- I told you I don't remember, but I'm pretty
10 sure Julian will and he can tell you.

11 Q Well, he's a lot younger than both of us. Hopefully -
12 -

13 A Yeah.

14 Q --- he will.

15 A I don't -- I -- I -- I don't remember. All I can tell
16 you is everything that should've been done in this -- this
17 case was personal to me because of the family. There
18 wasn't a "I" -- a "T" not crossed and a "I" not DOT [sic].
19 That young lady, his grandmother sitting back there,
20 they're just as close to me as I can be.

21 Everything was done with Julian -- and -- and you may
22 call his aunt. Most of the time it -- particularly when
23 the trial was going on, I think there was several times --
24 I don't remember what we discussed, but she came back just
25 to make sure he understood what was going on. So I think

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1 we did it all. Yes, ma'am.

2 Q Okay. But again, did you have conversations with him
3 in which you made certain he understood that if he went to
4 trial for murder and were convicted, the very least he
5 could get was 30 years day-for-day?

6 A I told him the sentence, yes.

7 Q And did you explain to him it was day-for-day?

8 A Yes, ma'am. You got to. That's part of the sentence.

9 Q Okay. If you did not explore any plea negotiations in
10 this case, can -- what would be the reason for not doing
11 that?

12 A I -- I wouldn't. I don't know what to tell you on
13 that.

14 Q Well, I -- I know judges don't get involved per se in
15 plea negotiations, but would it be fair to say it's fairly
16 rare to try a case without a judge at least inquiring as
17 to, you know, whether or not the parties have tried to work
18 something out?

19 A I -- I don't wanna say it's rare. I mean, I know it
20 happens. Whether it's rare or not, I -- I -- you know, if
21 there's a situation where, you know, the State brings that
22 in or the situation where the Defense bring it in. They --
23 they do that. I -- I'm talking about this case. I don't
24 remember for this case, but yes, there are times we go talk
25 with the judge about the case and get instructions and

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1 directions, not what he would rule, but -- but give us
2 kinda some directions. Most of the time they say we'll
3 hold it, but give directions, yes.

4 Q Okay. And I understand. I'm -- I'm -- I'm not trying
5 ---

6 A Uh-huh.

7 Q --- to beat you up about this. But your client was a
8 teenager with no prior criminal record, from a real good
9 family, and the State didn't have, you know, witnesses that
10 were saying they had witnessed him shoot this fella and
11 they didn't have the gun, right?

12 A They didn't have the gun.

13 Q So it's -- you had at least reason to -- to have
14 discussions with the State where you could reasonably
15 suggest they had some potential problems with their case,
16 and you had worries for your client, right?

17 A That is truly possible. Again, I -- I'll say, I don't
18 remember whether we did a discussion or not. If it comes
19 out we did, maybe we can backtrack what happened, but I
20 don't remember whether -- and I really don't remember
21 whether we had it or not.

22 Q Do you have any standard method in your filing system
23 for documenting plea offers and -- and preserving them in
24 your file?

25 A While the trial's going on, yes. But -- but after the

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1 trial's gone and after you move, and -- and all of your
2 files are -- what's the right word -- moved and even you --
3 you went through the file and I had to get you a whole new
4 copy.

5 So -- so in this particular case, all I can say is I
6 did all I was supposed to do when I was with Julian. And
7 yes, there are cases that I document in certain instance.
8 Whether we did it in this one or not, I don't remember.

9 And I keep saying, "I don't remember." I don't wanna
10 -- you know, I'm not gonna say "yes" or "no" and lie
11 because if I did something wrong that's gonna get Julian
12 out, I hope the judge let him go. That's not the issue.

13 Q I ---

14 A I'm telling you what I know.

15 Q Mr. Johnson, I'm not trying to be difficult. I'm just
16 -- you know, my own files -- you can look. I've got a
17 subpoena file, I've got a research file, I've got a -- you
18 know, whatever. I'm just asking if you have a standard ---

19 A Uh-huh.

20 Q --- operating procedure for preserving plea --

21 A You saw my ---

22 Q -- documents.

23 A You saw my trial folder. You saw the tabs, you
24 saw -- you saw all of that.

25 Yes, when I try the case I got a folder. Yes, we

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1 organize everything. Again, I don't remember.

2 Q I'll move on. Lastly, we -- we've already
3 covered the amendment to 42 that's in 42(a), but the
4 last thing is pretty important. Let me get you to take
5 a look at page 353, line 23.

6 A Okay.

7 Q And according to the headers, this is during --
8 let's -- let's go back. Your cross-examination begins
9 on page 349 at the top of the page. You see that?

10 A Yes, ma'am.

11 Q All right. And if you go back to the 353, line
12 23, you ask (as read): "All right. Now, during your
13 investigation, did you determine that there was -- that
14 he carried a gun to protect himself?"

15 A Yes.

16 Q Why did you ask that question?

17 A I asked the -- the SLED agent did Mr. Bailey
18 carry a gun to protect himself 'cause I wanted to show
19 that the gun came from him.

20 Q Okay. If SLED had under -- uncovered any evidence
21 whatsoever that this gentleman carried a gun, would that
22 not have been something that they would've been required,
23 under *Brady*, to disclose to you in the discovery process?

24 A They should have, yes.

25 Q Okay.

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1 A Uh-huh.

2 Q And they did not.

3 A I -- I'm not saying they didn't. I asked that
4 question. I guess I just wanted to be sure.

5 Q Okay. Well, when he answered your question, he said -
6 - and I'm going to 354, line 1 through 2, he said (as
7 read): "Everyone said he didn't carry a weapon."

8 A Yes.

9 Q Now, that's hearsay, isn't it?

10 A Yes, it is.

11 Q Why didn't you object to that?

12 A I didn't object. I don't know why, but I didn't
13 object and that is hearsay.

14 Q And -- and the question of who brought the gun to the
15 party, so to speak, was really important.

16 A It is important.

17 Q And -- and there was no evidence that your client was
18 seen with -- specifically seen with a gun.

19 A Correct.

20 Q Nobody claimed of seeing your client take a gun to the
21 car or bring one back.

22 A Correct.

23 Q But there were only two people at the car at the
24 moment the "pop" was heard and that was the deceased and
25 your client, right?

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1 A Correct.

2 Q And through hearsay, the SLED agent was just allowed
3 to say, "Everybody we talked to said he was known not to
4 carry a -- he -- said he didn't carry a weapon."

5 A And -- and on that instance, on that part, I did not
6 object. You're right.

7 Q In retrospect, do you think you should've even asked
8 that question?

9 A Oh. In retrospect, I -- I asked the question -- yes I
10 did -- because I was hoping -- I was hoping that if there
11 was any -- they may -- more investigation about this, and
12 sometimes stuff's not written down. A lot of times --
13 sometimes folk don't write stuff down just to make sure
14 they don't have to bring it out.

15 I wanted to make sure that if there was any testimony
16 does -- the other guy having the gun, that was gonna help
17 Julian. I asked the question. I woulda asked the same
18 question again; however, if you ask me was that hearsay,
19 that was hearsay and I shoulda objected.

20 Q Mr. Johnson, nothing stopped you, did it, from
21 speaking to that SLED agent before the trial and knowing
22 whether or not they had found any -- you could've
23 interviewed that SLED agent and asked that very question
24 before he got up on the witness stand, couldn't you?

25 A Okay. You -- you're redoing my whole case. I

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1 could've done a bunch of things, but in this particular
2 case, I didn't. Yeah. I guess I could have, but I didn't.

3 Q Okay. And would you agree, at least in retrospect,
4 that you certainly should've objected to that hearsay?

5 A Anytime there's hearsay in a situation and I thought
6 [sic] I should object, yes, and I didn't.

7 Q And in this particular instance that this particular
8 example of hearsay went to probably the most important
9 question in the trial or one of the most important
10 questions in the trial, didn't it?

11 A It was one of the issues in the trial; however, if you
12 go through the complete trial, you'll see I constantly said
13 -- you -- you know, their job is to do -- is to present
14 prejudicial testimony. My job -- if you ask me if I had
15 prejudicial testimony I could've gotten against somebody
16 else, I would've.

17 They did their job, I should have object [sic], I
18 didn't object. I would've asked the question again. If I
19 -- if I did it again, I would've asked the same question
20 'cause I wanted to be sure if there was any way to say
21 Julian didn't have that gun, I was gonna do that.

22 Q And why would you ask that question at trial without
23 having interviewed the SLED agent in advance ---

24 A Now, you say ---

25 Q --- to know what his answer would be?

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1 A You said I didn't talk to the SLED agent.

2 THE COURT: Hold on a minute. Hold on a minute.

3 THE WITNESS: I'm sorry.

4 THE COURT: Let her finish her question ---

5 THE WITNESS: Yes, sir.

6 THE COURT: --- okay?

7 THE WITNESS: Yes, sir.

8 THE COURT: Now, Attorney General was get -- was
9 trying to stand to -- I'm assuming to object.

10 MR. SAVILLE: Yes, Your Honor, and it was just to note
11 that Agent Johnson was, I believe, with the South Carolina
12 State Police Department not SLED.

13 MS. SHURLING: Well, actually --

14 THE WITNESS: Either way, I talked to him, Your Honor.

15 MS. SHURLING: Hold on.

16 THE WITNESS: I know -- I know ---

17 THE COURT: For the purposes of this hearing, it
18 really doesn't matter ---

19 THE WITNESS: Matter.

20 THE COURT: --- whether he was with SLED, the ---

21 MS. SHURLING: Exactly.

22 THE COURT: --- State police, Highway Patrol,
23 Dorchester County, Summerville City, Orangeburg County,
24 whomever. It doesn't matter.

25 MR. SAVILLE: Thank you, Your Honor.

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1 MS. SHURLING: Your Honor, nothing further ---

2 THE COURT: And we can clarify that later. If -- if
3 you feel like it's something that's of urgent importance,
4 I'll let you clear that up on cross, okay?

5 MR. SAVILLE: Yes, sir.

6 MS. SHURLING: And Your Honor, that would be all I
7 would have of Mr. Young [sic] today. I have asked to
8 reserve the right to recall him tomorrow if my review of
9 the discovery this evening yields any further necessary
10 inquiry.

11 THE COURT: All right.

12 MS. SHURLING: Thank you.

13 THE COURT: Mr. Saville, cross-examination, sir.

14 MR. SAVILLE: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. SAVILLE:

17 Q Good afternoon, Mr. Johnson. Thank you for being here
18 today.

19 A Good afternoon. I'd have loved to have been someplace
20 else.

21 Q Now, Mr. Johnson, this will probably be a little bit
22 shorter than I anticipated 'cause I think -- think y'all
23 hit on a lot of the ---

24 A Okay.

25 Q --- high points there. Do you recall how you came to

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1 be retained in this case?

2 A Yes, sir. Yes, sir. I represent might near everybody
3 in that family. I'm venture -- I could venture to say that
4 family is my family. If they had a problem, they call me.

5 Q Yes, sir. And do you believe you received full
6 discovery in this case?

7 A I'm -- I'm sorry?

8 Q I'm sorry. Do you believe you received full discovery
9 in this case?

10 A Yes, I did

11 Q Do you remember what the evidence was that the State
12 presented at trial, aside from all the testimony of the
13 people who were there?

14 A Okay. I don't fully understand the question.

15 Q Sure. Do you remember what the evidence was against
16 Mr. Young?

17 A The -- honestly, there was not an -- there was not a
18 lot of evidence against Mr. Young other than them implying
19 about the gun, and that's why I was so focused on the gun.

20 Q Yes, sir. This might seem silly. Do you think it
21 would've been a good idea to discredit witnesses who said
22 that they never saw your client with a gun?

23 A No. I wasn't gonna say nothing to them.

24 Q Did you feel you had a good idea of how the witnesses
25 were going to testify at trial?

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1 A I -- I thought I had a very good idea because I -- I
2 transcribed -- I got -- I think I got the transcripts and I
3 transcribed some of the preliminary hearings.

4 Yes. I knew what they -- I had a good idea what they
5 were going to say, and even after talking to Julian, Julian
6 might have -- I don't know how he did it, Julian might have
7 talked to some of them. I had a good idea what they were
8 gonna say.

9 Q Yes, sir. And in fact, do you remember cross-
10 examining investigating officer Agent Johnson ---

11 A Yes, sir.

12 Q --- and do you remember that you were actually able to
13 get him to testify that the most reliable testimony
14 would've been from the people who were there? It's on page
15 363 of the transcript.

16 A 363.

17 Q That's at line 21.

18 A Line 21. Yes, I did ask him that question and he
19 said, "Correct."

20 Q So you actually got a police officer to testify on the
21 stand that the witnesses who testified that your client --
22 that they never saw your client with a gun were the most
23 reliable testimony?

24 A Yes.

25 Q And then you reinforced the fact (as read): "And the

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1 most reliable testimony said that they didn't see Julian
2 with a gun; is that correct?"

3 A Yes.

4 Q And how did the police officer answer?

5 A He -- (as read): "Yes, sir."

6 (Brief pause.)

7 MR. SAVILLE: My apologies. I'm just trying to skip
8 through the ones we've already ---

9 THE COURT: Nah, you're fine.

10 MR. SAVILLE: --- touched on.

11 THE COURT: Take your time. I gave Ms. Shurling --
12 Shurling plenty of time. I'll give you as much as you
13 need.

14 MR. SAVILLE: Thank you.

15 Q Going to the allegations regarding accomplice
16 liability, Mr. Johnson, do you think it would've been a
17 good idea to bring up the idea of accomplice liability in
18 front of the jury?

19 A No, I didn't. That's why I didn't bring it up. And
20 the fact -- that, along with the fact that the testimony
21 didn't hurt me.

22 Q Yes, sir.

23 A Uh-huh.

24 THE COURT: That along with what? I'm sorry.

25 THE WITNESS: The fact that the testimony didn't hurt

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1 Julian's case.

2 Q Do you think it would've been helpful to plant the
3 idea of felony murder in the jury's minds?

4 A No.

5 Q Just going back to the testimony, we -- we had kind of
6 a brief discussion while you were under direct examination
7 about the lack of testimony about a tussle. This seems
8 like a minor point, Mr. Johnson, but just for the -- for
9 clarity and the record, do you recall that Ricky Gibson
10 actually did testify that Mr. Young and the victim were
11 tussling?

12 A I don't remember who it was, but I thought somebody
13 said it was a tussle.

14 Q Sure. And ---

15 THE COURT: You have a page -- you got a page on that?

16 MR. SAVILLE: Yes, Your Honor. It's reflected on page
17 142 of the transcript.

18 THE COURT: Okay.

19 MR. SAVILLE: The paragraph starts at line 5.

20 THE COURT: All right. Thank you.

21 Q And was it a strategic decision to present a closing
22 argument in this case -- last closing argument in this
23 case?

24 A Yes, sir.

25 Q Now, in closing argument, do you feel like you were

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1 able to advance your theory that the gun was brought there
2 by the victim?

3 A I thought I did.

4 Q Yes, sir. So that was kind of a backdoor way to raise
5 that issue without having Mr. Young on the stand.

6 A Right.

7 Q Yes, sir. In fact, is it correct -- do I recall
8 correctly that you told the jury they could infer that the
9 victim brought the gun?

10 A Yes.

11 Q Do you recall asking for any lesser included offenses
12 in this case?

13 A I -- I -- I think we did. I think he denied them.

14 Q Yes, sir. And the transcript will reflect on page
15 382, Judge Dickson states that, coming out of the charge
16 conference in chambers, they will not be charging voluntary
17 manslaughter or involuntary manslaughter.

18 A Yeah. I think I did a brief on that, too. I'm not
19 sure.

20 Q Okay. And after the conclusion of the trial, did you
21 even move to arrest the verdict and for a new trial?

22 A Yes. The truth of the matter is everybody in the
23 courtroom was stunned when I -- when we lost that trial. I
24 mean, the family, every -- all of us were just shocked
25 because nobody thought they would find him guilty after

1 that trial.

2 Q Yes, sir. 'Cause you thought you had done a good
3 enough job of planting reasonable doubt as to whether Mr.
4 Young had a gun.

5 A Everybody -- law enforcement officers, everybody in
6 the courtroom, that that was the thing, said, "Well, you
7 got this one." But look, I mean, I don't know what
8 happened.

9 Q Yes, sir. Going to the allegations regarding the
10 Solicitor's closing argument in this case, you've
11 articulated that -- you seem to articulate that it's not
12 really your theory that you should object during closing
13 argument unless it's something substantial.

14 A It -- it had to be substantial, and you had to take
15 into consideration my -- the jury didn't get to hear my
16 client. And here I am, jumping up and down, objecting on
17 everything. I don't wanna give a bad impression of him or
18 look like we hiding nothing. So you have to be selective
19 about your objections.

20 Q Okay. Mr. Johnson, that's basically the end of my
21 scripted questions. So I'm just gonna hit on a few little
22 highlights that I noted during your direct ---

23 A Okay.

24 Q --- examination. Going to actually the first
25 allegation in the application about the -- if -- if you'll

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1 turn to page 72 of the transcript, please.

2 MS. SHURLING: Could you repeat that? 72?

3 MR. SAVILLE: 72, yes, your -- yes, ma'am.

4 MS. SHURLING: Oh. I thought you gave the page
5 number. Sorry.

6 A Okay. I'm there.

7 Q And it was alleged that -- make sure I have -- make
8 sure -- let me make sure I did give you the right page
9 number there. My apologies. It's 79. I'm sorry.

10 MS. SHURLING: I was just gonna say that.

11 THE COURT: What page?

12 MR. SAVILLE: 79, Your Honor.

13 THE COURT: Okay. Thank you.

14 MR. SAVILLE: On -- upon further review.

15 A Okay. I'm there.

16 Q And there was an allegation that you told the jury
17 that they could infer that your client had a gun.

18 A Yes.

19 Q And I believe it was kinda touched on on direct
20 examination that you had just briefed arguing against
21 inferred malice.

22 A Right.

23 Q You didn't tell the jury that they could infer malice,
24 did you?

25 A No. Okay. I guess what I was trying to do is, I --

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1 to get people to understand -- the jury got a right to
2 infer what they want, but I wanted them to know -- by the
3 time this case is over, they will see that Julian had
4 nothing to do with this. I couldn't stop them from
5 inferring what they want, but if they will listen and let's
6 get through the case.

7 Q Yes, sir.

8 A Okay.

9 (Brief pause.)

10 Q What's -- I understand that you actually handed up two
11 briefs to Judge Dickson pre-trial in an effort to keep out
12 the statements that the victim made in the ambulance to the
13 responding officer.

14 A I handed up -- yes. There were briefs.

15 Q And I -- I believe there is an objection that you --
16 you could've made some more arguments to keep out the
17 statement as an excited of utterance. Do you remember
18 that?

19 A I heard --

20 Q Have ---

21 A -- what was said.

22 Q Have you had an opportunity to review the -- the
23 appellate records of this case?

24 A Honestly, no. I didn't review the ---

25 Q Okay.

1 A --- appellate records.

2 Q Okay. Would it surprise you to know that that
3 argument about excited utterance and the fact that the
4 victim did not give the officer his name was raised in the
5 final brief of the Appellant?

6 A I -- I wouldn't doubt it, no. No, sir.

7 Q Okay. And that the conviction was ultimately
8 affirmed?

9 A Well, I knew it was affirmed. Yes.

10 Q And there was also a allegation about your questioning
11 of Agent Johnson about the victim carrying a gun for self-
12 defense. It's on -- it starts on page 353, line 23.

13 And I know you just read this a few minutes ago, but
14 on line 23, you -- you begin asking (as read): "Okay. All
15 right. Now, during your investigation, did you determine
16 that there was -- that he carried a gun to protect
17 himself?" And Richard Johnson testifies (as read): "From
18 all account, no, sir. Everybody said he didn't carry a
19 weapon."

20 But do you see after that, you do, at least, continue
21 pressing the issue, trying to raise the fact, or at least
22 the inference, that he was carrying a weapon.

23 A Yes. It says (as read): " All right. Now, during
24 your investigation, did you determine that there was --
25 that he carried a gun to protect himself?" And from all

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1 accounts, he said, "Everyone said he didn't carry a
2 weapon."

3 "During an investigation -- during the process of your
4 investigation, you have -- you have determined that he
5 carried a gun to protect himself?"

6 "I don't recall that, no, sir."

7 "Oh, you don't recall it?"

8 "Yes, sir."

9 "All right. During the investigation, did you ever
10 find out the information that he had? Did you ever find
11 information that he had multiple guns?"

12 So yes. I -- I -- I kept trying to dig at it.

13 Q Yes, sir. So you were always kinda trying to plant
14 the seed there.

15 A Right. Also, on line 24, it says (as read): "I just
16 want to be 100 percent sure you reviewed all the documents
17 you gave the Solicitor, and that the Solicitor gave me --
18 you have reviewed all of those documents."

19 Again, I was trying to make sure if there was anything
20 out there, it was my time to try to get it on the record.

21 Q Yes, sir. I think there was a allegation that the
22 Solicitor was arguing facts not in evidence when he noted a
23 lack of evidence of the victim shooting himself. Do you
24 recall an expert testifying at trial that there was no
25 contact wound on the victim?

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1 A I mean, an expert testified. I -- I don't remember
2 all of the details today of what they said. He or she -- I
3 don't remember whether it was a he or she, but an expert
4 did testify, but I think it's somebody from the Coroner's
5 Office of Newberry.

6 Q Sure. And if I could direct your attention to page
7 277, line 15, Mr. Johnson.

8 A 277.

9 Q Really it started at -- at line 14.

10 A Line 13?

11 Q Start at line 14.

12 A Okay. Line 14 (as read): "But you saw no evidence,
13 say contact. There was no evidence of muzzle imprint and
14 no soot."

15 Q Yes, sir. All -- all this to say, Mr. Johnson, as ---

16 THE COURT: Hold on a minute. Say that again. My
17 Court Reporter didn't get that, I don't think.

18 THE WITNESS: The question was (as read): "But you
19 saw no evidence of, say, contact", question.

20 Answer: "There is no evidence of a muzzle imprint and
21 no soot," s-o-o-t.

22 Q I think that -- that about wraps up the allegations
23 about arguing facts not in evidence that I wanted to hit
24 on.

25 Mr. Johnson, is there anything else you'd like the

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1 Court to know about your representation of Mr. Young?

2 A Nothing more than I thought I did the -- the best I
3 could, and you know, if the Court so find that I -- you
4 know, if there's a question, I don't want him in jail if I
5 made a mistake.

6 Q Do you feel like you thoroughly investigated this
7 case?

8 A Painstakingly.

9 Q That's all the questions I have, Mr. Johnson. Thank
10 you very much.

11 A All right.

12 THE COURT: Any redirect?

13 MS. SHURLING: Very quickly.

14 And for the record, Your Honor, I would draw you
15 attention to page 335 where Richard Johnson is identified
16 as being employed with the South Carolina Law Enforcement
17 Division. Last time I checked that's SLED.

18 MR. SAVILLE: My apologies. There are two Officer
19 Johnsons in this case.

20 REDIRECT EXAMINATION

21 BY MS. SHURLING:

22 Q And with regard to your testimony all afternoon, your
23 -- your -- your mission, your focal point was this gun and
24 proving that nobody had any evidence that your client had a
25 gun, right?

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR. 99

1 A Correct.

2 Q You could've interviewed that SLED agent before you
3 got to trial, couldn't you?

4 A And -- and I said that that was one of the things we
5 kinda got -- I -- I talked to him several times.

6 Q Well ---

7 A I did.

8 Q There was nothing in the -- the discovery that led you
9 to believe they had evidence of him, the victim, having
10 charges for carrying a gun or having a weapon or -- at any
11 juncture, right?

12 A Right.

13 Q And you basically -- I mean, I hate to say this, but
14 you know, when you ask a question don't know the answer to,
15 it -- by asking him -- that you opened the door for him to
16 say, "Everybody we talked to said he never carried a gun."

17 A Well, if you'll talk to Julian, there were rumors
18 about not only he had one gun -- that's why I asked the
19 question about multiple guns. And it -- and it was the --
20 it's a decision you make if -- to get it in front the jury.

21 Everybody -- no. Nobody heard that, but don't you
22 think it's important for -- for the -- if -- if there's the
23 possibility -- the opportunity for the law enforcement to
24 say that this guy carries a gun, too, you don't think that
25 that would've been important if that got in?

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.100

1 Q Why do you do your digging in front of the jury?

2 A Okay. Well, that's the way I do it.

3 Q Well, my -- my question is if -- if you didn't know,
4 why open the door for them to say exactly what he said?
5 "Everybody talked -- we talked to said the guy ..." -- so at
6 that point, the jury's heard that everybody we talked to
7 said that guy didn't carry a gun.

8 A Uh-huh. Julian ---

9 Q Right?

10 A Yes.

11 Q And they came out, no offense, but through you.

12 A Uh-huh.

13 Q Right?

14 A Yes.

15 Q Okay. And then we've also got the other issue is that
16 when you talking about the gun, you've got -- hammering
17 Gibson about the fact that, "You never said he had a gun.
18 You never said he had a gun." He'd already said he didn't
19 see anybody with a gun.

20 A Okay.

21 Q Okay. Once again, so we're -- we're summarizing what
22 they have got about the gun ---

23 A No. You second guessing what I was doing during that
24 time. I made a decision in the courtroom. We're in the
25 trial, and there were a thousand things going on that I was

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.101

1 watching, I'm observing. I made a decision. Everything
2 that this record said I did, I did. I did with the purpose
3 of the trial. What you're doing now is second guessing and
4 offering hypotheticals of what I should've done.

5 In the hindsight, there are plenty of things you
6 mighta/shoulda done. On the scene, I did what was closest
7 to my theory of the case. My theory of the case was to show
8 that the gun came from Bailey. This was another -- it
9 didn't work in our favor, but this would've been another peg
10 where it came from Bailey; and again, if you talk to Julian,
11 there were rumors around that this guy not only had a gun,
12 but multiple guns.

13 And you heard me ask Agent Johnson -- you heard me
14 say, "Look, in your investigation, are you sure," because a
15 lot of times, some things don't get in writing. So if they
16 didn't give it to me in writing and it's sitting out there
17 and I've heard it, it's just a chance you take with your
18 strategy.

19 Q Well ---

20 A I took a chance.

21 Q --- let's back up for a minute. You just said two
22 minutes ago that you talked to SLED Agent Johnson several
23 times before this trial ---

24 A But I didn't talk with him in front of a jury.

25 Q No. But why didn't you ask -- that's the whole point.

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.102

1 Why didn't you ask him when there wasn't a jury around to
2 hear what the unknown answer was whether their investigation
3 had yielded any evidence that the deceased carried a weapon
4 or was known to be armed?

5 A I -- I'm gonna say it one more time. I made a
6 decision in the courtroom at that time to ask the question.
7 I thought it fit within my strategy. Had I had to do it,
8 I'd probably do the same thing again in this case. There's
9 nothing else I can say. I made a decision and I did it.

10 THE COURT: Well, the question was, Mr. ---

11 THE WITNESS: Johnson.

12 THE COURT: I'm sorry.

13 THE WITNESS: Yes, sir.

14 THE COURT: --- is why didn't you talk to SLED about
15 that issue before you came in?

16 THE WITNESS: The ---

17 THE COURT: You just simply chose not -- just chose to
18 wait 'til you came in the court to do it and that's your
19 answer, that's fine.

20 THE WITNESS: That ---

21 THE COURT: I just wanna make sure it's clear to me.

22 THE WITNESS: Here's what I can say to that: I wanted
23 the jury to hear that somebody else had a gun. I made a
24 decision, it didn't -- it didn't work out in our favor.
25 That was just part of the strategy, but I made a decision.

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.103

1 I -- I never denied that.

2 THE COURT: Okay. Anything ---

3 Q Would it be fair ---

4 THE COURT: --- else, Ms. Shurling?

5 Q Would it be fair to -- if you had asked that SLED
6 agent before trial whether they'd uncovered any evidence
7 about the deceased carrying a gun, if he had said to you
8 then, outside the presence of a jury, "No. As a matter of
9 fact, everybody we talked to said that guy never carried a
10 gun" --

11 A I didn't -- I didn't ask him that outside of the jury.
12 That's a hypothetical. I don't know what I'd have done.

13 Q What I'm saying is if he had given you that answer
14 outside of the courtroom, you certainly wouldn't have asked
15 that same question in front of the jury, would you have?

16 A You're asking me a hypothetical question what I
17 might've done. I don't know what I'd have done. That's my
18 answer.

19 THE COURT: Next question.

20 MS. SHURLING: Your Honor, let me glance at my notes.
21 I think we about got it. One quick question.

22 Q With regard to it being a contact wound/not being a
23 contact wound, I think my point has been missed and that
24 usually means I'm not being articulate. But nobody was --
25 had offered any testimony claiming this was a contact wound,

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.104

1 had they?

2 A I -- I don't remember if they did or not.

3 Q Well, my -- my point being you've got the pathologist
4 saying they don't have the records that stippling and soot
5 or whatever for it to be characterized as a contact wound,
6 and she says right in her testimony (as read): "... which
7 means it was two feet or further away," which is pretty
8 standard. That's what her testimony says, right?

9 A Okay. Again, that part of the transcript, I had -- I
10 hadn't read that. I -- I ---

11 Q Okay.

12 A --- you know, you have -- you have to give me those
13 facts again. You asking me what -- I -- I don't remember
14 that from five years ago. I -- I didn't read that ---

15 Q Would you ---

16 A --- part of the transcript.

17 MS. SHURLING: Sorry. I'm doing what I said I
18 wouldn't do, Madam Court Reporter. I'm sorry.

19 Q Would you agree with me that at least in the closing
20 argument, and at various places, it -- it sounds like, you
21 know, the State's making an issue with it. "Oh, this
22 couldn't have possibly been a contact wound."

23 Well, nobody on the defense side had said it was a
24 contact wound, had they?

25 A Not -- well, not that I remember, no.

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.105

1 Q And as a matter of fact, the pathologist, the closest
2 she had nailed it down to was that it would've been two feet
3 or further, right?

4 A Okay. If that's in the transcript ---

5 Q It is.

6 A --- it's in the transcript.

7 Q And it'll speak for itself.

8 A Okay.

9 Q So if your client is standing just inside a cracked
10 door or leaning in a window all the way on the passengers
11 side, that there was a lot of room for -- if they were
12 tussling with a weapon, for it, at any juncture, to have
13 been couple of feet away, right?

14 A Assuming -- yes, it could be.

15 Q Any particular reason why you didn't object when the
16 State -- the State was making something out of a non-issue.
17 In the closing argument, they were basically trying to argue
18 that there was no evidence that it was a contact wound, none
19 of -- nobody had said it was, had they?

20 A From what you say from the transcript, nobody did.

21 MS. SHURLING: One quick look at my list, Your Honor.

22 THE COURT: Okay.

23 Q I'm not being a smart alack. I promise I'm not,
24 Virgin, but when you say you believe you received full
25 discovery --

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.106

1 A Uh-huh.

2 Q -- it -- isn't the reality that you never know when --
3 if you didn't receive full discovery 'cause you can't know
4 what you don't know, can you?

5 A That's a fact, and that's why sometime -- if you hear
6 rumors about a gun or multiple guns, sometimes you have to
7 make a decision to ask that question. You exactly right.

8 Q And of course, your only option was not to -- you --
9 you -- asking in front of the jury wasn't your only option,
10 was it?

11 A But ---

12 Q You could've asked it in an interview outside the
13 courtroom.

14 A I guess I could've.

15 Q Okay.

16 MS. SHURLING: Your Honor, with regard to the opening
17 argument issue, the State, at page 73, had already informed
18 the jury that malice could be inferred from the use of a
19 deadly weapon, right? Page 73 --

20 A Oh. I thought you said, "Your Honor."

21 Q State's close -- no. I said the State had already
22 argued -- before your opening, the State argued on page 73
23 that malice could be expressed or implied and one of the
24 things that could be inferred, rather, from the use of a
25 deadly weapon, right?

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.107

1 A Okay. If it's in the transcript, yes.

2 Q Okay. And so then the next step, on page 79, my very
3 able young Respondent has pointed out you're not saying
4 "inferring malice," but you're providing the next step,
5 aren't you, telling them they might infer that he had a gun?
6 The State's already said, "You can infer malice from the use
7 of a deadly weapon," and now you're telling them they can
8 infer that he had a weapon.

9 A I'm telling them, as a jury, they can infer
10 everything; however, there are no facts -- if you keep
11 reading, there are no facts to say that he had a gun.

12 Q Yes, sir. And with regard to the State's notation
13 that you did, in fact, ask for voluntary manslaughter and it
14 was denied, right?

15 A It -- I think we did. It's in the transcript if ---

16 Q And it was denied based on the record that had been
17 made, correct?

18 A For whatever reason the judge gave.

19 Q Pardon?

20 A I said whatever the reason the judge gave in the
21 record, that's the reason.

22 Q Well, what I'm saying is the judge could only grant or
23 deny a jury charge based on the evidence that had been
24 heard. He's -- he's required by law to give jury
25 instructions that are supported by the evidence deduced at

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1 trial.

2 A And if my client don't wanna take the stand, I can't
3 put him up for him to give the evidence.

4 MS. SHURLING: Your Honor, no further questions unless
5 something comes up from my review over this evening.

6 THE COURT: All right.

7 MS. SHURLING: Thank you.

8 THE COURT: Any re-cross?

9 MR. SAVILLE: Just one question, Your Honor, if you
10 will.

11 THE COURT: Okay.

12 MR. SAVILLE: Thank you.

13 RE-CROSS-EXAMINATION

14 BY MR. SAVILLE:

15 Q Mr. Johnson, when you spoke with Agent Johnson before
16 trial, was he under oath at that time?

17 A No, he wasn't.

18 MR. SAVILLE: No further questions, thank you.

19 THE COURT: All right. Hold on just a minute ---

20 THE WITNESS: Yes, sir.

21 THE COURT: --- please.

22 THE WITNESS: Yes, sir.

23 DIRECT EXAMINATION

24 BY THE COURT:

25 Q Mr. Johnson, I want to ask you a few questions just

1 for my ---

2 A Yes, sir.

3 Q --- clarification. And let me say this, I -- you --
4 you said earlier that there were other places you'd like ---

5 A Yes, sir.

6 Q --- to be other than here today.

7 A Yes, sir.

8 Q I understand. I've been in your seat before. Okay?
9 And -- and this is for the edification, so to speak, of
10 those in the audience.

11 Trying cases is very stressful. All right? And --
12 and I know that, and I hope everybody -- lawyers sitting up
13 here know that. Okay? I mean, I quite often tell lawyers
14 that -- that I want them to try their case and not have to
15 worry about me jumping on them or getting on them for -- for
16 various things 'cause ---

17 A Yes, sir.

18 Q --- it's stressful trying a case. I get that. Okay?

19 And it's not fun sitting in your seat, being
20 questioned, so to speak, from a armchair quarterback
21 position and ---

22 MS. SHURLING: Your Honor ---

23 Q --- in no way criticizing you, Ms. Shurling. You're
24 doing your job. Again, I understand that.

25 MS. SHURLING: Well, Your Honor, if it makes Mr.

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR. 110

1 Johnson feel any better, I'm gonna be the target in a murder
2 PCR coming up with about a four New-York-City-phone-book
3 looking transcript in a couple of months myself. I've been
4 there.

5 THE COURT: Uh-huh.

6 Anyone that does criminal defense work as I did have
7 been in your boat. I understand that. But -- and I'm gonna
8 ask you some questions 'cause ---

9 THE WITNESS: Yes, sir.

10 THE COURT: --- I want some clarification because
11 again, I'm gonna read the transcripts --

12 THE WITNESS: Yes, sir.

13 THE COURT: -- and I'm gonna give the lawyers an
14 opportunity to -- to brief and submit proposed orders as Ms.
15 Shurling asked for earlier. But I want them -- as we go
16 forward, I want to make sure I'm on the same page with
17 what's going on here.

18 THE COURT: And -- and it was conveyed to me, and I
19 want to make sure of the facts -- and you lawyers correct me
20 if I mistake something here, okay?

21 Q But the Defendant, Mr. Young, along with Mr. Thompson,
22 Gibson, and Alston, came to this particular location from
23 wherever it was; and the victim, Mr. Bailey, arrived in his
24 own personal automobile by himself.

25 A Yes, sir.

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR. 111

1 Q Is that correct?

2 A Yes, sir. It was five of them in the car. Pinckney,
3 Thompson -- yes, sir. Those five.

4 Q Pinckney I missed.

5 A Yes, sir.

6 Q I didn't have Pinckney.

7 MR. SAVILLE: And I missed Pinckney, Your Honor.
8 That's my fault.

9 THE COURT: Okay.

10 Q So it was Young, Thompson, Gibson, Alston, and
11 Pinckney?

12 A Yes, sir.

13 Q All right. And Gibson, Young, and Thompson went to
14 the car that Bailey was in; is that right?

15 A It was Gibson, Your -- I think it was -- it was three
16 of them, yes.

17 MS. SAVILLE: It was Gibson, Young, and Alston.

18 A And Alston.

19 Q Alston. I'm sorry.

20 A Alston.

21 MR. SAVILLE: Mr. Thompson drove. I believe he
22 remained in the driver's seat.

23 THE COURT: All right.

24 Q And the testimony in the trial was that -- that Alston
25 and Gibson left the car ---

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR. 112

1 A Yes, sir.

2 Q --- which Bailey was seated in by himself, leaving
3 only Young at the car.

4 A Yes, sir.

5 Q Okay. All right. So you have Bailey and Young at the
6 car in which Bailey is subsequently shot.

7 A Yes, sir.

8 Q And -- and it was your theory and your position
9 throughout the trial of the case -- and I'm going back to
10 what -- was to show that the gun came from Bailey.

11 A Yes, sir.

12 Q Okay. What -- going along with the theory side of it
13 -- because you ended up with -- with someone there that was
14 dead --

15 A Yes, sir.

16 Q -- resulting in this young man being indicted --
17 charged, indicted, tried, and convicted.

18 A Yes, sir.

19 Q What was your theory of -- of how Mr. Bailey was shot?
20 Was it by ---

21 A The -- the ---

22 Q --- by himself? And that was ---

23 A From the tone ---

24 Q --- pointed out in -- I think, closing arguments of
25 the State that was pointed out during your examination by

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR. 113

1 Ms. Shurling, I think, was where he makes that argument to
2 the jury and says, "It's not logical, sir," and I'm
3 paraphrasing here --

4 A Yes, sir.

5 Q -- "that he would have shot himself."

6 A That's -- it's on the tussle.

7 Q Okay. So it was your position that there was a ---

8 A Tussle.

9 Q --- tussle, and I think there was something pointed
10 out on that from Mr. ---

11 MR. SAVILLE: It was Mr. Gibson's testimony, Your
12 Honor.

13 THE COURT: On page ...?

14 MR. SAVILLE: On --

15 THE COURT: And you said it on your ---

16 MS. SHURLING: 143, lines 22 through 24, is when he
17 says he couldn't see their hands.

18 THE COURT: 143?

19 MS. SHURLING: 143, line 22 through 24. And I believe
20 somewhere just before that he says he saw them tussling, but
21 then when questioned more closely, he admits that, "Well, I
22 couldn't see their -- I didn't -- couldn't see their arms
23 and hand -- you know, their hands."

24 THE COURT: Okay.

25 MR. SAVILLE: Yes, Your Honor. It's page 142 where he

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR. 114

1 talks about a tussle.

2 DIRECT EXAMINATION

3 BY THE COURT:

4 Q Okay. So there never was a contention or an argument
5 or a theory or any implication or facts of any potential
6 third-party guilt.

7 A Nobody else, Just those two. And my thought behind
8 it, Your Honor, was Bailey was upset because it was -- he
9 said one of the guys said that the drugs was no good.

10 Julian went back -- or -- or Julian somehow or another
11 tried to talk -- my -- my position was Bailey got mad 'cause
12 of the drugs, and that's where the gun came from because
13 nobody else saw Julian with a gun.

14 Q Was there a request for -- and I haven't looked at the
15 transcript as I've said more than once today.

16 A Yes, sir.

17 Q I know there was a request for a voluntary
18 manslaughter charge of which Judge Dickson rejected.

19 A Yes, sir.

20 Q Was there a request for self-defense?

21 A Your Honor, I think it was. I think that's in the
22 transcript also. It's not in there?

23 Q If it is, it is. I'm just -- and I'll ---

24 A I thought -- I thought it was, Your Honor. And -- and
25 I thought my -- my partner made that. Korey, at that time,

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR. 115

1 I thought he did that, but I thought it was for the -- for
2 the voluntary and I thought for the self-defense.

3 MS. SHURLING: What page did you find the voluntary
4 request on?

5 Q Because the logical ---

6 MR. SAVILLE: Looks like ---

7 Q --- assumption would be question would be ---

8 (Ms. Shurling and Mr. Saville confer.)

9 Q --- your client didn't bring the gun.

10 A Right.

11 Q Bailey pulls the gun --

12 A Right.

13 Q -- and there is a tussle.

14 A Right. Right.

15 Q Maybe that is evidence of self-defense. My question
16 is whether or not it was ever asked of the charge?

17 A Your Honor, I ---

18 Q You believe it was ---

19 A I believe it was ---

20 Q --- the transcript ---

21 A --- but the transcript would be the accurate -- the
22 transcript would be accurate.

23 MR. SAVILLE: And Your Honor, I believe there is -- on
24 the transcript it reflects that the charge conference was
25 held back in chambers, off the record.

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.116

1 THE COURT: Well, I mean -- and that happens quite
2 often, that happens quite often. But the question is
3 whether or not it was addressed in court, on the record,
4 subsequent to the in chambers conference. Is there anywhere
5 in there concerning that, Mr. Saville?

6 MR. SAVILLE: Closest thing, Your Honor, would be
7 where they've objected to *Belcher*, and Judge Dickson notes
8 that there's been no mitigating evidence of self-defense in
9 this case.

10 THE COURT: Okay.

11 THE COURT: All right. I think that's all the
12 questions that I have at this time, having -- and I don't do
13 this quite often. I just wanted to make sure I was clear on
14 some stuff.

15 But having -- the Court having asked you some
16 questions, I'll give the lawyers an opportunity to ask
17 anything that they may so desire in follow up with what I've
18 asked.

19 THE COURT: Ms. Shurling?

20 MS. SHURLING: Your Honor, the only thing that occurs
21 to me that we didn't get into that I might set the stage for
22 in the morning is how did your --

23 REDIRECT EXAMINATION

24 BY MS. SHURLING:

25 Q Korey Williams --

26 A Yes.

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.117

1 Q -- was he your law partner at the time?

2 A He was.

3 Q And -- and when you were hired by the family, were --
4 was it originally just you that was retained or did they
5 agree to retain you both at the same time?

6 A Well, when we signed the retainer, I think it was on
7 the firm letterhead, but I was the main person that they
8 retained.

9 Q Okay. And -- but was Korey actually paid a separate
10 fee?

11 A Oh, not -- no. No, it came through the firm.

12 Q Okay. And -- and was there any specific division of
13 labor between you and Mr. Williams as to who was gonna
14 handle what at trial?

15 A I -- most of the time when we came to trial, I did
16 everything and he would sit to the table, but I thought he
17 did handle a motion or something in this case.

18 Q Okay.

19 THE COURT: Well, you ---

20 A I can't remember.

21 THE COURT: --- can look at the transcript and see on
22 that.

23 A Yeah.

24 MS. SHURLING: Yes, sir. I was just -- all I wanted,
25 for the purpose of preparing over the evening, whether there

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON, JR.118

1 was any specific agreement. You know, like it -- sometimes
2 it'll say somebody was brought in just to address DNA
3 evidence, for example, or just ---

4 A Uh-huh.

5 Q --- to address -- was there anything like that?

6 A No, no, no, no. It ---

7 Q Thank you.

8 MS. SHURLING: No further questions, Your Honor.

9 A It was me.

10 THE COURT: Okay. Anything else, Mr. Saville?

11 MR. SAVILLE: No further questions. Thank you.

12 THE COURT: Mr. Johnson, thank you very much, sir.

13 You may step down.

14 THE WITNESS: Thank you, Your Honor. And -- so am I
15 -- and I -- doing that -- now, I'm a city judge right now,
16 and I have to hold court myself, so can you tell me about
17 tomorrow, what you want me to do 'cause I certainly want to
18 be in place for whatever you want me to do.

19 THE COURT: Well, let me ask what y'all's -- what your
20 plan is, Ms. Shurling, as far as putting witnesses up.

21 MS. SHURLING: I -- Your Honor, I will not know until
22 I finish going back over my notes on the remainder of the
23 discovery that I didn't get to last evening. I worked 'til
24 three in the morning and gave out.

25 THE COURT: I -- I understand. I want this young man

1 to be able to do whatever bond court or ---

2 THE WITNESS: Yes, sir.

3 THE COURT: --- whatever he needs to handle in the
4 morning. My question to you is is -- is not what you need
5 him for -- what you need him for, my question is when you
6 might need him.

7 MS. SHURLING: Oh.

8 THE COURT: Do you anticipate putting him up first?

9 MS. SHURLING: Wouldn't have to.

10 THE COURT: Okay.

11 THE WITNESS: I understand, Your Honor.

12 THE COURT: Very well. So what time you think you
13 could be back here, Mr. Johnson?

14 THE WITNESS: Your Honor, I usually get out of bond
15 court about eleven if we don't have a lot. But what I --
16 what I'll do, Judge, I'm gonna find a way to be -- you just
17 tell me what you -- I'm gonna find -- you just tell me what
18 you want.

19 THE COURT: No. I -- I'm assuming that Ms. Shurling
20 is gonna put her client up. We also have the other attorney
21 ---

22 MS. SHURLING: Korey Williams.

23 THE COURT: --- Mr. Williams.

24 MS. SHURLING: And Don Sorenson.

25 THE COURT: Okay. So she's got three more people to

1 put up.

2 MS. SHURLING: Yes, sir.

3 THE COURT: So I would ask that you take care of
4 whatever ---

5 THE WITNESS: Yes, sir.

6 THE COURT: --- as expeditiously as you can in the
7 morning --

8 THE WITNESS: Yes, sir.

9 THE COURT: -- and then head on this way.

10 THE WITNESS: Yes, sir.

11 THE COURT: And we'll -- we'll work it accordingly.

12 THE WITNESS: Yes, sir.

13 THE COURT: Is that fair enough, Ms. Shurling?

14 MS. SHURLING: Yes, sir. And given what I have been
15 able to establish on the record today and how really limited
16 Mr. Williams' participation in the actual trial appears to
17 have been, I don't anticipate my examination of him taking
18 very long.

19 But again, I've got Korey Williams, Don Sorenson, will
20 be putting my client up I anticipate. So I -- if we --
21 could -- could we start at ten in the morning, Your Honor?

22 THE COURT: Depends on how long-winded you anticipate
23 ---

24 MS. SHURLING: I ---

25 THE COURT: --- being tomorrow.

1 MS. SHURLING: It's not gonna be anything like today.
2 The -- today was the main part of it.

3 THE COURT: We can start at two tomorrow if you want
4 to, but ---

5 MS. SHURLING: No, sir.

6 THE COURT: --- I'm not gonna let you go too far.

7 MS. SHURLING: If we can start at ten, then I can
8 knock out those three people by 11:30 --

9 THE COURT: Okay.

10 MS. SHURLING: -- 11:45, and by then, Virgin can be
11 back.

12 THE WITNESS: Yes. Judge, I'm gonna try to get one --
13 there's another associate judge that had covered for me
14 today. I don't know -- she -- she's in private practice.
15 I'm gonna call her tonight, see if she can cover, and I'll
16 just come back in -- I'll -- I'll try to be wherever you
17 want me to be.

18 THE COURT: Well, you -- you get here as soon as you
19 can.

20 THE WITNESS: Yes, sir.

21 THE COURT: If you can get it covered, great. If not,
22 you take care of your business and then get here ---

23 THE WITNESS: All right.

24 THE COURT: --- as soon as you can. And we'll ---

25 THE WITNESS: All right.

1 THE COURT: --- we'll do it that way.

2 THE WITNESS: Okay.

3 THE COURT: We'll start at ten in the morning. Is
4 that okay with you, Mr. Saville?

5 MR. SAVILLE: Yes, Your Honor.

6 MS. SHURLING: Thank you.

7 THE COURT: All right. Sir, you may step down.

8 THE WITNESS: Thank you, sir.

9 THE COURT: Thank you very much.

10 (The witness exits the stand.)

11 THE COURT: Anything else today?

12 MS. SHURLING: No, sir.

13 THE COURT: All right.

14 MR. SAVILLE: Thank you, Your Honor.

15 THE COURT: Y'all be ready to go. Now, we gonna start
16 at ten.

17 MS. SHURLING: Yes, sir.

18 THE COURT: All right? Y'all have a good evening.

19 MS. SHURLING: Your Honor, may I --

20 THE COURT: Yes?

21 MS. SHURLING: -- ask if we needed to inquire --

22 THE COURT: Yes. This gentleman, it's my
23 understanding, is staying here in St. George somewhere at
24 night.

25 MS. SHURLING: Transport him ---

1 CORRECTIONS OFFICER: He'll be in our jail in
2 Summerville.

3 THE COURT: Okay.

4 MS. SHURLING: Can you possibly give me about 15
5 minutes with him before you take him?

6 THE COURT: If you all would do that, I'd appreciate
7 it 'cause --

8 CORRECTIONS OFFICER: Okay.

9 MS. SHURLING: I'll be ---

10 THE COURT: -- she's out of Columbia. I don't know
11 where he has been housed. Where's he -- where you been
12 housed, Mr. Young?

13 THE APPLICANT: McCormick prison.

14 THE COURT: McCormick. Which that's not a short drive
15 for anybody -- anyone. If y'all will give her a few minutes
16 to -- to meet with him, I'd appreciate it.

17 CORRECTIONS OFFICER: Yes, sir.

18 THE COURT: Thank you.

19 MS. SHURLING: Thank you.

20 THE COURT: All right. Ten o'clock in the morning.

21 MS. SHURLING: Thank you, Your Honor.

22 (Off the record at 3:50 p.m.)

23 DAY 2

24 (On the record at 10:00 a.m.)

25 THE COURT: All right. State ready to proceed?

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 124

1 MS. SHURLING: Call Mr. Don Sorenson so we can get him
2 up and out.

3 THE COURT: All right. Mr. Sorenson, if you'd come
4 around please, sir, to be sworn.

5 MR. SORENSON: Yes, sir.

6 MS. SHURLING: Try to keep my promises.

7 THE COURT: Me, too.

8 DONALD SORENSON, having been first
9 duly sworn, testifies as follows:

10 DIRECT EXAMINATION

11 BY MS. SHURLING:

12 Q Good morning.

13 A Good morning.

14 Q Would you please, for the Court Reporter's benefit,
15 say your full name and spell your last name?

16 A Yes, ma'am. It's Donald Sorenson, S-o-r-e-n-s-o-n.

17 Q Thank you very much. If I slip and call you "Don"
18 during your testimony, forgive me. We have really known
19 each other a long time, haven't we?

