

**VOLUME II OF III**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

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RICHARD B. NILES, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000396

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APPENDIX

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1 Q The recording device that you all use, New Freedom, that  
2 was the one you had in operation back in April 2007?

3 A It is.

4 Q Was it capable of taking those telephone calls and  
5 putting them in a place where you could play them back and  
6 transfer them to another device or medium?

7 A Yes, sir.

8 Q And how do you know this?

9 A I know that because that's what I do.

10 Q And how long have you been doing this?

11 A I've been doing the communications part for about six  
12 years now.

13 Q What kind of experience do you have in operating this  
14 New Freedom device?

15 A I was trained on the device by a lieutenant that's no  
16 longer with the department and since then I've been doing all  
17 the audio recordings from the telephone and 911.

18 Q Ever had any trouble operating the device?

19 A No, sir.

20 Q Let me show you what's been marked State's Exhibit for  
21 ID 130. Do you recognize this item? Sorry about that.

22 A That's all right. Yes, sir, I do.

23 Q And how do you recognize that item?

24 A This is the kind of disk we use to put all recordings.

25 Q Have you had an opportunity to review this item?



1 A I have.

2 Q And does it appear that those tracks on this, what is  
3 this item? You said it's a CD?

4 A It's a CD, yes, sir.

5 Q The recordings on this CD do they appear to be a true  
6 and accurate recording of the phone conversations between one  
7 of your operators and other individuals on April 9<sup>th</sup>, 2007?

8 A Yes, sir.

9 Q And do you recognize the operator's voice?

10 A I do, sir. That's Office McGriff.

11 Q And who made these copies?

12 A I did.

13 MR. RICHARDSON: Your Honor, at this time the State  
14 would seek to put into evidence State's Number 130.

15 THE COURT: Any objection?

16 MR. BARR: No objections.

17 MR. HAZZARD: No objections, Your Honor.

18 THE COURT: State's Exhibit Number 130 admitted into  
19 evidence with objection.

20 (Whereupon, State's Exhibit Number 130 [911 Call - CD]  
21 admitted into evidence and appropriately marked.)

22 MR. RICHARDSON: Permission to publish.

23 THE COURT: All right.

24 BY MR. RICHARDSON:

25 Q Office Nobles, you said you did listen to this.

1 A Yes, sir.

2 Q With particular attention to track number seven?

3 A Yes, sir.

4 (Whereupon, State's Exhibit Number 130 played in open  
5 court.)

6 BY MR. RICHARDSON:

7 Q Officer Nobles, that recorded, that phone conversation  
8 took place April the 9<sup>th</sup>, 2007?

9 A It did.

10 Q In the evening?

11 A Yes, sir.

12 Q And that's the extent of your involvement in this case;  
13 correct?

14 A Yes, sir, it is.

15 Q Officer Nobles, thank you for your cooperation.

16 A Thank you.

17 Q Please answer any questions the Defense may have.

18 CROSS EXAMINATION

19 BY MR. BARR:

20 Q Officer Nobles, this is as far as your concern just a  
21 call taken in the normal course of business on a normal day;  
22 right?

23 A Yes, sir.

24 Q You know - you don't know anything about the truth or  
25 veracity of what's going on or not, you gave her standard

1 instructions as to what to do in a case of a stolen vehicle;  
2 is that correct?

3 A Yes, sir.

4 Q All right.

5 MR. BARR: No further questions.

6 THE COURT: Mr. Hazzard.

7 MR. HAZZARD: Thank you, Your-Honor.

8 CROSS EXAMINATION

9 BY MR. HAZZARD:

10 Q Okay, now, that call was between your operator and an  
11 individual who introduced themselves or identified themselves  
12 as Martha Niles; correct?

13 A Yes, sir.

14 Q Okay, now, Mokeia Hammond didn't make that call;  
15 correct?

16 A No, sir.

17 Q Okay, nothing about that call. Okay, nothing further.

18 MR. HAZZARD: No further questions.

19 A Thank you.

20 THE COURT: Any redirect?

21 MR. RICHARDSON: No, sir, Your Honor.

22 I'd just ask that Officer Nobles be excused to return to  
23 her duties.

24 THE COURT: All right, any objections?

25 MR. BARR: No objection.

Raul Denis - Direct by Mr. Richardson

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1 MR. HAZZARD: No objection, Your Honor.

2 THE COURT: All right, thank you for being with us.  
3 You're free to go.

4 A Thank you.

5 THE COURT: All right, you can call your next  
6 witness.

7 MR. RICHARDSON: Officer - calls Lieutenant Raul Denis.

8 Whereupon, Raul Denis was called to the stand, duly  
9 sworn by the Clerk and testified as follows:

10 THE CLERK: Please be seated. Please state your full  
11 name, spell your last name for the Court.

12 MR. DENIS: My name is Raul Denis. My last name is  
13 D-E-N-I-S.

14 DIRECT EXAMINATION

15 BY MR. RICHARDSON:

16 Q Good afternoon, Lieutenant Denis?

17 A Hello, how are you?

18 Q Could you please tell us about your place of employment,  
19 how long and in what capacity?

20 A I'm a lieutenant with the Horry County Police  
21 Department, been with the county police since 1996.

22 Q Okay, and currently what are your duties?

23 A Currently I'm a watch commander which puts me in charge  
24 of pretty much every police officer on duty at, you know, at  
25 any given time. At the time of this particular incident I

1 was a sergeant over a squad.

2 Q That was back in April of 2007?

3 A Yes, sir.

4 Q And as sergeant over a squad where was that squad  
5 located?

6 A This squad was located on what we consider the south  
7 precinct, which includes everything from Lake Arrowhead south  
8 to the Georgetown county line.

9 Q Would that area include Murrells Inlet mall?

10 A Yes, sir, it would.

11 Q And what kind of calls come into the south precinct?

12 A Anything and anything you can imagine if, you know,  
13 anyone calls for a police officer they're going to get one.

14 Q And at the time one of your duties was it to supervise  
15 patrol officers? You said you were over a group of patrol  
16 officers?

17 A Yes, sir, yes, sir, we would supervise, basically we're  
18 there with them while everything occurs. We listen to the  
19 radio, you know, follow them on calls, oversee the reports,  
20 that kind of thing.

21 Q So, you oversee the reports?

22 A Yes, sir.

23 Q Does that mean you review the report?

24 A Yes, sir, we do.

25 Q What type of reports?

Raul Denis - Direct by Mr. Richardson

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1 A Every one of them.

2 Q Incident report?

3 A Exactly, yes.

4 Q And those types of reports, incident reports in  
5 particular, what's contained in those?

6 A Well, the basic information of the complaint being made,  
7 who's making it, when and where, what time and, you know,  
8 pretty much the if, when, where, what and how of an incident

9 Q And upon your review of an incident report how and if by  
10 any manner do you signify that you've reviewed that report?

11 A You sign it or initial it. At the bottom there's an  
12 actual supervisor's block that indicates review.

13 Q Back on April 10<sup>th</sup>, 2007, was there an officer named  
14 Felix Negrón working on your shift?

15 A Yes, sir, there was.

16 Q And who was assigned to assist shift supervisors?

17 A Well, his shift supervisor was actually Sergeant  
18 Chatfield, but either - what happens is in the course of one  
19 shift is a 12 hour shift and obviously it runs into the next  
20 shift. So, if there's paperwork left behind because of the  
21 number of calls that day or the sergeant was tied up, if  
22 there's a major incident the supervisor has to go to that  
23 major incident, which would preclude him obviously from going  
24 back to the office to take care of paperwork and whatnot  
25 So, the oncoming guy who doesn't really have anything going

1 on goes over there and reviews all the paperwork from that,  
2 you know, whatever is left over and approves it or oversees  
3 it to make sure that, you know, if anything needs to be done  
4 it gets done.

5 Q And from time to time you said Sergeant Chatfield was  
6 over him, would you all sign off on each other's squads?

7 A Yes, sir.

8 Q Did you ever have the opportunity to sign off on review  
9 of a report done by Officer Negron?

10 A Yes, I did.

11 Q Did you bring some paperwork with you today?

12 A Yes, sir, I brought a copy of the report.

13 MR. RICHARDSON: Your Honor, I'm going to have this  
14 marked for identification purposes.

15 THE COURT: All right.

16 MR. RICHARDSON: The Court's indulgence, Your Honor.

17 THE COURT: All right.

18 BY MR. RICHARDSON:

19 Q Lieutenant Denis, I'm going to present to you what's  
20 been marked for identification purposes as State's Exhibit  
21 131. Do you recognize this document?

22 A Yes, sir, this is a copy of the report that we're  
23 speaking about, the report involving this incident which  
24 Officer Negron completed that, that day or actually that  
25 evening.

Raul Denis - Direct by Mr. Richardson

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1 Q And how do you recognize it as being that report?

2 A Well, I am looking at it. It shows the complainant's  
3 name, describes the incident, plus I see my initials on it  
4 and what I wrote on the bottom of the report.

5 Q Is it a true and accurate copy of a report that you  
6 signed off on?

7 A Yes, sir, it is.

8 MR. RICHARDSON: Your Honor, at this time the State  
9 would seek to introduce State's 131 into evidence.

10 THE COURT: Any objection?

11 MR. BARR: Without objection.

12 MR. HAZZARD: Without objection, Your Honor.

13 THE COURT: State's Exhibit 131 admitted into  
14 evidence without objection.

15 MR. RICHARDSON: And publish.

16 THE COURT: All right.

17 (Whereupon, State's Exhibit 131 [Report of Officer  
18 Negron] admitted into evidence and appropriately marked.)

19 BY MR. RICHARDSON:

20 Q Lieutenant Denis, I'm just going to ask you a few  
21 questions about that document and State's 131 what type of  
22 crime is being reported?

23 A A stolen car, a stolen vehicle.

24 Q Is that vehicle identified in any way?

25 A Yes, sir, it's described in the report. It's



1 specifically described as a 2007 Ford Fusion silver in color  
2 and it's also identified as a rental car from the Hertz  
3 Company.

4 Q And who's the complainant in that report?

5 A Martha Niles from Salters, South Carolina, it looks  
6 like.

7 Q Do you have her address?

8 A Yes, sir, it shows [REDACTED] and it describes  
9 her as a black female 55 years of age.

10 Q Is that in Williamsburg County?

11 A I believe Salters is, yes, sir.

12 Q And who's the listed victim on there?

13 A The Hertz Rental Company.

14 Q So, it would be a rental car she's reported?

15 A Right.

16 Q And where did she allege this theft took place?

17 A According to the report she alleges that it was stolen  
18 from the mall down in Murrells Inlet, which is Inlet Square  
19 Mall and she claims she parked in front of the Stein Mart.

20 Q Was there an allegation as to when this stuff took  
21 place?

22 A Yes, sir, according to the report it was stolen at six  
23 o'clock on the 9<sup>th</sup> of April, 2007.

24 Q And to your knowledge was this vehicle ever recovered?

25 A Yes, sir, that's how I became involved in this. Officer

Raul Denis - Cross by Mr. Barr

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1 Negron had called me on the incident because it was at the  
2 end of the shift and, you know, advised me that this was  
3 taking place and that this was the vehicle that was used in  
4 the homicide that occurred in Myrtle Beach which was being  
5 investigated. Obviously that left me in a position to figure  
6 out what had happened and what we needed to do with this  
7 report. I called my supervisors from the investigations  
8 division and found out that our detectives were already  
9 working with the Myrtle Beach detectives, namely a Detective  
10 Cox that works for our department. So, I called him and I  
11 said, "Hey, this, this is what's going on. We have Ms.  
12 Niles trying to report this car stolen," and basically he  
13 told me don't do anything, "Just fax a copy of the report to  
14 the Myrtle Beach Police Department and I'll go up there and  
15 get it," and that's what I did.

16 Q And that is the extent of your knowledge in this  
17 matter?

18 A Yes, sir.

19 Q Lieutenant Denis, thank you. If you'll just answer any  
20 questions Mr. Barr, Mr. Hazzard may have.

21 CROSS EXAMINATION

22 BY MR. BARR:

23 Q Lieutenant, do you have a recollection as to whether or  
24 not this report was called in or whether or not there was  
25 actually an appearance at the department to make this report?

1 A No, sir, I don't specifically and the report doesn't  
2 indicate one way or another whether it was taken over the  
3 phone or in person which would lead me to think it was taken  
4 in person but I couldn't say either way.

5 Q But there's no indication on the report ---

6 A No, sir, not ---

7 Q --- as to whether or not it was called in?

8 A --- not specifically, no.

9 Q Okay, all right. Thank you so much.

10 CROSS EXAMINATION (By Mr. Hazzard)

11 Q Okay, sir, does Mokeia Hammond's name appear anywhere on  
12 that report?

13 A No, sir.

14 Q Okay, and your involvement do you have any indication  
15 that Mokeia Hammond ever possessed a gun?

16 A No, sir, I've never heard Ms. Hammond's name until you  
17 mentioned it.

18 Q Okay, so, you have no indication that Mokeia Hammond  
19 ever shot anyone?

20 A No, sir.

21 Q No information in this investigation indicating that  
22 Mokeia Hammond ever robbed anyone?

23 A In this investigation is that your question?

24 Q Yes.

25 A I'm not familiar with the investigation, sir.

1 Q Okay, okay.

2 A My extent was this report and that's it.

3 Q Okay, so, no information whatsoever regarding Mokeia  
4 Hammond; right?

5 A No, sir, my involvement in this case is just this  
6 report.

7 Q Okay, well, let's not leave it like that. You got any  
8 involvement with her in any other report?

9 A No, sir, not to my knowledge.

10 Q All right, just wanted to make sure.

11 MR. HAZZARD: No further questions.

12 THE COURT: Anything on redirect?

13 MR. RICHARDSON: No, sir, Your Honor. I'd just ask that  
14 Lieutenant Denis may return to his duties, be excused.

15 THE COURT: Any objection?

16 MR. BARR: No objection.

17 MR. HAZZARD: No objection.

18 THE COURT: All right, Lieutenant Denis, you're free  
19 to go. Thank you very much for being here.

20 A Thank you, Your Honor.

21 THE COURT: Any more today?

22 MS. ELDER: No, Your Honor, that would be the  
23 witnesses that we have available today.

24 THE COURT: All right.

25 MS. ELDER: Just start back at - we would ask the

1 Court to start back at 9:30. We have someone coming from  
2 Columbia in the morning, Your Honor.

3 THE COURT: All right, well, it's 5:15. It's a good  
4 time for us to break for the evening.

5 Ladies and gentlemen of the jury, we're going to go  
6 ahead and call that a day. Please be back in your jury room  
7 tomorrow morning at 9:30, leave your pads, pencils here in  
8 the jury box. A bailiff will take them up. I caution you  
9 again please do not watch any news accounts, read any  
10 newspaper accounts, listen to any radio accounts or conduct  
11 any independent investigations whatsoever into this case. Do  
12 not discuss this case even among yourselves at this point in  
13 time. I thank you for being with us today and I look forward  
14 to seeing you again tomorrow. Hope everyone has a happy,  
15 nice evening and we'll see you at 9:30 tomorrow morning.  
16 Thank you very much.

17 (Whereupon, the following takes place outside the  
18 presence of the jury.)

19 THE COURT: Anything before we break?

20 MS. ELDER: No, sir, Your Honor.

21 MR. BARR: Your Honor, might we have a sidebar?

22 THE COURT: Yeah, come on up.

23 (Whereupon, a bench conference was held.)

24 THE COURT: All right, we'll stand in recess until  
25 9:30 tomorrow morning.

1 OFF THE RECORD

2 (On the record, Thursday, March 12, 2009.)

3 (Whereupon, the following takes place outside the  
4 presence of the jury.)

5 THE COURT: All right, anything from the State before  
6 we bring in the jury?

7 MS. ELDER: No, sir, Your Honor.

8 THE COURT: Anything from the Defense?

9 MR. BARR: No, sir, Your Honor.

10 MR. HAZZARD: Your Honor, a couple of matters before we  
11 begin. The Defense - Defendant Hammond had on her witness  
12 list the decedent's girlfriend or ex-girlfriend, Rachael  
13 Ramlochan. I spoke with her yesterday evening with regard to  
14 scheduling purposes and I indicated I did not intend to call  
15 her as a witness and would release her from the subpoena.  
16 She indicated, therefore, that she would like to be able to  
17 come and watch the trial and I indicated that as I would be  
18 releasing her from the subpoena I would think that she would  
19 be allowed to.

20 THE COURT: All right, as long as she's not going to  
21 be used as a witness or is under subpoena in any way unless  
22 there's some objection.

23 MS. ELDER: No, Your Honor.

24 MR. HAZZARD: Okay.

25 THE COURT: All right, that'll be fine.

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1 MR. HAZZARD: Okay, secondly, Your Honor, the Defendant  
2 Hammond has a witness, Officer Salina Mann, of the Conway  
3 Police Department. It's my understanding that when we get to  
4 the defense case that we will continue in the same order.  
5 Mr. Barr will present his defense case and then I would  
6 present mine; correct?

7 THE COURT: That's the way I've assumed it unless you  
8 know of any reason as to why we should not proceed in that  
9 fashion.

10 MR. HAZZARD: No, sir, but - I'm sorry.

11 MR. BARR: I'd certainly be willing to change that  
12 if it ---

13 THE COURT: Okay, well, let's keep it in the same  
14 order we're going then just for ---

15 MR. HAZZARD: Well, what I need to ask for a request of  
16 the Court Salina Mann has a dentist appointment at two p.m.  
17 that she's been waiting on for a couple of weeks and I told  
18 her I'm not sure how long things will take. I don't know how  
19 much longer the State's case is or how long Mr. Barr's case  
20 would be. I would, therefore, ask if the State does indeed  
21 finish before lunch that we be allowed to put Officer Mann up  
22 out of order so that she can make that dentist appointment if  
23 at all possible.

24 THE COURT: Okay, unless there's some objection I  
25 don't - I'm not opposed to doing it that way. We will

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1 certainly work around her schedule.

2 MR. HAZZARD: Okay.

3 THE COURT: We'll either call her out of order or if  
4 they don't want to call her out of order then we'll certainly  
5 break or whatever to give her time for when she can be here  
6 and testify.

7 MR. HAZZARD: Thank you, Your Honor. The last thing I  
8 want to verify, I believe that Mr. Barr placed a document in  
9 evidence much earlier in the trial; is that  
10 correct?

11 THE COURT: Well, it was as I recall he did. It was  
12 originally - yes, it's Defendant Niles Exhibit One but I  
13 think it was the same thing as an exhibit that was marked by  
14 the State but was not put into evidence.

15 MR. RICHARDSON: That's correct, Your Honor. It was  
16 marked for identification purposes and was not used and I  
17 believe Mr. Barr had it marked as a defense exhibit.

18 THE COURT: Right, and it came in as Defendant Niles  
19 Exhibit One.

20 MR. HAZZARD: Okay, and my understanding of the law is  
21 that when you have a multiple Defendant case when any  
22 Defendant puts evidence in all Defendants lose the right to  
23 final close; is that correct?

24 MR. RICHARDSON: State v. Crow, Your Honor.

25 THE COURT: Yeah, but isn't there some exception for



1 murder?

2 MR. RICHARDSON: No, sir, State v. Crow was actually a  
3 murder case. It was a murder and a felony murder case as a  
4 matter of a fact.

5 THE COURT: Okay, all right, yeah, I agree with you.  
6 That is my understanding is the law but I was thinking there  
7 was or maybe it was a capital case.

8 MR. BARR: That would be capital, yeah, capital  
9 case.

10 MR. RICHARDSON: Might be a capital case.

11 THE COURT: Okay, all right, and maybe then I'm  
12 thinking of a capital case then. All right, that's fine.

13 Okay, so, I was thinking of a capital case. So, yeah,  
14 that would be correct.

15 MR. HAZZARD: Okay.

16 THE COURT: All right, anything further?

17 MR. HAZZARD: Nothing further on behalf of Defendant  
18 Hammond, Your Honor.

19 THE COURT: All right, let's bring the jury in.

20 (Whereupon, the following takes place in the presence  
21 the jury.)

22 THE COURT: All right, ladies and gentlemen, welcome  
23 back. I hope everyone had a good evening. We're getting  
24 ready to resume the trial of this case. The reason we have  
25 not had you in here before now this morning is we have a

1 flashing light right over the Solicitor's table and we were  
2 hoping to get it fixed before we could start the trial but it  
3 looks like it might be a while before they can get somebody  
4 over here to fix it. So, we've agreed to go ahead and resume  
5 the trial of the case. If any of you finds that flashing  
6 light to be too distracting to where it impedes your ability  
7 to pay attention to what's going on in the trial, like a  
8 dripping faucet, if there was a dripping faucet I would just  
9 stop until we got it fixed because I wouldn't be able to pay  
10 any attention. So if any - if it distracts any of you in any  
11 way please raise your hand and let me know and we'll make  
12 whatever arrangement we can. I know it's a little discerning  
13 but some people are able to put it out of their minds better  
14 than others and I hope you can, but if you can't please do  
15 not hesitate to let me know that it is distracting you and  
16 keeping you from paying attention to the witnesses. All  
17 right, the State can call their next witness.

18 MS. ELDER: Thank you, Your Honor, the State would  
19 call Agent Catherine Leisy.

20 Whereupon, Catherine Leisy was called to the stand, duly  
21 sworn by the clerk and testified as follow:

22 THE CLERK: Thank you. Please be seated. Please  
23 state your full name, spell your last name for the Court.

24 MS. LEISY: Yes, ma'am, Catherine Leisy, L-E-I-S-Y.

25 DIRECT EXAMINATION

1 BY MS. ELDER:

2 Q Agent Leisy, where are you employed?

3 A I'm employed by the South Carolina Law Enforcement  
4 Division, also known as SLED.

5 Q And in what capacity?

6 A I am a forensic scientist assigned to the DNA and  
7 serology unit.

8 Q And what are some of your obligations and  
9 responsibilities in that unit?

10 A My responsibilities include processing forensic cases,  
11 generating reports based on the results and conclusions drawn  
12 and testifying to those reports as necessary.

13 Q And have you, in fact, testified before?

14 A Yes, I have.

15 Q Have you been qualified as an expert in DNA analysis?

16 A I have.

17 Q And how many analyses do you perform in a given year?

18 A In a given year I could process anywhere between 150 to  
19 250 cases, which would include possibly several thousand  
20 actual samples of DNA.

21 Q And how long have you been doing this?

22 A I've been employed with SLED for approximately three  
23 years and prior to my employment in SLED I worked as a  
24 forensic DNA analyst at a private forensic laboratory for  
25 approximately four years.

Catherine Leisy - Direct by Ms. Elder

1 Q Did you receive any special training or degrees to make  
2 you qualified for your job?

3 A I have a bachelor of science degree in genetic  
4 engineering from Cedar Crest College in Allentown,  
5 Pennsylvania. I have received in-house training that allows  
6 me to use the techniques used by SLED. I also attend annual  
7 training, either conferences or training specific to  
8 instrumentation used to maintain my continuing education.

9 MS. ELDER: Your Honor, at this time I would like to  
10 move Agent Leisy ---

11 A Leisy.

12 MS. ELDER: --- Leisy into, as an expert in the area  
13 of forensic DNA analysis.

14 THE COURT: Any questions or objections?

15 MR. BARR: No objection.

16 MR. HAZZARD: No questions, no objections, Your Honor.

17 THE COURT: All right, I find Ms. Leisy to be an  
18 expert qualified to give an opinion in the area of forensic  
19 DNA analysis.

20 BY MS. ELDER:

21 Q Agent Leisy, did you receive some samples to test from  
22 the Myrtle Beach Police Department in reference to an  
23 incident date of April 9th, 2007, individual suspects listed  
24 as Richard Niles and Mokeia Hammond?

25 A Yes,, I did.

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1 Q And did you perform analysis on those items?

2 A I did.

3 Q I'm going to hand you three items. State's Exhibit 86,  
4 85 and 90. Are those the items that you received and  
5 analyzed?

6 A Yes, they are.

7 Q And just briefly tell me when you receive something in  
8 your lab how - do you mark it in any special way to identify  
9 that you're the one who used it, manipulated, analyzed it?

10 A The containers that the items arrive in are given my  
11 initials and are also given the specific case number and item  
12 numbers that SLED has assigned to these items as identifying  
13 marks.

14 Q And do you do those in order to protect the sample?

15 A That's correct so that it can be later identified as  
16 belonging to this particular case.

17 Q And if any samples that you receive appear to be  
18 tampered with would you process it?

19 A No, I would not. If the outside seal of the container  
20 were tampered with or had not been sealed properly the item  
21 would not be processed.

22 Q And did you issue a report after analyzing those three  
23 items that I just handed you?

24 A Yes, I did.

25 Q And do you have that report with you?

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1 A I do.

2 Q And would it assist you to refer to that when I ask you  
3 your questions?

4 A Yes, it would.

5 Q In particular I want to talk about item State's Exhibit  
6 85. It's indicated four cigarette filters removed from the  
7 suspect's vehicle. Could you tell me what you did to  
8 processes those items and any findings that you made?

9 A When processing evidence items for DNA the first step is  
10 what we call extraction where we're simply removing DNA from  
11 that particular item. Once DNA has been removed we perform  
12 an amplification step where we're copying the specific  
13 locations in DNA that we're interested in testing. Once we  
14 have the DNA copied we then generate what is known as a DNA  
15 profile. Once I have a DNA profile generated from a piece of  
16 evidence I can compare that profile to the profile of a known  
17 individual and compare to determine whether or not that  
18 individual could have contributed the DNA that was obtained  
19 from that piece of evidence.

20 Q And did you have a known sample shown in Exhibit 90 from  
21 Defendants Mokeia Hammond and Richard Niles to compare to?

22 A Yes, I did.

23 Q And did you later obtain one from Ervin Moore?

24 A I did.

25 Q Now could you tell me about any findings that you made

1 in reference to those State's Exhibit 85, the four cigarette  
2 filters located in the suspect vehicle?

3 A The DNA profile developed from the cigarette butt  
4 labeled SLED item 1.3 matches the DNA profile of Richard  
5 Niles, Jr. The probability of randomly selecting an  
6 unrelated individual having a DNA profile matching this item  
7 is approximately one in 1.5 quadrillion. The DNA profile  
8 developed from cigarette butt labeled SLED item 1.4 is a  
9 mixture of at least two individuals. The DNA profile  
10 developed from the major contributor to this mixture also  
11 matches the DNA profile of Richard Niles, Jr. Mokeia Hammond  
12 cannot be excluded as a possible contributor to this mixture.  
13 Ervin Moore is excluded, and the DNA profiles developed from  
14 cigarette butts, excuse me, labeled SLED items 1.1 and 1.2  
15 are mixtures of at least two individuals. Neither Richard  
16 Niles, Jr., nor Mokeia Hammond can be excluded as possible  
17 contributors. Ervin Moore is excluded as a contributor.

18 Q And tell me the difference between the 1.3 was a match  
19 to Defendant Richard Niles but the other, the other two, in  
20 particular 1.1 and 1.2 Mokeia Hammond and Richard Niles could  
21 not be excluded but you're not matching?

22 A That's correct.

23 Q Help explain that to me a little bit.

24 A For items 1.1 and 1.2 I have a mixture and if - unless  
25 you have what we call a primary contributor or a major

1 contributor, meaning one person contributed significantly  
2 more DNA allowing you to pull out their individual profile,  
3 you can't make a match if you have a consistent contribution.  
4 So, for these particular items I can't determine an  
5 individual profile from these mixtures but I can't exclude  
6 either Mr. Niles or Ms. Hammond as possible contributors to  
7 the profile that I developed.

8 Q But you can exclude people?

9 A Correct, it is possible to exclude.

10 Q All right, I want you to take a look at State's Exhibit  
11 86. In particular there is a swab from the - on - I believe  
12 you've identified it as SLED item two, it's identified as, I  
13 believe, agency item 15 and State's Exhibit 86, a swab of the  
14 red plastic cup removed from the center console of the  
15 suspect vehicle. Did you analyze that?

16 A I did.

17 Q And what were your findings in that regard?

18 A The DNA profile developed from the swab from the plastic  
19 cup from the vehicle center console matches the DNA profile  
20 of Richard Niles, Jr.

21 Q The next item is your item number three, a swab from the  
22 rim of a red plastic cup removed from the near left front  
23 seat of the suspect vehicle. That is item number 16 in  
24 State's Exhibit 86. Did you analyze that?

25 A Yes, I did.



1 Q And what were your findings?

2 A The DNA profile developed from a swab from a cup found  
3 near the left front seat of the vehicle is a mixture of at  
4 least two individuals. Richard Niles, Jr., and Mokeia  
5 Hammond cannot be excluded as possible contributors. Ervin  
6 Moore is excluded as a contributor.

7 Q And item seven, your item number seven is a swab from a  
8 red plastic cup straw from the left rear floorboard of  
9 suspect's vehicle. That's identified in State's Exhibit 86  
10 as item number 17. Can you tell me if you did an analysis on  
11 that?

12 A Yes, I did.

13 Q And what were your findings?

14 A The partial DNA profile developed from a straw on the  
15 left rear floorboard matches the DNA profile of Ervin Moore

16 Q Now, also, in State's Exhibit 86 you received three  
17 additional swabs that indicated blood; is that correct?

18 A That is correct.

19 Q Now, I would like to take those one at a time. Your  
20 item number four, which is indicated as a swab from the back  
21 of the left front seat of the suspect's vehicle, did you  
22 analyze that?

23 A Yes, I did.

24 Q And what were your findings?

25 A The DNA profile developed from a swab from the back of

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1 the left front seat of the vehicle matches the DNA profile of  
2 Mokeia Hammond. The probability of randomly selecting an  
3 unrelated individual having a DNA profile matching this item  
4 is approximately one in 1 quadrillion.

5 Q And you also on your item number five also contained in  
6 State's Exhibit 86 is indicated as a swab from the headrest  
7 of the right front seat of the suspect's vehicle. Did you  
8 analyze that?

9 A I did.

10 Q And what were your findings?

11 A The DNA profile developed from the headrest of the right  
12 front seat of the vehicle is a mixture of at least two  
13 individuals. The DNA profile developed from the major  
14 contributor to this mixture matches the DNA profile of Ervin  
15 Moore. The probability of randomly selecting an unrelated  
16 individual having a DNA profile matching the major  
17 contributor to this item is approximately one in 68  
18 quadrillion. Richard Niles, Jr., and Mokeia Hammond are  
19 excluded as contributors to this item.

20 Q All right, and the final swab contained in State's  
21 Exhibit 86 is indicated as a swab from the left rear seat of  
22 the suspect's vehicle. Did you do an analysis on that?

23 A Yes, I did.

24 Q And what were your findings?

25 A The DNA profile developed from the swab from the left

Catherine Leisy - Cross by Mr. Barr

1 rear seat of the vehicle matches the DNA profile of Richard  
2 Niles, Jr.

3 Q And what were the possibilities on that?

4 A The probability of randomly selecting an unrelated  
5 individual having a DNA profile matching this item is  
6 approximately one in 1.5 quadrillion.

7 MS. ELDER: Thank you, Your Honor. The State has no  
8 further questions.

9 THE COURT: All right, Mr. Barr.

10 CROSS EXAMINATION

11 BY MR. BARR:

12 Q Ms. Leisy, the items you've testified to earlier, are  
13 those the only items submitted to you for analysis in this  
14 case?

15 A No, there were other items submitted.

16 Q Okay, does the report contain that information?

17 A Yes, it does.

18 Q Okay, okay.

19 MR. BARR: All right, I have no further questions.

20 THE COURT: All right, Mr. Hazzard.

21 MR. HAZZARD: Very briefly, Your Honor.

22 CROSS EXAMINATION

23 BY MR. HAZZARD:

24 Q Good morning, ma'am. How are you?

25 A Good morning, sir.

Catherine Leisy - Cross by Mr. Hazzard

1 Q All of the items that Ms. Elder asked you about were  
2 taken from the Ford Fusion; right?

3 A The description that I received was just that it was  
4 taken from a suspect's vehicle. I don't have specific  
5 knowledge of what vehicle it was taken from other than that.

6 Q Okay, so, nothing that we're talking about here today  
7 that matches Mokeia Hammond came out of anything considered  
8 to be the victim's vehicle; right?

9 A Based on the paperwork and information that I received,  
10 no.

11 Q All right, and you mentioned one and I might not have  
12 been paying attention close enough and I apologize. You  
13 mentioned one batch wherein you said Ervin Moore was the  
14 major contributor and then there was obviously then a minor  
15 contributor but that both Mokeia Hammond and Richard Niles  
16 were excluded as being that minor contributor; is that  
17 correct?

18 A That is correct.

19 Q So, then, Ervin Moore had someone else's blood on him at  
20 some point or his blood got mixed with someone else's, not  
21 either of these two people; right?

22 A I can't determine whether or not it was mixed with other  
23 blood. I just know that in that particular sample there is  
24 DNA from at least one person other than Ervin Moore that is  
25 not either Mr. Niles or Ms. Hammond.

1 Q All right, thank you very much.

2 THE COURT: Anything on redirect?

3 MS. ELDER: Yes, just one quick question.

4 REDIRECT EXAMINATION

5 BY MS. ELDER:

6 Q You also received a blood sample from the victim, James  
7 Salter; is that correct?

8 A Yes, I did.

9 Q And you analyzed on item number six, I believe, that he  
10 is - I'm sorry, not to - item number five you compared that  
11 to the victim, James Salter; is that correct?

12 A That is correct.

13 Q And he was excluded from that as a contributor as well;  
14 is that correct?

15 A He was excluded, yes.

16 MS. ELDER: No further questions, Your Honor.

17 THE COURT: All right, you may step down.

18 A Thank you, sir.

19 THE COURT: Thank you.

20 MS. ELDER: Your Honor, we would ask that this  
21 witness be excused.

22 THE COURT: Any objection?

23 MR. BARR: No objections.

24 MR. HAZZARD: No objections, Your Honor.

25 THE COURT: The witness is excused. Thank you very

1 much for being here.

2 A Thank you.

3 THE COURT: All right, ladies and gentlemen of the  
4 jury, I'm going to excuse you back to the jury room briefly  
5 I think our light repairman is here. So, it'll give you an  
6 opportunity to stretch your legs while we get the light  
7 fixed. Thank you very much. If everyone else would please  
8 remain seated while the jury is excused.

9 (Whereupon, the following takes place outside the  
10 presence of jury.)

11 THE COURT: All right, we'll stand in recess until he  
12 gets it fixed.

13 MS. ELDER: Thank you, Your Honor.

14 THE COURT: Thank you.

15 OFF THE RECORD

16 (On the record.)

17 (Whereupon, the following takes place outside the  
18 presence of the jury and.

19 THE COURT: Anything from the State before we bring  
20 the jury back in?

21 MS. ELDER: No, sir, Your Honor.

22 THE COURT: Anything from the Defense?

23 MR. BARR: No, Your Honor.

24 MR. HAZZARD: No, Your Honor.

25 THE COURT: All right, please bring the jury back in.

1           (Whereupon the following takes place in the presence of  
2 the jury.)

3           THE COURT:       All right, ladies and gentlemen, welcome  
4 back. State, you can call your next witness.

5           MS. ELDER:       Your Honor, the State would call Dr. Erin  
6 Presnell.

7           THE COURT:       All right.

8           Whereupon, Susan Erin Presnell was called to the stand,  
9 duly sworn by the clerk and testified as follows:

10          THE CLERK:       Thank you. Please be seated. Please  
11 state your full name, spell your last name for the Court.

12          MS. PRESNELL:   My name is Susan Erin Presnell. The last  
13 name is P-R-E-S-N-E-L-L.

14                           DIRECT EXAMINATION

15          BY MS. ELDER:

16          Q       Dr. Presnell, where are you employed?

17          A       I work at the Medical University of South Carolina in  
18 Charleston as a forensic pathologist.

19          MS. ELDER:       Your Honor, at this time we at the State  
20 will move Dr. Presnell an expert in the area of forensic  
21 pathology. It is my understanding that Defense Niles and  
22 Defense Hammond will stipulate to that.

23          THE COURT:       Any questions?

24          MR. BARR:       That is correct, Your Honor.

25          MR. HAZZARD:     So stipulated, Your Honor.

Susan Erin Presnell - Direct by Ms. Elder

1 THE COURT: All right, I find this witness to be  
2 qualified as an expert in the field of forensic pathology.

3 MS. ELDER: Thank you, Your Honor.

4 BY MS. ELDER:

5 Q Now, Dr. Presnell, you indicated that you're a forensic  
6 pathologist at MUSC?

7 A Yes.

8 Q And what do you do as a forensic pathologist?

9 A Well, like I kind of always explain, everyone is getting  
10 a little more familiar with forensic pathology with the CSI  
11 shows and all, but forensic pathology is actually a  
12 subspecialty of the broad field pathology, which is the study  
13 of disease, and most pathologists actually examine tissues  
14 that are taken off by another physician like say a skin  
15 biopsy or a breast biopsy or if somebody has a surgery and  
16 they remove a portion of an organ that tissue goes to the  
17 pathologist. They look at it, look under the microscope,  
18 diagnose disease like it's cancer or it's not cancer.  
19 Forensic pathology is a subspecialty of that where we're not  
20 looking at a single piece of tissue. We're looking at a  
21 whole, a whole person, a decedent, somebody that's passed on  
22 The procedure that we examine them is, of course, the  
23 autopsy. We look externally and internally. We look for  
24 disease, but in addition to that, we also look for traumas  
25 and interpret traumas and ultimately come up with the cause



1 and manner of death.

2 Q And did your lab have an opportunity to perform an  
3 autopsy on the victim, James Michael Salter?

4 A Yes, an autopsy was performed on Mr. Salter on  
5 April 10<sup>th</sup>, 2007.

6 Q And was a report generated as a result of that autopsy?

7 A Yes.

8 Q And do you have a copy of that with you?

9 A I do.

10 Q And would it assist you to refer to that as I ask you  
11 your questions?

12 A Yes, it would.

13 Q I want to go to the final diagnosis. I believe that is  
14 the second to the last page and could you go through those,  
15 this diagnosis or the findings of the autopsy?

16 A Well, again, this autopsy was performed in 2007. I  
17 mean, it was performed by a colleague and I have - who has  
18 since moved to Michigan. I've reviewed the materials and the  
19 pictures and the entire report, and basically what this case  
20 boils down to is that there was a single gunshot wound. It  
21 entered into the right side of his chest. It passed between  
22 rib number five and six and also caused a fracture of rib  
23 number six and it went into the chest, went through the right  
24 lung, went up to the pulmonary artery. The pulmonary artery  
25 is the main vessel leaving the heart. All the blood coming

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1 back to the heart leaves through the pulmonary artery to go  
2 to the lungs to be oxygenated. So, the bullet hit the right  
3 pulmonary artery, hit a rib and kind of bounced back into the  
4 right lung where the bullet was recovered. Because it struck  
5 the pulmonary artery there was a lot - there was massive  
6 bleeding, basically exsanguination or bleeding to that and  
7 bleeding into the chest cavity and ultimately caused his  
8 death.

9 Q Were there any other injuries noted?

10 A He had - well, he had an abrasion or a scratch on his  
11 knee and he also had two small lacerations on his lower lip  
12 which may or may not - and a laceration is caused by some  
13 type of blunt injury causing the skin to split. Now, that  
14 may or may not have been a blunt injury from some altercation  
15 or it may have been through intubation. He had a lot of  
16 resuscitative measures that were attempted on him and  
17 including intubation where they put the endo-trach - a tube  
18 down into your airway to try to breathe for you and  
19 occasionally you get some oral injury with that. So, other  
20 than the couple of scratches on the left knee and the two  
21 small lacerations on the lower lip the only other injury was  
22 the gunshot wound.

23 Q Okay, and when you were indicating the placement of the  
24 wound I just want to make sure. I don't know if they were  
25 able to see it. Could you stand and point that out?

1 A Approximately in the mid right chest on the side.

2 Q It was on the side?

3 A Yes, yes.

4 Q And you indicated that a projectile was removed from the  
5 autopsy; is that correct?

6 A Yes, ma'am.

7 Q Okay, and was Dr. Caplan employed at MUSC at one time?

8 A Dr. Caplan was the pathologist at that time.

9 Q Okay, Doctor, like you'd to take a look at State's  
10 Exhibit 106. There's a sticker on there. Is that a normal  
11 sticker that would come from your lab?

12 A Yes, this is the autopsy sticker with our - with the  
13 name and the autopsy number and it's also inscribed bullet,  
14 yes.

15 MS. ELDER: One moment, Your Honor?

16 THE COURT: All right.

17 BY MS. ELDER:

18 Q In part of an autopsy do you do a tox report as well?

19 A Yes, we do. We collect blood and urine if available to  
20 run a screen for drugs and alcohol.

21 Q And did you make any findings in reference to that in  
22 regards to this victim?

23 A Yes, the toxicology lab found THC which is marijuana as  
24 well as some resuscitative drugs.

25 Q Nothing to the level that would cause his death?

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1 A No.

2 Q And was there a conclusion made as to the cause of  
3 death?

4 A The cause of death was the gunshot wound to the right  
5 side of the chest.

6 Q And was there a conclusion as to the manner of death?

7 A The manner of death is homicide.

8 MS. ELDER: No further questions, Your Honor.

9 THE COURT: All right, Mr. Barr.

10 MR. BARR: I have no questions of this witness, Your  
11 Honor.

12 THE COURT: All right, Mr. Hazzard.

13 CROSS EXAMINATION

14 BY MR. HAZZARD:

15 Q Good morning, ma'am.

16 A Good morning.

17 Q Is there anything in the report you reviewed or any  
18 investigation that you did that would indicate that Mokeia  
19 Hammond in any way, shape or form did anything that led to  
20 the death of James Salter?