20 A Yes, ma'am.

21 Q Okay. Do you recall prosecuting this case?

22 A I do.

23 Q And I know it's been a very long time ago, but thanks
24 to my needing the discovery, you've had a recent opportunity
25 to review a good bit of the stuff gathering discovery

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 125

1 materials for me, correct?

2 A To some degree, yes, ma'am.

3 Q Okay. You tried this case along with Harrison Bell?

4 A Yes, ma'am.

5 Q Is he still with your office?

6 A He is not. Mr. Bell retired couple of years ago.

7 Q Okay. And you were lead counsel anyway.

8 A That'd be correct.

9 Q Okay. There were, other than the deceased, a total of
10 five young men involved in this case, correct?

11 A I know ---

12 Q You had Gibson ---

13 A I -- I know there were at least three other
14 individuals that were charged. I'm not sure. In looking at
15 my records, I -- I was unable to find where --

16 Q Okay.

17 A --- a fifth one was charged with anything.

18 Q Well, let's just go through this one at a time.

19 A Yes, ma'am.

20 Q I'm -- I'm not gonna spend a lot of time with you. So
21 we'll -- we'll make this as organized and quick as we can.

22 But Gibson, Ricky Gibson, was the -- I'm gonna call
23 him the "middle man." He was the one that supposedly set up
24 the drug deal. Remember him?

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 126

1 A I -- I believe that is correct. Yes, ma'am.

2 Q Okay. And then in addition to him, there was Ray
3 Anthony Alston, and he was the young man who was, according
4 to other witnesses present, the one that, in addition to the
5 Applicant, got out of the car and talked to the deceased by
6 his car.

7 A That'd be correct.

8 Q You recall that?

9 A Yes.

10 Q Okay.

11 A Yes, ma'am.

12 Q And in addition, there was a Maurice Thompson and a
13 Hilliard Pinkney who remained in the car.

14 A That -- that is my recollection. I believe Mr.
15 Thompson was the driver, if I remember correctly.

16 Q Okay. Now, at my request, have you reviewed what your
17 records reflect concerning what kind of deals or
18 consideration were given to any -- first off, what each of
19 these people were charged with and what, if any, deals or --
20 or favorable treatment in exchange for cooperation they were
21 given. And then, what your knowledge is of what the
22 ultimate disposition on any of their charges would've been.

23 And can we take them one at a time and start out with
24 Mr. Gibson, since ---

25 A Yes, ma'am. Could -- would I be able to get somebody

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 127

1 to -- to bring my box up here, just 'cause ---

2 Q I'll do it.

3 A --- I do -- I do have some notes in -- in there from
4 that.

5 Q It's a big box. I'm gonna let them carry it.

6 (Brief pause.)

7 A Okay. You can go ahead. You can go ahead.

8 Q Okay. Let's start with -- with the first of the group
9 to testify at trial, the middle man, for our identification
10 purposes, Ricky Gibson.

11 A Yeah. I don't believe Mr. Gibson -- I don't have any
12 independent recollection of him being charged with anything,
13 and I don't -- in looking through our -- my files and also
14 checking our records system, I -- I don't see -- I don't
15 believe he was ever charged with anything stemming out of
16 this incident.

17 Q Okay. And Mr. Gibson admitted from the stand that he
18 had been selling marijuana, correct?

19 A I -- I believe so. Yes, ma'am. I mean, I have -- I
20 have not reviewed the transcript, so I don't ---

21 Q If I misrepresent it, the record's gonna catch me in a
22 fib and I don't like that. So I -- I'll stand on the
23 record.

24 But Mr. Gibson also said that he had been told that if
25 he just told the truth --

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 128

1 I'm gonna look at page 150. 129 is where he admits
2 that he'd been selling pot during that time period, Your
3 Honor. On page 159, he says he was told to (as read): "Just
4 be honest and you'll be released."

5 A Okay. That is -- I mean, who's -- I don't -- I -- I
6 -- I have not reviewed the transcript.

7 Q Okay.

8 A So I don't know exactly what the content -- context of
9 that question is --

10 Q Okay. Well, we'll go back and ---

11 A -- or who's even asking that question at the time.

12 Q Thank you. On page 159, I can tell you who it
13 would've been.

14 THE COURT: Cross by Mr. ---

15 Q It --

16 THE COURT: --- Johnson.

17 Q -- would've been on cross.

18 A Cross by Mr. Johnson.

19 Q On cross by Mr. Johnson.

20 A Okay. I -- I -- as I said, I -- I don't have any
21 records of Mr. Gibson even ---

22 Q That's okay. We'll ---

23 A --- being charged with anything, so I don't know what
24 the context of that question was.

25 Q We'll -- we'll go through them one at a time and then

1 ---

2 A Okay.

3 Q --- we'll talk about them just a little bit.

4 A Okay.

5 Q The next one would have been Ray Anthony Alston.

6 A Yes, ma'am.

7 Q And Mr. Alston was the only person other than my
8 client who was actually charged with murder, correct?

9 A That'd be correct.

10 Q And whatever happened to him?

11 A Mr. Alston ended up pleading guilty to misprison,
12 looks like probably three or four months after Mr. Young's
13 trial. And if my memory serves me correct, Judge Dixon --
14 it was just a straight-up plea to misprison, and Judge Dixon
15 ended up giving him a time-served sentence. And I believe
16 he had been incarcerated that entire time.

17 Q Okay. So we went from 30 to life, day-for-day for
18 murder, to misprison and couple years in jail.

19 A That'd be correct. Yes, ma'am.

20 Q Okay. Let's move along to Maurice Thompson.

21 A Mr. Thompson was charged with accessory after the fact
22 to -- to murder.

23 Q To two murders?

24 A To murder.

25 Q To murder.

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 130

1 A T-o, t-o murder.

2 Q I'm sorry. I thought I missed a body in there
3 somewhere.

4 A No.

5 Q I apologize.

6 A T-o murder.

7 Q And what was the final disposition on his charge?

8 A He pled guilty. In looking at this, it appears to be
9 the same day that Mr. Alston pled guilty. That was November
10 5 of 2012, in front of Judge Dixon, to -- to misprison also,
11 and received a -- five years, suspended to three years of
12 probation.

13 Q Okay. And then, of course, there is Mr. Pinkney I
14 skipped over while ago.

15 A Yes. Mr. Pinkney was also charged with accessory
16 after the fact. His charged ended up ultimately being
17 dismissed about a year later, in October of 2013.

18 Q Okay. Now, based on the evidence that you had in your
19 file and in going forward on this case, what was the basis
20 for charging Alston with homicide?

21 A I -- I mean, the initial basis, I think you'd probably
22 have to talk -- to law enforcement about that because we --
23 I mean, I was not the -- I mean, SLED is the charging
24 agency. The Solicitor's Office isn't ---

25 Q But you moved forward on -- that -- that charge was

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 131

1 still in place at trial.

2 A I -- I believe ---

3 Q So what was the ---

4 A --- so. It was basically because of the fact that he
5 had gotten out of the vehicle also. He was up at the
6 vehicle right prior to the -- if I remember correctly, we
7 had a hand print or something of his on the vehicle. If I'm
8 ---

9 Q Okay.

10 A --- I'm remembering that correctly. So I think that
11 was the initial -- what led to the two of them, being Mr.
12 Alston and your client being -- both being charged with
13 murder.

14 Q Okay.

15 A And ultimately, obviously, as I'm receiving and
16 preparing this case for trial, I became fairly convinced
17 that your client was the -- was the actual shooter, and
18 that's who we proceeded -- proceeded forward against.

19 Q And Don, how long have you been a prosecutor?

20 A Twenty-two years, twenty-three years.

21 Q Would it be fair to say you've tried, probably -- or
22 at least been involved in quite a few cases where multiple
23 people were charged with a murder because a group of people
24 were involved in a crime that resulted in one of them
25 killing somebody?

DIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 132

1 A Yes, ma'am.

2 Q That's our beloved "hand of one, hand of all," right?

3 A Yes, ma'am.

4 Q What was the rationale of the prosecution for charging
5 only Alston with homicide when there were clearly two other
6 people that came to the scene if -- if -- it was the State's
7 theory of the case that they were robbing a drug dealer,
8 right?

9 A I -- I mean, I believe that was our -- our theory as
10 to what your client's involvement was, yes. Now,
11 necessarily proving that everybody in the vehicle knew
12 that's what he was gonna do ahead of time, I'm not -- I'm
13 not sure that was quite as clear cut.

14 Q Okay. Well -- and -- and as far as the testimony that
15 you had from these gentlemen, their purpose in going there
16 was to buy a small quantity of marijuana, right?

17 A If -- if I remember correctly, yes, ma'am.

18 Q And all four of them owned up to that. I mean, they
19 all admitted that's what they were -- they'd gone there for,
20 right?

21 A I'm not sure you client admitted to anything.

22 Q No. I said all four of them, the four that we're
23 discussing.

24 A Yes, ma'am.

25 Q Pinkney, Thomson ---

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1 A Yes -- yes, ma'am. Yes, ma'am.

2 Q Okay. And so they all -- it was their story that they
3 went there just to buy reefer from Bailey.

4 A That is my recollection, yes, ma'am. That there was
5 some initial conversation with Mr. Anthony and the victim
6 about the -- if I'm remembering this correctly, about the
7 quality of the marijuana and it's kind of after that ---

8 Q I'm sorry. Initial conversation between whom
9 concerning that?

10 A Mr. Alston ---

11 Q Alston.

12 A --- and the victim.

13 Q And in fact, the testimony was that Mr. Alston had
14 complained about the quality and was walking off when the
15 Applicant allegedly then re-engaged Bailey in conversation,
16 correct?

17 A That is my recollection.

18 Q Okay.

19 A Yes, ma'am.

20 Q So they all went there to buy marijuana, and Alston
21 says he -- he, along with the Applicant, got out of the car
22 to go do the deed, to actually physically buy the marijuana;
23 but Alston claimed, as did -- that -- that he didn't like
24 the look of the product and wasn't gonna buy it and had
25 disengaged from the potential drug deal and was walking

1 away, right?

2 A Yes, ma'am.

3 Q Okay. So -- so basically, if their testimony is
4 believed, all three of those people -- Alston, Pinkney, and
5 Maurice Thompson -- were all there, you know, buying drugs
6 and -- and buying marijuana and Alston had pooh-poohed the
7 deal because it was poor quality and walked off, right?

8 A Yes, ma'am.

9 Q Okay. So would it be fair to say that in terms of --
10 of potential evidence of hand of one being the hand of all,
11 you didn't have much more on Alston that you did on Maurice
12 Thompson and Pinkney.

13 A I think by the time we got to that, I mean, that --
14 that factual scenario that you just played out --

15 Q Uh-huh.

16 A -- played out more once we -- Mr. Alston -- we talked
17 to him and he became -- and he testified. So I mean, I
18 would agree with that. I believe, quite frankly, at the
19 time, once all of the evidence was presented, that -- that
20 there wasn't evidence that would've convicted Mr. Alston of
21 -- of murder or quite frankly, any of them as an accessory
22 before the fact, definitely of murder. Obviously, they were
23 all involved after the fact and that was the basis of the
24 misprison plea to -- for two of them.

25 Q Okay. And what was the basis for the misprison? They

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1 all cooperated, they all told you in statements virtually
2 exactly what they testified to in court. Not you. Pardon
3 me. They told law enforcement essentially exactly what they
4 testified to in statements.

5 A Right. I don't believe any of them came forward on
6 their own to law enforcement. I think the basis for
7 misprison would be that you've known a felony has been
8 convicted -- committed, you know who the perpitrator was,
9 and you basically don't come forward.

10 Q Well -- and that you give false information to law
11 enforcement, you withhold information.

12 A Withhold. I don't think you have to give false
13 information, but if you withhold information. You're
14 present at the scene of a homicide, you know who the shooter
15 was, and you don't come say anything, I mean, I think you --

16 Q So it's your understanding that as -- as soon as --
17 within days after this incident, if they had not come
18 forward and supplied the information on their own volition,
19 that would be sufficient for misprison.

20 MR. SAVILLE: Objection, Your Honor, to relevance. I
21 don't see how the decisions in charging his co-defendants is
22 ---

23 MS. SHURLING: I'll make it clear ---

24 THE COURT: Objection -- well, I'm gonna sustain the
25 objection at this point. If you need to -- if you wanna try

1 to clarify it ...

2 MS. SHURLING: Okay.

3 Q Mr. Sorenson, those charges were all still pending,
4 the accessory after the fact charges and the -- the murder
5 charge on Alston. Those were pending at the time of their
6 trial testimony, correct?

7 A Yes, ma'am.

8 Q Okay. So they testified with the impression or with
9 the knowledge that they had charges hanging over their head.

10 A I'm pretty sure that all three of them were aware of
11 that. Yes, ma'am.

12 Q And at a point in time when -- when -- in your
13 preparation for this trial and your review of all the
14 evidence in the case, it was pretty clear you're -- you
15 couldn't have made a case against those young men for those
16 charges, could you?

17 A As to Mr. Alston's murder charge, I think that was
18 very, very, unlikely. The accessory after the facts,
19 probably a little different, I mean, 'cause they obviously
20 -- one of -- Mr. Thompson drove him away from the scene of a
21 homicide.

22 Q Okay. But neither -- certainly, for example, Mr.
23 Pinkney, he wasn't driving the car.

24 A I think that's what ultimately lead to me dismissing
25 these charges a year later. We -- realizing that -- I mean,

1 I'm not sure what ---

2 Q I understand.

3 A --- he was not ...

4 Q But none of those charges were dismissed or reduced
5 and pleas done. None of that happened until after this
6 trial.

7 A That's -- that's correct. I mean, I went through
8 those dates for you, yes ma'am. It was all ---

9 Q 'Til after they'd testified.

10 A Yes, ma'am.

11 Q Okay. Now, I asked you this morning about some
12 information that I found in the discovery materials over
13 last night. And I'm gonna hand you a copy to look at.

14 A I've -- I've got it.

15 Q Okay. If you would look at page 7 --

16 A Yes, ma'am.

17 Q -- of the SLED investigative file.

18 And I'm gonna walk over to you, Mr. Saville, and show
19 you page 7.

20 They talk about an interview with a Regina Spurgeon --

21

22 A Yes, ma'am.

23 Q -- who talks about walking out of a Shell/Bojangles in
24 Orangeburg?

25 A Yes, ma'am.

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1 Q And they're referring to (as read): "That is the dude
2 that killed Oh Buddy," which is what people called Jonathan
3 Bailey, that -- you see they've got Jonathan Bailey's name
4 in parens [phonetic]. And they refer to the fact that two
5 people also said that Kennedy, Leon Kennedy, known as
6 "Leave," had been the one ...

7 Let's see, pardon me. Let me get my right line here.

8 (As read): "That Kennedy got an ounce of weed and
9 almost \$200 from Jonathan Bailey." You see that?

10 A I -- I do. Yes, ma'am.

11 Q Okay. Whatever happened to that lead? There was no
12 mention of that person or -- or that person having
13 supposedly been involved in this at trial. Do you know what
14 happened to that?

15 A I -- I don't have any --

16 Q Pardon?

17 A -- I don't have any -- at this point in time, six
18 years later, any specific recollection. I mean, obviously,
19 at that -- some point in time, during the course of
20 preparing this for trial, we were talking with -- with the
21 lead SLED agent. We would've discussed all of that.

22 You know, it's not uncommon in a case like this, in
23 the days or weeks afterwards, that all kinds of -- kind of
24 tips and things like that come in that, ultimately, when --
25 when we get to the point when -- you know, in this case,

1 when the Defendants were found and started getting
2 statements from them, realized that this other stuff is --
3 does not -- is not credible.

4 Q Okay. And by the way, just so the record's very
5 clear, I'm certainly not suggesting a *Brady* violation here.
6 This ---

7 A It's in the ---

8 Q --- this ---

9 A Right.

10 Q --- entire report was in the discovery materials given
11 to Defense counsel. Let the record be clear on that.

12 Okay. What -- what about plea negotiations in this
13 case with my client? He was 16, he had no prior criminal
14 record. Were there any plea negotiations in this case?

15 A In -- in looking through this, Ms. Shurling, I did not
16 see -- I attempted to find the answer to that, and I don't
17 have any independent recollection of whether -- of how far
18 we ever got in that regard.

19 I do -- I do recall having several conversations with
20 Mr. Johnson kind of leading up to scheduling this trial.
21 And -- and the general gist from Mr. Johnson was that his
22 client was not interested in pleading guilty to anything.
23 So I'm not too sure that it ever went farther than that.

24 I -- I do have in my file a piece of paper that's
25 consistent with what I probably would've sat and gone --

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1 gone over with the victim's family, kind of dealing with
2 murder and -- and voluntary manslaughter as possibilities,
3 but ---

4 Q Yes.

5 A --- but there's nothing in there that would lead me to
6 believe that I ever made a formal plea offer to Mr. Johnson.

7 Q And would you please share with us what your notes
8 reflect concerning what your thoughts were with regard to
9 possible plea? I assume that's -- you -- your notes were
10 taken in preparation for discussing a possible plea with the
11 family?

12 A Yes, ma'am. And it would've just been going over the
13 -- the possible penalties for murder, and -- and it
14 obviously, if -- you know, the potential of -- of if -- if
15 -- if a voluntary manslaughter was either a possibility at
16 trial, given the -- how the evidence played out or as a
17 possibility of something that we could -- could reduce it to
18 to plea. So just basically just going over the -- the
19 possible penalties.

20 I -- I do see where I -- I do have a kind of boxed in
21 30 years on voluntary. So I may have discussed that with
22 Mr. Johnson. I -- I don't know that. I don't have any
23 independent recollection of that. But I do recall, from my
24 conversations with Mr. Johnson, I -- I know his take on this
25 case and the evidence was a little different than mine prior

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1 to -- leading up to trial, and -- so -- so I don't know the
2 answer to that.

3 I -- I -- there's a chance that I talked with him
4 about a possible plea to manslaughter for 30 years, but --
5 but I don't have -- I couldn't find a written plea offer,
6 which is what I would typically do. I do not see that in
7 here. So this could've been more of an informal
8 conversation with him where he had indicated to me that
9 that, I mean, is not even close to what his client would be
10 interested in and it never went farther than that.

11 Q Thank you.

12 MS. SHURLING: Your Honor, may I approach?

13 THE COURT: Yes, ma'am.

14 Q May I see the piece of paper you're referencing?

15 A Yes, ma'am. And that -- that's very typical when I'm
16 just sitting, chatting with -- with, especially in homicide
17 cases, parents. I mean, they're family members where I, you
18 know, would write out murder, what the potential penalties
19 are, obviously guilt -- not guilty, guilty; what he would be
20 looking at if he was convicted of that, and then the -- in
21 this case, the lesser of manslaughter and what the potential
22 penalty is for that.

23 Q And you've actually got (as read): "Two years/30
24 years."

25 A Well, that -- that would be what manslaughter carries.

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1 Q The range --

2 A Yes, ma'am.

3 Q Exactly. And so my question is the -- you've got 2
4 years to 30 years next to voluntary manslaughter, which
5 obviously you're anticipating discussing with the family
6 that voluntary manslaughter carries 2 to 30 versus murder,
7 30 to life.

8 A Yeah. Yes, ma'am.

9 Q And so do you have any specific recollection or notes
10 that -- that you could use that would -- does anything
11 indicate that 30 years, at this point, meant anything other
12 than you were explaining to the family that he most he could
13 get for manslaughter was 30 years?

14 A There's nothing on there. I mean, it's -- I -- I will
15 say looking at the fact that I've got it boxed, and that
16 even below there I have 25 to 30 and then 30 boxed, that --
17 that -- that I must've had some conversation with the family
18 about offering 30 years on manslaughter.

19 Q Okay. Now --

20 A Whether that -- where that got with Mr. Johnson, I --
21 I don't -- I don't know the answer to that.

22 Q Mr. Sorenson, I'd like to introduce this as an exhibit
23 and -- with -- let me show Respondent.

24 THE COURT: Why don't you make a copy of it, and you
25 can introduce ---

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1 MS. SHURLING: That's what I was just fixing to ---

2 THE COURT: --- the copy ---

3 MS. SHURLING: --- ask him.

4 THE COURT: --- and let him keep his original, please.

5 MS. SHURLING: That's what I was ---

6 THE COURT: Any objection, Mr. Saville?

7 MR. SAVILLE: No objection, Your Honor.

8 (Marked Applicant's Exhibit No. 1, one page document.)

9 MS. SHURLING: You took ---

10 THE COURT: All right. Madam ---

11 MS. SHURLING: --- the words right out of my mouth.

12 THE COURT: Madam Clerk, if you could make a copy when
13 you get a chance.

14 Q And I'm almost through, but Mr. Sorenson, isn't it --
15 I mean, I hate to compare a criminal prosecution to a real
16 estate transaction, but plea negotiations can kinda be like
17 a real estate transaction sometimes in terms of you start
18 out with what you think you can get the family to agree to,
19 and the Defense says that's not -- that dog's not gonna hunt
20 and you go back and forth. And it's not uncommon, is it,
21 for you to ultimately get a family to agree to be okay with
22 something a little bit better for the Defendant than what
23 you started out asking for?

24 A That's correct. I mean, if Mr. Johnson had come back
25 to me and said his client was willing to do, you know, 20 to

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1 30 or something along those lines, then obviously I would've
2 -- I would've sat down and discussed that with the family.
3 I -- I -- I don't recall that ever happening in this case.

4 Q Sure. But I guess my point is that even if that 30,
5 in fact, reflects that that's where you've started, it -- it
6 doesn't mean that you would not, for the sake of saving the
7 family going through a trial and -- and your office and
8 everything else, if -- if Mr. Johnson had come back and
9 said, "I think I might could sell 20, but not 30," you
10 would've taken that to the family and at least seriously
11 considered it?

12 A I would've talked to them. Yes, ma'am. I ---

13 Q Okay.

14 A --- I mean, whether I -- what my recommendation
15 would've been if that had happened, I -- I -- I can't answer
16 that now six years later. Obviously ---

17 Q I understand.

18 A --- part of my discussion with families is, you know,
19 working out a plea as opposed to going trial -- to trial,
20 avoiding them sitting here six years later.

21 Q Exactly.

22 A So ...

23 Q And -- and lets go back through real quickly. You --
24 you had -- admittedly, you had four witnesses, but none of
25 them were saying that there'd been any discussion about

1 planning to rob that guy, right?

2 A That -- I believe that is correct. Yes, ma'am. I
3 don't think we had anybody that had indicated that was the
4 plan --

5 Q They were all --

6 A -- going into this.

7 Q They were all in agreement that it was a drug deal.

8 A Yes, ma'am.

9 Q And the testimony about what transpired at the scene
10 essentially was that Alston was unhappy with the quality of
11 the marijuana and wasn't buying it. And that then, my
12 client talked to the gentlemen, and nobody says they could
13 hear that conversation. So we don't know yet what the
14 conversation may have been.

15 But that the car was put in reverse, there was a
16 "pop," and then the guy drove off, later to wreck and die.
17 I'm not minimizing that, but he did drive off from the
18 scene.

19 A Yes, ma'am.

20 Q And you didn't have a murder weapon.

21 A I believe that is correct.

22 Q And as far as your discovery materials are concerned,
23 you had no indication that any of them were going to say
24 they had seen my client with a gun that day.

25 A Say -- say that again.

1 Q As far as what you knew going into the trial, based on
2 the SLED report and the statements of the various witnesses,
3 nobody was saying that they had seen Julian Young with a gun
4 either before or after this incident.

5 A Not that I recall. I know there was some evidence of
6 that. I wanna say it was his brother where we were --
7 'cause I know there was a photograph we had of his brother
8 with a gun. That I -- I believe was the thought was the
9 murder weapon. I don't -- with -- without reviewing this in
10 a lot more detail, I don't remember how much ---

11 Q Sure.

12 A --- those dots were connected or -- or even whether
13 that came out during the trial or not.

14 But I do know that there was some evidence of -- of --
15 I believe it's his brother who, you know, on Facebook or
16 either on his phone or something like that -- this may have
17 been pre-Facebook -- but on his phone having a -- having ---

18 Q Actually -- pardon me. Actually, you had a photograph
19 in the discovery from some form of social media of the
20 brother with a pistol.

21 A Yes, ma'am.

22 Q And the ballistics testimony at trial was that that
23 gun had been tested and that it was inconclusive.

24 A Okay.

25 Q That it couldn't be ---

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1 A Could -- could be or ---

2 Q --- ruled out and ---

3 A --- may not be. Yes.

4 Q But coulda been -- couldn't be ruled out, but
5 certainly coulda been any number of other guns. It -- it
6 wasn't identifying it as the gun. And it was the brother,
7 not my client, right?

8 A I -- yes, ma'am. I mean, that's ---

9 Q I'm just trying to put the pieces ---

10 A --- something you just said ---

11 Q --- together.

12 THE COURT: Hold on. Ho, ho, ho.

13 MS. SHURLING: Sorry.

14 THE COURT: Both of you are talking at the same time.
15 Please, please, make sure questions are finished before
16 answers ---

17 MR. SORENSON: Yes, sir.

18 THE COURT: --- are given and vice versa.

19 MR. SORENSON: Yes -- yes, sir.

20 THE COURT: Okay. Thank you.

21 MR. SORENSON: Yes, sir, Judge. Sorry.

22 Q And I apologize, Mr. Sorenson. I'm -- I'm conscious
23 or trying to wrap this up quickly and in the process,
24 forgetting my manners. I apologize.

25 So you didn't have a gun. You didn't have anyone

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1 saying there was a plan to rob anybody. And even with
2 regard to what was observed at the scene, you don't have
3 anybody saying that they saw my client standing outside the
4 car with a gun, pointing it at the gentlemen; or saying, you
5 know, "Give me the money"; or -- you don't have any of that.
6 Okay? So aren't all of those considerations that you
7 would've had to discuss with the family, in terms of how the
8 trial would go, if you had been in the process of trying to
9 work out a deal?

10 MR. SAVILLE: Objection. Calls for speculation.

11 MS. SHURLING: Well, I can ask him --

12 Q -- in the course of your career as a prosecutor, are
13 those the types of -- is it your habit, your custom, to
14 discuss with families what you perceived as problem areas if
15 the case goes forward to trial and how that might to be
16 consideration they take into account when they're discussing
17 with you what they can live with?

18 A I mean, Yes. That would be stuff that I would go over
19 with the family.

20 Q Okay.

21 A I mean, obviously, I mean, in my opinion, what lesser
22 included might get charged, I mean, what defenses might get
23 charged, I mean, what I -- my opinion as to the credibility
24 of -- of those defenses. I mean, that's ---

25 Q Sure.

1 A --- all stuff that goes into that ---

2 Q Sure.

3 A --- that -- those discussions.

4 Q Right. And -- and in trying cases like this or
5 preparing them for trial, is it not fairly common for people
6 who have originally said, "No how, no way are we going to
7 plead," to end up folding and pleading closer to trial time?

8 A I wouldn't say it's common, but I mean, it occurs.

9 Q Well, I must just be very unlucky. But anyway...

10 Would you agree it's fair to say a lot of people that
11 start out saying there's no way they'll plea, end up
12 pleading?

13 A I -- I mean, that happens. I mean, I -- whether it --
14 it's not something I've sat ---

15 Q Okay.

16 A --- and done the math on as to what percentage of
17 people do that, but ...

18 Q Do you ever approach defense attorney's with a
19 potential plea offer when -- without them first approaching
20 you?

21 A Yes, ma'am.

22 Q Do you have any documentation or recollection of
23 whether you even attempted to do so -- or whether you
24 attempted to do so in this case?

25 A I -- I ---

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1 MR. SAVILLE: Objection. Asked and answered.

2 THE COURT: Sustained. He's already answered that.

3 MS. SHURLING: I -- I couldn't remember asking that
4 particular one. Okay.

5 Q So you just don't know?

6 THE COURT: He -- he indicated previously that he had
7 no independent recollection other than ---

8 MS. SHURLING: Okay.

9 THE COURT: --- that sheet that he had that's been
10 marked as an exhibit.

11 Q Do you know anything about the murder case of Mr.
12 Pinkney? He's subsequently been killed in a homicide,
13 correct?

14 A That -- that's my understanding. I just heard of that
15 kind of -- kind of through the grapevine. That's not in our
16 circuit.

17 MR. SAVILLE: Objection. Relevance.

18 THE COURT: I'm gonna let it go right now. She may
19 tie it in.

20 Q Other than your discussions with me, do you have any
21 knowledge as to who suspects in that homicide are?

22 A I don't, ma'am. No, ma'am.

23 Q Okay. I have no further questions. Thank you for
24 being here.

25 A Okay.

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1 THE COURT: Mr. Saville?

2 MR. SAVILLE: Yes, Your Honor.

3 MS. SHURLING: Before we go forward -- I'm sorry -- I
4 did mean to introduce a copy of the SLED report that ...

5 Q Mr. Sorenson, will you identify if this is -- I can
6 make this really easy for you.

7 THE COURT: Any objection, Mr. Saville?

8 MR. SAVILLE: No objection, Your Honor.

9 Q This is -- you sent it to me in this envelope.

10 THE COURT: He doesn't have any objection. You ---

11 MS. SHURLING: Oh. Thank you.

12 THE COURT: --- you can enter it however you want.

13 Okay?

14 THE COURT REPORTER: What is it? What are you
15 calling it?

16 MS. SHURLING: It is a SLED ---

17 THE COURT REPORTER: --- report?

18 MS. SHURLING: --- investigative report.

19 THE COURT REPORTER: Okay.

20 MS. SHURLING: A SLED investigative file, I guess they
21 call it. Thank you, very much.

22 THE COURT: Is that Applicant's 2?

23 THE COURT REPORTER: Yes, sir.

24 THE COURT: Thank you.

25 (Applicant's Exhibit No. 2, SLED report.)

1 MS. SHURLING: And I have a couple of other things
2 that I'll be introducing, Your Honor, from yesterday. But
3 we'll do that later.

4 THE COURT: Okay.

5 CROSS-EXAMINATION

6 BY MR. SAVILLE:

7 Q Good morning, Mr. Sorenson. How you doing?

8 A Good morning. How are you?

9 Q Good. Thank you for being here today. Just have just
10 a few short follow-up questions.

11 On direct examination, Ms. Shurling asked you about a
12 statement about a possible third party who was rumored to
13 have committed the murder. If you would turn with me to
14 page 7 of the SLED report.

15 A Yes, sir.

16 THE COURT: Page 7?

17 MR. SAVILLE: Yes, Your Honor.

18 Q And it's a summary of a statement they took on April
19 25, 2011, when they interviewed Kendall Hampton. And could
20 you -- could you read the paragraph -- I guess the first
21 full paragraph on that page, Mr. Sorenson?

22 A It says, (as read): "On April 25, 2011, SA" -- so
23 it'd be "Special Agent Johnson and Lieutenant Bonham
24 interviewed Kendall Lamar Hampton, who provided the
25 following information: Hampton stated that a girl he knows

1 as "Jenna" told him that she was in the store in Orangeburg
2 when she saw two unknown persons standing in front of the
3 store. An individual she knows as "Nard" came out of the
4 store and the two unknown persons stated, 'That's the dude
5 that shot Oh Buddy.'

6 "The two dudes then asked Nard what happened. Nard
7 stated that Buddy would not give up his dope. Hampton
8 stated that, according to Jenna, 'Lil Bit -- 'Li Bit, who is
9 Jonathan Bailey's cousin, told her," Jenna" -- in
10 parenthesis -- '...that a person known as "Lev" most likely
11 would've pulled the trigger. Li Bit also told Jenna that
12 Nard and a guy known as "Poopie" hangs with Lev.'

13 "Special Agent Johnson completed a memorandum of
14 interview, it's attachment 18, based on this information
15 provided by Hampton."

16 Q And I believe you were asked if -- what y'all did to
17 follow up, and I just wanted to ask -- ask your impression.
18 Does this seem like a -- so the gist of this conversation is
19 that somebody told -- somebody said that a girl told them
20 that she overheard one stranger tell another stranger
21 something at a store. That's the basis of the information.

22 A Yes, sir.

23 Q Okay. In your experience, Mr. Sorenson, is it common,
24 following a high-profile crime such as this, that you -- you
25 get a bunch of leads on suspects who actually were not

1 involved in the incident?

2 A Yes, sir. Especially if an arrest isn't made right
3 away. I mean, obviously, if it leads to an arrest that
4 night, then this probably doesn't happen as much, but ...

5 Q Yes, sir. It feeds a lot of gossip.

6 A Yes, sir.

7 Q Is there anything else you'd like to tell the Court
8 about your experience prosecuting this case, Mr. Sorenson?

9 A I -- I mean, I don't think so, Mr. Saville.

10 Q That's all the questions I have for you today. Thank
11 you very much.

12 A Thank you, sir.

13 MS. SHURLING: Quickly.

14 REDIRECT EXAMINATION

15 BY MS. SHURLING:

16 Q You were asked about page 7 on that report. Have you
17 got it up there with you? Here we go.

18 A I -- I do.

19 Q As to it being based on that, whether it's general
20 hearsay concerning two unknown people --

21 A Yes, ma'am.

22 Q -- the next paragraph, after the one that Mr. Saville
23 had you read, shows that the officers, after talking to
24 Kendall Lamar Hampton, actually interviewed Jenna herself --

25 A That's true.

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1 Q -- about her conversation with "Lev," Leon Kennedy, at
2 the store. So they did follow up and talk to the person
3 that actually identified who she'd seen talking about that,
4 right?

5 A According to this, I mean, they did interview a Regina
6 -- a Regina Spurgeon. I -- I -- I mean, at this point in
7 time, I'm assuming that's "Jenna," but I -- I don't know the
8 answer to that on this occasion.

9 Q And Jenna Spurgeon is talking about walking out of the
10 store and an unknown black male stating to another unknown
11 black male also, but talking in more specificity about Lev
12 Kennedy and his involvement in the Jonathan Bailey murder,
13 right?

14 A She provided some information. Yes, ma'am.

15 Q I understand. So -- so the -- the hearsay reference
16 by the singular witness of Ms. [sic] Kendall Lamar Hampton
17 was followed up with additional information from another
18 witness concerning the same conversation.

19 A I mean, I believe law enforcement did attempt to
20 follow up on this. Yes, ma'am.

21 Q Thank you. And with regard to that conversation, they
22 referenced somebody named "Poopie"; you remember that?

23 A Yes, ma'am.

24 Q Who did you know to be "Poopie"?

25 A (No audible response.)

REDIRECT EXAMINATION BY MS. SHURLING - DONALD SORENSON 156

1 Q Did you know who "Poopie" was?

2 A I think there's a chance that's the Defendant's
3 brother, but I'm not a hundred -- I mean, without going
4 through here, I mean, that's kind of jogging that in my
5 memory, but I'm not -- I could be wrong about that, but ...

6 Q Okay. And apparently SLED, in investigating this, had
7 checked social media sites and -- and gotten various
8 photographs. And to be clear, the photograph with someone
9 with a gun was not my client, it was the brother. And it
10 was the search warrant executed at the brother's residence
11 that yielded a pistol, right?

12 MR. SAVILLE: Objection, Your Honor. I feel like this
13 has gone beyond the scope of cross.

14 THE COURT: I -- I'll allow it.

15 A That is correct. I believe it's Eugene Young, if I
16 remember correctly, his full name.

17 Q Thank you very much. Nothing further.

18 RE-CROSS-EXAMINATION

19 BY MR. SAVILLE:

20 Q Just one more question, Mr. Sorenson, and that's if
21 the Court will indulge.

22 THE COURT: Yeah. Go ahead, Mr. Saville.

23 Q So Mr. Sorenson, Ms. Shurling had you read the
24 statement following the statement from Kendall Hampton, and
25 I just wanted to clarify. So the statement that followed up

RE-CROSS-EXAMINATION BY MR. SAVILLE - DONALD SORENSON 157

1 the hearsay with that hearsay statement was also a hearsay
2 statement.

3 A I -- that would be my impression of it. Yes, sir.

4 Q That's all I have. Thank you, Mr. Sorenson.

5 MS. SHURLING: Nothing further.

6 THE COURT: Mr. Sorenson, I wanna ask you something --

7 A Yes, sir.

8 Q -- if I may. And I'm gonna hand you ...

9 THE COURT: And once I ask a question, if you all will
10 follow up with anything like I did yesterday, I'll let you
11 do so. Okay?

12 MS. SHURLING: Thank you, sir.

13 DIRECT EXAMINATION

14 BY THE COURT:

15 Q During the course of the trial, when Ricky Gibson was
16 on the stand, on page 142 of the transcript, starting on or
17 about line 10 -- I'm gonna hand you this and I've
18 highlighted --

19 A Yes, sir.

20 Q There's some testimony in there concerning observation
21 of the victim and this Defendant in some sort of tussle.

22 A Yes, sir.

23 Q Other than the testimony of Mr. Gibson, do you recall
24 -- and I haven't read the transcript in it's entirety. It
25 was just given to me yesterday. But through your

1 investigation and from your recollection of the evidence in
2 this case, was -- was there any other testimony concerning
3 such?

4 A I don't believe so, Your Honor. The -- I -- without
5 looking back at Mr. Alston's testimony 'cause he would be
6 the other person that possibly -- and just looking at my
7 notes from his testimony --

8 Q Uh-huh. And I'll give you -- if you need some time to
9 look through it. You know, please feel free to.

10 A I know I had some notes from -- and this would be Mr.
11 Alston I'm referring to now, Judge, and it looks like notes
12 that I've got from his cross-examination, that him -- that
13 he referenced seeing some tugging. And I've got that in
14 parenthesis, so that word must've been used --

15 Q Okay.

16 A -- during the question from Mr. Johnson, I assume is
17 who -- Mr. Johnson was doing this cross -- or at some point
18 in time from Mr. Alston's testimony, either on direct or on
19 cross, that he had referenced some sort of tugging going on
20 inside the vehicle.

21 I think that was what I kind of took that to be is
22 that he had -- he had reached in and attempted to grab
23 either the -- the -- the marijuana and/or money --

24 Q Or gun.

25 A -- or -- right. And that they were -- right. Well,

1 either that Mr. -- the Defendant had reached in and
2 attempted to grab the money or -- or the weed, or -- or the
3 victim had attempted to grab the gun when the gun was pulled
4 out. And then ultimately, as he puts the vehicle in -- in -
5 - in drive or reverse, I can't remember if he backed our or
6 pulled forward out of there, that the -- the shots went off
7 at that point in time.

8 Q All right. Next question: It -- it's later indicated
9 on the record by Judge Dickson that there was a charging
10 conference in chambers?

11 A Yes, sir.

12 Q And on page 382 of the transcript, Judge Dickson
13 indicates, starting on line 6, that I've underlined on my
14 copy --

15 A Yes, sir.

16 Q -- that he is not going to charge voluntary or
17 involuntary manslaughter. Do you recall whether or not --
18 during your in-chambers discussion whether you objected to
19 that charge or not?

20 A I'm 99 percent sure I did not object to that.

21 Q Okay.

22 A So I don't know if Mr. Johnson had objected to that,
23 and that was why he didn't ---

24 Q Well -- and you would agree that if charged, that
25 would've certainly been to this gentleman's benefit.

1 A I -- I -- I would agree with that. Yes, sir. I mean,
2 I can -- I can say I've got, you know -- looking, I was
3 actually kind of -- 'cause I -- I do not have any
4 recollection of that -- of whether he charged that or not,
5 but I did see in my -- you know, I have -- typically, when
6 I'm preparing a closing argument, I'll have, you know -- I
7 started just kind of making notes. And then, you know, the
8 night before will actually basically write out or outline
9 out my closing. And I did have in those notes where I saw,
10 you know, kind of narrowed this down, you know, two issues:
11 Who did it, and then, you know, the circumstances
12 surrounding it, whether it was gonna be potentially self-
13 defense, accident, or any lesser included, obviously, at
14 that point in time, not knowing if the Defendant was gonna
15 testify or what all the evidence was going to be.

16 But then I do see in my closing, though, where I've
17 got it kind of outlined out, I don't have any reference in
18 here at all even talking about manslaughter. So ---

19 Q In -- I'm sorry,

20 A I don't know if this charge -- and -- and you may know
21 -- I mean, I'm sure I could figure it out if this charging
22 conference was the night before we did closings or
23 immediately -- I -- I -- without looking, I don't remember
24 that.

25 I mean, I would -- if it was the night before, I could

1 then see I would know going into actually outlining my
2 closing I didn't need to address the lesser included. If it
3 was right before that, it would shock me a little bit
4 because I would've thought that I would've had that kind of
5 in my outline and then had gone back through and just
6 obviously crossed that ---

7 Q Struck ---

8 A --- out and not to -- not to -- not to talk about
9 that. So ...

10 Q Okay. But in your review of the case prior to trial,
11 murder and manslaughter was something you took into ---

12 A When I talked with him ---

13 Q --- consideration. Hold on.

14 A Yes -- yes, sir.

15 Q --- was something you took into consideration and at
16 least, potentially, discussing that with the victim's family
17 prior to this trial.

18 A Yes, sir. Now, I probably would've done that even in
19 a case where I was pretty convinced that manslaughter
20 wouldn't have been charged.

21 Q Uh-huh.

22 A You know, given a sixteen-year-old Defendant, I mean,
23 you know, I probably still would've had that conversation
24 with the -- with the ---

25 Q Family ---

1 A --- family. I mean, unless it was just the most
2 brutal -- I mean ---

3 Q Right.

4 A You know, obviously anytime it's a -- dealing with a
5 drug-related deal, I mean, I probably would've had that
6 conversation one way or the other, even if I didn't think
7 that, quite frankly, manslaughter was gonna be charged. But
8 ...

9 Q But in this case you thought it was ---

10 A I mean, I -- I could see ---

11 Q Hold on a minute. Basically -- or possibly, based
12 upon the evidence that you saw from the investigation,
13 statements, and then testimony, that that was a real
14 possibility of that charge.

15 A So given the fact that there was obviously some sort
16 of brief struggle in that vehicle --

17 Q Uh-huh.

18 A -- that it could potentially have been. Now, whether
19 that rises to the level of sufficient legal provocation, I
20 mean, when you --

21 Q It could potentially be a question of fact for a jury.

22 A It -- it could be. Yeah. I mean, I -- I can't ...

23 Q Okay. And -- and I guess my question to you certainly
24 was whether or not you recalled in that conference --
25 chambers conference whether you objected to it or not 'cause

1 there wasn't any -- anything ---

2 A I ---

3 Q --- anything on the record from ---

4 A Right.

5 Q --- either you or Mr. Johnson objecting to that
6 charge.

7 A From doing this for 20 some odd years, given these
8 facts, Judge, I can't imagine I would've objected to -- to
9 Judge Dickson charging manslaughter.

10 Q Under these facts and circumstances.

11 A Under these facts. Obviously, there's some situations
12 where, I mean ---

13 Q Right.

14 A --- I -- obviously, if I don't think there's any --
15 any evidence whatsoever.

16 So I can only guess that it was Mr. Johnson that had
17 objected to that. But I -- but obviously, as you said, if
18 you're saying that that's -- none of that's on the record, I
19 don't -- I mean, I don't have any independent recollection -
20 --

21 Q Okay.

22 A --- of that.

23 Q Okay. Very good. Thank you.

24 THE COURT: Pursuant to my questioning, any follow-up
25 questions?

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1 MS. SHURLING: Yes. And my hearing's not the best, so
2 I'm gonna move closer.

3 MR. SORENSON: I'm sorry. I probably should've been
4 leaning forward.

5 MS. SHURLING: Thank you.

6 MR. SORENSON: I'm sorry.

7 REDIRECT EXAMINATION

8 BY MS. SHURLING:

9 Q I -- I heard you say that you were reviewing your
10 notes and that you had notes to the effect that voluntary
11 manslaughter, and I believe you said accident.

12 A I have notes, basically, that would've been made
13 leading up to -- some of this stuff is even pre-, you know,
14 the weeks leading up to trial, where I start just kind of
15 briefly outlining stuff for my closing.

16 Q Sure.

17 A And -- and -- and that was just one of the things,
18 obviously, you know, possible to the circumstances
19 surrounding the shooting. I mean, it was either potentially
20 self-defense, potentially accident, potentially some sort of
21 a lesser included that -- you know, just being able to
22 address that if he were to testify.

23 Q Sure.

24 A Nothing really in our facts that suggested most of
25 that, but obviously I don't know what he's gonna potentially

REDIRECT EXAMINATION By MS. SHURLING - DONALD SORENSON 165

1 say if he testifies.

2 Q Well, at least leading up to this, based on what you
3 did have in discovery materials ---

4 A Uh-huh.

5 Q --- it was the same thing. You foresaw the
6 possibility that self-defense, accident, and a lesser
7 included might come into play in this trial.

8 A I mean, I don't know if Mr. Young's gonna get on the
9 stand and say that, you know, the victim pulled a gun on him
10 and he took the gun from him and that's the tussle that you
11 saw. Like I said, I had no idea so I'm trying to make sure
12 I'm kinda trying to anticipate the ---

13 Q I understand.

14 A --- those possibilities. Now, obviously, as the case
15 played out, that was not. I mean, you know, I don't think
16 self-defense or accident, I mean, any of those were even a
17 question at that point in time by the time the case played
18 out, but ...

19 Q But what we did know was that the witnesses all said
20 that the Defendant was standing in an open door when the
21 deceased put the car in reverse and started backing up, and
22 then they heard the "pop." So that -- that's really --
23 short of ---

24 A I ---

25 Q --- testimony ---

RE-CROSS-EXAMINATION BY MR. SAVILLE - DONALD SORENSON 166

1 A --- I believe that's -- I'm sorry. Go ahead.

2 Q I'm sorry. Assuming that I'm being truthful with you
3 about what the record says, and I am, but the record will
4 reflect that.

5 So short of testimony from the Applicant, you don't
6 have anything else to support that there -- you've got the
7 reference to a tussle, but that doesn't go very far in terms
8 of supporting sudden heat of passion legal provocation, you
9 don't have testimony of people overhearing the conversation,
10 that kind of thing, right?

11 A That would be correct. And I suspect that was
12 ultimately the reason that Judge Dickson didn't charge
13 manslaughter was that he -- you know, just that slight
14 testimony about him tussling wasn't enough to ...

15 Q And so also without the Defense affirmatively trying
16 to go for accident, self-defense, and even possibly the less
17 voluntary manslaughter, there was no basis for invoking the
18 *Belcher* decision for not giving a jury instruction on the
19 inference of malice from the use of a deadly weapon, right?

20 A I would agree with that. Yes, ma'am.

21 Q Thank you. No further questions.

22 THE COURT: Mr. Saville, anything further?

23 MR. SAVILLE: Just brief -- briefly, Your Honor.

24 RE-CROSS-EXAMINATION

25 BY MR. SAVILLE:

RE-CROSS-EXAMINATION BY MR. SAVILLE - DONALD SORENSON 167

1 Q Mr. Sorenson, this may have been touched on on the
2 final question, and I -- I -- I couldn't quite hear all it.
3 But you do recall that Mr. Johnson objected to the implied
4 malice charge under *Belcher*?

5 A I -- I -- I don't have any independent recollection of
6 that. I do know that when flipping through this stuff this
7 morning, I did see a sticky note that I had written there --
8 I can't get my hands on it right now, though -- that
9 referenced looking at that *Belcher* case that's -- it's -- I
10 -- I -- I don't know what year that came out, but I know it
11 would've been pretty -- would've been fairly recent decision
12 at the time that this happened. So ...

13 Q Sure.

14 A So I suspect my argument would've been if the judge is
15 not charging manslaughter, is not charging self-defense, is
16 not charging accident, then therefore, the -- the charge,
17 with regards to inference of use of a deadly weapon, would
18 be appropriate.

19 Q Yes, sir. And it's actually on page 382 of the
20 transcripts where Judge Dickson notes that the Defense
21 objected to the charge under *Belcher*, but he found that
22 there was no mitigating evidence such as in *Belcher*.

23 A And -- and that would suggest to me yet again that we
24 had had that conversation in chambers about manslaughter,
25 and I just don't -- I don't -- I'm sorry. I don't have any

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1 independent recollection of what my position would've been
2 on that. I mean, I ---

3 Q Sure.

4 A --- suspect if -- if Mr. Johnson had asked for
5 manslaughter and the judge was leaning towards it, I
6 probably would not have objected to that, but I -- I don't
7 ...

8 Q Yes, sir. That's all the questions I have for you,
9 Mr. Sorenson. Thank you.

10 MS. SHURLING: One quick follow-up, Your Honor. I
11 would direct the Court's attention to the statutory inquiry,
12 of course, that's always required after jury charge.

13 REDIRECT EXAMINATION

14 BY MS. SHURLING:

15 Q If we look at page 446, the charge ends, and at 447,
16 the top of the page, you're asked whether you have any
17 comments concerning the instructions. And you say (as
18 read): "No, sir." And the State asked Mr. Johnson (as
19 read): "Anything from Defense?"

20 MS. SHURLING: Your Honor, we're looking now at lines
21 4 through 7.

22 Q And Mr. Johnson says (as read): "Nothing in your
23 charge, other than I want to redo my motion about the
24 inferred."

25 So after the charge was given, there's -- there's no

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1 objection on the record either to voluntary manslaughter not
2 having been charged, right?

3 A I -- I don't have the transcript in front of me, but
4 if you're reading that, I mean, I don't -- I don't have any
5 reason to doubt what you just said ---

6 Q Right.

7 A --- but I don't -- I don't have the transcript in
8 front of me.

9 Q Thank you.

10 MS. SHURLING: And Your -- Your Honor, just for the
11 record, again, it's page 447 lines 1 through 7 --

12 THE COURT: Okay.

13 MS. SHURLING: -- where that is addressed. And I'm
14 done, with Mr. Sorenson, anyway.

15 THE COURT: You may step down.

16 MR. SORENSON: Thank you, Your Honor.

17 (The witness exits the stand.)

18 MS. SHURLING: Mr. Williams, Mr. Korey Williams, you
19 are my next witness.

20 KOREY WILLIAMS, having been first
21 duly sworn, testifies as follows:

22 THE COURT REPORTER: Will you spell your first name
23 for me?

24 THE WITNESS: K-o-r-e-y.

25 DIRECT EXAMINATION

1 BY MS. SHURLING:

2 Q Good morning, Mr. Williams

3 A Good morning, Ms. Shurling.

4 Q At the time you participated in the defense of my
5 client, Julian Young, you were law partners with Mr.
6 Johnson?

7 A Yes, I was.

8 Q And do you now share office space with him; is that
9 correct?

10 A Yes.

11 Q Okay. But you're not partners in the technical sense
12 of the word anymore?

13 A No.

14 Q Okay. Were you involved in this case from the
15 beginning when Virgin was first hired or did you get
16 involved later, closer to trial? Do you remember the
17 chronology?

18 A As I recall I think we'd already partnered up, so I --
19 I'm sure I was involved early on in preparation of this
20 case.

21 Q Do you recall what your agreement was with Mr. Johnson
22 concerning who was going to be handling what aspects of the
23 defense at trial or who was gonna handle what aspects of the
24 preparation?

25 A I -- I don't recall an agreement. Mr. Johnson had

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1 been practicing substantially longer than I had in the
2 criminal field at the time. I did a lot of the legwork on
3 the case, I guess, for lack of better terms.