21 A No, I'm not familiar with any of the case history.

22 Q Okay. Thank you.

23 MR. HAZZARD: No further questions.

24 THE COURT: Anything on redirect?

25 MS. ELDER: No, Your Honor. We would ask that Dr.

1 Presnell be excused at this time.

2 THE COURT: Any objection?

3 MR. BARR: Without objection.

4 MR. HAZZARD: No objection.

5 A Thank you.

6 THE COURT: All right, Dr. Presnell, you're excused.  
7 Thank you very much for being here. All right, you can call  
.8 your next witness.

9 MS. ELDER: Your Honor, at this time the State of  
10 South Carolina would rest.

11 THE COURT: All right, all right, ladies and  
12 gentlemen of the jury, the State has presented its case in  
13 chief in the trial of this case and now is the portion in the  
14 trial in which I must take up some legal matters. It's  
15 procedural legal matters that I need to take up with the  
16 attorneys. So, I'm going to excuse you back to the jury room  
17 while we deal with these matters of law. As I said before,  
18 it's not that we're hiding anything from you. It's just that  
19 when we discuss matters of law it often requires us to  
20 discuss factual issues and we don't want anything that the  
21 attorneys or I may say to influence you in determining what  
22 the facts of this case are because you and you alone are the  
23 factual finders of this case. So, I'm going to excuse you  
24 back to the jury room while we discuss these legal matters  
25 and I'll bring you back out in just a minute. Thank you very

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1 much.

2 (Whereupon, the following takes place outside the  
3 presence the jury.)

4 THE COURT: All right, anything further from the  
5 State?

6 MS. ELDER: No, sir, Your Honor, and in reference to  
7 the Defendants testifying they have no record.

8 THE COURT: All right, anything from the Defense?

9 MR. BARR: Your Honor, at this time on behalf of  
10 Defendant Niles, we would ask the Court grant a directed  
11 verdict based on the fact that the State has not met the  
12 burden of proving beyond a reasonable doubt to the point that  
13 the jury could reasonably believe that the Defendant is  
14 guilty of murder or armed robbery or use of a weapon during  
15 the commission of a violent crime. Your Honor, at best the  
16 State has presented one witness who says that he may have  
17 been present. He cannot or did not assert that he actually  
18 saw the Defendant commit a wrongful killing and that there  
19 was any malice aforethought. I don't think he testified to  
20 the extent that a jury could find that Mr. Niles robbed or  
21 with a weapon robbed Mr. Salter. I don't think that it would  
22 be a reasonable finding also that at any point that Mr. Niles  
23 engaged in any kind of plan or scheme in order to accomplish  
24 the killing of Mr. Salter, and for those reasons, Your Honor,  
25 we feel as if the State's case, taken in the best possible

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1 light to them, would not present a jury question.

2 THE COURT: All right, your motion is noted. I deny  
3 it. I think that there is enough testimony to go to the jury  
4 on that part.

5 MR. BARR: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. HAZZARD: Your Honor, at this time make a motion  
8 for a directed verdict on behalf of Mokeia Hammond. As the  
9 Court has heard, Your Honor, there is no witness that the  
10 State has presented that has indicated in any way, shape or  
11 form that Mokeia Hammond directly committed any of the crimes  
12 for which she is charged, no witness indicated that she  
13 directly robbed anyone while armed, no witness testified that  
14 she directly possessed a handgun, no witness indicates or  
15 testifies that she directly fired a shot that led to the  
16 death of James Salter and that being an unlawful killing.  
17 That would then bring us to the issue, therefore, of  
18 accomplice liability, okay, where the felony murder rule or  
19 the hand of one is the hand of all. I would submit that there  
20 is the only way that the State could have these charges, you  
21 know, go forward. Well, in looking at the testimony the only  
22 witness that I recall from the State who gives any testimony  
23 whatsoever regarding what occurred that day among the three  
24 Codefendants is Ervin Moore and what I recall Ervin Moore  
25 saying is that at some point in time he heard Rich Niles say

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1    "I'm going to hit a lick," or something to that effect. I  
2   do not recall hearing any testimony indicating that Mokeia  
3   Hammond heard that statement. I do not remember hearing any  
4   testimony that would indicate that Mokeia Hammond even knew  
5   whatever that terminology or that slang is supposed to mean.  
6   I do not recall hearing any testimony indicating that as a  
7   result of hearing this slang phraseology that Mokeia Hammond  
8   in any way, shape, or form indicated that she was and knew of  
9   a plan to commit a robbery or indicated that she was part of  
10   a plan to commit a robbery. In fact, from what I recall  
11   hearing, the light most favorable, taken in the light most  
12   favorable to the State the only evidence is Ervin Moore says  
13   at some point Rich Niles said, "I'm going to hit a lick,"  
14   no indication whatsoever, A, as to whether Mokeia Hammond  
15   heard those words, B, whether she would have any idea what  
16   those words meant because I do not believe that we will be  
17   involved with the conceit that every member of a certain  
18   ethnic group happens to know and recognize any gutter street  
19   slang that is thrown out there, but I don't personally recall  
20   hearing anything from Ervin Moore or any other witness  
21   indicating that Mokeia Hammond specifically knew of any plan  
22   to rob anyone.

23       Now, as to the issue of them going there for the purpose  
24   of committing a drug deal, as this Court is well aware, Your  
25   Honor, based on Gore versus Leeke, the felony murder rule



1 does not apply to matters that are mala prohibita, which the  
2 transaction of drugs is illegal because the State says it is  
3 illegal. It is not a mala in se crime, something such as  
4 stealing or robbing or killing, okay, and Gore versus Leeke  
5 very clearly states that in order for the felony murder rule  
6 to apply the action that the accomplice is involved in has to  
7 be a knowing accomplice or action regarding a mala in se.  
8 So, our point is if they cannot show and we submit they have  
9 not by any stretch of the imagination shown that Mokeia  
10 Hammond knew of a plan to rob anyone. Then the fact that she  
11 was merely there for the purpose of a drug transaction  
12 without more does not bring this into something that will  
13 pass a directed verdict, Your Honor.

14 THE COURT: All right, let me hear from the State on  
15 that.

16 MR. RICHARDSON: Your Honor, the State is not moving  
17 forward on felony murder based on the mere drug transaction.  
18 The statements, the testimony that was taken was that Richard  
19 Niles sits beside Mokeia Hammond on the cell phone. Ervin  
20 Moore who is in the backseat does hear him order the  
21 marijuana and then say to the car in general, "We're going  
22 to, we, we're going to hit a lick. We're going to do a  
23 robbery." That was the testimony, Your Honor. Ms. Hammond  
24 is there as the getaway driver. This was not about a drug  
25 transaction. The pretense was a drug transaction but what,

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1 what was planned was the robbery. The shoebox is upfront  
2 that has the pistol in it. Ms. Hammond lives with Mr Niles  
3 That's evidenced from the, from the mail that's at the house,  
4 the address that's on the mail that's found in the car, the  
5 same address as Mr. Niles, same address as Mr. Niles' mother.  
6 Your Honor, we have a classic case of the hand of one, hand  
7 of all here, as the charge states. While only one hand pulls  
8 the trigger, while only one bullet is used, only one victim,  
9 both Defendants can be equally guilty of the murder, of the  
10 homicide, when they're engaged in an act. There is clear  
11 evidence that there was a common plan to do a robbery. We've  
12 had a Defendant say he knew about it, he was in the car, he  
13 wasn't even the getaway driver. His job was even more  
14 minute. He was just to get out and check to see if the  
15 property was there. Mokeia Hammond sat behind the wheel  
16 ready to drive away and she did just that. She did her job.  
17 She's involved in the drug business with Mr. Niles earlier in  
18 the day. Your Honor, they don't act alone. They're always  
19 acting together. They're acting in the drug business.  
20 They're acting in ordering these drugs together. They're  
21 acting in this drug robbery that turns into a felony murder,  
22 Your Honor.

23 THE COURT: All right.

24 MR. RICHARDSON: And the State is - she knows Ervin, she  
25 knows that Mr. Moore is the lookout man, going to check to

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1 see the drugs there, and the Court, in the light most  
2 favorable to the State, is, is - should be concerned with the  
3 existence of any evidence, not about its weight, Your Honor

4 THE COURT: All right, all right, Mr. Hazzard, I note  
5 your motion. I'm going to deny the motion for a directed  
6 verdict. Anything else?

7 MR. BARR: Your Honor, ask at this time prior to the  
8 jury coming back in that the Court on the record queries Mr.  
9 Niles as to his rights as a Defendant to testify.

10 THE COURT: All right, yeah, I was going to do both  
11 Mr. Niles and Ms. Hammond. If I could get both of you to  
12 stand, please.

13 (Complies with request.)

14 THE COURT: If I could get you to raise your right  
15 hand.

16 (Mr. Niles and Ms. Hammond sworn by Court.)

17 THE COURT: All right, sir, and your full name.

18 MR. NILES: Richard Bill Niles, Jr.

19 THE COURT: All right, and ma'am?

20 MS. HAMMOND: Mokeia Shanell [spelled phonetically]  
21 Hammond.

22 THE COURT: All right; you can put your hands down  
23 now.

24 All right, Mr. Niles, Ms. Hammond, at this time I'm  
25 going to explain to you your rights as Defendants in this

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1 case and whether or not to testify or not testify in this  
2 case. If you do not understand anything I say, please let me  
3 know. If you want me to explain anything in more detail  
4 please let me know. If you want to take a break and speak  
5 with your attorney please let me know. Do you understand  
6 that so far, Mr. Niles?

7 MR. NILES: Yes, sir.

8 THE COURT: All right, Ms. Hammond?

9 MS. HAMMOND: Yes, sir.

10 THE COURT: All right, now, we've now reached the  
11 stage in the trial where you may present your defense. You  
12 have the right to claim the protection given to you by the  
13 Fifth Amendment of the United States Constitution. This  
14 amendment states in part that no person shall be compelled in  
15 any criminal case to be a witness against himself. This  
16 means that you cannot be required to testify in this case.  
17 You have the right to testify on your own behalf. However,  
18 no one can make you testify. This is a personal right and no  
19 one can waive this right except for you. If you decide to  
20 testify you will be subject to the same rules that govern  
21 other witnesses and you may be examined and cross-examined on  
22 any relevant issue in this case. In addition, if you have  
23 any convictions involving dishonesty or false statement or  
24 for crimes punishable by imprisonment for more than one year  
25 and this Court determines that the probative value of

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1 admitting this evidence outweighs its prejudicial effect to  
2 you, the Solicitor will be able to introduce your record to  
3 attack your credibility. If you decide to testify this  
4 decision on your part must be freely, voluntarily and  
5 intelligently made with knowledge of the protections given to  
6 you by the Fifth Amendment and the consequences of your  
7 decision to testify. If you decide not to testify I will  
8 instruct the jurors that they cannot give the fact that you  
9 did not testify any consideration whatsoever and that there  
10 is to be absolutely no prejudice to you because you did not  
11 testify. It is left entirely up to you whether or not you  
12 testify. You may talk with your attorney, your family and  
13 friends or anyone else, but the final decision will be left  
14 entirely up to you. Do you understand what I have explained  
15 to you thus far? Mr. Niles?

16 MR. NILES: Yes, sir.

17 THE COURT: And do you understand what I've explained  
18 to you thus far, Ms. Hammond?

19 MS. HAMMOND: Yes, sir.

20 THE COURT: All right, do either of you have any  
21 questions that you want to ask me, Mr. Niles?

22 MR. NILES: No, I do not, sir.

23 THE COURT: Do you, Ms. Hammond?

24 MS. HAMMOND: No.

25 THE COURT: Do either of you want to discuss this

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1 matter with your attorney or with any family or friends at  
2 this time, Mr. Niles?

3 MR. NILES: No, I do not, sir.

4 THE COURT: Ms. Hammond?

5 MS. HAMMOND: No, Sir.

6 THE COURT: All right, Mr. Niles, do you wish to  
7 testify in this case?

8 MR. NILES: Yes, I do, sir.

9 THE COURT: All right, Ms. Hammond, do you wish to  
10 testify in this case?

11 MS. HAMMOND: No, sir.

12 THE COURT: All right, is there anything further,  
13 Mr. Barr, that you want placed on the record?

14 MR. BARR: Nothing, Your Honor.

15 THE COURT: All right, is there anything that you  
16 want placed on the record?

17 MR. HAZZARD: Note the Defendant's objection to the  
18 denial of the directed verdict motion for the purposes of  
19 appeal.

20 THE COURT: All right. All right, thank you very  
21 much. You may be seated. All right, anything from the State  
22 before we call the jury back in?

23 MS. ELDER: Nothing from the State, Your Honor.

24 THE COURT: Anything from the Defendants? Mr. Barr,  
25 anything, anything before we bring the jury back in?

1 MR. BARR: Nothing from Defendant Niles, Your Honor.

2 THE COURT: Anything from the Defendant Hammond?

3 MR. HAZZARD: No, Your Honor.

4 THE COURT: All right, let's bring the jury back in.

5 (Whereupon, the following takes place in the presence of  
6 the jury.)

7 THE COURT: All right, ladies and gentlemen, welcome  
8 back. Mr. Barr, you can call your first witness.

9 MR. BARR: Your Honor, the Defense calls Salina  
10 Mann.

11 THE COURT: All right.

12 Whereupon, Salina Mann was called to the stand, duly  
13 sworn by the clerk and testified as follows:

14 THE CLERK: Thank you. Have a seat. Please state  
15 your full name and spell your last name for the Court.

16 MS. MANN: Salina Mann, last name is M-A-N-N.

17 DIRECT EXAMINATION

18 BY MR. BARR:

19 Q Ms. Mann, what do you do for a living?

20 A Police officer.

21 Q Okay, all right, now, where do you work?

22 A Currently at Conway Police Department.

23 Q Okay, were you formerly employed with the Myrtle Beach  
24 Police Department?

25 A Yes, I was.

1 Q Did you participate in the investigation of the incident  
2 involving James Salter?

3 A Yes, I did.

4 Q What role did you play in that investigation?

5 A I was one of the investigators assigned to assist with  
6 the case.

7 Q Okay, now, as a part of this investigation did you at  
8 some point interview the roommates of James Salter?

9 A Yes, I did.

10 Q You did?

11 A Uh-huh.

12 Q Did you interview a Sean Lundy in connection with this  
13 incident?

14 A Yes.

15 Q Okay, as a part of that interview or did you do the  
16 interview alone?

17 A No, I had another detective with me.

18 Q Who was that detective?

19 A I believe Mike Curry.

20 Q Okay, and Mike Curry was also one of the chief  
21 investigators in this case?

22 A Yes.

23 Q Okay, now, as a part of that investigation did you  
24 question Mr. Lundy about being at the Best Buy parking lot?

25 A Yes, I did.



Salina Mann - Cross by Mr. Hazzard

1 Q Okay, did he indicate to you that ---

2 MR. RICHARDSON: Objection, Your Honor. He's asking for  
3 hearsay now, did he indicate.

4 THE COURT: All right.

5 Q Did you determine, did you determine whether or not he  
6 was there at the Best Buy parking lot?

7 A Yes.

8 Q During this incident?

9 A Yes.

10 Q Okay, and that was at the date and time that this  
11 incident allegedly occurred?

12 A Yes.

13 Q Okay. Thank you so much.

14 THE COURT: Mr. Hazzard.

15 CROSS EXAMINATION

16 BY MR. HAZZARD:

17 Q Good morning, ma'am. How are you doing?

18 A Good. How are you?

19 Q I'm doing all right. Now, as a part of your  
20 investigation and as a result of your investigation did you  
21 make a determination or find information indicating the type  
22 of vehicle that Mr. Lundy was operating?

23 A Yes.

24 Q And what type of vehicle did your investigation  
25 indicate?

1 A A red Durango.

2 Q A red Durango, an SUV type vehicle?

3 A A Durango would be classified as an SUV, red in color.

4 Q Okay, and your investigation indicated that Mr. Lundy  
5 and the Durango, the SUV were present in the parking lot at  
6 the time of the incident; correct?

7 A Yes.

8 Q All right, thank you. Please answer any questions the  
9 State may have.

10 MS. ELDER: Just a moment, Your Honor.

11 THE COURT: All right.

12 MR. RICHARDSON: Your Honor, the State has no questions  
13 of this witness.

14 THE COURT: All right. Mr. Barr, anything on  
15 redirect as ---

16 MR. BARR: Nothing on redirect, Your Honor, from  
17 Defendant Niles.

18 THE COURT: All right, you may step down. Thank you.

19 A Thank you.

20 MR. HAZZARD: Your Honor, as Detective Mann is my  
21 witness I would ask that she be excused. She has an  
22 appointment with the dentist this afternoon.

23 THE COURT: Any objections from the State?

24 MR. RICHARDSON: None from the State, Your Honor.

25 THE COURT: Mr. Barr?

1 MR. BARR: None.

2 THE COURT: All right, you're excused. Thank you  
3 very much.

4 All right, Mr. Barr, you can call your next witness.

5 MR. BARR: Your Honor, the Defense calls Mr. Richard  
6 Niles.

7 THE COURT: All right, Mr. Niles, if you would please  
8 come forward.

9 Whereupon, Richard Bill Niles, Jr., was called to the  
10 stand, duly sworn by the clerk and testified as follows:

11 THE CLERK: Thank you. Please be seated. Please  
12 state your full name and spell your last name for the Court.

13 MR. NILES: Richard Niles, Richard Bill Niles, Jr.,  
14 Niles, N-I-L-E-S.

15 DIRECT EXAMINATION (By Mr. Barr)

16 Q Thank you, Mr. Niles. Mr. Niles, how old are you, sir?

17 A 25.

18 Q 25?

19 A Yes, sir.

20 Q Okay, now, you are from where?

21 A I am from Williamsburg, Salters, South Carolina.

22 Q Okay, what is your address?

23 A [REDACTED], Salters, South Carolina.

24 Q Okay, what is the last grade you completed in school?

25 A I completed 12<sup>th</sup> grade at Wil Lou Gray Opportunity

1 School, military school.

2 Q Okay, now, as far as your background is concerned, have  
3 you ever been incarcerated for commission of any crime of  
4 violence?

5 A No violent crimes but I have been for marijuana.

6 Q For simple possession of marijuana?

7 A Simple possession, yes, sir.

8 Q Okay, all right, now, do you have any other record of  
9 arrest or incarceration other than in this case?

10 A No, I do not.

11 Q Okay, all right, now, do you know or did you know the  
12 decedent, James Salter?

13 A Yes, I did.

14 Q How did you come to know him?

15 A We met a night at a club on Myrtle Beach, Red Rooster.

16 Q Okay, and the meeting at the club that night how did  
17 that occur?

18 A I was standing up over the balcony and he approached me  
19 asking me, he, he was, he introduced himself to me and he  
20 introduced himself as Spice and that's when he, you know, we  
21 conversated.

22 Q Okay, now, so, you knew him as Spice?

23 A Yes, sir.

24 Q Did you know him by any other names?

25 A Not until later on in the - our relationship.

1 Q Okay, and then you came to know him as who?

2 A They called him James but, you know, his friends was  
3 calling him Jay.

4 Q Okay, so, you called him Jay or at any point did you  
5 call him Jase?

6 A No, I called him Spice.

7 Q You called him Spice?

8 A Yes, sir.

9 Q So, you knew him as Spice?

10 A Yes, sir.

11 Q So, now, how long did you and Spice know each other?

12 A Well, we came to get to know each other I would say  
13 possibly for about close to a year, about six to nine months

14 Q Close to a year. Okay, now, during this year that you  
15 knew Spice or James what kinds of things did you all do?

16 A Well, we did some drugs, some drug relationships, you  
17 know, business-wise and went out a couple of times together.

18 Q Okay, so, you all did drug transactions?

19 A Yes, we did.

20 Q Okay, now, were you ever a guest in his home?

21 A Yes, a couple of times.

22 Q Where does he live?

23 A I can't say exactly where he live but I know it's over  
24 there next Masters. It's like, in like a condo area.

25 Q Okay, okay. So, what kind of home does he have or did

1 he have?

2 A It was a pretty nice sized house where him and some  
3 roommates had a house. It was like a three bedroom upstairs,  
4 a car garage.

5 Q Okay, and did he have a car garage?

6 A Yes, he did.

7 Q Okay, what was in the living room?

8 A Well, when you first come into the house he has like on  
9 the left-hand, on the right-hand side it's the door to the  
10 garage. Then he has like a - it's a couch facing the  
11 television. It's a room on the other side over there and on  
12 the upstairs you got two more rooms.

13 Q Okay, now, during the course of this year that you new  
14 Spice or James Salter, did you all ever have a conflict?

15 A No, we didn't.

16 Q Did you ever have an argument or push and shove  
17 disagreement?

18 A No, we didn't.

19 Q Did you all ever have a dispute over money?

20 A No, we did not.

21 Q Did you all exchange large sums of money and large sums  
22 of drugs?

23 A Yes, we have.

24 Q Was there ever any problems about getting paid or being  
25 paid back?

1 A No, it hasn't.

2 Q Or anything like that?

3 A No, it hasn't.

4 Q Okay, now, let me ask you, do you feel as if - well, let  
5 me ask you this first. In your opinion what is the street  
6 value, what would have been the street value at that point of  
7 a pound of marijuana?

8 A Okay, well, it's like you get two prices of a pound of  
9 marijuana. You got regular kind of weed and you've got  
10 exotic. The type that me and James dealt with was some  
11 exotic and I'd say like for a regular pound you probably pay  
12 for like 600, 650. You probably get a deal for like five or  
13 for some exotic you probably pay probably about the least  
14 about 1200.

15 Q So, about \$1,200 would've been the street value of a  
16 pound of exotic marijuana?

17 A Yes, sir.

18 Q Do you feel as if you had gone to James and said,  
19 "Well, James, my supply is low. Let me have a pound of  
20 marijuana," that he would have given it to you?

21 A Yes, he, well, he probably wouldn't have give it to me  
22 like he just hand in hand but probably like on a half deal or  
23 probably be like, "Well, just, just give me this right here  
24 back on it when you make this or whatever."

25 Q Okay, did you do that kind of thing for him?

1 A Yes.

2 Q Had you recently extended some drugs to Spice?

3 A Yes, I have.

4 Q And when was that?

5 A It was a week before the accident. I gave him a certain  
6 amount of marijuana. I was - I expected for him to give me  
7 5,000 back ---

8 Q For the ---

9 A For the, what he had got, weed I gave him.

10 Q For the amount of marijuana that you had given him?

11 A Yes.

12 Q Did you see any need to hassle him about it?

13 A No, sir.

14 Q Did you feel confident that at any point that you could  
15 have gotten either a comparable value of marijuana or the  
16 \$5,000 had you asked him for it?

17 A Yes, sir.

18 Q Okay, and he was the type of guy if you asked him for it  
19 he would have given it to you?

20 A Yeah, James, he was a straight up guy.

21 Q He was just a straight up guy.

22 A Yes, sir.

23 Q Okay, all right, okay, now, in terms of your dealings  
24 with Ervin Moore how did you come to know Ervin Moore?

25 A Well, I met him through relatives of the family. I



1 didn't know him like grew up with him but like relatives of  
2 the family that's how I get to knew him.

3 Q Okay, was there a point when you gave Ervin Moore a ride  
4 to Myrtle Beach?

5 A Yes, on that specific day.

6 Q How did that come to happen?

7 A Well, during the time me and my fiancée Mokeia we was --  
8 my plan was we was going to the baseball field. I had some,  
9 I had like a little small amount of marijuana that I was  
10 going to smoke, a little bit of, a little bit of liquor and I  
11 stopped by the store to get some cigars. When I got to the  
12 store to got some cigars that's when he was coming across the  
13 street approaching me. He asked me, he say, he asked me did  
14 I had any weed. I was like, "No, I do not." I say, I say,  
15 "No, I don't have none at the time." I said, I said, "How  
16 much you trying to get?" And he was like, "I'm trying to  
17 get some, you know, I mean, to go back to North Carolina  
18 with." I was like, "How much you trying to get?" He was  
19 like, "A pound." He said, "At the least I want a pound."  
20 I said, "Well, I ain't got none at the time," and that's  
21 when he was like, "Well, you ain't know nobody?"

22 During the time of the conversation that's when Spice  
23 called me and he was letting me know he was like, he was  
24 like, "Rich Boy," that's how he called me, he was like,  
25 "Rich Boy, I got your money," and he was like, "I got some

1 nuggets, too." I was like, "Well, I ain't had no plan on  
2 coming to the beach today, you know what I mean." I say,  
3 "Me and my fiancé we was going to chill." He was like,  
4 "Well, I got the money for you. So, whenever you come  
5 through he said just holler at me." He said, "I've got  
6 some nuggets, too, you know what I mean, you trying to get  
7 anything." So, that's when I was like, "You know, speaking  
8 of it, man," I say, "My peoples trying to get something he  
9 wanted to take back to North Carolina." I said, "As a  
10 matter of a fact I'm going to let you all talk." So, I  
11 gave, I gave Ervin the telephone and they were speaking on  
12 the phone as I was going in the store. I came back out of  
13 the store with the cigars and it didn't take no longer than  
14 probably about two minutes to go in the store to get the  
15 cigars. So, by the time I came back out of the store I'd say  
16 about, he probably was on the phone for like another minute  
17 or two. So, they probably was on the phone for probably  
18 about, about five minutes at the most and he gave me the  
19 phone back and he was like, I say, "He's still on the  
20 phone," and he was like, "Nah." So, I called him back and  
21 he was like, I say, "What you all talked about?" He was  
22 like, "He say he wanted to get some weed. So," he said,  
23 "Just call me when you get the beach."

24 So, I hung up the phone. As our way to the beach we was  
25 smoking, we was smoking blunts, but during the time I was

1 high. So, I fell asleep. So, when I woke up again in  
2 Pawleys Island we were putting, we was about to put some gas  
3 in the car.

4 Q Let me stop you there.

5 A Okay.

6 Q At any point in that discussion did either James Salter  
7 or Ervin Moore speak to Mokeia Hammond about what you all  
8 were talking about or what you all had planned to do?

9 A No, they didn't.

10 Q Okay, so, Mokeia Hammond other than being your fiancée  
11 and you all are riding together and she's driving ---

12 A Uh-huh.

13 Q --- there was no discussion with Mokeia Hammond or  
14 between Mokeia Hammond and Ervin Moore or between Mokeia  
15 Hammond and James Salter?

16 A No, it wasn't.

17 Q Okay, now, do you as best you can recall when Mr. Salter  
18 had the conversation, the telephone conversation with  
19 Mr. Ervin Moore, do you know whether or not Mokeia Hammond  
20 was privy to that?

21 A During the conversation when Ervin Moore and Spice was  
22 on the phone?

23 Q Yes. When he gave, when you gave him this phone where  
24 was he?

25 A Oh, he was standing at the store door beside me - well,

1 it's a glass door at the store.

2 Q Okay.

3 A So, he was like standing at the door.

4 Q Okay?

5 A Standing at the, at the gas tank.

6 Q And where would Mokeia Hammond had been at that point?

7 A She was sitting in the car.

8 Q She was in the car?

9 A Yes, she was.

10 Q Okay, so, she - there was no close proximity, they were  
11 not in close proximity to each other?

12 A No, they wasn't.

13 Q Okay, now, during the ride from Salters, South Carolina,  
14 to Myrtle Beach did the three of you have a conversation  
15 about doing any kind of robbery when you all got to the  
16 beach?

17 A No, we didn't.

18 Q Okay, did you tell either Mokeia Hammond or Ervin Moore  
19 that, "When we get to the beach we're going to hit a lick"?

20 A No, I did not.

21 Q Okay, now, after you got to the beach was there any  
22 discussion between you and Ervin Moore and Mokeia Hammond in  
23 the car about hitting some sort of lick or committing a  
24 robbery?

25 A No, I didn't.

1 Q Did you ever tell Ervin Moore that you wanted him to go  
2 into a car and verify whether or not James Salter had a pound  
3 of marijuana?

4 A No, sir.

5 Q And come back and let you know?

6 A No, sir.

7 Q That never happened?

8 A No, sir.

9 Q Okay, did you have any reason at all to rob James Salter  
10 of a pound of marijuana worth 600 to \$1000 or so?

11 A I had no reason to do that, sir.

12 Q Okay, again, could you simply have just asked him for it  
13 and he would have given it to you?

14 A Well, like I said earlier, he probably wouldn't have  
15 just gave it to me but he probably would have gave it to me  
16 like half, half on the deal or he probably would have gave it  
17 to me but be like, "Well, give me this right here back on  
18 it," because, you know, we was dealing like that for so  
19 long.

20 Q And on that same day he called and offered you the  
21 repayment of \$5,000 that you had advanced him; is that  
22 correct?

23 A Yes, sir.

24 Q And again, as far as your belief about him, you believed  
25 or is it your belief that if he called you and told you that

1 he was going to give you \$5,000 that he, in fact, would have  
2 done that?

3 A Yes, he would have, sir.

4 Q And there would have been no need to rob him?

5 A No reason, sir.

6 Q Okay, now, if you would please describe the contact  
7 between you and Mr. Salter after you got to the beach?

8 A Okay, while I was on the beach me - I made a couple of  
9 stops at some motels, a couple of houses, and during the  
10 process of that Spice called me, and he was like, "Yo, where  
11 you at?" I was like, "I told you, you know what I mean,  
12 when I get down there I was going to holler at you." I  
13 said, "I got to make a couple of moves right now." I said,  
14 "But as soon as I get done I'm going to call you," and he  
15 was like, "All right." So, that's when he hung up the  
16 phone. That's when I hung up the phone and I made a couple  
17 of more moves, and later on I called him back, and I was  
18 like, I was like, "I'm about done what I'm doing." I said,  
19 "Just give me like a couple of minutes or two, you know what  
20 I mean, I'll hit you back." So, I'd say probably it didn't  
21 take me a couple of minutes. It probably took me about 30  
22 more minutes or better that's when he called me back.

23 Q So, you wasn't anxious to go have a meeting with Mr.  
24 Salter?

25 A No, sir; no, sir.

1 Q You were doing other things?

2 A Yes, sir.

3 Q And making money doing it?

4 A Yes, sir.

5 Q Okay, now, approximately how much money did you have as  
6 best you can recall at that time?

7 A Well, on the way to the beach I probably had about at  
8 the most, I know, I know I probably had about four to \$500 at  
9 the most on me, and during the process of the transaction  
10 that I was making I'm quite sure I had like a couple of  
11 thousands on me after that.

12 Q Okay, all right, did you ever ask Mr. Moore whether or  
13 not he could pay for this marijuana that he was going to get  
14 from Mr. Salter?

15 A I never asked him that.

16 Q Okay, but now, was it intended to be as best you could  
17 recall the exotic type; is that correct?

18 A Yes.

19 Q So, that would have been worth say \$1200?

20 A Yes.

21 Q And do you know whether or not Mr. Moore had \$1200?

22 A No, I didn't.

23 Q Okay, all right, and you didn't ask him?

24 A No, I didn't.

25 Q Okay, all right, now, again, let's go back to the

1 discussion between you and Mr. Salter about meeting at the  
2 Best Buy parking lot?

3 A Okay, well, I called him back on the way. As a matter  
4 of a fact he called me during the time when I was - I was  
5 about to call him back and let him know that I was on the way  
6 next to the side to, I was going to go to his house because  
7 that's where I would usually split, that's where I usually  
8 meet him at at his house or we be usually meet like at a  
9 motel or something. That's when he was like, "Meet me at,"  
10 I was like, "Meet me at Masters." I was like, "Meet me at  
11 Masters," and he was like, "Nah, I don't want to meet at  
12 Masters because they got cameras out there," and he said,  
13 "Meet me at Best Buy." I said, "Well, all right, I'll  
14 meet you at Best Buy," and that's when I approached at Best  
15 Buy after I hung up the phone on him, after I done hung up  
16 the phone we approached that Best Buy. I sat there for  
17 probably about five minutes at the most. That's when he, he  
18 called me back, and he was like, "Where you at?" I was  
19 like, "I'm at Best Buy. Where you at?" And he's like,  
20 "Where you parked at?" I was like, "Where you?" And he  
21 was like, "I'm pulling in Best Buy at the time."

22 Q Okay, let me stop you for a second and I'm going to show  
23 you what's been marked as State's Exhibit Number Six, which I  
24 believe is the Best Buy parking lot and I'll turn this so  
25 that the jury can see it. Now, if this is the front entrance



1 to the Best Buy and this is the parking lot, where did you  
2 park and where did he park?

3 A We parked at?

4 Q Yes.

5 A If I'm not mistaken or let me make sure I'm right now.

6 Q This is the front of the store. This is the parking  
7 lot.

8 A Okay, I was right over here.

9 Q Right in there?

10 A Uh-huh.

11 Q So, you parked right in front of the store?

12 A Yes, I did.

13 Q Okay, so, now, you didn't try to park down over here or  
14 ---

15 A No, I didn't.

16 Q --- over here and all of these places are available;  
17 right?

18 A Yes, sir.

19 Q So, you're going to park right in front of the store?

20 A Yes, sir.

21 Q Okay, you didn't see any reason to hide; did you?

22 A No reason to, sir.

23 Q And no reason to park out of sight. You pull up and  
24 park right in front of the store?

25 A Yes, sir.

1 Q Okay, and he pulls up, what, right next to you?

2 A No, he, he pulled over - he - well, before, before he  
3 pulled, before he parked he called me. He, he asked, he  
4 said, "Where," he said, "Where you parked?" He said,  
5 "What you driving?" He said, "What you parked at?" I  
6 told him, I say, "Make the first left soon as you come in  
7 that Best Buy," and he was like, "All right." That's when  
8 he pulled in, and I was like, "I'm," he said, "What you  
9 driving?" I said, "I'm driving a gray car." He was like,  
10 "A Fusion?" I was like, "Yeah." I said, "I see the  
11 Mustang right there in front of me," and he was like, "All  
12 right." So, he, he backed in across from me, and that's  
13 when we pulled out and I backed up beside him.

14 Q Okay, okay, so, you all are side by side?

15 A Yes.

16 Q Right then and there in the, in the parking lot?

17 A Yes.

18 Q Okay, then what happened?

19 A I was like noticing the parking lot. That's, that's,  
20 that's what I do when I'm usually doing like transaction or  
21 any other thing, you know, I was noticing the parking lot.  
22 So, as I was looking around I seen, I seen a SUV that was  
23 like it pulled up like right before he pulled up, right  
24 before he pulled up it parked like, okay, we was parked, we  
25 backed in, we was backing in and it was like the truck was

1 | like over here on this side.

2 | Q     Okay.

3 | A     Because it was a couple of - it was some empty spaces  
4 | right there beside us. So, it was like it wasn't, it was  
5 | obvious that it was, you know what I mean, the car was just  
6 | parking, it was just parking up right there, we was pulling  
7 | in right there.

8 | Q     Okay, all right, all right, but you couldn't identify  
9 | who was in the SUV; could you?

10 | A     No, I couldn't.

11 | Q     All right, now, if you would tell us then what happened?

12 | A     Okay, that's when - after I pulled up beside them that's  
13 | when Ervin Moore, Ervin got out of the car and he got into  
14 | the car with him and my seat was laid back and that's when me  
15 | and Mokeia we was, we was conversating and we was talking  
16 | about what we was going to do after we get married, planning  
17 | the honeymoon or whatever and that's when she glanced over to  
18 | the passenger, to the side and she was like, "Baby, they  
19 | fighting," and I like, "They fighting?" That's when I  
20 | looked over. When I was looking over that's when I seen they  
21 | were tussling in the car. That's when he tried to get out  
22 | the car. That's when Ervin tried to get out of the car and  
23 | heard, I heard myself and James, Spice was like, "You ain't  
24 | getting out this car with my weed without no money." So,  
25 | during that time that's when Ervin, that's when Ervin hopped

1 in, Ervin opened the back door. He went to hop in the car  
2 and that's when I heard and that's when I seen Spice reaching  
3 under his seat. I seen him pulling out a gun.

4 Q Okay, now, let's just be honest, Mr. Niles, did you, did  
5 you shoot Mr. Salter or shoot at Mr. Salter at least?

6 A Yes, yes, I did.

7 Q You did?

8 A Yes, I did.

9 Q Okay, and you haven't been straightforward about that in  
10 the past; have you?

11 A No, I wasn't.

12 Q Okay, Mr. Salter first shoot at you or shoot in the  
13 direction of the car?

14 A Well, when he was getting out, when Ervin was getting  
15 out of the car and Salter was reaching underneath his seat I  
16 seen him pulling the gun and that's when he start firing off  
17 as Ervin was jumping in the back seat and when he pulled the  
18 door to that's when he was shooting in, he was shooting in  
19 the car. That's when my fiancée she started screaming. She  
20 ducked in my lap. She was screaming. So, while he was  
21 shooting in the car, yes, I did had a gun. So, I grabbed my,  
22 I grabbed my pistol and that's when I shot two times. My  
23 eyes was closed. I wasn't even looking. I shot two times.  
24 I went pow, pow. I wasn't trying to hit nobody.

25 Q And there was gunfire coming into the car?

1 A Yes, there was.

2 Q Constantly?

3 A Yes, there was.

4 Q Okay, now, let me ask you this, what then happened  
5 immediately thereafter?

6 A Soon as the gunshots went off?

7 Q Yes.

8 A Okay, well, as I was saying, I was leaning back in the  
9 car and I shot two times.

10 Q Okay, all right.

11 A I was just trying to just get him to stop shooting.  
12 That's all I was trying to do. I didn't know my fiancée got  
13 shot or nothing. That's the first thing came to my head, you  
14 know.

15 Q Okay, so, did you then tell Ms. Hammond to drive, drive  
16 and drive away?

17 A I told her to mash the gas.

18 Q Yes, sir, you did.

19 A As she mashed the gas I grabbed the steering wheel and I  
20 was controlling the steering wheel because she was still  
21 ducked. I wasn't knowed - I didn't know that she got shot or  
22 anything, so.

23 Q So, she mashed the gas and you controlled the steering  
24 wheel and you all sped away?

25 A Yes, we did.

1 Q Okay, now, let me ask you this, where did you go after  
2 you left the Best Buy parking lot?

3 A Okay, when we got in front of the Best Buy parking lot  
4 she was still mashing the gas. So, that's when I whipped the  
5 steering wheel hard as I could instead of going towards the  
6 store side that's when I whipped it hard as I could so to  
7 make it turn. I was like, "Is you all right?" And she was  
8 like, "Yeah." I was like, "You ain't hit?" So, that's  
9 when she lift up and I was like grabbed the steering wheel,  
10 and as she was grabbing the steering wheel we was going in  
11 the back of the restaurant then on the grass part. So,  
12 that's, that's how we got behind the restaurant coming across  
13 the grass and everything.

14 Q Now, where did you all go at that point?

15 A We went down it's the Highway 501. We went dead in  
16 traffic, 501 and that's when we went to a trailer park to  
17 some people house I knew that I usually do business with.

18 Q Okay, and that's why you went to the trailer park?

19 A Yes.

20 Q Okay, and did you leave the car there at the trailer  
21 park?

22 A Yes, I did.

23 Q Okay, got out of the car and left the car there at the  
24 trailer park?

25 A Yes, I did.

1 Q Okay, did you - was Mr. Moore with you guys, all three  
2 of you in the car at that time?

3 A Yes.

4 Q Okay, now, this is a rental car as I understand?

5 A Yes, it is.

6 Q Is that right?

7 A Yes, sir.

8 Q The car is rented in whose name?

9 A My mother's name.

10 Q Your mother's name; right?

11 A Yes.

12 Q And you all had rented the car the previous week to  
13 travel; is that right?

14 A Yes.

15 Q Okay, did you call your mother at that point?

16 A Yes, I did.

17 Q And what did you tell her?

18 A I specifically said, I was like, "Mom," I say, "Call  
19 and report the car stolen," and that's when she was like,  
20 "What happened?" I said, "Don't worry about that," and I  
21 hung up the phone on her.

22 Q Okay, so, what you did was you called your mother and  
23 told her to report the car stolen?

24 A Yes, I did.

25 Q That's right, and you didn't give her any facts and

1 circumstances about why she should report the car stolen.

2 A No, I didn't whatsoever.

3 Q But you told her to report it stolen?

4 A Yes, I did.

5 Q Okay, all right, so, now, would it be fair to say at  
6 that point you're in a state of panic?

7 A Yes, I was.

8 Q Okay, all right, now, you didn't call the police; did  
9 you?

10 A No, I didn't.

11 Q Okay, all right, now, with regard to what happened next,  
12 after you called and asked your mother to report the car  
13 stolen you left the car there in the trailer park?

14 A Yes.

15 Q Is that right?

16 A Yes.

17 Q Okay, now, with regard to Mr. Moore, did he travel with  
18 you or let me ask you this. Where did you all go at that  
19 point?

20 A Okay, we got out of the car. That's when I grabbed my  
21 backpack. It was in the backseat of the car. One was in the  
22 backseat and one was in the trunk.

23 Q Okay.

24 A So, I grabbed one out of the backseat and I grabbed the  
25 one out of the trunk.



1 Q Okay.

2 A During that time as I was grabbing the stuff I was  
3 calling a cab I usually, I usually call to make moves on the  
4 beach. So, that's when I called the cab and I told them to  
5 meet me at the trailer park where he usually come pick me up  
6 at or where he usually meet me at. So, that's when they came  
7 to the trailer park, I tell them you will see, you will see  
8 me walking.

9 Q Okay.

10 A So, as we were walking towards the road that's when the  
11 cab came in and we got in the cab, left the trailer park and  
12 we went to Sea Banks Motel. That's - when we got to Sea  
13 Banks Motel that's when we got, we got out of the cab and  
14 that's when we splitted up.