4 Q I'm very familiar with the term.

5 Mr. Williams, I'm not being a smart alack, I'm really
6 not. Can -- can you recall what exactly your role, if any,
7 was in the actual trial of this case?

8 A My role -- I cross-examined some of the law
9 enforcement witnesses in the case early on. I got -- I did
10 -- I met with Julian, Mr. Young, at the -- while he was
11 incarcerated in preparation for the trial.

12 Q Can you -- do you recall which witnesses you crossed?

13 A I can look back at the transcript, but I believe I
14 cross-examined Ms. -- Sergeant Williams and Investigator --
15 or Officer Johnson -- not SLED Agent Johnson, but Officer
16 Johnson -- and another officer. I can't recall the name.

17 Q Okay. I'm -- I'm -- do you have a copy of the
18 transcript up there ---

19 A I -- I do.

20 Q --- with you? I'm looking. It -- it appears to show
21 that you crossed Dustin Johnson and then Dr. Kelly, the
22 pathologist, and Carl Kinley. Mr. Kinley was the gentleman
23 I believe that talked about the registration issues with the
24 cars that were spotted under surveillance, something like
25 that.

1 A Yes, ma'am.

2 Q Remember that?

3 A Yes, ma'am.

4 Q So basically that was your involvement in this trial
5 was your cross of those people. I'm not minimizing what you
6 did in terms of preparation, but I mean, active participate
7 in the trial, that's were you were and that's what you did,
8 right?

9 A I believe so.

10 Q Okay.

11 A Yeah. It also says I cross-examined.

12 Q Were you aware of any plea negotiations in this case?

13 A I can't recall any plea negotiations or offers in this
14 case. I don't remember the solicitor making any offers.

15 Q In your experience, do you sometimes approach the
16 Solicitor's Office about a possible plea whether they've
17 contacted you about one or not?

18 A Sometimes we would.

19 Q Okay. Do you have any recollection of any -- any
20 discussion with you and Mr. Johnson, any efforts by y'all,
21 you going together to the Solicitor's Office, anything about
22 exploring a plea deal in this case?

23 A Not as I can recall, but I mean, I -- I probably
24 wasn't there every time the solicitor and Mr. Johnson talked
25 either.

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1 Q Well, I covered it with Mr. Johnson yesterday. I just
2 wanted to know what your memory is.

3 A I don't recall.

4 Q Okay. Did you keep a separate file, or is -- or is
5 Mr. Johnson's file -- it was as common file?

6 A It was a common file. Of course, for trial purposes,
7 he would have trial notebook and I would have a trial
8 notebook when we were in court.

9 Q Okay.

10 A But it was one file.

11 Q Were you passing notes to one another during the trial
12 of this case?

13 A I'm sure we were.

14 Q Huh? Pardon?

15 A I said, yes, I'm sure we were.

16 Q Okay. Do you recall during Mr. Gibson's testimony
17 when he said --- you've got your copy of the transcript?

18 A I do have a copy.

19 Q Page 143, line 19, through 144, line 2. If I've got
20 the cite right. Let me make sure. Let's see, 143, 19 (as
21 read): "Could you see their hands, could you see they were
22 tussling? What they were tussling over?" Line 22, 23 (as
23 read): "No, sir."

24 And then 25, this is Mr. Sorenson (as read): "Let me
25 ask you this: Did you ever see anybody with a gun?" And he

DIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 174

1 says, "No, sir." See that?

2 A Yes, ma'am.

3 Q Okay.

4 THE COURT: What page is that again?

5 MS. SHURLING: 143, and just as back drop, I would
6 start at 22 and go to 144, line 2.

7 And I apologize. Yesterday was -- that was the one
8 where my flag had fallen off.

9 Q Okay. Then later, on cross, Mr. Johnson presses him,
10 and to look at page 155, line 2 through 55 -- 2 through 15,
11 excuse me. 155, 2 through 15.

12 A Okay.

13 Q And he acknowledges (as read): "In any one of those
14 statements, did you say Julian had a gun?"

15 And at first he says, "No, sir." But if you go down,
16 line 15, he says (as read): "It was one of the two, though,
17 so technically, yes."

18 And then there's a discussion between Mr. Sorenson and
19 the Court, and if you go over to page 156, line 6, through
20 157, line 20, he said that -- he's asked (as read): "Did in
21 either statement you say that Julian had a gun?" "No, but
22 as in the statement, I said either his -- the friend that
23 was with him or he had a gun." See that?

24 A Yes, ma'am.

25 Q Okay. Are you familiar with the written statements

1 that were given by Mr. Gibson?

2 A I don't have them in front of me. Of course, it's
3 been a long time, but ...

4 Q Well --

5 MS. SHURLING: Your Honor, a moment's indulgence.

6 (Brief pause.)

7 Q Well, I can -- first off, if I can hand you what's
8 been marked as Applicant's 2 and get you to look with me at
9 page 10, maybe starting at the bottom of 9 where the SLED
10 report, written by Agent Johnson, summarizes what they got
11 in terms of statements from Gibson.

12 And actually, I'm sorry, it does start at the bottom
13 of -- or the middle of page 9.

14 A Okay.

15 (Brief pause.)

16 Q Now, that portion of the SLED report reveals that a
17 signed witness statement was taken from Gibson on May 6,
18 correct?

19 A Yes, ma'am, it does say that ---

20 Q And ---

21 A --- Special Agent Johnson's note says (as read): "May
22 6, 2011."

23 Q Okay. And what has been referred to as his second
24 statement is, in fact, on a reference on -- to what the SLED
25 report says on May 11, 2011, was a telephone interview with

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1 Ricky Gibson and some clarification of his earlier statement
2 that he gave in that telephone interview, correct?

3 A Yes, ma'am. That's what it says here.

4 Q Okay. Will you let me know when you're through
5 reading that?

6 A Yes, ma'am.

7 Q Thank you.

8 (Brief pause.)

9 Q Excuse me. Okay.

10 A Yes, ma'am.

11 Q Okay. And the written statement given by Ricky Gibson
12 was made Attachment 25, according to the report, to the SLED
13 report, correct?

14 A Yes, ma'am. That's what it says here.

15 MS. SHURLING: Your Honor, I would move to introduce
16 -- and I would ask that I be allowed to make a copy of this.
17 It's the only one I've got. I'm sorry.

18 THE COURT: It's 25 cent a page, isn't it, Madam
19 Clerk?

20 MS. SHURLING: Thank you.

21 MR. SAVILLE: No objection, Your Honor.

22 THE COURT: Without objection, No. 3.

23 (Applicant's Exhibit No. 3, written statement of Ricky
24 Gibson, in evidence.)

25 Q And then memorandum that was done to document the

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1 telephone conversation is referenced in the report as
2 "Attachment 27," correct?

3 A Yes, ma'am.

4 MS. SHURLING: Does the respondent have any objection
5 to the memorandum Attachment 27?

6 MR. SAVILLE: No objection.

7 THE COURT: So admitted.

8 (Marked Applicant's Exhibit No. 4, memorandum of
9 interview, 2 pages, in evidence.)

10 MS. SHURLING: Your Honor, for the record, my office
11 provided the respondent a copy of all the discovery in this
12 matter prior to the hearing so that he would have the
13 opportunity to review it before today.

14 (Brief pause.)

15 Q Neither of these documents reference, do they, Mr.
16 Gibson saying a thing about seeing your client, Julian
17 Young, with a gun or his friend with a gun, do they?

18 A No, ma'am.

19 Q Okay. So after Mr. Gibson said that he didn't see
20 anybody with a gun and the Defense went forward and pressed
21 and he made the claim that his statement had, at some
22 juncture, said that one of the two of them, either Mr. Young
23 or his friend, had a gun, did you catch the fact that there
24 was nothing in his statements that backed up what he said in
25 court?

1 A (No response.)

2 Q Do you recall noticing that is all I'm asking you?

3 A I don't recall it.

4 Q Okay. Did -- y'all had a witness list before this
5 trial, right?

6 A Yes, ma'am.

7 Q And -- and you certainly knew at least that these
8 other four young men that were at the scene were -- were
9 virtually certain to be witnesses at trial.

10 A Yes, ma'am.

11 Q Okay. So would you and Mr. Johnson have reviewed, in
12 preparation for the trial, their pre-trial statements to
13 know what use you might need to make of them during the
14 trial?

15 A Yes, ma'am. We would've reviewed the file.

16 Q Okay. Now, if you read further in the cross, Mr.
17 Johnson does -- and -- and I am gonna owe him a bit of an
18 apology. I got a little mixed up yesterday and I'll give
19 him my apology in person in a minute.

20 But Mr. Johnson does try to show Mr. Gibson that
21 statement and -- and get him to talk about, you know, "Where
22 in there are you talking about being a gun" and all that.
23 You remember that?

24 A (No response.)

25 Q Where it goes on ---

DIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 179

1 A I see in there, down around 20, when he's asking if he
2 has a copy of the statement. Yes, ma'am. He starts talking
3 about ---

4 Q And he goes on to say he can't really read it because
5 it's -- it -- he can't -- couldn't -- was having trouble
6 reading the handwriting 'cause it was "sketchy." Remember
7 that?

8 A Yes, ma'am.

9 Q Okay. Well, if you look at the opening -- the very
10 opening line of the statement, it says (as read)" "This
11 statement is written by S. A. Johnson, in my presence, and
12 at my request." So the actual handwriting on here is SLED
13 Agent Johnson, not Mr. Gibson according to what it says.

14 You want me to hand it up to you and let you see it?
15 I'm sorry.

16 (Brief pause.)

17 A Yes, ma'am. That's what it says.

18 Q Okay. So that gave you an opportunity -- or gave the
19 Defense an opportunity, did it not, to -- Johnson didn't
20 testify to 'til after Gibson.

21 A Yes, ma'am.

22 Q So since he physically wrote this, it gave you an
23 opportunity to clarify through him that there's not a word
24 in Mr. Gibson's statement contrary to what he said in court
25 about him having seen either my client or his friend with a

1 gun, right?

2 A Yes, ma'am. I think ---

3 Q Okay.

4 A --- Mr. Johnson tried to note that, that ---

5 Q It -- it -- did y'all discuss that? Did you -- did
6 you pass him a note and say, you know, I -- I -- I've looked
7 back over the statement. It isn't in there," or ...

8 A I don't recall if I passed him a note or -- or us
9 discussing it. I looked back through the case file and did
10 not find my notes, you know, from the trial, my notebooks.
11 They weren't in the -- in the files I found.

12 Q I understand. And the statement, of course, was not
13 introduced as an exhibit at trial either. So as far as the
14 jury knows, he says he said in his statement that either the
15 Defendant or his friend had a gun, and that he told the
16 police that in his statement. And he dodged answering
17 whether or not it was actually in his statement by saying he
18 couldn't read the handwriting.

19 A I had -- Mr. Johnson asked him earlier, on page -- in
20 page 156 (as read): "Did Julian have a gun?" And he
21 answered (as read): "No."

22 Q I understand. But he goes on to say, page 156, line 6
23 through 157, line 20, that as he said -- he said something
24 like, as I said -- line 7 (as read): "No. But as in the
25 statement, I said either his --the friend that was with him

1 or he had the gun."

2 A Yes, ma'am.

3 Q And that would be the only place in the entire trial
4 where anybody put a gun in Julian Young's hands or at least
5 said that either Julian had one or his friend he was with
6 had one.

7 A Yes, ma'am.

8 Q Nobody else said anything about seeing a gun.

9 A Not as I recall.

10 Q So would you agree that that was a pretty important
11 piece of evidence right there?

12 A It was -- I would agree it was inconsistent with his
13 statement, yes.

14 Q Okay. And in a homicide case with no murder weapon
15 and no testimony about anybody else being seen with a gun,
16 someone saying that he told the police that either Julian or
17 his friend did have a gun provided kind of a missing link at
18 trial, didn't it?

19 A It was inconsistent with what he said before. Yes,
20 ma'am.

21 Q Okay. I give you props for you guys thinking so hard
22 about trying to making use of *Belcher*. It was a fairly new
23 decision. But *Belcher* makes it clear, does it not, that --
24 the rule in *Belcher* is that the Court may not charge that
25 malice may be inferred from the use of a deadly weapon if

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1 the Defendant is asserting self-defense, accident, or that
2 it was a lesser included crime?

3 A Yes, ma'am.

4 Q And if the Defendant isn't asserting that, then you
5 get no benefit from the *Belcher* decision, do you?

6 A (No response.)

7 Q Or if the Court's not charging -- the Court's not
8 charging self-defense, the Court's not charging accident,
9 the Court's not charging voluntary manslaughter. If that's
10 the case, then the *Belcher* rule doesn't help you, does it?

11 MR. SAVILLE: Objection, Your Honor. Irrelevance. As
12 Judge Dickson denied their objection based on the fact that
13 there was no mitigating evidence in this case, not because
14 they did not raise the issue of self-defense or accident.

15 THE COURT REPORTER: I'm sorry. Because they did not
16 ...

17 MR. SAVILLE: Raise the defense of self-defense or
18 accident.

19 THE COURT: I'm gonna allow the question.

20 Q That -- I mean, that's -- that is the rule in *Belcher*,
21 right?

22 A As I recall -- as I understand it, yes, ma'am.

23 Q And when the judge says he's not gonna give voluntary
24 manslaughter or involuntary manslaughter, he says because
25 there's no evidence of mitigation, right?

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1 A Yes, ma'am.

2 Q But that's based on the record in front of him.
3 That's based on what y'all did do, not what you didn't do,
4 right?

5 A Yes.

6 Q So if you had argued, for example, that with the
7 Defendant pinned in -- in the opening of a car door when the
8 car's backing up, and then he's tussling with the deceased,
9 that it -- there could be some scenario through which that
10 ends up being an accidental shooting. If you'd argued that,
11 if you'd put up your client to testify to it or something,
12 then you would have a basis for asking for the charge and
13 that would've made *Belcher* kick in, right?

14 MR. SAVILLE: Objection. I don't think there was any
15 testimony of him being pinned.

16 MS. SHURLING: That's my point. One of the
17 allegations ---

18 THE COURT: Hold on a minute. Uh-uh-uh-uh. Address
19 me, not ---

20 MS. SHURLING: I'm sorry.

21 THE COURT: --- Mr. Saville. Your reply, Ms. Shurling?

22 MS. SHURLING: My reply, Your Honor, is that the
23 allegation is that the Defense team neglected to fully
24 advise their client, a, as to the law regarding self-
25 defense, accident, voluntary ---

DIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 184

1 THE COURT: Right.

2 MS. SHURLING: --- manslaughter, involuntary. And
3 further, not only as to the law pertaining the -- to those
4 things, but the fact that if they did not put up a factual
5 basis for ---

6 THE COURT: Well, and I -- and I don't mean to cut you
7 off, but I am.

8 From -- from the standpoint of what Mr. Saville is
9 objecting to, I think, at least from what I understood it --
10 Mr. Saville, you correct me if I'm wrong, your objection is
11 to the mischaracterization of him being pinned in the car
12 when there's absolutely nothing with regards to that.

13 MR. SAVILLE: Yes, Your Honor.

14 THE COURT: The testimony was that he was -- his feet
15 were outside the car when she -- when the car was backed up
16 or going forward or whatever it was. But -- but there's no
17 evidence, wasn't any evidence in trial unless I haven't seen
18 it in the transcript, that he was actually pinned in the car
19 ---

20 MS. SHURLING: My ---

21 MR. SAVILLE: Yes, Your Honor.

22 THE COURT: So that's what his objection was to.

23 Now, with regards to your line of questioning, I don't
24 have a problem with that, but the mis-characterization of
25 what ---

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1 MS. SHURLING: Yes, sir.

2 THE COURT: --- the evidence actually showed at trial.

3 MS. SHURLING: And -- and I ---

4 THE COURT: And I sustain the objection with regards
5 to that.

6 MS. SHURLING: And he would be correct. If -- I
7 obviously did not articulate what I said the way I intended
8 to. My point being had there been testimony that because of
9 the position the man was standing in and where he was when
10 the car backed up, that it created a, you know, dangerous
11 situation resulting in a scuffle, and it -- it --
12 hypothetically --

13 THE COURT: Right.

14 Q -- if that -- if there had been testimony -- and I
15 haven't heard my client's testimony, I don't know what it's
16 gonna be. But if there'd been testimony along those lines,
17 it would've provided a basis for asserting accident,
18 potentially self-defense.

19 And once you get there, once you got a basis for
20 getting those instructions, then and only then do you get
21 the benefit of the *Belcher* rule, right?

22 A Yes, ma'am.

23 Q Do you have any recollection of explaining to your
24 client that if he didn't get the -- State's case is closed.
25 Okay? You've heard every bit of what they've got to offer.

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1 Did you explain to him that if he did not get up and
2 tell his side of this, that there was going to be no basis
3 for arguing sudden heat of passion sufficiently for
4 provocation? And -- and beyond that, no basis for arguing
5 self-defense or accident. If he didn't testify and that if
6 he didn't provide a basis for those things, the judge was
7 absolutely going to charge the jury that they could infer
8 malice from the very fact that a gun was involved in this
9 homicide.

10 A As I recall, we went in the back. We discussed -- we
11 did not discuss anything about a accident as I recall. We
12 did discuss, as far as I can recall, whether or not he was
13 going to testify and whether or not we had any self-defense,
14 but that's all I can -- and what was the third part of your
15 question?

16 Q Well, did -- there are two issues really: One,
17 whether or not he wants to testify and of course, you as
18 counsel, Officer of the Court, gonna tell him nobody can
19 make him testify. He doesn't have to. I assume you
20 would've told him that if -- if he had had a criminal
21 record, they would've been able to use that to impeach him
22 with, but he didn't have a criminal record so that wasn't an
23 issue, right?

24 A Yes, ma'am.

25 Q Okay. And you would've gone over with him about the

DIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 187

1 kinds of things they could ask him and all that, right?

2 A Yes, ma'am.

3 Q Okay. And my question is -- you know, you've got the,
4 "I'm scared, I'm nervous. I don't wanna testify. I'm
5 scared they're gonna get me mixed up," whatever. Typical
6 defense -- Defendant afraid to testify conversation, right?
7 You have that a lot, right?

8 A Yes, ma'am.

9 Q Okay. But in this case, my question is beyond the if
10 you're nervous, you're scared, you don't have to testify if
11 you don't want to, beyond that, did you take it the next
12 step and say, "But if you don't testify and tell your side
13 of this, they are [sic] not gonna be enough evidence on this
14 record for this judge to give voluntary manslaughter,
15 involuntary, certainly not accident or self-defense"?

16 A I can't recall if we ---

17 MR. SAVILLE: Objection.

18 A --- put it in those ---

19 THE COURT: What's your ---

20 MR. SAVILLE: Asked and answered, Your Honor.

21 A Sorry, Your Honor.

22 THE COURT: Do what? Hold on a minute. Hold on a
23 minute. Hold on a minute. What's your objection?

24 MR. SAVILLE: Asked and answered, Your Honor.

25 THE COURT: I'll allow it. Go ahead. I'm sorry.

1 A All right.

2 Q Did you discuss that with him?

3 A I can't recall if we discussed it in those terms.

4 Q Okay. And last question: You -- if you can't recall
5 discussing that with him in those terms, did you at -- I
6 would assume that you then did not discuss with him that if
7 you didn't get jury charges on something in that group, you
8 were not gonna be able to stop the judge from giving the
9 inference of malice from the use of a deadly weapon charge.

10 A I -- I just can't remember us saying it in those
11 terms. I'm sure we discussed what defenses we had with the
12 client and how we would get it in, but I -- I can't recall
13 us saying it in those specific terms, Ms. Shurling.

14 Q I don't want -- you're maintaining your objection --
15 or the defense -- not you specifically, Mr. Johnson [sic] --
16 maintaining your objection to a charge on the inference of
17 malice from the use of a deadly weapon after the State's
18 evidence has closed, after your client has told the judge
19 he's not gonna testify, and even after the jury charge has
20 been given, you're still objecting to that inference of
21 malice from the use of a deadly weapon, right?

22 A Yes, ma'am.

23 Q Why? I mean, it -- it -- *Belcher's* clear. You don't
24 have an objection to that charge unless you've gotten in one
25 of those other things. So is -- is it possible -- and I

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1 realize it was a very new case, but is it possible that you
2 and -- that you did not understand that you weren't entitled
3 to that beneficial rule in *Belcher* unless you got those
4 other issues put before the jury?

5 A As I recall, the judge had already told -- had already
6 ruled against us, but then we renewed the objection at the
7 close.

8 Q I understand. And my point is that at the point you
9 were renewing it, you knew that he had not charged -- he had
10 not charged a lesser, that there had been no charge on a
11 defense like accident or ...

12 A Yes, ma'am. There was no charge.

13 Q Okay. So at that point, there's no basis for *Belcher*,
14 but you're still renewing the *Belcher* objection. So I'm --
15 I'm asking you honestly, and I recognize it was a very new
16 decision. So is it possible that you thought that *Belcher*
17 was simply a prohibition against ever giving a charge on the
18 inference of malice from the use of a deadly weapon? Do you
19 think you understood that it -- that rule only came into
20 play if those lesser charges or defenses were before the
21 Court? If you don't remember, you don't remember. I'm just
22 asking.

23 A I -- I'm -- I don't remember. I think I knew that we
24 had to get some evidence on the record that day or self-
25 defense or some mitigating circumstances, but ...

1 Q No further questions. Thank you.

2 THE COURT: All right. Cross.

3 MR. SAVILLE: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. SAVILLE:

6 Q Good morning, Mr. Williams. How you doing?

7 A Good morning, Mr. Saville.

8 Q Under direct examination, there were a lot of things
9 discussed that perhaps y'all could've brought out had Mr.
10 Young decided to testify in this case.

11 A Yes, sir.

12 Q Do you have anything that gave you concern about Mr.
13 Young testifying in this case?

14 A Yes.

15 Q What was that?

16 A The fact that during one of our interviews, and I
17 don't remember when, there was a statement that the weapon
18 would've never been found or located.

19 Q Yes, sir. And in fact, I believe Mr. Johnson
20 testified yesterday to that effect.

21 Did it concern you that if you were going to put him
22 on the stand, it would force you into a position of
23 committing fraud upon the Court or conceding that he had the
24 gun?

25 A Yes, sir.

1 Q As a result of your conversations, did you believe
2 that he brought the gun?

3 A I don't recall if I ever asked him whether or not he
4 brought the gun or where it came from. Just that I believe
5 that at some point he had the gun in his possession -- or
6 knew from our conversations that he had the gun in his
7 possession and disposed of it.

8 Q And what was that last part? I'm sorry.

9 A Had disposed of it, I guess, for lack of better terms.

10 Q I gotcha. Yes, sir.

11 And there was some testimony on direct about the cross-
12 examination of Ricky Gibson. You didn't cross-examine Ricky
13 Gibson, did you?

14 A No, sir.

15 Q And there was also some talk about the *Belcher* decision
16 and perhaps an allegation that you didn't understand it at
17 the time, though you did vigorously raise it. I think y'all
18 -- correct me if I'm wrong Mr. -- Mr. Williams, but did
19 y'all, in fact, brief the *Belcher* issue?

20 A Yes, sir. I did. We had briefs for most of our
21 arguments in -- in the -- in the case that we submitted to
22 the Court.

23 Q Yes, sir. And do you recall Mr. Johnson having a
24 personal involvement in this case?

25 A Well, he knew the -- the family, you know, for many

1 years. The grand -- the grandmother who raised Julian and
2 the aunt, I call her "Kitty." I'm sorry. I can't remember
3 her first name.

4 Q Yes, sir.

5 A But -- and I met them through Mr. Johnson.

6 Q Yes, sir. And by all accounts they are -- they are a
7 great family and did -- did Mr. Johnson, you feel, represent
8 them extra diligently in this case?

9 A Yes, sir.

10 Q And do you recall that when it came time for Mr. Young
11 to decide to testify, y'all also met with the family?

12 A Yes, sir.

13 Q So there are multiple people involved in this decision.

14 A Yes, sir.

15 Q Okay.

16 MR. SAVILLE: Beg the Court's indulgence, Your Honor.

17 (Brief pause.)

18 Q Do you recall that Mr. Young was interested in a plea
19 deal?

20 A Not as I recall.

21 Q So -- so he wasn't interested in anything that gave him
22 time?

23 A No.

24 Q Okay. If he had asked you to pursue a plea deal, would
25 you have pursued one?

REDIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 193

1 A If the client asked us to, of course we would.

2 Q That's good to hear. Yes, sir.

3 MR. SAVILLE: Beg the Court's indulgence. Nearing the
4 end here.

5 (Brief pause.)

6 Q Mr. Williams, is there anything else you'd like to tell
7 the Court about your representation of Mr. Young?

8 A No, sir. I don't think so, Mr. Saville.

9 Q Well, that's all the questions I have for you right
10 now. Thank you very much.

11 MS. SHURLING: Very briefly.

12 REDIRECT EXAMINATION

13 BY MS. SHURLING:

14 Q Mr. Williams, you testified earlier that you didn't
15 have any recollection of -- of plea discussions with your
16 client about the possibility of a plea?

17 A I think you asked me about plea -- plea negotiations
18 with the Solicitor's Office.

19 Q Right. And my -- my question is: Do -- do you have,
20 here today, independent recollection of discussions that
21 took place in your presence with my client -- with your
22 client, about the possibility of entering into plea
23 negotiations?

24 A Entering into plea negotiations? No.

25 Q Well, the State asked you to agree that he wasn't

REDIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 194

1 interested in anything that was gonna give him time. How do
2 you know that if you didn't talk to him about a plea?

3 A He said "plea negotiations," meaning that I would've
4 went to the solicitor saying he -- he'd take 20 years or --
5 or whatever. We didn't enter into those types of
6 negotiations. Did we -- at some point probably did we
7 discuss whether or not he wanted a plea? I'm sure we did,
8 but he didn't want any time.

9 Q I -- okay. But you're saying "probably"? You probably
10 did, but you have no recollection of that here today, and --
11 and I'm asking how do you know he wouldn't be interested in
12 a plea because he wasn't gonna do any time. If you don't
13 have any memory of those discussions, how do you know he
14 wasn't willing to consider a deal that involved any time?

15 A Well, as I said, if I -- if I'd -- we'd discussed that,
16 I would've written it in my notes during our interviews, and
17 I'm unable to locate those notes.

18 Q And you have no independent recollection of that here
19 today.

20 A I -- Mr. Saville asked me if he'd asked us to enter
21 into a plea negotiations, would we. Yes.

22 Q That was not my question. My question was whether or
23 not you have any recollection of discussing with Mr. Young
24 whether or not he would authorize you to at least explore
25 the possibility of some kind of deal with the State.

RE-CROSS-EXAMINATION BY MR. SAVILLE - KOREY WILLIAMS 195
DIRECT EXAMINATION BY THE COURT - KOREY WILLIAMS

1 A No, ma'am.

2 Q Thank you. No further questions.

3 THE COURT: Mr. Saville?

4 MR. SAVILLE: Just briefly.

5 RE-CROSS-EXAMINATION

6 BY MR. SAVILLE:

7 Q This is really just a matter of housekeeping Mr. --
8 Mr. Williams. Were you present at every meeting between
9 Mr. Young and Mr. Johnson?

10 A No, I don't think I was.

11 Q And vice versa, was Mr. Johnson with you at every
12 meeting with Mr. Young?

13 A No.

14 Q All right. That was just for clarity. Thank you,
15 Mr. Williams.

16 THE COURT: Hold on just a minute.

17 THE WITNESS: Yes, sir.

18 DIRECT EXAMINATION

19 BY THE COURT:

20 Q Mr. Williams, I'm kinda -- I'm just looking at the
21 index here to the transcript --

22 A Yes, Your Honor.

23 Q -- and it appears that -- and you correct me if I'm
24 wrong here. Okay? -- that maybe you cross-examined a Dr.
25 Kelly Rose?

1 A Yes, Your Honor.

2 Q And maybe a Carl Kinley?

3 A Yes, Your Honor.

4 Q Other than that, and then you sitting at counsel's
5 table with Mr. Johnson and I guess conversing back and
6 forth during the course of the trial, did you participate
7 in any other part of the trial, opening or closing maybe?

8 A I --

9 Q If you recall?

10 A -- I don't think I opened or closed, Your Honor.

11 Q Okay.

12 A I may -- I think I --

13 Q No. It -- you're right. I -- I see the index now.

14 Mr. Johnson ---

15 A I ---

16 Q --- opened and closed.

17 A I think I -- as I recall, I crossed Officer Williams
18 and again Officer Johnson, Kinley, and Dr. Rose.

19 Q Right.

20 A I think Mr. Johnson may have done the actual in
21 camera argument ---

22 Q Okay.

23 A --- on our motion with Sergeant Williams. I might've
24 done the cross, Your Honor --

25 Q Okay.

DIRECT EXAMINATION BY THE COURT - KOREY WILLIAMS 197

1 A -- looking back through the transcript.

2 Q Well, let me ask you this: What was your -- yours
3 and Mr. Johnson's -- at least your understanding of what
4 your theory of the case or the defense was in this -- in
5 this case?

6 THE COURT REPORTER: I'm sorry, Your Honor.

7 THE COURT: What -- what their theory of the case or
8 their theory of the defense as it relates to this case.

9 Q Because what you have is Mr. Bailey -- the evidence
10 of Mr. Bailey, who is -- who is the victim, and only this
11 Defendant who were -- who was at that car when the
12 shooting took place. What was your understanding of what
13 the theory was or at least y'all's defense?

14 A Basically, Your Honor, that no witness had test -- or
15 could show that Mr. Young had a gun.

16 Q All right. And -- and I get that. What was your
17 position or theory as to who shot Mr. Bailey when it was
18 only those two there?

19 A Just not our client, Your Honor.

20 THE COURT REPORTER: I'm sorry, sir. It was not your
21 ...

22 THE COURT: Not your -- not their client.

23 A Yes, Your Honor. That was kind of the working theory
24 of the case.

25 Q Okay. Possibly a third party?

1 A Possibly. I think in my -- in my cross-examination
2 of -- I believe it was Johnson, the bullet fragments were
3 found away from the scene. The gun was never located and
4 I think the money was strewn along the street. So there
5 -- there was somewhat -- and I -- of a time gap between
6 their -- Mr. Young and Mr. -- talking to Mr. Bailey as to
7 when and where it was actually discovered.

8 As you see from the transcript, I asked about how far
9 away it was located -- where the bullet fragment was
10 located, how far it was from the initial site, Your Honor,
11 could something have happened in that time frame.

12 Q But it wasn't any issue or potential or argument Mr.
13 Bailey was shot somewhere else other than when the
14 Defendant and Mr. Bailey were together at that car.

15 A Was there an issue or argument? No, sir. I don't
16 think so.

17 Q Or anything leading to any kind of insinuation or
18 implication that he was maybe shot somewhere else, in
19 another location, by another person.

20 A I don't think we ever put that in, Your Honor. Just
21 the --

22 Q And I'm just trying to get my bearings 'cause again,
23 you were in here earlier and I told Mr. Sorenson, I hadn't
24 read the transcript in it's entirety. I'm just ---

25 A Yes, sir.

REDIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 199

1 Q --- trying to educate myself a little bit, and that's
2 why I'm asking these questions. Okay?

3 A As I recall, Your Honor, in looking back at the
4 transcript when I reviewed it, my only implication was
5 that there were not just one scene, I guess, but possibly
6 two because of where they located -- and I think the
7 fragment -- and I can look back to make sure, was found
8 outside of the car, if I'm ---

9 Q Okay.

10 A --- if I'm correct, not in it ---

11 Q Okay.

12 A --- in it.

13 Q Thank you very much.

14 A Yes, sir.

15 THE COURT: Anything further, Ms. Shurling?

16 MS. SHURLING: One quick follow up.

17 REDIRECT EXAMINATION

18 BY MS. SHURLING:

19 Q You said that at some point it was your understanding
20 that in some kind of interview with the client that you
21 came to the understanding that he had, at some point -- I
22 don't wanna misstate what you said, but you became aware
23 that -- that the statement was that "the gun would never
24 be found."

25 A Yes, ma'am.

REDIRECT EXAMINATION BY MS. SHURLING - KOREY WILLIAMS 200

1 Q Something to that affect, right?

2 A Yes, ma'am.

3 Q Okay. And in -- from that you took that he had been
4 in possession of the gun at some point.

5 A Yes, ma'am.

6 Q Okay. But that -- the fact that -- and you were
7 inferring -- let me back up.

8 Yesterday we heard testimony from Mr. Johnson that --
9 that he had asked him if you needed to worry about the gun
10 ever being found. Were you present during that interview
11 when that was said, when that conversation was had?

12 A I think I was.

13 Q Okay. And so and -- and so that yielded what you're
14 recalling that the gun was never gonna be found, right?

15 A If my recollection is right, I mean, I might've
16 gotten that information from Mr. Young first and then
17 relayed it to Mr. Johnson. He followed up with an
18 interview later on.

19 Q Okay. So my next question is: If, for the sake of
20 argument, that statement could be taken to mean that your
21 client at some point in time after the shooting was in
22 possession of the weapon that made the popping sound that
23 everyone heard and arguably shot Mr. Bailey, that doesn't
24 establish that it was Mr. Young's gun or that he is the
25 one that had it and took it to Mr. Bailey's car, does it?

RE-CROSS-EXAMINATION BY MR. SAVILLE - KOREY WILLIAMS 201

1 A No, ma'am.

2 Q He could could've been guilty of -- in -- of removing
3 the gun from the scene, hypothetically, and it still have
4 been Mr. Bailey's gun.

5 A Yes, ma'am.

6 MS. SHURLING: No further questions, Your Honor.

7 THE COURT: Mr. Saville?

8 MR. SAVILLE: Briefly, Your Honor. Thank you.

9 RE-CROSS-EXAMINATION

10 BY MR. SAVILLE:

11 Q Mr. -- Mr. Williams, you were just questioned by
12 Judge -- Judge Brown briefly about defense theories and do
13 you also recall that throughout the closing argument, Mr.
14 Johnson asked the jury to infer that it was Mr. -- Mr.
15 Bailey who brought the gun?

16 A I believe so. Yes, sir.

17 Q So he was kinda able to get that information through
18 the back door without having Mr. Young testify.

19 A Yes, sir. He had closing argument ---

20 Q And possibly ---

21 A --- last argument.

22 Q I'm sorry.

23 A I'm sorry. Yes, sir. He had last argument.

24 Q So that was a way of getting that in without having
25 Mr. Young possibly commit fraud upon the Court.

RE-CROSS-EXAMINATION BY MR. SAVILLE - KOREY WILLIAMS 202

1 A Yes, sir.

2 Q And I just want to -- to note for the record, Mr.
3 Williams, just so it's clear for everybody, about the --
4 the bullet being found -- or being found away from the
5 scene. You do recall the bullet was found by the driver
6 door where the car eventually crashed, correct?

7 A Yes, sir. From reviewing the transcript, yes, sir.

8 Q And I think on -- so it was within, you know, rolling
9 distance. It could've fallen out the driver door when the
10 victim was removed from the car.

11 THE COURT REPORTER: When the victim was ...?

12 MR. SAVILLE: Removed from the car.

13 A Possibly. Yes.

14 Q And that's on page 343, line 23 of the transcript,
15 just in case the Court wants to note that.

16 THE COURT: Thank you.

17 MR. SAVILLE: Yes, sir.

18 Q And Mr. Williams, you -- you were not here to hear
19 the testimony yesterday, but it was actually Mr. Johnson's
20 testimony, if I remember his wording correctly, that it
21 was not the victim that brought the gun to the rodeo. Are
22 you in general agreement with that proposition?

23 A I'm sorry. It wasn't the victim that brought it?

24 Q That brought the gun to the rodeo.

25 THE COURT: To the what?

RE-CROSS-EXAMINATION BY MR. SAVILLE - KOREY WILLIAMS 203

1 MR. SAVILLE: To the rodeo, which I think is the ---

2 THE COURT: Thank you.

3 MS. SHURLING: I'm sorry. Could you repeat that
4 whole thing?

5 MR. SAVILLE: Sure.

6 MS. SHURLING: I got lost.

7 MR. SAVILLE: Sure. I was noting that Mr. Williams
8 was not here with us yesterday during Mr. Johnson's
9 testimony in which Mr. Johnson offered that it was not the
10 victim who brought the gun to the rodeo. So to say it was
11 not the victim who brought the gun to the incident.

12 Q Based on your conversations with Mr. Young and --

13 A Uh-huh.

14 Q -- Mr. Johnson are you in agreement with that?

15 A I -- I don't remember ever knowing who brought the
16 gun. I don't remember Julian ever telling us who brought
17 the gun.

18 Q Okay. But do you recall that Mr. -- Mr. Johnson was
19 the one more personally involved with the family in this
20 case.

21 A Yes, sir

22 Q Okay. That's all the questions I have, Mr. Williams.
23 Thank you very much.

24 THE COURT: Thank you, sir. You may step down.

25 MS. SHURLING: Your Honor, I have one fast -- no?

1 Okay.

2 THE COURT: That's it.

3 MS. SHURLING: Thank you.

4 THE COURT: Plowed that field enough.

5 All right. Sir, you may step down. We gonna stand
6 down for a few minutes. How long of a break you need,
7 Madame Court Reporter?

8 THE COURT REPORTER: Ten minutes

9 THE COURT: Ten minutes.

10 (The witness exits the stand.)

11 MR. SAVILLE: Thank you, Your Honor.

12 (Off the record at 11:53 a.m.)

13 (On the record at 12:15 p.m.)

14 THE COURT: All right. Call your next witness.

15 MS. SHURLING: I would re-call Mr. Virgin Johnson.

16 THE WITNESS: Good morning again, Your Honor.

17 THE COURT: Good morning, sir.

18 THE WITNESS: Yes, sir.

19 THE COURT: Thank you for getting back here.

20 THE WITNESS: Yes, sir.

21 THE COURT: All right. I remind you, you're still
22 under oath. Okay?

23 THE WITNESS: Yes, sir.

24 MS. SHURLING: And I am gonna keep this very short,
25 I promise.

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 205

1 THE COURT: That's -- you told me a minute ago you
2 were gonna ask one question and ended up asking about 10.
3 You promise?

4 MS. SHURLING: I promise I'm gonna be as brief as I
5 can be, and I'm gonna pleasantly surprise you.

6 THE COURT: All right. Go ahead.

7 DIRECT EXAMINATION (recall)

8 BY MS. SHURLING:

9 Q Mr. Johnson, have you got your copy of my amended PCR
10 application up there with you?

11 A Yes, I do have.

12 Q I'm gonna get you to look at No. 4.

13 A Okay.

14 Q And then I'm gonna ask you to look at page 159, line
15 21 of the transcript.

16 A Line 20?

17 Q 159, line 21.

18 A Oh. I'm sorry. Thank you. Okay.

19 Q There you go.

20 MS. SHURLING: Your Honor, a moment's indulgence.

21 THE COURT: Yes, ma'am

22 (Brief pause.)

23 Q Okay. During your cross-examination, you asked Mr.
24 Ricky Gibson if he'd ever heard of "felony murder" (as
25 read): "What's felony murder?" You recall that?

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 206

1 A I said that, yes, ma'am. It's in the transcript.

2 Q Okay. Does South Carolina recognize a felony murder
3 rule?

4 A No, ma'am, it does not.

5 Q Okay. Was there any particular reason why you were
6 cross-examining one of the State's witnesses on a rule
7 that doesn't exist?

8 A Yes, ma'am. It wasn't so much on the rule, he had --
9 I started cross-examining him and he started getting
10 smart, and I was trying to get him back in line. I said,
11 "Look, you understand this -- it -- it was a felony. We
12 don't have a felony murder, but it was a felony to murder
13 somebody. You understand that?" And his attitude changed
14 immediately. I got his attention.

15 Q Okay. Just so we're clear. You -- you were cross-
16 examining this man --

17 A Ricky Gibson.

18 Q -- and basically saying, "Felony -- okay. You know
19 about the felony murder rule, and you're committing a
20 felony," 'cause he talking about selling drugs, right?

21 A No. I was cross-examine [sic] him about the
22 statement that -- that he got from -- he gave to SLED
23 Agent Johnson that SLED Agent Johnson said he was using
24 the word "Big Daddy." And what I was trying to get him to
25 understand -- he was all nonchalant. I was trying to get

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 207

1 him to understand this is nothing to play with, and his
2 attitude changed.

3 And -- and murder is a felony, but no, we do not have
4 a felony murder rule. No, we do not.

5 Q Well -- and -- and selling drugs in most
6 circumstances is a felony as well, right?

7 A Yes, ma'am.

8 Q And he was involved, at least as setting up in a
9 combination sale if nothing else, by his own admission,
10 right?

11 A No only that, he was involved in not just that one.
12 He was involved in other drug deals, and any of those
13 could've been a felony.

14 Q Okay.

15 A Uh-huh.

16 Q So you were reminding him how high the stakes were?

17 A Yes, ma'am. And it -- it -- it helped because if you
18 notice, he started his -- his -- his questions -- he
19 started answer -- he began to answer truthfully, or what I
20 thought was truthful.

21 Q Okay. I'm gonna move on. You heard the discussion
22 this morning at length about the fact that -- that Mr.
23 Gibson, as result of your cross-examination, claimed on
24 page 156, line 6 through 157, line 20, that he had said in
25 his statement that he had seen either Julian or Julian's

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 208

1 friend with a gun.

2 A I heard that this morning. Yes.

3 Q Okay. And you subsequently tried to get him to show
4 you -- and I -- again, I said I was gonna apologize
5 publicly and I will. I got a little twisted around on
6 that yesterday.

7 But you did -- he testified first at page 155. It's
8 -- pardon me -- 143, line 19 through 144, Line 2, that he
9 had not seen anyone with a gun.

10 A Okay.

11 Q And then he tries to say (as read): "Well,
12 technically, it was one of the two, though. So
13 technically, yes." That's at 155, Line 2 through 15. I'm
14 just catching you up cause --

15 A Okay.

16 Q --- I know you weren't here this morning when we were
17 going over some of this.

18 A Okay.

19 Q And then ultimately, at 156, Line 6 through 157, Line
20 20, he gets bold and claims he'd said it in his statement.

21 Now, you had his written statement in the discovery
22 materials and you had the SLED investigative report that
23 summarized his written statement and his supplemental
24 statement, if you will ---

25 A Uh-huh.

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall)209

1 Q --- the interview, the subsequent interview that was
2 given to the SLED agent that clarified some additional
3 points, right?

4 A Yes.

5 Q Okay. And you tried to get him to acknowledge that
6 nowhere in his statement did it say anything about seeing
7 either one of those gentlemen with a gun, right?

8 A Correct.

9 Q At which point he started in shortly thereafter the
10 last passage I quoted with him claiming he couldn't really
11 read it 'cause it was "sketchy." Recall that?

12 A Yes, ma'am.

13 Q Okay.

14 A I heard that, too.

15 Q So he never acknowledged that it wasn't in the
16 statement.

17 A Okay.

18 Q Okay. And the statement wasn't introduced.

19 A Okay.

20 Q Okay. So -- but you had another shot, didn't you?
21 When Agent Johnson testified --

22 A Are -- are you ---

23 Q -- after Ricky Gibson --

24 A Uh-huh.

25 Q -- and the opening line of -- do -- have you recently

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 210

1 taken a look at that statement that was given on May 6?

2 A No, I have not looked at it since ---

3 Q And were you here when ---

4 A I heard y'all discussing it ---

5 Q --- we were discussing this part this morning?

6 A --- this morning.

7 THE COURT: Hold on a minute, now. I need one at --
8 on talking at the time.

9 THE WITNESS: And I apologize. Yes, sir.

10 THE COURT: That's okay.

11 A Yes, sir. I heard her -- I heard y'all discussing it
12 this morning.

13 Q Okay.

14 THE COURT: And that's exhibit what, Ms. Shurling?

15 MS. SHURLING: It --

16 THE COURT: 3?

17 MS. SHURLING: Exhibit No. 3, and it's just -- I'm
18 just drawing attention to opening line ---

19 THE COURT: Right.

20 MS. SHURLING: --- where the agent -- it says that
21 the agent's writing the statement.

22 THE COURT: Correct.

23 Q Okay?

24 A Okay.

25 Q So why would you not have in your cross-examination

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall)211

1 asked Agent Johnson to verify for the record that there's
2 not a word in his statement about having seen either
3 Julian or Julian's friend with a gun?

4 A Okay. The only thing I can say is during the time I
5 was doing the cross-examination, I heard that -- I -- I
6 don't know if it hit me like it's hitting you now, after
7 the fact, during the cross-examination because he stated
8 several times, no, he didn't see my client with a gun.
9 And again, that was my focus, and him when he said he saw
10 either -- I think he was saying -- or the way I
11 interpreted it, he was saying one or the other in the car
12 had to have the gun and -- and that's true. My client
13 didn't have it, so if they wanted to infer the other guy
14 had it that was there, that's fine with me.

15 Q Okay. But actually what you asked him over and over
16 again was whether or not he had ever said in any statement
17 that he saw Julian with a gun. And he said "no" over and
18 over again, right?

19 A No. I think I asked him did he see Julian with a
20 gun, not necessarily was it from any other statement.

21 Q Can -- do -- are you familiar enough with the
22 transcript to ---

23 A No, ma'am. I -- I -- I ---

24 Q Okay.

25 A --- glanced -- I glanced over it. Hopefully I'll

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall)212

1 have to never see it again after today.

2 Q Okay. Well -- and the record will speak for itself.

3 A Yes, ma'am.

4 Q But if in fact, what he says repeatedly, is that he's
5 never -- he's never said in any of his statements that he
6 saw Julian with a gun, but then corrected it, if you will,
7 and said, "Well, technically" -- and I'm gonna read it
8 back (as read): "It was one of the two, though. So
9 technically, yes." That's at 155, lines 2 through 15.

10 And then he says that it was in it's -- in his
11 statement that it was either the Defendant or his friend.

12 A Okay. Did I not show him the statement and ask him
13 about that?

14 Q Yes.

15 A Okay.

16 Q And that's when you -- you -- when you asked him
17 where he said it, and he said he couldn't read it because
18 it was sketchy, the officer's handwriting -- sketchy was
19 an interesting adjective to me is the only reason it
20 sticks in my mind.

21 But he claimed he couldn't say for -- 'cause he
22 couldn't read it 'cause it was sketchy.

23 A I -- I guess my perspective is I asked him the
24 question, he said no. I handed him the statement and he
25 claimed he couldn't read. He was a college student. So I

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall)213

1 -- I -- I don't think it affected me like it's affecting
2 you now.

3 Q Well, I -- I guess my point is that one would expect
4 a SLED agent to have some degree of credibility with the
5 jury a little better than just Mr. Gibson, right?

6 A Well, I would -- I would hope so.

7 Q Okay. And if you had an opportunity to ask the man
8 who wrote the statement whether anywhere in that statement
9 in his handwriting does it reference him having been told
10 by Gibson that he saw either Julian or his friend with a
11 gun.

12 A Okay. I did not ask him. I -- I -- all I can tell
13 you from that I got a college student, drug dealer at
14 that, selling drugs and he said he can't read a statement.
15 After he had done said "no," I thought I had my point
16 across.

17 Q That was a rather sad testimony on the educational
18 system, wasn't it?

19 A Yeah.

20 MS. SHURLING: Your Honor, one moment's indulgence,
21 if ---

22 THE COURT: Yes, ma'am.

23 MS. SHURLING: --- I can real quickly check down my
24 list, I believe I can set this witness free.

25 (Brief pause.)

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 214

1 Q Oh. I -- I guess I do have to go back to this.

2 After the jury -- I -- I understand that you did a
3 bench brief on malice and -- and the new rule in *Belcher*
4 for the Court, and -- and that was certainly admirable.
5 But at the end of the jury charge the statute requires the
6 judge give both sides a chance to enter any problems
7 they've got.

8 A Uh-huh.

9 Q And at that point you already knew -- I mean, the
10 State's case was over, your case was over, Julian wasn't
11 gonna testify. And you knew that the judge had not
12 charged voluntary or involuntary, he had not charged
13 accident or self-defense. What was your basis in
14 persisting that the *Belcher* rule would apply to your case?

15 A You -- you know the funny part about this? I thought
16 about that all yesterday after I left you and after you
17 asked me that question; and last night, it hit me. If I
18 didn't do it, we'd have been here today asking why I
19 didn't do it. I did it, and we're here today asking that
20 I did do it.

21 What happens is you try to protect the record. Even
22 though I know what the *Belcher* case said, why would I not
23 try to protect the record anyhow? It's overkill, I guess.

24 Q Okay. And you said you thought about this a lot, you
25 know, since yesterday ---

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall)215

1 A Yes, ma'am.

2 Q --- and I'm sure overnight as I have. Do you here
3 today have any recollection of telling your client that he
4 didn't stand a chance of getting a charge on a lesser
5 included offense if he didn't take the stand?

6 A The way you ask that question I gonna -- I'm gonna
7 say no, I don't remember that. But it -- we explained all
8 that. He fully understand [sic] what didn't happen --
9 what would happen if he didn't take the stand, what would
10 happen if he did.

11 Again, the only one I think I didn't explain [sic]
12 him about was accident because I didn't see how accident
13 applied because my thought from the process he brought the
14 gun, and one of the elements of self-defense is not to be
15 the one who instituted the problem. So the accident I did
16 not do. The -- the rest of them I did.

17 Q Okay. Mr. Young, you keep saying he brought the gun.

18 A Uh-huh. I said that's the way -- that's my
19 perception from the question and my relationship with him
20 --

21 Q Okay.

22 A -- as his lawyer.

23 Q But -- but you have said under oath that what you
24 asked him is, "Do I need to worry about them finding that
25 gun?"

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 216

1 A Right.

2 Q "Are they ever gonna find the gun," right?

3 A That's all I asked him.

4 Q And he said, "No."

5 A And he said, "No."

6 Q So he didn't tell you he brought the gun to the
7 rodeo, did he?

8 A No, ma'am. He didn't say those words outta his
9 mouth.

10 Q He didn't tell you that it was his gun, that it was
11 his friend's gun, that he brought it. He -- he -- all he
12 did was answer your question.

13 A That's what he did.

14 Q And you have perceived from that that that was some
15 sort of admission that he brought the gun to the car.

16 A If you wanna call it my perception, yes, ma'am. It
17 was my perception from my relationship and from talking
18 with him and knowing him and trusting him and him trusting
19 me. I -- as his attorney, I understand when the gun is
20 not gonna be found. I understand that. So he did not --
21 I did not ask him that question as you say, and he did not
22 answer it just like you say.

23 Q I swear I'm not trying to be argumentative, but do
24 you see that that answer addresses his knowledge and/or
25 possession of the gun after the fact not before the fact?

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 217

1 A I see the way you see it, but I disagree with that.

2 Q Okay.

3 MS. SHURLING: A moment more, Your Honor. Keep going
4 real quickly.

5 (Brief pause.)