15 Q So, that's when the three of you split up?

16 A Yes, well, that's when me and my fiancée and Ervin split  
17 up.

18 Q Okay, but your fiancée, Ms. Hammond stayed with you?

19 A Yes, she did.

20 Q Did you see Mr. Moore anymore that day?

21 A No, I didn't.

22 Q Did you all have any contact anymore that day?

23 A No, we didn't.

24 Q Did you have any discussion with him that day?

25 A No, we didn't.

1 Q After, after the incident?

2 A No, we didn't.

3 Q Did you tell him that you were going to go back to the  
4 mobile home park and get a gun or move a gun or hide a gun or  
5 anything?

6 A No, we didn't.

7 Q You didn't have such a conversation?

8 A No, we didn't.

9 Q Okay, and as a matter of a fact you never saw him again  
10 period; did you?

11 A No, I didn't.

12 Q Okay.

13 A I would like to go back on something. When we left ---

14 MS. ELDER: Objection, Your Honor, objection.

15 Q Just please just answer the questions.

16 A Okay.

17 Q Okay, now, again, did you and Mr. Moore have any  
18 discussions at that point about the shooting?

19 A When we left the scene I was, I was, I was fussing at  
20 him. I was like, "Man, what you, what you, why you pulling  
21 something like that off, man," and that's when he was like,  
22 "What you mean, man?" He was like, "What you mean?" I  
23 say, "Man, you ain't had to do that, man. You ain't had to  
24 do that," now, I mean, because I was upset at the time  
25 because I was like, "Yo, man, you could have got my old, you

1 could have got my old lady killed, man." I said, "Man, you  
2 put, you put lives on the line at the time, man." I said,  
3 "Yo, man," I said, "That's messed up." I was using four  
4 languages at the time, yes, I was.

5 Q Okay.

6 A Because I was seriously upset, you know what I mean,  
7 because I was, I'm in a conflict with somebody who I do  
8 business with, you know, and we never had no problems  
9 whatsoever, you know, and it really pissed me off because he  
10 got me shooting at this man who I do business with and he got  
11 this man shooting into my car who can hit my fiancée as well  
12 as me, you know what I mean?

13 Q Okay, all right, now, do you know whether or not your  
14 mother came to Myrtle Beach or whether she called in this  
15 report that same day?

16 A She called it in.

17 Q Okay, now ---

18 A To my knowledge she called it in.

19 Q Okay, okay, now, your mother was charged in this  
20 incident just like you were; wasn't she?

21 A Yes, she was.

22 Q Okay, but she's since died; right?

23 A Yes, she has.

24 Q How did she die?

25 A A car accident.

Richard Bill Niles, Jr. - Direct by Mr. Barr

1 Q When did she die?

2 A Well, it was told to me April, it was told to me  
3 January 11<sup>th</sup>, but she passed January the 10<sup>th</sup>, the 10<sup>th</sup> of  
4 January.

5 Q Of this year.

6 A Yes, sir.

7 Q Okay, and that's the day or the day or so before we were  
8 scheduled to try this case?

9 A Yes, sir.

10 Q All right, now, let me ask you this, two or three days  
11 later you showed up at my office; is that right?

12 A Yes, that's correct.

13 Q Okay, now, were you there to seek legal counsel about  
14 this incident?

15 A No, no, I did not come there for that.

16 Q All right.

17 MR. BARR: The Court's indulgence, Your Honor.

18 THE COURT: All right.

19 BY MR. BARR:

20 Q I'm going to show you this document and ask you whether  
21 or not you recognize it.

22 A Yes, yes, I do.

23 Q Would you identify it for me if you would, please?

24 A It was a settlement for 15,000.

25 Q Okay, now, what's the date on that document?

1 A It's the 19<sup>th</sup>.

2 Q Okay, so, you were there at my office that day regarding  
3 the settlement of an accident, bodily injury accident; is  
4 that right?

5 A Yes, sir.

6 Q Okay, and you were there because we'd received a check  
7 and we were handling the financial portion of the  
8 transaction; is that right?

9 A Yes, sir.

10 Q Okay, now, under this settlement I believe you were to  
11 receive \$15,000; is that right?

12 A Yes, sir.

13 Q So, this would have been additional money that you all  
14 ---

15 MS. ELDER: Objection, Your Honor. I don't see the  
16 relevancy at this point. I think he's established his point.

17 THE COURT: All right, well, let's come on up for a  
18 second.

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

21 THE COURT: All right, Mr. Barr.

22 MR. BARR: Thank you, Your Honor.

23 BY MR. BARR:

24 Q Mr. Niles.

25 A Yes, sir.

1 Q Let's, let's go then - you were arrested I believe that  
2 day in the parking at my office; is that correct?

3 A Yes, that's correct.

4 Q And taken into custody?

5 A Yes, sir.

6 Q And you were brought to the Myrtle Beach Police  
7 Department; is that correct?

8 A Yes, I was.

9 Q Okay, you were transferred - you were first taken to the  
10 Williamsburg County Detention Center; is that right?

11 A Yes, sir.

12 Q And then transported to the ---

13 A Yes, sir.

14 Q --- Myrtle Beach Detention Center?

15 A Yes, sir.

16 Q Okay, now, during the course of being at the Myrtle  
17 Beach Detention Center did you give a statement to the  
18 detectives who interviewed you?

19 A At Myrtle Beach?

20 Q At Myrtle Beach.

21 A Yes, I did.

22 Q Okay, now, the statement that you gave you didn't tell  
23 the truth about what happened; did you?

24 A No, I didn't.

25 Q You were given one statement or you gave one statement

1 and you wasn't candid and you didn't tell the truth in that  
2 statement; did you?

3 A No, I didn't.

4 Q Okay, now, were you told near the end of that statement  
5 that your mother was present in the building?

6 A Yes, I was.

7 Q And were you told by the detectives that they would see  
8 or try to see whether or not you could speak with your  
9 mother?

10 A Yes, they did.

11 Q Okay, at some point did you ask that interview with the  
12 detectives be terminated? Did you say, "I don't want to  
13 talk anymore"?

14 A Yes, I did.

15 Q Did you also say that, "I want to speak to my lawyer"?

16 A Yes, I did.

17 Q Were you allowed to speak to your attorney?

18 A No, I didn't.

19 Q Okay, now, at some point that same day did you resume  
20 giving a second statement to the detectives?

21 A Yes, I was; yes, I did.

22 Q And why, why did you do that?

23 A The reason, the reason I did that is because that's when  
24 I, I had - was told at the end of it that my mom was there  
25 and that was the whole purpose of me going back giving

1 another statement.

2 Q Okay, now, in the second statement that you give, that  
3 you gave you didn't tell the truth that time either; did you?

4 A No, I fully didn't.

5 Q Okay, did you give either the name Ervin Moore or of  
6 James Salter in that interview?

7 A No, I didn't.

8 Q As a matter of a fact you intentionally gave a false  
9 name for even Moore; didn't you?

10 A Yes, I did.

11 Q And you referred to him as what?

12 A Keith.

13 Q Keith, okay, so, you were trying to protect all the  
14 parties involved in this?

15 A Yes, I was.

16 Q At least that's what you thought.

17 A Yes, I was.

18 Q Okay, now, at some point did you also conclude that  
19 interview or that statement?

20 A Yes.

21 Q Okay, now, did you at some point while you were  
22 incarcerated get a letter from Ervin Moore?

23 A Yes, I did.

24 Q Okay, did you first send him a letter?

25 A No, I didn't.



1 Q Okay, all right, okay, now, with regard to the  
2 statement, both first and second statements the information  
3 you provided to the police at that point was incorrect?

4 A Yes, it was.

5 Q Okay, now, regarding your testimony here today have you  
6 truthfully answered all of the questions that I've asked you?

7 A Yes, I have.

8 Q To the best of your ability?

9 A Yes, I did.

10 Q Okay, all right, please answer any questions that the  
11 other attorneys or that the Court may have for you at this  
12 time.

13 A Yes, sir.

14 THE COURT: Mr. Hazzard.

15 MR. HAZZARD: Thank you, Your Honor.

16 CROSS EXAMINATION

17 BY MR. HAZZARD:

18 Q Good morning, Mr. Niles.

19 A Good morning.

20 Q All right, sir, I'm going to hand you a document that -  
21 well, before I do that let me ask you this. Now, you  
22 indicated that when you all got to the mobile home park you  
23 called the cab; is that correct?

24 A Yes.

25 Q Can you be mistaken on that? Isn't it true that

1 actually Mokeia called the cab when you got there?

2 A It's possible that that happened.

3 Q Okay.

4 A Yeah.

5 Q So, you're not really clear. You just know one of the  
6 two of you all called a cab?

7 A Yes.

8 Q Okay, thank you. No further questions.

9 THE COURT: All right, cross.

10 CROSS EXAMINATION

11 BY MS. ELDER:

12 Q What kind of business were you doing here at the beach?

13 A Well, honestly, I was, I was in the business of selling  
14 drugs.

15 Q So, on April 9<sup>th</sup> when you testified that you were going  
16 from motel to motel or house to house you were selling dope;  
17 right?

18 A Yes, I was.

19 Q And how long you been selling dope?

20 A Well, I was selling dope for a while.

21 Q And your girlfriend with you?

22 A Well, in my transactions I don't allow her to know what  
23 I'm doing in the drug thing because I don't want her to be of  
24 fear of any of that.

25 Q She's driving you around and you're slinging drugs at

1 the beach and she don't know what you're doing?

2 A Okay, during that time on the beach, during the time on  
3 the beach while I was staying on the beach she wasn't with me  
4 any of the times when I make transactions.

5 Q So, on April the 9<sup>th</sup>, 2007, when you all drove up to the  
6 beach from Salters she wasn't with you?

7 A Yes, she was.

8 Q Okay, you testified to Mr. Barr that earlier that day  
9 you were stopping from hotel to hotel, house to house ---

10 A Uh-huh.

11 Q --- who was driving?

12 A She was.

13 Q So, she was there on the 9th?

14 A Yes, she was.

15 Q And you were selling dope?

16 A Yes.

17 Q Where was your gun?

18 A Well, my gun was in a black bag.

19 Q Where?

20 A Underneath my seat.

21 Q Where did the gun come from?

22 A Where did it come from?

23 Q Yeah?

24 A Well, it came from a friend of mine from - I met.

25 Q Who, what friend?

1 A His name is, well, I call him Black. That's who I know  
2 him as Black. He's from up north.

3 Q And how long you had the gun?

4 A Approximately probably about, I'd say probably about,  
5 about a year.

6 Q What, what kind of gun is it?

7 A What kind of gun is it?

8 Q That's right.

9 A It's a, it's a revolver.

10 Q Thirty-eight?

11 A No, it wasn't.

12 Q What is it?

13 A It's, I'm not going to lie, to be exact was a 357.

14 Q Okay, put 38 bullets in it?

15 A No, I didn't.

16 Q What did you carry in it?

17 A 357 bullets.

18 Q It's a longer revolver; is that correct?

19 A Yes.

20 Q I want to get some basic facts down so I can understand.  
21 How long are you testifying before Mr. Salter was killed and  
22 murdered did you know him?

23 A Before he was killed?

24 Q That's correct.

25 A Did I testify here?

- 1 Q Today. Yeah, let's, let's start with today.
- 2 A Okay, I knew him ---
- 3 Q Then we'll go back to all the others.
- 4 A Okay, I knew Mr. Salter for about six to nine months,
- 5 probably it was close to a year.
- 6 Q Close to a year?
- 7 A Yes.
- 8 Q And where would you all conduct business at supposedly?
- 9 A Talking about during the time of our relationship?
- 10 Q That's correct.
- 11 A Several places. I have went - I went to his house, at
- 12 his house a couple of times. I went to - he came to the
- 13 motels I was at a couple of times.
- 14 Q Now, are you saying that he was selling for you?
- 15 A Well, he, he, he made a couple of moves for me plenty of
- 16 times, yes, he did. We did transactions.
- 17 Q And the day April 9<sup>th</sup>, whose idea was it to get
- 18 marijuana?
- 19 A It was Ervin's.
- 20 Q Ervin's, solely Ervin's idea?
- 21 A Yes.
- 22 Q So, you called the victim?
- 23 A He called me.
- 24 Q He just happened to know that the person in the car with
- 25 you wanted some dope?

1 A No, when he called me, I was - during the time me and  
2 Ervin was talking about, Ervin, Ervin had asked me did he -  
3 he wanted some weed. Ervin asked me did I have some weed.  
4 That's when during the conversation that's when Salter called  
5 me, which I know him as Spice. He called me and was letting  
6 me know that he had the money that he owed me and he said,  
7 ``I got the money that you owe - I owe you.'' So, he was  
8 like that's when he was, that's when he said, ``I got some  
9 nuggets, too.''

10 Q So, the time had just happened to be right, Ervin Moore  
11 just said, ``I want some, I want some pot,'' and about that  
12 same time James Salter called say, ``I got some''; right?

13 A Yes.

14 Q Now, you testified that today, let's just start, like I  
15 said, let's start with the story today. You testified that  
16 you went to the Best Buy parking lot and Ervin Moore got out?

17 A Yes; yes, ma'am.

18 Q And Ervin Moore got into the car with Salter?

19 A Yes, ma'am.

20 Q For the purpose of what?

21 A To make the - his transaction.

22 Q Well, I thought you were there to get your money?

23 A No, the purpose of us meeting at Best Buy was first him  
24 and Ervin, Spice and Ervin was going to do their business and  
25 after that that's when me and Spice was going to talk.

1 Q And how much money was he supposedly bringing to you  
2 that day?

3 A He told me he had - he said, ``I had the \$5,000 for  
4 you.''

5 Q So, you hooked up Ervin Moore with somebody he didn't  
6 know, James Salter, supposedly to do a transaction and you  
7 never got out the car for that?

8 A No, I didn't.

9 Q And supposedly James Salter had in his car \$5,000 that  
10 he owed you but you didn't get out of the car to check that  
11 out first?

12 A No, I didn't.

13 Q You were going to let them do some minor marijuana sale  
14 first before you got over there.

15 A Yes.

16 Q Then you're saying that Ervin Moore got into some  
17 physical altercation?

18 A Yes, ma'am.

19 Q And jumped back in your car?

20 A Yes, ma'am.

21 Q Where did he jump back at?

22 A In the backseat.

23 Q And what happened than?

24 A That's when as he was jumping in the backseat that's  
25 when - I, I was already looking because my fiancée said they

1 were there fighting over there. That's when I was looking  
2 over there. As Ervin was getting out of the car Jason made  
3 the comment, he was like, ``You ain't getting out this car  
4 with my weed, man, '' and that's when Ervin was getting out of  
5 the car he was opening my back door. After, after, while he  
6 was opening my back door I seen Spice pulling out the gun and  
7 he started firing.

8 Q All right, well, let me ask you this, you said you were  
9 backed in?

10 A Yes, ma'am.

11 Q And you were on the passenger side?

12 A Yes, ma'am.

13 Q Right?

14 A Yes, ma'am.

15 Q And were your windows up or down?

16 A They were down - they were up.

17 Q They were up?

18 A Yes, ma'am.

19 Q And James Salter's vehicle was on the driver's side?

20 A Yes, ma'am.

21 Q Of your vehicle?

22 A Yes, ma'am.

23 Q Was it backed in or was it pulled up?

24 A Backed in.

25 Q So, his passenger door was to your driver's side door?



1 A Yes, ma'am.

2 Q And your girlfriend Mokeia Hammond was in the driver's  
3 seat?

4 A Yes, ma'am.

5 Q Right?

6 A Yes, ma'am.

7 Q And you said, you testified you were kicked back in, you  
8 had your seat ---

9 A Laid back, yes, ma'am.

10 Q --- reclined?

11 A Yes, ma'am.

12 Q How did you see James Salter's gun?

13 A Okay, when my fiancée said that - she said they was over  
14 there fighting that's when I sat up and started looking into  
15 the car. That's when I seen them tussling. That's when I  
16 seen Ervin trying to get out of the car and then that's when  
17 Spice made the comment saying, "Man, you ain't getting out  
18 of this car with my weed." As he was saying that Irvin was  
19 getting out of the car. When he was getting out of the car  
20 getting into the backseat of my car that's when I seen Spice  
21 pull out his gun.

22 Q And was the door of the victim's car open, closed,  
23 window down, window up, what?

24 A His door was open.

25 Q And Ervin Moore was getting out running to the back of

1 your car and ---

2 A Well, he, he actually didn't have to run. He was just  
3 getting out of the passenger side of Spice's car and getting  
4 in the back seat of my car.

5 Q All right, they're all parked close?

6 A Yes, right in this parking lot. This is parking lot and  
7 this is the next parking lot, we were right there beside each  
8 other.

9 Q All right, well, so, James Salter's passenger door  
10 wasn't flung wide open because it would have hit your car.

11 A No, actually ---

12 Q Okay.

13 A --- it wouldn't have hit my car because we was like  
14 parked in the right distance from each other.

15 Q Okay, now, you're parked a distance from each other.

16 A No, we were parked in the same, okay, it's like, okay,  
17 you all know how a parking lot look, okay, you got this  
18 parking lot right here, then you have this parking lot right  
19 there. It's, it's in space where you can park where some one  
20 can open their door wide enough where they don't hit another  
21 car. That's, sometimes you can ---

22 Q As long as it's not flung straight out?

23 A No, you have some parking spaces that are wider than  
24 some of them.

25 Q All right, so, you were - you're testifying you were in

1 one of the wide spaces in the parking lot?

2 MR. BARR: Your Honor, I'm going to object to this  
3 line of questioning.

4 THE COURT: Hold, hold, hold for a ---

5 MR. BARR: He's, he's testified that he's in one  
6 parking space, the next vehicle was in the next parking  
7 space. There's no wide and narrow parking space. All the  
8 parking spaces are the same.

9 MS. ELDER: Well, I know that, Your Honor.

10 THE COURT: All right.

11 MS. ELDER: But that's not what he's testifying to.

12 MR. BARR: No, no.

13 THE COURT: All right, well, I'm going to allow it.

14 This is cross examination. I'm going to allow it.

15 Overruled, go ahead.

16 BY MS. ELDER:

17 Q So, you were in - side by side in the parking space?

18 A Yes, ma'am.

19 Q Okay.

20 A Yes, ma'am.

21 Q And there - was there a wider space than others?

22 A I can't speak on that behalf. The only thing I can tell  
23 you is his door was wide enough where it wouldn't hit my car.

24 Q But you could clearly see over your girlfriend, Mokeia,  
25 while he had his door open and Ervin was exiting out you

1 could clearly see him reach, pull a gun and start shooting?

2 A Yes, because I sittted up. That's was my purpose in  
3 sitting up to see what was going on in the car.

4 Q And was the car Mokeia was driving on or off?

5 A It was on.

6 Q And when you saw the gun what'd you do?

7 A When I seen his gun?

8 Q That's right.

9 A Well, Ervin was jumping in the back of the car at that  
10 time and when I seen the gun by the time I seen the gun he  
11 started firing. When I seen, when I seen him pulled out the  
12 gun, soon as he pulled it out, he start releasing, soon as he  
13 pulled it out.

14 Q And did Mokeia take off?

15 A No, she didn't.

16 Q She just sat there?

17 A She panicked.

18 Q All right, what did you do?

19 A When I seen him shooting, when I, when I seen him  
20 shooting the gun I reached down for mine.

21 Q So, you had time, you saw him get the gun, pull it up,  
22 point it, start shooting, then you saw - you had enough time  
23 to reach under your seat, open your bag and get your gun out?

24 A Okay, my bag it was open at the time. It was open at  
25 the time because my - I keeps it open to where I can grab it

1 at any time.

2 Q So, it's real accessible to you; right?

3 A Basically, it is.

4 Q Because that's what you do when you deal drugs; right,  
5 carry a weapon?

6 A Yes, ma'am.

7 Q Ervin have a gun?

8 A Not to my knowledge he didn't.

9 Q Okay, and you didn't hear any shots fired from Ervin  
10 Moore; did you?

11 A No.

12 Q What does hit a lick mean in the drug trade?

13 A Okay, well, it's - you got different phrases in hitting  
14 a lick in the drug trade. You can do like, okay, you can  
15 have like this type of drugs and say, "Well, I got this dude  
16 who want to buy this right here." "I got a lick for you."  
17 I can mix it up with some like babbage type of weed, he  
18 making it look like it's a mix some exotic and you can pay  
19 for more of it. Then you got the phrase you can use as,  
20 "I'm going to rob somebody," as well.

21 Q All right, so, in Myrtle Beach, South Carolina, you know  
22 that hitting a lick in the drug trade means, "I'm going to  
23 rob somebody"?

24 A I mean, well ---

25 Q Do you know that?

1 A I wouldn't say why - I mean, I wouldn't say - I can't  
2 answer that honestly.

3 Q Okay, now, let's go back to April 13<sup>th</sup>, 2007. You were  
4 arrested?

5 A Yes, ma'am.

6 Q Okay, and you went and talked to investigators; right?

7 A Yes, ma'am.

8 Q And it was recorded?

9 A Yes, ma'am

10 Q And they explained to you what your rights were and all  
11 that stuff; right?

12 A Yes, ma'am.

13 Q And you went ahead and talked to them?

14 A Yes, ma'am.

15 Q Do you know what you were charged with at the time or  
16 had you been charged?

17 A Well, at the knowledge they were saying that I was an  
18 accessory to a murder.

19 Q Okay, have you been served a warrant?

20 A No, I wasn't.

21 Q Okay, but you were in custody?

22 A Yes, ma'am.

23 Q Do recall them asking you do you know James Salter?

24 A Yes, ma'am.

25 Q What did you say?

1 A Yes, I mean, honestly, I didn't say - I did not say yes  
2 at the time because I didn't know him as that name.

3 Q Okay, so, isn't it true that when they asked you at the  
4 initial part of that interview if you knew James Salter, if  
5 that name rang a bell you said no; right?

6 A I can't be exact on that.

7 Q You don't remember?

8 A Honestly, no, I don't.

9 Q How many times did they ask you if you knew James Salter  
10 in the first part of your interview?

11 A I can't recall.

12 Q You ever remember them asking you have you ever had  
13 contact with James Salter and your response was no?

14 A I can't recall that question.

15 Q Of course. They asked you do you recognize his name and  
16 you responded, "I don't know the name"?

17 A I can't ---

18 Q Do remember that?

19 A I can't recall.

20 Q Okay, "Do you know what happened at Best Buy?" Do you  
21 remember them asking you that question and you responded, "I  
22 don't know nothing about Best Buy?"

23 A Yes, I do remember that question.

24 Q Oh, we've got one. You have a nickname?

25 A Yes, I do.

1 Q What's that?

2 A Rich Boy.

3 Q Do you recall detectives asking you, ``Now, your  
4 nickname is Rich Boy; right,'' and your response was, ``No,  
5 they don't call me Rich Boy.''

6 A Yes, I do remember that question.

7 Q All right, did you respond that way?

8 A I can't recall how I responded but I remember that  
9 question.

10 Q Do you recall again, ``Have you'' - officers asking you,  
11 ``And you never talked to James Salter before,'' and you  
12 responded, ``I ain't never heard the name before, honest, I  
13 swear to God, man''?

14 A I can't recall saying all that.

15 Q Do you recall saying anything about dealing drugs with a  
16 person of a different color?

17 A No, I can't recall that question.

18 Q So, you don't remember, ``If I have, I mean, the only  
19 time I have to say I have conversated with them, no, a man, a  
20 color off, not my color probably in the club or something,  
21 no, I mean, it don't go no further than that''?

22 A No, I don't recall all that.

23 Q Do you recall officers asking you, ``So, you were there  
24 just to buy a little weed,'' and you responded, ``I wasn't  
25 there period. That's what I'm saying''?



1 A I can't recall. It's possibly that I said that though.  
2 I'm not going to deny it.

3 Q Do you deny saying, ``See, that's the thing I'm telling  
4 you, dead serious, man, I am being honest with you. I was  
5 not there''?

6 A I can't recall that but it's possible that I said it  
7 though.

8 Q And I believe they asked you about a dude that drives a  
9 white Mustang, and you said what - they asked you what's the  
10 dude that drives the white Mustang while selling drugs. Do  
11 you recall you said, ``I don't know no dude with no white  
12 Mustang. I'm telling you the truth''?

13 A That's possible that I said that.

14 Q They asked you about a gun and you told them, ``I'm  
15 going to tell you the truth. I ain't never had no gun, man,  
16 never. I ain't never went to Best Buy.'' Do you recall  
17 saying that?

18 A Yes.

19 Q ``I don't know no James Salter,'' you kept saying that.  
20 Is that correct?

21 A It's possible that I did.

22 Q But you don't recall today? Do you remember  
23 investigators asking you about why your fingerprints would be  
24 on that car?

25 A I can't recall.

- 1 Q All right.
- 2 A But it's possible that they asked that question.
- 3 Q And you told them, ``My fingerprints ain't on that
- 4 car,'' talking about the white Mustang?
- 5 A It is possible that I told them that, too.
- 6 Q Then you stop the interview because you say, ``I want a
- 7 lawyer,'' the investigators stop that interview; right?
- 8 A Yes, ma'am.
- 9 Q You go back and about 25 minutes later you want to talk
- 10 to the police again; right?
- 11 A Yes, ma'am.
- 12 Q Why did you want to come back and talk to them?
- 13 A Because during the ending of the interview they made a
- 14 statement saying that my mom was here.
- 15 Q Yeah, I wanted to ask you about that. What did you tell
- 16 them about, initially tell them about the car?
- 17 A About what car?
- 18 Q About the Focus that you and your girlfriend were riding
- 19 in when you went to the Best Buy and James Salter was
- 20 murdered? What did you tell them about the car?
- 21 A What did I told them about it?
- 22 Q Uh-huh, the first time?
- 23 A Could you like say like ---
- 24 Q Sure.
- 25 A --- in a different way or something?

- 1 Q Did you tell investigators that, ``Somebody stole my  
2 mama's car, she left it, she left us at the house Monday and  
3 somebody stole her car''?
- 4 A Yes, I did.
- 5 Q Did you also tell them, ``She came back to the house  
6 upset and said her car had been stolen at Murrells Inlet  
7 Mall''?
- 8 A Yes, I did.
- 9 Q And you were referring to the Ford Focus; right?
- 10 A Yes, ma'am.
- 11 Q All right, so, now, you come back to investigators with  
12 a second story. Now, you are admitting you were at Best Buy;  
13 right?
- 14 A Yes, ma'am.
- 15 Q And you are now also remembering that you know the  
16 victim; right?
- 17 A Yes, ma'am, it's possible.
- 18 Q Do you recall telling them when they asked you where did  
19 you first meet this guy from you said, ``At the Red Rooster  
20 Club''; right?
- 21 A Yes, ma'am, it's possible that I did said that.
- 22 Q And that that was only about two months prior to this  
23 incident?
- 24 A It's possible that I said that as well.
- 25 Q So, today, if you knew him a year, back in April of '07

1 you had only known him two months?

2 A It's possible that I said that but today, I mean, I'm  
3 under oath. So, I'm being straight up, honest the truth.

4 Q And when you started talking to them about the incident  
5 at Best Buy you told them that James Salter came up with a  
6 passenger; isn't that correct?

7 A If I'm not mistaken I believe I did said that.

8 Q And you also said there was some Explorer there?

9 A I said that, too.

10 Q And they asked you was someone in the car with them.  
11 You said, ``Yeah, some, he had somebody in the car with him  
12 sitting in the passenger seat''; right?

13 A In, in what, in which, which vehicle?

14 Q In the victim's car?

15 A Spice?

16 Q Yes.

17 A I told them that someone was sitting in there with  
18 him?

19 Q That's correct.

20 A I can't recall saying that but it's possible that I did  
21 said it.

22 Q You even went so far as to describe this person who was  
23 sitting with James Salter in his passenger seat. You recall  
24 that?

25 A I can't recall all that but it's possible I said that.

- 1 Q Do you recall when officers said, ``So, you were there  
2 in the Best Buy parking lot. What were you going to get from  
3 him," referring to James Salter, and you responded, ``I told  
4 him, he say he would give me what was, what it was, a QP or  
5 something like that''?
- 6 A It is possible that I said that as well.
- 7 Q And you went further to say, ``I ain't got the money for  
8 all that, man, you know what I mean? He was like, `Well,  
9 I'll make you a deal. I say I give you half a pound,' and  
10 you were like, `I ain't got no money for all that.'''  
11 Remember that?
- 12 A I don't, I don't recall saying that.
- 13 Q You don't recall saying that?
- 14 A No, but it's possible ---
- 15 Q Do you deny that you said that?
- 16 A No, it's possible that I said it, no.
- 17 Q Now, you also after investigators repeatedly told you  
18 that we had people that knew there was somebody else in the  
19 car with you, you said you met one of your boys at the beach?
- 20 A Repeat that and say that again, now.
- 21 Q After a period of time in this interview you told  
22 officers you did have somebody else in the car with you and  
23 your girlfriend; is that right?
- 24 A Yes, ma'am, it's possible.
- 25 Q And that you had met him at the beach?

1 A If I'm not mistaken I believe I did said that.

2 Q And that his name was Keith?

3 A Yes, ma'am.

4 Q And then later you said, ``No, no, there wasn't a third  
5 person with us''; do you remember that?

6 A It's possible that I said that as well.

7 Q So, you took Ervin Moore out completely during the  
8 course of the interview?

9 A It's possible.

10 Q How long had you known Ervin Moore?

11 A Well, as I said earlier on, I said, well, I knew him  
12 through a family member. That's how, that's how I met him  
13 through a family member. So, I can't - I knew him for a  
14 couple of years, yes, I do.

15 Q Okay, do you recall telling officers, ``No gun was in  
16 our car at all''?

17 A It is possible that I said that as well.

18 Q ``I ain't lying, no lies, swear to God, there ain't no  
19 gun in that car, man, I'm being straight''?

20 A It is possible that I said that as well.

21 Q Do recall telling officers what you talked about with -  
22 what your intentions were when you were going to Best Buy?

23 A Repeat that?

24 Q Do you recall telling officers what your intentions were  
25 when you went to the Best Buy parking lot that night after

1 you admitted that you had gone to Best Buy?

2 A I can't recall exactly what I said.

3 Q Do recall saying, "I mean, it was like he, referring to  
4 the victim, wanted me to spend money, you know what I mean.  
5 Basically at the same time I wasn't trying to spend no money.  
6 I wanted to see what I was smoking before I had just got  
7 something, you know what I mean?"

8 A It is possible that I said that.

9 Q You tell officers you didn't get close to James Salter's  
10 car at all?

11 A It's possible that I said that as well.

12 Q You tell officers you ain't never been in James Salter's  
13 house?

14 A I can't recall that but it's possible that I said that.

15 Q Do recall telling officers that you didn't even have any  
16 contact with Salter because you felt it bad because you saw  
17 some Explorer and his passenger in the seat with him and you  
18 just left the parking lot?

19 A It's possible that I said that.

20 Q You didn't tell him anything about Ervin Moore getting  
21 out of the car either; did you?

22 A It's possible that I didn't.

23 Q You also recall saying about when you were talking about  
24 Ervin Moore you referred to him as Keith, "I would've heard  
25 if he shot a gun. I know that much." You remember saying

1 that?

2 A I don't recall but it's possible that I said it.

3 Q And you repeatedly said, ``I don't know nothing about no  
4 gun''?

5 A It's possible that I said that as well.

6 Q Now, this is your second interview when you came back,  
7 which this is all from the second interview. They asked you  
8 about a white Mustang again and you said, ``I ain't never  
9 been in that car, never seen the car before.'' You remember  
10 saying that?

11 A It's possible that I did.

12 Q You know your fingerprint was on it?

13 A It's possible that it was.

14 Q Well, okay. Do recall denying, ``That you ain't never  
15 had a gun?''

16 A Yes, it's possible.

17 MR. BARR: Objection, Your Honor. Asked and  
18 answered.

19 THE COURT: Sustained.

20 MR. BARR: She's asked these questions three times.

21 THE COURT: Sustained.

22 Q You remember officers toward the end of that second  
23 interview say, ``How much were you going to buy'?

24 A Repeat that again.

25 Q During the end of your second interview, the second part



1 of this interview where you had asked to come back and talk  
2 to officers they asked you the questions how much were you  
3 going to buy?

4 A I don't recall that question but it's possible that they  
5 asked me that.

6 Q Do you recall saying, "I mean, he tell me he would give  
7 me a deal on a QP or a half a pound or something like that,  
8 but I like, man, I ain't got no money for that. I like, just  
9 get me, all I wanted was a plug or two. That's what I told  
10 him," talking about the victim? Do you recall saying that?

11 A It's possible that I said that as well.

12 Q Nowhere in that interview did you tell them that Ervin  
13 Moore was the one who wanted the pot; right?

14 A It's possible that I didn't.

15 Q But today that's the story; right?

16 A Yes, ma'am.

17 Q Nowhere in that interview did you tell them that Ervin  
18 Moore was tussling with James Salter; did you?

19 A I don't think I did gave that statement.

20 Q Nowhere in that interview did you say you fired shots in  
21 the Best Buy parking lot; did you?

22 A No, I did not give that statement as well.

23 Q What did you do with the gun?

24 A I got rid of it.

25 Q Got rid of it how?

- 1 A I torched it, tore it apart, pieces.
- 2 Q Where did you put it?
- 3 A I didn't put it anywhere. I was just throwing pieces.
- 4 Q As you were driving away?
- 5 A No, not after I was driving away, after, it was like
- 6 after I got out of Myrtle Beach.
- 7 Q So, you had the gun with you when you went to the
- 8 Patrick's Mobile Home Park?
- 9 A Yes, I did.
- 10 Q When you got out of the car did you get anything from
- 11 the car?
- 12 A Did I got anything out of the car?
- 13 Q That's correct.
- 14 A Yes, I got two my bags out of the car.
- 15 Q Did your girlfriend Mokeia Hammond get anything out of
- 16 the car?
- 17 A I can't recall.
- 18 Q What about Ervin Moore?
- 19 A I can't recall that either.
- 20 Q What happened to the dope?
- 21 A The marijuana?
- 22 Q Yes.
- 23 A He had that with him already.
- 24 Q Who is he?
- 25 A Ervin.

1 Q So, now you recall he had the dope?

2 A He got out of Spice car with it.

3 Q And when he got to Patrick's Mobile Home Park what  
4 happened to it?

5 A He had already had it stashed on him I guess. He never  
6 left it in the car if it wasn't found in there.

7 Q Did you get injured in this exchange?

8 A Not to my knowledge I didn't.

9 Q How was it that blood that was identified one and three  
10 point something quadrillion was taken from the back behind  
11 the driver seat of that car you were riding in?

12 A Like I said, I don't - I can't recall that I did get hit  
13 by anything but I don't know why it would be in the backseat  
14 of the car besides me going in the backseat of the car  
15 getting my backpack.

16 Q What did you do - you said you had a revolver;  
17 right?

18 A Yes, ma'am.

19 Q What did you do with the casings that were left from the  
20 shots that you fired?

21 A I threw them away.

22 Q So, the ones they found in your house in Williamsburg  
23 County where were those fired from?

24 A They were fired probably, I don't know probably a couple  
25 of months before that even happened.

- 1 Q And you just kept the fired casings in your house?
- 2 A It's possible that I did.
- 3 Q You don't know?
- 4 A It's possible that I did.
- 5 Q What were you shooting at before?
- 6 A Oh, in the yard.
- 7 Q In the yard?
- 8 A Yes, ma'am.
- 9 Q And you were arrested when?
- 10 A I can't recall exactly what date I was arrested but if
- 11 I'm not mistaken it was like three days or four after the
- 12 accident happened.
- 13 Q When you gave your statement you were incarcerated?
- 14 A Yes, ma'am.
- 15 Q Did you get served with warrants after your statement?
- 16 A Yes, ma'am.
- 17 Q What did you get served with warrants for?
- 18 A I got one warrant for murder.
- 19 Q Did your girlfriend get served with a warrant?
- 20 A Later on I found that out, yes, she did.
- 21 Q What did she get served with a warrant for; do you know?
- 22 A If I'm not mistaken it was for murder as well.
- 23 Q Your mother get served with a warrant?
- 24 A To my knowledge she did.
- 25 Q Do you know what she got served with a warrant for?

1 A Honestly, no, I don't.

2 Q Connected to this offense, connected to this case;  
3 correct?

4 A Who, my mother?

5 Q Yes.

6 A Yes.

7 Q We'll get back to that in a minute. Tell me - I want to  
8 go back to the parking lot because I'm a little confused.  
9 You said you didn't start shooting and you were the only one  
10 shooting back but you didn't start shooting until the victim  
11 had shot first. Where were you shooting at?

12 A I couldn't say because I had my eyes closed when I  
13 started firing.

14 Q All right, so, you're in the passenger seat?

15 A Yes, ma'am.

16 Q Your girlfriend is next to you and the victim's car is  
17 right here. So, you just held up a gun and closed your eyes  
18 and started shooting; is that right?

19 A Well, as, as - when I started firing I lifted my arm up  
20 like this right here. I know it was facing out of the  
21 window. I know that much because that's when he - that's -  
22 because - the glass was already shot out. So, that's when I  
23 was leaning back in my chair and I just, I just closed my  
24 eyes and fired off two times.

25 Q Across your girlfriend?

1 A No, I leaned back. I was shooting out of the backseat  
2 of the car out of the passenger window.

3 Q Where Ervin Moore was trying to get into your car at?

4 A He was already into the car.

5 Q How many times did you shoot?

6 A I shot twice.

7 Q And then what happened?

8 A That's when I told my fiancée to mash the gas and  
9 I grabbed the steering wheel and we start pulling out.

10 Q Did you shoot anymore?

11 A No, I didn't.

12 Q So, you only shot bang, bang and drove off.

13 A Yes.

14 Q And you were - had your eyes closed when you were  
15 shooting across the back seat.

16 A I wasn't shooting across the backseat. I was shooting  
17 on - I was shooting in the backseat as I was laying back in  
18 the passenger seat out of the window.

19 Q Okay, so, you had two people to your left, you had your  
20 girlfriend and then you had your boy Ervin Moore and you were  
21 shooting in between them but you didn't look to see where you  
22 were aiming, you just started shooting?

23 A My fiancée she was laying on my lap at the time because  
24 of the shooting of the gun coming towards my car. Ervin, he  
25 dived into the car. So, when he - as, as he was shooting I

1 was leaning back in the seat and I just let off two shots.

2 Q Today at your trial is the first time you have ever told  
3 this story; isn't it?

4 A Yes, it is.

5 Q You never told police since you were arrested in '07  
6 you, your girlfriend, Ervin Moore, your mother all arrested  
7 and put in jail and not once in the course of almost two  
8 years have you come to their aid and said, "You know what,  
9 he shot first, it's all a big mistake," not once?

10 MR. BARR: Objection, Your Honor. This is  
11 argumentative. There's no question.

12 Q Did you?

13 THE COURT: Hold it. Come on up here for a minute.

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

16 BY MS. ELDER:

17 Q Did you answer the question?

18 A No, I didn't. Could you repeat that, please, ma'am?

19 Q In the course of two years you've not made this  
20 statement; right?

21 A No, ma'am.

22 Q Where have you been for two years?

23 A In J. Reuben Long.

24 Q Where has your girlfriend been?

25 A She was home.

1 Q She was locked up for a period of time.

2 A Yes, ma'am.

3 Q Your mom was locked up, too?

4 A Yes, she was.

5 MS. ELDER: One moment, Your Honor.

6 THE COURT: All right.

7 MS. ELDER: No further questions, Your Honor.

8 THE COURT: All right, Mr. Barr, anything on redirect?

9 MR. BARR: Nothing further, Your Honor.

10 THE COURT: All right, you may step down.

11 A Thank you, sir.

12 THE COURT: All right, let me see the attorneys.

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

15 THE COURT: All right, ladies and gentlemen, this is  
16 a good time for us to go ahead and break for lunch. I  
17 understand that we do have lunch ordered. I don't know if  
18 it's here yet, but it should be here shortly. So, we're  
19 going to go ahead and take a little break. As a matter of a  
20 fact we'll break for lunch. Certainly if anybody wants to  
21 stretch their legs, get a deputy or something, if anybody  
22 wants to go outside and stretch their legs or whatever the  
23 case may be. We're probably going to break until about two  
24 o'clock. So, we're going to have a nice little break but I  
25 don't want you to miss your lunch that we've got on the way.



1 If you finish your lunch and you're ready and you've got  
2 somewhere to go or whatever I'll allow you to leave, but  
3 please be back in the jury room say by ten till two; okay?  
4 So, make sure you're back in your jury room by ten till two.  
5 Please do not discuss this case even among yourselves at this  
6 point in time. If you've taken any notes please leave your  
7 pads and pencils here in the jury box and I'll excuse you at  
8 this time and we'll bring you back out at about two o'clock.  
9 Everybody else please remain seated while the jury is  
10 excused.

11 (Whereupon, the following takes place outside the  
12 presence of the jury.)

13 THE COURT: All right, I guess I probably should have  
14 done it before they left, but I understand that, Mr. Barr,  
15 you have rested now?

16 MR. BARR: Yes, Your Honor, the Defendant Niles  
17 rests.

18 THE COURT: All right, we'll stand in recess until  
19 two o'clock.

20 MR. RICHARDSON: Thank you, Your Honor.

21 MS. ELDER: Thank you, Your Honor.

22 THE COURT: Thank you.

23 OFF THE RECORD

24 (On the record.)

25 (Whereupon, the following takes place outside the

1 presence of the jury.)

2 THE COURT: Thank you very much. Please be seated.  
3 All right, when we recessed the Defendant Niles had rested  
4 his case. Mr. Hazzard, during my initial questioning your  
5 client had said she did not wish to testify in this case. Is  
6 that still her decision?