6 Q There -- during the State's closing argument, Mr.
7 Sorenson, you know, professes that he was actually
8 somewhat shocked that Gibson would own up to feeling some
9 degree of responsibility for putting the pieces in place
10 that resulted in this man getting killed. Do you recall
11 that?

12 A I recall that ---

13 MS. SHURLING: Your Honor, that's specifically,
14 somewhere on page 4-0 -- excuse me.

15 A I think it was 407.

16 MS. SHURLING: -- 6, 406.

17 A 406 or 407. I remember that.

18 Q 406. I understand your position about objections,
19 but -- but realistically, was there any reason to be
20 shocked? I mean, Mr. Gibson had admitted from -- at the
21 very first statement he gave that he sat -- he set up that
22 drug deal, right?

23 A Right.

24 Q Those boys did not know Mr. Bailey until he arranged
25 to take them to him.

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall)218

1 A That's correct.

2 Q Okay. So the fact that he was taking responsibility
3 for that and owning up to his role in it wasn't any big
4 surprise to anybody, was it?

5 A It shouldn't have been.

6 Q Okay. All right. Moving on.

7 A But remember that he ---

8 Q In the discovery -- pardon. What's ---

9 A --- but remember now, Solicitor Sorenson was saying
10 that he looked over at me, that I looked shocked. As I
11 told you yesterday, I didn't think I looked shocked. That
12 was his impression. That wasn't necessarily me being --
13 looking -- wasn't necessarily me looking shocked.

14 Q And -- and my point being it -- there wasn't any
15 reason for you to be shocked.

16 A None.

17 Q You -- you were fully on notice that that was
18 happening.

19 A I ---

20 Q And did you consider objecting to that being some
21 sort of negative commentary on your strategy at trial?

22 MR. SAVILLE: Objection, Your Honor. I believe this
23 was asked and answered yesterday.

24 THE COURT: Well, it may have been, but ---

25 MS. SHURLING: I didn't ---

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 219

1 THE COURT: --- I'll allow it.

2 MS. SHURLING: --- remember it.

3 THE COURT: I don't remember. Go ahead.

4 A Yesterday I told you -- I said some people do a lot
5 of objections. I try and not to object a lot. Here's the
6 reason I try not because he didn't testify, the jury
7 didn't hear him testify. We -- we got the last argument;
8 however, I didn't wanna look like we were hiding something
9 by bouncing up and down. I had last argument try to
10 straighten out anything.

11 Q I understand. Now, we addressed yesterday the -- the
12 fact that -- that as they went through the various
13 statements that were given and they talked about the
14 various people cooperating and giving statements and --
15 and did it in a manner that left clear inference that your
16 client had not been cooperative and -- and had not given a
17 statement; and I believe you -- yesterday said that you
18 didn't see any reason to object to that?

19 A No. I admitted on the record that I didn't do that.

20 Q Okay. And in -- do you see my point as to why that
21 should've been objected to?

22 MR. SAVILLE: Objection. Asked and answered.

23 THE COURT: You can answer the question.

24 A Okay. I only know what -- after the fact if you
25 asked me if that's one of the things I could've answered,

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 220

1 yes, I could've asked that. During the time -- the
2 testimony, what I wanted was that nobody saw Julian with a
3 gun. I got that from them. There was no reason to
4 antagonize the other witnesses. They were testifying to
5 help us.

6 I did not ask that. I didn't think it was necessary
7 in the case, and if that was out of order, I made the
8 decision to do that. Matter of fact, I did that. Mr.
9 Williams wasn't even -- he was sitting at the table. I
10 made that decision, so that's what I did.

11 Q Let's go back real quickly to the whole issue of
12 whether or not Julian oughta testify. You said he was
13 scared, didn't wanna testify, right?

14 A Along with the fact that I believe that if you put
15 him on the stand, you would have been putting some
16 falsification on the -- fraud on the Court.

17 Q Well, did he tell you he was gonna lie on the stand?

18 A He did not tell me that.

19 Q Well ---

20 A And I don't think he would've.

21 Q --- then why did you think you would be perpetrating
22 fraud?

23 THE COURT: Sustain the objection. It's not an
24 objection made, but he's -- he's answered that question.
25 Just move on.

EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON (recall) 221

1 MS. SHURLING: Okay. Yes, sir.

2 THE COURT: Next question.

3 Q Last question: You said -- and it may be a two
4 parter, but it is the last subject. You -- you said
5 yesterday that your client was the only one that didn't
6 give a statement 'cause he was the only one that had
7 lawyer?

8 A I said, yes, I hope that was the only reason he
9 didn't -- he shouldn't have because he had a lawyer. Yes,
10 I said that.

11 Q Okay. You -- you -- you looked surprised -- if I'm
12 wrong I apologize, but you looked surprised when I noted
13 that there was, in the discovery material, a signed
14 Miranda waiver from your client. Were you aware that he
15 had signed a Miranda waiver?

16 A I don't remember when I was aware of that. I know he
17 didn't talk to anybody, at least he didn't tell me he
18 talked to anybody, and it never came up.

19 Q Okay.

20 MS. SHURLING: Your Honor, I would move to introduce
21 this into this ---

22 THE COURT: Any objection.

23 MR. SAVILLE: No objection.

24 THE COURT: Without objection.

25 (Applicant's Exhibit No. 5, Miranda Waiver Form, in

CROSS-EXAMINATION BY MR. SAVILLE - VIRGIN JOHNSON (recall 22

1 evidence.)

2 THE WITNESS: Yes, sir.

3 MS. SHURLING: I forgot you were judging these days.
4 I should have been calling you "Your Honor."

5 (Brief pause.)

6 Q And Mr. Young [sic], thank you very much for coming
7 back for such a few questions. I'm done.

8 A Thank you. Okay. And you know, it's gone be
9 Johnson. You know, Julian and I -- Julian and I are
10 close, but you keep calling me "Mr. Young." It's gonna be
11 Johnson.

12 Q I'm sorry. I apologize. I got my name -- it's been
13 a long two days. I'm getting tired. Thank you.

14 THE COURT: Mr. Saville?

15 MR. SAVILLE: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. SAVILLE:

18 Q Welcome back, Mr. Johnson. Good to have you here.

19 A Always happy to serve the State.

20 THE COURT: I know how you feel, Mr. Johnson.

21 Q Now, Mr. -- Mr. Johnson, this is gonna be really
22 short and it's gonna sound like a very minor point. On --
23 if you flip with me to page 157 of the transcript where we
24 go through ---

25 MS. SHURLING: Excuse me, Mr. Saville.

CROSS-EXAMINATION BY MR. SAVILLE - VIRGIN JOHNSON (recall 23

1 MR. SAVILLE: Oh, sure.

2 MS. SHURLING: I didn't wanna walk in front of you,
3 but I left my transcript. 157?

4 MR. SAVILLE: Yes, ma'am.

5 Q And it's the discussion you're having with Mr. Gibson
6 where you're crossing him about the fact that he claims
7 not to be able to read the statement.

8 A Right.

9 Q And would you agree that on page 158, line 7, he says
10 that the photocopy may have messed it up?

11 A Yes. That's what it said. Yes, sir. Photocopy may
12 have messed it up.

13 Q Sure. Now, is it possible that that's a different
14 copy of the statement that we have in court today?

15 A I -- I don't know how to answer that.

16 Q Okay. But you did feel like you were kinda able to
17 -- to push back on him -- on him a little bit on that
18 issue.

19 A Oh, yes. I thought I was able to push back -- I
20 thought I was able to push back a lot. Here's a --
21 somebody who's not a freshman. I think he's a upper-
22 classman. First of all, he's selling drugs on campus, and
23 then you hand him a statement and he can't read it? So I
24 think I thought I covered exactly what I needed to cover.

25 A Yes, sir. Is there anything you heard from Mr.

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR.224

1 William's testimony that you'd like to reiterate to the
2 Court?

3 Q No, sir, 'cause Korey talked to Julian sometimes I
4 didn't talk with him. I talked with him. So -- so I
5 can't question with it, no. No, sir.

6 A Sure.

7 Q That's all I have. Thank you very much.

8 MS. SHURLING: No further questions.

9 THE COURT: Mr. Johnson, let me ask you a question.

10 DIRECT EXAMINATION

11 BY THE COURT:

12 A Yes, sir.

13 Q If you don't mind. I'm gonna hand you my copy ---

14 A Yes, sir.

15 Q --- of this transcript. On page 160, line 4.

16 A Yes, sir. May I stand, Judge?

17 Q Yeah. Yes, sir. And you can hold it.

18 A All right, sir.

19 Q What I've underlined there (indicates.)

20 A Line 4. Yeah. Yeah. I -- yes, sir.

21 Q Explain to me the context in which that question was
22 asked. I mean -- and I know you -- you look at something
23 in a snapshot, and -- and you may not get the entire
24 context of it. But if I just read that question there --

25 A Yes, sir.

DIRECT EXAMINATION BY THE COURT - VIRGIN JOHNSON, JR.225

1 Q -- it appears that -- that there's an admission that
2 a murder took place here. Can you see where I -- how I'm
3 seeing that?

4 A Yes, sir. I see -- I see exactly how you see it.

5 Q And -- and you're implying that Gibson played ---

6 A Yes, sir.

7 Q --- a part in it, but it appears to be an admission
8 to some extent that a murder, in fact, has taken place.

9 A But -- but Judge, the only way I can answer that is
10 -- is when I was cross-examining Gibson, again, I said he
11 picked up his attitude and -- and he didn't get charged.

12 Q Right.

13 A And my thing was, "Look, you -- my client's here
14 accused of murder and you here acting like you acting and
15 you didn't even get charged." I ---

16 Q Right.

17 A --- said, "You know, don't you know selling drugs and
18 him -- and him being here today and this guy dying, you
19 [sic] part of that."

20 Q Right.

21 A That's what I meant.

22 Q Okay.

23 A That's what I meant.

24 Q Okay. Thank you, sir.

25 THE COURT: Anything else?

REDIRECT EXAMINATION BY MS. SHURLING - VIRGIN JOHNSON 226

1 MS. SHURLING: Just that I ---

2 THE COURT: I hesitantly ask that question, but I ---

3 -

4 MS. SHURLING: That's okay. I'm grateful. Under
5 *Simmons v State* I would add that as an -- an initial
6 allegation developed by the testimony presented at the
7 hearing today. Thank you.

8 THE COURT: Okay.

9 REDIRECT EXAMINATION

10 BY MS. SHURLING:

11 Q only question I would have in return about that is that
12 wasn't there -- weren't there any number of ways you
13 could've said, "Mr. Gibson, if this was a -- you know, if
14 this was a murder, as the -- the State claims, wasn't it
15 your fault?" I mean, you didn't have to say "this murder"
16 the way you did, right?

17 THE COURT: Hold on a minute. He said it in the way
18 he did, certainly, and I'm gonna answer it to some extent
19 for him. There are other options that he coulda -- I
20 wanted to understand the context in which that question --
21 -

22 MS. SHURLING: I understand.

23 THE COURT: --- and give him an opportunity to
24 explain that. So move on, please. That can be arguments
25 to me in your brief.

RE-CROSS-EXAMINATION BY MR. SAVILLE - VIRGIN JOHNSON (recall) 227

1 MS. SHURLING: Thank you, Your Honor. I have nothing
2 further. Thank you, again.

3 THE COURT: One -- one last question, Mr. Saville.

4 MR. SAVILLE: Yes, sir.

5 THE COURT: I'll give you a little leeway 'cause
6 that's what Ms. Shurling said earlier, and I gave her
7 about seven questions.

8 (Courtroom laughter.)

9 MR. SAVILLE: I will choose -- I will choose wisely.

10 RE-CROSS-EXAMINATION (recall)

11 BY MR. SAVILLE:

12 Q Mr. Johnson, on page 159 of the transcript, during
13 your cross-examination of Mr. Gibson, starting at line 20
14 of page 159, do you notice that it's actually Mr. Gibson
15 who first brings up a homicide?

16 A (As read): "Answer. 'Yes, sir. He -- he was more
17 interested in the homicide.' 'Okay.' 'He knew about it
18 ...'" Yeah. Yes, sir.

19 Q So this was an idea -- the whole homicide topic of
20 conversation was brought up by Mr. Gibson.

21 A That's correct. I didn't think about that. That
22 wasn't brought up by me.

23 Q So it was more of a rhetorical question, you would
24 agree?

25 A Yes, sir.

1 Q That's all I have. Thank you.

2 THE COURT: Thank you. Sir, you may step down.

3 THE WITNESS: Your Honor, am I free to go?

4 THE COURT: You are free to go ---

5 THE WITNESS: Your Honor, may ---

6 THE COURT: --- Mr. Johnson.

7 THE WITNESS: Thank you, sir. Your Honor, may I
8 offer to the Court now since your freed me up, I can
9 promise you I will not be found by the FBI, SLED, or
10 anybody. So once I go, I'm gone.

11 THE COURT: All right. Thank you for being here.

12 THE WITNESS: Thank you, sir.

13 THE COURT: You have a nice day.

14 THE WITNESS: Yes, sir.

15 (The witness exits the stand.)

16 THE COURT: All right. Ms. Shurling, how many more
17 witnesses do you have?

18 MS. SHURLING: Just my client, Your Honor, and -- but
19 I anticipate that he will probably take, I would say, 30
20 to 45 minutes with me, maybe 30. And then the State, of
21 course, will have to cross.

22 THE COURT: I'd say an hour. If you say 30 minutes,
23 that's gonna take an hour. And that's not just you. Most
24 lawyers, they tell you it's gonna take a day or two to try
25 a case. It ends up taking three or four. That's just how

1 it works.

2 MS. SHURLING: I will say in this case, brevity is my
3 friend, even though I'm not good at it. So I think I can
4 stick with it, but we'll see.

5 THE COURT: Well, y'all wanna work through or y'all
6 wanna take a break for lunch?

7 MS. SHURLING: Your Honor, I'm not familiar with this
8 courthouse. Is there, like, a canteen with crackers and
9 Diet Cokes or anything?

10 THE COURT: What you wanna do?

11 THE COURT REPORTER: Whatever you wanna do.

12 MS. SHURLING: I'll do what everybody else wants to
13 do, Your Honor.

14 THE COURT: If we take a -- take a break, it's gonna
15 be short. We're not gonna be a hour lunch.

16 MS. SHURLING: If we were going to break at all, I
17 would not ask for more than just 30 minutes to run down
18 the road and eat some crackers. But ---

19 THE COURT: Thirty minutes gonna do it?

20 MS. SHURLING: --- I can do without it.

21 THE COURT: Well, you know they say -- and I'm not
22 implying myself or anyone in this courtroom, but you know,
23 some people get grumpy when they don't eat.

24 MS. SHURLING: I've been accused of being grumpy
25 without that problem. So I mean ...

DIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 230

1 THE COURT: I've been accused of a lot worse.

2 (Courtroom laughter.)

3 THE COURT: Well, we'll take 30 minutes. I -- I
4 might not get grumpy, but I get a headache if I don't eat.
5 How 'bout that.

6 MR. SAVILLE: Thank you, Your Honor.

7 THE COURT: All right. Thirty minutes.

8 (Off the record at 12:45 p.m.)

9 (On the record at 1:28 p.m.)

10 THE COURT: All right. Call your next witness,
11 please ma'am.

12 MS. SHURLING: Your Honor ---

13 THE COURT: Hold on. I'm sorry.

14 (Brief pause.)

15 THE COURT: Call your witness, please, ma'am.

16 MS. SHURLING: Julian Young, please.

17 THE COURT: Sir, if you'd come around to be sworn,
18 please.

19 JULIAN YOUNG, having been first
20 duly sworn, testifies as follows:

21 DIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q Okay. Julian, state your full name for the record.

24 A I'm Julian Young.

25 Q Okay. I'm gonna say something I don't want you to

1 take the wrong way, but I want you to listen to me. Okay?

2 A Yes, ma'am.

3 Q You, like a lot of young people I deal with, have a
4 tendency to run all your words together like this.

5 A Yes, ma'am.

6 Q His Honor needs to hear what you're saying.

7 A Yes, ma'am.

8 Q And he needs to understand what you're saying.

9 A Yes, ma'am.

10 Q I know you're scared, I know you're nervous --

11 A Yes, ma'am.

12 Q -- but he -- yes, ma'am.

13 A Yes, ma'am.

14 Q Okay. It will not do us any good to go through this
15 exercise if he can't hear you.

16 A Yes, ma'am.

17 Q So speak up, speak clearly.

18 A Yes, ma'am.

19 Q Minimize street. Okay?

20 A Yes, ma'am.

21 Q All right. We understand a little bit of street, but
22 we're old. We don't understand -- well, he's not as old
23 as me, but we don't understand some of this talk y'all
24 use.

25 A Yes, ma'am.

1 Q So try to keep it to English that we'll understand.

2 A Yes, ma'am.

3 Q And speak slowly and clearly. Okay?

4 A Yes, ma'am.

5 Q Okay. How old were you back on the day when this
6 shooting happened?

7 A I was 16 years old.

8 Q How old?

9 A Sixteen.

10 Q Sixteen, not 18, 16.

11 A Yes, ma'am.

12 Q Okay. You were still in high school, weren't you?

13 A Yes, ma'am.

14 Q What -- what grade were you in?

15 A The eleventh.

16 Q The eleventh grade.

17 A Yes, ma'am.

18 Q Okay. And the people that were with you that day,
19 let's go through them. Out of that group, who would you
20 say you knew the best?

21 A Pinckney.

22 Q Pinckney?

23 A Yes, ma'am.

24 Q And how old was Pinckney?

25 A I think, like, 22 or 23.

1 Q Okay. And was Pinckney a student at State?

2 A No, ma'am.

3 Q No?

4 A No, ma'am.

5 Q Okay. And how 'bout Maurice Thompson? How well did
6 you know him?

7 A I didn't know him that much.

8 Q Okay. Well, who brought him to the party, so to
9 speak. Who was he hanging out with? What was the reason
10 he was with y'all that day?

11 A Because he coming to see Pinckney.

12 Q He came to see Pinckney.

13 A Yes, ma'am.

14 Q Okay. He was visiting Pinckney.

15 A Visiting.

16 Q From another town, or just --

17 A From Charelston. He ---

18 Q From Charleston.

19 A --- lived in Charleston.

20 Q Okay. So Maurice Thompson was from Charleston, and
21 he was in town visiting Pinckney.

22 A Yes, ma'am.

23 Q Okay. Then how 'bout Alston?

24 A He was from Charleston, too. It was ---

25 Q So -- aha. So Alston and Maurice Thompson were from

1 Charleston and had both come to O'Town, Orangeburg, to see
2 Pinckney.

3 A Yes, ma'am.

4 Q Okay. Did any -- out of your group, who knew Gibson?
5 Who knew Ricky Gibson?

6 A Alston.

7 Q Alston?

8 A Yes, ma'am.

9 Q So these two -- and -- and Maurice Thompson, did he
10 know Gibson too?

11 A No, ma'am. I don't know. Like, I didn't really know
12 him like that.

13 Q Okay. So he didn't say anything that made you feel
14 like he knew the Gibson guy.

15 A No, ma'am.

16 Q Okay. But -- but Alston did.

17 A Yes, ma'am.

18 Q Okay. And y'all were gonna party that night, right?

19 A Yes, ma'am.

20 Q Now, how old were these other fellas? How old --
21 let's go through it. How old about -- I know they were
22 not good friends, but Maurice Thompson and -- and Alston,
23 about how old fellas were they?

24 A I think they was like, 24. I can't really remember.
25 Maybe like 24 or 23. Around that age.

1 Q Okay. So they were -- they were Pinckney's age?

2 A Yes, ma'am.

3 Q Your friend that they were -- had come to visit?

4 A Yes, ma'am.

5 Q And Pinckney, at -- at that age, the difference
6 between 16 and 24 is a lot, isn't it?

7 A Yes, ma'am.

8 Q Okay. How did you know Pinckney so well? Was he
9 good friends with people in your family?

10 A No. I just had met him, like, from being around the
11 apartment complex that I was staying in. And the
12 apartment complex was Pinehill. So I had know [sic] him
13 from being around the apartment complex ---

14 Q Okay.

15 A --- and we got real cool.

16 Q And you thought he was cool?

17 A Yeah.

18 Q Okay. When you're young, you look up to people like
19 that sometimes, huh?

20 A Yes, ma'am.

21 Q Okay. Pinehill's where you were living. Who were
22 you living with?

23 A I was living with my mother.

24 Q Your mom? Who's that?

25 A Yes, ma'am. Ms. Julia, right here.

1 Q Okay. And don't you also have an aunt that is almost
2 like a second mama to you?

3 A Yes, ma'am.

4 Q And who's she?

5 A That's my Aunt Kitty.

6 Q They're all back there. Okay.

7 A Yes, ma'am.

8 Q And your grandmama, too, right?

9 A Yes, ma'am.

10 Q All right. Out of that -- who was living together?
11 Was -- I'm sorry. Getting off track. Who -- who were you
12 living with, just your biological mama?

13 A My biological mom and my brother.

14 Q Okay. And your brother is the one you've heard me
15 refer to as "Poopie"?

16 A Yes, ma'am.

17 Q Okay. And is he older than you or younger?

18 A He's older than me.

19 Q How much?

20 A Like, two years.

21 Q Okay. And was he friends with Pinckney, too?

22 A Yes, ma'am.

23 Q Okay. That night had your group -- when I say "the
24 group," I'm not talking about Gibson, but -- but the two
25 boys from Charleston and Pinckney, had y'all decided you

1 wanted to get some marijuana?

2 A Yes, ma'am. We decided to get some marijuana.

3 Q Speak up.

4 A Yes, ma'am. We decided to get some marijuana.

5 Q Okay. Whose idea was that?

6 A It was really Alston, but all us agreed to getting
7 marijuana.

8 Q Okay. And he's the one that set it up?

9 A Yes, ma'am.

10 Q Okay. You and I've spent a long time at -- on a
11 number of different occasions talking, haven't we?

12 A Yes, ma'am.

13 Q Did it take you a long time to tell me the truth?

14 A No, ma'am.

15 MR. SAVILLE: Objection, Your Honor. I feel like
16 that's bolstering.

17 THE COURT: State your question again.

18 MS. SHURLING: I asked him if it took him a long time
19 to tell me the truth.

20 THE COURT: Overruled.

21 A I mean, I was a little ---

22 Q Well ---

23 A --- I was nervous, like.

24 Q Let me rephrase. You didn't tell me the truth about
25 everything -- you didn't tell me the whole story when I

1 first started representing you, did you?

2 A No, ma'am.

3 Q After I met with you a number of times and explained
4 a lot about the law to you --

5 A Yes, ma'am.

6 Q -- and explained the various things about your case
7 that I thought you needed to understand --

8 A Yes, ma'am.

9 Q -- did you then begin to open up to me and tell me
10 more about the facts of the case?

11 A Yes, ma'am.

12 Q Okay. You heard the testimony in the courtroom when
13 Mr. Virgin Johnson said he asked you -- and I'm -- I'm
14 paraphrasing 'cause I don't remember the exact words, but
15 whether they were ever gonna find that gun or did he need
16 to be worried about them finding the gun, something like
17 that. You heard that?

18 A Yes, ma'am.

19 Q Okay. And you heard him say that you told him no.

20 A Yes, ma'am.

21 Q Okay. That was the truth, wasn't it?

22 A Yes, ma'am.

23 Q Okay. Is that pretty much the only time -- the only
24 in-depth discussion that Mr. Johnson ever had with you
25 about the facts of what actually happened that day?

1 A Yes, ma'am. We had a lot of -- we talk [sic] a lot
2 of times back then.

3 Q But that's the only time he came close to asking you
4 what actually happened?

5 A Yes, ma'am.

6 Q And even then, all he asked was if the gun was gonna
7 be found.

8 A Yes, ma'am.

9 Q Okay. I'm gonna digress just a little for a minute.
10 Did -- did he ever -- well, did he ever say that he wanted
11 you to tell him exactly what happened?

12 A Yes, ma'am.

13 MR. SAVILLE: Objection. Hearsay.

14 THE COURT: Overruled.

15 Q Did he ever ask you to tell him exactly what
16 happened?

17 A Yes, ma'am.

18 Q Did you tell him?

19 A Yes, ma'am.

20 Q Did he tell you -- did he then go over with you,
21 taking those facts -- well, let me back up. Did you --
22 what you told Mr. Johnson at the time, was that the same
23 thing that you have subsequently told me?

24 A Yes, ma'am.

25 Q Okay. The same thing, you didn't tell two different

1 stories.

2 A No, ma'am.

3 Q Okay. Did he go over with you how those facts might
4 be relevant to different ideas in the law and different
5 concepts, like self-defense or accident or whether it
6 might be something less serious than murder, be voluntary
7 manslaughter? Did he go over those things with you?

8 A He said something about the -- like, I think the
9 accident. Basically, I was just using the term of me
10 understanding was, like, self-defense.

11 Q Okay. I didn't understand what you just said. I'm
12 sorry.

13 A What I was saying that he was talking 'bout the
14 accident, like, accident. You asked me -- what you just
15 had said [sic]?

16 Q Okay. What -- did he discuss self-defense with you?

17 A Yes, ma'am.

18 Q And why did he tell you it couldn't be self-defense?

19 A Because -- I -- I can't remember, really. I can't
20 remember.

21 Q Well, is it because you were buying drugs?

22 MR. SAVILLE: Objection, Your Honor. Leading.

23 THE COURT: Sustained.

24 Q You just don't remember.

25 A I can't remember.

1 Q He did discuss accident with you?

2 A Yes, ma'am.

3 Q Okay. How about voluntary manslaughter?

4 A No. No, ma'am.

5 Q When you and I talked and I explained to you
6 voluntary manslaughter being a lesser included offense of
7 murder --

8 A Yes, ma'am?

9 Q -- I went over with you all the elements of voluntary
10 manslaughter, right?

11 A Yes, ma'am.

12 Q Had you ever been over those carefully with your
13 defense attorneys?

14 A No, ma'am.

15 Q Had they ever explained to you what sudden heat of
16 passion and sufficient legal provocation were?

17 A No, ma'am.

18 Q Had they ever discussed with you whether the facts in
19 your case might -- could be argued to fit the definition
20 of voluntary manslaughter?

21 A No, ma'am.

22 Q How 'bout involuntary manslaughter?

23 A No, ma'am.

24 Q Do you even know what involuntary manslaughter is or
25 did you know until I explained it to you?

DIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 242

1 A I only know it 'til you explained it to me.

2 Q Okay. So nobody had ever discussed that with you.

3 A No, ma'am.

4 Q Okay. Now, you remember at trial when they talked
5 about the inference of malice from the use of a gun?

6 A Yes, ma'am.

7 Q And they were talking about some new case called
8 *Belcher*, remember that?

9 A Yes, ma'am.

10 Q Did they ever explain to you that if you did not
11 testify and tell your side --

12 A Yes, ma'am.

13 Q -- that there was not gonna be a factual basis on the
14 record for asking for jury instructions on any of those
15 things?

16 A I can't really remember.

17 Q Sorry?

18 A I can't really remember --

19 Q Okay.

20 A -- back then.

21 Q Do you -- when they talked to you about testifying --

22 -

23 A Yes, ma'am?

24 Q -- did they ever tell you the good and the bad side
25 of testifying?

1 A Yes, ma'am.

2 Q A little bit?

3 A Yes, ma'am.

4 Q Okay. Well, when they were discussing that with you,
5 did they ever tell you there were certain things about
6 your story that if you told those things in court, would
7 give the judge a reason to give jury instructions that
8 might be helpful to you?

9 A Yes, ma'am.

10 Q Okay.

11 A Yes, ma'am.

12 Q But did they tell you that if you didn't testify,
13 there wasn't gonna be a way to get those charges?

14 A No. They didn't told [sic] me that.

15 Q Okay. And did they tell you that if you didn't
16 testify, there wasn't gonna be a legal reason for the
17 judge not to charge about the inference of malice from the
18 use of a deadly weapon?

19 A Yes, ma'am.

20 Q Okay. Did they tell you that?

21 A No, ma'am.

22 Q Okay. Now, I know this is hard, but I have to ask.
23 You do understand that if His Honor decides -- and he's
24 not gonna decide today. Don't -- don't amp up your
25 nervous. It's not gonna be decided today.

1 A Yes, ma'am.

2 Q But if he decides that he's gonna grant you a new
3 trial --

4 A Yes, ma'am?

5 Q -- that's not just a "you go home card."

6 A Yes, ma'am.

7 Q It's -- you'd -- you'd be in jail. The odds are not
8 good of you getting bond ---

9 A Yes, ma'am.

10 Q --- and you'd get a new trial.

11 A Yes, ma'am.

12 Q And I've explained to you that there is a
13 constitutional right to a jury trial, but there's no
14 constitutional right to a plea bargain, right?

15 A Yes, ma'am.

16 Q So there's nothing to say the Solicitor's Office
17 would even chose to bargain with you if it were remanded
18 for a new trial, you know that.

19 A Yes, ma'am.

20 Q Have I also told you that if you were re-tried and if
21 the wrong jury on the wrong day you've -- we're convicted
22 again of murder ---

23 A Yes, ma'am.

24 Q --- the judge at that trial would not be bound by the
25 35- year sentence you got last time.

1 A Yes, ma'am.

2 Q I've explained to you, have I not --

3 A Yes, ma'am.

4 Q -- that if the same judge were to try it, if he
5 wanted to give you more than 35 years, he would have to
6 put a reason on the record for going higher than he
7 originally gave you.

8 A Yes, ma'am.

9 Q Right? But if it was a different judge, what did I
10 tell you?

11 A (No response.)

12 Q What did I tell you you could get? What? Anything
13 up to the statutory maximum, right?

14 A Yes, ma'am.

15 Q Which is what?

16 A Life.

17 Q Life. I been hammering that on you for about a year
18 and half now. Are you sure you wanna take that risk?

19 A I mean, I ain't for getting life.

20 Q Well, what I'm saying is you -- if -- if we win on
21 your trial --

22 A Yes, ma'am?

23 Q -- you -- you could get acquitted. I mean, a jury
24 might find you -- might -- not guilty.

25 A Yes, ma'am.

1 Q And I have told you that in my experience, I have
2 very rarely get longer sentences, and I've never had
3 someone get a longer sentence in one of my cases. But
4 that technically, it was possible, right?

5 A Yes, ma'am.

6 Q And -- and I'm asking you in the interest of having
7 your new day of trial, are you willing to take that risk?

8 A Yes, ma'am.

9 Q Okay. Now we're clear.

10 When this happened --

11 A Yes, ma'am.

12 Q -- you and Alston got out of the car.

13 A Yes, ma'am.

14 Q Who got out of the car first, Gibson?

15 A Yes. And Alston.

16 Q Okay.

17 A Yes, ma'am.

18 Q And I want to let you just tell your story, but you -
19 - you know what's happening? You're getting nervous and
20 so you're getting like this. You're getting real quiet.
21 Okay.

22 A Yes, ma'am.

23 Q I -- I -- I -- just you gotta speak up. Okay.

24 A Yes, ma'am.

25 Q Gibson and Alston got out of the car. What happened

1 next?

2 A Then I got -- they came back to the car and was
3 arguing about the drugs were trash. Him and Alston was
4 arguing. So I got out of the car and I was trying to get
5 the weed. I was trying to get some weed.

6 Q Okay. So they came back and said they weren't gonna
7 buy any 'cause it was trashy?

8 A Yes.

9 Q And are you saying that you decided you wanted to buy
10 a little even if they thought it wasn't good?

11 A Yes. Yes, ma'am.

12 Q Little bit of bad weed's better than no weed at all?

13 A Yes, ma'am.

14 Q Okay. So what happened then? You approached the
15 car?

16 A I approached the car and he was -- he was, like, mad.

17 Q Yeah. Let's -- let's back up. Stop for a minute.

18 A Yes, ma'am.

19 Q When Alston left the car --

20 A Yes, ma'am.

21 Q Gib -- Gibson had sat down in the car first, right?

22 A Yes.

23 Q And then he got up and walked away and let Alston sit
24 down in the car.

25 A Alston didn't sit down in the car.

1 Q Okay. What was Alston doing, standing, talking
2 through a window, through the door? You gotta paint the
3 picture for us.

4 A He -- he -- he was talking through the door, like,
5 basically, standing in the door, like, leaning in the
6 door. He was talking through the door ---

7 Q Okay.

8 A --- with his hands out.

9 Q Stop. Paint a picture for me.

10 A Yes.

11 Q When Alston walked up, did he open the car door or
12 was it already open? Had Gibson left the door open?

13 A Yeah. Gibson left the door open.

14 Q Okay. So Gibson left the door open.

15 A Yeah.

16 Q Let's -- let's talk about this for a second. When
17 y'all got there --

18 A Yes, ma'am.

19 Q -- who was driving?

20 A Thompson.

21 Q And Thompson backed into the parking spot, right?

22 A He backed into the parking spot.

23 Q Okay. So then when -- when Mr. Bailey got there, he
24 pulled in next to y'all.

25 A Yes.

1 Q Okay. So y'all's car was backed in and his was
2 straight in.

3 A Yes, ma'am.

4 Q Okay. So when Alston got out -- Gibson got out of
5 the car and left the door ajar and Alston just stood in
6 that open passenger door, right --

7 A Yes. Yes, ma'am.

8 Q -- and talked and then next thing you know, Alston
9 came back to the car.

10 A Yes, ma'am.

11 Q Gibson didn't come back to the car, did he?

12 A No, ma'am.

13 Q Okay. He just walked off?

14 A Yeah. He was standing, like, by the car, like, he
15 was standing, like, in the front of the car, by the car.

16 Q Okay. So Alston came back -- was coming back to the
17 car, and Gibson was standing right by the car.

18 A Yes, ma'am.

19 Q All right. And were you already walking in that
20 direction when Alston reached the car, or did you wait for
21 Alston to get to the car before you walked over there?

22 A No. I was like -- I wait til he get back to the car.
23 He was already, like, to the car. It was -- it was so
24 close, though.

25 Q Okay. Yeah. I mean, when the cars are next to each

1 other, I'm not implying it's like a hike. But I mean
2 they're right there.

3 A Yes, ma'am.

4 Q And -- and so Gibson and Alston are talking about it
5 being trashy weed and he didn't want any of that weed
6 'cause it was bad, right?

7 A Yes. Yes, ma'am.

8 Q I'm paraphrasing, but that -- right?

9 A Yes, ma'am.

10 Q Okay. So you decided you were gonna talk to Bailey
11 yourself.

12 A Yes, ma'am.

13 MR. SAVILLE: Objection. Leading.

14 THE COURT: Rephrase your question.

15 Q Did you decide to approach the car yourself?

16 A Yes, ma'am.

17 Q For what purpose?

18 A I was trying to buy marijuana. I was trying to get
19 some marijuana.

20 Q Okay. We won't reinvent that wheel. That -- that
21 was your purpose.

22 A Yes, ma'am.

23 Q When you walked up to the car, what did you say to
24 Bailey?

25 A I was like, I'm just trying to buy some weed, man.

1 Like, I ain't never seen the weed or anything like that.

2 And he was like just -- he was mad. He was mad. He was
3 aggressive. He was aggressive towards me and I never even
4 talked to him.

5 Q Okay. Did you tell him that, look, I don't care
6 whether Alston wants it or not, I'll take it. I want
7 some.

8 A That's what I basically was telling him, and he just
9 been aggressive. He was mad.

10 Q So when you say he was "aggressive," what do you mean
11 by "aggressive"?

12 A I mean, he just -- "Man, How -- how did my weed get
13 trashy" and stuff. Like, "How my weed get trashy? Like,
14 "Why would you call me all of a sudden," like, he was
15 saying stuff like that. "Why would you call me if my weed
16 trashy?" Like -- he was, like, aggressive, like. He just
17 been talking 'bout the weed. He was, like, why you -- you
18 know.

19 Q Did he act like he ---

20 MR. SAVILLE: Objection. Hearsay.

21 MS. SHURLING: Sir?

22 THE COURT: Overruled. Go ahead.

23 Q What did your -- I -- I'm -- I'm not a good artist,
24 but if you got the car -- his door was closed, right?

25 A Yes. His door was closed.

1 Q And passenger door was open?

2 A Yes, ma'am.

3 Q Were you standing between the -- on the left side of
4 the open car door?

5 A Yes. I was in, like -- you know where the car door
6 -- where the car door open at, I was in at, like, right
7 there. In it, like right there. I was there.

8 Q And leaning in talking to Bailey.

9 A Leaning in talking to him.

10 Q What happened next?

11 A And he start, like, reaching to -- by his console.
12 He was reaching by his console. He was reaching by his
13 console. He was reaching -- he was reaching by it ---

14 Q Go ahead.

15 A He was reaching by his console -- he wasn't really
16 talk, so he was reaching by the console there.

17 Q At the same time did he do anything with the car?

18 A Yes. He had, like -- he slammed, like -- like he had
19 a floor shift in the car. So he knock it in reverse. And
20 when he knocked it in reverse, that's when he started
21 hitting the gas and it started, like, hitting me with the
22 door, like, it was knocking me out the way and he was
23 hitting the gas hard.

24 So the car go hit the other -- like, hit our car a
25 little bit, so it had me jammed in it. Only time I could

1 get out we started tussling. We was tussling over the
2 weapon that he had that he grabbed from beside the
3 console.

4 Q Back up. You jumping way ahead. We gotta do this in
5 baby steps. We ---

6 A Yes, ma'am.

7 Q --- gonna try to do it quickly, but we gotta get it
8 all in.

9 A Yes, ma'am.

10 Q When you saw him reaching for the console --

11 A Yes, ma'am.

12 Q -- did you look where he was reaching?

13 A I kinda -- it was dark, but I seen where he was
14 reaching, Like, he was reaching, like, real close by his
15 seat, like.

16 Q And what did you see him grab?

17 A Like, a pistol. It was a pistol. He grabbed a
18 pistol and he, like, was pulling up and we started out
19 tussling over this pistol.

20 Q And at the same time the car's --

21 A In reverse.

22 Q -- rolling and --

23 You can't talk at the same time as me.

24 A I'm sorry.

25 Q And I know I been messing up and doing it all day,

1 but just try to be better than me.

2 A Yes, ma'am.

3 Q The car's rolling backwards?

4 A Yes, ma'am.

5 Q And you're in the wedge between the open door of the
6 car.

7 A Yes, ma'am?

8 Q And you're tussling with him for the gun.

9 A I'm tussling with him for the gun.

10 Q And then what happened?

11 A Then just -- a shot went off and I just been scared.
12 I was nervous. I didn't know what to think. I was just
13 trying to get the gun.

14 Q While y'all are tussling from -- tussling, the gun
15 went off.

16 A Yes, ma'am.

17 Q Whose hands were on the gun when you were tussling?

18 A Both our hands was on the gun.

19 Q Okay. And you were trying to take it away from him.

20 A Yes, ma'am.

21 Q And -- and you hear a "pop"?

22 A Yes. I heard a "pop."

23 Q And at that point had you managed to -- to get
24 control of the weapon?

25 A I had control of the weapon and that's when I ---

1 Q Okay. Did you know that Bailey had been hit?

2 A No, ma'am.

3 Q Did he --

4 A I ---

5 Q -- yell out anything or shout I've been hit or
6 anything?

7 A No, ma'am.

8 Q Did you see any blood?

9 A No, ma'am.

10 Q What did you do next?

11 A I just jumped out. I was in shock. I was nervous.
12 I just been trying to get control of the gun so he won't
13 shoot me. I just been, like, I was trying to get control
14 of the gun.

15 Q So you had the gun in your hand --

16 A And I just got back in the car. And when I got back
17 in the car, Pinckney went like, "Let me get the gun."

18 Q Okay. When you took that gun --

19 MR. SAVILLE: Objection. Hearsay.

20 MS. SHURLING: Pardon?

21 MR. SAVILLE: Objection. Hearsay.

22 THE COURT: Overruled. Go ahead.

23 Q When you took that gun --

24 A Yes, ma'am.

25 Q -- what were you thinking? Why'd you take it with

1 you?

2 A 'Cause, like, I had my fingerprints on it. I didn't
3 like -- it had my fingerprints on it, and I just getting
4 the gun from him. I didn't want him to shoot me.

5 Q Okay. You didn't know he was shot, did you?

6 A No, ma'am.

7 Q And he'd been reaching for that gun before you took
8 it -- I mean, he was grabbing the gun before you got into
9 it ---

10 A Yes ---

11 Q --- with him, right?

12 A Yes, ma'am.

13 Q Were -- you -- you just said it. You were afraid he
14 was gonna shoot you?

15 A I was afraid he was gonna shoot me. Like, I just had
16 to get control of the gun. If I didn't take the gun, he
17 probably woulda shoot me [sic].

18 Q But to be honest, you were also afraid that your
19 prints might be on it, right?

20 A Yes. Yes, ma'am.

21 Q And again, you were 16 years old, weren't you?

22 A I was 16.

23 Q Had you ever been in trouble?

24 A I never been in trouble.

25 Q No prior criminal record?

1 A No prior criminal record. I never been ---

2 Q Okay.

3 A --- in trouble.

4 Q And Pinckney was about 24?

5 A Twenty-four, twenty-three.

6 Q So he was seven or eight years older than you.

7 A Yes, ma'am.

8 Q And he said, "Gimme that gun."

9 A Yes. He's like, "Gimme that gun."

10 Q Okay.

11 A And I didn't see it any more.

12 Q If I don't ask it, he's going to. Why give it to
13 him? Why not take it and hide it yourself?

14 A 'Cause I felt like he was older than me. Like, I
15 trusted him. He was like, "Give me the gun," and I was
16 home. So that's ---

17 Q Did you think Pinckney would -- you trusted him to
18 hide it better than you could or ...

19 A Yes, ma'am. He was older than me. I just looking up
20 to him. He was like -- I was young.

21 Q Okay.

22 A So ...

23 Q And while all this is -- same time this is going on,
24 Bailey's literally driven away from the scene, right?

25 A Yes, ma'am.

1 Q So you didn't know he'd been hit --

2 A No, ma'am.

3 Q -- and that -- him driving away sort of reinforced
4 you thinking he must be okay.

5 A Yes, ma'am.

6 Q Okay. Why didn't you just call the police?

7 A I was scared. I was nervous. I was young. Like, I
8 didn't know. I just been nervous. I was scared, and
9 being a teenager, like, I didn't know what to do.

10 Q Did the fact that you were buying a little bit of
11 marijuana have something to do with it?

12 A That's all I was trying to do was buy a little bit of
13 marijuana.

14 Q But I mean, were you scared that if you told the
15 police that you were there to buy marijuana ---

16 A Marijuana -- I would probably go to jail or something
17 like --

18 Q Were you also afraid they might not believe you about
19 anything else once you told them that's why you were
20 there?

21 A Yes, ma'am.

22 Q Okay. Is it your testimony that you told Mr. Johnson
23 all of this?

24 A Yes. I told him and I told him about the tussle.
25 Like, I told him, like, everything I told you. I -- I

1 don't know, like -- if he acting like he can't remember,
2 that's what it seem like to me, you know, listening, like,
3 he can't remember that much.

4 Q Okay. But did he -- did he tell you why he didn't
5 want you to tell the truth and tell what happened?

6 A Nah. He -- he just been telling me, like, it would
7 have got -- something about the stand. He would say
8 something about the stand. He was, like, it would've
9 been, you know, cross-examine me, try to mix me up and
10 stuff like that. That's ---

11 Q Excuse me. I've got to interrupt myself. I just
12 said something in a way that came out in a way I didn't
13 mean it to. I'm not suggesting that he ever told you to
14 tell anything that wasn't the truth either.

15 A Yeah.

16 Q What I'm saying is you -- you knew that you had a
17 right not to testify, right?

18 A Yes, ma'am.

19 Q If you didn't wanna testify, you didn't have to.

20 A Yes, ma'am.

21 Q And so he's saying just don't testify.

22 A Yes, ma'am, basically.

23 Q Okay. Now, we gotta cover something else, though.
24 To be fair, you were scared to testify, weren't you?

25 A Yes, ma'am.

1 Q And what had he told you was gonna be so bad about
2 you testifying?

3 A He said that it would've gotten hot. He was
4 basically saying, like, 500 degrees. That's what he said.
5 He -- he said that they would've cross-examined me and mix
6 me up or try to mix my words up.

7 Q Okay.

8 A Yes, ma'am.

9 Q Gonna be hot like 500 degrees?

10 A Yes, ma'am.

11 Q And you were scared they were just gonna turn you
12 upside down?

13 A I just got nervous. Like, this my first time I'd
14 ever been through this.

15 Q Okay.

16 A Yes, ma'am.

17 Q Mr. Ford [sic], if you had understood then the things
18 that I have helped you understand now --

19 A Yes, ma'am.

20 Q -- about self defense --

21 A Yes, ma'am.

22 Q -- accident, voluntary manslaughter --

23 A Yes, ma'am.

24 Q -- would you have wanted to testify?

25 A Yes, ma'am.

1 Q If you woulda understood that the jury would never
2 have a chance to even consider whether it was maybe self-
3 defense or an accident or at least the lesser included of
4 voluntary manslaughter, if you didn't testify and put a
5 factual basis for the request for those charges on the
6 record, would you have testified?

7 A Yes, ma'am.

8 Q Scared or not, you would've done it?

9 A Yes, ma'am.

10 Q You would've overcome your fears and done it?

11 A Yes, ma'am.

12 Q And if -- did you ever understand that if you didn't
13 testify and make a case, so to speak, for at least one or
14 more of those things, that the Court was gonna tell the
15 jury that the very fact that a weapon was involved in this
16 killing was something they could infer malice from?

17 A Yes, ma'am?

18 Q If you had understood that, would you have insisted
19 on getting up and telling your side of the story?

20 A Yes, ma'am.

21 Q Okay. Now, I talk too much a lot, and I know that.
22 Now, I've talked way lot with you.

23 A Yes, ma'am.

24 Q I've told you over and over again the benefits and
25 the risks of coming forward and telling your story here

1 today, haven't I?

2 A Yes, ma'am.

3 Q And I told you that if we're blessed with a ruling
4 that gets you a new trial, heaven help you if you try to
5 get up and not tell same truth then, that they'll be able
6 to use your testimony here today --

7 A Yes, ma'am.

8 Q -- to impeach you with it.

9 A Yes, ma'am. But it's the truth.

10 Q Okay. But ---

11 A Yes, ma'am.

12 Q But I have warned you about that.

13 A Yes, ma'am.

14 Q And just to protect -- this one's for me. I made
15 sure that, just like at trial, you didn't have any
16 obligation to testify, that nobody could make you testify
17 --

18 A Yes, ma'am.

19 Q -- I told you nobody could make you testify here
20 today, didn't I?

21 A Yes, ma'am.

22 Q And I told you if you wanted to get up and tell the
23 truth, you had to do it for yourself --

24 A For myself.

25 Q -- and not to do it for who?

1 A Nobody else.

2 Q Including me.

3 A Yes, ma'am.

4 Q Okay. Can you think of any -- well, let's -- let's
5 -- let's go back for a minute. You were questioned by the
6 police?

7 A No, ma'am.

8 Q Well, I mean -- let me rephrase that. They picked
9 you up and they read you your rights, right?

10 A Yes. Yes, ma'am.

11 Q And you signed this document that's been marked
12 Applicant's 5 acknowledging you'd been given your Miranda
13 warnings, right?

14 A Yes, ma'am.

15 Q But by that time your family had real quickly hired
16 you a lawyer, Mr. Virgin Johnson.

17 A Yes, ma'am.

18 Q And -- and he advised you to just keep your mouth
19 shut.

20 A Yes, ma'am.

21 Q Okay. When you did not talk to the police about what
22 happened, were you just purely doing what your lawyer told
23 you?

24 A Yes, ma'am. I basically, like, listen to what he
25 told me 'cause he already was hired.

1 Q Okay. How soon before the trial did you -- did you
2 -- did you have meetings before the trial where you sat
3 down with your lawyers and talked about whether or not
4 they were gonna think you should testify and what
5 considerations would go into play? How -- how long before
6 the trial did they sit down with you and talk with you
7 about that decision?

8 A It wasn't -- it wasn't, like, a lot of times. It was
9 a lot of time they'd sit down and talk to me, but it --
10 like, he didn't even talk to my family about it and stuff.
11 And he was, like, he didn't think I should be testifying.
12 Like, I didn't -- he -- he think that I shouldn't testify
13 because that they woulda cross-examined me. Basically, I
14 was -- like, I was nervous and scared. Basically, that's
15 what had been going on.

16 Q And while we're at it, I warned you that this lawyer
17 right here is gonna have a shot at you, too, right?

18 A Yes, ma'am.

19 Q And he's mean.

20 A Yes, ma'am.

21 Q I'm just kidding. But you know, it -- this is court
22 like anything else. And he's gonna have his shot at you,
23 and I warned you about that, right?

24 A Yes, ma'am.

25 Q Okay. How -- what I'm asking you is when did that

1 conversation -- with your family and all that, when did
2 that take place?

3 A It was ---

4 Q Was it like the day before the trial or ...

5 A It was like while the trial was going on. It was
6 like a little break, a 30-minute break or something like
7 that.

8 Q Okay. So you never had discussions before the trial
9 started about that decision?

10 A No, ma'am.

11 Q So it was not until in the middle of the trial that
12 they talked to you about it.

13 A Yes, ma'am.

14 Q Okay. And is anybody in your family a lawyer?

15 A No, ma'am.

16 Q Okay. Do they know -- do -- you're a 16-year-old boy
17 with no background with the law, but any of them know
18 anymore about the law than you do to your knowledge?

19 A No, ma'am.

20 Q Okay. And they were hearing the same advice you were
21 hearing about it getting 500 degrees hot in that
22 courtroom?

23 A Yes, ma'am.

24 Q Okay. Julian, barring extraordinary circumstances
25 not likely to occur, this is probably the only PCR you

1 will have. Okay?

2 A Yes, ma'am.

3 Q I wanna be real clear about that, and I have gone
4 over a long list of issues in the last two days. In my
5 opinion, the vast majority of those are legal issues that
6 His Honor can decide based on the record and the PCR
7 testimony from the lawyers.

8 A Yes, ma'am.

9 Q Okay? So that -- that really doesn't require your
10 input. But to the extent that I have discussed those
11 issues with you, are -- are the -- do -- are those issues
12 that you would like your lawyer to have handled
13 differently?

14 A (No response.)

15 Q You don't understand what I've been saying?

16 A No, ma'am.

17 Q We'll just leave the legal issues for the judge.

18 Is there any issue that you wanted me to raise that I
19 have neglected to touch on yesterday or today?

20 A No, ma'am.

21 Q And don't be -- don't be worried about hurting my
22 feelings. I -- this is your case, your trial. I want --
23 if you think there's an issue that His Honor needs to
24 consider that I haven't covered, speak up.

25 A No, ma'am.

1 Q Then I want you to do me one favor.

2 A Yes, ma'am.

3 Q Sit up, sit close to that microphone.

4 A Yes, ma'am.

5 Q Listen to the State's questions carefully.

6 A Yes, ma'am.

7 Q If you don't understand a question ---

8 A Right.

9 Q --- don't answer it.

10 A Yes, ma'am.

11 Q If you don't understand it, speak up, say you don't
12 understand it. Ask him to repeat it or to clarify it, and
13 he will do so.