7 MR. HAZZARD: I believe it is, Your Honor, but I've  
8 discussed with her the fact that I do want to place that on  
9 the record. Again, I want the Court to have a new colloquy  
10 with her ---

11 THE COURT: All right.

12 MR. HAZZARD: --- since we're now at a different stage  
13 of the proceeding.

14 THE COURT: All right, all right, Ms. Hammond, if you  
15 would please stand, raise your right hand.

16 (Whereupon, the Mokeia Hammond is sworn by the Court.)

17 THE COURT: All right, now, do you remember my  
18 earlier instructions, you can put your hand down. Do you  
19 remember my earlier instructions regarding your right to  
20 testify?

21 MS. HAMMOND: Yes, sir.

22 THE COURT: All right, do you want me to go through  
23 those instructions again with you?

24 MS. HAMMOND: No, sir.

25 THE COURT: All right, is there anything about my

1 earlier instructions to you that you do not understand, do  
2 not remember or have any questions about it?

3 MS. HAMMOND: No, sir.

4 THE COURT: Is there anything that you want to ask me  
5 or ask your attorney at this time?

6 MS. HAMMOND: No, sir.

7 THE COURT: All right, do you intend or do you wish  
8 to testify at this point in time?

9 MS. HAMMOND: No, sir.

10 THE COURT: All right.

11 All right, Mr. Hazzard, is there anything further you  
12 want to put on the record?

13 MR. HAZZARD: With regard to this matter, no, Your  
14 Honor.

15 THE COURT: All right, you may be seated. Thank you  
16 very much.

17 MS. HAMMOND: Thank you.

18 THE COURT: Do you have any other witnesses or  
19 Defense that you want to put up on your client's behalf.

20 MR. HAZZARD: At this time the Defendant Mokeia Hammond  
21 rests, Your Honor.

22 THE COURT: All right, well, before we bring the jury  
23 in is there any motions at this point in time?

24 MR. HAZZARD: Yes, sir, Your Honor. On behalf of the  
25 Defendant Mokeia Hammond at this point the Defense renews its

1 motion for a directed verdict. I've handed up to the Court  
2 and provided to counsel a couple of cases, State versus  
3 Buckmon and State versus Lollis, and with regard to those two  
4 cases, Your Honor, the main, the gravamen of the two cases  
5 specifically is that they say first of all where the State  
6 attempts to prove its case through solely circumstantial  
7 evidence that that evidence must be substantial. It says a  
8 Defendant is entitled to a directed verdict when the State  
9 fails to produce evidence of the offense charged. If there  
10 is any direct evidence or substantial circumstantial evidence  
11 reasonably tending to prove the guilt of the accused the  
12 Court must find the case was properly submitted to the jury.  
13 Accordingly, a trial judge should grant a directed verdict  
14 motion when the evidence merely raises a suspicion that the  
15 accused is guilty. Now, the facts in Buckmon are somewhat  
16 similar to the facts we have here today. It was a multiple  
17 Defendant case, a case involving statements from un-indicted  
18 alleged co-conspirators involving their part in the criminal  
19 enterprise, statements to the effect or testimony to the  
20 effect that certain other co-conspirators, not the appellant,  
21 made statements that before the robbery, because it was a  
22 robbery resulting in a murder, that before the robbery  
23 the codefendants said, you know, "We're going to get some  
24 cheese tonight," and the testimony was that cheese meant  
25 money. A cellmate of another of the codefendants testified

1 that he and a codefendant discussed the crime after the fact  
2 and that the codefendant told him certain facts, there were  
3 two pistols involved, that the codefendant was out to get  
4 paid that night, that the codefendant was the lookout, the  
5 codefendant told the cellmate that he had told his  
6 co-conspirators to take her out if necessary, that he ran  
7 after the victim was shot, that he kept the gun but threw the  
8 other gun away and that he was going to hit a lick. So, all  
9 of this evidence was submitted and the Supreme Court said  
10 with regard to this particular appellant, you know, who made  
11 none of these statements, did none of these things, the Court  
12 said that the trial court erred in failing to direct a  
13 verdict of acquittal on the charges against the appellant.  
14 They said specifically, "No direct evidence was adduced at  
15 trial linking the appellant to the crimes of murder and armed  
16 robbery." The State's case depended entirely on  
17 circumstantial evidence. When a directed verdict motion is  
18 made in a criminal case where the State relies exclusively on  
19 circumstantial evidence it says, "The trial judge must  
20 submit the case to the jury if there is any substantial  
21 circumstantial evidence reasonably tending to prove the guilt  
22 of the accused or from which guilt may be fairly and  
23 logically deduced." However the Court said in reviewing the  
24 directed verdict motion, "The Court is concerned with the  
25 existence of evidence, not its weight."

## Motions

1        Now, even in this case even viewing the circumstantial  
2 evidence in the light most favorable to the State the  
3 evidence does not reasonably tend to prove the appellant's  
4 guilt, specifically saying that all it did was raise a mere  
5 suspicion of guilt.

6        With regard to the other case cited, the Lollis case,  
7 Your Honor, that is the case where a husband and wife were  
8 both charged with arson in the second degree. Specifically  
9 what happened was their home burned down. On the day their  
10 home burned down the investigator went out and talked with  
11 the wife and the wife admitted that she had basically torched  
12 the house and that she had done it by leaving a pan of hot  
13 grease on a hot eye on the stove leaving it on, but that she  
14 had first removed most of their valuables and put it in a  
15 storage unit somewhere else on the property. Now, the  
16 husband always said that he did not in any way, shape or form  
17 have the knowledge or the plan nor did he participate in the  
18 plan and then the wife, in fact, stated that, that the  
19 husband did not have knowledge of the plan nor did he  
20 participate in the plan. However, the case still went to  
21 trial regardless, and in this case as well the State, the  
22 Court said, "Even viewing the circumstantial evidence in the  
23 light most favorable to the State the evidence presented does  
24 not reasonably tend to prove Lollis' guilt," pointing that,  
25 first, the wife had admitted that she had committed a crime

1 without him and without his knowledge and that the State  
2 presented no evidence of an agreement between them. I would  
3 submit to you in this case there is no evidence of an  
4 agreement between Ms. Hammond and Mr. Niles to combine,  
5 conspire and to commit an armed robbery. Again, to my  
6 recollection the only evidence on this issue is  
7 circumstantial having come from Ervin Moore because my  
8 recollection is Ervin Moore does not say Mokeia Hammond heard  
9 this statement regarding hitting a lick, does not verify that  
10 she acted in some fashion as if she heard it, does not  
11 indicate that she nodded in agreement, does not indicate that  
12 she stated anything as a result to indicate her affirmation  
13 to the crime itself. So, therefore, we're not talking about  
14 direct evidence. We're talking about circumstantial  
15 evidence, and as such it has to be substantial according to  
16 our Supreme Court, and to have the statement merely be a  
17 statement was made in the car to hitting a lick and nothing  
18 more, Your Honor, I would submit that clearly merely raises a  
19 suspicion of guilt, and as such, as merely raising a  
20 suspicion of guilt, pursuant to State v. Lollis, 541 SE2d 254  
21 and Lollis is spelled L-O-L-L-I-S, and State v. Buckmon, and  
22 Buckmon is spelled for the court reporter B-U-C-K-M-O-N, and  
23 that's 555 SE2d 402, we would submit that a directed verdict  
24 should be granted in this regard.

25 THE COURT: All right, let me hear from the State.

1 MR. RICHARDSON: Thank you, Your Honor. May it please  
2 the Court, I am in possession of those cases that Mr. Hazzard  
3 pointed out and all due respect I think he missed the mark on  
4 those cases. Both these cases, in both these cases not one  
5 witness puts these Defendants at the scene of the crime, do  
6 anything in furtherance. We have direct evidence that  
7 Ms. Hammond drove the vehicle there. We had direct evidence  
8 from the stand Mr. Ervin saying they openly discussed pulling  
9 a rip, she's the getaway driver. I believe in ---

10 THE COURT: Well, now, he didn't say she was the  
11 getaway driver.

12 MR. RICHARDSON: Well, said she was the driver and they  
13 - and that they discussed we are going to hit a lick.

14 THE COURT: All right, now, when he - are you saying  
15 his testimony was that Ms. Hammond discussed it or that ---

16 MR. RICHARDSON: That Richard Niles said, "We're going  
17 to hit a lick."

18 THE COURT: And that's it. There was no further  
19 input from Ms. Hammond.

20 MR. RICHARDSON: No, sir, but he, he indicated where  
21 they were going to rob, if my recollection is correct, they  
22 indicated that he was going to rob the boy at Best Buy.

23 THE COURT: All right.

24 MR. RICHARDSON: Mokeia Hammond drives on to Best Buy.  
25 At that point Mokeia Hammond is sitting right beside Richard



## Motions

1 Niles. At that point she has become a part and parcel of the  
2 crime at that point, Your Honor. In the Buckmon case the  
3 statements were codefendants saying, "I did this. I did  
4 that," people had seen the codefendants with Buckmon earlier  
5 that evening. No one saw them at the scene. Nobody ID'd  
6 them at the scene. Here we actually had the codefendant  
7 testify. So, the facts probably would've been different if  
8 we would - in Buckmon if one of the codefendants would have  
9 actually testified and said this is what we did, this is what  
10 happened.

11 In Lollis, Your Honor, this was a, he's right, there was  
12 no evidence. I'm very familiar with this case, that the  
13 biggest piece of evidence that the State had in there was the  
14 mere fact that the husband in the case had a key to the  
15 storage shed where the stuff was stored. The State's case  
16 actually fell apart during the middle of that. They didn't  
17 have anybody to put Mr. Lollis at the scene assisting in any  
18 way to burn the house down, didn't have him buying any  
19 gasoline, didn't have him getting matches or anything, didn't  
20 have him driving his wife away from the scene like we do  
21 here, Your Honor.

22 That gun's in the front seat. Even by Mr. Niles own  
23 testimony it's open where, where it's easy access, certainly  
24 a driver can see it, Your Honor, certainly a driver sitting  
25 there ready to get away and that's indeed what she did by all

1 the testimony.

2 THE COURT: All right.

3 MR. RICHARDSON: And the State - the State would put  
4 forth that the burden is upon the Defense to show that there  
5 was no evidence, and in this case the State has met its  
6 burden in the light considered most favorable to the State.

7 MR. HAZZARD: Your Honor, and very briefly ---

8 THE COURT: All right.

9 MR. HAZZARD: --- the facts stated or the allegations  
10 made by counsel again simply raise a mere suspicion of guilt.  
11 You know, as much as he wants to say that Richard Niles'  
12 words were, "We are going to commit a robbery," I don't  
13 recall that. I recall the allegation being made by Mr. Moore  
14 that Richard Niles got off the phone and then said, "I'm  
15 going to hit a lick." I don't recall anything about any  
16 robbery being said.

17 As far as arguing this matter, it seems the State's  
18 biggest point is that Mokeia Hammond happens to be there with  
19 Rich Niles. You know, again, no evidence or testimony  
20 whatsoever regarding specificity of knowledge, no evidence or  
21 testimony whatsoever regarding doing anything differently to  
22 aid and abet as the result of the statement, nothing  
23 whatsoever. It's simply they were in the car together all  
24 day. This statement is allegedly made by Richard Niles, and  
25 then the incident occurs, and it just so happens she is

1 there. Again, I would submit that simply is a - merely  
2 raises a suspicion of guilt. There's a reason why the  
3 Supreme Court says there must either be direct evidence or  
4 substantial circumstantial evidence, Your Honor, and that  
5 without that, without either of those two, without direct  
6 evidence or substantial circumstantial evidence the matter  
7 must be decided by this Court on a directed verdict.

8 THE COURT: All right, motion is noted. However, I'm  
9 going to deny it. Anything further?

10 MR. HAZZARD: Nothing further on behalf of Defendant  
11 Hammond.

12 THE COURT: Anything further from Defendant Niles?

13 MR. BARR: Nothing further, Your Honor..

14 THE COURT: All right, are you all going to be  
15 putting up anything in reply?

16 MS. ELDER: No, sir, Your Honor, we are not.

17 THE COURT: All right, so, I guess we can just go  
18 ahead and bring the jury in and start closing arguments?

19 MR. HAZZARD: Your Honor, before we do that I'd like to  
20 find out what the Court's intended charges are.

21 THE COURT: Yeah, what I'm going to do, let's see,  
22 I've got them, got them drawn up. Let's take - well, it  
23 won't take about ten minutes. Let me go ahead and I can  
24 print them out for you, let you take a look at them before  
25 you start your closing arguments and we'll have a brief

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1 conference before we start closing arguments; okay?

2 MS. ELDER: Thank you, Your Honor.

3 MR. RICHARDSON: Yes, sir, Your Honor.

4 THE COURT: All right, be back in just a second

5 OFF THE RECORD

6 (On the record.)

7 (Whereupon, the following takes place outside the  
8 presence of the jury.)

9 THE COURT: All right, has the State had a chance to  
10 go over my proposed charges?

11 MS. ELDER: Yes, sir, we have.

12 THE COURT: All right, any challenges or requested  
13 additions?

14 MS. ELDER: Yes, sir, there is.

15 THE COURT: All right, let me hear from you. I'll go  
16 ahead.

17 MS. ELDER: Your Honor, in the - it doesn't really  
18 matter to the State where but in the charge for murder in  
19 reference to the felony murder there is if one intentionally  
20 kills another during the commission of a felony, I didn't see  
21 anywhere in the charge that the Court identified that armed  
22 robbery is indeed a felony. We would ask that that be  
23 identified either there or in the armed robbery charge.

24 THE COURT: All right.

25 MS. ELDER: I believe Your Honor identified it as a

1 violent crime but not a felony.

2 THE COURT: Yeah, all right, any objection to in the  
3 charge for murder adding that armed robbery - that where it  
4 says it can be inferred from.

5 MR. BARR: No, sir.

6 THE COURT: Malice from commission of a felony just  
7 adding that armed robbery is a felony.

8 MR. BARR: Yes, sir, there's no objection.

9 MR. HAZZARD: Your Honor, the Defendant Hammond would  
10 prefer so as it doesn't draw too much attention to that  
11 particular part of the charge that you specify in the armed  
12 robbery charge that armed robbery is a felony because when  
13 you say, you know, commission of a felony where a murder  
14 occurs, you know, considered to be what it is then you say,  
15 "Oh, by the way armed robbery is a felony," it almost makes  
16 it seem as if you are commenting on the fact that the armed  
17 robbery did in fact occur, but now, if you place that  
18 definitional part in the armed robbery part of the charge  
19 then it defines the armed robbery within its and places it  
20 within its proper perspective, and as the Court indicated the  
21 jury will actually have a copy of these, of this charge with  
22 them for their review.

23 THE COURT: All right.

24 MS. ELDER: And Your Honor, I have no problem with  
25 that if that's the positioning, if we could get the armed

1 robbery charged first or the possession of a weapon during a  
2 violent crime and the armed robbery charged prior to the  
3 murder.

4 MR. HAZZARD: No objection.

5 THE COURT: Well, what difference does that make?

6 MS. ELDER: Well, Your Honor, we're asking them to go  
7 through or charge them with murder and indicating that they  
8 can infer malice with a felony and then we're not telling  
9 them that armed robbery is a felony until after we've given  
10 them the charge murder.

11 THE COURT: Yeah, but I don't know. I think - how  
12 about just where it says possession of a weapon during the  
13 commission of a violent crime I have murder and armed robbery  
14 are both violent crimes and felonies, just adding it there.

15 MS. ELDER: That's fine, Your Honor.

16 THE COURT: All right, so, on page 19 of 29 the last  
17 paragraph before hand of one it'll just read murder and armed  
18 robbery are both violent crimes and felonies. All right.

19 MS. ELDER: Your Honor, in the charge for armed  
20 robbery we would ask somewhere I believe on page, probably on  
21 page 17 maybe the second paragraph that the Court instruct  
22 the jury that contraband or narcotics can be considered  
23 personal property of another.

24 THE COURT: All right, any objection to that?

25 MR. HAZZARD: I would submit that that is an improper

1 commentary on the facts of the case, Your Honor. I mean, the  
2 law speaks for itself. The law is the law but to start  
3 talking about, "Oh, by the way I want you all to know that  
4 narcotics can be considered, you know, property," I think  
5 that's treading really, really close to commenting on the  
6 facts of the case.

7 THE COURT: All right, how is that not commenting on  
8 the facts of the case?

9 MS. ELDER: Well, Your Honor, it's an illegal  
10 substance and the testimony in the case has been that the  
11 robbery occurred over narcotics. So, certainly, we think the  
12 jury should know that any - whether it be legal or illegal  
13 property can be considered personal property.

14 MR. HAZZARD: Your Honor, the testimony spoke for itself  
15 with regard to Mr. Moore saying that, and in fact, Mr. Niles  
16 saying that Mr. Salter possessed the alleged substance, that  
17 Mr. Moore and Mr. Salter tussled over it and that depending  
18 upon who the jury chooses to believe either Mr. Niles or  
19 Mr. Moore took it. So, I think that takes care of itself.  
20 The jury can draw whatever inference from the testimony that  
21 they want but to specify that, "I want you all to know that  
22 narcotics are considered to be personal property," I would  
23 think would be an impermissible commentary on the facts of  
24 the case.

25 THE COURT: All right, I'm going to sustain your

1 objection. I'm just going to leave it as is.

2 MS. ELDER: Your Honor, finally on the jury verdict  
3 portion on the last page.

4 THE COURT: All right.

5 MS. ELDER: Your Honor, the indication is that in the  
6 charge in reference to Defendant Mokeia Hammond the only  
7 limitation on your verdict is that you cannot find her guilty  
8 of any crime unless you likewise find Richard Niles guilty of  
9 that crime. We certainly foresee a circumstance based on the  
10 arguments that have been presented to the jury and the  
11 testimony that one of the codefendants has, in fact, pled  
12 guilty to armed robbery. I think they can find both of these  
13 Defendants guilty of armed robbery based on his testimony and  
14 plea. Now, I understand that they're saying at this point  
15 that Richard Niles had a gun and Ervin didn't, but that  
16 affects the murder. It doesn't affect the robbery and the  
17 testimony from Ervin Moore was that he got in the car, but  
18 the testimony from Richard Niles is he got in the car and  
19 there was a scuffle and he got back in the car with the dope  
20 and they heard, "You ain't getting out of my car without  
21 giving me money." I think they certainly can base a  
22 decision on hand of one hand of all for the armed robbery.  
23 So, I'd ask that that be stricken and I'd also ask that the  
24 limitation that you placed in reference to Richard Niles and  
25 the possession of a weapon during a firearm be put in for



1 Mokeia Hammond.

2 THE COURT: All right, let me hear from you on that.

3 MR. BARR: Your Honor, I think the State's position  
4 throughout the trial has been, especially in their argument  
5 against directed verdict, has been that Ms. Hammond has been  
6 acting in concert with Mr. Niles and to make that change  
7 would be to extend the argument to say that Ms. Hammond now  
8 could have been acting in concert with Mr. Moore. I don't  
9 think that that's a valid, a valid argument, Your Honor.

10 THE COURT: Well, but I think they're right. I think  
11 Mr. Moore has pled guilty to armed robbery in this, in this  
12 case. So, conceivably she could be the hand - that could  
13 have been the hand of one is the hand of all. Although, if  
14 he didn't possess a firearm - let me think - let's think  
15 about this for a minute. You've got Mr. Moore who didn't  
16 possess a firearm.

17 MS. ELDER: He doesn't have to to be guilty of armed  
18 robbery if he made ---

19 THE COURT: All right, but let's say he's not - he  
20 doesn't possess a firearm how can you get, convict Ms.  
21 Hammond without convicting Mr. Niles?

22 MS. ELDER: Well, Your Honor, Mr. Moore pled guilty  
23 to armed robbery which indicates that either ---

24 THE COURT: Armed robbery without, without possession  
25 - I mean, but he didn't - he wasn't armed with a deadly

1 weapon.

2 MS. ELDER: And under armed robbery he doesn't have  
3 to be as in - if he expressed or led the victim to believe he  
4 was armed. That could certainly happen under armed robbery  
5 as well. Armed robbery ---

6 THE COURT: Yeah, but we don't have anything in the  
7 record to indicate that. The only use of a deadly weapon  
8 that we have involving this case is Mr. Niles' gun.

9 MS. ELDER: Well, and I asked him, I believe I asked  
10 him if Mr. Moore had a gun and he said he didn't see one.

11 THE COURT: Right, but the only deadly weapon you've  
12 got is Mr. Niles' gun. So, even though you've got Mr. Moore  
13 pleading guilty to armed robbery, the armed - he pled guilty  
14 I'm assuming to armed robbery under the fact that he  
15 committed a robbery in concert with Mr. Niles while Mr. Niles  
16 was armed with a deadly weapon, that that was the armed part  
17 of the armed robbery.

18 MS. ELDER: But I don't - I think the jury is  
19 confronted with a codefendant who pled guilty to armed  
20 robbery and manslaughter and that's the information that they  
21 have.

22 MR. HAZZARD: And that was the State's choice, Your  
23 Honor.

24 MS. ELDER: And I think they can make ---

25 MR. HAZZARD: They chose to take that plea.

1 THE COURT: Hold it for a second. All right, go  
2 ahead.

3 MS. ELDER: And I think they can make a finding and  
4 Mr. Moore testified that this was a plan, a joint plan.

5 THE COURT: And I understand that but we're talking  
6 about my instructions here that says you can only find  
7 Ms. Hammond guilty if you find Mr. Niles guilty.

8 MS. ELDER: Correct.

9 THE COURT: How can you find Ms. Hammond guilty of  
10 armed robbery, of murder or of possession of a deadly weapon  
11 during the commission of a violent crime if Mr. Niles is  
12 found not guilty on all three. Under your theory that she  
13 can be found guilty because Mr. Moore pled guilty, he doesn't  
14 have a deadly weapon in his possession and he didn't plead  
15 guilty to possession of a weapon during the commission of a  
16 violent crime. He pled guilty to manslaughter and he pled  
17 guilty to armed robbery, the armed - the armed part of the  
18 armed robbery the only evidence to support that charge and as  
19 a recall from his guilty plea is the fact that Mr. Niles had  
20 a gun.

21 MS. ELDER: That's correct, Your Honor, but they're  
22 putting forward a case that certainly would imply from  
23 Mr. Niles' testimony that and even from their cross of  
24 Mr. Niles that he's the one who got in the car with the  
25 purpose to rip him off.

1 THE COURT: Exactly.

2 MS. ELDER: So, they certainly - the jury can  
3 certainly infer from that cross that he had a weapon. I  
4 mean, I understand that that's not testified to but that  
5 certainly was the argument that was presented.

6 THE COURT: No, there's nothing to indicate that Mr.  
7 Moore had a weapon, absolutely nothing, and I know he's pled  
8 guilty to armed robbery, but his guilty plea was under this  
9 joint hand of one - I mean, basically he was admitting the  
10 hand of one is the hand of all and that's what Mr. Niles went  
11 there to do and, "That's why I'm pleading guilty to armed  
12 robbery. I knew we were going to rob him. I knew he had a  
13 gun but I didn't know he was going to kill him," and so,  
14 we've got that's why he pled guilty to manslaughter I'm  
15 trying to think how you can convict Ms. Hammond of any of  
16 these crimes without convicting Mr. Niles because the only  
17 theory you have against her is the hand of one is the hand of  
18 all. Now, you have to have a hand in there. That hand is  
19 Mr. Niles. It's not Mr. Moore.

20 MS. ELDER: Well, Your Honor, again, I don't want to,  
21 I don't want to continue too long on argument but the fact is  
22 that they've established or they at one point they said that  
23 Mr. Moore or argued that Mr. Moore was the one doing the lick  
24 because he was going to get the marijuana without the -  
25 without money and that, in fact, Mr. Niles testified that

1 Ms. Hammond heard them argue about it and then Mr. Salter  
2 said, ``You're not getting out of the car with my dope," and  
3 he jumps back in the car and they start firing. They  
4 certainly are implying there was a robbery.

5 THE COURT: A robbery.

6 MS. ELDER: Yes, sir.

7 THE COURT: Not an armed robbery.

8 MS. ELDER: Yes sir, I understand that but they can  
9 also, a jury certainly from the information, from the  
10 pathologist, the shot that killed Mr. Salter was under here.

11 THE COURT: Right.

12 MS. ELDER: It is not a random shot, Your Honor. It  
13 is - it - certainly would indicate or draw the inference that  
14 it was somebody in close proximity or in the car. Now, I  
15 know that Mr. Ervin, Mr. Moore did not have a gun but a jury  
16 can certainly infer from the testimony that he was in the  
17 car, he was the one doing the robbery and he shot him because  
18 that shot, where the shot is, the pathologist testified to is  
19 not just a headshot or a shoulder shot. It is under his  
20 right arm. So, I think from the facts they can certainly  
21 infer, they can believe part of this, part of that, part of  
22 nothing.

23 THE COURT: No, just, just cite me any piece of  
24 evidence that indicates Mr. Moore shot and killed the victim.

25 MS. ELDER: There's ---

1 THE COURT: There's no evidence.

2 MS. ELDER: No, sir; no, sir.

3 THE COURT: So, therefore, there is no evidence that  
4 Mr. Moore was armed. Therefore, you cannot use his  
5 conviction of armed robbery to say Ms. Hammond the hand of  
6 one is the hand of all because the only way he got armed  
7 robbery was through his contention that Mr. Niles was the one  
8 that was armed. So, I don't see how you can convict  
9 Ms. Hammond of armed robbery, even though Mr. Moore pled  
10 guilty to it, he didn't plead guilty to it under the  
11 admission that he was armed. He pled guilty to it under an  
12 admission that Mr. Niles was armed. So, you're going to have  
13 to have Mr. Niles armed to do it.

14 MS. ELDER: Yes, sir.

15 THE COURT: So, I think I'm going to leave it as is  
16 on that regard.

17 MS. ELDER: Your Honor, in reference to the adding in  
18 the possession of a firearm exception to Ms. Hammond's  
19 charge.

20 THE COURT: Well, that's what I was kind of thinking  
21 that that was kind of included in that.

22 MS. ELDER: Okay.

23 THE COURT: Is that you could not find her guilty of  
24 any of the crimes unless you likewise found the Defendant and  
25 then with him saying you can't find him guilty of possession

1 of a firearm unless you find him guilty of one of these other  
2 two that it covered that. I mean, it does to me. If you all  
3 don't think it does I'll add that in there.

4 MS. ELDER: Well, I'm sure the verdict form will  
5 probably be ---

6 THE COURT: Well, I was just going to let them write  
7 on the back of the indictment, each indictment guilty or not  
8 guilty. If you want me to add that additional in there I  
9 will. I just thought it was a little bit - or just as clear  
10 this way but if you want me to add in there that the only  
11 limitations on the verdict regarding Ms. Hammond that you  
12 cannot find this Defendant guilty of any crime unless you  
13 likewise find the Defendant Richard Bill Niles, Jr., guilty  
14 of that same crime; likewise, you cannot find her guilty of  
15 being in possession of a weapon during the commission of a  
16 violent crime without also finding her guilty of murder or  
17 armed robbery or both.

18 MS. ELDER: That's fine, Your Honor. We'll withdraw  
19 that request.

20 MR. HAZZARD: I mean, it's kind of like going around  
21 your, you know, your elbow to get your other shoulder because  
22 by the way you originally have it written logically deducted  
23 it has to be that way because in order to find ---

24 THE COURT: Well, now that I look at it, the way I  
25 say the only limitation is that she cannot be found guilty

1 unless you find Mr. Niles guilty I guess conceivably a jury  
2 could come back and find him guilty of murder or armed  
3 robbery and possession of a firearm and then just her guilty  
4 of possession of a firearm without the other two and that  
5 wouldn't be a proper verdict. So, I think we are going to  
6 need to add that in there or I'll add that portion to that  
7 paragraph. All right, anything else, anything further from  
8 the State?

9 MS. ELDER: No, Your Honor.

10 THE COURT: All right, Mr. Barr, any exceptions,  
11 additions or challenges?

12 MR. BARR: Yes, Your Honor, I'd ask that the Court  
13 considers charging both involuntary manslaughter and  
14 voluntary manslaughter as a lesser included of murder.

15 THE COURT: All right, let me hear the State on that.

16 MS. ELDER: Your Honor, I don't think there was  
17 absolutely any evidence of anything that would come close to  
18 voluntary manslaughter, let alone involuntary manslaughter.  
19 He's requested self defense, and ---

20 THE COURT: Yeah, let me look at involuntary. I know  
21 voluntary manslaughter with heat of passion or ---

22 MS. ELDER: A lawful activity.

23 THE COURT: --- or provocation. I don't ---

24 MR. HAZZARD: Provocation is they're shooting at you.

25 MR. BARR: Your Honor, both looking at the facts and



1 circumstances of the case I think it's possible that the jury  
2 could infer that, you know, the situation got out of hand,  
3 and in the heat of passion, that's when the crime was  
4 committed and provocation was, "You shot at me. Now I'm  
5 going to shoot at you."

6 THE COURT: No, I think that the evidence of this  
7 case is one of two things happened, either the victim started  
8 shooting and Mr. Niles was acting in self-defense or  
9 Mr. Niles started shooting or killed the victim during the  
10 commission of an armed robbery. I don't - like I say, let me  
11 look over the involuntary manslaughter charge right quick.  
12 I'm not going to charge voluntary manslaughter. Let me see  
13 what involuntary says.

14 No, I don't see where that ---

15 MR. BARR: Your Honor, the second option under  
16 involuntary manslaughter the unintentional killing of another  
17 without malice while engaged in a lawful activity with  
18 reckless disregard for the safety of others, unintentional  
19 meaning that the Defendant did not intend for anybody to be  
20 killed or for them to be serious or anybody to be seriously  
21 injured. I can foresee a situation where the jury could  
22 perceive that there was no malice between Mr. Niles and  
23 Mr. Salter and Mr. Salter was killed and that at the same  
24 time Mr. Niles may not have been engaging in anything  
25 unlawful, that maybe Mr. Moore was engaging in something

1 unlawful and that that could possibly be conceived by the  
2 jury.

3 THE COURT: Okay, no, I don't think that fits this  
4 case. I'm going to deny your motion.

5 MR. BARR: Thank you.

6 THE COURT: All right, anything else?

7 MR. HAZZARD: Yes, sir, Your Honor. A little guidance  
8 from the Court, looking at page 16 of the instructions the  
9 start of the first full paragraph, the second sentence starts  
10 with, "Malice may be inferred from conduct showing a total  
11 disregard for human life". The second sentence there says,  
12 "Inferred malice may also arise when the deed is done with a  
13 deadly weapon." Now, I thought back in the day because I'm  
14 getting a little long in the tooth but I thought back in the  
15 day there was a case Sandstrom versus Montana or Montana  
16 versus Sandstrom that said that that deadly weapon inference  
17 was impermissible burden shifting. Has that been changed or  
18 repealed or ---

19 THE COURT: I'm not aware that it has, no. If you  
20 can show me something that says it has but I'm not aware that  
21 ---

22 MR. HAZZARD: Okay, so, my position would be if that is  
23 the correct proposition of the law and I'm not sure it is  
24 I'll be ready to argue it first thing in the morning, Your  
25 Honor, I can promise you that is that I thought I in reading

1 that case sometime ago it said when you try to infer malice  
2 by the use of a deadly weapon that's an improper and  
3 impermissible shifting of the burden of proof, but like I say  
4 I won't, won't ---

5 THE COURT: Well, let me hear from the State on that.

6 MS. ELDER: I'm not, I'm not aware of that, Your  
7 Honor. This is a charge that's typically given in the courts  
8 and I believe it's in the judges' charge book across the  
9 state that it's being used in this manner.

10 THE COURT: That's where I got it from. I got it  
11 straight out of our charge book.

12 MR. HAZZARD: I will be ready to address that first  
13 thing in the morning.

14 Also, the start of the second full paragraph or the  
15 third total paragraph says, "If one intentionally kills  
16 another during the commission of a felony the inference of  
17 malice may arise." The concern I've got there, Judge, is  
18 that's like treading really close to the whole issue of  
19 felony murder rule, and if you're talking felony murder rule  
20 then I would submit that the Defendant Hammond is entitled to  
21 the charge with regard to mala in se versus mala prohibita  
22 because I don't, I can foresee a situation where the jury  
23 does not believe Mr. Moore, they do not believe an armed  
24 robbery was taking place, they believe that it was a drug  
25 deal but that Mr. Niles intentionally killed Mr. Salter

1 during the commission of a felony, that felony being the drug  
2 deal and then the inference of malice for the purpose of  
3 determining murder may arise, when the law from the Gore v.  
4 Leeke with regard to mala in se versus mala prohibita would  
5 definitely indicate that that would not be proper.

6 THE COURT: Yeah, okay, I understand your motion.  
7 I'm going to deny it and leave that charge as is. All right,  
8 anything else?

9 (No response.)

10 THE COURT: All right, we ready to begin closing  
11 arguments? I don't want to waste this time. I'd say -- how  
12 long is it going to take you to close?

13 MS. ELDER: With all three, Your Honor, if it's  
14 anything like openings that was - I think it was right at  
15 about an hour and a half, two hours.

16 THE COURT: All right, what do you all want to do?  
17 Do you want to do it all tomorrow morning?

18 MR. BARR: Your Honor, we had discussed not breaking  
19 it up for the benefit of having the jury better understand.

20 THE COURT: Well, I'm going to tell you right now if  
21 we start - wait until tomorrow morning we're going to stay  
22 straight through until we get a verdict. I'm not ---

23 MR. HAZZARD: Yes, sir.

24 MS. ELDER: The State would have no objection.

25 THE COURT: I mean, because we, we cut short the

1 other day and we're cutting short an hour and a half today.

2 MR. HAZZARD: No objection.

3 THE COURT: So, an hour and a half out the other day,  
4 an hour and a half today that's three hours or it was an hour  
5 the other day. Yeah, when was it we broke?

6 MR. RICHARDSON: We were about to cut short the other  
7 day, Your Honor, but ---

8 MS. ELDER: And we didn't. We ended up calling a  
9 witness.

10 MR. RICHARDSON: --- and we ended up pushing it till  
11 right at five o'clock.

12 MS. ELDER: Yes, sir.

13 MR. RICHARDSON: The day we had Officer Allen.

14 THE COURT: Okay.

15 MS. ELDER: We had talked about it but we ended up  
16 not doing it, Your Honor.

17 THE COURT: All right, well, let's, let's start at  
18 9:00 o'clock tomorrow morning. Be here ready to get going at  
19 nine o'clock; okay?

20 MS. ELDER: Your Honor, if we could have the  
21 Defendants rest on the record in front of the jury so we  
22 don't have any issues arise with regard to that.

23 THE COURT: Okay, any opposition to doing that?

24 MR. HAZZARD: No, Your Honor.

25 THE COURT: Go ahead, bring the jury in, we'll have

1   them rest and then we'll start tomorrow morning.

2           (Whereupon, the following takes place in the presence of  
3   the jury.)

4           THE COURT:   Ladies and gentlemen, welcome back.   I hope  
5   everyone had a good lunch, and I apologize for keeping you so  
6   long back in the jury room, but we were attending to some  
7   legal matters before we brought you back out, and at the time  
8   you last left the courtroom Mr. Barr had just finished  
9   calling his last witness; is that correct?

10          MR. BARR:       That is correct, Your Honor.

11          THE COURT:       All right, and your client rests on the  
12   record; is that correct?

13          MR. BARR:       Yes, Your Honor.

14          THE COURT:       All right, likewise, Mr. Hazzard, your  
15   client?

16          MR. HAZZARD:    Your Honor, at this time the Defendant  
17   Mokeia Hammond rests.

18          THE COURT:       All right, thank you very much.   Any  
19   reply from the State?

20          MS. ELDER:       No, sir, Your Honor.   There will be no  
21   reply.

22          THE COURT:       All right, all right, so, ladies and  
23   gentlemen, you have now heard all of the testimony and  
24   evidence you're going to hear in this case.   We're now to the  
25   part of the trial where the attorneys will give their closing

1 arguments and I'll instruct you a little bit further on that  
2 when they begin that. It's - to keep from breaking up the  
3 closing arguments, procedurally what'll happen is the  
4 attorneys will give their closing arguments. I'll charge you  
5 on the law and you'll begin your deliberations; and so,  
6 rather than breaking up the closing arguments and the jury  
7 charge it's a good time for us to break for the day and we'll  
8 come back tomorrow morning and I'll ask you to be back in  
9 jury room at 9:00 o'clock tomorrow morning and then when we  
10 bring you out of the jury room it'll be for the purposes of  
11 the parties making their closing arguments. I'll charge you  
12 on the law and you'll be able to begin your deliberations.  
13 At this point in time it's still too early to begin your  
14 deliberations. Don't talk about this case with anyone even  
15 among yourselves. Don't conduct any independent  
16 investigations. Don't watch any news accounts or try to do  
17 any research on your own, but I'll excuse you for the  
18 remainder of the day and I ask that you please be back in the  
19 jury room at 9:00 a.m., 9:00 o'clock tomorrow morning. Thank  
20 you very much. Everyone else please remain seated while the  
21 jury is excused.

22 (Whereupon, the following takes place outside the  
23 presence of the jury.)

24 THE COURT: All right, anything further from the  
25 State?

1 MS. ELDER: Nothing from the State, Your Honor.

2 THE COURT: Any from the Defendants?

3 MR. BARR: Nothing from the Defendant Niles, Your  
4 Honor.

5 MR. HAZZARD: Nothing on behalf of Defendant Hammond,  
6 Your Honor.

7 THE COURT: All right, we'll stand in recess till  
8 nine o'clock tomorrow morning.

9 MS. ELDER: Thank you, Your Honor.

10 MR. RICHARDSON: Thank you.

11 THE COURT: Thank you.

12 OFF THE RECORD

13 (On the record, Friday, March 13, 2009.)

14 (Whereupon, the following takes place outside the  
15 presence of the jury.)

16 THE COURT: Anything from the State before we bring  
17 in the jury?

18 MS. ELDER: No, sir, Your Honor.

19 THE COURT: Anything from the Defense?

20 MR. BARR: Nothing from the Defendant Niles, Your  
21 Honor.

22 THE COURT: All right, sir.

23 MR. HAZZARD: There are a couple of housekeeping  
24 matters, Your Honor. I looked over the charge you provided  
25 us yesterday evening.



1 THE COURT: Right.

2 MR. HAZZARD: Direct the Court's attention to page 11  
3 of 29 where it talks about prior inconsistent statements.  
4 The Defendant Hammond would request that the Court specify  
5 that the prior, the issue of prior inconsistent statement  
6 deal specifically with Ervin Moore and with Mr. Niles because  
7 it says a witness and the Defendant. It doesn't specify  
8 which one.

9 THE COURT: All right, I see what you're saying. So,  
10 there's been evidence presented that a witness in this case  
11 and the Defendant Niles, I'll insert that.

12 MR. HAZZARD: Okay.

13 THE COURT: Any objection?

14 MS. ELDER: No, we're just going to say witness and  
15 defendant Niles.

16 THE COURT: Right, that a witness.

17 MS. ELDER: I would object to, yes.

18 THE COURT: Yeah.

19 MS. ELDER: I would object to just putting Moore in  
20 there.

21 THE COURT: Yeah, well, and that first sentence what  
22 I'll do is I'll put, "There has been evidence presented that  
23 a witness in this case and the Defendant Richard Bill Niles,  
24 Jr., made prior statements which are not consistent with  
25 their present testimony."

1 MR. HAZZARD: Okay.

2 The second thing, I mentioned to the Court a question of  
3 malice and impermissive burden shifting. I was thinking of  
4 State versus Lowry, that's L-O-W-R-Y, 657 SE2d 760, that's a  
5 2008 case that talks about Sandstrom v. Montana talking about  
6 the use of a firearm as proof of malice, and in this case and  
7 in the charge the Court has provided the Court's charge  
8 specifically says an inference. In that case they were  
9 talking about a charge where the judge said use of a firearm  
10 basically as proof of malice and that that impermissibly  
11 shifted the burden. So, there's no impermissive burden  
12 shifting issue here.

13 THE COURT: All right.

14 MR. HAZZARD: Wanted to clear that up. Also wanted to  
15 make sure for the record that Defendant Hammonds' objection  
16 to the Court's failure to charge the mala in se precept from  
17 Gore versus Leeke is noted for the record.

18 THE COURT: All right, thank you.

19 MR. HAZZARD: Nothing further, Your Honor.

20 THE COURT: All right, all right, just for the  
21 education of those that are in the audience when we start the  
22 closing arguments and when I start the charge to the jury  
23 nobody is going to be able to come into the courtroom or  
24 leave the courtroom. So, if you don't want to sit through  
25 the whole closing, I don't want anybody's - I don't want any

1 distraction during the closing argument or to the charge of  
2 the law to the jury. So, if you don't want to be here  
3 throughout the whole closing arguments and jury charge you  
4 need to go ahead and leave now and I'll also ask that no one  
5 be allowed in during the closing arguments. Yes, sir.

6 MR. HAZZARD: Your Honor, I would think that more  
7 likely than not the entire closing arguments are going to be  
8 fairly lengthy and that the jury may very well want a very  
9 brief break in between the closing argument and the charge.

10 THE COURT: All right, well, we may and that might be  
11 the case. I'm just going to say that during the closing  
12 arguments and during the closing charge nobody will be able  
13 to leave. Now, certainly if we take a break you'll be able  
14 to come and go then but we'll just have to see how much time  
15 is involved and whether or not they'll need a break then.  
16 Okay? Anything before we bring the jury back in?

17 MS. ELDER: No, sir, Your Honor.

18 THE COURT: All right, let's bring the jury in.

19 (Whereupon, the following takes place in the presence of  
20 the jury.)