14 A Yes, ma'am.

15 Q Okay? If -- if you don't understand again, ask --
16 don't answer questions until you understand what's being
17 asked of you. Okay?

18 A Yes, ma'am.

19 Q You get in trouble that way.

20 A Yes, ma'am.

21 Q Tell the truth, that's all I'm asking of you, and
22 answer all his questions.

23 A Yes, ma'am.

24 Q Unless I stand up and object.

25 A Yes, ma'am.

1 Q And if I do, then you wait for His Honor to rule on
2 my objection before you open your mouth. Okay?

3 A Yes, ma'am.

4 Q All right.

5 MS. SHURLING: He's all yours.

6 THE COURT: Cross-examination.

7 CROSS-EXAMINATION

8 BY MR. SAVILLE:

9 Q Mr. Young, do you remember telling Judge Dickson that
10 you were truly remorseful and asking the Court for mercy?

11 A Yes. Yes, sir.

12 Q What were you remorseful for?

13 A Think -- it was, like, my lawyer told me to say that.
14 Mr. Johnson told me to say that.

15 Q Okay. So you -- you were just kinda going with the
16 flow?

17 A Yes.

18 Q Okay. Do you remember swearing on the Bible to tell
19 the truth when you went to court?

20 A Here today?

21 Q When you went to court -- no. Okay. I gotcha. Are
22 you just going through the motions here today?

23 A Sir? Say that again.

24 Q Are you just going through the motions here today?

25 A The motions?

1 Q Are you just going through the motions here today
2 like you were during your sentencing?

3 A I don't understand ---

4 MS. SHURLING: Your Honor, I have to object to that
5 one. He's comparing apples and oranges.

6 THE COURT: Overruled. You know, if you can answer a
7 question answer it. If not, if you don't understand it,
8 so be it.

9 A I don't understand it, sir.

10 Q Okay. So -- so you're not truly remorseful for this?

11 A Like, I -- I been 16 years old. I was 17 in trial,
12 so I didn't understand what was going on basically.

13 Q Okay.

14 A He just told me to say that.

15 Q Okay. Now, do you feel like Mr. Johnson kinda forced
16 you not to testify?

17 A A little 'cause if he had given me, like, some
18 understanding, I woulda testified. Like, what was going
19 on. I was young.

20 Q Sure.

21 A I never been in trouble.

22 Q And do you remember telling Judge Dickson that it was
23 your decision not to testify?

24 A I can't remember.

25 Q Okay. But you remember the things that your lawyer

1 told you before you told Judge Dickson those things.

2 A I can't remember.

3 Q Okay. Now, did you tell Mr. Johnson that you saw Mr.
4 Bailey reaching for his console in his car?

5 A Yes. I -- I -- I -- like, I can't remember that much
6 back, but I can remember, like, I was telling him that.

7 Q Okay. Didn't you also tell Ms. Shurling that the
8 only facts Mr. Johnson wanted to hear was that the gun
9 would never be found?

10 A Say that again.

11 Q Didn't you also tell Ms. Shurling that the only facts
12 that Mr. Johnson wanted to hear was that the gun would
13 never be found?

14 A Yes.

15 Q But then you're saying that you also told him that
16 the victim was reaching for the console?

17 A I'm not understanding what you're saying, sir.

18 Q Doesn't -- doesn't it sound like y'all talked about
19 the facts a little bit more than just that the gun
20 wouldn't be found.

21 A I -- I'm not understanding, like, where you're coming
22 from. I don't understand.

23 Q If you don't understand, you don't understand. Fair
24 enough.

25 Was it your decision to approach the green Monte

1 Carlo?

2 A Yes, I was trying to buy some marijuana.

3 Q Okay. Okay. Were you pulled into the Monte Carlo or
4 you reached into the Monte Carlo?

5 A Like, we was -- like, we was talking at first until
6 he start going to his console. That's when it came to a
7 -- like, his aggressiveness. Like, he was aggressive
8 like. He was -- like, I don't know what was going through
9 his mind, like, he was aggressive. That's it. He was
10 aggressive. Like he didn't trust nothing 'cause he saying
11 the weed was trash. Like, I'm -- I don't know what else
12 to say.

13 Q Okay. So him reaching for the center console scared
14 you 'cause you were thinking he might be pulling a gun.

15 A He did pull a gun, sir.

16 Q Okay. Why would he pull a gun at the same time as he
17 was trying to back away from you?

18 A 'Cause the car was already in reverse. When he got
19 to the scene, it was in reverse. He had it in reverse.
20 It's a floor shifter.

21 Q So he's backing away, and then he pulls a gun on you?

22 A Sir, before he even back away, he was getting the gun
23 out. All he had to do was grab the console.

24 Q Okay.

25 A Yes, sir.

1 Q Okay. And you testified that you were -- you felt
2 like you were kinda trapped in a car?

3 A Yes.

4 Q Okay. So you were able to free yourself from the car
5 while removing the gun from Mr. Bailey while Mr. Bailey
6 hit the car in reverse.

7 A Oh, I'm not understanding. Would you say that again?

8 Q Sure. So you were able to free yourself from being
9 trapped in the car, all the while wrestle a gun away from
10 Mr. Bailey, all the while he is able to start backing the
11 car up.

12 A The only time I gotta free myself been when the door
13 got between -- like, after the door got out in the open
14 and I get front of the car that we was riding in 'cause
15 the door was tangled up with the car that we were driving.

16 Q Okay. And do you remember there was some testimony
17 from witnesses that they had heard the gun shot before the
18 car was backing up, correct?

19 A Say that again.

20 Q There was some testimony that witnesses heard the
21 gunshot before they saw the car back away, correct?

22 A No. I didn't -- I don't know nothing 'bout that
23 right there.

24 Q So it's your testimony that the car was backing away
25 before the gunshot?

1 A It's my testimony that the car was backing -- when it
2 -- when it was backing away that's when it happened 'cause
3 we was tussling over to his gun. When we was tussling
4 over his gun, that's when it came out. After the door got
5 untangled, like, I didn't open in front of my car.

6 Q Yes, sir.

7 MR. SAVILLE: Beg the Court's indulgence, Your Honor.

8 THE COURT: Yes, sir.

9 (Brief pause.)

10 Q Are you nervous here today, Mr. Young?

11 A A little, but not too much.

12 Q Understandable. Were you a lot more nervous back
13 when you were 17 years old?

14 A Yes, 'cause I was young.

15 Q Yes, sir. And you testified that you only met with
16 Mr. Johnson a few times before the trial?

17 A Yes. I met with him, like, a few times, like, at the
18 County, when I was in the County.

19 Q But he was really close with your family, correct?

20 A You could say.

21 (Brief pause.)

22 Q So it's your testimony here today that nobody else
23 shot Mr. Bailey.

24 A No. No, sir.

25 Q It -- it was you, correct?

1 A I ain't gonna say it was me. I don't know who shot
2 who. We was tussling over a gun.

3 Q Okay.

4 A We was tussling over his gun, and so how can I shot
5 (sic) him if both of us got hands controlling the gun,
6 basically holding the gun?

7 Q Yes, sir. So were y'all, like, basically right on
8 top of each other as this was happening?

9 A We just been tussling over the gun, sir. Like, while
10 he was backing up with the car, trying to get the door
11 from caught up, we was tussling over it, like I said, and
12 it just was a "pop."

13 Q Okay.

14 A And I didn't know who was shot. I thought I was
15 shot. I didn't know who was shot, sir. Only thing I was
16 trying to do was get control of the gun.

17 Q Sure. So it was at very -- like, very close range,
18 the gunshot?

19 A No, sir.

20 Q You -- you don't -- you don't remember? I mean ...

21 A I don't know what you saying. At close range? I
22 don't know. I didn't know he was shot, sir.

23 Q Okay. Well, were you -- were you right -- basically
24 right on top of Mr. Bailey when the "pop" went off?

25 A No, I was not right on top of him.

1 Q Okay. But you must've been at arm's reach, right?

2 A I -- I don't understand.

3 Q If -- if you were tussling over a gun, I would
4 imagine that y'all were close enough to both be holding
5 the gun.

6 A Basically, he stayed on me, that -- like, what I'm
7 trying to say if I'm standing outside a car, I'm leaning
8 in, and he backing up and the door is clogged up on
9 another car, like, it gonna be scraping the other car and
10 that's like, in the time of he backing out, we just
11 tussling over the gun. Like, I don't understand, like,
12 that you saying. I'm telling you, like, we been tussling
13 over the gun, his gun.

14 Q Sure. No further questions. Thank you.

15 THE COURT: Any redirect?

16 MS. SHURLING: Very quickly.

17 REDIRECT EXAMINATION

18 BY MS. SHURLING:

19 Q When Mr. Bailey pulled in --

20 A Yes, ma'am?

21 Q -- did he park real close to where y'all were?

22 A Yes, ma'am, real close.

23 Q And so when the passenger door was opened --

24 A Yes, ma'am?

25 Q -- it's like my worst nightmare in a parking lot --

REDIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 276

1 his door was like hitting ---

2 A Yes.

3 Q --- the side of the car you were in.

4 A Yes. You couldn't open it that far.

5 Q Okay. How far -- was the door completely open or
6 just kinda partially open and hitting the other car?

7 A Hitting the other car. It was like --

8 Q Okay.

9 A -- pretty partially open. It was partially open.

10 Q Stand up for just a second.

11 (The witness complies.)

12 Q How tall are you?

13 A I'm about 6' 2."

14 Q Okay. Got long -- I'd ask you to show us your arms,
15 but you're shackled.

16 A Yes, ma'am.

17 Q You got long arms, don't you?

18 A Yes, ma'am.

19 Q Have a seat.

20 (The witness complies.)

21 Q So you're standing -- (indicates) this is the open
22 car door.

23 A Yes, ma'am.

24 Q And if you're standing here (indicates), if you
25 weren't leaning down, you couldn't see the man to talk to

REDIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 277
1 him, right?

2 A Yeah.

3 Q You'd be looking at the top of the car.

4 A Yes, ma'am.

5 Q So you were leaning down and in talking to Bailey.

6 A Yes, ma'am.

7 Q And is that -- and he's mad 'cause the other guys
8 insulted him, right?

9 A Yes, ma'am.

10 Q And when you say you wanna take some of his weed, you
11 -- you -- you don't care whether the other guy wants to
12 buy it or not, you wanna buy some.

13 A Yes, ma'am.

14 Q He's hot 'cause he's been insulted and he's mad.

15 A Yes, ma'am.

16 Q And when you keep -- you -- you 16. You want some
17 reefer. You keep trying to talk to him about it, he's
18 getting madder --

19 A Yes, ma'am.

20 Q -- and is that when you saw him reaching in the
21 console?

22 A Yes, ma'am. But he ---

23 Q Okay.

24 A --- but he probably was reaching before. I didn't
25 know. But I know he had his hand down and 'til he pull it

REDIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 278
1 up, that's when I realize --

2 Q That it was a gun.

3 A -- it was a gun.

4 Q Okay. And so you -- you're not sitting in the car
5 next to him, you're leaning in.

6 A I'm leaning in.

7 Q Okay. You and your big ol' long arms, you're
8 reaching in, trying to get control, gonna keep him from
9 shooting you.

10 A Yes, ma'am.

11 Q And at some point, "pop."

12 A "Pop."

13 Q Now, that moment when the "pop" went off, did -- did
14 that give you the opportunity to snatch it away from him?

15 A Yes, ma'am.

16 Q After -- after the shock of it having gone off.

17 A Yes, ma'am.

18 Q Okay. Now, you did not know he'd been shot.

19 A No, ma'am. He drove off.

20 Q So really, to this day, do you know whether -- when
21 that gun went off, do you know whether that shot hit him
22 or not?

23 A To the day now I realize it shot him.

24 Q Well, let's -- let's -- talk about that.

25 A Yeah.

REDIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 279

1 Q What you're saying is you ---

2 MR. SAVILLE: Objection. Asked and answered.

3 THE COURT: I'll allow it. Go ahead.

4 Q You've already said you did not know whether or not
5 he'd been hit.

6 A No, ma'am.

7 Q And he drove off.

8 A Yes, ma'am.

9 Q And he had an accident somewhere near there you've
10 heard people say.

11 A Yes, ma'am.

12 Q And they get to him and they find out he's bad
13 injured and he goes to the hospital.

14 A Yes, ma'am.

15 Q Okay. You don't know what may or may not have
16 happened to him after he left out of where you were,
17 right?

18 A Yes, ma'am.

19 Q But you acknowledge that, while wrestling with him
20 over the gun, there was a discharge, you don't know
21 whether he was hit or not.

22 A No, ma'am.

23 Q And you know, you can -- you can assume that that may
24 mean that shot hit him, but you don't know.

25 A I don't know. I was shocked and --

REDIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 280

1 Q Okay.

2 A -- trying to get control of the gun so he won't shoot
3 me.

4 Q He's reaching, you see the gun.

5 A Yes, ma'am.

6 Q You try to get control of it. Once you're reaching
7 for the weapon --

8 A Yes, ma'am.

9 Q -- is that when he threw it in reverse?

10 A That's when he hit it. Like, he throw his hand where
11 he grab it, but I was reaching for it.

12 Q That -- that thing on the floor board?

13 A Yes, ma'am.

14 Q So -- so he throws it in reverse after -- when you're
15 tussling for the gun.

16 A Yes. Like, not when we're tussling, but like ---

17 Q Okay. And if he had gone -- I mean, you're in the
18 wedge of the door.

19 A Yes, ma'am.

20 Q If he reversed much harder, all -- the -- the car and
21 the door would've hit you, right?

22 A Yes, ma'am. But the car next to the door, like, when
23 the door was partially open, the car -- our car was
24 basically, like, stopping the door, like, stopping it from
25 ...

REDIRECT EXAMINATION BY MS. SHURLING - JULIAN YOUNG 281

1 Q You've been talking to me too much. You're starting
2 to anticipate my questions. When he threw the car in
3 reverse --

4 A Yes, ma'am.

5 Q -- what's the only thing that stopped that car from
6 hitting you and knocking you down when he threw it in
7 reverse?

8 A The door. Like, the other car.

9 Q The fact that the door got stuck on the other car.

10 A Yes.

11 Q Hit the other car.

12 A Yes, ma'am.

13 Q Let me look at my notes real fast.

14 (Brief pause.)

15 Q Oh. When -- when they asked you -- pardon me. When
16 you weren't both speaking -- I apologize. When Mr.
17 Saville asked you the judge asked you if it was your
18 decision not to testify, right?

19 A Yes.

20 Q That decision was based on what you knew at that
21 time, right?

22 A Yes, ma'am.

23 Q That decision was based on what advice your lawyers
24 had given you.

25 A Yes, ma'am.

RE-CROSS-EXAMINATION BY MR. SAVILLE - JULIAN YOUNG 282

1 Q If your lawyers had told you all the things that I
2 have told you, would you have made a different decision?

3 A Yes, ma'am.

4 Q And would you have testified?

5 A Yes, ma'am.

6 Q Without any doubt?

7 A Without any doubt.

8 Q No further questions.

9 MR. SAVILLE: Just a brief opportunity, Your Honor?

10 THE COURT: Yes, sir.

11 RE-CROSS-EXAMINATION

12 BY MR. SAVILLE:

13 Q Now, Mr. Young, you just told Ms. Shurling that --
14 did you tell Ms. Shurling that after the shot, that's when
15 Mr. Bailey put the car in reverse?

16 A No. Like, it -- he didn't -- after the shot, he,
17 like -- say that again, sir.

18 Q Sure. Did you tell -- when did you tell Ms. Shurling
19 that Mr. Bailey put the car in reverse?

20 A He put the car in reverse -- when he put the car in
21 reverse, we was tugging over the gun. The shot ain't
22 happen 'til after we got in the front of my car.

23 Q Sure.

24 A In the front of the car we was riding in.

25 Q Yes, sir.

1 A So we was tugging over the gun the whole time. So
2 sir, like ...

3 Q Why did you tell me that the car was already in
4 reverse before the tussle when I was first asking you
5 about that?

6 A He -- it's a floor shifter, sir. All he had to do
7 was tap it. It's a floor shifter, so he ain't gotta do
8 much. All you gotta do is tap it and it gonna go in
9 reverse.

10 Q Sure. I think we're just disagreeing over at what
11 point he did it.

12 A I'm really not hearing clear what you saying.

13 Q That's all I have. Thank you.

14 THE COURT: Sir, you may step down. Thank you.

15 (The witness exits the stand.)

16 THE COURT: Ms. Shurling?

17 MS. SHURLING: Your Honor, in the report that was
18 done by SLED, they reference the various statements made
19 by the other people involved in this case, and I have
20 introduced Gibson's and the Miranda statement.

21 I can't remember which one at the moment, but one of
22 the others references the fact that Bailey's car door hit
23 and damaged the car next door to it. Given a few minutes
24 I can find it and I'd like to introduce that statement
25 into evidence, but it'll take me a few minutes to find it.

1 THE COURT: It's not part of the SLED ---

2 MS. SHURLING: Do you remember it?

3 MR. SAVILLE: Is it part of the ---

4 THE COURT: It's not a part of the --

5 MS. SHURLING: It's -- it -- it's in the statement,
6 but then I would need to introduce the attachment which
7 would be the actual statement of the individual.

8 If you -- if you give me one second I may -- I may
9 have found -- got it. Page 14 of the SLED report, the top
10 paragraph the agent puts in (as read): "Thompson told
11 SLED Agent Johnson that the green car hit the car he was
12 driving, although he did not put that in his statement."

13 So there is confirmation in the SLED report that the
14 driver of the car the young men arrived in, Thompson told
15 the authorities that Bailey's -- when Bailey was backing
16 up, that he hit their car.

17 THE COURT: Okay.

18 MS. SHURLING: And that's in what's already been
19 introduced. And I note that it -- it says he didn't put
20 it in a statement, so I don't need to put the statement
21 in.

22 THE COURT: All right.

23 MS. SHURLING: And that's it.

24 Your Honor, I would ask for leave of Court to order
25 the transcript of yesterday and today's proceedings. And

1 then to provide the Court with either memoranda or, if
2 Your Honor prefers, proposed orders in the -- memoranda in
3 the form of proposed orders.

4 It doesn't matter. I -- I prefer to do a memorandum
5 and then give you separate proposed order.

6 THE COURT: Let me ask this question first: Are all
7 of the parties -- in -- in your case in chief here, all of
8 the parties involved in this trial have testified. Do you
9 intend on calling -- I see Mr. Sorenson's still sitting in
10 here. Were you gonna call on any witnesses?

11 MR. SAVILLE: Your Honor, Mr. Sorenson is actually
12 just here viewing it, and so I -- I don't -- I don't think
13 we need to call any more witnesses.

14 THE COURT: Okay.

15 MS. SHURLING: I ---

16 THE COURT: Are you calling any more witnesses?

17 MS. SHURLING: No, sir, Your Honor. And I apologize.
18 Did not mean to appear to be preempting the AG, but I
19 thought I understood that I had called everyone that he
20 would've potentially called.

21 THE COURT: And I don't doubt that, but I -- I wasn't
22 aware of that.

23 MS. SHURLING: I understand.

24 THE COURT: That's why I asked that question. Okay.

25 MS. SHURLING: Thank you.

1 MR. SAVILLE: State rests, Your Honor.

2 THE COURT: All right. That's fine, I mean, I
3 anticipate, regardless of what my decision's gonna be, one
4 of you gonna appeal. So you're gonna have to type the
5 transcript anyway, Ms. Bonnie.

6 I -- I don't have a problem with y'all getting the
7 transcript. Y'all need to go through the proper channels
8 to order it from Ms. Bonnie. Make sure she gets paid for
9 it.

10 MS. SHURLING: Thank you, Your Honor. I -- I would
11 inquire -- in a recent case with Julie Coleman, we were
12 able to agree that we would split the cost of the
13 transcript between -- we would order it and split the cost
14 between the Applicant and the State?

15 THE COURT: I'm sure the --

16 MR. SAVILLE: I -- I can ask ---

17 THE COURT: I'm sure the ---

18 MR. SAVILLE: --- somebody who would know a little
19 bit more than I would about that, but ...

20 MS. SHURLING: Okay. Well ---

21 THE COURT: Y'all work that out. It's not -- it's
22 not something y'all need to talk with me about. Y'all can
23 figure it out.

24 MS. SHURLING: Thank you.

25 THE COURT: And I'll go from there.

1 MS. SHURLING: Yes, sir.

2 (Brief pause as the Court confers with the Court
3 Reporter.)

4 THE COURT: How much time you need after you get the
5 transcript? I don't like leaving MUA's on my -- matters
6 under advisement on my list forever and a day. In fact --
7 -

8 MS. SHURLING: I understand.

9 THE COURT: --- the Chief Justice got on us -- not me
10 'cause I don't keep them on mine, but he got on some for
11 having extended --

12 MS. SHURLING: Yes, sir.

13 THE COURT: -- matters under advisement for too long
14 a period of time.

15 How long do you need after -- if you get it within 60
16 days, how long you need?

17 MS. SHURLING: Your Honor, I'm not trying to be
18 evasive. It depends entirely on when my surgery is
19 scheduled for. I have an appointment with the orthopaedic
20 surgeon on the 18th to schedule my surgery. I -- I
21 anticipate -- I have been told that I should be able to be
22 back on light duty work after 10 days. So even if it is
23 soon, it -- I can read transcripts and write at home. SO
24 I'm not really worried about that. Thirty days after we
25 get the record?

1 THE COURT: Okay. That'll be fine.

2 MS. SHURLING: Thank you, sir.

3 THE COURT: If you all, Madam Clerk, would make me
4 copies of those exhibits ---

5 THE CLERK: Yes, sir.

6 THE COURT: --- so I can take the copies with me, I'd
7 appreciate it.

8 MS. SHURLING: And while you're at it, if you could
9 make me a set because for the appeal, I will need a copy
10 of the set that are marked as exhibits or Mr. Saville
11 will. If you make me a copy, I will scan them and make
12 him a copy as well.

13 THE CLERK: I can scan all of them and email them to
14 you if you'd like.

15 MS. SHURLING: That'd be fabulous.

16 THE CLERK: Okay.

17 THE COURT: All right. Very well.

18 MS. SHURLING: Thank you, Your Honor.

19 MR. SAVILLE: Thank you, Your Honor.

20 (Off the record at 2:31 p.m.)

21

22 -- END OF TRANSCRIPT OF RECORD --

23

24

25

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the First Circuit Court for Dorchester County, South Carolina, on the 4th and 5th days of October, 2018.

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

e/Bonnie H. Kelly

Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

January 17, 2019

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Julian Young, #352043,

2015-CP-38-00298

Applicant,

Order Granting Post-Conviction Relief

v.

State of South Carolina,

Respondent.

FILED FOR RECORD
WINNIE B. CLARK
2020 MAY 20 PM 1:06
CLERK OF COURT
ORANGEBURG, SC

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the April 2014 term of the Court of General Sessions for Orangeburg County for Murder (2011-GS-38-1833). Applicant was represented by Virgin P. Johnson, Esq. and Korey L. Williams, Esq. (hereinafter "Trial Counsel" and "Co-Counsel" respectively). The State was represented by Donald N. Sorenson, Esq. (hereinafter "Solicitor Sorenson") as lead chair and now-retired Harrison Bell ("Solicitor Bell") as second chair. On August 14, 2012, Applicant proceeded to trial before the Honorable Edgar W. Dickson. Applicant was found guilty on August 16, 2012. Judge Dickson sentenced Applicant to thirty-five (35) years' imprisonment for Murder.

Applicant filed a timely notice of appeal and filed a Final Brief of Appellant on December 17, 2013. On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction. Applicant filed a Petition for Writ of Certiorari on September 24, 2014, which was denied by the South Carolina Supreme Court on December 18, 2014.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons (hereinafter "Allegations"):

DCB
P. 10/9/15

1. Trial Counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun.
2. Trial Counsel was ineffective for neglecting to adequately cross-examine co-defendant, Ricky Gipson, concerning what deals he had reached with law enforcement in the Solicitor's Office in exchange for his testimony.
3. Trial Counsel was ineffective for neglecting to question witness, Ricky Gipson, concerning the penalties for dealing in the quantity of drugs admittedly involved in the transaction he set up between Austin and the Bailey.
4. Trial Counsel was ineffective for cross-examining witness, Ricky Gipson, concerning "felony murder" where said cross examination was inconsistent with South Carolina law and could readily have mislead the jury into believing that Applicant's involvement in a felony drug deal made him responsible for murder in connection with any death occurring in the course of said felony.
5. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his potential sentencing exposure for murder in connection with the death of the Bailey had the state elected to pursue the charge of murder against him under the concept of accomplice liability.
6. Trial Counsel was ineffective for failing to cross-examine witness, Ricky Gipson, concerning the amount of marijuana involved in the drug deal he allegedly set up between the Bailey and Applicant and his friends.
7. Trial Counsel was ineffective for failing to adequately counsel Applicant concerning the potential advantages and disadvantages of testifying in his own defense.

8. Trial Counsel was ineffective for neglecting to advise Applicant concerning the law as it relates to the defense of self-defense.
9. Trial Counsel was ineffective for neglecting to advise the Applicant thoroughly concerning the law as it relates to the lesser included offense of voluntary manslaughter.¹
10. Trial Counsel was ineffective for neglecting to advise the Applicant adequately concerning the law in South Carolina concerning the defense of accident.
11. Trial Counsel was ineffective for neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged.
12. Trial Counsel was ineffective for failing to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions.
13. Trial Counsel was ineffective for neglecting to adequately explain to the Applicant the fact that, absent testimony from him there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as the testimony presented during the State's case in chief did not provide evidence supporting those theories of the case.

¹ Applicant's allegations of ineffectiveness do not assert that Trial Counsel failed to advise Applicant of the law concerning Involuntary Manslaughter. However, PCR Counsel questioned Trial Counsel, without objection from the State, about Involuntary Manslaughter and whether he explained such to Applicant. Therefore, the court will address the application of Involuntary Manslaughter as a potential lesser included offense as it relates to Applicant. (PCR Hr'g Tr. p. 159, ln. 12-20); (PCR Hr'g Tr. p. 187, ln. 9-18); and, (PCR Hr'g Tr. p. 241, ln. 22-23).

14. Trial Counsel was ineffective for neglecting to cross-examine witness, Ricky Gipson, concerning what if any discussion he heard between Applicant and the Bailey.

15. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that he could have been charged with attempted armed robbery and was not.

16. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he was not charged with murder when under the State's theory of the case he could have faced that charge under the theory of accomplice liability.

17. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he had not been charged with any drug crime in connection with his admitted involvement in the conspiracy to purchase marijuana from the deceased.

18. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could have been charged with attempted armed robbery under at least one interpretation of the evidence presented by the State.

19. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that the State's failure to charge him with certain potential offenses in connection with this case constituted a benefit in exchange for his testimony.

20. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could still be charged with a number of other serious offenses in connection with this incident if the State elected to prosecute him under a theory of accomplice liability.

21. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that the State had not charged him with a number of serious offenses for which he could have been prosecuted under a theory of accomplice liability.
22. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his knowledge that the State could still elect to prosecute him for multiple serious felonies at some future date should they elect to prosecute him under a theory of accomplice liability.
23. Trial Counsel was ineffective for continuing to cross-examine State witness, Ricky Gipson concerning whether he had seen Applicant with a weapon during the incident in question after this witness had clearly testified that he had not seen Applicant with a weapon on that date.
24. Trial Counsel was ineffective for continuing to cross-examine Ricky Gipson concerning whether or not he had ever informed law enforcement that he saw Applicant with a weapon on the day in question where in one statement given to law enforcement, which was available to Counsel in the discovery process, Gipson claimed that either Applicant or his friend with him had a gun, and consequently Counsel's continued cross-examination on this point resulted in publication of testimony and evidence that was prejudicial to Applicant.
25. Trial Counsel was ineffective for failing to object to the State's characterization of witness Ray Anthony Austin's prior criminal record as "just a little bit of trouble in the past" where said characterization was intended to minimize the impact of this witness's prior record on the jury's determination of his credibility.

26. Trial Counsel was ineffective for failing to cross-examine Ray Anthony Austin concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.

27. Trial Counsel was ineffective for neglecting to adequately cross-examine Ray Anthony Austin concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.

28. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Ray Anthony Austin concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.

29. Trial Counsel erred in neglecting to object to a portion of the State's closing argument in which the prosecution violated the Applicant's Sixth Amendment right to be fully heard in his defense by improperly commenting on the strategies employed by Defense Counsel.

30. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution essentially argued that there was no legal basis for the position of defense that witness Gipson could have been charged with murder and other offenses.

31. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence by arguing that there was evidence that Applicant pulled the trigger and was trying to steal from Bailey.

32. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument in which the Solicitor stated that witness Gipson would not have taken "them"

over there to buy marijuana if he had known Applicant had a gun where there was nothing in evidence establishing that Applicant in fact had a gun.

33. Trial counsel was ineffective for neglecting to object to the manner in which a law enforcement officer was questioned concerning the chronology between when other State's witnesses were arrested, cooperated with an interview and then gave statements where the method in which the officer was questioned concerning each of the State's witnesses, following by the same testimony concerning Applicant which did not reference cooperation and the giving of a statement, amounted to an improper comment on Applicant's exercise of his right to remain silent.

34. Trial Counsel was ineffective for failing to cross-examine Maurice Thompson concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.

35. Trial counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.

36. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Maurice Thompson concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.

37. Trial Counsel was ineffective for failing to object to a closing argument made by the State in which the prosecution argued that witness Gipson ran from the scene because he

didn't have a gun on him where said argument addressed matters not in evidence and as such was highly improper.

38. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the Solicitor argued that "we know it's not a contact" in arguing that any suggestion that the Bailey shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's own expert witness, the pathologist, in this case.

39. Trial Counsel was ineffective for neglecting to use readily available evidence, disclosed to the defense in the discovery process, to impeach the State's witnesses and challenge the State's theory of the case.

40. Trial Counsel was ineffective for failing to clearly refute the State's position that a key witness for the State was Applicant's cousin.²

41. Trial Counsel was ineffective for failing to adequately argue that the statements made by the deceased did not have the degree of reliability typically afforded a dying declaration where the evidence before the Court verified that the description of the circumstances under which he was shot as a robbery was in fact suggested to him by the law enforcement officer questioning him.

42. Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the grounds that his attempt to conceal his identity from law enforcement by lying about his name provided direct evidence that he was not operating under the belief that his demise was imminent.

² This allegation was not argued before the Court during the PCR hearing and was referenced by PCR Counsel that it was her intention to withdraw this allegation. Therefore, it was not preserved and will not be discussed in this Order. (See PCR Hr'g Tr. p. 70, ln. 8-11).

42(A). Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement, by refusing to provide his name, constituted direct evidence that he had the capacity for reflective thought at the time of the "utterance."

43. Trial Counsel was ineffective for failing to adequately investigate any plea negotiations between the State and witnesses appearing for the prosecution at Applicant's trial.

44. Trial Counsel was ineffective for neglecting to adequately discuss potential plea negotiations with the State prior to Applicant's trial.

45. Trial Counsel was ineffective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation "everyone said he didn't carry a weapon" in response to a question concerning whether there was any evidence that the deceased carried a weapon for defense.³

Statement of Facts

Kendra Williams, a sergeant with the South Carolina State University (SC State) Police Department, was dispatched to 2195 Russell Street on the night of April 15, 2011. (Trial Tr. p. 82, ln. 3 - p. 83, ln. 5). Williams was called to the property around 11:14 p.m. because a vehicle had hit the building at 2195 Russell Street, which held offices for SC State. (Trial Tr. p. 83, ln. 6-25).

Williams arrived at the scene at 11:20 p.m. (Trial Tr. p. 83, ln. 6-12). When Williams arrived, she observed that a green car had struck the front of the building at 2195 Russell Street. (Trial Tr. p. 84, ln. 13-22). Williams observed "a lot of car pieces and a lot of bricks everywhere."

³ PCR Counsel, in her proposed order previously forwarded to this Court, adds Allegation 45 as an additional allegation of ineffective assistance of counsel which was not alleged in Applicant's first, second, or third amended Application. However, this Allegation was argued at the PCR hearing and was not objected to by the State. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 98 594 S.E.2d 485, 496 (Ct. App. 2004).

(Trial Tr. p. 84, ln. 19-20). There were already a number of public safety officers and an ambulance at the scene. (Trial Tr. p. 84, ln. 13-21).

Williams found the former occupant of the wrecked vehicle, a man named Jonathan Bailey, who is the Bailey in this case, in the ambulance. (Trial Tr. p. 87, ln. 11-22). Williams got in the back of the ambulance with Bailey and observed that he had a gunshot wound to the right chest area and another wound to the left chest area. (Trial Tr. p. 88, ln. 3-13). Williams observed that Bailey "was frantic, he was scared, terribly scared." (Trial Tr. p. 88, ln. 14-17). Bailey was rolling back and forth on a stretcher and complaining of the pain he was in. (Trial Tr. p. 88, ln. 14-21). According to Williams, he kept saying, "get me to the hospital, I'm going to die." (Trial Tr. p. 89, ln. 2-4).

Williams asked Bailey his name and if he was a student at SC State, but Bailey would not answer. (Trial Tr. p. 88, ln. 22 - p. 89, ln. 2). Bailey gave few audible responses. (Trial Tr. p. 93, ln. 22-23). Williams testified that she:

asked him if he was Queen's Village, he said he—well, he shook his head, yes. I asked him if he had been robbed, he shook his head, yes. I asked him if, how many, and he stuck his hand up and showed me four fingers. I asked him if he saw the weapon, he shook his head, yes. I asked him if it was a revolver, he shook his head, yes. When I asked him if he saw the color of the weapon, he just shook his head, no. He just kept saying he was in pain, get me to the hospital. It wasn't real easy to get anything out of him.

Trial Tr. p. 89, ln. 6-14.

The ambulance ultimately took Bailey to the helipad at The Regional Medical Center of Orangeburg where he was then transported to another hospital. (Trial Tr. p. 89, ln. 19-25). Bailey died later that night from his injuries. (Trial Tr. p. 90, ln. 1-3).

After getting information from Bailey, Williams contacted her supervisors and then a number of officers from the SC State Police Department responded to 2195 Russell Street and

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Queen's Village. (Trial Tr. p. 91, ln. 13 - p. 92, ln. 14). At this point, the two crime scenes consisted of the Queen's Village area, where Sergeant Williams believed the shooting had occurred based on the information she obtained from Bailey, and the Russel Street location where the ambulance had responded to treat Bailey due to the traffic accident report. Law enforcement secured both locations and began looking for evidence. (Trial Tr. p. 92, ln. 1-14).

Dustin Johnson, an officer with the SC State Police Department (hereinafter "Officer Johnson"), responded to Queen's Village the night of April 15, 2011, in response to a call that there had been a shooting in Queen's Village, which was part of the South Carolina State campus, and was debriefed by Sergeant Williams and the responding police Commander upon his arrival. (Trial Tr. p. 100, ln. 4-10). By the time Officer Johnson arrived, the crime scene had already been secured. (Trial Tr. p.100, ln. 11-16). Officer Johnson then started to look around, investigate, and do the initial processing of the crime scene. (Trial Tr. p. 100, ln. 20-24). As he was performing his crime scene investigation at the Queen's Village area, Officer Johnson found and collected what he believed to be evidence, two bags of a green leafy substance that appeared to be marijuana and a fifty dollar bill. (Trial Tr. p. 100, ln. 24 – p. 101, ln. 8). Officer Johnson also photographed an area that had—what he perceived to be—fresh, tire skid marks. (Trial Tr. p. 101, ln. 8 - 12). Officer Johnson did not find any bullets or shell casings in the area. (Trial Tr. p. 107, ln. 11-17).

Officer Johnson then went to process the second crime scene, which was a short distance away on Russell Street. (Trial Tr. p. 107, ln. 23 - p. 108, ln. 14). While observing the wrecked car at the crime scene, Officer Johnson noticed a marking on the arm rest of the driver side door that appeared to be blood spatter, so he began looking for a bullet projectile. (Trial Tr. p. 109, ln. 2 - p. 110, ln. 24). He found a bullet projectile about eighteen inches from the side of the car, right under the driver side door. (Trial Tr. p. 111, ln. 4-11). In the passenger side of the car, he found

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another fifty dollar bill, along with five, twenty dollar bills and another bag of a green leafy substance that appeared to be marijuana. (Trial Tr. p. 114, ln. 8 - p. 115, ln. 20). Johnson then secured the vehicle with evidence tape and had it towed to a secure location. (Trial Tr. p. 115, ln. 21 - p. 116, ln. 7).

Once police learned that Bailey had died from his injuries, the South Carolina Law Enforcement Division (SLED) was called in to take over the case. Karl Kenley, a crime scene special agent with SLED, responded to the crime scene and lifted two latent prints from outside of the passenger door of Bailey's vehicle, one from the top of the window and one from the door, near the key entry. (Trial Tr. p. 292, ln. 22 - p. 294, ln. 23). The latent print from the window was identified as belonging to Ray Anthony Alston. (Trial Tr. p. 315, ln. 13 - p. 316; p. 325, ln. 15-19). The other print could not be identified at first, but eventually it was identified as belonging to Applicant. (Trial Tr. p. 317, ln. 9 - p. 318, ln. 14; p. 325, ln. 20-24).

SLED Agent Richard Johnson (hereinafter "Agent Johnson") came to Orangeburg on April 16, 2011, to begin his investigation. (Trial Tr. p. 336, ln. 14-24). As part of SLED's investigation, Agent Johnson obtained Bailey's phone records. (Trial Tr. p. 338, ln. 8-17). From those records, Agent Johnson identified Ricky Gipson as someone who had been in "constant contact" with Bailey before his death and who had sent two text messages to Bailey shortly after the 911 call was made regarding Bailey's accident. (Trial Tr. p. 338, ln. 17-25). Agent Johnson contacted Gipson and took his statement about what happened the night of April 15th. (Trial Tr. p. 340, ln. 3-8). Agent Johnson showed Gipson a photograph of Alston, and Gipson identified Alston as someone who was present the night Bailey was shot. (Trial Tr. p. 340, ln. 9-17).

Thereafter, Alston was arrested for murder and Alston identified the other individuals that were present the night Bailey was shot. (Trial Tr. p. 340, ln. 18 - p. 341, ln. 22). Alston also

identified Applicant, who goes by the nickname Gouda, as one of the individuals present the night Bailey was killed. (Trial Tr. p. 341, ln. 8-24).

At trial, Alston testified that, on the night of April 15, 2011, he was hanging out with Applicant and others at a friend's house. (Trial Tr. p. 198, ln. 8 - p. 199, ln. 4). Alston decided he wanted to get some marijuana. (Trial Tr. p. 202, ln. 3-8). Alston testified that he talked to Applicant about making arrangement for Alston to buy marijuana. (Trial Tr. p. 202, ln. 17 - 19). Alston testified that Applicant then made some phone calls and set something up. (Trial Tr. p. 202, ln. 20 - p. 203 ln. 3). Thereafter, Alston, Applicant, Hilliard Pinckney, and Maurice Thompson drove to the SC State campus in a silver Buick. (Trial Tr. p. 199, ln. 1-4; p. 199, ln. 9-13; p. 200, ln. 1-23). Thompson drove, and Pinckney sat in the passenger seat. (Trial Tr. p. 204, ln. 21 - p. 205, ln. 4). Alston and Applicant sat in the back seat. (Trial Tr. p. 205, ln. 5-24).

Once on the SC State campus, the group picked up Gipson, who had been contacted by Applicant earlier in the day about purchasing marijuana. (Trial Tr. p. 130, ln. 16 - p. 135, ln. 4). Because Gipson did not have as much marijuana as Alston wanted to buy, Gipson arranged for Bailey to sell to Alston. (Trial Tr. p. 131, ln. 16 - p. 132, ln. 20). Gipson sat between Alston and Applicant in the back of the car, but Applicant was the only one there who knew Gipson. (Trial Tr. p. 132, ln. 18 - p. 136, ln. 16; p. 205, ln. 25 - p. 206, ln. 4).

Gipson testified that he had arranged to meet with Bailey at the marriage housing area. (Trial Tr. p. 134, ln. 18 - p. 135, ln. 4). Gipson and the group arrived before Bailey, so they reversed and parked in a parking space and waited for Bailey to arrive. (Trial Tr. p. 138, ln. 8-21; p. 176, ln. 4-24). When Bailey arrived, Bailey pulled into a parking spot such that his passenger side was closest to the passenger side of the Buick. (Trial Tr. p. 138, ln. 21 - p. 139, ln. 11; p. 207, ln. 25 - p. 208, ln. 21). Gipson, Alston, and Applicant went to Bailey's car, and Gipson got in the

passenger seat to facilitate the transaction. (Trial Tr. p. 140, ln. 1-13). Alston and Applicant began complaining to Bailey because they were not happy with the quality of the marijuana that Bailey had to sell to them. (Trial Tr. p. 140, ln. 4-13; p. 209, ln. 13 - p. 210, ln. 7). Gipson then got out of Bailey's car, as Alston and Applicant were communicating with Bailey, because at that point "it didn't have anything to do with [him]." (Trial Tr. p. 141, ln. 21 - p. 142, ln. 7). After Gipson had gotten out of Bailey's car and walked away, another silver car pulled up to the general area and Gipson spent about fifteen seconds observing this silver car because he did not know who the car belonged to. (Trial Tr. p. 142, ln. 8-15). When Gipson turned back around towards Bailey's car, he saw Applicant and Bailey "tussling in the car. . . ." (Trial Tr. p. 142, ln. 12-14). Gipson could not tell what Applicant and Bailey were fighting over. (Trial Tr. p. 143, ln. 22-24). Gipson observed that the passenger side door of Bailey's car was open and Applicant was leaning in the car while this tussling was occurring, and while all this was occurring, Bailey's car was simultaneously going into reverse. (Trial Tr. p. 142, ln. 10-16). Gipson testified that the tires of Bailey's car began to "spur out" as it was going to reverse and that he heard a "pop" after he heard the tires 'spurring out.' (Trial Tr. p. 142, ln. 16-18). Gipson ran away after hearing the "pop." (Trial Tr. p. 142, ln. 18-21). Gipson testified that he never saw anyone with a gun. (Trial Tr. p. 143, ln. 25 - p. 144, ln. 2). Gipson also observed that Alston was standing away from the car at the point that Bailey's car had begun to go into reverse. (Trial Tr. p. 144, ln. 11-19). After Gipson began to run away from the scene, he looked back and saw that Bailey's car had left the parking spot so Gipson continued to run away. (Trial Tr. p. 142, ln. 21-25).

Alston also testified at Applicant's trial. He testified that: he walked away from Bailey's car and Applicant went up to the passenger side window of Bailey's car (Trial Tr. p. 210, ln. 22-25); it looked like Applicant and Bailey were just talking at first, and then Bailey's car went into

reverse with Applicant "inside the car" (Trial Tr. p. 210, ln. 25 – p. 211, ln. 2); when the car started to go into the reverse with Applicant leaning into the car, Applicant was "getting dragged by it, somewhat getting dragged by it" when Alston heard a "pow" sound (Trial Tr. p. 212, ln. 5-11); and, he heard this "pow" sound, which Alston believed to be a gun shot, and then Applicant got back into the silver Buick the group arrived in. (Trial Tr. p. 211, ln. 2-3; p. 212, ln. 12-14). Alston asked Applicant "if he was alright, and then [Alston] asked if he shot the guy, but [Applicant] never answered." (Trial Tr. p. 211, ln. 3-6; p. 214, ln. 1-7).

Standard of Review

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1976).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 669).

Strickland does not guarantee perfect representation, only a "reasonably competent attorney." 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of

the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 689.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, an applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Under this prong, the court measures an attorney's performance by its “reasonableness under prevailing professional norms.” Id. (quoting Strickland, 466 U.S. at 668). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective. McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness based thereon. Where counsel articulates a strategy, it is measured, on a claim of ineffective assistance, under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). When evaluating the reasonableness of counsel's conduct, for purposes of claim of ineffectiveness assistance, the “court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a

particular case." Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (quoting Strickland, 466 U.S. at 690).

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687).

In assessing prejudice under Strickland, the question is whether it is "reasonably likely the result would have been different absent the errors." Strickland, 466 U.S. at 696 (emphasis added). The likelihood of a different result must be substantial, not just conceivable. Harrington, 562 U.S. at 112 (citing Strickland, 466 U.S. at 693).

Courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions. See Wiggins v. Smith, 539 U.S. 510, 526-528 (2003). However, there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Harrington, 562 U.S. at 109. Strickland, however, calls for an inquiry into the objective

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reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 110 (citing Strickland, 466 U.S. at 688).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. See Strickland, 466 U.S. at 689-690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. Id. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Strickland, 466 U.S. at 689; see also Bell v. Cone, 535 U.S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (internal citation omitted). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

INTRODUCTION

Prior to this Court's analysis of Applicant's allegations, this Court believes that it is necessary to discuss Trial Counsel's theory of the case. Trial Counsel testified throughout the PCR hearing that: he wanted to establish that Applicant did not take the gun to the car and therefore could not have been the one that did the shooting (PCR Hr'g Tr. p. 23, ln. 18-21); his theory was

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that Applicant had nothing to do with the gun (PCR Hr'g Tr. p. 35, ln. 10-11); "[s]omebody could have take [sic] the gun, somebody could have moved the gun, but I can tell you who I know didn't touch the gun. Julian Young didn't touch the gun. That was my theory" (PCR Hr'g Tr. p. 35, ln. 14-17); his theory was to show that the gun came from Bailey (PCR Hr'g Tr. p. 101, ln. 7-8) & (PCR Hr'g Tr. p. 112, ln. 10-11); and his position was Bailey got mad because of the failed drug deal, and that Bailey drew the gun that belonged to him out of anger because no one else saw Applicant with a gun. (See PCR Hr'g Tr. p. 114, ln. 11-13).

Co-Counsel confirmed this theory at the PCR hearing when he testified that no witness could show that Applicant had a gun and that it was possibly a third party that shot the Bailey. (PCR Hr'g Tr. p. 197-198, ln. 14-25 & ln. 1). When Co-Counsel was asked if there was any kind of "insinuation or implication that he [Bailey] was maybe shot somewhere else, in another location, by another person," Co-Counsel responded saying, "I don't think we ever put that in, ..." (PCR Hr'g Tr. p. 198, ln. 17-20). Co-Counsel's only implication "was that there were not just one scene, . . . , but possibly two because of where they located -- and I think the fragment -- . . . , was found outside of the car, ..." (PCR Hr'g Tr. p. 199, ln. 4-8).

Trial Counsel's theory of the case was based upon him asking Applicant if the gun used in this incident would ever be found and Applicant telling him that it would not. Trial Counsel further stated that if they could never find the gun, then there was no way to connect Applicant with the shooting at all. (PCR Hr'g Tr. p. 33, ln. 16-23). Trial Counsel also testified that the only thing Applicant told him was that the gun would not be found and that was what he (Trial Counsel) used in forming his defense. (PCR Hr'g Tr. p. 48, ln. 17-23). Based upon Applicant telling Trial Counsel that the gun would not be found, Trial Counsel inferred that Applicant had the gun and, therefore, that he wanted to "keep [Applicant] out of harm [sic] way" due to Trial Counsel's fear

of what would happen "if [Applicant] took the stand." (PCR Hr'g Tr. p. 34, ln. 7-10). Trial Counsel also testified, based solely upon Applicant telling him that the gun would not be found, that he had no question in his mind that the gun did not come from Bailey but rather from Applicant. (PCR Hr'g Tr. p. 46, ln. 17-20). Trial Counsel never asked Applicant if he brought the gun. (PCR Hr'g Tr. p. 216, ln. 21-22). Trial Counsel stated that all he asked Applicant was, "Do you think this gun will ever be found." (PCR Hr'g Tr. p. 47, ln. 10-11).

Co-Counsel also testified to this issue stating that he did not recall asking Applicant whether or not he brought the gun or where it came from. (PCR Hr'g Tr. p. 191, ln. 3-4). However, he believed that Applicant had possession of the gun at some point and disposed of it. (PCR Hr'g Tr. p. 191, ln. 4-7). Co-Counsel acknowledged the fact that Applicant may have had possession of the gun at some point did not establish that it was Applicant's gun, that he was the one that had the gun, or that he took the gun to Bailey's car. (PCR Hr'g Tr. p. 200, ln. 23 – p. 201, ln. 1). Furthermore, Co-Counsel stated that he did not remember ever knowing who brought the gun or remember Applicant telling them who brought the gun. (PCR Hr'g Tr. p. 203, ln. 15-17).

This Court believes that Trial Counsel's theory of the case was deficient from the outset. In measuring Trial Counsel's conduct under prevailing professional norms, this Court concludes that Trial Counsel's representation fell below the range of competence required in a criminal case. This Court further believes, which will be discussed below, that Trial Counsel's strategy and/or theory was unreasonable under an objective standard of reasonableness in that he failed to make the adversarial testing process work in this case. Because Trial Counsel's strategy and/or theory was not objectively reasonable based upon that which will be discussed below, Applicant was prejudiced in that "but for" Trial Counsel's deficient performance there is a substantial likelihood that the result of the trial would have been different.

INEFFECTIVE ASSISTANCE OF COUNSEL ALLEGATIONS ANALYSIS

Trial counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun. (Allegation #1)

An opening statement serves to inform the jury of the general nature of the action and defenses involved in the case so they will be better prepared to understand the evidence presented. State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981). The solicitor's comments in opening and closing statements must be confined to the facts presented and the reasonable inferences therefrom. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (citing State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). The scope of the opening statement is within the discretion of the trial judge, whose decision will stand absent a showing of an abuse of discretion and prejudice to the complaining party. State v. Harris, 275 S.C. 463, 466, 272 S.E.2d 636, 638 (1980). Any error in the solicitor's opening statement defining a point of law can be cured by the trial judge's charge defining it properly. State v. Jones, 298 S.C. 118, 122, 378 S.E.2d 594, 596 (1989) (internal citation omitted).⁴

Solicitor Bell, in his opening statement at trial, told the jury that: "Implied malice means you have to look at the circumstances. The use of a deadly weapon you can imply, or the fact that during the commission of a crime, another crime - - - ." (Trial Tr. p. 72, ln. 6-9). Trial counsel immediately informed the Trial Court that he had a motion to make outside the presence of the

⁴ Opening statement to a jury is not an argument, rather it is opportunity to identify issues and to outline facts which attorney expects to establish in the course of trial. State v. Bernier, 486 A.2d 147, 149 (Me. 1985). It is improper for an attorney to refer to any testimony or to assert any facts in his opening statement unless, in good faith, he reasonably believes that supporting evidence will be offered and admitted at trial. Id.

jury. (Trial Tr. p. 72, ln. 10-14). After the jury exited the courtroom, Trial Counsel moved for a mistrial stating:

Mr. Bell just said that it can be implied from a deadly weapon. That is not the case law. The jury just has been told they can be implied that there was a deadly weapon involved that you can find him guilty of murder and that creates malice. It does not create malice, and if there's any other, if – the law is if there's any other evidence at all you cannot imply or infer malice from a deadly weapon, and they just have been told that you can infer malice from a deadly weapon, and I don't think you can cure that.

Trial Tr. p. 73, ln. 2-10.

Solicitor Bell argued in response that the Trial Court "cannot charge that implied malice, or malice can't be implied from the use of deadly weapon." (Trial Tr. p. 73, ln. 16-20). Solicitor Bell went on to state that "there's nothing that prevents the State from arguing the use of a deadly weapon can imply malice. Id. Trial Counsel responded, citing to State v. Belcher (385 S.C. 597, 685 S.E.2d 802 (2009)), stating that "[t]he implication of malice is there is not any testimony that would reflect any other lesser charge is the law, not the fact that you can infer malice." (Trial Tr. p. 73-74, ln. 24-25, 1-3). Trial Counsel went on to state that it was his understanding that "whether you charge self-defense or not, whether it's accident or not, it cannot be inferred if there is any other evidence, not just self-defense." (Trial Tr. p. 74, ln. 8-12). Trial Counsel also argued that if you "tell the jury that now, the jury in the whole deliberation, if they hear about a gun they're going to be saying, well, we can infer, it's planted now that they can infer from a gun, and that's just not the law." (Trial Tr. p. 74, ln. 20-23). The Court denied Trial Counsel's Motion for a Mistrial but told Trial Counsel "you have the absolute right in your opening argument to tell them that, you know, it cannot be inferred if there is any evidence which would reduce, mitigate, excuse or justify the homicide." (Trial Tr. p. 74, ln. 24 – pg. 75, ln. 2).

After Trial Counsel's Motion for a Mistrial was denied and the trial resumed, the State told the jury that "inferred malice is not a different type of malice, it can be inferred from the circumstances surrounding the crime, such as use of a deadly weapon, or involvement in another crime." (Trial Tr. p. 75, ln. 24 - p. 76, ln. 3). In Trial Counsel's opening statement, he drew attention to the very same information he had challenged just moments earlier. In his opening statement, Trial Counsel stated that "[t]here is no testimony and we believe from the evidence we have seen there is no testimony that you, Julian, had a gun there. You may be able to infer it, but no testimony." (Trial Tr. p. 79, ln. 20-24). Thus, Applicant's own advocate virtually invited his jury to infer a key element of the crime of murder.

Applicant asserts that it would have been best for Trial Counsel not to "parrot" the State's language in his opening. (PCR Hr'g Tr. p. 17, ln. 13-15). Trial Counsel asserted at the PCR hearing that: he was trying to make sure that the jury knew that Applicant did not have a gun since he believed that the gun was the focal point in the case (PCR Hr'g Tr. p. 16, ln. 2-9); he wanted the jury to start with the fact that Applicant did not have a gun (PCR Hr'g Tr. p. 16, ln. 2-9); he was afraid of the weapon being anywhere near Julian (PCR Hr'g Tr. p. 16, ln. 23); and, he was "trying to make sure I start out front with Julian not having anything to do with that weapon." (PCR Hr'g Tr. p. 17, ln. 3-5).

PCR Counsel asked Trial Counsel on direct examination that "[i]f you felt strongly enough about that and the danger of the jury potentially inferring malice --- from the testimony about a weapon, wouldn't it have been best for you not to parrot that language in your own opening?" (PCR Hr'g Tr. p. 17, ln. 9-15). Trial Counsel acknowledged that in hindsight, PCR counsel may be right. (PCR Hr'g Tr. p. 17, ln. 16-17). However, Trial Counsel said that he was "trying to prepare for anything that might come down the road." (PCR Hr'g Tr. p. 17, ln. 23-24).

On cross-examination at the PCR hearing, Trial Counsel stated that he did not tell the jury that they could infer malice. (PCR Hr'g Tr. p. 94, ln. 23-25). Trial Counsel further elaborated saying that "the jury got a right to infer what they want, but I wanted them to know – by the time the case is over, they will see that Julian had nothing to do with this. I couldn't stop them from inferring what they want, but if they will listen and let's get through the case. (PCR Hr'g Tr. p. 94, ln. 1-6). On redirect, Trial Counsel indicated that he was telling the jury that they could infer everything but there were no facts to say that Applicant had a gun. (PCR Hr'g Tr. p. 107, ln. 9-11).

This Court believes that it was improper for the State to argue "implied malice" in its opening statement since no evidence had been presented at this point. This Court also believes that it was proper for Trial Counsel to object to such argument and move for a mistrial. However, after the Court denied Trial Counsel's Motion for a Mistrial, this Court believes that it would have been proper to ask the Trial Court for a curative instruction taking away any taint from the Solicitor's argument, to the extent such curative instruction could do so.

In any event, this Court also finds that Trial Counsel erred in his attempt to rebut the State's argument of this permissive inference pursuant to State v. Belcher. It is of necessity to note that the Belcher decision held that a jury cannot be instructed by the Court that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809 (overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), which held that a jury charge on the inference of malice may not be given by the Court but that this ruling does not apply to convictions challenged on post-conviction relief). However, the Belcher decision stated in a footnote that:

The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to

raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." In addition, **we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging.**

Id. at 612, 685 S.E.2d at 810 (emphasis added).

The Belcher decision points out the difference between the prosecution stating to the jury an inference they may make, defense counsel arguing the absence of malice or the presence of reasonable doubt, and the Court charging the jury about an inference it can make at the close of trial. In the same way that Belcher allowed a prosecutor to argue to the jury that they may infer malice from the use of a deadly weapon, defense counsel may argue the absence of malice or the presence of reasonable doubt.

It is apparent from the outset of this trial that Trial Counsel did not know or understand the implications of Belcher. Trial Counsel did not know that the State could argue that malice may be inferred from the use of a deadly weapon nor did he know, understand, or appropriately argue to the jury the absence of malice or presence of reasonable doubt. Trial Counsel failed to argue to the jury that malice could not be inferred if there was any evidence which would reduce, mitigate, excuse, or justify the homicide after being instructed by the Court that he could do so. (Trial Tr. p. 74 & 75, ln. 24-25, 1-2). Trial Counsel did not follow the court's instructions when he failed to argue the absence of malice or the presence of reasonable doubt which would have contradicted the prosecution's opening argument.

The State's argument that malice could be inferred from the use of a deadly weapon before any evidence was presented and Trial Counsel telling the jury they could infer that Applicant had a gun would result in the only logical conclusion for the jury to reach, and that is, that the element

of malice was satisfied. This argument conveyed to the jury from the outset how they could supply a vital element to the charge of murder by merely inferring it from the use of a deadly weapon. The argument further allowed the jury to listen to the State's case with an eye towards inferring malice from the beginning of the trial until its conclusion. Since the jury could logically reach this conclusion as to malice, the only remaining element the State would have to prove would be the "killing of any person" which was not, nor could it have been, contested.

It is clear that Trial Counsel was deficient in his efforts to protect Applicant from the very danger that he perceived and failed to protect Applicant's rights by choosing to argue to the jury in a manner contrary to that suggested by the trial judge. Rather, Trial Counsel's deficient conduct at this early stage of the trial increased the prejudice to Applicant by reinforcing the State's argument which he had, just moments before, made a motion for a mistrial before any evidence was presented in the case. Trial Counsel's error at this stage of the trial was particularly prejudicial to Applicant since the jury was told they could infer malice and infer that Applicant had a gun from the very beginning.

While Trial Counsel articulated a reason for his argument, it was unreasonable under an objective standard of reasonableness since Trial Counsel's theory from the outset was that no one could connect the gun to Applicant while at the same time telling the jury they could infer that Applicant had a gun. This Court further believes that Trial Counsel's argument was prejudicial to Applicant's case because he planted in the mind of the jury that they could Applicant had a gun after the State told them they could infer malice from the use of a deadly weapon. This argument, in essence, allowed the jury to infer a vital element of the murder charge that Applicant was facing.

Therefore, Applicant has established that Trial Counsel was deficient as to this allegation and has established that this deficiency resulted in a "reasonable probability that, but for counsel's

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unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, this Court grants Applicant's relief as to this allegation.

Trial Counsel was ineffective for failing to adequately counsel Applicant concerning the potential advantages and disadvantages of testifying in his own defense. (Allegation 7)

Some decisions are reserved for the client, rather than for the lawyer, notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991)). Waiver of Fifth Amendment right must be knowing and voluntary. Id. (citing State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Rule 1.2 of the Rules of Professional Conduct states, in part, the following:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. **In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**⁵

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.⁶

S.C. Rules of Professional Conduct 1.2 (d) (2016).

Rule of Professional Conduct 1.4(a)(2) & (b) states:

(a) A lawyer shall:

⁵ "Consult" of consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. S.C. Rule of Professional Conduct 1.0(c) (2016).

⁶ "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. S.C. Rule of Professional Conduct Rule 1.0(h) (2016).

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.⁷

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule of Professional Conduct 1.4(b)(2) & (b) (2016).

Rule of Professional Conduct 3.3 (a)(3) states:

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, **other than the testimony of a defendant in a criminal matter**, that the lawyer reasonably believes to be false.⁸

During the trial, prior to the State resting its case, and before SLED Agent Richard Johnson testified, Applicant was advised of his Constitutional Rights, including his right to testify. (Trial Tr. p. 330, ln. 3 through p. 332, ln. 3). The Trial Court inquired as to whether Applicant had previously discussed this issue with his attorney and he acknowledged that he had. (Trial Tr. p. 330, ln. 4-6). The Trial Court then inquired as to whether Applicant had discussed this issue with his family or friends and Applicant indicated that he had not. (Trial Tr. p. 330, ln. 13-15). Finally, Applicant indicated to the Trial Court that he wanted an opportunity to discuss this issue with his family. (Trial Tr. p. 330, ln. 16-17). After Agent Johnson testified and before the State rested its case, Applicant was given the opportunity to meet with his attorneys and family to discuss whether

⁷ "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. S.C. Rule of Professional Conduct Rule 1.0(k) (2016). "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and the circumstances are such that the belief is reasonable. S.C. Rule of Professional Conduct Rule 1.0(l) (2016).

⁸ Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. S.C. Rule of Professional Conduct, Comment 9 (2016).

or not he would testify. After meeting with his attorneys and family, Applicant indicated to the Trial Court that he did not wish to testify. (Trial Tr. p. 378, ln. 9-21).

Trial Counsel testified at the PCR hearing as to this allegation as follows: Applicant did not want to testify (PCR Hr'g Tr. p. 33, ln. 24); Applicant had the opportunity whether he wanted to take the stand or not (PCR Hr'g Tr. p. 34, ln. 10-11); Applicant was real nervous (PCR Hr'g Tr. p. 34, ln. 12); Applicant's aunt, the minister, was present when we they discussed the issue of him testifying (PCR Hr'g Tr. p. 34, ln. 11-15); Applicant said, "Look, I don't want to take the stand. I'm nervous" (PCR Hr'g Tr. p. 34, ln. 15-16); Applicant's decision not to testify was not from not knowing or from not explaining (PCR Hr'g Tr. p. 34, ln. 24-25); we talked about all the issues and the fact that Applicant could testify but Applicant said he was nervous and that he did not want to take the stand (PCR Hr'g Tr. p. 40, ln. 8-16); there was not a "t" that was not crossed nor an "i" not dotted (PCR Hr'g Tr. p. 77, ln. 17-18); and that if Applicant did not want to take the stand, then he could not put him up to give the evidence (PCR Hr'g Tr. p. 108, ln. 2-3). PCR counsel also asked Trial Counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: "The way you ask that question I gonna – I'm gonna say no, I don't remember that." (PCR Hr'g Tr. p. 215, ln. 2-7). Trial Counsel went on to say, however, that Applicant fully understood what would happen if he didn't take the stand. (PCR Hr'g Tr. p. 215, ln. 8-10).

Co-counsel testified at the PCR hearing as well. He testified to the following: Applicant was afraid to testify (PCR Hr'g Tr. p. 187, ln. 3-8); that they met with Applicant's family (PCR Hr'g Tr. p. 192, ln. 10-12); and that multiple people were involved in the decision. (PCR Hr'g Tr. p. 92, ln. 13-14). PCR Counsel also asked Co-Counsel at the PCR hearing whether Applicant was

advised that if he did not testify and tell his side of the story there was not going to be enough evidence in the record for the judge "to give voluntary manslaughter, involuntary, certainly not accident or self-defense?" (PCR Hr'g Tr. p. 187, ln. 12-15). Co-counsel, similar to Trial Counsel's response, acknowledged that he could not recall if they discussed this issue in those terms with Applicant. (PCR Hr'g Tr. p. 188, ln. 2-13).

Applicant testified at the PCR hearing that: he was told a little bit about the good and bad of testifying (PCR Hr'g Tr. p. 242-43, ln. 24 through 3); he was scared (PCR Hr'g Tr. p. 259, ln. 24-25); Applicant was told that if he testified, they (the State) would cross-examine him, mix him up, mix up his words, and it would be like 500 degrees (PCR Hr'g Tr. p. 260, ln. 5-10); Trial Counsel did not think he should testify because they would cross-examine him (PCR Hr'g Tr. p. 264, ln. 11-13); he was nervous and scared (PCR Hr'g Tr. p. 264, ln. 13-14); the conversation that took place with his family about him testifying occurred during an approximate thirty minute break during the trial (PCR Hr'g Tr. p. 265, ln. 5-7); and they never had a discussion about whether or not he should testify before trial. (PCR Hr'g Tr. p. 265, ln. 8-10). Applicant was also asked at the PCR hearing whether his attorneys ever explained to him that if he did not testify and tell his side of the story, then there was not going to be a factual basis for "jury instructions on any of those things," to which Applicant responded that he could not really remember. (PCR Hr'g Tr. p. 242, ln. 10-20). When Applicant was further asked "[b]ut did they tell you that if you didn't testify there wasn't gonna be a way to get those charges," Applicant responded, "No. They didn't told (sic) me that." (PCR Hr'g Tr. p. 243, ln. 12-14).

While Trial Counsel and Co-Counsel testified to the above, Trial Counsel also testified at the PCR Hearing that he did not want to put Applicant on the stand because he was trying to "protect the record and not do any fraud on the Court." (PCR Hr'g Tr. p. 34, ln. 17-22). Trial

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Counsel also said that there was reasoning behind why Applicant did not take the stand. (PCR Hr'g Tr. p. 34, ln. 23-24). He also stated that he "couldn't put Julian up." (PCR Hr'g Tr. p. 35, ln. 1). Trial Counsel further stated that he thought, but was not positive, he asked Applicant if he had struggled with Bailey for the gun and that this had a lot to do with not wanting to put him on the stand. (PCR Hr'g Tr. p. 42, ln. 11-21). Co-Counsel reaffirmed Trial Counsel's position when he testified that if Applicant testified, it would have forced them into a position of committing a fraud upon the Court. (PCR Hr'g Tr. p. 190, ln. 12-25).

Applicant testified that: the only in depth discussion that he had with Trial Counsel about the facts of the case was whether or not the gun would be found (PCR Hr'g Tr. p. 238, ln. 23-25 – p. 239, ln. 1); he did tell Trial Counsel what actually happened on the night of the incident⁹ (PCR Hr'g Tr. p. 239, ln. 10-24); Trial Counsel was basically telling him not to testify and he felt as though Trial Counsel forced him not to testify (PCR Hr'g Tr. p. 259, ln. 21-22) & (PCR Hr'g Tr. p. 269, ln. 15-17); and his decision not to testify was based on what he knew at that time and on the advice of Trial Counsel. (PCR Hr'g Tr. p. 281, ln. 20-25). In addition, Applicant testified that: Trial Counsel did not tell him why he did not want him to tell his side of the story (PCR Hr'g Tr. p. 259, ln. 4-6); he would have testified to get the lesser included charges regardless of being scared (PCR Hr'g Tr. p. 261, ln. 1-7); and he would overcome his fear of testifying and insisted on telling his side of the story (PCR Hr'g Tr. p. 261, ln. 8-20).

It is clear, based upon the above, that Applicant waived his right to testify at trial. Trial Counsel, Co-Counsel and Applicant acknowledge that Applicant was scared and nervous. This is

⁹ This is somewhat confirmed by Trial Counsel acknowledging at the PCR hearing that he had asked Applicant if he had struggled with the gentleman in the car and Trial Counsel stating that that had a lot to do with not wanting to put Applicant on the stand. (PCR Hr'g Tr. p. 42, ln. 11-16).

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not something that should surprise anyone in light of the severity of the charge against Applicant, the fact that he was only seventeen at the time of his trial, and he did not have a prior criminal record. (PCR Hr'g Tr. p. 39, ln. 23-24). However, this Court does not believe that Applicant voluntarily waived this right with the knowledge of its consequences. It is apparent from above that Applicant did not make his decision not to testify after "consultation" with his attorney(s) as required under Rule 1.2, Rules of Professional Conduct, since "consultation" requires that an attorney communicate information to his client that is reasonably sufficient so the client can appreciate the significance of the matter. Trial Counsel and Co-Counsel failed to reasonably consult with Applicant in a manner that reasonably prudent and competent lawyers should do. The significance of the matter in this case was that if Applicant did not testify, then there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense since there was not sufficient evidence in the record after the State rested its case to warrant such charges.¹⁰

Applicant's waiver of his right to testify both knowingly and voluntarily is further highlighted by the requirement of Rule 1.4 of the Rules of Professional Conduct which require a lawyer to explain matters reasonably necessary to permit the client to make an informed decision regarding such representation. Trial Counsel and Co-Counsel acknowledged that they did not convey to Applicant that if he did not testify, then there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense. By not explaining this to Applicant, he was not in a position to make an informed decision as to whether or not to testify. Had Trial Counsel and Co-Counsel adequately explained the

¹⁰ The legitimacy and applicability of these will be further discussed below.

advantages and disadvantages of testifying to Applicant, Applicant testified, and this Court believes, that he would have overcome his nervousness and fear and testified.

Having determined that Applicant's waiver of his right to testify at his trial was not knowing and voluntary, it is imperative that this Court address another issue relevant to Allegation 7. Trial Counsel's theory, as discussed above, based solely on Applicant telling him that the gun used in the incident would never be found, led him to not want to put Applicant on the stand during his trial because of his concern that Applicant would perpetrate a fraud upon the Court. This concern of Trial Counsel is completely misplaced. While Rule 3.3 of the Rules of Professional Conduct prohibits an attorney from knowingly offering evidence that the lawyer knows to be false, it does not prohibit an attorney in a criminal trial from putting up evidence that the lawyer reasonably believes is false. Comment 9 to Rule 3.3 even elaborates saying that a lawyer in a criminal trial may not refuse to offer testimony where the lawyer reasonably believes or does not know that the testimony will be false.

It was not reasonable for Trial Counsel to infer that Applicant brought the gun to the incident based solely upon Applicant saying that the gun would not be found. If Trial Counsel believed this, that Applicant brought the gun to the incident, he did not **know** that Applicant's testimony would be false. In other words, he did not have actual knowledge of this fact. Because Trial Counsel did not **know** the testimony would be false he would be required to honor the client's decision to testify if the client so desired. Therefore, it was error on Trial Counsel's part not to want to put Applicant on the stand out of fear that Applicant would perpetrate a fraud on the Court when did not **know** if Applicant brought the gun to the incident.

Because Applicant's waiver of his right to testify was not knowing and voluntary and because Trial Counsel's belief that he could not put Applicant on the stand at his trial because he

feared Applicant would perpetrate a fraud on the court is misplaced, Applicant has clearly established that Trial Counsel was deficient and that he was prejudiced to the extent that if he had been properly advised of the advantages and disadvantages of testifying, there is a reasonable probability that the outcome would have been different which will be further discussed below in addressing Allegations 8-13.

Failure to Advise Applicant as to Possible Defenses and Lesser-Included Offenses

Applicant has numerous Allegations that fall within the scope of Counsel's alleged failure to advise Applicant thoroughly on the law concerning possible defenses and lesser included offenses and the impact of such failure. Specifically, the Allegations are that:

Counsel neglected to advise Applicant concerning the law as it relates to the defense of self-defense (Allegation number 8);

Counsel neglected to advise Applicant thoroughly concerning the law as it relates to the lesser-included offense of voluntary manslaughter (Allegation number 9);

Counsel neglected to advise Applicant concerning the law as it relates to the defense of accident (Allegation number 10);

Counsel failed to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions (Allegation number 12); and,

Counsel failed to adequately explain that, absent testimony from him, there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as testimony presented during the State's case in chief did not provide evidence supporting these theories (Allegation number 13).

Allegations 8-10

Trial Counsel testified that he recalled reviewing the possible defenses and the lesser included offenses with Applicant. (PCR Hr'g Tr. p. 41, ln. 15-18). Trial Counsel testified that he discussed self-defense with Applicant. (PCR Hr'g Tr. p. 33, ln. 11-13). Applicant confirmed that Trial Counsel discussed self-defense with him but could not recall what he was told about self-

defense. (PCR Hr'g Tr. p. 240, ln. 16-20). Trial Counsel testified he could not recall discussing the defense of accident with Applicant.¹¹ (PCR Hr'g Tr. p. 41, ln. 13-18). At the PCR hearing, when PCR Counsel asked Applicant whether Trial Counsel went over "different ideas in the law and different concepts like self-defense or accident," Applicant responded saying that Trial Counsel "said something about the – like, I think the accident. Basically, I was just using the term of me understanding was, like, self-defense." (PCR Hr'g Tr. p. 240, ln. 3-10). However, when Applicant was further questioned about this issue, Applicant testified that Trial Counsel did discuss the defense of accident with him. (PCR Hr'g Tr. p. 241, ln. 1-2). Trial Counsel testified that he did discuss voluntary manslaughter with Applicant. (PCR Hr'g Tr. p. 41, ln. 13-18). Applicant testified to the contrary, stating that he was not told anything about voluntary or involuntary manslaughter. (PCR Hr'g Tr. p. 241, ln. 1 - p. 242, ln. 2).

The conclusion from the above is that Trial Counsel and Applicant agree that self-defense was discussed. Trial Counsel asserts that he did not discuss the defense of accident with Applicant while Applicant asserts that it was. However, based upon Applicant's answers to PCR Counsel's questions concerning this defense, Applicant was likely confused as to his understanding of the difference between accident and self-defense. Therefore, the defense of accident probably was not discussed in detail with Applicant. Trial Counsel asserts that voluntary manslaughter was discussed with Applicant. However, it is not clear if involuntary manslaughter was discussed with Applicant because it does not appear in the record that Trial Counsel was specifically asked this question. What is clear from the record though is that Trial Counsel asserts that he submitted a

¹¹ At the PCR hearing, Trial Counsel stated that he did not explain accident "because I didn't see how accident applied because my thought from the process he (Applicant) brought the gun, and one of the elements of self-defense is not to be the one who instituted the problem." (PCR Hr'g Tr. p. 215, ln. 11-15).

brief to the trial court concerning these lesser included charges and in fact the trial court judge states on the record, after an in-chambers conference, that he would not be charging these lesser-included offenses (voluntary and involuntary manslaughter).¹² (PCR Hr'g Tr. p. 91, ln. 11-19) & (See Trial Tr. p. 382, ln. 3-7). Therefore, this Court believes, in all likelihood, that these two lesser-included offenses were discussed with Applicant in some fashion. To what extent though, it is unclear.

Overall, the testimony at the PCR hearing and the trial record indicates that Trial Counsel likely discussed some lesser-included offenses and defenses and failed to discuss others. Whether Trial counsel adequately explained the law concerning these lesser included offenses and defenses is important and could be evidence of deficiency of Trial Counsel. However, this Court believes a failure to adequately explain that these jury charges would not be given absent evidence or testimony from Applicant are more critical in assessing deficiency and prejudice of Trial Counsel's conduct and will therefore be discussed more fully below.

Allegations 12 & 13

The law to be charged to the jury is determined by the evidence presented at trial.¹³ State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Shuler, 344 S.C. 604,

¹² When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999), finding trial counsel was deficient for failing to place his argument about the jury seeing his client in chains on the record, and thus failing to adequately preserve the issue for appeal).

¹³ Solicitor Sorenson was asked at the PCR hearing whether he objected to the Trial Court Judge refusing to charge the jury on the lesser included offense of manslaughter. Solicitor Sorenson stated that he couldn't imagine that he would have objected to the charge but he could only guess that it was Trial Counsel that had objected. However, he did not have any independent recollection. (PCR Hr'g Tr. p. 163, ln. 7-19).

632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. Lee, 298 S.C. at 364, 380 S.E.2d at 835.

During the PCR hearing, PCR Counsel asked whether Trial Counsel had explained to Applicant that, at the conclusion of the State's case-in-chief, "[n]one of these other people have testified to anything that's gonna give me a basis for asking for voluntary manslaughter, asking for accident, asking for self-defense. So if I'm going to be able to ask for a charge on either one of those defenses with a lesser included, you've gotta tell your side of the story." (PCR Hr'g Tr. p. 50, ln. 10-16). Trial Counsel responded: "As to the accident, again, no. As to the others, yes. (PCR Hr'g Tr. p. 50, ln. 8-23). PCR counsel also asked Trial Counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: "The way you ask that question I gonna – I'm gonna say no, I don't remember that." (PCR Hr'g Tr. p. 215, ln. 2-7). Co-Counsel was also asked about this issue. More specifically, he was asked by PCR Counsel if Applicant was told that if he didn't testify and tell his side of the story, then there was not going to be evidence in the record for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. Co-Counsel's response was that he could not recall if it was put in those terms. (PCR Hr'g Tr. p. 187, ln. 9-18; p. 88, ln. 2-3).

Applicant initially testified that he could not remember whether he was advised that if he did not testify this would result in the trial Court not giving the jury charges at issue, and then testified that Trial Counsel did not explain this to him. (PCR Hr'g Tr. p. 242, ln. 10 – p. 243, ln. 21). Applicant testified that Trial Counsel explained to him that testifying and telling his side of the story could result in the trial court giving beneficial jury charges, but he was not told by Trial

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Counsel that testifying would be the only way that the trial court would give helpful jury instructions. (PCR Hr'g Tr. p. 243, ln. 12-13).

Applicant's Allegations 12 and 13 come down to Applicant's assertion that he would have testified at trial had he been informed by Trial Counsel of the necessity of evidence being in the record to receive these beneficial instructions, especially in light of the fact that at the conclusion of the State's case, there was insufficient evidence supporting a charge on these lesser included offenses and/or defenses. (PCR Hr'g Tr. p. 243, ln. 12-13). This Court has already concluded in its analysis of Allegation 7 above that Trial Counsel and Co-Counsel were deficient in failing to advise Applicant of the advantages and disadvantages of testifying thus preventing him from making an informed decision about whether or not to testify. Whether Applicant would have received these beneficial instructions had he taken the stand is, therefore, analyzed more fully below.

Voluntary manslaughter

Voluntary manslaughter is defined as the intentional and unlawful killing of a human being in sudden heat of passion and upon sufficient legal provocation. State v. Niles, 412 S.C. 515, 522 772 S.E.2d 877, 880 (2015). Sudden heat of passion, upon sufficient legal provocation, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. Id. (citing State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)). "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Pittman, 373 S.C. 527, 575, 647 S.E.2d 144, 169

(2007) (internal citation omitted). For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing. State v. Smith, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14-15 (2011).

Applicant's case is very analogous to the Niles case referenced above. In Niles, the South Carolina Supreme Court held that a jury charge on voluntary manslaughter was not proper in the factual scenario when an arranged drug deal, gone awry, led to the defendant shooting and killing the drug dealer. 412 S.C. 515, 772 S.E.2d 877. In Niles, the defendant (buyer) was leaning into the passenger door window of the victim's (drug dealer) car. Id. at 519, 772 S.E.2d at 879. He was then seen fleeing the victim's vehicle and jumping into the vehicle that the defendant had arrived in, which was parked near the victim's. Id. at 518-519, 772 S.E.2d at 878-879. The witness testifying to this was in the back seat of the victim's car, and this witness testified that the defendant had robbed the victim before fleeing back to the car that the defendant arrived in. Id. at 519, 772 S.E.2d at 878. After the defendant jumped back into the car opposite of the victim's, the victim began firing shots at the defendant. Id. at 520, 772 S.E.2d at 879. The defendant fired shots in response, which killed the victim. Id. at 519-520, 772 S.E.2d at 879. The defendant testified at trial that he "grabbed [his pistol] and that's when I shot two times...I went pow pow...I was just trying to get [the victim] to stop shooting." Id. at 520, 772 S.E.2d at 879. The Niles Court held that the defendant, by his own testimony, lacked the intent to harm the victim, and thus a voluntary manslaughter charge was not appropriate. Id. at 523, 772 S.E.2d at 881.

Gipson testified at trial that he was the only one that knew Bailey. (Trial Tr. p. 140, ln. 4-6). So, there was no previous relation between Applicant and Bailey. Furthermore, there was no testimony from any of the witnesses, at trial or at the PCR hearing, that Applicant was ever enraged or that Applicant was acting "under an uncontrollable impulse to do violence" when Bailey was

shot. In fact, Applicant testified at the PCR hearing that he lacked the intent to kill the Bailey. He testified that he "was just trying to get the gun," that he was just trying to take the gun away from the Bailey, and that he was not even aware that he had shot the Bailey at the time when the shooting occurred. (PCR Hr'g Tr. p. 254, ln. 10-13; p. 255, ln. 10-14; p. 255 ln. 1-2 & p. 256, ln. 5-6).

Based on the Niles holding and the facts above, as referenced herein, this Court finds that a jury charge on voluntary manslaughter would not have been likely as a matter of law had Applicant given the same testimony at trial that he gave at his PCR hearing. Therefore, this Court does not believe that Trial Counsel was deficient nor was Applicant prejudiced, even if he failed to discuss the lesser included offense of voluntary manslaughter and its application to the facts of Applicant's case. Thus, Applicant's request for relief as to all allegations of ineffectiveness pertaining to voluntary manslaughter are denied.

Self-Defense

The elements of self-defense are as follows:

(1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3)(a) if the defense is based on the belief of imminent danger, then a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or (3)(b) if the defendant was actually in imminent danger, the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and, (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Court of Appeals noted in State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (2019), that our Supreme Court held that a defendant who brought a concealed pistol to a drug

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deal brought on the difficulty and is therefore not entitled to a self-defense charge. Owens, 427 at 332-33, 831 S.E.2d at 129 (citing to State v. Williams, Op. No. 27895, 427 S.C. 246, 830 S.E.2d 904, 2019 WL 2518797 (S.C. Sup. Ct. filed June 19, 2019)). If there is any evidence in the record from which it could reasonably be inferred that Defendant acted in self-defense, it should be charged. State v. Burkhardt, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002) (internal citation omitted). The State must disprove self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998). The defense of self-defense is not established if any one of the elements is disproven. See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Gipson testified at trial, on cross examination by Trial Counsel, that in neither one of his statements did he say that Applicant had a gun. (Trial Tr. p. 155, ln. 11-13). Pinkney testified that he didn't see Applicant get out of the car or get back in the car after the incident with a gun. (Trial Tr. p. 186, ln. 6-11). Alston testified that he did not see Applicant with a gun. (Trial Tr. p. 225, ln. 1-20). Thompson testified that he never saw Applicant with a gun. (Trial Tr. p. 262, ln. 17-20). Finally, Applicant testified at the PCR hearing that it was Bailey that pulled a gun from beside his console. (PCR Hr'g Tr. p. 253, ln. 10-19). Based upon the testimony of each of these, individuals, there is no evidence that Applicant brought the gun to the incident or was at fault in bringing on the difficulty.

As to element 2 and 3, Gipson testified at trial that Applicant was leaning in Bailey's car and that Applicant and Bailey were tussling over something that Gipson could not see. (Trial Tr. p. 143, ln. 19-24). Gipson also testified that Bailey backed up and at that point he heard a "pop." (Trial Tr. p. 144, ln. 17-21). Gipson further stated that when he heard the "pop", he believed Applicant was still hanging in the car tussling with Bailey. (Trial Tr. p. 144-45, ln. 25 & 1-4).

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Alston testified that when Bailey began to back his car up, Applicant was inside Bailey's car, "getting dragged by it, somewhat getting dragged by it" and that is when he heard a "pow." (Trial Tr. p. 212, ln. 6-11). Thompson testified that after Alston decided not to purchase the marijuana from Bailey and after Alston had returned to the car that they came in, he felt the car jerk and Applicant was hanging out the passenger side of the car and then he heard a loud bang. (Trial Tr. p. 251, ln. 21-24). Applicant testified that he was leaning in Bailey's car talking to him when he reached by his console, that Bailey put the car in reverse, that the car was hitting him with the door and that it was knocking him out of the way. Applicant also testified that Bailey hit their car and that he was "jammed in it." (PCR Hr'g Tr. p. 252, ln. 11-25). Finally, Applicant testified that while he was trying to take the gun away from Bailey, he heard a "pop." (PCR Hr'g Tr. p. 254, ln. 19-22).

This Court believes that this would have been sufficient evidence to create a question for the jury as to whether Applicant actually believed or actually was in imminent danger of losing his life or sustaining serious bodily injury. This Court further believes that this testimony would have created a question for the jury as to whether or not a "reasonably prudent man of ordinary firmness and courage would have entertained the same belief" of being in imminent danger or whether "the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life."

As to the final element of self-defense, and referring to the facts previously referenced, Gipson testified that Applicant was hanging out of the car and tussling with Bailey when he heard the "pop." Alston testified Applicant was getting dragged by the car when he heard the "pow." Thompson testified Applicant was hanging out the passenger side of the car when he heard a loud bang. Finally, Applicant testified that Bailey hit their car and that he was "jammed in it." (PCR

Hr'g Tr. p. 252, ln. 11-25). These facts would have certainly been evidence for the jury to decide as to whether Applicant had "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance."

This Court finds that the testimony of Gipson, Alston, and Thompson coupled with that of Applicant would have established evidence in the record creating a reasonable inference that Applicant acted in self-defense. Furthermore, these facts would have further placed the burden upon the State to disprove self-defense beyond a reasonable doubt. Therefore, Applicant has established that: Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of self-defense would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge; and, Applicant was prejudiced in the sense that he has established, as discussed above, that the Trial Court would have been required to charge self-defense based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different.

Accident

A homicide will be excusable on the ground of accident when: (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. See State v. Commander, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). The defense of accident fails if the State proves beyond a reasonable doubt that Defendant's unlawful activity

proximately caused the harm. State v. Goodson, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1 (1994). Where there is evidence that the Bailey was the aggressor along with evidence that the gun discharged accidentally then a jury charge on accident would be applicable. See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 413 (2008).

As discussed above, Applicant engaged Bailey after Alston refused to purchase marijuana from Bailey and after Alston had walked away from Bailey's car. (PCR Hr'g Tr. p. 250, ln. 15-16). Applicant further testified that : it was Bailey who reached by his console and grabbed a weapon before they started tussling (PCR Hr'g Tr. p. 253, ln. 1-3 & 16-19); while Applicant and Bailey were tussling over the gun, the gun went off (PCR Hr'g Tr. p. 254, ln. 8-13); Applicant did not know that Bailey had been shot (PCR Hr'g Tr. p. 255, ln. 1-2); and Applicant was trying to get control of the gun so that Bailey would not shoot him. (PCR Hr'g Tr. p. 255, ln. 11-14). Had Applicant testified to these facts at trial, this Court believes that he would have been entitled to charge on the defense of accident.

The above is evidence that Bailey was the aggressor and that he was killed unintentionally. What may questionable is whether Applicant was acting lawfully. The purchase or attempt to purchase marijuana is an unlawful act. The State would have had to prove beyond a reasonable doubt that the unlawful activity proximately caused Bailey's death. However, this Court believes that death cannot be said to be the natural or necessary result of buying or attempting to purchase marijuana, especially when there is no evidence that Applicant possessed a gun prior to the incident that resulted in Bailey's death or that there was any preexisting plan to rob Bailey. It is also questionable as to whether Applicant exercised due care in the handling of the weapon. Regardless of what is questionable here, this Court finds that Applicant testifying at trial to the same effect

that he testified at the PCR hearing would have resulted in a jury charge on the defense of accident. It would have clearly created a question for the jury.¹⁴

Therefore, Applicant has established that Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of accident would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge. Furthermore, Applicant has established that he was prejudiced by this error, as discussed above, in that the Trial Court would have been required to charge accident based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different.

Involuntary manslaughter

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Evidence of a struggle between the defendant and the Bailey over a weapon supports submission of an involuntary manslaughter charge. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). The South Carolina Supreme Court also recognized in State v. Brayboy that evidence of a struggle between a defendant and Bailey supports submission of an involuntary manslaughter

¹⁴ While this Court is aware that the defense of self-defense and accident are often mutually exclusive, there are instances where both charges are warranted. This Court believes that both would have been warranted in Applicant's case had he testified. See State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990); see also State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999).

charge. State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (2010) (citing to State v. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008), holding a jury charge on involuntary manslaughter was proper when petitioner testified that he took a loaded gun from the Bailey who was threatening him with the gun, that the gun fired almost immediately after he took possession of it, and that there was a struggle between he and the Bailey over the gun).

During the trial, Gipson testified that he saw Applicant and Bailey tussling in the car. (Trial Tr. p. 142, ln. 13-14). Alston also testified that he saw Applicant and Bailey "tugging" over something but did not know what it was about. (Trial Tr. p. 224, ln. 14-18). Applicant added to this testimony at the PCR hearing when he testified that Bailey was reaching by his console when Bailey grabbed a gun. After Bailey grabbed the gun, Applicant and Bailey began "tussling" over the pistol. (PCR Hr'g Tr. p. 253, ln. 13-19). Applicant further testified that while they were tussling for the gun that both his and Bailey's hands were on the gun when he heard a "pop." (PCR Hr'g Tr. p. 254, ln. 17-22). Trial Counsel even acknowledged at the PCR hearing that he asked Applicant if he had struggled with Bailey over the gun and said this had a lot to do with not wanting to put Applicant on the stand. (PCR Hr'g Tr. p. 42, ln. 11-16).

Gipson also testified at trial that he brought Bailey in on the deal because the guy wanted more than the amount of marijuana he had available. Gipson said he thought it was going to be "something small like a Ten or a Twenty." (Trial Tr. p. 131, ln. 22 – p. 132, ln. 2). Alston testified that he was the one who wanted to buy marijuana that night and said he planned to buy, "probably like an ounce or something." (Trial Tr. p. 203, ln. 8). Therefore, the testimony seems to indicate that the drug deal that was planned involved an ounce of marijuana which would constitute a misdemeanor pursuant to S.C. Code Ann. § 44-53-370 (c) (4) (1976 & Supp. 2011).

This Court believes that if Applicant testified at trial, consistent with his testimony at the PCR hearing, coupled with the testimony of Gipson and Alston, then he would have received a jury charge on involuntary manslaughter since there would have sufficient evidence establishing a jury question as to whether the killing was unintentional without malice while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily injury. Furthermore, this Court believes that Applicant would have been entitled to an involuntary manslaughter charge even in light of Dr. Kelly Rose testifying at trial that the bullet that struck Bailey "traveled from right to left, slightly down, and slightly forward, ..." (Trial Tr. p. 269, ln. 17-19). In other words, a charge on involuntary manslaughter would have been warranted even if they State argued that Bailey's wound was inconsistent with Applicant's testimony because this Court does not believe that there is overwhelming evidence that Applicant intentionally killed Bailey.¹⁵ See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 412 (2008).

Therefore, Applicant has established that: Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of involuntary manslaughter would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge; and, Applicant was prejudiced in the sense that he has established, as discussed above, that the Trial Court would have been required to charge voluntary manslaughter based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different.

¹⁵ A self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges. State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008). This Court believes that if Applicant had testified at trial consistent with his testimony at the PCR hearing, he would have been entitled to a jury charge on both self-defense and involuntary manslaughter.

Conclusion as to the lesser included charges and defenses

Based upon the above discussion of the lesser included offenses and defenses, this Court believes that Applicant would have been entitled to a jury charge on self-defense, accident, and involuntary manslaughter had his testimony at trial been consistent with his testimony at the PCR hearing. Because Trial Counsel and Co-Counsel were deficient in failing to adequately explain the necessity of his testimony to receive such charges, Applicant has demonstrated prejudice by showing that he would have received these charges had he testified and established that there is a reasonable probability the result of the proceeding would have been different.

Trial Counsel neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged. (Allegation 11)

The Belcher decision, as noted during the discussion of Allegation 1, held that a jury cannot be told that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809. Applicant asserts that Trial Counsel failed to discuss or explain the implications of Belcher and what was necessary to prevent the trial court from telling they jury that they could infer malice from the use of a deadly weapon in his case.

Trial Counsel was asked at the PCR hearing if he explained to Applicant that if he did not testify and provide some basis for the assertion of a lesser included or some affirmative defense, then there was not going to be a basis to object to the Court charging that malice could be inferred from the use of deadly weapon. (PCR Hr'g Tr. p. 49, ln. 18-23). Trial Counsel indicated that he thought he had explained it and that he thought he did a brief on it as well. (PCR Hr'g Tr. p. 49-50, ln. 24-25 & 1-2). PCR counsel further inquired of Trial Counsel asking him whether after the

State rested and their witnesses had not testified to anything that would give the Court "a basis for asking for "voluntary manslaughter, asking for accident, asking for self-defense," if he told Applicant he had to tell his side of the story so that he could ask for these charges and receive the benefit of Belcher. Trial Counsel responded stating, as to accident, no, but as to the others, yes. (PCR Hr'g Tr. p. 50, ln. 23). Upon further questioning of Trial Counsel, PCR Counsel asked Trial Counsel why he persisted that the rule in Belcher applied to this case when he knew the Trial Court was not going to charge voluntary, involuntary, accident or self-defense. (PCR Hr'g Tr. p. 214, ln. 11-14). Trial Counsel responded saying that he was trying to protect the record. (PCR Hr'g Tr. p. 214, ln. 15-23).

Co-Counsel was also asked about this issue and he testified he understood Belcher to mean that if there was no evidence of a lesser included offense(s) and or defense(s), then Applicant would not receive the benefit of Belcher. (PCR Hr'g Tr. p. 182, ln. 7-22). Co-Counsel acknowledged that when the Trial Court Judge told them that he was not going to give "voluntary manslaughter or involuntary manslaughter" because there was no evidence of mitigation, then that was based upon the record in front of him (the Trial Court Judge) and what "y'all did do, not what you didn't do." (PCR Hr'g Tr. p. 182-183, ln. 23-25 & 1-5). Co-Counsel was further asked, but could not recall, if they told Applicant that if he did not testify there was not going to be enough evidence for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. (PCR Hr'g Tr. p. 187, ln. 12-16). PCR Counsel went on to state that she would assume that Co-Counsel "did not discuss with him that if you (Applicant) didn't get jury charges on something in that group, you were not gonna be able to stop the judge from giving the inference of malice from the use of a deadly weapon charge. (PCR Hr'g Tr. p. 188, ln. 5-9). Co-Counsel stated that he could not recall "saying it in those terms." (PCR Hr'g Tr. p. 188, ln. 10-13). PCR Counsel pointed

out that even though there was no evidence that would warrant a lesser included charge(s) and/or defense(s), Trial Counsel still objected to the Court charging the jury that they could infer malice from the use of a deadly weapon. (PCR Hr'g Tr. p. 189, ln. 8-18). After pointing this out, PCR Counsel asked Co-Counsel if they understood that the rule in Belcher only came into play if those lesser charges or defenses were before the Court and Co-Counsel indicated that he could not remember but thought that he knew that they had to get some evidence of mitigation on the record to receive the benefit of Belcher. (PCR Hr'g Tr. p. 189, ln. 18-24).

This issue was briefly discussed by PCR Counsel and Applicant at the PCR hearing. Applicant was asked if he was told that if he did not testify, there was not going to be a legal reason for the judge not to charge the inference of malice from the use of a deadly weapon. Applicant initially responded that they had but when asked again, responded that they had not. (PCR Hr'g Tr. p. 243, ln. 15-21).

It appears there was some discussion with Applicant concerning the possible implications of Belcher and avoiding a jury charge that they could infer malice from the use of a deadly weapon. This Court, however, finds insufficient evidence that Applicant was adequately advised of the need to testify to establish evidence in mitigation of the charge of murder and receive the benefits of Belcher. As noted previously in discussing Allegations 7-13, Counsel and Co-Counsel were asked at the PCR hearing whether they discussed the issue that without the defense putting forth evidence that would mitigate, excuse or justify the homicide, the inference of malice jury charge would be proper. Trial Counsel testified he did not recall specifically informing Applicant about the implications of the Belcher decision in those terms. (See PCR Hr'g Tr. p. 215, ln. 2-7). Co-Counsel confirmed such as well. (See PCR Hr'g Tr. p. 188, ln. 4-9, ln 4-13).

This Court believes that it was incumbent upon Trial Counsel and Co-Counsel to thoroughly advise Applicant of what was needed to receive the benefits of Belcher so that he could make an informed decision of whether or not to testify. Had Trial Counsel done so, Applicant testified at the PCR hearing that he would have insisted on testifying at trial and Trial Counsel would have been required to honor Applicant's decision pursuant to the Rules of Professional Conduct which have previously been referenced above and discussed.

Given how crucial Applicant's testimony would have been with regard to obtaining application of the rule announced in Belcher, this Court cannot find that Trial Counsel's failure to adequately advise Applicant on the necessity for his testimony was harmless error. Because of this deficient and inadequate advice, Applicant was unable to make a knowing and voluntary waiver of the benefits that he would have received under Belcher had he testified. Applicant has therefore proven that Trial Counsel was deficient and that but for Trial Counsel's error, there exists a reasonable probability that the outcome of the trial would have been different had Applicant testified at trial consistent with his PCR testimony. For this reason, this Court finds that Applicant is entitled to relief as to this Allegation.

Trial Counsel was ineffective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation "everyone said he didn't carry a weapon" in response to question concerning whether there was any evidence that the deceased carried a weapon for defense (Allegation 45).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(d), SCRE. The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (2010). The improper admission of hearsay testimony is deemed harmless when it could not have reasonably affected the result of the trial. State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) (citing State v. Blackburn, 271

S.C. 324, 247 S.E.2d 334 (1978). Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. Jennings, 394 S.C. at 478, 716 S.E.2d at 93-94.

During Applicant's trial, Agent Johnson was asked by Trial Counsel on cross-examination whether Agent Johnson had determined through his investigation that Bailey carried a gun to protect himself. (Trial Tr. p. 353, ln. 23-25). Agent Johnson responded, "From all account, no, sir. **Everyone said he didn't carry a weapon.**" (Trial Tr. p. 354, ln. 1-2). Trial Counsel's follow-up question to this answer was whether Agent Johnson determined that (Bailey) carried a gun to protect himself, to which Agent Johnson responded that he did not recall that Bailey carried a gun to protect himself. (Trial Tr. p. 354, ln. 3-6). Trial Counsel then asked Agent Johnson if he ever found out that Bailey had multiple guns to which Agent Johnson said that he had not. (Trial Tr. p. 354, ln. 9-14). The State then objected to Trial Counsel's question asserting that the question had already been asked, and answered. The Trial Court stated, "he's already answered that he didn't have any guns, so" (Trial Tr. p. 354, ln. 15-19).

Trial Counsel testified at the PCR hearing that: the questions were intended to plant a seed of doubt into the jury that Bailey could have been the one who possessed the gun in question (PCR Hr'g Tr. p. 95-96, ln. 10-25 & 1-20); he was trying "to make sure if there was anything out there, it was my time to try to get it on the record" (id.); the focal point was the gun and proving that nobody had any evidence that Applicant had a gun (PCR Hr'g Tr. p. 98-99, ln. 22-25 & 1); there was nothing in the discovery that led him to believe there was any evidence that Bailey had prior charges for carrying a gun or having a weapon at any juncture (PCR Hr'g Tr. p. 99, ln. 8-12); and, there were "rumors" about Bailey having a gun(s) and stating "don't you think it's important for – for the – if – if there's the possibility – the opportunity for the law enforcement to say that this guy

(Bailey) carries a gun, too, you don't think that that would've been important if that got in?" (PCR Hr'g Tr. p. 99, ln. 17-25).

Trial Counsel was then asked why he did his "digging" in front of the jury. Trial Counsel simply responded saying that that was the way he does it. (PCR Hr'g Tr. p. 100, ln. 1-2). Upon being pressed further by PCR Counsel concerning this issue, Trial Counsel stated again that his theory of the case was to show that the gun came from Bailey and that his question did not work out but there were "rumors" that Bailey not only had one gun, but multiple guns. (PCR Hr'g Tr. p. 101, ln. 7-12). Trial Counsel then stated "if they didn't give it to me in writing and it's sitting out there and I've heard it, it's just a chance you take with your strategy. I took a chance." (PCR Hr'g Tr. p. 101, ln. 15-20). PCR Counsel asked Trial Counsel why he did not ask Agent Johnson, outside the presence of the jury, whether their investigation had yielded any evidence that Bailey carried a weapon or was known to be armed. Trial Counsel responded saying, "I made a decision in the courtroom at that time to ask the question. I thought it fit within my strategy. Had I had to do it, I'd probably do the same thing again in this case. There's nothing else I can say. I made a decision and I did it." (PCR Hr'g Tr. p. 102, ln. 1-9). Trial Counsel then acknowledged that if he had asked Agent Johnson this question outside of the presence of the jury and learned that no one said Bailey ever carried a gun, then he does not know what he would have done. (PCR Hr'g Tr. p. 103, ln. 5-18). Finally, Trial Counsel acknowledged that he could have asked Agent Johnson this question outside the presence of the jury in an interview outside of the courtroom. (PCR Hr'g Tr. p. 106, ln. 8-14).

This Court believes that there was no more critical issue in this trial than the question of who brought the gun to the scene of this drug deal. Trial Counsel's theory throughout the trial was to show that the gun came from Bailey. (PCR Hr'g Tr. p. 101, ln. 7-8). Agent Johnson's response

to Trial Counsel's question was classic hearsay. It was clearly a statement offered for the truth of the matter asserted, that everyone said Bailey did not carry a gun. Rule 801, SCRE. Furthermore, this hearsay statement did not fit within any recognized exceptions to the Hearsay Rules found in Rule 803, SCRE. There is no clearer principal of evidence law than the absolute prohibition against the admission of out-of-court statements to prove the truth of the matter asserted, unless an exception to the rules apply. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

The prejudice to Applicant from Agent Johnson's hearsay response is clearly apparent. When Agent Johnson testified, Gipson, Alston, Pinckney and Thompson had already testified. Gipson had testified that it was "either his, the friend that was with him or he (Applicant) had the gun." (Trial Tr. p. 156, ln. 6-8). Pinckney testified that Applicant did not get out of the car with a gun or get back in the car with a gun. (Trial Tr. p. 186, ln. 6-11). Alston testified he did not see Applicant with a gun. (Trial Tr. p. 225, ln. 1-20). Thompson testified that he did not see a gun, coming or going. (Trial Tr. p. 262, ln. 17-20). Gipson further testified that Alston was about two feet, diagonal from him and that he was not at Bailey's car when the shot occurred. (Trial Tr. p. 144, ln. 11-16). Alston testified he was back in the car that he came in when the shooting occurred. (Trial Tr. p. 212, ln. 15-17). Likewise, Thompson testified that Alston was back in the car when the shooting occurred. (Trial Tr. p. 251, ln. 21-24). All of this testimony established that no one saw Applicant with a gun and that Alston was back in the car when the shooting occurred.