21 THE COURT: Ladies and gentlemen, welcome back. I  
22 hope everyone had a restful evening. As I told you when we  
23 broke yesterday you have now heard all of the testimony and  
24 all of the evidence to be presented in this case has been  
25 presented. Now is the time of the trial where the attorneys

1 make their closing arguments. Like their opening statements,  
2 these closing arguments are not evidence. They are simply  
3 the attorney's opinion as to what the evidence in this case  
4 has shown and their opinion as to what facts can be drawn  
5 from that evidence. If at any time during their closing  
6 arguments these attorneys make a statement that disagrees  
7 with what you perceive the facts to be then you're to  
8 disregard their statements because these statements are not  
9 evidence. It is simply their account as to what they feel  
10 has been shown in this case.

11 All right, Mr. Barr:

12 MR. BARR: Thank you, Your Honor. If it pleases  
13 the Court?

14 THE COURT: Yes, sir.

15 MR. BARR: Fellow attorneys.

16 Good morning, members of the jury panel.

17 I'd like to begin by thanking you for being so attentive  
18 throughout this long trial. I've noticed you paying  
19 attention and on behalf of Defendant Niles I appreciate you  
20 being so attentive and I appreciate all that you've done in  
21 this process.

22 I told you at the very beginning of this that this would  
23 be a long case, that it would be difficult, that you would  
24 sit a long time and we have. You've seen, I believe,  
25 probably close to 130 exhibits. We've had four days of

1 witnesses presenting evidence in this case and you've sat  
2 through all of this. I still want you to look for the truth.  
3 We talked about justice. Justice is now in your hands. This  
4 is the phase of the trial whereby you get to decide this.  
5 You get to decide what's factual and what's believable. The  
6 Judge will tell you that all of these exhibits and all of  
7 what's been talked about it will be at your disposal, you can  
8 take it into the jury room with you. You can review it. You  
9 can look at it again. You can talk about it as you  
10 deliberate in this case.

11 Now that all the evidence is in, I want you to look at  
12 the evidence a little bit differently. There's been a lot of  
13 conflicting statements. There's been a lot of conflicting  
14 stories. I want you to look at the evidence at this point in  
15 terms of what's consistent, what's believable, what in your  
16 gut tells you that this is right. I want you to consider the  
17 credibility of witnesses and the Judge will tell you that you  
18 can believe all of what one witness says, none, a part of.  
19 You have the right to judge what you think is, in fact, true  
20 in this case.

21 With regard to Defendant Niles I want you to be  
22 reminded of the standard of proof, proof beyond a reasonable  
23 doubt. I want you to look at and consider every single  
24 element of the crime or crimes alleged and the Judge will  
25 instruct you on how to look at it but I want you to consider

1 whether or not the State has met the burden of proving beyond  
2 a reasonable doubt that Richard Niles unlawfully killed James  
3 Salter. I want you to seriously consider whether or not with  
4 the incoming gunfire coming into his car whether or not  
5 Richard Niles had a right to defend himself at that point. I  
6 want you to consider whether or not there was any malice  
7 between Richard Niles and James Salter. I think the evidence  
8 has showed or has shown that Richard Niles and James Salter  
9 had known each other for a while. We're not absolutely  
10 certain just how long but they had been exchanging drugs and  
11 selling drugs and Niles has been into Salter's home. They  
12 know each other well enough, I think, over a period of time  
13 that I don't think that we could say that Niles harbored any  
14 malice toward Salter or the inverse.

15 Now, I'm not going to try to tell you that I'm trying to  
16 convince you that I want you to condone what Niles was doing,  
17 selling drugs. I'm not going to tell you that I want you to  
18 say this is okay. It's not. I'm not going to try and  
19 convince you that anything good happened in Best Buy parking  
20 lot. I think you've heard enough this week to realize that  
21 we could have had three dead people in that parking lot but  
22 for the grace of God.

23 I want you to understand that I'm not offering excuses  
24 Certainly Niles has gotten caught up in the glamour of the  
25 street sale of illicit drugs and I don't think it'll

1 eventually benefit society, you, him, anybody, and I pray and  
2 I'll ask him take a different direction in life, but I don't  
3 think that Niles went to the Best Buy parking lot with any  
4 intention to harm Salter or anyone else in any way and I  
5 don't think the evidence has pointed to that. I'd ask you as  
6 you consider these exhibits to consider this one, State's  
7 Exhibit Number Six, the Best Buy parking lot. I don't think  
8 it is reasonable to believe that if Niles and his fiancée are  
9 in control of their vehicle they have an intention to rob Mr  
10 Salter, if there's any plan to rob Mr. Salter that they would  
11 drive up to the Best Buy parking lot and park directly in  
12 front of the store during the daytime with an intention to  
13 rob someone. It doesn't make any sense. So, I don't want  
14 you to believe that because it doesn't. I want you to  
15 consider the two stories that you've heard, Niles and  
16 Ervin's. Truth be told both of them lied and in their  
17 initial statements to the police. They did. Both of them  
18 testified in a way in court during this trial that would be  
19 considered self-serving. They did, but I want you to  
20 consider as you deliberate the fact that Niles' story is  
21 consistent with what the neutral witnesses say, people who  
22 are going home no matter what happens today, people who don't  
23 have an ulterior motive. If you look at what the neutral  
24 witnesses say then I think you see a consistency between what  
25 they say and what Niles says. Both Niles and Ervin say that

1 they had been riding around all day and Niles has a  
2 substantial sum of money. It appears as if the arrangement  
3 was, ``Let's buy a pound of marijuana.'' The testimony says  
4 it could be \$700, it could be as much as \$1200, so we average  
5 and we say maybe \$1,000 for a pound of marijuana, and Ervin  
6 says, ``We need marijuana to smoke.'' A pound of marijuana  
7 is more than a user quantity. I want you to believe that  
8 this is a drug sale and I want you to believe that Richard  
9 Niles would have no reason whatsoever in a drug sale to try  
10 and steal the drugs when he could have paid for them. He and  
11 Mr. Salter know each other. They're engaged in a business  
12 where they're making money. There's no logical reason why  
13 Niles would screw that up for \$675, \$700 or \$1000 or \$1200  
14 just off the cuff.

15       You heard the phone calls going back and forth, heard of  
16 the phone calls going back and forth between Niles and  
17 Salter. So, they're talking to each other. Niles testified  
18 that Salter is going to give him some \$5000 or some sum of  
19 money.

20       You heard the evidence presented by the detectives.  
21 Salter has \$2600 in his car at that time. Would it be  
22 logical for Niles to rob Salter of an item that's worth \$1000  
23 that he has to then go out and sell because he can't smoke a  
24 \$1000 worth of marijuana or would it be more reasonable to  
25 just take the \$2600 but the money is left. It's not, it's



1 not taken. This is not about Niles wanting to rob Salter of  
2 drugs.

3 I want you to consider Moore and Niles. Moore is 37  
4 years old. He is a career criminal, list of convictions.  
5 He's here in South Carolina from North Carolina we think to  
6 pick up drugs. Moore testifies before you as a person who  
7 has made a deal with the State that, "If I don't have to  
8 risk going to prison for 30 years or the rest of my life and  
9 you can guarantee me I can get ten to 15," then the day  
10 before the trial starts, "I'll testify as a State's witness  
11 against the other Defendants."

12 Now, without even looking at the credibility comparison,  
13 you heard Moore testify from this witness stand he'd say  
14 whatever he needed to say to get to go home. Now, that's  
15 exactly the same version that his statement and I questioned  
16 him about it from his interview with the detectives.

17 "Mr. Moore, how many children have you got?" "I've got  
18 five." "You love your children?" "Yes." I said it and  
19 I will say it again, that this notion that this is a robbery  
20 by Niles is planted in these conversations with the  
21 detectives.

22 Compare Niles. Niles is 25 years old. He has virtually  
23 no criminal history, convicted of simple possession of  
24 marijuana. At the time this robbery was supposed to have  
25 occurred he and Ervin estimates that he probably had \$3,000

1 in his pocket. He has no motive to rob James Salter. He  
2 just doesn't. Again, I want you to look for the consistency  
3 between the neutral witnesses and what the conflicting  
4 statements were between the Defendants.

5 Ms. Hooper, Ms. Hooper and I want you as you consider  
6 her testimony take with you Defense Exhibit Number One. Take  
7 it into deliberations with you and read it because Ms. Hooper  
8 says that, "I'm parked, I'm parked right here and I'm  
9 backing out and I can see clearly what's going on here. What  
10 I saw was I saw Mr. Salter leaning over the back seat or  
11 leaning over his seat firing into the vehicle, the Ford Focus  
12 five or six times," and I don't want to misquote Ms. Hooper.  
13 I think what she said in the statement, please read it, but  
14 she said, "I heard the shots and then I saw," and that's  
15 what the statement says.

16 Now, Ms. Hooper didn't testify that same way here in  
17 court but she said, "I talked to my husband who is a police  
18 officer and that's the person I talked to and I talked with  
19 him after this." I'm not going to get any further into  
20 that.

21 Mr. Watts testified five or six shots. Mr. Watt says  
22 what Ms. Hooper said which is consistent with what Richard  
23 Niles said, five or six shots. Now the story is not only  
24 consistent with the neutral witnesses, lay witnesses but the  
25 professional witnesses.

1       Mr. Whitler, the forensic specialist, he says the clip  
2 carries ten, six spent cartridges, four remaining that were  
3 found. It's all here, with a capacity of ten. Do the math.  
4 It adds up. All of the forensic evidence, the scientific  
5 evidence is consistent with the Niles' version.

6       I want you to consider also the Niles' statement. Now,  
7 the Judge may give you instructions that you might disregard  
8 the Niles' statement, either in part or in whole, and I won't  
9 give the Judge's instructions. The Judge will give his own  
10 instructions but I will tell you the testimony was and I  
11 remind you that when Niles was giving his statement he asked,  
12 "May I see my attorney? I don't want to talk anymore."  
13 His statement was ended.

14       Now, even before the statement began the  
15 detective testified that Niles says, "No, I don't want to  
16 sign a waiver. I'm not going to sign it." These are  
17 significant rights that citizens have. The Miranda warning  
18 is not, "I tell you that you have a constitutional right not  
19 to incriminate yourself and to have an attorney present when  
20 I question you but I'm going to read this to you and then  
21 let's just forget it, let's just go on." Ladies and  
22 gentlemen, the Miranda warning, the spirit and the essence of  
23 the thing is that you have a right, the Fifth Amendment of  
24 the United States Constitution says you have a right not to  
25 incriminate yourself and you have a right not to give any

1 information that may incriminate you. If you listen to  
2 what's being read to you it says everything you say is going  
3 to be used against you. It says you have a Sixth Amendment  
4 right to counsel. You have a right to have a lawyer. It's  
5 not, "I read you the notion that you have a right to have a  
6 lawyer and then I just question you anyway." That's not how  
7 it works.

8 I want you to consider again that it may be possible  
9 that the police tells Mr. Moore, "Well, look, Mr. Moore, we  
10 know that old boy flipped out and we know you all had to  
11 shoot him but tell us what happens at the shooting. This is  
12 your chance to get out of a deep hole and to help yourself."  
13 Well, sometimes when you think that you're getting into  
14 someone else's head and you're maneuvering them they might  
15 very well be maneuvering you. "Well, maybe I will listen to  
16 enough of what you're saying and I will find out what you're  
17 suggesting that I should say and then I'll say it if that's  
18 what you want to hear." Now, is that Moore's version of  
19 what happened? Or maybe this career criminal is slicker than  
20 the police thinks he is. "Okay, I'll say what they want to  
21 hear and at the same time I'll tell those young folks, they  
22 don't know any better, I'll tell them let's just hold the  
23 line, let's be real, let's stand together, let's go all the  
24 way together, I will manipulate them. I'll write Niles a  
25 letter and I'll tell him are you a real stand up man like I

1 am. I heard that bitch of yours working with the people so  
2 that you can believe that I'm with you, but my real option to  
3 save my own hide at any cost whatsoever, wheresoever,  
4 whenever it becomes necessary."

5 I'm going to ask you not to believe the suggestion that  
6 Richard Niles was in the car of James Salter, and I'm  
7 going to ask you to believe that - to not believe that simply  
8 on the basis of common sense. Detective Iannone testified  
9 that he lifted a partial fingerprint of Mr. Niles' left index  
10 finger and he did this analysis, that sort of thing and  
11 then eventually he told you he didn't even do the analysis,  
12 Detective Allen did the analysis.

13 Now, I asked Detective Allen in your presence,  
14 "Detective Allen, how did you get the left partial print or  
15 the left index finger, nothing else?" Detective Allen and  
16 Detective Iannone would have you believe that weather  
17 conditions, all of these things play a part in being able to  
18 lift prints or to not lift prints, that type of thing. I  
19 would ask you to just believe what appears to be logical that  
20 there was no fingerprints taken from the white Mustang  
21 because they say we use the same process on the white Mustang  
22 that we use on the Ford Focus and we got seven or so highly  
23 defined prints from all throughout the Focus. You saw the  
24 evidence. The white Mustang ends up a ways down from the  
25 Best Buy parking lot still running, it's on the curb, would

1 you actually believe that no fingerprint could be lifted from  
2 that car when it was not out in the weather, it's taken  
3 directly to the police compound, the keys still in the car,  
4 how did Mr. Salter get in the car without his fingerprint  
5 being on the keys, the door, no fingerprint from the driver  
6 of the car in his own car? I'll ask you to believe the car  
7 was just not tested. You can lift seven prints with that  
8 degree of definition from the car out in the weather days  
9 later at the trailer park. So, if the weather and the wind  
10 and the conditions are the defining factors then the good  
11 print should have come from the white Mustang but you can't  
12 say that Richard Niles did anything to James Salter unless  
13 you can somehow paint the notion that he had some contact  
14 with James Salter. I'm going to ask you simply not to  
15 believe that because it's impossible.

16 I'm, I'm not going to talk much longer but I want you to  
17 consider that Richard Niles had no motive whatsoever to shoot  
18 James Salter. There's been no evidence presented that  
19 Richard Niles harbored any malice towards James Salter.  
20 There's been no evidence presented that Richard Niles had any  
21 evil intent with regard to James Salter. There's been no  
22 evidence presented that there was a plan or a conspiracy,  
23 let's say no evidence presented that identified a time and a  
24 place where there was a conspiracy between Mokeia Hammond and  
25 Ervin, Richard Niles to harm James Salter, and I believe if

1 it had been they wouldn't pull up right in front of the Best  
2 Buy parking lot and say, ``Let's, let's do it right here  
3 while the people are coming in and out of the store and  
4 everybody can see what we're doing.'' I don't think that  
5 Ervin Moore is being candid about that part. I believe that  
6 if he was in the car with Richard Niles and Mokeia Hammond  
7 and they pulled up in front of the Best Buy parking lot and  
8 parked right in front of the store door and the plan was to  
9 rob James Salter he would have said, ``Hey, no, let's, let's  
10 move, all of these other parks out here, let's go out here by  
11 the road somewhere where, where all of these people aren't  
12 coming in and out of the store that's going to be witnesses  
13 that see what we do and they're going to tell. Let's not do  
14 it like that.''

15 I don't think there's been any sound evidence presented  
16 that you could rely on to say beyond a reasonable doubt that  
17 Richard Niles had a weapon, used it during the commission of  
18 a violent crime. I think the evidence will tend to show that  
19 Richard Niles probably did shoot James Salter but he wasn't  
20 trying to rob him. I don't think there's any evidence that's  
21 going to show that he was trying to rob him. I don't think  
22 there's any evidence that's presented that you can rely on  
23 beyond a reasonable doubt that's going to say there was an  
24 armed robbery.

25 Ladies and gentlemen of the jury, Ervin Moore says he

1 admits to being guilty of voluntary manslaughter and armed  
2 robbery and I think he admits that because he is guilty and  
3 I think he knows that and I think that the justice that we  
4 seek is with Ervin Moore and I would ask that on behalf of  
5 Richard Niles that you find that the truth is that no one in  
6 the car had any intention of robbing James Salter but Ervin  
7 Moore and that you would bring back a verdict that speaks the  
8 truth. Thank you, again, so much for your service.

9 THE COURT: Mr. Hazzard.

10 MR. HAZZARD: Thank you, Your Honor.

11 Good morning. I'm not going to talk too long because I  
12 don't have a great deal to say. As you know I represent  
13 Mokeia Hammond seated right over there. When this trial  
14 began what Mr. Richardson here, the very able prosecutor,  
15 very able, both Mr. Richardson and Ms. Elder are very, very  
16 able and I can honestly say as a taxpayer here in Horry  
17 County I'm very proud to have them working for me, but what  
18 they told you to begin with was that this was a Bonnie and  
19 Clyde situation, that Rich Boy Niles and Mokeia Hammond were  
20 rolling around the countryside robbing and stealing and  
21 raising all kind of havoc. Well, I think we see now after  
22 four days of testimony that that is not true, no question  
23 about that, we all see that but the State has a certain  
24 scenario that they've presented to you and that that scenario  
25 as they put up through Ervin Moore was that for reasons



1   satisfactory only to himself Rich Boy decided that he was  
2   going to - what phrase did they use? Hit a lick, pull a rip,  
3   some foolishness like that, meaning to rob Mr. Salter and  
4   that this crime would go down around 6:30 to 7:00 p.m. on an  
5   April afternoon in the middle of a busy Best Buy parking lot.

6       First of all, let's take a look. Richard Niles tells  
7   you that he and Mokeia are just riding around on an afternoon  
8   in Trio, South Carolina, that he tells you quite honestly had  
9   a little bit of marijuana, he was going to go stop at a  
10   convenience store, get a little something to drink, go down  
11   to the baseball field, which I would presume is a good  
12   deserted spot, hang out, commune with nature, smoke some  
13   marijuana, drink a little bit, relax and enjoy our day. We  
14   get to the convenience store and this is not in dispute, and  
15   we run into Ervin Niles, I mean run into Ervin Moore. Now,  
16   this is where the stories start to divert because Ervin Moore  
17   says that he did want to go along with them to the beach and  
18   that's fine, that's fine. Apparently nobody really wants to  
19   be in Trio in the middle of the day. I understand. Never  
20   been there. I'm sure it's a wonderful place, but what does  
21   Rich Boy tell you? He says, "Ervin asked me about getting  
22   some marijuana," okay. Did Ervin eventually after much  
23   prompting admit that? Yes, he did. Rich Boy also tells you  
24   that James Salter, his compatriot, his business partner  
25   happened to call around that same time and he said, "Look, I

1 don't have much marijuana on me. Here talk to this man. I  
2 know he's probably got some." So, according to Richard  
3 Niles there is a discussion between Mr. Salter and Mr. Ervin  
4 Moore. The importance of that is this, when they get to the  
5 Best Buy parking lot, okay, even Ervin Moore says, "I got  
6 out of the car and I went and I got into Mr. Salter's car,"  
7 and according to Ervin Moore the reason for doing that was  
8 because he was supposed to check and see if the drugs were  
9 there. Now, remember this is the State's scenario of what  
10 happened. I would submit to you, ladies and gentlemen, that  
11 is absolutely without belief because according to the State's  
12 version Ervin Moore had never talked to James Salter, Ervin  
13 Moore had never made a deal with James Salter, Ervin Moore  
14 didn't know who James Salter was but yet when they get to the  
15 Best Buy parking lot he's supposed to go and get in the car  
16 with someone he had never spoken with, doesn't know, never  
17 had any dealings with and according to their version this  
18 person that Ervin Moore doesn't know from Adam is allowed  
19 into the car. To put it in perspective it is as if any one  
20 of us has a friend who lends another person that we don't  
21 know \$1000 and then we are hanging out with our friends and  
22 our friend says, "Remember I told you I lent Jimmy that  
23 \$1000." "Well, yeah." "Okay, well, we're going to go run  
24 around, do some shopping or whatever but I've got to stop by  
25 Jimmy's house pick up the money." "All right, fine."

1        You get to Jimmy's house and then the friend says, "All  
2 right, I know you don't know Jimmy, but you go on, I'm going  
3 to sit here in the car. You go on upstairs and get the money  
4 from him." I guarantee you any one of us our response would  
5 be, "Are you crazy? This person doesn't know me from Adam.  
6 How are they going to give me money?" How are they going to  
7 have me knock on the door and go, "Hey, I'm here for Bill.  
8 He says you owe him \$1000. Now I'm here to see if you've got  
9 it." Does that make any sense? But that's the State's  
10 scenario. That's the State's scenario as to how Ervin Moore  
11 ended up in the car.

12        Now, what does Richard Niles tell you? Ervin Moore  
13 talked to James Salter. They apparently, being, they being  
14 James Salter and Ervin Moore apparently reached an agreement  
15 as to the purchase of a pound of marijuana. Now, the  
16 question has been raised as to did Richard Niles know that  
17 Ervin Moore didn't have any money? Remember, Richard Niles  
18 knows that Ervin Moore used to be in the game back in the  
19 day. Remember Ervin Moore is the guy that was running the  
20 crack house. So, there's no reason for Richard Niles to say,  
21 "Well, you know, okay, well, let me check and see if you have  
22 money, if you want to" - that's like a friend of mine  
23 calling me up and saying, "Well, let's go to dinner " I  
24 presume if they are asking me to dinner they have money, no  
25 reason for me to ask, but Richard Niles tells you that Ervin

1 Moore says, ``I want to get hold of a quantity of  
2 marijuana,'' talked with James Salter. They then go to the  
3 Best Buy, and remember, at this point James Salter has talked  
4 to the man on the phone. So, he has some knowledge that he's  
5 going to meet with someone new who knows Richard Niles. So,  
6 that's why Ervin Moore ends up in the car, okay. That's why.

7 Now, why does the State have to have it the other way?  
8 Why does it have to be a plan to rob? Because that is the  
9 only way that they could convict this young lady of anything.

10 Remember, virtually every witness, you've got 122 exhibits.

11 You've heard from approximately 30 witnesses. Remember, I  
12 asked virtually every one of them, ``Does your investigation  
13 indicate any evidence whatsoever that Mokeia Hammond either  
14 possessed a gun, fired a gun, killed anyone or robbed  
15 anyone,'' and what did each of the State's witnesses say?

16 No. So, we know Mokeia Hammond never possessed a gun, never  
17 fired a gun, never killed anyone and never robbed anyone.

18 That's not up to dispute. So, what the State is trying to  
19 hang their hat on is this scenario or this issue of the hand  
20 of one is the hand of all and that's, that's nice. That's a  
21 solid proposition of the law, but what it requires and what I  
22 believe the Judge will inform you and charge you is that it  
23 requires a specific plan and that's where Ervin Moore comes  
24 in. He's the one that gives them the plan.

25 Now, there's been a lot of talk as to whether what Ervin

1 Moore said on this witness stand is consistent with Ervin  
2 Moore's statement to the police in December of '07. Ladies  
3 and gentlemen, I don't think there's any question that he  
4 gave two different stories, and if you want to know whether  
5 he gave two different stories think of this. If he had told  
6 them the same thing in December of '07 why is it that he  
7 doesn't enter a guilty plea, isn't sentenced, doesn't reach  
8 an agreement with the State until the day before this trial  
9 begins? What did he testify? Sunday, March 8th, 2009, the  
10 prosecution comes out to see him, and I say, "Okay," I  
11 think Mr. Barr asked him, "Well, how long did they talk to  
12 you?" "They talked to me for 90 minutes." Now, ladies  
13 and gentlemen, I don't know about any other body, anybody  
14 else's world, but my world is a pretty simple one. The truth  
15 don't ever take 90 minutes. If they believed what he had to  
16 say all they had to say was, "Okay, this is what you said  
17 December of '07. We believe that's the truth. Just get on  
18 the stand and say it." They could have saved themselves  
19 another 89 minutes and 45 seconds and been on about their  
20 day, but no, they've got to talk for 90 minutes about this  
21 story to make it conform, to make it be some kind of plan to  
22 rob because remember without that plan there is no  
23 conspiracy, without that conspiracy Mokeia Hammond hasn't  
24 done anything, but even with, even with that, even with -  
25 because the State, I think, is going to make a big deal about

1 Mokeia Hammond was there, she was there with Rich Boy, they  
2 were riding around all day, they were doing drug deals, they  
3 were smoking marijuana, she was there. That's nice, but I  
4 believe the law says and I believe the Judge will tell you  
5 that merely being present at the scene of a crime is not  
6 sufficient to convict anyone as a principal, as someone who  
7 is aiding and abetting. Okay, I believe that Your Honor is  
8 going to charge you that. I believe he's going to say a  
9 Defendant's presence where a crime is being committed or even  
10 mere association with the person who commits a crime does not  
11 make a Defendant an accomplice or an aider or abetter of the  
12 person who was committing a crime. So, even if they go with  
13 that, "Well, she was there. She was driving. She was  
14 there," that's not enough. So, they've got to have Ervin  
15 Moore. They've got to have this agreement. They've got to  
16 have it be a robbery. That's why it's got to be a robbery,  
17 ladies and gentlemen, because without that they can't convict  
18 anyone, by the law they cannot convict anyone, and I'm very  
19 concerned about this case. I'm very concerned because even  
20 with all the State's witnesses having said that Mokeia  
21 Hammond did nothing wrong, even with all of that, I'm very  
22 concerned because people sometimes have a reason to say, I  
23 mean, what they do, as Mr. Barr indicated, what this  
24 gentleman here did and the lifestyle that this young lady at  
25 that point in time chose to lead was misguided and wrong, and

1 I'm very fearful that a jury might say, ``Well, they did  
2 something wrong. So, let's convict them anyway.'' Ladies  
3 and gentleman, Richard Niles got on this witness stand under  
4 oath and testified that he is a drug dealer and that he deals  
5 drugs, that he moves a large quantity of drugs. Believe me,  
6 there will be another court, another judge sometime soon who  
7 will address that issue because it doesn't get much simpler  
8 than that. They've got him under oath saying it and they've  
9 got him under oath admitting that she assisted. So, I don't  
10 want there to be a mentality of we've got to round up the  
11 posse and mete out justice regardless of the law. Let's  
12 stick with the facts of this case, the charges on this case  
13 because their justice for the other things they have done  
14 wrong will be here fairly quickly, trust me.

15 I submit to you that what really happened in this case  
16 is that Ervin Moore wanted to get back in the game, simple as  
17 that because he testified been smoking marijuana a long time.  
18 I think he said 19 years. ``Had my felony drug conviction  
19 for cocaine. I've had my conviction for being the proprietor  
20 of a crack house, but I'm not in the game anymore. I'm just  
21 working at Bojangles,'' but he has someone, he's so broke he  
22 can't even drive down from Greensboro. Remember that  
23 testimony. He's got to have his baby mama bring him, okay,  
24 to see his relatives and he's walking to the convenience  
25 store. He ain't got no car and he runs into Rich Boy, big

1 man, but remember there's about a 10 or 11 year difference in  
2 their ages. So, back in the day when Richard was coming up  
3 Ervin was the man. He was the man, but now life has taken  
4 him a slightly different path. He's been in trouble, in and  
5 out of trouble with the law. So, he's kind of busted in the  
6 game, probably lost his connections and now he comes back to  
7 Salter's, South Carolina, and Rich Boy is the big man in town  
8 now. So, he wants to hang out with Rich Boy and he wants to  
9 get back in the game. "So, can you help me out? Can you  
10 help me get my startup? Can you help me get a pound of  
11 marijuana?" Rich Boy says, "Okay, I'll make a call," or  
12 in fact, Salter called him and he said, "Here, here is the  
13 phone, talk to this guy," and that's where it begins, but I  
14 would submit to you, ladies and gentlemen, Ervin Moore has a  
15 malignant heart, a heart devoid of social consciousness, bent  
16 on mischief, ill will, because a couple of times despite the  
17 fact that he was well-prepared to testify as to what to say,  
18 because remember we had to talk to him for 90 minutes to tell  
19 him what to say or to get him, to get him to where he could  
20 testify. Despite that I think a couple of times he kind of  
21 let his true nature slip and he let you see it because I  
22 asked him, I said, "Well, how much money did you have when  
23 you went to the convenience store?" "I didn't have any  
24 money." "Okay, so, you were just going to sit outside the  
25 convenience store or you were just going to sit there watch



1 other people buy stuff," and what did he say, "I could go  
2 in there and get whatever I want. I don't need money," and  
3 I asked him, I said, "Well, how? I mean, they're going to  
4 give it to you on credit, you got family members to run the  
5 store," and if you think back to it, he never answered that  
6 question. He never answered it but I submit to you that  
7 that's how he thinks, that if he wants something he can take  
8 it, and I submit to you that's what happened when he came  
9 across James Salter. He saw something he wanted. He was  
10 going to take it and that was simple as that and his last  
11 words to you were, "You know, I'll do anything it takes."

12 Now, the witnesses who testified for the State all, all  
13 have incredible training and expertise in their jobs.  
14 There's not a single one of them, well, for the most part,  
15 the vast majority of them have great training and expertise  
16 in their jobs. Let me put it that way and I'll explain that  
17 in a second but that's why when they get on that stand and  
18 they say that they did a thorough investigation into this  
19 case over an almost two-year period, and they tell you there  
20 is no evidence to indicate that Mokeia Hammond committed a  
21 crime, that's why I submit that is the strongest evidence  
22 that we could have. It's not that they did a shoddy job.  
23 It's not that they sat around the police department and ate  
24 doughnuts and didn't do an investigation. No, you got 122  
25 exhibits worth of investigations here but not anything says

1 and not anyone says Mokeia Hammond committed a crime. Even  
2 Ervin Moore, the person they tied their case to about this  
3 supposed conspiracy, this agreement, this combination to rob  
4 does he say that, does he say, ``We were in the car and we  
5 talked amongst ourselves and agreed that this was how it was  
6 going to go down?'' No. What he says is, ``Well, Rich Boy  
7 was in the front and he was talking to the boy on the phone  
8 and then he hung the phone up, then he turned around to me  
9 and he said, `I'm going to hit a lick.''' There's nothing  
10 else about, ``He made this announcement and then Mokeia  
11 said, `Well, oh, well, how are we going to do it,''' and  
12 Ervin said, ``Well, what's my part going to be in it,''' none  
13 of that because that's the interesting thing. Remember Ervin  
14 Moore saying he was the person who was supposed to get out  
15 and go check, see if the drugs were there. He never  
16 testifies that they even discussed that. He said Richard was  
17 on the phone, he hung the phone up and then he turned around  
18 and said, ``I'm going to hit a lick supposedly.'' See, so,  
19 my grandmother told me a long time ago when I was a kid, ``If  
20 you want to know which way the wind is blowing you don't look  
21 at the big oak tree. You look at the leaves on the tree, the  
22 little things are what's going to point you towards the  
23 truth.'' Those kinds of inconsistencies let you know that  
24 Ervin Moore's statement is made up at a whole part and cannot  
25 be believed and is not worthy of belief.

1       I believe that the Judge will also indicate to you as a  
2 part of the law that mere association with someone who  
3 commits a crime does not make someone guilty of that crime.  
4 Mere association does not make one guilty. So, I want you to  
5 remember that when you go back in your jury room as well.

6       Now, I've heard the prosecutor say before that, "Well,  
7 don't blame us if we have to use someone like Ervin Moore as  
8 a witness because if you're going to convict the devil you've  
9 got to go to hell to get your witnesses." Well, in this  
10 particular case I want you to think of exactly who is the  
11 devil here, who is the devil here. Is it this young lady  
12 here? Or is it the career drug dealer Ervin Moore, the  
13 person who actually got out and got in the car and tussled  
14 with James Salter? Who is it? Now, I think that when we  
15 have this Bible here. the witnesses place their hand on it  
16 and they raise their right hand and they swear to tell the  
17 truth and you take an oath as jurors and that oath says, you  
18 know, "So help me God that I will well and truly try the  
19 issues in this case and a true verdict render," that this  
20 book that the oaths are taken on also says in 1st Timothy,  
21 "Let no one, let no one in our society be convicted by the  
22 word of one." Let that one who is accusing come back with  
23 two or three more, and why, so that we will know that the  
24 truth is done and that justice is done in our society. The  
25 only person who alleges in any way that Mokeia Hammond has

1 done wrong is Ervin Moore and yet you've heard a chorus of  
2 other State witnesses that say we have nothing to indicate  
3 that this young lady has committed any crime and the crimes  
4 that she has committed that have been discussed they will be  
5 addressed. You can trust and believe that, but that's for  
6 another judge and another courtroom and another day in the  
7 near future, not for you, not for you.

8 Now, very briefly to wrap up, there are certain issues  
9 in the State's case that I do not understand but I did want  
10 to bring them to your attention. There was a lot of talk,  
11 some talk in my opening statement and I always try to be  
12 truthful with the jury and I always try to deliver what I  
13 tell you. So, I don't want there to be any misconceptions.  
14 In my opening statement I indicated that one of James  
15 Salter's roommates was present in the Best Buy parking lot.  
16 Now, this is not a huge point in the case but I try to bring  
17 things home and be truthful about what I say, never try to  
18 mislead you. Now, the State and Mr. Barr say the roommate  
19 was present in the Best Buy parking lot driving an SUV. For  
20 some reason the State felt the need to try to dispute that.  
21 They were asking witnesses, "Did you see an SUV?" I think  
22 Mr. Richardson even referred to it as the magical or mythical  
23 SUV. Okay, you might remember Detective Selina Mann got on  
24 the stand and said, "I was part of the investigation of that  
25 when I was with the Myrtle Beach Police Department. I'm now

1 with the Conway Police Department, and yes, as a part of my  
2 investigation I determined Sean Lundy, a roommate of James  
3 Salter, was present in the Best Buy parking lot driving a red  
4 Durango SUV. Now, what is strikingly strange about this to  
5 me is that as I questioned the witnesses for the State any  
6 time I had an incident report I wanted to ask them about what  
7 did I say? I'm going to - because I don't try to trick  
8 anybody. So, I say, "I've got this report that the State  
9 gave me. So, take a look at it. Let me make sure that's the  
10 same report you have." So, the vast majority of information  
11 I have in this case comes from the State. So, they knew  
12 about the SUV. They knew about all of that So, why the  
13 need to call it magical, mythical, make you think it didn't  
14 exist, make you think Mr. Lundy wasn't there, I do not know.  
15 I do not know.

16 Now, the second thing is the phantom fingerprint. Now  
17 I really hate to do that because I don't want to cast an  
18 aspersion on Corporal Allen. I think she is a very fine  
19 woman. I think she tries to do her job very well. However,  
20 you may recall she's up there looking at the fingerprints,  
21 looking at these prints and she says she saw a, she saw a  
22 picture, a blown up picture of a fingerprint and she  
23 initially thought it was a palm print. She initially thought  
24 it was a palm print. Now, I'm not an expert in fingerprints,  
25 but she's supposed to be and that kind of concerns me. If

## Closing Argument by Mr. Hazzard

f f n

1 I'm a car salesman I would like to think I could tell the  
2 difference between a subcompact and a hummer, okay? So, that  
3 gives me some concern and then what gives me also concern  
4 about this fingerprint business is this whole notion that  
5 only one found fingerprint of Richard Niles could be taken  
6 from that Mustang. Now, as I walked out to my car this  
7 morning I saw that we are starting to have pollen season show  
8 up and it struck me that anyone who lives in the south and  
9 has lived through pollen season knows exactly how easy it is  
10 to have fingerprints show up on your car. So, maybe they're  
11 dusting with the wrong thing. Maybe they ought to use pollen  
12 instead of something else because I tell you what your  
13 fingerprints can clearly be seen, especially on the trunk  
14 area because, you know, you put the key and you lift the  
15 trunk, oh, you've got a good set of four right there, easy,  
16 but they say, no, couldn't get a single print from the  
17 Mustang with the exception of a partial print of Mr. Niles,  
18 but we got 32 prints off of and inside of the Ford Fusion.  
19 I want to say it was 15 prints off of the vehicle itself and  
20 17 prints off of the objects within the vehicle, for a total  
21 of 32, and if I misspeak I'm not trying to mislead you but  
22 that's my recollection, and of course, you'll have that  
23 information in there with you. Isn't it much more believable  
24 that what occurred is simply one part got misplaced or  
25 mislabeled, simple as that, because, again, I don't think

1 that the Myrtle Beach Police Department is trying to deceive  
2 or lie to you citizens. They do a fine, fine, fine job but  
3 we're all human. We all make mistakes, simple as that, and  
4 what causes me to believe this whole mislabeling thing may  
5 exist is you may remember a very, very, very small matter, I  
6 believe it was crime scene specialists Iannone testified  
7 about a bunch of different pictures and one of the ones he  
8 testified about is in here somewhere for your review but you  
9 may remember and you may see it and it'll be in the jury room  
10 if you want to look at it was a picture of a receipt from a  
11 hotel room, okay, and Ms. Elder asked him about it and he  
12 said, ``Yes, I got that out of the Ford Fusion, the same with  
13 all of these other pictures in evidence," and I got up and I  
14 said, ``Well, wait a minute now, wait a minute. Just let me  
15 clarify. You're saying that receipt came out of the Ford  
16 Fusion," and he again said, ``Let me check my notes," and  
17 he said yes. Well, Ms. Elder being the fine prosecutor that  
18 she is she immediately caught what was wrong with that and  
19 clarified him that that receipt, that picture and the receipt  
20 may have come from somewhere else. Why is that fairly  
21 significant? Because the receipt is from the check-in and  
22 checkout of the hotel room where Mokeia and Richard went  
23 after they left the car at the mobile home park, after. So,  
24 they knew, Ms. Elder, kudos to her, she caught it and she  
25 quickly corrected it, but see, that's how human nature is and

1 that's how mistakes can be made; and so, I submit to you that  
2 the mislabeling of a fingerprint can just as easily happen,  
3 no question about that, but again, I still have concerns to  
4 wrap up because I've talked with friends and they have said,  
5 ``Well, Gee, I don't know, Ron.'' One of my friends who's an  
6 attorney, I've known her for 20 years. We were in law school  
7 together. I was talking very briefly about the facts of the  
8 case and she shocked me. She shocked me. This is someone  
9 who has been to law school and everything, and she said,  
10 ``No, I don't know. I'd have a really hard time not  
11 convicting somebody who didn't take the stand,'' and I about  
12 fell out of my chair. I would submit to you, ladies and  
13 gentlemen, what can Mokeia Hammond add? I know that you  
14 would like to sit here for another eight hours listening to  
15 testimony back and forth. I know you would, but really what  
16 can she add? Twenty some odd State witnesses have sat up  
17 here and said, ``She didn't rob anybody, she didn't shoot  
18 anybody, she didn't kill anybody, okay.'' Richard Niles has  
19 told you about their activities on that day. What more can  
20 she add? So, if you, if you have a problem with her not  
21 testifying that's on me. That ain't on her. She's got  
22 nothing to hide, but she also would have nothing more that  
23 she could say to add to this.

24 The issue of the drug deals, and as I said, there'll be  
25 another court and another day for that. So, don't let that



1    sway your judgment, and the third thing is I'm always fearful  
2    that someone on the jury panel is like my mother because my  
3    mother is 70 years old and she lives in Columbia but she  
4    spends one to two weeks with me down here every month and  
5    there are two things that my mother is going to read  
6    everyday. One is the Bible. The other is the newspaper, and  
7    she is going to read the newspaper from cover to cover, and  
8    we will be sitting on weekends at the breakfast table and I  
9    will have the sports section. She'll have the local section  
10   and she will at some point rattle the paper and she will read  
11   about some heinous crime that has been committed and the fact  
12   that someone has been arrested and she will invariably say,  
13   ``Well, thank God they caught him," or, ``Thank God they  
14   caught her," and I look up and I put the sports section down  
15   and I say, ``Mom, they - why do you say thank God they caught  
16   him?" ``Well, I mean, this horrible crime occurred and they  
17   made an arrest. Thank God they got him or her off the  
18   street." Well, I say, ``Mamma, they're innocent until  
19   proven guilty. My goodness gracious," and then she always  
20   kind of blushes and she'll giggle a little and she'll say,  
21   ``Oh, you're right. You're right." I go back to reading  
22   the sports section. She goes back to reading the local  
23   section. Then about two minutes later she goes, ``Well, it  
24   is a horrible crime. It's a good thing they got him," and  
25   that's fine for my mother to do at the breakfast table. All

1 of us have our own opinions, all of us have those rights. At  
2 the breakfast table you have that bias, but when you raise  
3 your right hand to God and you say, "I will well and truly  
4 try the issues of this case and a true verdict render so help  
5 me God," you promise to leave and you commit to leave all of  
6 those biases and preconceptions and misinformed notions  
7 behind and to go strictly with the law as this Court gives it  
8 to you and the evidence and the weight that you wish to place  
9 on that evidence, you know.

10 Now, the Judge will tell you that your verdict must be  
11 unanimous and there's no question that it must. However, I  
12 do want you to understand and realize that while you must  
13 listen to and carefully consider the point of view of each of  
14 your fellow jurors you must not ever give away your vote.  
15 Your vote is sovereign and sacred to you. Okay, it belongs  
16 to each and every one of you individually and if you're in  
17 that jury room and nine of you think that these two young  
18 people are guilty and three of you think they are not guilty  
19 those three of you are to hold fast to your belief after  
20 having considered and given due credence to the point of view  
21 of your fellow jurors, but hold fast to your belief, and by  
22 the same token, if nine of you think Mokeia is not guilty and  
23 three of you just think she is for some odd reason, then you  
24 three are entitled to hold fast to your sovereign vote and do  
25 not give it away, but I will tell you this, if you're in that

1 jury room and you've thought about it and you've talked about  
2 it and you've reasoned about it and you've argued about it,  
3 and the 12 of you reasonable people cannot come to an  
4 agreement then I would submit to you that is the truest form  
5 of reasonable doubt, and if that is what's going on then by  
6 your oath you must write a verdict of not guilty. I thank  
7 you for your time and your attention.

8 THE COURT: Mr. Richardson.

9 MR. RICHARDSON: Thank you, Your Honor.

10 Folks, Bonnie and Clyde, Mokeia Hammond and Richard  
11 Niles, young lovers living the criminal lifestyle, doing what  
12 they want when they want, whoever they want. They're two  
13 sides of the same coin. One does not act without the other's  
14 knowledge. One doesn't go anywhere without the other. You  
15 can bet one's not going to commit a crime without the other  
16 one helping out. Together they are guilty and together they  
17 must be put away.

18 On April 9th, 2007, together in the car, Mokeia Hammond  
19 and Richard Niles rode to Myrtle Beach, had Ervin Moore in  
20 the back. Mokeia Hammond sat right beside Richard Niles by  
21 everyone's testimony as he made that call to James Salter and  
22 said, "Hey, man, I want to buy a pound, a pound of weed,"  
23 and she sat there right beside him with the gun right up at  
24 his feet that he keeps at home, the home they share, as he  
25 hangs up the phone and says, "We're going to hit a lick."

1 We're going to rob him. I ain't buying it. We're going to  
2 rob him, and then she drives him to the robbery place, the  
3 place they've agreed to go to and see James Salter, the place  
4 that Richard Niles has said, "I'm going to go rob him."  
5 She drive him to the incident and murder location. Right  
6 there she's aiding and abetting but she doesn't stop there.  
7 She waits there in the car ready to run when the crime is  
8 committed and she does just that. Hand-in-hand together they  
9 were in on this crime and hand-in-hand together they must  
10 face the consequences of their crime and they must be found  
11 guilty, guilty for the armed robbery of James Salter and  
12 guilty for the felony murder of James Salter.

13 In a few moments Judge Culbertson is going to start  
14 giving you some instructions. Number one he's going to tell  
15 you you are the triers of fact. It's your job to weigh all  
16 the evidence and all the testimony that you have heard here  
17 this week and you take that and you do your job, you try and  
18 seek justice. You try and render a true and just verdict but  
19 he's going to assist you because he'll give you the law.  
20 He'll tell you he's the judge of the law and he'll give you  
21 the law to apply to those facts. He's going to talk to you  
22 about armed robbery. He's going to tell you that armed  
23 robbery is the taking of another's property, doesn't matter  
24 if that property is stereo speakers, marijuana. It's the  
25 taking of another's property by force with the use of a

1 weapon. Folks, that's a no-brainer here. We know marijuana  
2 was stolen. We know force was used and a weapon because it  
3 was a 38-caliber projectile fired from a handgun that killed  
4 James Salter. That's an easy one. The use of a weapon  
5 during a crime of violence, that, too, is easy. It's a real  
6 simple crime. The Judge is going to tell you both armed  
7 robbery and murder are violent crimes and they are felonies  
8 and that if you use a weapon during them, well, there's your  
9 crime.

10 He'll talk to you about murder, about it being the  
11 killing of another human being with malice aforethought.  
12 Folks, we have a killing. Young James Salter has been dead  
13 for almost two years now from that gunshot wound, but what's  
14 malice? Well, it can be inferred or express. Express, "I  
15 hate you, I'm going to kill you," easy, but that malice can  
16 be inferred. It can be inferred by the use of a deadly  
17 weapon such as that handgun that fires the 38-caliber  
18 projectile. It can be inferred by the fact that that killing  
19 takes place during the commission of a felony, here an armed  
20 robbery. Folks, that one's an easy one, too. We know we've  
21 got a murder.

22 The Judge is going to talk to you about mere presence  
23 and they may want to belabor it but it just says that if  
24 you're present at a crime scene doesn't mean you're guilty.  
25 We don't have that here. Mokeia Hammond was not only

1 present, she was aiding and abetting. She was in on the  
2 plan.

3       The Judge is going to talk to you about that hand of one  
4 hand of all. Sounds a little bit hokey. Maybe, maybe a  
5 little bit difficult, but like eye for an eye but it's the  
6 hand of one hand of all, and that law is basically that if  
7 two or more persons join together with a plan or a scheme to  
8 commit a criminal act and they're both present in furtherance  
9 of committing that act, then the hand of one is the hand of  
10 all. In other words, the one person that's in on that act,  
11 while another person is in on that act they are criminally  
12 responsible for what, everything done by that secondary  
13 person in furtherance of that initial plan or scheme. In  
14 this case they planned the armed robbery. They planned to  
15 use the pistol. They planned to put a gun to James Salter  
16 and the natural and probable consequence of that when you  
17 point a loaded firearm at somebody that you might have to  
18 kill them, they may want to defend themselves just like James  
19 Salter tried; and so, in conspiring on that armed robbery  
20 they ultimately conspired for the murder, the hand of one is  
21 the hand of all.

22       The Judge is going to talk to you about reasonable  
23 doubt. That's a biggie. We've all heard it. Perhaps you've  
24 heard it on a television show, maybe Law and Order, or maybe  
25 you've read a John Grisham novel or a James Patterson novel

1 has reasonable doubt in it, but what exactly is it? You're  
2 in luck. The Judge is going to give you instructions. He'll  
3 tell you that to prove someone guilty beyond a reasonable  
4 doubt the State must give you evidence that leaves you firmly  
5 convinced of their guilt, not to lose every bit of doubt that  
6 has ever been, but that leaves you firmly convinced of the  
7 guilt of Mokeia Hammond and Richard Niles, and folks, we have  
8 to do that by using the competent, relevant and admissible  
9 evidence. That's the State's job. That's my job. That's  
10 Ms. Elder's job. Not to mislead you, not to distract you,  
11 not to put witnesses on the stand that have no meaning to  
12 this case, that are on the periphery, it's to give you the  
13 admissible, relevant and competent evidence that will assist  
14 you in weighing this evidence and rendering a true and just  
15 verdict. That's what we've done. That's what we've done.  
16 So, let's take a look at the evidence.

17 You had Ervin Moore to take the stand. Ervin Moore took  
18 the stand and testified to you, to accept the consequences of  
19 his actions on that day. Now, to hear Mr. Niles tell the  
20 story he didn't do anything wrong, and yet, Mr. Moore is here  
21 to tell you his guilt. He knows that armed robbery was going  
22 to take place, didn't know Richard had a gun, but he knew the  
23 armed robbery was going to take place, and he took his guilt.  
24 He's going to prison. He told you, and he told you he knew  
25 that if he lied on the stand all deals were off. He's facing

1 a longer prison sentence. So, what did he tell you? He told  
2 you on April 9<sup>th</sup>, 2008, he sat in Trio, South Carolina. The  
3 Defendants came by and picked him up, "Hey, man, you want to  
4 smoke some weed? Come ride with us. We're heading to the  
5 beach. We're going to do business," not big business as the  
6 defense attorneys try to allege. Mr. Moore tells you they go  
7 from hotel to hotel, hand to hand drug deals, and Mr. Moore  
8 tells you they end up with a couple of hundred dollars.

9 Now, Mr. Barr asked him, "Couldn't it have been  
10 \$3500," is Mr. Barr's words that try to inflate that money.  
11 But Mr. Moore says, "No, it was a couple of hundred dollars,  
12 saw some twenties, didn't see a big stack, saw some  
13 twenties," a couple of hundred dollars, and they run out of  
14 marijuana. That's all right. Rich Boy Good over there he's  
15 got a plan; and so, he begins calling. Ervin Moore is  
16 sitting in the backseat. Rich Niles and Mokeia Hammond are  
17 up front, Mokeia is driving. So, he calls James Salter,  
18 orders up some marijuana, agrees to be at the Best Buy.  
19 Maybe it's James Salter that says meet at the Best Buy.  
20 He's trying to protect himself on this drug deal. We know he  
21 was trying to protect himself in other ways with the gun, and  
22 when he hangs up the phone with James Salter he turns to him,  
23 tells everybody in that car, Mokeia Hammond is sitting right  
24 beside him that gun right up between his legs, "I'm not  
25 going to buy. I'm going to hit a lick. We're going to do a



1 robbery," and when they get to Best Buy Ervin Moore told you  
2 he did just as he was directed. He was the man that was  
3 instructed, ``You go check to see if the marijuana is  
4 there.'' You see, Rich Niles didn't want to get out of the  
5 car with that gun, didn't want to flash that gun, didn't want  
6 to take the chance of going over there to try and steal  
7 something that wasn't theirs. So, he had to have somebody to  
8 check it out and he had to have time to ready that handgun,  
9 make sure it's loaded, that revolver, but Ervin does what he  
10 says and he gets in the car with James. Why does James let  
11 him in? Because they're there to buy marijuana. That is  
12 what James is there to do, to sell marijuana. He's not going  
13 to be overly picky and they're there to steal that marijuana,  
14 not the cash in the backseat. They don't know about that.  
15 They've ordered a pound of marijuana. So, Ervin gets back  
16 out of the car, walks back around that Ford Fusion and Rich  
17 Niles is getting out, getting ready, he says, he's got the  
18 marijuana, and Ervin gets in the backseat right where his DNA  
19 is found, and he sees Rich Niles walk back around the Ford  
20 Fusion back to the Ford Mustang and lean up against the car.  
21 My, my, isn't that where you would leave your fingerprint if  
22 you lean on the car one time, but he leans on the car and  
23 Ervin is back over here, and he hears bam, bam, and it shocks  
24 him, it shocks him. The next thing he knows everything is  
25 happening fast and furious. Big old Rich Niles is jumping

1 through the backseat, through, behind the driver's seat  
2 landing on top of him. The next thing he knows bullets are  
3 whizzing in, bam, bam, bam, glass is flying everywhere. You  
4 saw the pictures. Glass is flying everywhere, all in those  
5 seats. Ervin tells you, "I got cut in the eye. I'm  
6 bleeding." Only goes to figure everybody else is getting  
7 cut, too, but, "Drive, drive, drive," and they do just that  
8 and Ervin is in shock. He says they bounce over the curb, up  
9 over the curb into Logan's roadhouse. At this point he's on  
10 the floor covering that eye, Rich Niles on top of him, "What  
11 did you do, man? Are you crazy," and what does Richard  
12 Niles tell him as Mokeia is driving him away from the murder  
13 scene. "Man, I had to kill him. He went for his gun."  
14 The audacity of James Salter to try to defend himself, the  
15 audacity of him trying to go back and defend himself, and so,  
16 Rich Niles had to shoot him. Ervin tells you about how they  
17 ditched the car. It's marked up. They have to get it away.  
18 They ditch it in a trailer park. Ervin is shot, bleeding and  
19 Rich Niles calls a cab and then calls his mamma. "Mamma,  
20 report the car stolen." We know that's accurate. You heard  
21 that 911 call. Mamma is crying. What else did he tell her?  
22 What else did her son tell her? And he goes on to the hotel  
23 with them because he's got to get away. As soon as he can  
24 though he gets away from them. He stays through the night.  
25 He's got glass in his eye. He figures that Rich Niles goes

1 back to get the gun that he ditched over at the travel park,  
2 and we know he got it back because the gun is gone when the  
3 police arrive the next day to get the Ford Fusion and he gets  
4 out of town until he's arrested. How do we know Ervin  
5 Moore's story is accurate? Folks, it's the same story he  
6 told in December of 2007 when he was arrested. There were no  
7 deals in place. None. The police talked to him for about an  
8 hour and a half. Mr. Hazzard wants to talk about the  
9 prosecution talking to Mr. Moore for 90 minutes, an hour and  
10 a half. Folks, it takes 90 minutes to watch a video of your  
11 statement that lasted 90 minutes, and it's the same story he  
12 tells today and he tells you from the stand when they began  
13 that interview back in December of 2007 he tried to deny  
14 things at first and then he was confronted with the evidence,  
15 the evidence that been collected, the evidence against  
16 Richard Niles, the evidence against Mokeia Hammond and the  
17 evidence against himself and he says, ``Okay, I'll tell you  
18 what happened,`` and it's the same story he told you when he  
19 took this stand and accepted his guilt for his actions and  
20 told you what happened on April 9<sup>th</sup> of 2007, but what else  
21 corroborates Ervin Moore's story? What else corroborates his  
22 testimony? Every bit of physical evidence, every bit of  
23 testimony of those lay witnesses that were on the scene  
24 First, we have a dying declaration of James Salter You  
25 all remember the police officers two of them said they

1 extracted James from that Mustang and he's laying on the  
2 ground gasping they ask him, "Who shot you," and he said,  
3 "A couple of black dudes." Ervin Moore got out of the car,  
4 checked on the dope, that's one, and then Richard Niles  
5 approached on the passenger side and shot him, that's two.  
6 That's a couple.

7 We have Angie Hooper. She tells you she is starting to  
8 back her van out when she hears fireworks. Now, common sense  
9 tells you you don't hear and automatically facing the place  
10 where you can see exactly what you're hearing at the same  
11 time. You hear pop, pop, those first two shots, fireworks,  
12 where is it coming from? She turns and looks and she sees  
13 the return fire. Like Mr. Barr said, five or six shots.  
14 Well, we know Mr. Salter fired six shots and she sees those  
15 five or six shots, but she heard the fireworks first. So,  
16 who fired first? Richard Niles.

17 Let's go on over to Logan's Roadhouse. Mr. Watts,  
18 Mr. Watts doesn't have anything to gain by his testimony  
19 other than to tell you what he saw that day. Mr. Watts, who  
20 is not even from the area, tells you what he saw that day.  
21 He says he and his wife and their grandchildren were coming  
22 out of Logan's Restaurant with a clear view of the Best Buy.  
23 They hear what they think are fireworks, that initial pop,  
24 pop, and they turn and look. What do they see? They see a  
25 heavysset black male running, jumping from that Mustang over

1 to the Ford Fusion, not a tiny little fellow like Ervin  
2 Moore. You saw him. He's a tiny thing but a heavyset black  
3 male. Mr. Niles is a good bit bigger than Mr. Moore. What  
4 else does Mr. Watts see? He sees a black female driving.  
5 That's Mokeia Hammond. Once again by everybody's testimony  
6 she's driving. When that car hops the curb, curb over in  
7 Logan's Roadhouse Mr. Watts is close. What does he get a  
8 view of? He sees two individuals in that car. Like Ervin  
9 Moore told you he's down in the floorboard covering that eye  
10 saying, "What did you do?" He sees a heavyset black male  
11 in the back. It's happening fast. All you can tell is it's  
12 a heavyset black male. Once again, not a tiny guy like Ervin  
13 Moore but a big old fellow with black female driver. Ervin  
14 Moore's story is the one that's adding up. Ervin Moore's  
15 story is the one that's corroborated. Mr. Watts tell you  
16 where they all are by his testimony but what else tells us  
17 where everybody is sitting in the vehicle in that Ford Fusion  
18 after this murder.

19 DNA, by everyone's testimony Mokeia Hammond is driving.  
20 So, where is her blood found, her blood DNA, one in some  
21 quadrillion chance of it being someone else's. It's in the  
22 driver's seat. All that flying glass you're going to get  
23 cut. Mokeia Hammond's blood is found in the driver's seat.  
24 Where is Ervin Moore's found? Folks, you all remember this  
25 diagram, this little blood smear here, maybe a handprint

1 where Ervin Moore reaches up after he's cupped that bloody  
2 eye, grabs it to get out, where is it? My, oh, my, it's on  
3 the passenger side of that Ford Fusion right where he said he  
4 was. That's not a surprise. He told you, but where is  
5 Richard Niles' DNA found? Is it found in the front seat like  
6 he testified. He's in the front seat, all that flying glass,  
7 none of his blood up front but it's in the back right behind  
8 the driver, right where Gene Watts saw him, right where Ervin  
9 Moore told you he was. Ervin Moore's story adds up. It's  
10 corroborated. What other scientific evidence do we have  
11 telling us where Richard Niles was? We have that  
12 fingerprint.

13 Now, the Defense wants to agree with all of our experts  
14 except these fingerprint guys because they know it is  
15 severely detrimental to their case. Mr. Niles has said he's  
16 never gotten out of the car. I mean, I think his first  
17 statement to police was, "I've never even seen a white  
18 Mustang. I don't deal with white people." Even in his  
19 second statement, never got out of the car and even on his  
20 testimony never got out of the car. So, they have to explain  
21 away that fingerprint, must be a mistake. Folks, it's not a  
22 mistake. We've got two fingerprints, only one was usable.  
23 It's not that there weren't any fingerprints on the car.  
24 We've got one usable fingerprint off that white Mustang  
25 right where Richard Niles was. This isn't a car he's at all

1 the time. He leaves one fingerprint. Yeah, he's got a  
2 bunch of them in the Ford Fusion. He's been driving it for a  
3 few days. It's a rental car he's had. He's been getting in  
4 and out. His fingerprints are all over there. He gets out  
5 after he ditches the car. His fingerprints are all over  
6 there. They're on glass bottles he's got in there, but that  
7 fingerprint on that Ford Mustang right where he puts his hand  
8 as he levels the pistol, "Give me your dope, boy. Give me  
9 your dope," and he takes that marijuana up under his arm,  
10 goes to turn, he's grabbing a gun. "The audacity he's  
11 going to defend himself." Bam, bam, and he turns to jump in  
12 the Ford Fusion right behind him. Where else do we find  
13 fingerprints? Well, it's not a fingerprint. It's a palm  
14 print and it's on the driver's side of that Ford Fusion near  
15 the windshield on the doorpost just like if you're turning  
16 from a vehicle after shooting somebody, murdering them, and  
17 you run into it as you brace yourself to go jump around and  
18 jump in the back seat to get away. "Drive, girl, drive,"  
19 aiding and abetting, "You've got to get me out of here."  
20 The robbery went bad.

21 Folks, that gunshot, let's talk about it for a second.  
22 You heard Dr. Presnell explain exactly where the gunshot was,  
23 where all the wounds were found on James Salter, and I say  
24 all the wounds because there's one little bit of abrasions to  
25 his lip but there's one gunshot wound. It's not through his

1 arm. It's not in his back. It's not on his left side or in  
2 his head. It's under his arm in the rib cage. Folks, I  
3 would submit to you if I'm sitting in my car seat and I go to  
4 reach for a gun what's open, my rib cage. That's where the  
5 fatal shot is. That's where the kill shot is. That's where  
6 Richard Niles launched that first 38 projectile and killed  
7 James Salter. Now, to hear Richard Niles' testimony he is  
8 laid back in a seat firing behind a driver's seat only after  
9 James Salter is laid across the seat with that wound, down  
10 and firing. So, I guess Mr. Niles not only has 38 bullets,  
11 they're magic because somehow they slid up under the seat  
12 without causing damage and hopped into his rib cage.  
13 Mr. Niles' story doesn't make sense. Ervin Moore's testimony  
14 does.

15 What else do we have on the gun? Mr. Salter's defense,  
16 you heard Agent Whitler, you heard the testimony about where  
17 shell casings are found and there are six shell casings in  
18 James Salter's gun. He's got an automatic, spits them out as  
19 he shoots. There's two in the backseat, one over here on the  
20 floorboard, another a little bit closer in between the seats  
21 and in the ashtray, and folks, I submit to you when you get  
22 shot, uh, it takes a second to recover even with adrenaline.  
23 You pull your weapon and you see the Defendant Niles jumping  
24 in that backseat. Where are you going to shoot first? Back  
25 towards your attacker, the man who's killed you, given you



1 the mortal wound; and so, James reaches back, bam, first shot  
2 strikes the upper doorpost and fragments, bam, he blows out  
3 the window, glass is going everywhere, cuts Ervin Moore, cuts  
4 Richard Niles, cuts Mokeia Hammond, they start to take off.  
5 Those two shell casings are down. Bam, bam, bam, he's  
6 shooting the car as it's pulling out. He's trying to get  
7 some manner of defense. He's working on adrenaline. He's  
8 trying to fight back. Folks, we know that's about how it  
9 happened because where the shell casings are. The last shot  
10 I believe he even shoots off his rearview mirror. He's going  
11 into shock already and he drives out, and we find those 40  
12 caliber shell casings from his gun, but what happened to the  
13 38. We find a 38 projectile in his chest. We find another  
14 38 projectile right there in the floorboard of his car. Bam,  
15 bam, we find yet another 38 over on the other side of the  
16 Ford Fusion, maybe, maybe just like Ervin Moore said.  
17 Richard Niles fires again when he gets in the car and he -  
18 when he's jumping in maybe he fired because that back window,  
19 the side window is blown out, too, and it hits that van,  
20 lands on the side, and Ervin Moore told you he heard about  
21 ten shots total, six from James Salter. We know that, four  
22 more from Richard Niles, and what do we find, what do we find  
23 in Williamsburg County in the Defendant's house? Four, four  
24 38 shell casings. Like Agent Whitler said, an automatic, it  
25 spits those shells out, but the guns that shoots 38s those

1   tend to be revolvers, it's like luggage, folks, you take  
2   those shell casings with you, maybe a souvenir of his first  
3   kill, but we find this, those four 38 caliber shell casings  
4   in his home, not on Ervin Moore.

5       Folks, whose story is corroborated by the testimony?  
6   Whose story is corroborated by the evidence? It's Ervin  
7   Moore's. He took the stand. Yeah, he entered a proffer,  
8   yeah. He's going to do ten to 15 years. Yes, he's got a  
9   record, but he told you, "If I lie I know the deal's off,  
10   but I've also got a conscience. I'm ready to face my guilt.  
11   My story is corroborated."

12       How about the Richard Niles? Well, folks, it doesn't  
13   add up. His testimony does not add up. He gives one story  
14   when he's arrested, "Didn't know anybody there, never been  
15   to Best Buy, don't know white people, don't deal with them, I  
16   don't know nothing." Then the police confront him with the  
17   evidence. He needs a minute. He says, "I want to speak  
18   with my attorney." The police say, "That's fine," and  
19   they let him go on back, but he gets back in that jail cell  
20   and he starts thinking, "Whew, they found the stolen car,  
21   hmm, they got my fingerprints, hmm, they got a witness that  
22   put me there, got to come up with something. Let me speak  
23   with the officers again," and he comes out and gives a  
24   second statement.

25       Now this time it's changed a little bit. "Okay, maybe

1 I was at Best Buy, but I didn't stop, and maybe I knew James  
2 Salter, but it's only two months, and yeah, I had called him  
3 just like the phone records say, but it was to buy a quarter  
4 pound of marijuana," not Ervin Moore. As a matter of a fact  
5 he never mentions Ervin Moore. He gives out a third suspect.  
6 He calls him Keith, and now he's had two years, two years to  
7 review all the evidence and say, got to explain this away.  
8 He's had four days of trial where he's listened to all the  
9 testimony, and then yesterday he tries to take the stand and  
10 explain it away and it still doesn't add up. There's no way  
11 he could be firing the gun from the back seat and that shot  
12 land where he said it did. There's no way his DNA gets in  
13 the backseat, his bloody DNA with him sitting up front.  
14 Folks, it's the testimony who has everything to gain by  
15 standing up here and trying to tell you a new story. Ervin  
16 Moore is facing the consequences of his actions and it's time  
17 that Mokeia Hammond and Richard Niles do the same. Together,  
18 together they planned this robbery and what else do we find  
19 in Williamsburg County?

20 Mr. Barr made a big deal about we didn't find a pound of  
21 marijuana, that marijuana that was stolen but in the  
22 Defendant's vehicle, not the one they reported stolen, but  
23 the other vehicle what do we find? \$701, could it have come  
24 from a marijuana sale? I don't know, but Mr. Barr elicited  
25 the testimony that a pound of marijuana goes for about 650,

1 700. The only testimony as to any business dealings that  
2 James Salter and Richard Niles had comes from somebody who  
3 has got everything to gain, somebody who has had two years to  
4 figure out a story. This is a relationship that is not  
5 corroborated, no cell phone records, nothing. The only  
6 business relationship they had was James was willing to sell  
7 him some marijuana, and the Defendant wants you to believe  
8 that he was there to pick up \$5,000 and yet he lets this guy  
9 he barely knows, Ervin Moore, get out to go buy a pound of  
10 marijuana first. Folks, that's what doesn't make sense. If  
11 I'm owed \$5,000 you can bet I'm not going to go to somebody's  
12 house and say, ``Whew, tell you what, instead of picking up  
13 my \$5,000 that you have for me right now, would you mind  
14 giving this guy \$600 worth of marijuana or \$700 worth of  
15 marijuana first.'' I'm going to get my money first. This is  
16 drug money. I don't want the police to arrive and not - and  
17 me not get paid. Folks, Mr. Niles' story does not make  
18 sense. It doesn't make sense and you should not believe it.

19 I don't want to get any more long-winded than I have  
20 been, folks. Together these two Defendants planned the  
21 robbery. Mokeia Hammond sat right beside Richard Niles and  
22 as he told both her and Ervin Moore, ``I'm going to rob that  
23 kid, James Salter.'' They weren't at Best Buy when he came  
24 up with plan. He already had the gun up front. He tells  
25 them, ``We're going to rob him. We're going to hit a lick.

1 So, let's go, ' and Mokeia does what? She drives him to the  
2 murder scene, sits behind the wheel ready to go. She doesn't  
3 go in to get CDs. She sits right there ready to go because  
4 you've got to have a getaway driver. The hand of one is the  
5 hand of all. Hand in hand they preplan this crime, this  
6 armed robbery, and she is guilty for every act that took  
7 place during that armed robbery. She is guilty of the murder  
8 just as Richard Niles is. Together hand in hand they are  
9 guilty.

10 Folks, like I said they are two sides of the same coin.  
11 Put them away.

12 THE COURT: All right, ladies and gentlemen, that  
13 concludes the closing arguments portion of this trial. We  
14 been going at it a little while. I think I'm going to go  
15 ahead and give you a little break before I charge you with  
16 the law because that's going to take a little while also.  
17 So, I'll excuse you back to the jury room to stretch your  
18 legs, use the restroom, get a little something to drink.  
19 We'll take about a 10, 15 minute break and then I'll bring  
20 you back in to charge you with the law. Please do not  
21 discuss this case even among yourselves at this time. It's  
22 still too early for deliberations until after I've instructed  
23 you on the law. So, please do not discuss this case. If you  
24 have taken any notes still leave your notepads here in the  
25 jury box, but I'll excuse you and bring you back in in a

1 short while. Thank you very much.

2 (Whereupon, the following takes place outside the  
3 presence of the jury.)

4 THE COURT: All right, anything before we take a  
5 little recess?

6 MS. ELDER: No, Your Honor.

7 THE COURT: Anything from the Defense?

8 MR. BARR: No, sir.

9 MR. HAZZARD: No, Your Honor.

10 THE COURT: All right, let's stand in recess for  
11 about 10 minutes, okay?

12 OFF THE RECORD

13 (On the record.)

14 (Whereupon, the following takes place outside the  
15 presence of the jury.)

16 THE COURT: Thank you very much. Please be seated.  
17 Anything from the State before we bring the jury in?

18 MR. RICHARDSON: Nothing from the State, Your Honor.

19 THE COURT: Anything from the Defense?

20 MR. BARR: Nothing from the Defendant Niles, Your  
21 Honor.

22 MR. HAZZARD: Nothing on behalf of Defendant Mokeia  
23 Hammond, Your Honor.

24 THE COURT: All right, thank you very much. Let's  
25 bring the jury in.

1           (Whereupon, the following takes place in the presence of  
2 the jury.)

3           THE COURT: All right, ladies and gentlemen, welcome  
4 back.

5           All of the testimony and other evidence to be presented  
6 in this case has now been presented and now is the time of  
7 the trial when I charge you with the law to be applied in  
8 this case. I'll give you a copy of these instructions in  
9 written form and during your deliberations you may refer to  
10 the instructions to guide your decision-making. However, you  
11 must consider the instructions as a whole and not follow some  
12 and ignore others. Please return the written instructions to  
13 the Court at the time your verdict is rendered.

14          Now, I remind you that the fact that the Defendants in  
15 this case were arrested, charged and indicted is not evidence  
16 in this case and cannot be considered by you as evidence of  
17 guilt in this case nor does the Defendants' arrest, charge  
18 and indictment create any presumption or inference of guilt.  
19 These documents are simply the formal written instruments  
20 which contain the charges made against the Defendants. They  
21 are the formal documents by which this case is brought into  
22 this Court. The indictments in this case allege several  
23 different crimes against each Defendant. These charges are  
24 murder, armed robbery and possession of a weapon during the  
25 commission of a violent crime. Each indictment charges a

1 separate and distinct offense. You must decide each  
2 indictment separately on the evidence and the law applicable  
3 to it uninfluenced by your decision as to any other  
4 indictment. A Defendant may be convicted or acquitted on any  
5 or all of the offenses charged. You'll be asked to write a  
6 separate verdict of guilty or not guilty for each Defendant  
7 on each indictment. There are two Defendants in this case.  
8 Each of whom is charged with murder, armed robbery and  
9 possession of a weapon during the commission of a violent  
10 crime. The case of each Defendant and the evidence and the  
11 law concerning that Defendant should be considered separately  
12 and individually. Your verdict does not have to be the same  
13 for both Defendants. The fact that you may find one  
14 Defendant guilty or not guilty should not control your  
15 verdict as to the other Defendant. Where more than one  
16 person is charged with a crime, if the evidence warrants it,  
17 you may convict one and acquit the other or you may acquit  
18 both or you may convict both. It will depend upon your view  
19 of the testimony and evidence. You must take each Defendant  
20 and consider the evidence as to that Defendant and my  
21 instructions to you on the law. You will then write a  
22 separate verdict for each crime of guilty or not guilty for  
23 each individual Defendant.

24 Now, the Defendants have pled not guilty to these  
25 indictments and that plea puts the burden on the State to



1 prove the Defendants guilty. A person charged with  
2 committing a criminal offense in South Carolina is never  
3 required to prove his or her innocence. I charge you that it  
4 is an important rule of the law that the Defendant in a  
5 criminal trial no matter what the seriousness of the charge  
6 may be will always be presumed to be innocent of the crime  
7 for which the indictment was issued unless guilt has been  
8 proven by evidence satisfying you of that guilt beyond a  
9 reasonable doubt. This presumption of innocence does not end  
10 when you begin your deliberations but it accompanies the  
11 Defendant throughout the trial until you reach a verdict of  
12 guilt based on evidence satisfying you of that guilt beyond a  
13 reasonable doubt. The presumption of innocence is like a  
14 robe of righteousness placed about the shoulders of the  
15 Defendant which remains with the Defendant until it has been  
16 stripped from the Defendant by evidence satisfying you of the  
17 Defendant's guilt beyond a reasonable doubt. The presumption  
18 of innocence is not a mere legal theory. It is not just a  
19 legal phrase. It is a substantial right to which every  
20 Defendant is entitled unless you the jury are satisfied from  
21 the evidence of the Defendant's guilt beyond a reasonable  
22 doubt.

23 Now, what is reasonable doubt in the law? A reasonable  
24 doubt is the kind of doubt that would cause the reasonable  
25 person to hesitate to act. Proof beyond a reasonable doubt

## Charge

1 is proof that leaves you firmly convinced of the Defendant's  
2 guilt. We know very few things in this world with absolute  
3 certainty and in criminal cases the law does not require  
4 proof that overcomes every possible doubt. If based on your  
5 consideration of the evidence you are firmly convinced that  
6 the Defendant is guilty of the crime charged you must find  
7 the Defendant guilty. If on the other hand you think there  
8 is a real possibility that the Defendant is not guilty you  
9 must give the Defendant the benefit of the doubt and find the  
10 Defendant not guilty. I remind you that during this trial  
11 you and I have certain duties to perform. As the trial judge  
12 it is my responsibility to preside over the trial of this  
13 case and I also have the duty to rule on the admissibility of  
14 the evidence offered during the trial. You are to consider  
15 only the competent evidence before you. If there was any  
16 testimony ordered stricken from the record in this case  
17 during this trial you must disregard that testimony. You are  
18 to consider only the testimony which has been presented from  
19 the witness stand and any exhibits which have been made a  
20 part of the record in this case.

21 I have the additional duty to charge you with the law  
22 applicable to this case. As the presiding judge I am the  
23 sole judge of the law of this case and it is your duty as  
24 jurors to accept and apply the law as I now state it to you.  
25 If you already have any idea as to what the law is or what

1 the law ought to be and it does not agree with what I now  
2 tell you the law is you must disregard your idea of what the  
3 law is or ought to be because you are sworn to accept the law  
4 and apply the law exactly as I state it to you. In every  
5 case tried in this court before a jury the jury becomes the  
6 sole and exclusive judge of the facts in the case. A trial  
7 judge cannot intimate, state, comment on or make any  
8 statement to a trial jury about the facts in a case. Since  
9 you the jury are the sole judge of the facts of this case you  
10 are not to infer from what I have said during the progress of  
11 this trial, in ruling upon admissibility of evidence or  
12 otherwise or anything that I say now during the course of  
13 these instructions to you that I have any opinion about the  
14 facts in this case. The law does not allow me to have an  
15 opinion about the facts in this case. This is a matter  
16 solely for you the jury to determine. As jurors it is your  
17 duty to determine the effect, value, weight and truth of the  
18 evidence presented during the trial.

19 Now, there are two types of evidence which are generally  
20 presented during a trial, direct evidence and circumstantial  
21 evidence. Direct evidence is the testimony of a person who  
22 claims to have actual knowledge of a fact such as an  
23 eyewitness. It is evidence which immediately establishes the  
24 main fact to be proved. Circumstantial evidence is proof of  
25 a chain of facts and circumstances indicating the existence

## Charge

1 of a fact. It is evidence which immediately establishes  
2 collateral facts from which the main fact may be inferred.  
3 Circumstantial evidence is based on inference and not on  
4 personal knowledge or observation. The law makes absolutely  
5 no distinction between the weight or value to be given to  
6 either direct or circumstantial evidence, nor is it a greater  
7 degree of certainty required of circumstantial evidence than  
8 of direct evidence. You should weigh all of the evidence in  
9 the case. After weighing all of the evidence if you are not  
10 convinced of the Defendant's guilt beyond a reasonable doubt  
11 you must find the Defendant not guilty. Now, necessarily,  
12 you must determine the credibility of witnesses who have  
13 testified in this case. Credibility simply means  
14 believability. It becomes your duty as jurors to analyze and  
15 to evaluate the evidence and determine which evidence  
16 convinces you of its truth. In determining the believability  
17 of witnesses who have testified in this case you may believe  
18 one witness over several witnesses or several witnesses over  
19 one witness. You may believe a part of the testimony of a  
20 witness and reject the remaining part of the testimony of  
21 that same witness. You may believe the testimony of a  
22 witness in its entirety or reject the testimony of a witness  
23 in its entirety. You may consider whether any witness has  
24 exhibited to you any interest, bias, prejudice or other  
25 motive in this case. You may also consider the appearance

1 and manner of a witness while on the witness stand.

2 Now, there has been evidence presented that a witness in  
3 this case and the Defendant Richard Bill Niles, Jr., made  
4 prior statements which are not consistent with their present  
5 testimony. You may use this evidence to decide whether to  
6 believe the witness and or believe the Defendant. You may  
7 also use evidence of the earlier contradictory statements to  
8 determine the truth of those statements. It is up to you to  
9 decide whether to believe the earlier statements or the  
10 testimony given at trial. If a witness is shown to have  
11 knowingly testified untruthfully concerning any material  
12 matter you may consider this in determining whether to trust  
13 the witness's testimony as to other matters. You may reject  
14 all testimony of that witness or give all or part of the  
15 testimony the weight you think it deserves.

16 A person who has a past criminal record is competent to  
17 testify during a trial. A past record does not affect the  
18 ability of that witness to testify. The past record may only  
19 be considered by you if at all in determining the witness's  
20 believability. Remember you are the sole judges of the facts  
21 in the case and of the believability of any or all of the  
22 witnesses.

23 Now, the rules of evidence ordinarily do not permit  
24 witnesses to testify to opinions or conclusions. An  
25 exception to this rule exists for witnesses we call expert

1 witnesses. A witness who by education or experience has  
2 become expert in some art, science profession or calling may  
3 state an opinion as to relevant and material matter in which  
4 the witness claims to be an expert and may also state the  
5 reasons for the opinion. You should consider any expert  
6 opinion received in evidence in this case and like any other  
7 evidence give it the weight you think it deserves. If you  
8 decide that the opinion of an expert witness is not based on  
9 sufficient education and experience or if you conclude that  
10 the reasons given in support of the opinion are not sound or  
11 that the opinion is outweighed by other evidence you may  
12 disregard the opinion entirely. An expert witness's  
13 testimony is to be given no greater weight than that of any  
14 other witness simply because the witness is an expert.  
15 Further, you are not required to accept an expert's opinion  
16 even though it is not contradicted.

17 Now, in this case the Defendant Mokeia Hammond has  
18 chosen not to testify. I instruct you and emphasize that the  
19 fact that the Defendant did not testify is not a factor to be  
20 considered by you in any way in your deliberation and in your  
21 consideration on the question of the guilt or innocence of  
22 the Defendant. It must not be considered by you in any  
23 manner whatsoever. A Defendant has the constitutional right  
24 to remain silent and the assertion of this right must not be  
25 considered by you in your deliberations. I repeat, under

1 your oath you are to draw no conclusion whatsoever from the  
2 fact that this Defendant did not testify. The fact that this  
3 Defendant did not testify should not even be discussed in the  
4 jury room. The burden of proof, as I have stated to you, is  
5 on the State. The Defendant is not required to prove her  
6 innocence. The burden of proof remains on the State to prove  
7 guilt beyond a reasonable doubt.

8 Now, the Defendants are charged with murder. To convince  
9 the Defendants of this charge the State must prove beyond a  
10 reasonable doubt that the Defendants killed another person  
11 with malice aforethought. Malice is hatred, ill will or  
12 hostility towards another person. It is the intentional  
13 doing of a wrongful act without just cause or excuse and with  
14 an intent to inflict an injury or under circumstances that  
15 the law will infer an evil intent. Malice aforethought does  
16 not require that malice exists for any particular time before  
17 the act is committed but malice must exist in the mind of the  
18 Defendant just before and at the time of the act it is  
19 committed. Therefore, there must be a combination of the  
20 previous evil intent and the act. Malice aforethought may be  
21 express or inferred. These terms express and inferred do not  
22 mean different kinds of malice but merely the manner in which  
23 malice is shown to exist. It may be shown to exist either by  
24 direct evidence or by inference from the facts and  
25 circumstances which are proved. Express malice is shown when

1 a person speaks words which express hatred or ill will for  
2 another or when the person prepared beforehand to do the  
3 act which was later accomplished. For example, lying in  
4 wait for a person or any other act of preparation going to  
5 show that the deed was within the Defendant's mind would be  
6 express malice. Malice may be inferred from conduct  
7 showing a total disregard for human life. Inferred malice  
8 may also arise when the deed is done with a deadly weapon.  
9 A deadly weapon is any article, instrument or substance  
10 which is likely to cause death or great bodily harm.  
11 Whether an instrument has been used as a deadly weapon  
12 depends on the facts and circumstances of each case.  
13 If one intentionally kills another during the commission  
14 of a felony the inference of malice may arise. If facts are  
15 proved beyond a reasonable doubt sufficient to raise an  
16 inference of malice to your satisfaction this inference  
17 would simply be an evidentiary fact to be taken into  
18 consideration by you along with all other evidence in the  
19 case and you may give it the weight that you think, excuse  
20 me, and you may give it the weight that you decide it should  
21 receive.

22 The Defendants are also charged with armed robbery. In  
23 order to prove this offense the State must first prove beyond  
24 a reasonable doubt that the Defendants took personal property  
25 from the person or presence of another person. Property is



1 in the presence of a person if it is within the person's  
2 reach, inspection, observation or control so that the person  
3 could if not overcome with violence or prevented by fear keep  
4 possession of the property. The State must also prove beyond  
5 a reasonable doubt that the Defendants carried the property  
6 away intending to permanently deprive the owner of the  
7 property and to keep the property for the Defendant's own  
8 use. The slightest removal of the property or the complete  
9 possession of the property, even for an instant by the  
10 Defendants is sufficient to show a taking and carrying away  
11 of the property. The taking and carrying away of the  
12 property must have been done with violence or by putting the  
13 owner of the property in fear of violence.

14 Finally, the State must prove beyond a reasonable doubt  
15 that the Defendant was armed with a deadly weapon during the  
16 robbery. A deadly weapon is any article, instrument or  
17 substance which is likely to cause death or great bodily  
18 harm. Whether an instrument has been used as a deadly weapon  
19 depends on the facts and circumstances of each case. A  
20 pistol or gun may be a deadly weapon.