Thus, Agent Johnson's testimony essentially bolstered the testimony of Gipson with substituted anonymous claims from absent accusers by alluding to the fact that the gun had to have come from Applicant. With this damaging testimony coming in through cross-examination, Trial Counsel also managed to establish that law enforcement had not searched Bailey's apartment after

the shooting. (Trial Tr. p. 353, ln. 10-18). Rather than object to Agent Johnson's testimony and ask that it be stricken from the record, or make a Motion for a Mistrial, Trial Counsel exacerbated the prejudice to Applicant by asking the question again. While Trial Counsel apparently tried to muddy the water, so-to-speak, by getting Agent Johnson to say he did not recall ever determining that Bailey carried a gun for protection, he never objected to this prejudicial, inadmissible hearsay.

Furthermore, it cannot be said that Agent Johnson's testimony was cumulative to other evidence offered in the trial. As pointed out above, none of the State's witnesses had placed a gun in Applicant's hands through their testimony. More importantly, no other witness had testified that Bailey did not carry a gun(s) for protections. Since Agent Johnson's testimony was not cumulative, his hearsay response to Trial Counsel's question cannot be viewed as harmless because Agent Johnson's hearsay response completely undermined Trial Counsel's theory of the case: that the gun came from Bailey.

This Court is aware that the argument can be made that Trial Counsel opened the door to the damaging hearsay testimony by asking the questions he asked in cross-examination. However, this Court finds that Agent Johnson could have simply answered the question with a simple "no," instead of interjecting hearsay into his testimony. When Agent Johnson did not answer with a simple "no," Trial Counsel had an obligation to object to this damaging hearsay testimony. To the extent Trial Counsel should have known he was questioning this witness in such a manner that he risked soliciting a hearsay response, this Court finds he was deficient and ineffective for doing so. The real prejudice to Applicant, comes from Trial Counsel's failure to object to the testimony. Had his objection been sustained, Trial Counsel could have then decided between a request to strike the testimony in question or make a Motion for a Mistrial. Had such an objection been overruled, then this important issue would have been preserved for appellate review.

An additional issue needs to be addressed which this Court believes goes hand-in-hand with Allegation 45. At the beginning of the PCR hearing, Trial Counsel testified that he had read every witness statement. (PCR Hr'g Tr. p. 29, ln. 4). During the State's cross-examination of Trial Counsel during the PCR hearing, Trial Counsel was asked, "Do you feel like you thoroughly investigated this case;" and Trial Counsel responded, "painstakingly." (PCR Hr'g Tr. p. 98, ln. 6-8). PCR Counsel did not object to this question by the State or the answer provided by Trial Counsel. On redirect examination of Trial Counsel by PCR Counsel, Trial Counsel was asked why he did not ask Agent Johnson the question about whether his investigation revealed that Bailey carried a gun(s) for protection beforehand, outside the presence of the jury. Trial Counsel acknowledged that: he had spoken to Agent Johnson several times outside the presence of the jury (PCR Hr'g Tr. p. 101, ln. 21-24); and, that "I made a decision in the courtroom at that time to ask the question. I thought it fit within my strategy. Had I had to do it, I'd probably do the same thing again in this case. There's nothing else I can say. I made a decision and I did it." (PCR Hr'g Tr. p. 102, ln. 1-9).

This Court recognizes that no formal allegation by Applicant raised the issue of ineffectiveness of Trial Counsel for failure to investigate. However, the South Carolina Code of Laws states that an Applicant's application for Post-Conviction Relief "shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence." S.C. Code Ann. § 17-27-50 (1976). The South Carolina Code of Laws also states that "[a]t any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of filing of any pleading." Id.

Rule 71.1(a), SCRPC, states that "[t]he South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act. Rule 15(b), SCRPC, asserts that when issues that are not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. However, implied consent will not be found if all the parties did not recognize it as an issue at trial, even if evidence in the record exists to support the amendment. Armstrong v. Collins, 366 S.C. 204, 227-228, 621 S.E.2d 368, 380 (2005). On the other hand, in Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017), the South Carolina Supreme Court stated that "the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure." Mangal, 421 S.C. at 99, 805 S.E.2d at 575. The Mangal Court went on to say that it encourages trial courts in PCR cases to use their discretion on procedural matters to find reasonable ways – within the flexibility of the Rules – to reach the merits of substantial issues. Id. at 99-100, 805 S.E.2d at 575-576. Mangal further states that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." Id. at 100, 805 S.E.2d at 576 (quoting Robertson v. State, 418, S.C. 505, 513, 795 S.E.2d 29, 33 (2016)); quoting Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)).

Since the State raised this issue without objection and PCR Counsel further questioned Trial Counsel about the issue of not talking to Agent Johnson prior to taking the stand as it relates to whether or not they determined that Bailey carried a gun(s) for protection, this Court is therefore treating such as an amendment to the PCR application. Failure to do so, would be contrary to the interest of justice since this Court believes that this is a substantial issue.

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A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). A criminal defense attorney has a duty to perform a reasonable investigation, including "at a minimum...the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id. at 331-332, 642 S.E.2d at 597 (internal citation omitted). On a claim of ineffective assistance of counsel, the validity of counsel's strategy is reviewed under an objective standard of reasonableness. Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008).

The case of Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), is very similar to the case before this Court. In Ingle, counsel failed to interview a witness to ascertain whether she would support defendant's theory of the defense prior to putting her on the stand. Ingle, 348 S.C. at 471, 560 S.E.2d at 403. When she testified, she failed to corroborate defendant's theory of the case. Id. At the PCR hearing, trial counsel stated that he did not interview the witness because his client said she would be honest and when the state did not call her as a witness, he thought she would be favorable. Id. The Ingle Court, in citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), set forth the law that counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Id. (citing Roseboro, supra). The Ingle Court concluded that it was unreasonable for counsel to rely on defendant's assertion that the witness would be honest, and his assumption that she would be favorable since the State had not called her, amounted to an unreasonable strategy. Id. at 472, 560 S.E.2d at 403. The Ingle Court went on to say that it was objectively unreasonable for counsel to ask such a crucial question of the witness without first ascertaining her response. Id.

Similar to the Ingle case, Trial Counsel in Applicant's case asked a crucial question of Agent Johnson prior to him taking the stand. Trial Counsel asked Agent Johnson this question because it fit within his theory of the case, which was that the gun came from Bailey. However, Trial Counsel's question was based upon "rumors" that Bailey carried a gun, when Trial Counsel had no evidence of such, making it objectively unreasonable. Trial Counsel had every opportunity to interview Agent Johnson beforehand and it was incumbent upon him to know the answer to this question prior to asking it. Asking this question and receiving Agent Johnson's answer, without knowing the answer or objecting to the answer, totally undermined Trial Counsel's theory of the case and was tremendously prejudicial to Applicant. Because of such, Trial Counsel's representation was deficient, falling below an objective standard of reasonableness. This Court further finds that Trial Counsel's actions as to this issue, coupled with Applicant's allegations previously discussed, make it clear that there is a reasonable probability that the outcome of the proceedings would have been different. Therefore, Applicant is entitled to relief as to this issue.

Counsel was Ineffective for Continuing to Question Ricky Gipson about whether he saw Applicant with a Gun. (Allegations 23 & 24)

Applicant alleges that Trial Counsel was ineffective for continuing to cross-examine State witness, Ricky Gipson, whether he had seen Applicant with a weapon during the incident in question after this witness had clearly testified that he had not seen Applicant with a weapon on that date. (Allegation 23). Applicant also alleges that Trial Counsel was ineffective for continuing to cross-examine Ricky Gipson whether or not he had ever informed law enforcement that he saw Applicant with a weapon on the day in question because there was a previous statement Gipson made to law enforcement, which was part of discovery but not part of evidence at trial via testimony, where Gipson claimed that either Applicant or his friend with him had a gun. Applicant

alleges that this questioning resulted in publication of testimony and evidence that was prejudicial to Applicant (Allegation 24).

During Applicant's trial, while Trial Counsel was cross-examining Ricky Gipson, the following line of questioning occurred:

Q. You signed a statement on your first visit. And I want to be sure, in all of those statements not one time did you say that Julian had a gun, is that correct?

A. I don't know who had the gun, because I don't know any names.

Q. I didn't ask you that, sir, please answer my question and then you can explain. In any one of those statements did you say Julian had a gun?

A. No, sir.

Q. Okay.

A. It was one of the two though, so technically, yes.

Q. Okay. If that's what you want to say. The only thing I'm asking, and I want to get that clear, did you say in any statement that Julian had a gun?

Objection by the Solicitor

Q. Did in either statement you say that Julian had a gun?

A. No, but as, in the statement I said either his, the friend that was with him or he had the gun.

Trial Tr. p. 155, ln. 5-18, p. 156, ln. 6-8.

After Trial Counsel asked these questions and received those respective responses from Gipson, Trial Counsel handed Gipson a copy of his statement and asked him to point out where he had said this. Gipson at this point claimed that the handwriting was "a little sketchy" and that he could not read it. (PCR Hr'g Tr. p. 157, ln. 7-8). Solicitor Sorenson, then on redirect, asked Gipson the following:

Q. Okay. Tell the jury, would you read for the jury what you wrote on that, that same day?

A. "This is one of the guys there, either it was him or the man with him that had the gun, that shot the gun, shot Jon."

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Q. Okay. So, you did, in fact, tell the police back on May the Sixth of Two thousand eleven, and write it down on State's Exhibit Number 19 that it had to be one or the other that shot Jon, is that correct?

A. Yes, sir.

Trial Tr. p. 166, ln. 17-25.

The following references to Trial Counsel's testimony are contained in the line of questioning by Applicant's PCR Counsel directed to Trial Counsel regarding the above-captioned Allegations. (PCR Hr'g Tr. p. 24, ln. 23 - p. 31, ln. 6). Trial Counsel testified that he interpreted the witness's statement to mean that the witness was saying that either Applicant or the Bailey had to have had the gun. (PCR Hr'g Tr. p. 211, ln. 10-12). Trial Counsel also testified that: he got witness Gipson to admit multiple times on cross-examination that he never saw Applicant with a gun that day; and, if Applicant did not have a gun it would have been reasonable to infer that the Bailey is the one who brought the gun that day. Additionally, Trial Counsel testified that his focus was on the fact that he got the witness to repeatedly say that he never saw Applicant with a gun on the day of the incident. The critical point within this testimony by Trial Counsel is that the Defense's "theory of the case was that Julian wasn't [sic]-- didn't have a gun, [that] no one saw him with the gun," (PCR Hr'g Tr. p. 26, ln. 24 - p. 27, ln. 1); and Trial Counsel "wanted that on the record" (PCR Hr'g Tr. p. 27, ln. 1-2) and "wanted the jury to hear Julian didn't have a gun" (PCR Hr'g Tr. p. 27, ln. 12-14).

It was unreasonable for Trial Counsel to interpret Gipson's testimony to mean that either Applicant or Bailey had the gun. Gipson had previously testified that he was the only one that knew Bailey so the Bailey could not have been the "friend" of Applicant that Gipson referred to. (PCR Hr'g Tr. p. 140, ln. 4-5). In addition, Gipson testified that the "darker skinned heavier set guy" (Alston) was kind of next to him, about two feet diagonal to him when the shooting occurred.

(PCR Hr'g Tr. p. 144, ln. 11-16). This testimony further illustrated that Alston was not in close proximity to Bailey when the shooting occurred.

Applicant has established that Trial Counsel was deficient for continuing to ask Gipson if he saw Applicant with a gun after beneficial testimony was already in the record concerning such. Trial Counsel knew, or should have known, from an adequate review of the discovery, that pursuing this line of questioning further would have a prejudicial impact upon Applicant. Furthermore, Trial Counsel's conduct was prejudicial to Applicant in that Trial Counsel opened the door for the State to further clarify to the jury that the only people at Bailey's car when the shooting occurred was Bailey and Applicant. Applicant was further prejudiced in that Gipson's response to Trial Counsel's continuous line of questioning once again undermined Trial Counsel's theory of the case that the gun came from Bailey. Because Applicant has proven that Trial Counsel was deficient as to this allegation and that Applicant was prejudiced, Applicant is entitled to relief as to this Allegation.

Failure to Properly Cross-Examine or Impeach Witnesses

Applicant alleges various instances of ineffective assistance counsel relating to Trial Counsel's failure to impeach State's witnesses or failure to properly cross-examine State's witnesses. The following Allegations fall within the category of failure to properly cross-examine or impeach witnesses and investigate plea negotiations between the State and witnesses appearing for the prosecution: 2; 3; 5; 6; 15; 16-22; 26-28; 34-36; and, 43. Within these Allegations, Applicant alleges Trial Counsel was deficient for failing to impeach State's witnesses by not questioning the witnesses regarding the following: potential deals and consideration they may have received for cooperation and in exchange for testifying at trial; the amount of marijuana involved

in the deal; potential sentencing exposure for various offenses; potential for future prosecution of various charges; and, whether or not charges were brought against them as a result of this incident.

I. Specific Allegations related to failure to properly cross-examine witnesses

1. Ricky Gipson

Trial Counsel was ineffective for neglecting to adequately cross-examine witness, Ricky Gipson, concerning what deals he had reached with law enforcement in the Solicitor's Office in exchange for his testimony. (Allegation 2)

On cross-examination at trial, Trial Counsel asked witness Ricky Gipson: how many days he served in jail, to which Gipson responded "none" (Trial Tr. p. 158, ln. 8-9); whether he was ever under arrest, to which Gipson responds that he was not (Trial Tr. p. 158, ln. 11-12); and, whether he set up the drug deal in question, to which Gipson responds that he did set up the drug deal. (Trial Tr. p. 158, ln. 13-14). Trial Counsel also asked Gipson on cross-examination: "Didn't they cut you a deal because you wasn't [sic] charged?" Gipson responded "No, sir" (Trial Tr. p. 163, ln. 18-19); "everybody else went to jail," and Gipson responded "I wasn't with them;" and, "you didn't ride over there with them in the car," and Gipson responded "inadvertently, yes." (Trial Tr. p. 163, ln. 20-24).

The record clearly indicates that Trial Counsel did cross-examine Ricky Gipson regarding whether he had reached a potential deal with law enforcement and in the Solicitor's Office. Trial Counsel's question regarding the fact that Gipson did not serve any jail time also emphasized that he had not been charged in connection with this homicide despite playing a significant role in the chain of events leading to the homicide.

Trial Counsel was ineffective for neglecting to question witness, Ricky Gipson, concerning the penalties for dealing in the quantity of drugs admittedly involved in the transaction he set up between Alston and the Bailey. (Allegation 3)

During the direct examination of Gipson, Solicitor Sorenson asked Gipson "And tell the jury what that was that you were doing back in the spring of Two Thousand eleven [sic]," to which Gipson responds "selling marijuana." (Trial Tr. p. 129, ln. 11-13). During Trial Counsel's cross-examination of Gipson, Trial Counsel stated, "When this happened you were a drug dealer, correct?" to which Gipson responds "Yes, sir, that's correct." (Trial Tr. p. 152, ln. 6-8).

While Trial Counsel did not specifically question Gipson regarding the penalty for dealing marijuana in the quantity involved in the transaction in question, Trial Counsel's questions clearly placed before the jury the fact that Gipson was a drug dealer at the time of this incident. More importantly, Trial Counsel enumerated a valid and legitimate trial strategy for not further cross-examining the witnesses beyond that which he did at trial, to be discussed below. In that discussion, the Court will further address this Allegation.

Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his potential sentencing exposure for murder in connection with the death of the Bailey had the State elected to pursue the charge of murder against him under the concept of accomplice liability. (Allegation 5)

Trial Counsel asked Gipson, on cross-examination: "And you admitted to facts that you could get charged for felony murder" with Gipson answering affirmatively; and, "you're going home," to which Gipson answered yes. (Trial Tr. p. 165, ln. 2-6). Trial Counsel also asked Gipson: "Did you not cause this murder with helping sell these drugs," to which Gipson responded "[i]nadevertantly, yes." (Trial Tr. p. 160, ln. 4-6).

The record indicates that, while Trial Counsel did not question witness Ricky Gipson regarding the specific sentence exposure for murder or under what theory of criminal liability he could have been charged, he did elicit testimony from Gipson acknowledging that he could have been charged with murder.

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Trial Counsel was ineffective for neglecting to cross-examine witness Ricky Gipson concerning the amount of marijuana involved in the drug deal he allegedly set up between the Bailey and Applicant and his friends. (Allegation 6)

The trial testimony shows, which this Court referenced in its discussion of Allegation 3 above, there was testimony from Gipson on cross-examination that he was a drug dealer. The trial record clearly indicates that Gipson, as he testified to on cross-examination, set up the drug transaction in question (Trial Tr. p. 162, ln. 3-6). More importantly, however, the exact amount of marijuana to be purchased was evidence placed into the record by testimony, albeit not from Gipson on cross-examination. During direct examination of Ray Anthony Alston, Solicitor Sorenson asked "And do you remember how much you were looking to buy," to which Alston replied "Probably like an ounce or something." (Trial Tr. p. 203, ln. 7-8). During cross-examination of Alston, Trial Counsel asked, "And you said the amount you wanted to buy was an ounce, is that correct," to which Alston answers affirmatively. (Trial Tr. p. 222, ln. 25 - p. 223, ln. 2). Therefore, while the amount of marijuana involved in the transaction did not come in through the testimony of Gipson, it was clearly placed in the record before the jury by the testimony of Alston.

Trial Counsel was ineffective for neglecting to cross-examine witness, Ricky Gipson, concerning the fact that he could have been charged with attempted armed robbery and was not. (Allegation 15)

Trial Counsel cross-examining Gipson regarding the possibility of him being charged with attempted armed robbery would be speculative since there was a lack of facts in the record that would support Gipson being charged with attempted armed robbery. As Trial Counsel indicated during the PCR hearing, none of the witnesses in the car testified that Applicant intended to rob or did rob Bailey. (PCR Hr'g Tr. p. 23, ln. 4-13). The only testimony was that Gipson observed Applicant and Bailey "tussling" over something for which Gipson did not know. Thus, a question

directed at Gipson intended to put before the jury that Gipson could have been charged with attempted armed robbery would be nothing more than speculative.

Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that the State had not charged him with a number of serious offenses for which he could have been prosecuted under a theory of accomplice liability. (Allegation 21)

Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his knowledge that the State could still elect to prosecute him for multiple serious felonies at some future date should they elect to prosecute him under a theory of accomplice liability. (Allegation 22)

Allegations 21 and 22, which allege that Trial Counsel was ineffective for not cross-examining Gipson regarding potential charges he could have received stemming from the incident in question and that Trial Counsel was ineffective for not cross-examining Gipson regarding potential future charges he could receive stemming from this incident, are similar in nature to Allegations 3, 5, and 15, which have been addressed by the Court above.

2. Hilliard Pinckney

Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he was not charged with murder when under the State's theory of the case he could have faced that charge under the theory of accomplice liability. (Allegation 16)

Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he was not charged with any drug crime in connection with his admitted involvement in the conspiracy to purchase marijuana. (Allegation 17)

Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could have been charged with attempted armed robbery under at least one interpretation of the evidence presented by the State. (Allegation 18)

Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that the State's failure to charge him with certain potential offenses in connection with this case constituted a benefit in exchange for testimony. (Allegation 19)

Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could still be charged with a number of other serious offenses in connection with this incident if the State elected to prosecute him under a theory of accomplice liability. (Allegation 20)

Witness Hilliard Pinckney was charged with accessory after the fact, a fact that was placed before the jury during Solicitor Bell's direct examination. (Trial Tr. p. 182, ln. 23 - 25). Trial Counsel questioning Pinckney regarding the potential for Pinckney to be charged with attempted armed robbery would be contrary to Trial Counsel's other line of questioning on cross-examination, which was "...y'all didn't go there to rob anybody, did you?" (Trial Tr. p. 186, ln. 3-5). Thus, Allegation 18 is similar to Allegation 15 above, as to Ricky Gipson, which this Court has previously discussed and believes would be similar to Pinckney.

Allegations 16 and 17 will be discussed below. This Court will not address nor further discuss Allegations 19 and 20 since they are similar or duplicative in nature to Allegations 16 and 18 which have been discussed above.

3. Ray Anthony Alston

Trial Counsel was ineffective for failing to cross-examine Ray Anthony Alston concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges. (Allegation 26)

Trial Counsel was ineffective for neglecting to adequately cross-examine Ray Anthony Alston concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date. (Allegation 27)

Trial Counsel was ineffective for neglecting to adequately cross-examine witness Ray Anthony Alston concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for testimony. (Allegation 28)

On direct examination of witness Ray Anthony Alston, Solicitor Sorenson asked, "And what is it you're locked up for," to which Alston replied "murder." (Trial Tr. p. 193, ln. 21-22). Solicitor Sorenson followed up by asking Alston, "Is that stemming out of the incident that we're here about today," to which Alston replied "Yes, sir." (Trial Tr. p. 193, ln. 23-24). Solicitor Sorenson also asked Alston during direct examination whether he had been promised anything to

come and testify to which Alston said "no." (Tr. Tr. p. 220, ln 24-25, p. 221, ln. 1). The fact that Alston had been charged with murder in connection with this incident and that he was still in jail for this murder charge was before the jury.

As to Allegation 26, it is unclear what Applicant means when stating that there were "potential charges [Alston] could have faced" and what the "potential sentencing exposure [Alston] would have been facing had he been prosecuted on each of these charges." To the extent it refers to Alston being charged with murder, which was the only offense for which Alston was charged, the jury was aware of Alston's pending murder charge throughout his testimony during direct examination. Thus, Trial Counsel not cross-examining Alston regarding the specific sentencing exposure for murder is not ineffective assistance of counsel. If Applicant is referring to the potential charge of attempted armed robbery in Allegation 26, then cross-examining Alston regarding sentencing for attempted armed robbery would be both speculative and contrary to the evidence and Trial Counsel's line of questioning on cross-examination of Alston (Trial Tr. p. 228, ln. 7: "So there was no preplan for robbery?").

Allegation 27 would tend to signify that Trial Counsel was required to have asked speculative questions to witness Alston. Putting this aside, the Court will further discuss Allegation 27 and 28 below.

4. Maurice Thompson

Trial Counsel was ineffective for failing to-cross examine Maurice Thompson concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted for on each of those charges. (Allegation 34)

Trial Counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident at some future date. (Allegation 35)

Trial Counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a cooperation in exchange for his testimony. (Allegation 36)

The Court reiterates that these Allegations all tend to state that Counsel was ineffective for failing to cross-examine witness Maurice Thompson in a manner that would essentially be asking speculative questions, which would clearly not amount to ineffective assistance of counsel. Additionally, it would have been contrary to Trial Counsel's line of questioning on cross (Trial Tr. p. 259, ln. 17-19: "And one of the things you said was, there was never a plan of robbery with the four or the five of y'all, is that true?"). These Allegations will be further discussed below.

General allegation that Trial Counsel was ineffective for failing to adequately investigate any plea negotiations between the State and witnesses appearing for the prosecution at Applicant's trial. (Allegation 43)

In Allegations 2, 28, and 36, there are allegations of ineffectiveness of Trial Counsel for failure to cross-examine witness Ricky Gipson, Ray Anthony Alston and Maurice Thompson concerning any deals or consideration they received in exchange for their testimony. There was no such allegation relating to witness Hilliard Pinckney. Therefore, this Court is only addressing allegation 43 as it relates to Pinckney since the other witnesses were addressed under the above-referenced allegations.

During Applicant's trial, Solicitor Bell questioned Pinckney. Solicitor Bell specifically asked Pinckney: if he was charged with accessory after the fact; whether he had been offered anything to testify; and, if was expecting to cooperate to help himself. (Tr. Tr. p. 182, ln. 23-25, p. 183, ln. 1-5). Pinckney answered Solicitor Bell confirming the charge, denying he had been offered anything to testify, and that was testifying with the expectation of helping himself. Id.

At the PCR hearing, Solicitor Sorenson indicated that Pinckney was charged with accessory after the fact pursuant to this incident. (PCR Hr'g Tr. p. 130, ln. 15-16). Therefore,

Pinckney, Thompson, and Alston testified at Applicant's trial with pending charges against them, of which they were aware. (PCR Hr'g Tr. p. 136, ln. 8-11). However, Pinckney's charge was ultimately dismissed in October 2013, over a year after Applicant's trial. (PCR Hr'g Tr. p. 130, ln. 15-17). The charge was dismissed against Pinckney because he was not driving the car on the night of the incident. (PCR Hr'g Tr. p. 136, ln. 22-25). Since Pinckney was questioned about his pending charges and his expectations or benefits for testifying, it was not deficient performance by Trial Counsel for not questioning Pinckney concerning such.

II. General analysis of the Allegations regarding Counsel's alleged ineffective questioning of witnesses on cross-examination. (Allegations 2, 3, 5, 6, 15, 21, 22, 16-20, 26-28, 34-36, & 43)

The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. State v. Stokes, 381 S.C. 390, 401-02, 673 S.E.2d 434, 439 (2009). If a defendant has the opportunity to cross-examine a witness, there is no violation of the Confrontation Clause. State v. Nance, 393 S.C. 289, 712 S.E.2d 446 (2011); see U.S. Const. amend. VI.

In addressing the Allegations not fully addressed in the prior sections, and in addressing the above-referenced Allegations generally, this Court observes that Trial Counsel did cross-examine each of the State's witnesses. Trial Counsel testified at the PCR hearing that his strategy in not stringently cross-examining State's witnesses was due to the fact that their testimony was helpful to Applicant and that he did not think it was beneficial to antagonize witnesses that were being cooperative and testifying in Applicant's favor which was consistent with his theory of the case:

PCR Counsel: Every single one of the witnesses, Alston, Thompson, Pinckney, they -- Gipson, they that all got the potential for the State to have developed a different theory, which was that they all came there with the intention all along to rob the drug dealer, right?

PCR Counsel: And so under sound principles of accomplice liability, Gipson could have been charged with murder and attempted armed robbery, Alston -- all of them could have.

Trial Counsel: ...I didn't need to antagonize them. They said nothing to hurt -- matter of fact, everything they said helped our case. I was banking on that because each one of them said he wouldn't -- he left the car with no gun, he didn't come back with a gun.

Trial Counsel: None of those guys -- none of the ones that were in the car with Julian said he was trying to rob the -- rob him. Even Gipson said he didn't know whether he was robbing him or not, that the -- the State wanted that theory, but none of them testified to that theory.

PCR Hr'g Tr. p. 21, ln. 4-8; p. 21, ln. 22-24; p. 22, ln. 21-25; p. 23, ln. 9-13.

A review of the trial record confirms that none of the witnesses in question testified that they intended to rob Bailey. As Trial Counsel correctly noted at the PCR hearing, the State's theory at trial was that this incident resulted from a planned attempt to rob Bailey. Contrarily, the Defense's theory of the case was that no witness saw the murder weapon at any point and thus there was insufficient evidence to convict Applicant for murder. Furthermore, a review of the record reveals that part of Trial Counsel's strategy was specifically to get testimony into the record that this was not a planned or intended robbery. Trial Counsel questioning witnesses regarding whether they could have been charged with attempted armed robbery would have been favorable to the State's theory of the case and would have undermined Trial Counsel's theory of the case.

As to the Allegations that it was ineffective to not cross-examine witnesses regarding the possibility of being charged with drug offenses in relation to this incident, this Court also finds that attacking the credibility of the witnesses regarding this issue would undermine Trial Counsel's strategy of not jeopardizing the credibility of their general testimony that they did not meet Bailey with the intent to rob or shoot him and that they never saw Applicant with a gun. As to the possibility of being charged with murder with regard to witnesses Gipson and Alston, witness Gipson was questioned whether he realized he could have been charged with murder and witness Alston was in fact charged with murder. Solicitor Sorenson testified at Applicant's PCR hearing

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that the rationale in only charging Alston, in addition to Applicant, with murder was because Alston had gotten out of the vehicle and they had a "hand print or something of his on the vehicle" driven by the Bailey. (PCR Hr'g Tr. p. 131, ln. 4-7). He also said that "proving that everybody in the vehicle knew that what he (Applicant) was going to do ahead of time, I'm not – I'm not sure that was quite as clear cut." (PCR Hr'g Tr. pg. 132, ln. 4-16). This was because it was their story that they went there just to buy marijuana. (PCR Hr'g Tr. pg. 133, ln. 2-4). This was also confirmed by Solicitor Sorenson when he said that there wasn't evidence that would have convicted Alston of murder or any of them as an accessory before the fact of murder. (PCR Hr'g Tr. pg. 134, ln. 16-24).

Questioning witnesses Pinckney and Thompson on whether they understood they could have been charged with murder, or any other charges under the theory of accomplice liability, calls for speculation because law enforcement and the Solicitor's Office did not charge them with murder. In other words, it is speculation that they could have been charged with murder when they, in fact, were not charged with murder. The conclusion that this would have been speculation is further supported by the fact there was no testimony from these witnesses showing that this was a planned and prepared robbery that had gone wrong, and hence no evidence to support questioning regarding the witnesses being accomplices before the fact to murder under a theory of accomplice liability or the hand of one, hand of all.

At the PCR Hearing, PCR Counsel also questioned Solicitor Sorenson about the hand of one, hand of all (accomplice liability). PCR Counsel, asked Solicitor Sorenson "that in terms of – of potential evidence of hand of one being the hand of all, you didn't have much more on Alston that (sic) you did on Maurice Thompson and Pinckney." (PCR Hr'g Tr. pg. 134, ln. 9-12). Solicitor Sorenson agreed with PCR Counsel's assessment. (PCR Hr'g Tr. pg. 134, ln. 17-18).

This Court believes the facts of this case leading up to the shooting illustrate that these witnesses were "merely present," rather than accomplices, when this shooting occurred. There was no evidence, as previously discussed, that there was a plan to rob Bailey. Furthermore, each of these witnesses testified while they had pending charges against them from this incident and none of them had been promised anything in exchange for their testimony.

Under South Carolina law, the mere presence of individuals at the scene of the crime is not sufficient to prove that individuals are guilty of a crime and the presence of individuals at the scene where a crime is being committed, or mere association with a person who commits the crime, does not amount to those present being accomplices or aiders and abettors of the crime. State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973). Witnesses Gipson, Alston, Pinckney and Thompson appear to have been "merely present" based upon the evidence presented at trial as opposed to accomplices before the fact. It is important to note again, that Gipson was not charged with any crime, Alston and Thompson subsequently pled to Misprision of a Felony because of their actions after the incident, and the charges against Pinckney were dismissed because he wasn't driving the car. (PCR Hr'g Tr. p. 136, ln. 22-25)

This Court certainly recognizes the argument by PCR Counsel that these witnesses received a benefit for their testimony. However, this Court also recognizes that the charges that were not charged, dismissed or pled down were the result of the evidence that was presented at Applicant's trial, not from any "deals" or promises. Most importantly, none of the charges against any of these witnesses were dismissed, reduced, or pled down until after Applicant's trial. PCR Hr'g Tr. p. 137, ln. 4-6).

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For these reasons, this Court finds that Applicant has failed to prove that Trial Counsel was deficient in his cross-examination of these witnesses or that he was prejudiced. Therefore, Applicant's request for relief as to these allegations is denied.

Counsel Citing "Felony Murder" in Cross-Examination of Ricky Gipson
(Allegation 4).

Applicant alleges that Trial Counsel was ineffective for cross-examining Ricky Gipson concerning "felony murder" where said "cross-examination was inconsistent with South Carolina law and could readily mislead the jury into believing that Applicant's involvement in a felony drug deal made him responsible for murder in connection with any death occurring in the course of said felony."

In looking at the trial transcript, Trial Counsel asked Gipson if he had ever "heard of a felony murder." (Trial Tr. p. 159, ln. 21-23). Trial Counsel then followed that question asking Gipson, what is "felony murder," wherein Gipson answered that it is murder. (Trial Tr. p. 159, ln. 24-25). Gipson was then asked by Trial Counsel if that means "you call it a murder and you're committing a felony," to which Gipson responded "yes." (Trial Tr. p. 160, ln. 1-3).

Trial Counsel testified that he knew that South Carolina does not recognize felony murder, but he meant that murder was itself a felony. Trial Counsel testified that his intent with that line of questioning was to get witness Gipson back in line, as he felt Gipson was not taking the situation seriously:

I started cross-examining him and he started getting smart, and I was trying to get him back in line. I said 'look, you understand this . . . was a felony. We don't have a felony murder, but it was a felony to murder somebody. You understand that.' And his attitude changed immediately. I got his attention.

PCR Hr'g Tr. p. 206, ln. 8-14.

Trial Counsel testified that he wanted to make Gipson realize how high the stakes were and that he felt that Gipson began to testify more truthfully after that line of questioning. (PCR Hr'g Tr. p. 206, ln. 21 - p. 207, ln. 2). This Court finds Trial Counsel articulated a valid reason at the PCR hearing for questioning Gipson about "felony murder." Applicant has failed to show that Trial Counsel was deficient or that he was prejudiced by this line of questioning. Therefore, Applicant's claim for relief as to this allegation is denied.

Counsel Failing to Cross-Examine Ricky Gipson Concerning Discussion Heard
(Allegation 14)

Applicant alleges that Trial Counsel was ineffective for neglecting to cross-examine witness Ricky Gipson concerning what, if any, discussions he heard between Applicant and the Bailey. Trial Counsel testified that he did not ask Gipson about any conversations he may have overheard because his understanding was that Gipson was not near the car when the incident occurred. (See generally PCR Hr'g Tr. p. 59-60). During direct examination, Gipson stated "... after I heard the pop I was really trying to get away from the scene," and also answered affirmatively when asked whether he took off running at this point. (Trial Tr. p. 145, ln. 3-7). On re-cross, Trial Counsel asked Gipson "And you testified that you didn't know what happened in the car, right, so you're assuming that one of them had the gun, right because you wasn't [sic] there, right, because you dashed," to which Gipson responded, "Well, you could say that." (Trial Tr. p. 188, ln. 5-8). Gipson testified that he heard the "pop" of the gunfire right after the car, which Applicant and Bailey were in the front seat of, began to "spur out" and go into reverse. (See Trial Tr. p. 141, ln. 19 - p. 142, ln. 21). When asked where he was "when the car started backing up," Gipson replies, "I was at the rear of the car close to, I wasn't all the way at the end, by the bumper, in between the bumper and tire you could say, the bumper and the back tire." (Trial Tr. p. 144, ln. 6-10).

At the PCR hearing, Trial Counsel testified that Gipson "got out of the car and walked away, the Alston boy been in the other car and it was just he and Julian –it was Julian and the deceased at the car – I don't think anybody heard any discussion . . . [;]" Trial Counsel also testified that Gipson left the car and ran when he heard the "pops." (PCR Hr'g Tr. p. 59, ln. 1 - p. 60, ln. 6). Trial Counsel said that he did not believe that there was any reason to ask the witness about what he may have heard, because there was no evidence he was near the car when the incident occurred. (See PCR Hr'g Tr. p. 59, ln. 17-20).

This Court finds that there was no evidence in the record, or testimony during trial, that witness Gipson heard any conversation between Applicant and the Bailey. Thus, it is merely speculation that there was a conversation between Applicant and Bailey and that Gipson could have potentially heard the conversation. In addition to the trial record lacking any such evidence, there was no evidence at the PCR hearing that there was any conversation between Applicant and Bailey that could have been overheard. Applicant has failed to meet his burden in establishing that Trial Counsel was deficient or that he was prejudiced by Trial Counsel not cross-examining Gipson concerning any discussion he may have heard between Bailey and Applicant. Therefore, Applicant's claim for relief as to this allegation is denied.

Counsel was Ineffective for Failing to Object to Portions of the State's Closing Argument. (Allegations 29-32 & 37)

Applicant alleges that Trial Counsel was ineffective for failing to object to portions of the State's closing argument where the State argued matters not in evidence and improperly commented on the strategies of the Defense. Specifically, Applicant asserts Trial Counsel erred in failing to object to the following portions of the State's closing argument:

The State's improper comment on the strategies employed by Defense Counsel in violation of the 6th Amendment. (Allegation number 29);

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The State "essentially" arguing that there was no legal basis for the position of defense that Witness Ricky Gipson could have been charged with murder and other offenses. (Allegation number 30);

The State's argument of matters not in evidence through its argument that there was evidence that Applicant pulled the trigger and was trying to steal from the Bailey. (Allegation number 31);

The State's argument that Ricky Gipson would not have taken "them" to buy marijuana if he had known that Applicant had a gun. (Allegation number 32);

The State's argument that witness Gipson ran from the scene because he didn't have a gun on him where said argument addressed matters not in evidence and as such was highly improper. (Allegation number 37); and,

The State's argument that "we know it's not a contact" in arguing that any suggestion that the Bailey shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's own expert witness, the pathologist. (Allegation number 38).

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). "Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." Id. (internal citations omitted). The solicitor can attack the credibility of a defense. State v. Liberte and Sims, 336 S.C. 678, 521 S.E.2d 744 (Ct. App. 1999). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (internal citation omitted).

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"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (internal citation omitted)

Allegation 29, wherein Applicant asserts that the State's closing argument violated his Sixth Amendment right to be fully heard in his defense through the solicitor improperly commenting on the strategies employed by Trial Counsel, is without merit. As previously stated, a Solicitor may attack the credibility of a defense, as allowed under Liberte and Sims, and this is exactly what the State did. (Trial Tr. p. 395, ln. 11 - p. 401, ln. 5). Furthermore, Applicant was allowed to confront and cross examine each of the State's witnesses as required by the 6th Amendment.

Applicant next asserts that Trial Counsel was ineffective for failing to object to the State "essentially" arguing that there was no legal basis for the position of defense that witness Gipson could have been charged with murder and other offenses (Allegation 30). Applicant references pages 406 and 407 of the trial transcript in support of this allegation. Gipson testified during trial, however, that he contacted Bailey to set up the drug deal. (Trial Tr. p. 131, ln. 1-25). Because of this, along with no evidence of a preplanned robbery, there was not sufficient evidence to charge Gipson with murder or with accessory before the fact. (PCR Tr. p. 134, ln. 9-24). However, upon review of the Solicitor Sorenson's argument, he does state in his closing argument that Gipson could have been charged "with selling marijuana or something." Solicitor Sorenson never asserts that there was no legal basis for the position of Counsel that Gipson could have been charged with murder and other offenses. Therefore, this Allegation is without merit.

As to Allegation number 31, Applicant asserts that Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence, in arguing that there was evidence that Applicant pulled the trigger and was trying to

steal from Bailey. The record reflects that there was no direct evidence from any witness that Applicant pulled the trigger that shot Bailey nor was there any direct evidence that Applicant was attempting to steal from Bailey. However, there was testimony that Applicant was leaning into the passenger side of Bailey's car, that Bailey and Applicant were tussling over something, and that a "pop" was heard. (Trial Tr. p. 144-145). There was also testimony from Dr. Kelly Rose, the State's Forensic Pathologist, who testified that the wound to Bailey "traveled from right to left, slightly down, and slightly forward." (Trial Tr. p. 269, ln. 17-19). Other witness' testimony placing Applicant to the right side of Bailey when the shot occurred, coupled with that of Dr. Rose's testimony as to the path of the bullet, is clearly circumstantial evidence which could lead to a reasonable inference that Applicant did shoot Bailey. In addition, there was testimony at trial that when law enforcement arrived and searched Bailey's car, there was money and what appeared to be marijuana in the passenger floorboard. Moreover, there was testimony from witness Kendra Williams, the responding officer to the crime scene, that upon asking Bailey whether he had been robbed, "Bailey shook his head, yes." (Trial Tr. p. 89, ln. 7-8).

Circumstantial evidence in the trial record and the testimony of what Bailey told law enforcement creates a reasonable inference that a robbery was attempted by Applicant. As stated previously, the state's closing arguments are allowed to entail what is in evidence and the reasonable inferences from that which is in evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Therefore, the State's argument was not improper nor objectionable. Therefore, Applicant's assertion that Trial Counsel was ineffective for failure to object to such argument is without merit and is hereby denied.

Applicant asserts in Allegation 32 that Trial Counsel was ineffective for failing to object to a portion of the State's closing argument wherein Solicitor Sorenson stated that Gipson would

not have taken "them" over there to buy marijuana if he had known Applicant had a gun where there was no evidence establishing that Applicant in fact had a gun. (Trial Tr. p. 407, ln. 24-25). Gipson, on redirect examination at trial, confirms that if he had "seen a gun on one of these guys in the back seat" he would not have taken them over there to buy drugs. (Trial Tr. p. 167, ln. 1-4). Gipson also testified at trial on direct examination that he did not see the Bailey with a gun. (Trial Tr. p. 141, ln. 9-11). Hilliard Pinckney testified, on cross-examination, he did not see Applicant with a gun. (Trial Tr. p. 186, ln. 6-11). Alston testified at trial he did not see Applicant with a gun. (Trial Tr. p. 217, ln. 2-3). Alston also testified that Bailey was driving a green car when he arrived and that no one was with him. (Trial Tr. p. 208-09). Gipson and Alston testified that Applicant was leaning in the passenger side door of the Bailey's car when they heard a pop. (Trial Tr. p. 142-43, 212). After the pop and after Applicant got back in the car, Applicant was asked by Alston if he shot the guy and Applicant did not deny that he had shot Bailey. (Trial Tr. p. 211, ln. 2-6).

Based upon the above testimony, there was a reasonable inference that Applicant did have a gun which would not make the State's argument improper on this issue. Furthermore, it re-confirms facts in evidence that there was no plan to commit a robbery. Therefore, Applicant's assertion that Trial Counsel was ineffective for failing to object to this argument is without merit and Applicant's request for relief as to this Allegation is denied.

Allegation 37 asserts that Trial Counsel was ineffective for not objecting to the State's closing argument wherein Solicitor Sorenson argued that witness Gipson ran from the scene because he didn't have a gun on him where said argument addressed matters not in evidence and as such was highly improper. Gipson testified that after he heard the pop, he got away from the situation because he didn't have anything on him. (Trial Tr. p. 142, ln. 16-21). Gipson's testimony

is evidence that he did not have a gun, or at the very least, facts that create a reasonable inference of such. This testimony is direct or circumstantial evidence that Gipson did not have a gun on him when he ran from the scene which would allow the Solicitor to make such an argument during closing. Therefore, Applicant's assertion that Trial Counsel was ineffective for failing to object to this argument is without merit and Applicant's request for relief as to this Allegation is denied.

Allegation 38, asserts that Trial Counsel was ineffective for failing to object to a portion of the State's closing argument wherein Solicitor Sorenson argued that "we know it's not a contact" in arguing that any suggestion that Bailey shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's pathologist. Dr. Kelly Rose was the State's pathologist that performed the autopsy on the Bailey. She testified that Bailey had an open wound in his stomach and an exit wound coming out of his left side. (Trial Tr. p. 266, ln. 23-24). Dr. Rose also testified that the bullet would have traveled from right to left, slightly down, and slightly forward. (Trial Tr. p. 269, ln. 17-19). In addition, Dr. Rose defined different types of wounds, but most importantly she defined a "contact wound." She stated that if a wound is a contact wound, you would see a muzzle imprint. Dr. Rose then testified that there was no evidence of a muzzle imprint and no soot on Bailey. (Trial Tr. p. 276, ln. 14-15; Trial Tr. p. 277, ln. 14-15).

Based upon this testimony, direct evidence was presented for the State to argue that Bailey did not have a "contact wound." This testimony, as well as the entry location and exit location of the wound, created a reasonable inference supporting the State's argument that it would make "no sense" that Bailey shot himself. Therefore, the State's argument in closing as to this assertion was not objectionable, nor was it error for Trial Counsel not to object. Therefore, Applicant's assertion

that Trial Counsel was ineffective for failing to object to this argument is without merit and Applicant's request for relief as to this Allegation is denied.

In addition to the above, Trial Counsel testified at the PCR hearing that: he did not object to comments by Solicitor Sorenson in the State's closing argument as part of his trial strategy (see generally PCR Hr'g Tr. p. 64, ln. 23 - p. 70, ln. 7); there are differing thoughts on how to handle objections during closing arguments (id.); he believes that it was best to not object throughout closing arguments because the defense had last argument and he could explain the defense's theory of the case (id.); and he did not see where the comments by Solicitor Sorenson were inappropriate in that they were simply the State's theory of the case. (PCR Hr'g Tr. p. 66, ln. 13-24).

As previously stated, a solicitor is allowed to comment on the facts in evidence and reasonable inferences therefrom. The State was allowed to attack the credibility of a Trial Counsel's theory of the case. This Court, as previously stated, finds that the comments made by Solicitor Sorenson in the State's closing argument were neither inappropriate nor objectionable. Additionally, Trial Counsel enumerated a valid strategy for not objecting to the State's closing argument. Therefore, Trial Counsel was not deficient when he chose not to object to Solicitor Sorenson's statements at issue.

In addition, the Court finds that even if the comments were objectionable, Applicant suffered no prejudice. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003), holding appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). "The burden of proof is on [Applicant] to show prejudice." Id. (internal citation omitted). "In evaluating

prejudice, a number of factors should be considered: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." United States v. Mason, 344 Fed.Appx. 851, 854 (4th Cir. 2009). "When making this determination, [courts] must 'review the alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 655-656, 521 S.E.2d 744, 748 (Ct. App. 1999) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Putting aside the issue of whether or not Solicitor Sorenson's statements were improper, this Court finds that they were clearly not of a nature that would infect the trial with such unfairness as to mark Applicant's conviction as a denial of due process. Therefore, this Court finds that Applicant has failed to meet his burden in regards to these Allegations and his request for relief as to these Allegations is denied.

Failure to Adequately Argue to Suppress Statements of Dying Bailey. (Allegations 41, 42, & 42(A))

This Court finds that it need not address the allegations relating to the suppression of statements of the deceased Bailey, Allegation numbers 41, 42 and 42(A), since these issues were raised and argued on direct appeal. (See State v. Julian Young, Appellate Case No. 2012-213006, Unpublished Opinion No. 2014-UP-234 (filed June 18, 2014)). Issues that have been raised and ruled upon in a direct appeal may not be raised again in a post-conviction relief proceeding. See S.C. Code Ann. § 17-27-90 (1976); see Robertson v. State, 418 S.C. 505, 513-514, 795 S.E.2d 29, 33 (2016). This Court dismisses these Allegations as being improperly raised and outside the scope of the proceeding.

Trial Counsel was ineffective for failing to adequately argue that the statements made by the deceased did not have the degree of reliability typically afforded a dying declaration where the evidence before the Court verified that the description of the circumstances under which he was shot as a robbery was in fact suggested to him by the law enforcement officer questioning him. (Allegation 41)

Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement by lying about his name provided direct evidence that he was not operating under the belief that his demise was imminent. (Allegation 42)

Additionally, this Court finds that Allegations 41 & 42 lack merit on their face. In PCR Counsel's direct line of questioning to Trial Counsel at the PCR hearing, she acknowledges that Trial Counsel argued for suppression of the statements Bailey made to law enforcement on the basis that Bailey's unwillingness to identify himself to law enforcement showed the Bailey was forward-thinking, and thus his statements to law enforcement lacked the reliability required to be admissible under the dying declaration hearsay exception. Trial Counsel also submitted a brief in support of suppression of the statements. (PCR Hr'g Tr. p. 70, ln. 22- p. 71, ln. 4). More importantly, the trial record indicates that the Trial Court did not find this statement to be a dying declaration. Rather, the Trial Court admitted the statement under the excited utterance exception to hearsay. Thus, an Allegation that Trial Counsel did not adequately argue that the statement was not a dying declaration is clearly without merit when Trial Counsel argued that the statement did not qualify as a dying declaration and the statement was not admitted as a dying declaration.

Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement, by refusing to provide his name, constituted direct evidence that he had the capacity for reflective thought at the time of the utterance. (Allegation 42(A))

The Allegation claims that Trial Counsel was ineffective for not adequately arguing for the suppression of the Bailey's statement, on the basis of it not being part an excited utterance, based

on its lack of reliability. At the PCR hearing, PCR Counsel acknowledged that "[Trial Counsel] had argued previously that the fact that [Bailey] declined to provide his name was evidence of the fact that he didn't think he was about to die" and that "[Bailey] was thinking about possible prosecution..." (PCR Hr'g Tr. p. 72, ln. 19 – p. 73, ln. 2). At trial, Trial Counsel argued this as a basis for the lack of reliability of Bailey's statement and that it was inadmissible hearsay and not within the dying declaration exception. PCR Counsel claims it was ineffective to repeat this argument once the trial court overruled Trial Counsel's suppression motion finding it to be admissible as an excited utterance.

Upon review of the trial record, this Court finds this Allegation lacks merit for several reasons. For one, as noted above, Trial Counsel did in fact argue Bailey's statements were unreliable as they evidenced that Bailey did not want to give his name to law enforcement. While Trial Counsel may have not used the exact terminology of excited utterance at trial, the law is clear that "the excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (internal citations omitted). Trial Counsel argued to the Trial Court that Bailey's unwillingness to identify himself showed reflective thought through Bailey's apparent fear of law enforcement knowing his identity, and hence the statement lacked reliability. Since Trial Counsel argued the correct legal basis for when a statement cannot, as a matter of law, be an excited utterance at trial, this Court does not find Counsel to be ineffective for merely failing to give the technical label to the argument he was making.

Secondly, the testimony exchanged between PCR Counsel and Trial Counsel at the PCR hearing regarding this issue makes apparent why this Court finds this Allegation to be without merit. PCR Counsel asked Trial Counsel at the PCR hearing whether Trial Counsel considered

arguing separately that the statement was not an excited utterance, after the trial court had ruled that it was such. (PCR Hr' Tr. p. 73, ln. 6-19). In response, Trial Counsel stated that the trial court ruled it was an excited utterance and Trial Counsel objected to this ruling. The Trial Court noted Trial Counsel's objection and his motion to suppress the statements, and therefore Trial Counsel did not believe there was any action left to take. (PCR Hr'g Tr. p. 73). This Court tends to agree with Trial Counsel.

Lastly, Trial Counsel did in fact argue, albeit through his brief in support of his motion to suppress the statement rather than on the record, that Bailey's statement was not an excited utterance. (PCR Hr'g Tr. p. 74, ln. 4-5). Thus, the argument was before the Trial Court and was before the trial judge in the Trial Court's consideration and final ruling on the statement's admissibility.

For these reasons, these Allegation are without merit and Applicant's claim for relief as to these Allegations is denied.

Failure to Object to State's Characterization of Witness's Criminal History.

(Allegation 25)

Applicant alleges in this Allegation that Trial Counsel was ineffective for failing to object to the State's characterization of witness Ray Anthony Alston's criminal record where such characterization was intended to minimize the impact of the witness's criminal record. While not apparent on the face of this Allegation, PCR Counsel said during the PCR hearing that this characterization was also "an effort by the prosecution to, by analogy...minimize the misconduct of the deceased..." (PCR Hr'g Tr. p. 63, ln. 21-23). Specifically, during the State's examination of Alston, Solicitor Sorenson characterized Alston's criminal record as being "just a little bit of trouble in the past" and "a couple of marijuana convictions" (Trial Tr. p. 194, ln. 25 - p. 195, ln. 2).