21 The Defendants are also charged with possession of a  
22 weapon during the commission of a violent crime. To convict  
23 the Defendants of this charge the State must prove beyond a  
24 reasonable doubt that the Defendants were in possession of a  
25 firearm or visibly displayed what appeared to be a firearm

1 during the commission of a violent crime. A firearm means  
2 any machine gun, automatic rifle, revolver, pistol or any  
3 weapon which will, which will, is designed to or may be  
4 readily converted to expel a projectile. In order to find  
5 the Defendants guilty of possession of a weapon during  
6 commission of a violent crime you must first find the  
7 Defendants guilty of either committing a violent crime or  
8 attempting to commit a violent crime. Murder and armed  
9 robbery are both violent crimes and felonies. Now, if a  
10 crime is committed by one - excuse me, if a crime is  
11 committed by two or more people who are acting together in  
12 committing a crime the act of one is the act of all. A  
13 person who joins with another to commit an unlawful act is  
14 criminally responsible for everything done by the other  
15 person which happens as a probable or natural consequence of  
16 the acts done in carrying out the common plan and purpose  
17 If two or more people are together, acting together,  
18 assisting each other in committing the offense, the act of  
19 one is the act of all or as it is sometimes said the hand of  
20 one is the hand of all. Prior knowledge that a crime is  
21 going to be committed without more is not sufficient to make  
22 a person guilty of that crime. Mere knowledge that another  
23 person is going to commit a crime, even if the Defendant is  
24 present when the crime is committed is not sufficient to  
25 convict a person as a principal. Guilt as a principal is

1 shown by actual or constructive presence at the scene as a  
2 result of a prior arrangement. Therefore, a finding of a  
3 prior arranged plan or common scheme is necessary for a  
4 finding of guilt as a principal. The State must prove  
5 beyond a reasonable doubt by competent evidence the theory of  
6 the hand of one is the hand of all. A principal in a crime  
7 is one who either actually commits the crime or who is  
8 present aiding, abetting, assisting in the committing of the  
9 crime. When a person does an act in the presence of and with  
10 the assistance of another the act is done by both. Where two  
11 or more acting with a common plan or intent are present at  
12 the commission of a crime it does not matter who actually  
13 commits the crime, all are guilty, the hand of one is the  
14 hand of all. Present at the commission of a crime means to  
15 be sufficiently near to aid and abet and assist in the  
16 commission of the crime. However, mere presence at the scene  
17 of a crime is not sufficient to convict one as a principal on  
18 the theory of aiding and abetting. Intent is also a  
19 necessary element for there must have been a common design or  
20 intent to commit the crime and the crime must have been  
21 committed pursuant thereto with the person aiding and  
22 abetting by some overt act. Intent means intending the  
23 result which actually occurs, not accidentally or  
24 involuntarily. Intent may be shown by acts and conduct of  
25 the Defendant and other circumstances from which you may

1 naturally and reasonably infer intent. The State must prove  
2 these elements beyond a reasonable doubt. Now, mere presence  
3 at the scene is not sufficient to prove someone guilty of a  
4 crime. A Defendant's presence where a crime is being  
5 committed or mere association with a person who commits a  
6 crime does not make a Defendant an accomplice or an aider and  
7 abettor of the person committing the crime. The burden is on  
8 the State to prove every element of the crime charged. If  
9 you find after reviewing all of the evidence that the State  
10 has proved that the Defendant was only present at the scene  
11 of the crime and that they have not proved beyond a  
12 reasonable doubt any other participation in the crime then  
13 you must find the Defendant not guilty. The law is that  
14 proof of being at the scene of the crime is not sufficient to  
15 find someone guilty.

16 Now, the Defendant Richard Bill Niles, Jr., has raised  
17 the defense of self-defense. Self-defense is a complete  
18 defense and if it is established you must find the Defendant  
19 not guilty. The State has the burden of disproving  
20 self-defense by proof beyond a reasonable doubt. If you have  
21 a reasonable doubt of the Defendant's guilt after considering  
22 all of the evidence, including the evidence of self-defense,  
23 then you must find the Defendant not guilty. On the other  
24 hand if you have no reasonable doubt of the Defendant's guilt  
25 after considering all of the evidence, including the evidence

1 of self-defense, then you must find the Defendant guilty.  
2 The following elements are required to establish  
3 self-defense. First the Defendant must be without fault in  
4 bringing on the difficulty. If the Defendant's conduct was  
5 the type which was reasonably calculated to and did provoke a  
6 deadly assault the Defendant would be at fault in bringing on  
7 the difficulty and would not be entitled to an acquittal  
8 based on self-defense. The second element of self-defense is  
9 that the Defendant was actually in imminent danger of death  
10 or serious bodily injury or that the Defendant actually  
11 believed he was in imminent danger of death or serious bodily  
12 injury. If the Defendant was actually in imminent danger it  
13 must be shown that the circumstances would have warranted a  
14 person of ordinary firmness and courage to strike the fatal  
15 blow to prevent death or serious bodily injury. If the  
16 Defendant believed he was in imminent danger of death or  
17 serious bodily injury it must be shown that a reasonably  
18 prudent person of ordinary firmness and courage would have  
19 had the same belief. In deciding whether the Defendant  
20 actually was or believed he was in imminent danger of death  
21 or serious bodily injury you should consider all of the facts  
22 and circumstances surrounding the crime, including the  
23 physical condition and characteristics of the Defendant and  
24 the victim. The Defendant does not have to show that he was  
25 actually in danger. It is enough if the Defendant believed

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1 he was in imminent danger and a reasonably prudent person of  
2 ordinary firmness and courage would have had the same belief.  
3 The Defendant has the right to act on appearances, even  
4 though the Defendant's beliefs may have been mistaken. It  
5 is for you to decide whether the Defendant's fear of  
6 immediate danger of death or serious bodily injury was  
7 reasonable and would have been felt by an ordinary person in  
8 the same situation.

9 A final element of self-defense is that the Defendant  
10 had no other probable way to avoid the danger of death or  
11 serious bodily injury than to act as the Defendant did in  
12 this particular instance. A person cannot be required to  
13 make an exact calculation as to the degree or amount of force  
14 which may be needed to avoid death or serious bodily harm.  
15 Therefore, in self-defense the Defendant has the right to use  
16 the force needed to avoid death or serious bodily harm. The  
17 force used in self-defense does not have to be limited to the  
18 degree or amount of force used by the victim. The Defendant  
19 has the right to use so much force as appeared to be  
20 necessary for complete self protection and which a person of  
21 ordinary reason and firmness would have believed to be needed  
22 to prevent death or serious bodily harm. Under the law of  
23 self-defense the Defendant may take another's life in the  
24 defense of others. The right to intervene to protect another  
25 person is subject to the same rights and limitations as the

1 right of self-defense. The Defendant may take the life of a  
2 person who assaults a friend, relative or bystander if that  
3 friend, relative or bystander would've had the right of  
4 self-defense. To show that the person being defended has the  
5 right of self-defense it must first be shown that the person  
6 being defended and the Defendant were both without fault in  
7 bringing about the difficulty. If the conduct of the person  
8 defended or if the Defendant was the type which was  
9 reasonably calculated to and did provoke a deadly assault the  
10 person would be at fault in bringing on the difficulty and  
11 would not have the right of self-defense. Therefore, the  
12 Defendant would not have the right to use deadly force in  
13 defending that person. The defense of another person is  
14 excusable if the Defendant had reasonable grounds to believe  
15 and in good faith did believe that the person being defended  
16 was in imminent danger of death or serious bodily harm from  
17 the victim. In deciding whether the person defended actually  
18 was or that the Defendant actually believed the person was in  
19 imminent danger of death or serious bodily injury you should  
20 consider all the facts and circumstances surrounding the  
21 crime. In order to be entitled to defend another the person  
22 defended must have had no other probable way to avoid the  
23 danger of death or serious bodily injury than to act as the  
24 Defendant did in this particular instance.

25 Now, there are several possible verdicts which you may

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1 find for each Defendant in this case. No significance should  
2 be given to the order in which I state these possible  
3 verdicts to you. I simply must state one possible verdict  
4 first, another second and so on. As to the Defendant,  
5 Richard Bill Niles, Jr., you may find this Defendant guilty  
6 or not guilty on one, two or all three of the charges against  
7 him. The only limitation on your verdict is that you cannot  
8 find this Defendant guilty of being in possession of a weapon  
9 during the commission of a violent crime without also finding  
10 him guilty of either murder or armed robbery or both.

11 As to the Defendant Mokeia Hammond you may find her  
12 guilty or not guilty on one, two or all three of the charges  
13 against her. The only limitations on your verdict regarding  
14 this Defendant is that you cannot find this Defendant guilty  
15 of any crime unless you likewise find the Defendant Richard  
16 Bill Niles, Jr., guilty of that same crime. Further, you  
17 cannot find this Defendant guilty of being in possession of a  
18 weapon during the commission of a violent crime without also  
19 finding her guilty of either murder or armed robbery or both.

20 Ladies and gentlemen, your verdict must be a unanimous  
21 one. Mr. Foreman, when the jury agrees on a verdict you will  
22 write the verdict on the back of the indictment of that  
23 particular charge and sign your name as foreperson. When the  
24 jury has reached a verdict on all charges for both  
25 Defendants, knock on the jury room door and inform the



1 bailiff that you have reached a verdict. At that time we'll  
2 receive you back into the courtroom. So, we have, here are  
3 the indictments and on the face of the indictment you will  
4 see that there is a portion on each indictment for burglary.  
5 When you reach a decision on that particular indictment for  
6 that particular Defendant you'll either write guilty or not  
7 guilty in the verdict portion, sign your name and date the  
8 verdict form. When you've reached a decision on all of the  
9 indictments for all of the Defendants knock on the door and  
10 tell the bailiff that you have reached a verdict.

11 Now, I'm going to return you to your jury room at this  
12 point in time, but still it is not time to begin your  
13 deliberations. I have to go over with the attorneys to see  
14 if they have any challenges to my instructions, any  
15 additional charges or anything of that nature. If they do,  
16 I'll bring you back in and will charge you. If they don't  
17 I'll send word with the exhibits back to the jury room that  
18 you can begin your deliberations.

19 Now, I understand that we have got lunch ordered for  
20 you. When lunch arrives I will leave it entirely up to you.  
21 If you want to stop your deliberations and eat lunch without  
22 deliberating you can do that. If you want to continue your  
23 deliberations while you're eating lunch I'll allow you to do  
24 that. The only restriction is that you do not deliberate  
25 this case while anyone else is in the jury room. When

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1 someone is delivering the lunch to you or one of the bailiffs  
2 is bringing you something to drink or whatever the case may  
3 be cease your deliberations while someone else is in the jury  
4 room and deliberate only when it is - when the jury is in the  
5 room. Other than that it'll be up to you to decide when and  
6 how you want to deliberate in this case. So, I'll excuse you  
7 back to the jury room but please do not begin any  
8 deliberations until I instruct you to do so. If you brought  
9 pads and if you took notes you will be allowed to take those  
10 pads and notes back to the jury room with you. However,  
11 remember my prior instructions. Your notes are for you  
12 personally. Your notes are not to be used to influence any  
13 other juror because some jurors take notes better than  
14 others. Some remember better than others. So, your notes  
15 are personal to you to refresh your memory during the  
16 deliberation process. Thank you very much and you may now go  
17 back to the jury room.

18 (Whereupon, the following takes place outside the  
19 presence of the jury.)

20 THE COURT: All right, we've already discussed my  
21 closing charges to some degree on a prior record. Is there  
22 anything different that has not been raised heretofore that  
23 you think needs to be charged or challenged?

24 MS. ELDER: No, sir, Your Honor.

25 MR. RICHARDSON: Nothing from the State.

1 THE COURT: Any from the Defense?

2 MR. BARR: Nothing from the Defendant Niles.

3 MR. HAZZARD: Your Honor, just renew the objection  
4 regarding the failure to charge the mala in se precept from  
5 Gore v. Leeke.

6 THE COURT: All right, your challenges is noted.  
7 It's denied. Anything before we allow them to begin their  
8 deliberations?

9 MS. ELDER: No, sir, Your Honor.

10 THE COURT: All right, if we can go ahead and get the  
11 ---

12 MR. HAZZARD: Your Honor ---

13 THE COURT: Yes.

14 MR. HAZZARD: --- just out of an abundance of  
15 precaution I want to make sure that the jury is sure on the  
16 protocol for lunch, specifically if they decide to have lunch  
17 and not deliberate that none of them can deliberate, not like  
18 four can - everybody is eating but four is sitting over here  
19 talking about the case while the other eight are eating and  
20 not talking about it. I just want to make sure they know  
21 that, you know, either everybody is deliberating or nobody is  
22 deliberating.

23 THE COURT: All right, let's bring the jury back in  
24 and I will make that plain to them.

25 MR. RICHARDSON: And Your Honor, we have reviewed all

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1 the exhibits.

2 THE COURT: All right, good.

3 (Whereupon, the following takes place in the presence  
4 the jury.)

5 THE COURT: Ladies and gentlemen, I may have been  
6 somewhat delinquent in my instructions to you on deliberating  
7 during lunch and I wanted to make sure that everyone clearly  
8 understands or understood that if you choose to deliberate  
9 during your lunch break then everyone must deliberate during  
10 that lunch break. If you choose not to deliberate during  
11 lunch then no one can deliberate during lunch, none of the  
12 jurors. In other words it's got to be a joint decision where  
13 all 12 of you will participate during deliberations while you  
14 eat lunch or that none of you will participate in  
15 deliberations while you eat lunch. In other words we can't  
16 have some deliberating and others not; okay? And I just  
17 wanted to make that sure. I don't think I explained that  
18 properly to you and I apologize for that, but other than that  
19 we'll send you back to the jury room with the evidence, the  
20 instructions and the indictments and allow you to begin your  
21 deliberations. Thank you very much.

22 (Whereupon, the following takes place outside the  
23 presence of the jury.)

24 THE COURT: All right, anything before they begin  
25 deliberations?

1 MR. RICHARDSON: No, sir, Your Honor.

2 MR. BARR: No, Sir.

3 MR. HAZZARD: Nothing from Defendant Hammond.

4 THE COURT: All right, now, these - the indictments  
5 that I'm sending back I think I've been given copies of the  
6 indictments. Are these sufficient? They - are these the  
7 ones we want to send back or do we have the originals?

8 MS. ELDER: Where are the original indictments?

9 THE CLERK: I think you have the originals.

10 THE COURT: These are - this is what I was given and  
11 I don't know that - they don't look like they contain  
12 original signatures or stamps.

13 MR. HAZZARD: Your Honor, can we review those?

14 THE COURT: Yes, if you want to come take a look at  
15 them. Wait a minute. I've got them right here. They were  
16 stuck under the jury list. Sure do. I had them stuck with  
17 Mr. Moore's sentencing sheet from when he pled guilty. Yes,  
18 these are the originals here. They were with Mr. Moore's and  
19 his sentencing sheet.

20 MR. HAZZARD: No objection to the form of the Hammond  
21 indictments/verdict form on behalf of Defendant Mokeia  
22 Hammond, Your Honor.

23 MR. BARR: None on Defendant Niles.

24 MS. ELDER: None from the State, Your Honor.

25 THE COURT: All right, all right, there being no

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1 objection from the State or either Defendant regarding these  
2 indictments we'll go ahead and send the indictments, the jury  
3 charge, the exhibits with instructions that the jury can  
4 begin their deliberations.

5 All right, we'll stand in recess until the jury has  
6 reached a verdict.

7 (Whereupon, deliberations begin at 12:08 p.m.)

8 OFF THE RECORD

9 (On the record.)

10 (Whereupon, the following takes place outside the  
11 presence of the jury.)

12 (Question from jury at 12:30 p.m.)

13 THE COURT: All right, do we need your clients here  
14 or not? I've gotten a request from the jury.

15 MR. BARR: I would waive my client's presence, Your  
16 Honor.

17 MR. HAZZARD: Waive as well, Your Honor.

18 THE COURT: All right, I've gotten a note from the  
19 foreman of the jury that says, "Please provide the testimony  
20 and transcripts of the two eyewitnesses Hooper and Watts."  
21 I was going to let them know first of all that I cannot  
22 provide them with a transcripts because we don't have that  
23 capability. I will allow them to listen to the testimony of  
24 the two witnesses, the recorded testimony but they'll need to  
25 listen to the entire testimony, the direct, the cross, the

1 redirect or whatever the case may be. The question is do we  
2 want to call them back in or I was thinking about just  
3 writing that in response on their note saying that  
4 transcripts are not available, recorded testimony can be  
5 played back or the entire testimony of these witnesses can be  
6 played back if the jury chooses and for them to let us know  
7 and if they want to hear them we'll bring them back in, set  
8 it up and play it for them.

9 MS. ELDER: Your Honor, I don't have any objection to  
10 sending a note back there. My understanding is though if  
11 they only want to hear sections of testimony they would have  
12 the option of doing that rather than hearing the entire  
13 testimony. I don't know what there is they're looking for  
14 but ---

15 THE COURT: Well, I don't know what they're looking  
16 for either. It just says, "Please provide the testimony,"  
17 and that's why when they said the testimony to me it leaves  
18 they want to hear what these witnesses had and they're not  
19 giving any indication as to whether or not they want to hear  
20 the direct, the cross or anything. They just said the  
21 testimony. So ---

22 MR. HAZZARD: I would submit to the Court notify them  
23 that obviously the transcript is not available but they are  
24 allowed to listen to the testimony of both witnesses in their  
25 entirety.

## Question from Jury

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1 MR. BARR: I would concur.

2 THE COURT: Any objection? Or how about if I just  
3 put it and said on the response note, it says, "Please  
4 provide the testimony and transcripts of the two eyewitnesses  
5 Hooper and Watts." I just put transcripts are not  
6 available. You can hear the recorded testimony, the court  
7 reporter's recorded testimony.

8 MS. ELDER: That's sufficient for the State, Your Honor.

9 MR. HAZZARD: No objection.

10 MR. BARR: No objection.

11 THE COURT: All right.

12 I think what I'm going to do is I'm going to put you may  
13 listen to the recorded testimony in open court.

14 MS. ELDER: Yes, sir.

15 MR. RICHARDSON: Yes, sir.

16 THE COURT: So, they could come back in here and  
17 listen to it. I don't want them to think they can take  
18 anything back there.

19 MR. HAZZARD: For clarification that note would be made  
20 a Court's Exhibit; right?

21 THE COURT: Yeah, I'm going to make this as a Court's  
22 Exhibit, be Court's Exhibit Two, I believe; isn't it?

23 (Whereupon, Court's Exhibit Two [Question from Jury]  
24 marked.)

25 THE COURT: All right, the note dated 3-13-09,



1    "Please provide the testimony and transcripts of the two  
2    eyewitnesses, Hooper and Watts, signed David Kahanamoku,  
3    whatever, the foreman's name. I have written, if you want to  
4    inspect it you can, I have written, "Transcripts are not  
5    available. You may listen to the recorded testimony in open  
6    court. Please let the bailiff know what you want to do "  
7    Agreeable?

8           MS. ELDER:       Yes, sir.

9           MR. RICHARDSON: Yes, sir.

10          THE COURT:       We'll mark that on the back Court's  
11   Exhibit Two.

12          MR. HAZZARD:    No objection to the form of the Court's  
13   response.

14          THE COURT:       All right, and let's go ahead and take  
15   that and find out what they want to do or just give them the  
16   note. I'm assuming they will contact the bailiff if they  
17   want to come back in.

18                           OFF THE RECORD

19   (On the record.)

20           (Question from jury at 1:34 p.m.)

21           (Whereupon, the following takes place outside the  
22   presence of the jury.)

23          THE COURT:       All right, during the, during our lunch  
24   break I got two requests from the jury. Number one, the  
25   request was, "Please bring in the easel from the courtroom

1 so we can display the large, larger pictures more easily."  
2 I just directed the bailiff to take the easel into the, into  
3 the jury room for them. We'll mark that as Court's Exhibit  
4 Four.

5 (Whereupon, Court's Exhibit Four [Question from Jury]  
6 marked.)

7 THE COURT: The next request states, "We would like  
8 to hear the testimony of the two eyewitnesses, Hooper and  
9 Watts." So, I think we'll bring them in and have that  
10 testimony played back for them; okay? They bringing your  
11 clients in?

12 MR. HAZZARD: That's correct, Your Honor.

13 MR. BARR: They said it would be a minute or so.

14 THE COURT: Oh, here they come.

15 I think first Ms. Hooper's testimony was first and  
16 you're ready to go on that?

17 | REPORTER: Yes, sir.

18 THE COURT: All right, anything before we bring  
19 the jury back in?

20 MR. RICHARDSON: No, sir, Your Honor.

21 MR. BARR: No, sir.

22 MR. HAZZARD: Nothing on behalf of Defendant Hammond,  
23 Your Honor.

24 THE COURT: All right, let's bring the jury in.

25 (Whereupon, the following takes place in the presence of

1 the jury.)

2 THE COURT: All right, ladies and gentlemen, welcome  
3 back. I understand that you would like to hear the testimony  
4 of the two witnesses, Angie Hooper and Gene Watts; is that  
5 correct?

6 FOREPERSON: Correct.

7 THE COURT: All right, as I told you when I sent back  
8 we do not have printed transcripts. So, there's nothing to  
9 read, but we can play back their taped testimony and we'll do  
10 that for you. If you have trouble hearing the testimony then  
11 our court reporter can read back the testimony. I prefer to  
12 play back the testimony if you can understand what is being  
13 said and you should be able to. I know you'll be able to -  
14 the question will be whether or not we can get the volume  
15 loud enough for you to hear. If not then let me know and  
16 we'll read what needs to be read; okay?

17 All right, thank you very much. The first, the first,  
18 we'll take Ms. Hooper first and then Mr. Watts after that.

19 (Whereupon, testimony of Angie Hooper played in open  
20 court.)

21 THE COURT: All right, ladies and gentlemen, that is  
22 the testimony of Ms. Hooper. Now we'll fast forward until we  
23 get to the testimony of Mr. Watts.

24 (Whereupon, testimony of Eugene Watts played in open  
25 court.)

## Question from Jury

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1 THE COURT: All right, ladies and gentlemen, that's  
2 the testimony of Mr. Watts. I'll excuse you back to the jury  
3 room to resume your deliberations. Thank you very much!

4 (Whereupon, the following takes place outside the  
5 presence of the jury.)

6 THE COURT: All right, I'm going to mark this  
7 question, this will be Court's Exhibit, Court's Exhibit Five.

8 (Court's Exhibit Five [Question from Jury] marked.)

9 THE COURT: We'll stand in recess until they have a  
10 verdict or have another question; all right?

11 MS. ELDER: Thank you, Your Honor.

12 MR. RICHARDSON: Thank you, Your Honor.

13 OFF THE RECORD

14 (On the record.)

15 (Question from Jury at 3:00 p.m.)

16 (Whereupon, the following takes place outside the  
17 presence of the jury.)

18 THE COURT: All right, we've received two questions  
19 from the jury. I don't - they were both given to me, I don't  
20 know which order.

21 First question, number one, "Can the Defendant be  
22 guilty of armed robbery if doubt exists as to his actual  
23 knowledge of it prior to the act of robbery," and I think  
24 the answer to that is no, that you've got to have - if there  
25 is doubt as to whether or not the Defendant knew there was a

1 robbery that was going to take place then you can't have  
2 armed robbery. Anything further from the State, from the  
3 Defense on that?

4 I'll read it to you again, ``Can the Defendant be guilty  
5 of armed robbery if doubt exists as to his actual knowledge  
6 of it prior to the act of robbery?''

7 MS. ELDER: Reasonable doubt, I assume.

8 THE COURT: It just says doubt. ``Can the Defendant  
9 be guilty of armed robbery if doubt exists as to his actual  
10 knowledge of it prior to the act of robbery?''

11 MR. RICHARDSON: Your Honor, without drawing any undue  
12 inference to any particular charge, I mean, they could be  
13 recharged on reasonable doubt. They could be recharged on  
14 armed robbery or the Defendant can be found guilty of one,  
15 two, three charges or none of the charges.

16 THE COURT: Well, but I mean, let's respond to their  
17 question. They've asked a question ---

18 MR. RICHARDSON: Well, they're not talking about a -  
19 whether it's a reasonable doubt or not. They're just saying  
20 a doubt.

21 MS. ELDER: We would ask that that question be  
22 answered with the charging of armed robbery, the recharge of  
23 armed robbery.

24 THE COURT: No, with doubt and all of that, I'd  
25 recharge them on reasonable doubt, armed robbery, yeah, I

1 mean, I could do it that way.

2 MR. HAZZARD: Your Honor, I would submit that you can  
3 respond appropriately to their question and then refer them  
4 because they do have your charge in the jury room with them  
5 and then refer them to those specific sections. So, respond  
6 appropriately to their question, answer their question as the  
7 Court wishes to do to give them answer and then to refer them  
8 to those particular sections, the charge of armed robbery,  
9 the charge of reasonable doubt.

10 MS. ELDER: Your Honor, I don't know that - I think  
11 it is, there's certainly questions in my mind as to exactly  
12 what they're asking and I think that question could be  
13 interpreted a couple of different ways as far as doubt,  
14 reasonable doubt, if it's doubt he knew before armed robbery  
15 happened or just prior to it happening. I would - I have no  
16 problem with as Mr. Hazzard says to respond by only saying  
17 please see juror instruction A, B and C for the answer to  
18 this question and refer them back to the charge, but I don't  
19 know that it would be appropriate for the Court to say yes or  
20 no because that's a determination that they're going to have  
21 to make based on the charge.

22 THE COURT: All right, then I can just say please  
23 refer to the Court's instructions as to reasonable doubt and  
24 as to armed robbery.

25 MS. ELDER: We'd have no objection to that, Your

1 Honor.

2 THE COURT: Okay.

3 MR. BARR: The Defendant Niles would not object to  
4 that, Your Honor.

5 THE COURT: All right. Let's see. All right, I  
6 wrote, ``Please refer to the Court's instructions for  
7 reasonable doubt and armed robbery.''

8 Now, the next question, ``Can the Defendant be found  
9 guilty of murder and not guilty of armed robbery?''

10 MS. ELDER: Your Honor, my suggestion again if we're  
11 going to be consistent in what we're sending back there I  
12 believe that was covered. I can't remember on what page of  
13 Your Honor's instructions, but I think it was toward the very  
14 end where you indicated there's no - you can find the  
15 Defendant guilty of one, two, one of these charges, both of  
16 these charges, three of these charges and none of them. I  
17 believe that's, without looking at it, was something of that  
18 nature.

19 THE COURT: I guess on that one I would say, ``Please  
20 refer to the Judge's instructions regarding murder'' - well,  
21 let's - let me see. I've got it here.

22 MS. ELDER: Sounds to me like they're asking about  
23 that last page that Your Honor gave as far as the jury  
24 verdict itself.

25 THE COURT: See, I'm not so sure. I'm thinking it

1 might be that. I'm thinking they're also wondering can we  
2 find him guilty of murder if we - if the only grounds of  
3 malice is armed robbery. In this case if they're using armed  
4 robbery to show malice or to infer malice what other basis do  
5 we have? So, I think I'm going to say or I'll get it, refer  
6 to the Court's instructions on murder and jury verdict.

7 MS. ELDER: The State would have no objection to  
8 that, Your Honor.

9 MR. BARR: Your Honor, this is a bit perplexing  
10 because if they're asking whether or not in this particular  
11 case whether or not they would have to say that Mr. Niles was  
12 in the process of robbing Mr. Salter when the death occurred  
13 whether or not they could find him guilty of murder without  
14 saying that he was actually robbing Mr. Salter at that time  
15 ---

16 THE COURT: Well, let me ask the State on that, what,  
17 what do we have in evidence to indicate malice other than the  
18 State's argument that there was an armed robbery?

19 MS. ELDER: There's use of a deadly weapon, Your  
20 Honor.

21 MR. BARR: All right.

22 THE COURT: Okay, yeah, you've got the use of a  
23 deadly weapon.

24 MR. BARR: But again, the weapon is being used in a  
25 robbery.



1 MS. ELDER: Your Honor, if they - Your Honor, they  
2 could very well believe that there was no robbery and there  
3 was some argument between Ervin Moore and the victim and Mr.  
4 Niles jumps in with his gun and starts shooting first. I  
5 mean, they very well can believe that, that it not be armed  
6 robbery at the point of the robbery but that it becomes a  
7 dangerous situation in the use of a deadly weapon or deadly  
8 force.

9 MR. BARR: But there's nothing in the record to  
10 support that. Nobody put up any evidence that said that  
11 happened.

12 MS. ELDER: Well, sure, they did. Ervin Moore said  
13 he got in the car and they got up and said he was trying to  
14 get out of the car, he never had a gun and he was trying to  
15 get out of the car with the dope without paying for it,  
16 that's not an armed robbery if you believe that, it's a  
17 strong arm robbery.

18 THE COURT: Yeah, I agree. I think I'm just going to  
19 put so it's kind of in conformity with the other that,  
20 "Please refer to the Court's instructions regarding murder  
21 and jury verdict."

22 MR. HAZZARD: I would also ask that the jury be  
23 instructed to refer back also to the Court's instructions on  
24 reasonable doubt because they mention a doubt and a doubt  
25 exists.

## Question from Jury

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1 THE COURT: That's on the other question.

2 MS. ELDER: Right.

3 THE COURT: And I put on there to refer to the  
4 instructions on reasonable doubt. So, on the first question,  
5 ``Can the Defendant be guilty of armed robbery if doubt  
6 exists as to his actual knowledge of it prior to the act of  
7 robbery,'' I'm answering by saying, ``Please refer to the  
8 Court's instructions for reasonable doubt and armed  
9 robbery.'' Where it says, ``Can the Defendant be found  
10 guilty of murder and not guilty of armed robbery,'' I'm  
11 putting, ``Please refer to the Court's instructions for  
12 murder and jury verdict.''

13 MR. BARR: Again, Your Honor, I have a concern  
14 because what they're asking is can the Defendant Niles be  
15 found guilty of murder if he didn't go to this scenario with  
16 the intention, if he had no idea that, that Moore is going to  
17 rob Salter then can he be found guilty of murder separate and  
18 apart from that. Again ---

19 THE COURT: Well, I think your argument is is that he  
20 cannot be found guilty of murder unless they also find him  
21 guilty of armed robbery.

22 MR. BARR: Yes.

23 THE COURT: And I don't know that that's the case. I  
24 don't think that's the law.

25 MR. BARR: Well, not necessarily the law but in this

1 particular case is that what the jury is actually asking.

2 THE COURT: Okay.

3 No, I just say let's go with the way I've got it. We'll  
4 do it this way. I'll note your objection to my response, but  
5 I'll go ahead and mark it this way. All right?

6 MR. BARR: Okay.

7 THE COURT: All right, the first one, ``Can the  
8 Defendant be guilty of armed robbery if doubt exists as to  
9 his actual knowledge of it prior to the act of robbery?''  
10 ``Please refer to the Court's instructions for reasonable  
11 doubt and armed robbery.'' Mark that as Court's Exhibit Six.

12 (Whereupon, Court's Exhibit Number Six [Question from  
13 jury] marked.)

14 THE COURT: The next question, can the Defendant be  
15 found guilty of murder and not guilty of armed robbery,  
16 please refer to the Court's instructions for murder and jury  
17 verdict, be Court's Exhibit Seven.

18 (Whereupon, Court's Exhibit Seven [Question from Jury]  
19 marked.)

20 THE COURT: Any objections to me just sending the  
21 notes back in that regard?

22 MS. ELDER: No, sir, Your Honor.

23 MR. HAZZARD: No, Your Honor.

24 THE COURT: All right, Mr. Barr?

25 MR. BARR: Just the earlier objection.

1 THE COURT: Subject, subject to your earlier  
2 objections, all right.

3 All right, if you'd take that back and we'll stay -  
4 stand in recess unless there's another question or if the  
5 jury has - reaches a verdict.

6 MS. ELDER: Thank you, Your Honor.

7 THE COURT: Thank you.

8 OFF THE RECORD

9 (On the record.)

10 (Question from jury at 5:12 p.m.)

11 (Whereupon, the following takes place outside the  
12 presence of the jury.)

13 THE COURT: Thank you very much. Please be seated.  
14 All right, the jury has come back with another question.  
15 States, "What is the definition of aiding and abetting?"  
16 So, I have pulled the definition and my initial information  
17 is just to advise them on the law of aiding and abetting  
18 which states that, "A person who is present at the scene of  
19 the crime and intentionally or through a common plan aided,  
20 abetted or assisted in the commission of that crime through  
21 some overt act is guilty as an accomplice. To be liable as  
22 an accomplice the Defendant must have knowledge of the  
23 principal's criminal conduct. Mere presence at the scene of  
24 the crime is not sufficient to establish guilt as an  
25 accomplice. Intentionally means willfully, intending the

1 result which actually occurs, not accidentally or  
2 involuntarily." That came straight from the charge book.  
3 Anything from the State on - in regards to that response?

4 MS. ELDER: Your Honor, I would, in addition to that  
5 I would also ask the Court to instruct them to also refer to,  
6 in addition to that definition refer to Your Honor's  
7 instruction of hand of one and mere presence, not necessarily  
8 recharge them on those but also just as we did before also  
9 see Court's prior instructions on hand of one and mere  
10 presence because they're so interrelated.

11 THE COURT: All right, anything from the Defense?  
12 I'm inclined to do that, to - the question is just tell them  
13 to refer to that or to bring them back in? Let me hear from  
14 the Defense.

15 MR. HAZZARD: Well, if you intend to send in the  
16 written definition then, you know, they're on the same  
17 standing with all three things. They have the written  
18 definition in writing and then they have the reference to the  
19 charge in writing and that would be appropriate.

20 I would ask simply consideration of should they be  
21 given the definition of what the term overt means.

22 THE COURT: They haven't asked for it. That's why,  
23 why I haven't. So, I'll do that. I've got this written  
24 instruction for aiding and abetting. Let's mark that as  
25 Court's Exhibit Eight.

## Question from Jury

1 (Whereupon, Court's Exhibit Number Eight [Question from  
2 Jury] marked.)

3 THE COURT: I'll send in, in response what is the  
4 definition of adding and abetting, I'll put, "Please refer  
5 to Court's instructions regarding hand of one and mere  
6 presence and attached instructions on aiding and abetting."  
7 Is that sufficient?

8 MS. ELDER: It is from the State, Your Honor.

9 MR. HAZZARD: No objection, Your Honor.

10 MR. BARR: No objection.

11 THE COURT: All right.

12 All right, we'll make this Court's Exhibit Nine.

13 (Whereupon, Court's Exhibit Number Nine [Question from  
14 Jury] marked.)

15 THE COURT: All right, we'll give this to them  
16 There you go. We'll stand in recess till there's another  
17 question or a verdict.

18 MS. ELDER: Thank you, Your Honor.

19 THE COURT: Thank you.

20 OFF THE RECORD

21 (On the record.)

22 (Whereupon, the following takes place outside the  
23 presence of the jury.)

24 (Verdict reached at 5:53 p.m.)

25 THE COURT: Thank you very much. Please be seated.

1 All right, I understand the jury has reached a verdict.  
2 Anything from the State before we bring the jury in?

3 MS. ELDER: No, sir, Your Honor.

4 THE COURT: Anything from the Defendants?

5 MR. BARR: No, sir.

6 MR. HAZZARD: No, sir, Your Honor.

7 THE COURT: All right, I want to caution everybody.

8 This jury has had a very difficult job. There'll be no  
9 displays of emotion one way or the other when the verdict is  
10 received. If you agree with it, keep it to yourself. If you  
11 disagree with it, keep it to yourself because any - I don't  
12 want anything to reflect on this jury because they've had  
13 a very difficult time in dealing with this case.

14 All right, please bring the jury in.

15 (Whereupon, the following takes place in the presence of  
16 the jury.)

17 THE COURT: All right, ladies and gentlemen, welcome  
18 back. Mr. Foreman, has the jury reached a verdict on all  
19 charges as to both Defendants?

20 FOREMAN: We have, Your Honor.

21 THE COURT: All right, if you'd please give the  
22 verdicts to the Clerk or to the bailiff. Thank you.

23 (Complies with request and Court reviews.)

24 THE COURT: All right, all right, I'll ask the Clerk  
25 to please publish the verdicts.

## Verdict

726

1           THE CLERK:       This is indictment number 2008-4119, the  
2     State of South Carolina versus Mokeia Hammond, indicted for  
3     armed robbery, the verdict is guilty.

4           Indictment number 2007-GS-26-3362, State of South  
5     Carolina versus Mokeia Hammond, indicted for murder, the  
6     verdict is not guilty.

7           2008-GS-26-4118, State of South Carolina versus Mokeia  
8     Hammond, indicted for possession of a weapon during the  
9     commission of a violent crime, the verdict is not guilty.

10          This is indictment number 2008-GS-26-4116, the State  
11     versus Richard Bill Niles, Jr., indicted for possession of a  
12     weapon during the commission of a violent crime the verdict  
13     is guilty.

14          This is indictment number 2008-GS-26-4117, the State of  
15     South Carolina versus Richard Bill Niles, Jr., indicted for  
16     armed robbery, the verdict is guilty.

17          This is indictment number 2007-GS-26-3363, the State of  
18     South Carolina versus Richard Bill Niles, Jr., indicted for  
19     murder, the verdict is guilty.

20          David Kahanamoku, foreman, dated this date, March the  
21     13<sup>th</sup>, 2007.

22          Ladies and gentlemen of the jury, is this, if this is  
23     your verdict so signify by raising your right hand.

24          (All jurors raise right hand.)

25          THE CLERK:       Thank you.



1           THE COURT:       All right, any polling of the jury by the  
2 State?  
3           MS. ELDER:       None from the State, Your Honor.  
4           THE COURT:       Any from the Defense?  
5           MR. BARR:        Yes, Your Honor, we'd ask the jury be  
6 polled.  
7           THE COURT:       All right, Mr. Hazzard, do you request a  
8 polling of the jury?  
9           MR. HAZZARD:     Yes, Your Honor.  
10          THE COURT:       All right, let's poll the jury as to both  
11 Defendants.  
12          THE CLERK:       When I call your name please stand. I'll  
13 ask you two questions. After you answer, please be seated.  
14          David P. Kahanamoku, is this your verdict?  
15          MR. KAHANAMOKU:   Yes, ma'am.  
16          THE CLERK:       Is it still your verdict?  
17          MR. KAHANAMOKU:   Yes, ma'am.  
18          THE CLERK:       Thank you.  
19          Linda L. Rivers, is this your verdict?  
20          MS. RIVERS:       Yes, ma'am.  
21          THE CLERK:       Is it still your verdict?  
22          MS. RIVERS:       Yes, ma'am.  
23          THE CLERK:       Thank you.  
24          Leanora A. Webster, is this your verdict?  
25          MS. WEBSTER:      Yes, ma'am.

## Polling of Jury

1 THE CLERK: Is it still your verdict?  
2 MS. WEBSTER: Yes, ma'am.  
3 THE CLERK: Thank you.  
4 Sandy Espinal, is this your verdict?  
5 MS. ESPINAL: Yes, ma'am.  
6 THE CLERK: Is it still your verdict?  
7 MS. ESPINAL: Yes, ma'am.  
8 THE CLERK: Thank you.  
9 Bryan Shriver, is this your verdict?  
10 MR. SHRIVER: Yes, ma'am.  
11 THE CLERK: Is it still your verdict?  
12 MR. SHRIVER: Yes, ma'am.  
13 THE CLERK: Thank you.  
14 Kevin Boatwright, is this your verdict?  
15 MR. BOATWRIGHT: Yes, ma'am.  
16 THE CLERK: Is it still your verdict?  
17 MR. BOATWRIGHT: Yes, ma'am.  
18 THE CLERK: Thank you.  
19 Meghan - never mind.  
20 Chellen Butler, is this your verdict?  
21 MS. BUTLER: Yes, ma'am.  
22 THE CLERK: Is it still your verdict?  
23 MS. BUTLER: Yes, ma'am.  
24 THE CLERK: Thank you.  
25 Donna Lagore, is this your verdict?

1 MS. LAGORE: Yes, ma'am.  
2 THE CLERK: Is it still your verdict?  
3 MS. LAGORE: Yes, ma'am.  
4 THE CLERK: Thank you.  
5 Mary Brockmeier, is this your verdict?  
6 MS. BROCKMEIER: Yes, ma'am.  
7 THE CLERK: Is it still your verdict?  
8 MS. BROCKMEIER: Yes, ma'am.  
9 THE CLERK: Thank you.  
10 Warren Kemp, is this your verdict?  
11 MR. KEMP: Yes, ma'am.  
12 THE CLERK: Is it still your verdict?  
13 MR. KEMP: Yes, ma'am.  
14 THE CLERK: Thank you.  
15 Martyce Lewis, is this your verdict?  
16 MS. LEWIS: Yes, ma'am.  
17 THE CLERK: Is it still your verdict?  
18 MS. LEWIS: Yes, ma'am.  
19 THE CLERK: Thank you.  
20 Randolph Conrad, is this your verdict?  
21 MR. CONRAD: Yes, ma'am.  
22 THE CLERK: Is it still your verdict?  
23 MR. CONRAD: Yes, ma'am.  
24 THE CLERK: Thank you.  
25 THE COURT: Ladies and gentlemen of the jury, I want

1 to sincerely thank you for your service in this case and for  
2 you service as jurors this week. This concludes your service  
3 not only for this case but for this week and I want to thank  
4 you for your service in this case. We could not function as  
5 a court without you. We could not resolve these matters  
6 without you and this is the way our judicial system works and  
7 I want to thank you for your participation and your  
8 willingness to serve. I know it's not easy. I know it's not  
9 convenient but you have certainly fulfilled a very vital and  
10 important service to this state, to this community, to this  
11 county, and I want to thank you for your service. You're  
12 free to go and please have a nice remainder of the day and a  
13 nice weekend. You're free to go at this time.

14 (Jury exits courtroom.)

15 THE COURT: All right, any post-trial motions at this  
16 time?

17 MS. ELDER: None from the State, Your Honor.

18 MR. HAZZARD: At this time, Your Honor, on behalf of  
19 Defendant Hammond I would make a motion for a new trial. It  
20 seems that the form of the verdict is somewhat inconsistent.  
21 My understanding of the Clerk's reading of the verdict is  
22 that the jury found her guilty of armed robbery but not  
23 guilty of murder and not guilty of possession of a firearm.  
24 It seems somewhat inconsistent in that in order to find her  
25 guilty of an armed robbery based on the judge's instructions

1 they would have to find that there was a plan or a scheme to  
2 commit the robbery. So, they're saying based on the way I  
3 understand it that there was a plan to commit an armed  
4 robbery and during the commission of the armed robbery a  
5 death occurs which then kicks in the whole issue of the hand  
6 of one and the hand of all, hand of one is the hand of all  
7 and the felony murder rule. So, I would submit it seems  
8 inconsistent, to me it's an inconsistent verdict almost as if  
9 they reached a compromise that we'll find her guilty of armed  
10 robbery but not of murder, and as a compromise verdict I  
11 would submit that it would need to be set aside by this Court  
12 and a new trial ordered.