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When Trial Counsel was asked about this issue at the PCR Hearing, he admitted that he did not object to such characterization. (PCR Hr'g Tr. p. 63, ln. 15-18). Trial Counsel further asserted that he did not believe this characterization minimized his prior record because Alston admitted selling drugs all the time and Trial Counsel called Alston a drug dealer on cross-examination. (PCR Hr'g Tr. p. 64, ln. 7-12).

This Court finds that Trial Counsel was not deficient for failing to object to this portion of Solicitor Sorenson's question and that this characterization of Alston's criminal record did not prejudice Applicant. The allegation that the State's characterization of Alston's prior marijuana convictions as a "little bit of trouble" drew an analogy to the Bailey's drug-dealing and painted the Bailey in a favorable light, which prejudiced Applicant, requires several different layers of speculation.

It appears that the progression of this Allegation is that: the jury heard the State characterize Alston's prior marijuana convictions as being a little bit of trouble; prior marijuana convictions are only a little bit of trouble; people in general dealing marijuana, including Bailey on the date in question, is only a little bit of trouble; Applicant allegedly murdered a Bailey who was taking part in an offense that could only lead to a little bit of trouble; and, Applicant was more culpable and Bailey more innocent. The problem with these assumptions is that, by its own logic, this characterization would also minimize the activity of Applicant on the date in question, which was purchasing marijuana. In other words, however much it can be conceived that this characterization led to prejudice against the Applicant, it minimizes the negative connotations around being involved with marijuana transactions. Even assuming this failure to object was an error, it is nonetheless not enough "to show that the error had some conceivable effect on the outcome of the

proceeding” or that Applicant was prejudiced by such. Therefore, Applicant's claims for relief as to this Allegation is denied. Strickland, 466 U.S. at 693.

Trial Counsel was ineffective for neglecting to object to the manner in which a law enforcement officer was questioned concerning the chronology between when other State's witnesses were arrested, cooperated with an interview, and then gave statements where the method in which the officer was questioned concerning each of the State's witnesses, followed by the same testimony concerning Applicant, which did not reference cooperation and the giving of a statement, amounted to an improper comment on the Applicant's exercise of his right to remain silent. (Allegation 33).

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being “compelled in any criminal case to be a witness against himself[.]”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”). Pursuant to that right, both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) (“[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.”). “In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent[.]” Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense.”); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“As a corollary of this

right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible."). "The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony").

However, the mere mention of a defendant's decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) ("When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt."), rev'd on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such testimony only requires reversal where its admission results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson's conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson's case). Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.").

In determining whether the defendant was prejudiced by the admission of testimony concerning his post-arrest silence, any error resulting from the admission of that testimony will

not result in reversal if a review of the entire record establishes the error was harmless beyond a reasonable doubt. State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986); see United States v. Hastings, 461 U.S. 499, 509 (1983) (“[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]”). In reviewing the record to determine whether an error was harmless, the following factors should be considered: (1) whether the reference to defendant’s right to remain silent was a single reference; (2) whether the reference was repeated or alluded to at another point during trial; (3) whether the prosecutor tied the defendant’s exercise of his right directly to his exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming. Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687; see Truesdale, 285 S.C. at 18-19, 328 S.E.2d at 56 (identifying the factors relied upon in the opinion of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), as relevant factors to be considered in determining if a Doyle violation is harmless). None of those factors is alone dispositive, and the specific circumstances of each case should be considered individually on a case-by-case basis to determine whether the error was harmless beyond a reasonable doubt. Truesdale, 285 S.C. at 19, 328 S.E.2d at 56; see Alderman v. Austin, 695 F.2d 124, 126, n. 7 (5th Cir. 1983) (instructing that the factors for determining whether a Doyle violation is harmless identified in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), are not to be treated as rigid rules or applied strictly to all cases); see also United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983) (“Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant’s story is ‘not totally

implausible,' but the evidence of guilt is 'substantial.'" (internal citations omitted)); see, e.g., State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

Agent Johnson of SLED is alleged to have given testimony (PCR Hr'g Tr. p. 66, ln. 25 - p. 67, ln. 17) that referenced State witnesses giving statements and cooperating and then gave testimony that did not reference Applicant cooperating or giving a statement:

Q: Okay. And that was when you took a statement from **[Ricky Gipson]** at the Sumter County Sherriff's Office?

A: **That's correct**

Trial Tr. p. 340, ln. 6-8.

Q: And did **Mr. Pinckney** cooperate and give y'all a statement when you interviewed Mr. Pinckney?

A: **No, sir**, no interview was conducted with Pinckney.

Q: Okay. He asked for a lawyer when you attempted to interview Mr. Pinckney?

A: Yes.

Q: And then lastly, co-defendant, **Maurice Thompson**, was arrested, I think he testified, on May the Nineteenth, does that sound right?

A: **Yes, sir**.

Q: Okay. And did he, in fact, cooperate and give a statement?

A: Yes, sir.

Trial Tr. p. 346, ln. 8-20.

Applicant alleges this was an improper comment on his right to remain silent. Trial Counsel testified at the PCR hearing that he did not object to this line of questioning as being an impermissible comment on Applicant's right to remain silent. (PCR Hr'g Tr. p. 67, ln. 18). Trial Counsel also testified that he did not believe it to be an attempt to obtain "back door" testimony

relating to Applicant's invocation of his rights in violation of Doyle. (PCR Hr'g Tr. p. 67, ln. 10-21).

This Court has reviewed the relevant case law cited above and the record. First, a review of the record shows that Agent Johnson testified that Hilliard Pinckney did not cooperate, meaning that it is not clear that this line of questioning tended to point out that Applicant did not cooperate. Second, this Court finds that the testimony presented was not an improper comment on Applicant's right to remain silent nor was Trial Counsel ineffective for failing to object to the testimony. Furthermore, this Court, after reviewing the factors espoused in Edmond, finds that even if the testimony was an improper comment on Applicant's invocation of the right to remain silent, it was not of the nature that would warrant reversal. Even assuming this testimony could have provided for an inference on Applicant's invocation of his right to remain silent, it was not a reference to Applicant's invocation of such rights. The testimony was not alluded to throughout the trial, and the State did not tie the invocation of such rights directly to an exculpatory story by Applicant. Therefore, this Court finds that Trial Counsel was not ineffective for failing to object to this testimony or prejudiced by such. Therefore, Applicant has failed to meet his burden as to this Allegation and his claim for relief as to this Allegation is denied.

Failure to Discuss Potential Plea Negotiations with Applicant. (Allegation 44)

A defendant has no constitutional right to plea bargain. State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994). "Prosecutors have broad powers in the plea bargain process." State v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (1999). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." Becka, 333 S.C. at 684, 511 S.E.2d at 400-401.

Trial Counsel testified that he discussed the possibility of pursuing a plea offer with Applicant and that Applicant was not interested in pursuing a deal that would involve jail time. (PCR Hr'g Tr. p. 76, ln. 5-9). Trial Counsel testified that they would have pursued plea negotiations had Applicant requested they do so. (PCR Hr'g Tr. p. 75, ln. 3 - 15). Trial Counsel also testified that he discussed the possibility of Applicant entering a plea, but Applicant "was not interested in pleading guilty to anything." (PCR Hr'g Tr. P. 139, ln. 19-23). Co-Counsel confirmed that Applicant was not interested in a plea deal stating that Applicant was not interested in anything that gave him time. (PCR Hr'g Tr. p. 192, ln. 18-23). Co-Counsel also testified that if Applicant had wanted them to pursue a plea deal they would have done so. (PCR Hr'g Tr. p. 192, ln. 24 - p. 193, ln 1). Applicant failed to contradict Trial Counsel or Co-Counsel or provide any testimony concerning this issue at the PCR hearing.

Solicitor Sorenson testified at the PCR hearing that there was no record of an offer being made in this case and he did not have any independent recollection of an offer being made. Solicitor Sorenson also stated that the "general gist from Mr. Johnson was that his client was not interested in pleading guilty to anything. (PCR Hr'g Tr. p. 139, ln. 12-22). He also testified that he had notes about potential plea negotiations, but that they were of the sort that he would have used in discussions with Bailey's family about potential outcomes and were not indicative of actual plea negotiations. (PCR Hr'g Tr. p. 139-140, ln. 24-25, & 1-6).

This Court finds the testimony of Trial Counsel and Solicitor Sorenson to be credible and not contradicted by Applicant. This Court finds that Trial Counsel discussed the possibility of pursuing a plea offer with the State on behalf of Applicant but Applicant chose not to pursue that course of action. Furthermore, even if Trial Counsel had not discussed the possibility of pursuing a plea offer, this Court notes that even when defense counsel seeks a plea for a defendant, the State

is not required to extend any plea offers to a defendant, nor does a defendant have a constitutional right to a plea offer. See Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007). Therefore, Trial Counsel was not ineffective in his actions and Applicant has failed to show any prejudice resulting therefrom. Therefore, Applicants request for relief as to this Allegation is denied.

CONCLUSION

Based upon the findings of fact and conclusions of law set forth herein, this Court concludes that Applicant has met his burden of proof with regard to Sixth Amendment allegations addressed herein. This Court finds that Trial Counsel failed to provide Applicant reasonable professional assistance of counsel in the Trial Court and that the errors and omissions of counsel were not harmless error inasmuch as they damaged Applicant's right to a fair trial. It is the finding of this Court that, but for counsel's errors and omissions addressed herein, there is a reasonable probability that the outcome of Applicant's trial would have been different.

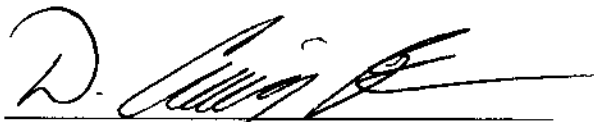
It is the observation of this Court that applications for post-conviction relief generally fall into two categories. Some cases involve situations where an attorney, who generally provided reasonable professional assistance of counsel, made isolated errors which were so serious and prejudicial as to warrant a reversal notwithstanding the fact that counsel otherwise represented his client within the prevailing norms for attorneys representing defendants in criminal matters. In other cases, evidence presented by the Applicant demonstrates an overall failure to provide reasonable professional assistance of counsel. In this case the representation of counsel, when viewed in its totality, fails to live up to the required standards for reasonable professional assistance of counsel. While this Court believes that multiple errors made by trial counsel in this case warrant reversal standing alone, this Court additionally finds that the overall representation of trial counsel

fell below an objective standard of reasonableness and warrants vacation of Applicant's conviction and sentence based upon a finding of cumulative prejudice.

This Court recognizes that the issue of whether the accumulation of several errors would warrant relief is an unsettled question in South Carolina. Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002). As discussed above, this Court has found multiple errors by Trial Counsel warrant reversal on their individual merit. However, this Court believes that in the event an appellate court were inclined to find no one issue in this case warranted reversal, the collective prejudice arising from the multiple errors and omissions presented in this case certainly does and this case could be the one that would give our appellate courts an opportunity to settle this question.

IT IS, THEREFORE, ORDERED:

This 11 day of May, 2020.



D. CRAIG BROWN

Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Julian Young, #352043,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2015-CP-38-00298

**RESPONDENT'S MOTION TO
RECONSIDER, ALTER, OR AMEND
PURSUANT TO RULE 59 (E), SCRCF**

This matter comes before this Court by way of an application for post-conviction relief filed on March 5, 2015, by Julian Young (Applicant). A hearing on this application was held in the Dorchester County Courthouse before the Honorable D. Craig Brown, presiding judge, on October 4-5, 2018. By written order signed May 20, 2020, and not yet served on Respondent, this Court granted post-conviction relief and remanded the matter to the Orangeburg County Court of General Sessions for a new trial, finding trial counsel was ineffective for the following reasons:

1. Trial counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun.
2. Trial counsel was ineffective for failing to adequately counsel Applicant concerning the potential advantages and disadvantages of testifying in his own defense
3. Failure to advise Applicant as to possible defenses and lesser-included offenses
4. Trial counsel neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of the decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged
5. Trial counsel was ineffective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation "everyone said he didn't carry a weapon" in response to question concerning whether there was any evidence that the deceased carried a weapon for defense

6. Counsel was ineffective for continuing to question Ricky Gipson about whether he saw Applicant with a gun

Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCP, would respectfully show unto this Court:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the April 2014 term of the Court of General Sessions for Orangeburg County for Murder (2011-GS-38-1833. Applicant was represented by Virgin P. Johnson, Esquire and Korey L. Williams, Esquire. The State was represented by Donald N. Sorenson, Assistant Solicitor and Harrison Bell, Esquire. On August 14, 2012, Applicant proceed to trial before the Honorable Edgar W. Dickson. Applicant was found guilty on August 16, 2012. Judge Dickson sentenced Applicant to thirty-five years imprisonment for Murder.

Applicant filed a timely notice of appeal and filed a Final Brief of Appellant on December 17, 2013. On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction. Applicant filed a Petition for Writ of Certiorari on September 24, 2014, which was denied by the South Carolina Supreme Court on December 18, 2014.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun.

2. Trial Counsel was ineffective for neglecting to adequately cross-examine co-defendant, Ricky Gipson, concerning what deals he had reached with law enforcement in the Solicitor's Office in exchange for his testimony.
3. Trial Counsel was ineffective for neglecting to question witness, Ricky Gipson, concerning the penalties for dealing in the quantity of drugs admittedly involved in the transaction he set up between Austin and the Victim.
4. Trial Counsel was ineffective for cross-examining witness, Ricky Gipson, concerning "felony murder" where said cross examination was inconsistent with South Carolina law and could readily have mislead the jury into believing that Applicant's involvement in a felony drug deal made him responsible for murder in connection with any death occurring in the course of said felony.
5. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his potential sentencing exposure for murder in connection with the death of the Victim had the state elected to pursue the charge of murder against him under the concept of accomplice liability.
6. Trial Counsel was ineffective for failing to cross-examine witness, Ricky Gipson, concerning the amount of marijuana involved in the drug deal he allegedly set up between the Victim and Applicant and his friends.
7. Trial Counsel was ineffective for failing to adequately counsel Applicant concerning the potential advantages and disadvantages of testifying in his own defense.
8. Trial Counsel was ineffective for neglecting to advise Applicant concerning the law as it relates to the defense of self-defense.

9. Trial Counsel as ineffective for neglecting to advise the Applicant thoroughly concerning the law as it relates to the lesser included offense of voluntary manslaughter.
10. Trial Counsel was ineffective for neglecting to advise the Applicant adequately concerning the law in South Carolina concerning the defense of accident.
11. Trial Counsel was ineffective for neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged.
12. Trial Counsel was ineffective for failing to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions.
13. Trial Counsel was ineffective for neglecting adequately explain to the Applicant the fact that, absent testimony from him there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as the testimony presented during the State's case in chief did not provide evidence supporting those theories of the case.
14. Trial Counsel was ineffective for neglecting to cross-examine witness, Ricky Gipson, concerning what if any discussion he heard between Applicant and the Victim.
15. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that he could have been charged with attempted armed robbery and was not.

16. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he was not charged with murder when under the State's theory of the case he could have faced that charge under the theory of accomplice liability.
17. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he had not been charged with any drug crime in connection with his admitted involvement in the conspiracy to purchase marijuana from the deceased.
18. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could have been charged with attempted armed robbery under at least one interpretation of the evidence presented by the State.
19. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that the State's failure to charge him with certain potential offenses in connection with this case constituted a benefit in exchange for his testimony.
20. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could still be charged with a number of other serious offenses in connection with this incident if the State elected to prosecute him under a theory of accomplice liability.
21. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that the State had not charged him with a number of serious offenses for which he could have been prosecuted under a theory of accomplice liability.
22. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his knowledge that the State could still elect to prosecute him for multiple serious felonies at some future date should they elect to prosecute him under a theory of accomplice liability.

23. Trial Counsel was ineffective for continuing to cross-examine State witness, Ricky Gipson concerning whether he had seen Applicant with a weapon during the incident in question after this witness had clearly testified that he had not seen Applicant with a weapon on that date.
24. Trial Counsel was ineffective for continuing to cross-examine Ricky Gipson concerning whether or not he had ever informed law enforcement that he saw Applicant with a weapon on the day in question where in one statement given to law enforcement, which was available to Counsel in the discovery process, Gipson claimed that either Applicant or his friend with him had a gun, and consequently Counsel's continued cross-examination on this point resulted in publication of testimony and evidence that was prejudicial to Applicant.
25. Trial Counsel was ineffective for failing to object to the State's characterization of witness Ray Anthony Austin's prior criminal record as "just a little bit of trouble in the past" where said characterization was intended to minimize the impact of this witness's prior record on the jury's determination of his credibility.
26. Trial Counsel was ineffective for failing to cross-examine Ray Anthony Austin concerning the potential charges he could have faced on the facts of his case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.
27. Trial Counsel was ineffective for neglecting to adequately cross-examine Ray Anthony Austin concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.

28. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Ray Anthony Austin concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.
29. Trial Counsel erred in neglecting to object to a portion of the State's closing argument in which the prosecution violated the Applicant's Sixth Amendment right to be fully heard in his defense by improperly commenting on the strategies employed by Defense Counsel.
30. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution essentially argued that there was no legal basis for the position of defense that witness Gipson could have been charged with murder and other offenses.
31. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence by arguing that there was evidence that Applicant pulled the trigger and was trying to steal from Victim.
32. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument in which the Solicitor stated that witness Gipson would not have taken "them" over there to buy marijuana if he had known Applicant had a gun where there was nothing in evidence establishing that Applicant in fact had a gun.
33. Trial counsel was ineffective for neglecting to object to the manner in which a law enforcement officer was questioned concerning the chronology between when other State's witnesses were arrested, cooperated with a interview and then gave statements where the method in which the officer was questioned concerning each of the State's witnesses, following by the same testimony concerning Applicant which did not reference cooperation

and the giving of a statement, amounted to an improper comment on Applicant's exercise of his right to remain silent.

34. Trial Counsel was ineffective for failing to cross-examine Maurice Thompson concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.
35. Trial counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.
36. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Maurice Thompson concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.
37. Trial Counsel was ineffective for failing to object to a closing argument made by the State in which the prosecution argued that witness Gipson ran from the scene because he didn't have a gun on him where said argument addressed matters not in evidence and as such was highly improper.
38. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the Solicitor argued that "we know it's not a contact" in arguing that any suggestion that the Victim shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's own expert witness, the pathologist, in this case.

39. Trial Counsel was ineffective for neglecting to use readily available evidence, disclosed to the defense in the discovery process, to impeach the State's witnesses and challenge the State's theory of the case.
40. Trial Counsel was ineffective for failing to clearly refute the State's position that a key witness for the State was Applicant's cousin.
41. Trial Counsel was ineffective for failing to adequately argue that the statements made by the deceased did not have the degree of reliability typically afforded a dying declaration where the evidence before the Court verified that the description of the circumstances under which he was shot as a robbery was in fact suggested to him by the law enforcement officer questioning him.
42. Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement by lying about his name provided direct evidence that he was not operating under the belief that his demise was imminent.
43. Trial Counsel was ineffective for failing to adequately investigate any plea negotiations between the State and witnesses appearing for the prosecution at Applicant's trial.
44. Trial Counsel was ineffective for neglecting to adequately discuss potential plea negotiations with the State prior to Applicant's trial.

The Court, after considering both the Applicant's proposed order and the State's proposed order, signed an order on May 11, 2020 and served on Respondent on June 4, 2020 granting post-conviction relief and remanding the matter to the Berkeley County Court of General Sessions for a new trial. This motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRPC, follows.

ARGUMENT IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief because Applicant failed to meet his burden of establishing counsel was constitutionally ineffective and prejudice resulted. Respondent addresses each allegation the Court granted relief in the order they are addressed in the Order Granting Relief.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); *see State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). Pursuant to that right, the defendant is entitled to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970); *see Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”). Significantly, effective assistance of counsel does *not* mean perfect representation. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”); *see also Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688. Meanwhile, counsel’s assistance is considered to be constitutionally ineffective when “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. *Franklin v. Catoe*, 346 S.C. 563, 570, 552 S.E.2d 718, 722

(2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to post-conviction relief. *Hughes v. State*, 364 S.C. 554, 558, 552 S.E.2d 315, 317 (2001). Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. *Id.*; see *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to

incompetence under prevailing professional norms and *not* when it simply “deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to post-conviction relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”¹ *Strickland*, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel’s unprofessional errors. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); *see Strickland*, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” *Richter*, 562 U.S. at 112 (emphasis added).

Trial counsel was not ineffective for advising the jury during his opening argument that, although the evidence would not prove that Applicant had a gun there, they may be able to infer he had a gun

An opening statement serves to inform the jury of the general nature of the action and defenses involved in the case so they will be better prepared to understand the evidence presented. *State v. Brown*, 277 S.C. 203, 284, S.E.2d 777 (1981). The solicitor’s comments in opening and closing statements must be confined to the facts presented and the reasonable inferences therefrom. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (citing *State v. Linder*, 276 S.C.

¹ Notably, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice “[i]f it is easier” to do so. *Id.*

304, 278 S.E.2d 335 (1981)). The scope of the opening statement is within the discretion of the trial judge, whose decision will stand absent a showing of an abuse of discretion and prejudice to the complaining party. *State v. Harris*, 275 S.C. 463, 466, 272 S.E.2d 636, 638 (1980). Any error in the solicitor's opening statement defining a point of law can be cured by the trial judge's charge defining it properly. *State v. Jones*, 298 S.C. 118, 122, 378 S.E.2d 594, 596 (1989) (internal citation omitted).

Applicant asserts that trial counsel was ineffective for "parroting" the State's language in his opening, stating to the jury that "there is not testimony and we believe from the evidence we have seen there is not testimony that you, Julian, had a gun there. You may be able to infer it, but no testimony." Tr. p. 79, ln. 20-24. Applicant asserts that trial counsel virtually invited the jury to infer a key element of the crime of murder. Although trial counsel did present to the jury that they may be able to infer Applicant had a gun, a point that was all but uncontested, any prejudice could and should have been cured by the trial court if it had properly instructed the lesser-included offenses for which evidence was presented. First, the fact that a deadly weapon (a gun) was used in the commission of this killing is a point that was all but uncontested at trial. Trial counsel tried to establish that Applicant did not bring a gun to the vehicle, counsel tried to establish the victim brought the gun (admitting a gun was involved), witnesses testified that Applicant did not bring a gun, witnesses testified that they heard a sound like a gunshot when Applicant was hanging out of the car window, the forensic expert testified that the injury was consistent with a gunshot wound, and a shell casing was found outside of the car where it ultimately crashed (likely rolling out when the door was opened). All of the above is to highlight the fact that trial counsel telling the jury that they may be able to infer that Applicant had a gun at some point was not as prejudicial as it appears, as the fact that a deadly weapon was used was not a contested point at trial and was ultimately a

factor in a number of the possible lesser-included offenses. Second, this Court ultimately finds trial counsel deficient for correctly stating to the jury that they may be able to infer Applicant had a gun at some point and failing to argue that malice could not be inferred if there was any evidence which would reduce, mitigate, excuse, or justify the homicide. However, this Court also explicitly found that the State arguing in its opening statement that malice could be implied from the use of a deadly weapon was improper before any evidence was presented. Therefore, this Court concludes that trial counsel was deficient for failing to make an improper argument to the jury. If any error exists it is with the trial court for failing to cure the solicitor's erroneous opening statement by properly charging the jury that they could not imply malice from the use of a deadly weapon in this case because evidence was presented to reduce, mitigate, or excuse the homicide. Respondent contends it is erroneous to find trial counsel deficient for failing to make an argument this Court explicitly found to be improper. Therefore, Respondent contends Applicant has failed to show that trial counsel was deficient for failing to make an improper argument and that he was prejudiced by counsel stating to the jury a fact that was all but uncontested at trial.

Trial Counsel was not ineffective for adequately counseling Applicant concerning the potential advantages and disadvantages of testifying in his own defense

Some decisions are reserved for the client, rather than for the lawyer, notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal. *Jones v. Barnes*, 463 US.. 745, 751 (1983). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991)). Waiver of Fifth Amendment right must be knowing and voluntary. *Id.* (citing *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)). Generally during trials the presiding judge will inquire of the defendant

whether or not they want to testify and if this decision was their decision. While no specific inquiry must occur on the record, the decision to testify or not to testify is ultimately up to the defendant. However, the Supreme Court has ruled that counsel can be ineffective when their advice not to testify was based on an error of law and undercover officer's testimony was the sole testimony against the defendant. *Horton v. State*, 306 S.C. 252, 411 S.E.2d 223 (1991). Further, the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Their purpose is to regulate and guide the legal profession by defining proper ethical conduct, and "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." Rule 407, SCACR. *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant was advised of his Constitutional Rights, including his right to testify. Tr. p. 330, ln. 3- p. 332, ln. 3). The trial court inquired as to whether Applicant had previously discussed this issue with his attorney and he acknowledged that he had. Tr. p. 330, ln. 4-6. The trial court then inquired as to whether Applicant had discussed this issue with his family or friends and Applicant indicated that he had not. Tr. p. 330, ln. 13-15. Finally, Applicant indicated to the trial court that he wanted an opportunity to discuss this issue with his family. Tr. p. 330, ln. 16-17. Applicant was given the opportunity to meet with his attorneys and family to discuss whether or not he would testify. After meeting with his attorney and family, Applicant indicated to the trial court that he did not wish to testify. Tr. p. 378, ln. 9-21.

Trial counsel testified at the PCR hearing that Applicant did not want to testify. PCR p. 33, ln. 24. Applicant had the opportunity whether he wanted to take the stand or not. (PCR p. 34, ln. 10-11); Applicant was real nervous (PCR p. 34, ln. 12); Applicant's aunt was present when we discussed the issue of him testifying (PCR p. 34, ln. 11-15); Applicant said, "Look, I don't want

to take the stand. I'm nervous." (PCR p. 34, ln 15-16); Applicant's decision not to testify was not from not knowing or from not explaining (PCR p. 34, ln. 24-25); we talked about all the issues and the fact that Applicant could testify but Applicant said he was nervous and that he did not want to take the stand (PCR p. 40, ln. 8-16); there not a "t" that was not crossed nor an "I" not dotted (PCR p. 77, ln. 17-18); and that if Applicant did not want to take the stand, then he could not put him up to give the evidence (PCR p. 108, ln. 2-3). PCR counsel also asked trial counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: "The way you ask that question I gonna-I'm gonna say no, I don't remember that." PCR p. 215, ln. 2-7. Trial counsel went on to say, however, that Applicant fully understood what would happen if he didn't take the stand. PCR p. 215, ln. 8-10.

Applicant testified at the PCR hearing that: he was told a little bit about the good and bad of testifying (PCR p. 242-243, ln. 24 through 3); he was scared (PCR p. 259, ln. 24-25); Applicant was told that if he testified, they (the State) would cross-examine him, mix him up, mix up his words, and it would be like 500 degrees (PCR p. 260, ln. 5-10); trial counsel did not think he should testify because they would cross-examine him (PCR p. 264, ln. 11-13); he was nervous and scared (PCR p. 264, ln. 13-14); the conversation that took place with his family about him testifying occurred during an approximate thirty minute break during the trial (PCR p. 265, ln. 5-7); and they never had a discussion about whether or not he should testify before trial. (PCR p. 265, ln. 8-10). Applicant was also asked at the PCR hearing whether his attorneys ever explained to him that if he did not testify and tell his side of the story, then there was not going to be a factual basis for "jury instructions on any of those things," to which Applicant responded that he could not really remember. PCR p. 242, ln. 10-20. When Applicant was further asked "but did they tell

you that if you didn't testify there wasn't gonna be a way to get those charges," Applicant responded, "No. They didn't told me that." PCR p. 243, ln. 12-14.

Counsel was not deficient for failing to erroneously advise Applicant that if he did not testify there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense since there was sufficient evidence in the record after the State rested its case to warrant such charges. This Court found that trial counsel was ineffective for failing to advise Applicant that if he did not testify that there would be no chance of receiving a charge on the lesser included offenses, thus, his waiver of his right to testify was not done knowingly and voluntarily with knowledge of the consequences.

First, counsel was not deficient for failing to inaccurately advise Applicant that he had "no chance" of receiving a charge on the lesser included offenses if he did not testify and for failing to be clairvoyant. As a matter of law, trial counsel would have severely misadvised Applicant if he had informed him that he could not receive a charge on any of the lesser included offenses if he did not testify. *State v. Hendrix*, 270 S.C. 653, 657, 244 S.E.2d 503, 505 (1978). As will be discussed further in the allegations below, there is no case law supporting the proposition that Applicant could not possibly have received a charge on the lesser included offenses unless he testified at trial. The appellate courts of this State have held, as noted above in *Hendrix*, that a defendant may be entitled to immunity under a theory of self-defense without testifying at trial. Further, as noted above, trial counsel testified that they discussed with Applicant that he would not be able to present his side of the story if he did not testify and that Applicant's waiver was not from a lack of understanding the consequences of the decision. At this point in the trial, counsel has no way of knowing that Applicant would not be receiving the benefit of a charge on the lesser included offenses and would need to be clairvoyant in order to advise Applicant of the same.

Counsel cannot be found to be deficient for failing to misadvise Applicant as to the law of this state and for lacking the ability to peer into the future to know that the trial court would erroneously fail to charge the lesser included offenses, despite evidence in the record warranting the charges.

Second, trial counsel was not deficient for thinking to himself that he could not put Applicant on the stand for fear of committing fraud upon the court. Trial counsel's fears, though potentially misplaced, could not possibly be the basis for a deficiency finding and certainly should not be considered in evaluating whether trial counsel was deficient for allegedly failing to advise Applicant as to the advantages and disadvantages of testifying. The Court's order and the record are both void of any testimony that trial counsel ever espoused his concerns about committing fraud on the court if he were to put Applicant on the stand. Thus, trial counsel's concerns could not possibly have weighed into Applicant's decision whether or not to testify if he was never made aware of trial counsel's concerns. Thus Respondent contends; Applicant was properly advised that he would not be able to present his side of the story if he did not testify, counsel was not deficient for failing to inaccurately advise Applicant that if he did not testify he could not receive charges on the lesser included offenses, trial counsel cannot be found deficient for failing to be clairvoyant, and trial counsel's uncommunicated belief that he would perpetrate fraud upon the court if Applicant testified could not have weighed into Applicant's decision whether or not to testify.

Trial Counsel properly failed to erroneously advise Applicant that jury charges on the lesser included offenses would not be given absent evidence or testimony from

Applicant

The law to be charged to the jury is determined by the evidence presented at trial. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Shuler*, 344 S.C. 604,

632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. *Lee*, 298 S.C. at 364, 380 S.E.2d at 835.

During the PCR hearing, PCR counsel asked whether trial counsel had explained to Applicant that, at the conclusion of the State's case-in-chief, "none of these other people have testified to anything that's gonna give me a basis for asking for voluntary manslaughter, asking for accident, asking for self-defense. So if I'm going to be able to ask for a charge on either one of those defense with a lesser included, you've gotta tell your side of the story." PCR p. 50, ln. 10-16. Trial counsel responded: "As to the accident, again, no. As to the others, yes." PCR p. 50, ln. 8-23. PCR counsel also asked trial counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded: "The way you ask that question I gonna say no, I don't remember that." PCR p. 215, ln. 2-7.

Self-Defense

The elements of self-defense are as follows:

(1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3)(a) if the defense is based on the belief of imminent danger, then a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or (3)(b) if the defendant was actually in imminent danger, the circumstances were such that would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and, (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Court of Appeals noted in *State v. Owens*, 427 S.C. 325, 831 S.E.2d 126 (2019), that the Supreme Court held that a defendant who brought a concealed pistol to a drug deal brought on the difficulty and is therefore not entitled to a self-defense charge. *Owens*, 427 at 332-33, 831 S.E.2d at 129 (*citing to State v. Williams*, Op. No. 27895, 427 S.C. 246, 830 S.E.2d 904, 2019 WL 2518797 (S.C. Sup. Ct. filed June 19, 2019)). If there is any evidence in the record from which it could reasonably be inferred that Defendant acted in self-defense, it should be charged. *State v. Burkhart*, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002) (internal citation omitted). The State must disprove self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998). The defense of self-defense is not established if any one of the elements is disproven. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Gipson testified at trial, on cross examination by Trial Counsel, that in neither one of his statements did he say that Applicant had a gun. (Trial Tr. p. 155, ln. 11-13). Pinkney testified that he didn't see Applicant get out of the car or get back in the car after the incident with a gun. (Trial Tr. p. 186, ln. 6-11). Alston testified that he did not see Applicant with a gun. (Trial Tr. p. 225, ln. 1-20). Thompson testified that he never saw Applicant with a gun. (Trial Tr. p. 262, ln. 17-20). Finally, Applicant testified at the PCR hearing that it was Bailey that pulled a gun from beside his console. (PCR Tr. p. 253, ln. 10-19). Based upon the testimony of each of these individuals, there is no evidence that Applicant brought the gun to the incident or was at fault in bringing on the difficulty.

As to element 2 and 3, Gipson testified at trial that Applicant was leaning in Bailey's car and that Applicant and Bailey were tussling over something that Gipson could not see. (Trial Tr. p. 143, ln. 19-24). Gipson also testified that Bailey backed up and at that point he heard a "pop."

(Trial Tr. p. 144, ln. 17-21). Gipson further stated that when he heard the "pop", he believed Applicant was still hanging in the car tussling with Bailey. (Trial Tr. p. 144-45, ln. 25 & 1-4). Alston testified that when Bailey began to back his car up, Applicant was inside Bailey's car, "getting dragged by it, somewhat getting dragged by it" and that is when he heard a "pow." (Trial Tr. p. 212, ln. 6-11). Thompson testified that after Alston decided not to purchase the marijuana from Bailey and after Alston had returned to the car that they came in, he felt the car jerk and Applicant was hanging out the passenger side of the car and then he heard a loud bang. (Trial Tr. p. 251, ln. 21-24). Applicant testified that he was leaning in Bailey's car talking to him when he reached by his console, that Bailey put the car in reverse, that the car was hitting him with the door and that it was knocking him out of the way. Applicant also testified that Bailey hit their car and that he was "jammed in it." (PCR Tr. p. 252, ln. 11-25). Finally, Applicant testified that while he was trying to take the gun away from Bailey, he heard a "pop." (PCR Tr. p. 254, ln. 19-22).

As to the final element of self-defense, Gipson testified that Applicant was hanging out of the car and tussling with Bailey when he heard the "pop." Alston testified Applicant was getting dragged by the car when he heard the "pow." Thompson testified Applicant was hanging out the passenger side of the car when he heard a loud bang. Finally, Applicant testified that Bailey hit their car and that he was "jammed in it." (PCR Tr. p. 252, ln. 11-25).

Trial counsel was not deficient for failing to advise Applicant that he would not receive a jury charge on self-defense unless he testified, as the testimony of the other witnesses provided evidence to support the charge. As is abundantly clear, there was no evidence at trial that Applicant brought the gun to the incident or brought about the controversy. The testimony of Gipson, Alston, and Thompson more than meet the standard of "any evidence" sufficient to require a jury charge in relation to elements two, three, and four. Gipson, Alston, and Thompson provided evidence for

the record through their testimony that Applicant struggled with the victim over something in the vehicle, Applicant was hanging out of the victim's vehicle window while the vehicle was moving, Applicant was struggling with the victim while being dragged by the vehicle, and Applicant was hanging in the window when the victim's vehicle hit the car they had arrived in. The above testimony clearly establishes evidence from which a jury could reasonably find Applicant acted in self-defense, thus necessitating a jury charge on self-defense. Further, Applicant's testimony was merely cumulative to that of the other three witnesses. Applicant simply removed the inference from the other witness' testimony that the struggle was over the gun and added that he was jammed when the victim's car hit the car they arrived in. Applicant's testimony does nothing to add to the evidence already in the record before the trial court. If any error occurred, it was the trial court erroneously refusing to charge self-defense where there was ample evidence in the record to support giving such a jury charge. Counsel was not deficient for failing to advise Applicant his testimony was necessary to support a charge on self-defense, particularly where there was sufficient evidence in the record to support the charge.

Accident

A homicide will be excusable on the ground of accident when: (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. *See State v. Commander*, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). The defense of

accident fails if the State proves beyond a reasonable doubt that Defendant's unlawful activity proximately caused the harm. *State v. Goodson*, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1 (1994). Where there is evidence that the Bailey was the aggressor along with evidence that the gun discharged accidentally then a jury charge on accident would be applicable. *See Tisdale v. State*, 378 S.C. 122, 126, 662 S.E.2d 410, 413 (2008).

As discussed above in the section on self-defense; the evidence before the trial court was that Applicant did not bring a gun to the victim's car, there was a struggle over something in the victim's vehicle, and a gunshot was heard when the victim's vehicle hit the vehicle Applicant arrived in while he was still hanging out of the window. Respondent submits that the testimony before the trial court was sufficient evidence to support a jury charge on accident. The testimony presents a factually question as to whether the victim was the aggressor, whether the killing was the unintentional result of the struggle in the vehicle, and whether Applicant handled the weapon with due care. The only element that is at question is whether Applicant was acting lawfully at the time, however, the State would have to prove that Applicant purchasing marijuana was the proximate cause of the killing. Respondent submits this Court accurately found that it is unlikely that Applicant purchasing marijuana proximately caused the killing, especially considering the lack of evidence that Applicant brought a gun or that there was a plan to rob the victim.

Applicant testified to the following at the PCR hearing. Applicant engaged Bailey after Alston refused to purchase marijuana from Bailey and after Alston had walked away from Bailey's car. (PCR Tr. p. 250, ln. 15-16). Applicant further testified that: it was Bailey who reached by his console and grabbed a weapon before they started tussling (PCR Tr. p. 253, ln. 1-3 & 16-19); while Applicant and Bailey were tussling over the gun, the gun went off (PCR Tr. p. 254, ln. 8-13); Applicant did not know that Bailey had been shot (PCR Tr. p. 255, ln. 1-2); and Applicant was

trying to get control of the gun so that Bailey would not shoot him. (PCR Tr. p. 255, ln. 11-14). Respondent submits, unlike the previously discussed self-defense charge, that although Applicant's testimony would have provided significant additional evidence in support of the accident charge it was not necessary for the charge to be given. Applicant's testimony clearly provides a much clearer picture of the events that unfolded during the incident. However, the standard requiring a trial court charge a lesser included offense is not that significant evidence exists to warrant a jury charge, but rather whether there is **any** evidence to warrant a jury charge.

Therefore, Applicant has failed to establish that trial counsel was deficient for failing to inaccurately advise him that a jury charge on accident would not be given unless Applicant testified at trial. If any error has occurred, it was the trial court refusing to give a jury charge on accident where evidence in the record warranted giving the charge. Respondent contends that trial counsel cannot be found deficient for failing to advise Applicant that his testimony was necessary to receive a jury charge on accident where evidence in the record warranted the charge being given by the trial court.

Involuntary Manslaughter

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011). Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). Evidence of a struggle between the defendant and the Bailey over a weapon supports submission of an involuntary manslaughter charge. *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391

(1991). The South Carolina Supreme Court also recognized in *State v. Brayboy* that evidence of a struggle between a defendant and Bailey supports submission of an involuntary manslaughter charge. *State v. Brayboy*, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (2010) (citing to *State v. Light*, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008), holding a jury charge on involuntary manslaughter was proper when petitioner testified that he took a loaded gun from the Bailey who was threatening him with the gun, that the gun fired almost immediately after he took possession of it, and that there was a struggle between he and the Bailey over the gun).

During the trial, Gipson testified that he saw Applicant and Bailey tussling in the car. (Tr. p. 142, ln. 13-14). Alston also testified that he saw Applicant and Bailey "tugging" over something but did not know what it was about. (Tr. p. 224, ln. 14-18). Applicant added to this testimony at the PCR hearing when he testified that Bailey was reaching by his console when Bailey grabbed a gun. After Bailey grabbed the gun, Applicant and Bailey began "tussling" over the pistol. (PCR p. 253, ln. 13-19). Applicant further testified that while they were tussling for the gun that both his and Bailey's hands were on the gun when he heard a "pop." (PCR p. 254, ln. 17-22). Trial Counsel even acknowledged at the PCR hearing that he asked Applicant if he had struggled with Bailey over the gun and said this had a lot to do with not wanting to put Applicant on the stand. (PCR p. 42, ln. 11-16).

Gipson also testified at trial that he brought Bailey in on the deal because the guy wanted more than the amount of marijuana he had available. Gipson said he thought it was going to be "something small like a Ten or a Twenty." (Tr. p. 131, ln. 22 – p. 132, ln. 2). Alston testified that he was the one who wanted to buy marijuana that night and said he planned to buy, "probably like an ounce or something." (Tr. p. 203, ln. 8). Therefore, the testimony seems to indicate that the

drug deal that was planned involved an ounce of marijuana which would constitute a misdemeanor pursuant to S.C. Code Ann. § 44-53-370 (c) (4) (1976 & Supp. 2011).

As discussed in the previous two sections, Respondent submits that the testimony of the other witnesses at trial was sufficient to warrant a jury charge on involuntary manslaughter. The testimony at trial established that Applicant did not bring a gun to the victim's vehicle, a gunshot was heard while Applicant was struggling with the victim, and Applicant was engaged in unlawful activity not amounting to a felony and not naturally tending to result in death or serious bodily harm. The testimony of Gipson and Alston establish that Applicant did not bring a gun to the vehicle, that there was a struggle in the vehicle, and that a gunshot was heard while Applicant was struggling with the victim. As this Court properly noted, evidence of a struggle supports submission of an involuntary manslaughter charge. Again, Applicant's testimony provides a clearer picture of the events that took place in the victim's vehicle, however, the testimony was not necessary to warrant an involuntary manslaughter charge. The testimony of Gipson and Alston provides evidence from which a reasonable jury could infer that Applicant unintentionally killed the victim (while struggling over the gun) while engaged in an unlawful activity not amounting to a felony and not naturally tending to result in death or serious bodily harm.

Therefore, Respondent submits Applicant has failed to establish trial counsel was deficient for failing to inaccurately advise him that his testimony was necessary to warrant a jury charge on involuntary manslaughter. If any error occurred, it was the trial court refusing to give a jury charge on involuntary manslaughter. Respondent contends that trial counsel cannot be found deficient for failing to advise Applicant that his testimony was necessary to receive a jury charge on involuntary manslaughter where evidence in the record warranted the charge being given by the trial court.

Trial Counsel was not deficient for neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in State v. Belcher and the potential impact of the decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon

The *Belcher* decision, held that a jury cannot be told that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. Respondent submits that evidence existed in the record to mitigate, excuse, or justify the homicide and therefore trial counsel was not deficient for failing to advise Applicant that he needed to testify in order to prevent the trial court from instructing the jury they could infer malice from the use of a deadly weapon.

Trial Counsel was asked at the PCR hearing if he explained to Applicant that if he did not testify and provide some basis for the assertion of a lesser included or some affirmative defense, then there was not going to be a basis to object to the Court charging that malice could be inferred from the use of deadly weapon. (PCR p. 49, ln. 18-23). Trial Counsel indicated that he thought he had explained it and that he thought he did a brief on it as well. (PCR p. 49-50, ln. 24-25 & 1-2). PCR counsel further inquired of Trial Counsel asking him whether after the State rested and their witnesses had not testified to anything that would give the Court "a basis for asking for "voluntary manslaughter, asking for accident, asking for self-defense," if he told Applicant he had to tell his side of the story so that he could ask for these charges and receive the benefit of *Belcher*. Trial Counsel responded stating, as to accident, no, but as to the others, yes. (PCR p. 50, ln. 23). Upon further questioning of Trial Counsel, PCR Counsel asked Trial Counsel why he persisted that the rule in *Belcher* applied to this case when he knew the Trial Court was not going to charge

voluntary, involuntary, accident or self-defense. (PCR p. 214, ln. 11-14). Trial Counsel responded saying that he was trying to protect the record. (PCR p. 214, ln. 15-23).

Co-Counsel was also asked about this issue and he testified he understood *Belcher* to mean that if there was no evidence of a lesser included offense(s) and or defense(s), then Applicant would not receive the benefit of *Belcher*. (PCR p. 182, ln. 7-22). Co-Counsel acknowledged that when the Trial Court Judge told them that he was not going to give "voluntary manslaughter or involuntary manslaughter" because there was no evidence of mitigation, then that was based upon the record in front of him (the Trial Court Judge) and what "y'all did do, not what you didn't do." (PCR p. 182-183, ln. 23-25 & 1-5). Co-Counsel was further asked, but could not recall, if they told Applicant that if he did not testify there was not going to be enough evidence for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. (PCR p. 187, ln. 12-16). PCR Counsel went on to state that she would assume that Co-Counsel "did not discuss with him that if you (Applicant) didn't get jury charges on something in that group, you were not gonna be able to stop the judge from giving the inference of malice from the use of a deadly weapon charge. (PCR p. 188, ln. 5-9). Co-Counsel stated that he could not recall "saying it in those terms." (PCR p. 188, ln. 10-13). PCR Counsel pointed out that even though there was no evidence that would warrant a lesser included charge(s) and/or defense(s), Trial Counsel still objected to the Court charging the jury that they could infer malice from the use of a deadly weapon. (PCR p. 189, ln. 8-18). After pointing this out, PCR Counsel asked Co-Counsel if they understood that the rule in *Belcher* only came into play if those lesser charges or defenses were before the Court and Co-Counsel indicated that he could not remember but thought that he knew that they had to get some evidence of mitigation on the record to receive the benefit of *Belcher*. (PCR p. 189, ln. 18-24).

Respondent submits that trial counsel failing to advise Applicant as to *Belcher* was not deficient, but harmless error at most, where sufficient evidence existed in the record to warrant Applicant receiving the benefits of the *Belcher* decision. Trial counsel could only be deficient for failing to advise Applicant as to the implications of *Belcher* if there was not already sufficient evidence in the record to warrant Applicant benefiting from the decision or if trial counsel was able to see the future to know that Applicant was not going to receive any jury charges on the lesser included offenses. Respondent contends, as argued extensively above, that trial counsel was not required to advise Applicant that his testimony was necessary to benefit from *Belcher* where sufficient evidence already existed in the record. Applicant has failed to establish that trial counsel was deficient for failing to advise him of the implications of *Belcher* or that he was prejudiced as a result of the alleged deficiency.

Applicant failed to establish he was prejudiced by trial counsel failing to object to testimony from SLED agent Richard Johnson

Applicant contends that trial counsel was deficient for failing to object to testimony from SLED agent Richard Johnson that amounted to hearsay. Respondent submits that Applicant has failed to establish that he was prejudiced by the alleged deficiency. Applicant has failed to establish that had trial counsel objected to this testimony the result of the trial would have been different. The vast majority of the evidence at trial was that Applicant did not have a gun the night of the incident and did not bring a gun to the victim's vehicle. The testimony of Agent Johnson does not place a gun in Applicant's hands, but simply states that he did not discover in his investigation that the victim carried a gun for protection. Applicant has failed to establish that if trial counsel had objected to this testimony there is a reasonable probability the result of the trial would have been different.

**Applicant has failed to establish that prejudice resulted from trial counsel
continuing to question Ricky Gipson**

Applicant contends trial counsel was deficient for continuing to question Gipson concerning seeing Applicant with a gun. Respondent submits Applicant has failed to establish he was prejudiced by the alleged deficiency. Trial Counsel ultimately elicited testimony that Gipson had an earlier statement where he said Applicant or another person had a gun. However, the vast majority of the testimony at trial was that no one saw Applicant with a gun that night. Applicant has failed to show that had trial counsel not elicited this testimony, the result of the trial would have been different.

Cumulative Error

Respondent submits that this Court erred in finding that Applicant's PCR should be granted based on cumulative error. Cumulative error has not been established as a basis for granting a PCR in South Carolina. Therefore, Respondent contends that this Court erred in finding Applicant's PCR should be granted on this basis.

Conclusion

For all the foregoing reasons, the State respectfully submits this Court reconsider its grant and deny Applicant's post-conviction relief application.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN H. LIMBAUGH
Assistant Attorney General

June 14, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	C.A. No. 2015-CP-38-00298
	)	
	)	
Julian Young,	)	
S.C.D.C. No. 352043	)	
	)	
Applicant,	)	
	)	MOTION TO WITHDRAW MOTION
v.	)	TO RECONSIDER, ALTER, OR
	)	AMEND PURSUANT TO RULE 59 (E),
	)	SCRCP
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The Respondent hereby requests that this Court allow him to withdraw his motion to alter or amend the judgment which was filed on June 15, 2020.

WHEREFORE, Respondent requests that the motion to alter or amend judgment be withdraw and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

s/Benjamin Limbaugh
BENJAMIN LIMBAUGH
Assistant Attorney General

Columbia, South Carolina
June 19, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Julian Young, #352043	)	
	)	Case No.: 2015-CP-38-00298
Applicant,	)	
	)	
v.	)	Certificate of Service
	)	
State of South Carolina	)	
	)	
Respondent,	)	
_____	)	

1. Undersigned is counsel of record for the Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."
3. Undersigned has served a copy of the **Motion to Withdraw Motion to reconsider, Alter or Amend, Pursuant to Rule 59 (E), SCRCP** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

Tara D. Shurling, Esquire
tdslaw@shurlinglaw.com

DATED this 19th day of June, 2020.

s/ Benjamin Limbaugh
Benjamin H. Limbaugh
Assistant Attorney General

Office of the Attorney General
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BLimbaugh@scag.gov

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Julian Young, #352043,

2015-CP-38-00298

Applicant,

**Order Granting Respondent's
Motion to Withdraw Motion
To Alter or Amend, Pursuant to
Rule 59(e), SCRPC.**

v.

State of South Carolina,

Respondent.

This matter came before this Court by way of an Application for Post-Conviction Relief (PCR) filed on March 5, 2015, and three subsequently filed Amended Applications dated October 2, 2018, October 3, 2018, and October 4, 2018. An evidentiary hearing was held on this PCR Application on October 4 – 5, 2018 in St. George, South Carolina. Applicant was present at this proceeding and was represented by Tara Dawn Shurling, of the Richland County Bar. Respondent was represented by Benjamin H. Limbaugh, Assistant Attorney General. Following that hearing, this Court granted this Application for Post-Conviction Relief by Order filed May 20, 2020.

Respondent subsequently filed a Motion to Alter or Amend pursuant to Rule 59(e) on June 14, 2020. Respondent thereafter filed a Motion to Withdraw its Rule 59(e) motion on June 19, 2020. Notice of Appeal from the Order granting relief in this PCR action was served and filed on June 19, 2020. It appears that said Notice of Appeal was prematurely filed inasmuch as no order had been issued by this Court granting Respondent's Motion to Withdraw its pending Motion to Alter or Amend as of the date of the filing of the Notice of Appeal. Counsel for Applicant has not objected to Respondent's Motion to Withdraw said motion, however, Counsel

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