13 THE COURT: All right, let me hear from the State on  
14 that.

15 MS. ELDER: Your Honor, in reference to inconsistent  
16 verdicts the rule of inconsistent verdicts was abolished back  
17 in State v. Alexander, that was a 1991 case, 303 SC 377 and  
18 401 SE2d 146. It was then again restated back in State  
19 versus Nichols, 325 SC 111, 41 SE2d 118 and in State versus  
20 Garrett, 350 SC 613, 567 SE2d 523. Of course, the State's  
21 position is I do not think these are inconsistent verdicts.  
22 I think it is very plausible that they could have had enough  
23 evidence to attribute her to the armed robbery but not have  
24 found her guilty of hand of one with the murder. I think  
25 that's very plausible.

1           THE COURT:       I agree with that, but how do you get  
2 guilty of armed robbery but not guilty of possession of  
3 a weapon during the commission of a violent crime?

4           MS. ELDER:       Your Honor, I think it's very plausible  
5 to consider that - I'm sorry, Your Honor, let me get to the  
6 charge itself, that they were in possession of a firearm or  
7 displayed a firearm during a violent crime, they may very  
8 well find out that she, in fact, thought there was an armed  
9 robbery and they just didn't get it to the point, Your Honor,  
10 of convicting her. It sounded like to me that they didn't  
11 get her to point of convicting her with the murder and the  
12 weapon, but again, even if the Court concludes that it is an  
13 inconsistent verdict, those cases that I have cited certainly  
14 indicate that that is not a basis for a new trial and based  
15 on ---

16          THE COURT:       What do those cases say?

17          MS. ELDER:       Your Honor, they - it says that,  
18 especially in Alexander it says that, "We're abolishing the  
19 rule prohibiting inconsistent verdicts in this state," and  
20 those were cases requesting new trials indicating that very  
21 rarely, when they set this aside they, in their dicta they  
22 said that very rarely is this ever a grounds in the past for  
23 a new trial and because of that and because of all the  
24 controversy surrounding it they abolished the rule  
25 prohibiting inconsistent verdicts in the state.

1 THE COURT: Oh, I thought you said the subsequent  
2 cases reinstated it.

3 MS. ELDER: Yes - no, no, no, Your Honor, they  
4 restated.

5 THE COURT: Oh, restated Alexander.

6 MS. ELDER: Yes, sir.

7 THE COURT: Okay, okay.

8 MS. ELDER: Garrett and Nichols both cite that being  
9 that inconsistent verdicts is not, is not sufficient to  
10 justify a new trial.

11 THE COURT: All right, all right, have you got those  
12 cases?

13 MS. ELDER: I've only got one copy but I'll be glad  
14 to pass them up, Your Honor.

15 THE COURT: All right, I'll give them back to you.  
16 Let me see it for a second. Thank you.

17 All right, after review of the cases submitted by the  
18 State I deny your motion.

19 Anything else, any other post-trial motions at this  
20 time?

21 MR. HAZZARD: None at this time on behalf of Defendant  
22 Hammond.

23 MR. BARR: None at this time, Your Honor, on behalf  
24 of Defendant Niles.

25 THE COURT: All right, now, in with the verdict forms

1 came a note from the jury that just said, ``We have reached a  
2 verdict.'' I'm going to go ahead and put that as Court's  
3 Exhibit Ten into the record.

4 (Whereupon, Court's Exhibit Ten [Note from Jury]  
5 marked.)

6 THE COURT: All right, anything from the Defense  
7 before we sentence?

8 MR. BARR: Yes, Your Honor, on behalf of Defendant  
9 Niles, Your Honor, like to point out to the Court, also like  
10 to acknowledge the presence of his father. They've been here  
11 most of the week, family members. His mother was a party to  
12 this action and she died last month. So, she's not here. He  
13 has a sister who has been here most of the week and his aunt  
14 and they're here.

15 Your Honor, Mr. Niles, as you probably know quite well  
16 by now, is 25 years old. He has substantially no criminal  
17 record. He, I believe, had one prior conviction for  
18 possession of marijuana. He has worked for Jacobs Plumbing  
19 as an apprentice plumber for a period of time recently. He  
20 has a 12<sup>th</sup> grade education, born in Williamsburg County in  
21 the Trio area and, Your Honor, he's had some difficulties in  
22 life but I would ask that the Court considers every possible  
23 leniency in sentencing Mr. Niles. I acknowledge that he's  
24 made some mistakes. He's made a lot of mistakes. I think  
25 being only 25 years old there's a possibility of redemption



1 in Mr. Niles' situation, and for that reason I would ask the  
2 Court consider giving him the minimal sentence in this case.  
3 Thank you.

4 THE COURT: All right, I'll give everybody an  
5 opportunity to speak a little bit later.

6 Anything, Mr. Hazzard, before and I'll give you an  
7 opportunity to speak a little bit later. I just want to know  
8 if there's any reason as to why we cannot impose sentence at  
9 this time.

10 MR. HAZZARD: No, Your Honor.

11 THE COURT: All right, anything, anything from the  
12 State as to why we cannot impose sentence at this time?

13 MR. RICHARDSON: No, sir, Your Honor.

14 THE COURT: All right.

15 All right, all right, Mr. Barr, I've heard from you. Is  
16 there anything that Mr. Niles would like to say or anybody  
17 want to say anything on his behalf?

18 MR. NILES: Yes, I do, Your Honor, would like to say  
19 something.

20 THE COURT: All right.

21 MR. NILES: First, I would like to apologize for the  
22 accident of Spice, well, better known as Mr. Salter. I truly  
23 admit for the crime that I did for the accident of his death,  
24 but during that time, Your Honor, I was only defending my  
25 family and my life as well, Your Honor, and I commit thee, I

1 honestly admit with all my heart and I apologize deeply to  
2 the Salter's family. I give them my deepest sympathy for  
3 that, and most of all I'm asking them to please forgive me  
4 for the wrong that I've 'did in you all's life and the sadness  
5 that I've caused. I really do ask for forgiveness. In order  
6 for Christ to forgive me I ask that deeply. During the life  
7 that I was living, yes, I was carrying a possession of a  
8 firearm and during that time I did not had Christ in my life,  
9 but for the two years that I did did in J. Reuben Long my  
10 life has really been changed around, and I can really and  
11 honestly I thank God for the two years that I did in J.  
12 Reuben Long because even though I lost my mother during that  
13 time, you know, God said hisself he say he will pull the  
14 closest thing from you to draw you near back to him, you  
15 know, and I come today, you know, asking for sympathy and,  
16 yes, I am asking for mercy upon my life like how Israel  
17 called out for mercy, the mercy that God showed them in  
18 Israel, and I ask truly to please have mercy upon me. Yes,  
19 sir, like I said before I was wrong for the crimes that I did  
20 in the future, in the past, but I ask please, please allow me  
21 to see daylight again, sir.

22 THE COURT: All right, sir, anybody want to say  
23 anything on your behalf?

24 MR. NILES: Yes, Judge, Your Honor, my name is  
25 Minister Niles.

1           THE COURT:       If you'd please come around forward  
2 please?

3           REVERAND NILES:       Yes, Judge, Your Honor, my name is  
4 Minister Niles.

5           THE COURT:       Yes, sir.

6           REVERAND NILES:       And this is my baby boy and he never  
7 give me no trouble and I can say to Richie he's a good, he's  
8 a good young guy. He's a good young man. He's a likeable  
9 person in the community, out of the community. I sings  
10 gospel all over and people always ask me where I'm going,  
11 ``When are Richie coming to join your group.'' I say,  
12 ``Well, he's incarcerated now, but just as soon as God say so  
13 he will,'' and I'm asking the Court this afternoon to have  
14 mercy upon Richie sentence that you're giving out this  
15 afternoon. May God bless Richie, stay with the Lord, God  
16 bless each and every one of you in this courtroom and I want  
17 to ask the Salter's family forgive us for this accident what  
18 happened as we continue and go on with a new life ahead of  
19 us. God bless you and have mercy upon him this afternoon,  
20 please, sir.

21           THE COURT:       All right, thank you very much.  
22           Anybody else?

23           MS. WILLIAMS:   My name is Pastor Verdie L. Williams and  
24 I want to say to the Court this afternoon Richie my nephew is  
25 a good boy and I know some of you are probably expecting me

## Sentencing

1 to say that, but I have a lot of nephews, but it always have  
2 been something special about Richie, and I know Richie was  
3 saved but he went back in the world because he got saved  
4 under me during the time that he have been seeking the Lord.  
5 I'm the pastor of Powerhouse of God Ministry. I have founded  
6 three churches, overseer over the other two and the pastor  
7 over one, and I'm asking the Court this evening to please  
8 have mercy upon Richie's life, please. They have been  
9 through a lot because the mother died to an auto accident on  
10 the 10<sup>th</sup> of January and that was very hard for them and to  
11 the Salter's family you all have my condolences. I know your  
12 heart is still heavy. I can understand that. It was an  
13 accident but I'm asking you all to forgive Richie, please.  
14 When you all been going through you all's troubles I've been  
15 praying for you all because I can imagine how it was. I've  
16 never been there but I can imagine how it was. So, Judge,  
17 I'm just asking you to please, sir, have mercy upon his life  
18 this evening and I want to say to the juror, thank God for  
19 you all. You all had a hard time, but I know you all reach  
20 what you all had to do. God bless you all.

21 THE COURT: Thank you, ma'am.

22 Anybody else on behalf of Mr. Niles?

23 (No response.)

24 THE COURT: All right, Mr. Hazzard, anything you  
25 would like to say? Anything in mitigation before I impose

1 sentence on your client?

2 MR. HAZZARD: Your Honor, as the Court well knows  
3 Mokeia is 21 years old. She was 19, and actually she's 20  
4 years old because her next birthday is in April. She was 19  
5 when this incident, or later this month, but she was 19 when  
6 this, when this incident occurred, Your Honor. She has, she  
7 has, she is a high school dropout, Your Honor, and I asked  
8 her when I spoke with her about it. I said, ``Why did you  
9 drop out of high school,'' and she said, ``I don't know, just  
10 doing what other kids were doing,'' simple as that.

11 She is an extremely intelligent young lady. Once she  
12 figured out that you can't get far in life as a high school  
13 dropout, she immediately went to work and has held a series  
14 of different jobs. At the time this incident occurred she  
15 was a desk clerk at a hotel at the beach.

16 From the day she left high school she has always been  
17 employed in some form or fashion. She has never been a  
18 deadbeat or anything like that. As the Court well knows,  
19 Mokeia has absolutely no prior record whatsoever not even as  
20 a juvenile, never been in trouble with the law one day, Your  
21 Honor, but I think that I won't refer to Mr. Niles as a bad  
22 influence. I think both of them got caught up into a  
23 lifestyle, what I refer to as a rap music video, you know,  
24 living fast and selling drugs and things of that nature and  
25 thinking that that was the way to get ahead, and a lot of

## Sentencing

1 times as the Court well knows children are too smart for  
2 their own good by half and I think that's what happened here.  
3 Based on the minimal if any role that she played in this  
4 event, based on her age, based on the fact that she has no  
5 prior record whatsoever, Your Honor, we would respectfully  
6 ask for the minimum sentence and any and all mercy that the  
7 Court can give. I know that her mother and other family  
8 members are present, and if the Court sees fit I would ask  
9 that they be allowed to address the Court if they, if they so  
10 wish.

11 THE COURT: All right, I'll hear from your client or  
12 anyone that wants to speak on her behalf.

13 MR. HAZZARD: My client indicates that she is not  
14 emotionally in a state where she can address the Court, Your  
15 Honor.

16 THE COURT: All right, does anyone want to speak on  
17 her behalf?

18 MR. HAZZARD: This is her mother, Your Honor.

19 THE COURT: All right, please give me your name.

20 MS. HAMMOND: Melinda Hammond.

21 THE COURT: All right, Ms. Hammond.

22 MS. HAMMOND: I just want to say that I love my  
23 daughter very much and I know, you know, things been bad for  
24 both of them in their life, you know, lifetime, but she's a  
25 very smart girl, and you know, I appreciate her, you know,

1 for who she is and I would just like the Court to be, you  
2 know, lenient on her because she's, she's a good person, you  
3 know, just like Mr. Hazzard was saying she has some good  
4 qualities in her life and some of the good decisions she made  
5 in her life and I was behind her one hundred percent and some  
6 of them, you know, I wasn't but I still love her for who she  
7 is and I just want to thank the Court, sorry for the family  
8 over here, and I thank the jury for what they have done and I  
9 just want to have mercy on her, please, sir. Thank you.

10 THE COURT: Thank you very much.

11 All right, anybody else want to speak on behalf of the  
12 Defendants?

13 (No response.)

14 THE COURT: All right, do the victims or anybody on  
15 the victim's behalf want to say anything?

16 MR. RICHARDSON: Your Honor, I'll begin with a very  
17 short address and then I believe we do have a couple of  
18 members of James' family who wish to address the Court.

19 THE COURT: All right.

20 MR. RICHARDSON: Your Honor, on April 9<sup>th</sup>, 2007, James  
21 Salter was 24 years old. He will always be 24 years old. He  
22 won't draw another breath, won't celebrate another birthday.

23 The family doesn't come here nor does the State seeking  
24 retribution. They wanted justice and we appreciate the  
25 jury's service in this, Your Honor.

## Sentencing

1           With regard to Ms. Hammond, she was young. She was 19.  
2 Your Honor, 19 is an adult in the eyes of the law. 19 is an  
3 adult in the eyes of all of our government. 19 year olds  
4 are expected to have jobs. 19 year olds are expected to know  
5 what they're doing, and here she chose to lead the fast and  
6 dangerous lifestyle that she was living, chose to be with Mr.  
7 Niles, sat there right beside him as he planned that armed  
8 robbery. She drove him to the scene. At any time she could  
9 have got out of the car but she chose not to. She chose to  
10 drive away from that scene. She chose to hide the car so as  
11 to hide out with Mr. Niles afterwards until they were  
12 arrested.

13           Your Honor, with respect to Ms. Hammond, the State would  
14 just seek a sentence that shows justice.

15           With regard to Mr. Niles, once again, nothing is going  
16 to bring James Salter back. This was a senseless, senseless  
17 crime. James Salter was killed over one pound of marijuana,  
18 600, \$1500 worth of marijuana. That was the value of his  
19 life to these Defendants. Your Honor, the State just asks  
20 for a sentence that takes that into consideration, the  
21 senselessness of this crime, the value that was placed on  
22 human life in regard to this crime.

23           THE COURT: All right, I'll hear from anybody on the  
24 victim's behalf.

25           MR. RICHARDSON: Your Honor, this is James' father.



1           THE COURT:       All right, sir, your name.

2           MR. RICHARDSON:   Ricky Salter.

3           MR. SALTER:       Richard Salter, Your Honor, James'  
4 father.

5           THE COURT:       All right, all right, Mr. Salter.

6           MR. SALTER:       Your Honor, I'm going to do my best to  
7 convey to you the impact James' death has made on all of us.  
8 Please understand that we'll never be able to righteously  
9 describe the feelings of pain that and loss that we have all  
10 been trying to live with since April 9<sup>th</sup> of 2007, but I'll do  
11 my best.

12           James is in this room here today. He's in each of us  
13 sitting here and he's in our hearts and our souls and  
14 everywhere we go. He's here to see that we carry out the  
15 process of justice for him. We speak on behalf of James  
16 Michael Salter, the solicitors, the people that present the  
17 evidence, the evidence itself all speak for him. The jury  
18 and the victims' advocate speak for James. In a sense I am  
19 speaking for James, the void in all of our lives from the  
20 loss of James will never be filled. The pain is  
21 indescribable, but with time the degree of pain does change.  
22 Instead of hurting constantly it now just hurts most of the  
23 time. The dark cloud of pain weighs us down. The pain is  
24 real, both physical and mental. Our family is not whole any  
25 longer and despite our efforts will never be again.

1        My daughter, I'd like to speak for her, and she says  
2        that, ``James was and will always be my big brother.'' This  
3        is on behalf of Jessica. ``To know that someone could  
4        actually murder my only brother, my dad's only son is  
5        sickening to know that someone killed a man with such an  
6        amazing personality, a man with the biggest grin in the world  
7        and a man who is loved by so many makes me physically ill.  
8        It shows me that they did not know the James I knew, that we  
9        all knew. It also shows me how pathetic and disgusting  
10       people can be.

11       On April 9<sup>th</sup>, 2007, our lives became a never-ending  
12       nightmare, to see and hear my dad say that James had been  
13       shot and killed it was unbearable. I felt anger,  
14       frustration, sadness and loss and I still do. I was 16 at  
15       the time of his death. My sister had just turned 18.  
16       Teenagers should be focused on school, not their brother's  
17       murder investigation. Having to actually go to therapy was  
18       embarrassing for me but I saw no other option. I thought it  
19       would help relieve the pain. I learned nothing will ever  
20       make this situation better. The entire truth will never be  
21       heard because my big brother isn't here to tell it. This is  
22       not reversible even though so many of us have prayed for just  
23       that. I cannot tell you how many times I've asked for my  
24       brother back. Of course it will never happen. A lot of  
25       things will never be the same. My father, Richard Salter,

1 will never be the same. He is mentally, physically,  
2 emotionally drained and I see how this has affected him every  
3 day. He is not the same person he was when his son was  
4 alive. My dad is a very respectable and honorable man and it  
5 kills me to see him in such horrendous pain. He doesn't  
6 deserve it, just like James did not deserve to be killed.

7 It's very hard to listen to all the lies and bite my  
8 tongue but it will make no difference if my voice is heard.  
9 What is done is done, and all I ask for is the respect that  
10 James deserves, the respect he was not given on April 9<sup>th</sup>,  
11 2007. My brother is James Michael Salter and I am honored to  
12 be his little sister and be able to speak on behalf of him."

13 Sir, I have watched my wife, Susan, and my two  
14 daughters, Jennifer and Jessica, suffer through this loss.  
15 Jennifer and Jessica have struggled to finish high school.  
16 They have delayed starting college as previously planned  
17 because they're trying to deal with the grief. They have  
18 both attended therapy to try to learn how to lessen the pain.  
19 Susan has been hospitalized twice with stress induced  
20 symptoms that have been severely aggravated by James' murder.  
21 I myself have spoken with counselors to help me cope with the  
22 loss of my son.

23 I find it difficult to see the joy life had prior to  
24 losing James, but this pain is not confined to just our  
25 family. His co-workers have and still express their sympathy

1 and grief whenever I see them at Costco. His friends often  
2 let me know how much he is still missed by them and everyone  
3 who happened to cross paths with James. James lost his life.  
4 That is forever. His death was undeserved and disrespectful.  
5 We will not get to see him grow into the great man he was  
6 destined to be had he been given a chance.

7 Had he been given a chance to change, that chance was  
8 taken away from him, sir. James Michael was my only son, my  
9 daughter's only brother. We lost a grandson, an uncle and a  
10 nephew and we all lost a friend, sir. I just ask that you do  
11 what you feel is right.

12 MR. RICHARDSON: Your Honor, we have one more.

13 THE COURT: All right.

14 MR. RICHARDSON: It's James' big sister.

15 THE COURT: Ma'am, your name?

16 MS. WOLD: Elaine Wold.

17 THE COURT: Elaine?

18 MS. WOLD: Wold.

19 THE COURT: Wold?

20 MS. WOLD: Wold, W-O-L-D.

21 THE COURT: All right.

22 MS. WOLD: Your Honor, first of all I would like to  
23 thank you for taking the time to listen to us today. There  
24 are no words that can explain ---

25 MR. RICHARSON: Your Honor, Ms. Wold just asks that I

1 read this for her.

2 THE COURT: All right.

3 MR. RICHARDSON: ``There are no words that can explain  
4 the pain that our family has endured since April 9<sup>th</sup>, 2007.  
5 On that terrible night my mom and dad received the worst  
6 phone call any parent can possibly get. They were told that  
7 their only son, my little and only brother, was shot and  
8 didn't make it. I was four and a half months pregnant at the  
9 time with James's niece that will never get to meet the uncle  
10 that my other three children and my niece have grown up,  
11 grown to love and adore.

12 The kids ask us all the time why Uncle James died.  
13 Thank God they understand as best as any eight year old and  
14 six year old can that he is in heaven watching over all of us  
15 that love him so much. When we go to my mom's we get to see  
16 him in the family room watching over everyone, make sure all  
17 of us are safe. James spent his last Christmas with us, with  
18 all of us in Minnesota. We thank God every day that we were  
19 able to spend that time with him. We've learned that we need  
20 to cherish every moment that we have with each other because  
21 we never know when our loved ones are going to be taken from  
22 us forever. My mom and I talk about James and our memories  
23 of him almost every day. Our lives are not complete without  
24 him. There's a constant pain in our chest that just is  
25 impossible to explain. Everything reminds us of the loss

1 that we have suffered through. We've cried about his death  
2 over and over again in the past two years and I am confident  
3 that those tears will not stop anytime soon.

4 We are a very close family and now we are missing a very  
5 important link to make us complete. James made some  
6 mistakes, and they cost him the ultimate price, his life.  
7 The James that we all knew was a very loving, respectful,  
8 honest, not afraid to give you a hug or say, "I love you  
9 mom," and he loved his family very much. Life without his  
10 smile, his bright blue eyes and hearing his voice on the  
11 phone leaves an empty feeling in our hearts. James Michael  
12 Salter is our son, our brother, uncle and grandson and he  
13 will be forever missed."

14 THE COURT: Anyone else want to speak on behalf of  
15 the victim?

16 MR. RICHARDSON: No, sir, Your Honor.

17 THE COURT: All right, with regard to Mr. Niles, any  
18 prior record?

19 MR. RICHARDSON: Your Honor, neither Defendant has any  
20 prior record.

21 THE COURT: All right, Mr. Niles, Ms. Hammond, if you  
22 would please stand.

23 (Complies with request.)

24 THE COURT: All right, Mr. Niles, on the charge of  
25 murder the sentence of the Court is that you be confined to

1 the State Department of Corrections for a period of 30 years.  
2 You'll be given credit for time served. On the charge of  
3 armed robbery, the sentence of the Court is that you be  
4 confined to the State Department of Corrections for a period  
5 of 30 years, be given credit for time served, and on the  
6 charge of possession of a weapon during the commission of a  
7 violent offense the sentence of the Court is that you be  
8 confined to the State Department of Corrections for five  
9 years, be given credit for time served and these sentences  
10 will run concurrently.

11 Ms. Hammond, on the charge of armed robbery the sentence  
12 of the Court is that you be confined to the State Department  
13 of Corrections for a period of 15 years. You'll be given  
14 credit for time served.

15 MS. ELDER: Thank you, Your Honor.

16 MR. RICHARDSON: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. BARR: Thank you, Your Honor.

19 (Adjourned.)

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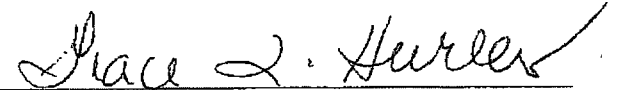
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## C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the trial held in the case of The State versus Mokeia Hammond and Richard Bill Niles, Jr., held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on March 9 through 13<sup>th</sup>, 2009.

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



Grace L. Hurley, CVR-CM

Official Reporter

July 23, 2009.



STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

APPELLANT

---

FINAL BRIEF OF APPELLANT

---

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STATEMENT OF ISSUES ON APPEAL

Whether the court erred by refusing to charge voluntary manslaughter based on evidence appellant was shot at and returned fire where the court incorrectly reasoned that appellant was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive?

STATEMENT OF THE CASE

Appellant was indicted at the August 23, 2007 term of the Horry County Grand Jury for the offenses of murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 766 -777. His case was called to trial on March 9, 2009, before the Honorable Benjamin H. Culbertson and a jury. R. 1.

Appellant was tried together with co-defendant Mokeia Hammond. Verdell Barr represented appellant. Ron Hazzard represented co-defendant Hammond. Donna Elder and Brad Richardson were the assistant solicitors. R. 1.

On March 13, 2009, jury found appellant guilty on all three counts. The jury found co-defendant Hammond not guilty on the charge of murder, guilty of armed robbery and not guilty on the charge of possession of a weapon during a violent crime. R. 741, ll. 1-19.

Judge Culbertson sentenced appellant to thirty years imprisonment for murder, thirty years imprisonment for armed robbery and five years imprisonment for possession of a weapon during the commission of a violent crime. The judge sentenced co-defendant Hammond to fifteen years imprisonment for armed robbery. R. 763, l. 24 – 764, l. 14.

This appeal follows.

### ARGUMENT

The court erred by refusing to charge voluntary manslaughter based on evidence appellant was shot at and returned fire where the court incorrectly reasoned that appellant was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive.

#### **Relevant Facts**

Myrtle Beach Police Officer Ryan Wood responded to a “shots fired call” on April 9, 2007, in the “Coastal Grand Mall area.” R. 152, l. 1 – 153, l. 10. The shooting occurred in the parking lot near the Best Buy. R. 153, l. 11 – 154, l. 5.

Wood found the decedent “slumped over the driver’s seat.” R. 156, l. 22 – 157, l. 4. The decedent was able to tell Wood his name, and “he was kind of going in and out of consciousness.” The decedent told Wood he had been shot by “a couple of black dudes.” R. 157, ll. 8-19.

On cross-examination, Wood acknowledged that the decedent never said “Rich Boy,” appellant’s nick name, shot him. Neither did he say: “Mokeia Hammond shot me.” R. 168, ll. 10-13. The obvious import of this, as defense counsel later argued, was that this case involved a drug deal where appellant knew the decedent, and that appellant would not have planned an armed robbery in broad daylight near the Best Buy. Further, the decedent would have named appellant as the shooter to Officer Wood if he thought appellant had shot him. The defense evidence, as will be seen infra was that alleged accomplice Ervin Moore decided to turn a “normal drug deal” into a robbery attempt without the knowledge of appellant. R. 652, l. 2 – 653, l. 21.

Ervin Moore pled guilty to voluntary manslaughter “and robbery and gun possession” as an accomplice in this case. R. 391, l. 13 – 392, l. 1. Moore was originally charged with murder and armed robbery. R. 392, ll. 2-21.

Moore said on April 9, 2007, he was at a store in Trio, South Carolina “a little boring little town from where my family is from. So, I got in the car with them [appellant and Hammond and] came to the beach.” Hammond apparently was driving. R. 394, ll. 13-20.

Moore said on the way to the beach appellant “made a couple of drug sales at a couple of motels.” Moore claimed: “We were smoking blunts in the car and while we [were] riding on the beach we were smoking blunts. We ran out of weed and we said [decided] we wanted to get some more weed. R. 394, l. 21 – 395, l. 2. Moore maintained appellant “made a couple of phone calls” and we “ended up in the Best Buy parking lot.” R. 395, l. 4-7.

Moore claimed he did not know who appellant was talking to on the phone. R. 395, ll. 3-21. Moore also maintained appellant said “he was going to do a lick.” R. 395, ll. 23-24. Moore said he understood this meant they were going to rob the drug dealer. R. 396, ll. 1-18.

Moore said when they got to the Best Buy he “got out of the car and got in the other car, the white mustang [the decedent’s car]” R. 397, ll. 3-6. Moore testified his job was “to identify the weed” for appellant. R. 397, ll. 3-16.

Moore said the decedent pulled the marijuana out from under his seat so Moore could see it. R. 397, ll. 20-22. Moore stated the pound of marijuana which was in a “big Ziploc bag.” R. 398, ll. 2-7.

Moore said after he inspected the marijuana he got out of the decedent's car and got back into the car with Hammond. Appellant was outside the car at this time. R. 398, ll. 8-23. Moore said he informed appellant he had seen the drugs, and "the next thing I knew I just heard two shots and I seen Richard [appellant], he jumped back in the back seat behind Mokeia. He didn't go in the front seat. He jumped in the back seat where I was at." R. 399, l. 1 – 400, l. 2.

Moore maintained: "[A]fter he [appellant] jumped in, after them two shots then the other guy fired a shot and he fired a shot between, I mean, through the driver's door on Mokeia's car." R. 400, ll. 3-6. Moore said "everybody was shook up . . . stunned. Then after that Richard shot some more and then he shot some more, I mean, by the, by the victim shooting he shot the back window out where I was sitting at and glass went, a piece of glass flew in my eye." Moore stated that at this point Hammond drove out of the parking lot with much of the glass shot out. R. 400, ll. 3-25.

Moore claimed on direct-examination that "the other guy didn't shoot until after Richard shot." R. 403, ll. 3-4. On cross-examination by defense counsel Barr Moore admitted that he lied to the police about the shooting. R. 423, ll.12-14. Moore acknowledged he told the police: "I didn't see Richard shoot first." Moore said he was testifying appellant shot first "because Richard told me he shot first when he jumped back in the car." R. 429, l. 6 – 430, l. 5.

Moore also said appellant had a couple hundred dollars with him from drug sales that day. At the same time, Moore alleged appellant set up the drug robbery. R. 431, ll. 1-13.



Appellant testified in his own defense. He said he had “no reason” to attempt to rob the decedent for marijuana. He denied he told either Hammond or Moore that “we’re going to do a lick.” R. 561, ll. 18-20.

Appellant testified that Moore asked him to attempt to purchase “a pound” of marijuana for him. R. 558, ll. 6-21. Appellant said he spoke to the decedent and planned to meet him at the Best Buy. R. 564, l. 25 – 567, l. 17.

Appellant recalled that Moore got out of his car and got into the car with the decedent. Appellant said he was talking with Hammond about their upcoming wedding. Hammond suddenly told him, “Baby, they are fighting.” Appellant said he looked over and saw “they were tussling in the car.” Appellant said he noticed Moore trying to get out of the car and he heard the decedent say, “You ain’t getting out of this car with my weed without no money.” R. 568, l. 11 – 569, l. 24.

Appellant remembered Moore then jumped back into his car, and “I seen him pull out a gun.” [T]hat’s when he [the decedent] started firing off as Ervin was jumping in the back seat and when he pulled the door that’s when he was shooting in, he was shooting in the car.” Hammond was screaming while these shot were fired at them, “So, while he was shooting in the car, yes, I did have a gun. So, I grabbed my, I grabbed my pistol and that’s when I shot two times. My eyes was closed. I wasn’t even looking. I shot two times. I went pow, pow. I wasn’t trying to hit nobody.” R. 568, l. 11 – 569, l. 24. Appellant was being shot at “constantly,” and he shot back. R. 569, l. 25 – 570, l. 9.

Defense counsel Barr argued in closing that appellant and “Mr. Salter [the decedent] know each other. They’re engaged in a business where they’re making money. There’s no logical reason Niles would screw that up . . . Counsel also argued, “[I] don’t think that Niles

went to the Best Buy Parking lot with any intention to harm Salter [the decedent] or anyone else in any way and I don't think the evidence has pointed to it." R. 652, l. 2 – 653, l. 21.

Counsel for co-defendant Hammond complained about the jury verdict finding her guilty of armed robbery where the jury acquitted her of murder thereby finding the homicide was not the natural consequence of a planned robbery under the principle of the "hand of one is the hand of all." He moved for a new trial on that basis. The judge refused to grant a new trial noting that inconsistent verdicts did not entitle Hammond to a new trial. R. 746, l. 15 – 748, l. 18.

### **Request to charge**

The judge agreed to charge self-defense. Defense counsel Barr also requested that the judge charge the jury on voluntary manslaughter based on evidence the decedent shot at him and he shot back. R. 637, l. 10 – 638, l. 5. The judge ruled he was not going to charge voluntary manslaughter, and he reasoned that "either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting or killed the victim during the commission of an armed robbery."<sup>1</sup> R. 638, ll. 6-13.

### **Discussion**

"It is well settled that self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence." State v. Wiggins, 330 S.C. 538, 549 n. 18, 500 S.E.2d (1998); State v. Nichols, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); State v. Gilliam, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988).

The rationale for this rule is that the jury may fail to find all of the elements for self-defense but still find a sufficient legal provocation and heat of passion to conclude the defendant was only guilty of voluntary manslaughter. See, State v Gilliam, 296 S.C. at 396-397, 373 S.E.2d at 597. It is elementary that a person is going to be in fear when they are being shot at and fear can constitute a basis for heat of passion to support a voluntary manslaughter instruction. State v Wiggins, 330 S.C. at 549, 500 S.E.2d at 495.

Here, defense counsel correctly argued that appellant being shot at provided the heat of passion and sufficient legal provocation necessary for voluntary manslaughter. The judge erred by reasoning appellant either shot back at the decedent in self-defense, and that the jury could acquit him by reason of self-defense based on that evidence, or the jury could only find him guilty of murder based on the planned armed robbery. See State v Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). Appellant is entitled to a new trial.

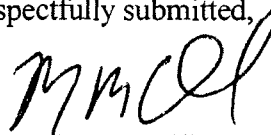
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<sup>1</sup> Defense counsel asked for an instruction on involuntary manslaughter. However, since appellant said he shot back intentionally he was not entitled to that instruction and it is not an issue on appeal.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RMCD', is written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

August 23, 2010

## CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 23, 2010



---

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

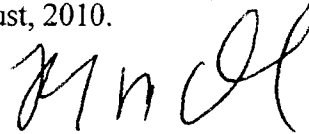
APPELLANT

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CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendon J. McDonald, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 23rd day of August, 2010.

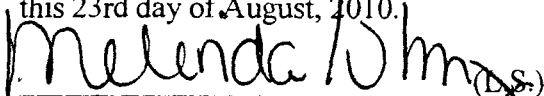



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 23rd day of August, 2010.



Notary Public for South Carolina

My Commission Expires: October 30, 2018

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

APPELLANT

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**QUESTION PRESENTED**

- I. Whether the trial court erred in declining to charge voluntary manslaughter where there was evidence Appellant was initially fired upon after which, he returned fire?

## INTRODUCTION

On April 9, 2007, James Salter was shot in a Best Buy parking lot in Myrtle Beach. (R. 153, 172). He later died from his injuries. (R. 534-35). Appellant, Richard Niles, his fiancé, Mokeia Hammond and a third party, Ervin Moore, were charged with murder, armed robbery and possession of a firearm during the commission of a violent crime. (R. 118, 392). Appellant and Hammond invoked their respective rights to trial by jury, while Moore pled guilty to charges of voluntary manslaughter, robbery and possession of a firearm during the commission of a violent crime.<sup>1</sup> (R. 16, 391-93). Appellant was convicted on all charges while Hammond was convicted of armed robbery.<sup>2</sup> (R. 741).

## STATEMENT OF THE CASE

Niles ("Appellant") was indicted during the August 2007 and October 2008 terms of court pursuant to indictment numbers: 2007-GS-26-3362 (murder), 2008-GS-26-4118 (possession of a firearm during the commission of a violent crime) and 2008-GS-26-4119 (armed robbery). (R. 773-77). On March 9, 2009, Appellant and Hammond's cases were called to trial before the Honorable Benjamin H. Culbertson. (R. 16). Appellant was represented by Verdell Barr. Four days later, Appellant was convicted of murder, armed robbery and possession of a firearm during the commission of a violent crime. (R. 744). Appellant received a thirty (30) year sentence for both the murder and armed robbery charges, in addition to a five (5) year sentence for the weapons charge, all to be served

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<sup>1</sup> The terms of Moore's plea agreement allowed him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Appellant and Hammond. (R. 391).

<sup>2</sup> Hammond was acquitted on the charges of both murder and possession of a firearm during the commission of a violent crime. (R. 741).

concurrently. (R. 764). Thereafter, on March 19, 2009, Appellant filed a timely Notice of Appeal.

### STATEMENT OF THE FACTS

At trial, the State painted the picture that Appellant and Hammond, who were tried jointly, acted as a modern-day Bonnie and Clyde, with Hammond as the getaway driver and Appellant as the robber. (R. 123). In support of this theory, the State offered Ervin Moore's testimony, who stated Appellant, shortly before the robbery, announced to the trio, "we're going to do a lick<sup>3</sup>" which Moore understood to mean, "we're going to commit a robbery." (R. 396). Getting into the specifics of the plan, Moore testified he was supposed to make sure the marijuana was in the car, at which point Appellant would get out of the car and demand the money from Salter. (R. 396-98). Hammond would serve as the getaway driver. (R. 396-98).

In his testimony, Moore described the incident in detail, stating that upon Salter's entering the parking lot and pulling beside Appellant's vehicle, he got out of the car to identify the marijuana. (R. 397-98). Moore explained that after identifying the marijuana and passing Appellant on his return to the car, he watched as Appellant stood alongside Salter's car. (R. 399). Moore then described Appellant leaning into Salter's window, hearing two shots, after which, Appellant, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (R. 399-400, 402, 403, 406). Moore then testified that Salter returned fire, and Appellant fired back. (R. 400). During the exchange of gunfire, Moore explained that Appellant shot Salter. (R. 402-03). Moore then stated that

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<sup>3</sup> According to Urban Dictionary, a lick is defined as: "any instance when you come upon easy money, whether you jack it, hustle it, or barter for it." See [www.urbandictionary.com](http://www.urbandictionary.com) entry entitled "lick." Alternate definitions include "stealing from someone." See [www.urbandictionary.com](http://www.urbandictionary.com) entry entitled "lick" definition number three.

the trio fled the Best Buy parking lot in Appellant's car, retreating to a nearby trailer park.<sup>4</sup> (R. 400). There, Appellant reportedly called his mother and asked her to report the car stolen.<sup>5</sup> (R. 400). According to Moore, Appellant then hid the stolen marijuana and gun before getting a cab to an area hotel. (R. 401, 405). Hammond accompanied Appellant, leaving Moore behind. (R. 405).

Corroborating Moore's testimony regarding the aftermath of the incident, the State presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Appellant's description run from a white car and jump into the rear driver's side door of a dark car.<sup>6</sup> (R. 227). The dark car then sped out of the parking lot. (R. 227, 228). Watts further noted the driver of the getaway car was a female. (R. 229). Angie Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (R. 206). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Niles. Specifically, Appellant's fingerprints were found on top of Salter's car. (R. 328). Additionally, DNA evidence taken from the driver's seat of Appellant's car was consistent with that of Hammond to a probability of one in one quadrillion. (R. 526-27).

Meanwhile, Appellant, testifying in his own defense, rejected Moore's version of the incident explaining there was no agreement between anyone to do "a lick." (R. 560-

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<sup>4</sup> Moore testified that on the way to the trailer park, Appellant admitted he fired the initial shots. (R. 402).

<sup>5</sup> In response to her son's request, Martha Niles reported the car stolen. (R. 510). She was later charged for her role in the incident, but died prior to trial. (R. 576).

<sup>6</sup> While the car was actually a rental car rented to Appellant's mother, Martha, the State, for purposes of convenience, will refer to the car as Appellant's. Furthermore, while there is a discrepancy in the record as to whether the car is gray, dark gray or black, there is no question that the car involved in the incident was the car rented to Martha Niles.

61). Instead, Appellant explained, he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (R. 558-59).

Describing the incident, Appellant stated that upon Salter's arrival at the scene, Moore emerged from Appellant's car and got into Salter's white Mustang, presumably in an effort to purchase the marijuana. (R. 568, 587). At that time, Hammond, who was seated next to Appellant, allegedly informed Appellant that Moore and Salter were fighting. (R. 568). Appellant then testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which Salter allegedly reached for his gun and fired at the car. (R. 569). Continuing, Appellant explained that he reached in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because "he was trying to get him to stop shooting." (R. 569). After the incident, Appellant admitted to leaving the car in a nearby trailer park.<sup>7</sup> (R. 571-72).

Following the close of evidence, Appellant asked the trial court to charge, in addition to self-defense, the lesser-included offense of voluntary manslaughter arguing, the gunshots could serve as sufficient legal provocation and "the jury could infer that . . . the situation got out of hand and [the crime] was committed in the heat of passion. (R. 637). The trial court denied Appellant's request, finding the evidence showed that either Salter began firing and Appellant was acting in self-defense, or Appellant started shooting during the course of an armed robbery, which the trial judge implied, would result in Appellant being guilty of murder. (R. 638).

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<sup>7</sup> On cross-examination, Appellant admitted, that to his knowledge, Moore did not have a gun. (R. 594).

### STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). Generally, the trial court is required only to charge the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). To warrant reversal, the trial court's refusal to give a requested instruction must be both erroneous and prejudicial. Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002).

### ARGUMENT

- I. The trial court did not err in failing to instruct the jury regarding voluntary manslaughter as there was no evidence presented showing either sufficient legal provocation or sudden heat of passion

Appellant maintains the trial court committed reversible error by failing to charge the jury on the lesser-included offense of manslaughter. Specifically, Appellant contends his testimony that Salter shot first, after which Appellant returned fire, supported a charge for voluntary manslaughter, especially in light of the fact that self-defense and voluntary manslaughter are not mutually exclusive. The State, while agreeing that self-defense and voluntary manslaughter are not mutually exclusive, disagrees with the proposition that the trial court should have charged voluntary manslaughter in this instance. Appellant failed to present evidence showing either sufficient legal provocation or sudden heat of passion, both prerequisites to receiving a charge on voluntary manslaughter. See State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (finding heat of passion and sufficient legal provocation must both be present at the time of killing to reduce murder

to voluntary manslaughter). Accordingly, Appellant was not entitled to an instruction on voluntary manslaughter. See State v. Hernandez, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) (holding a jury instruction should not be given unless justified by the evidence).

The evidence presented at trial determines the law upon which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). The trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). However, the trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Additionally, the trial court must charge the jury on a lesser-included offense if “there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater.” State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Conversely, the trial court may eliminate instructing the jury on a lesser-included offense where there is no evidence tending to reduce the crime from the greater offense to the lesser. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant.” Pittman, 373 S.C. at 572-73, 647 S.E.2d at 168.

As noted in Cole, “[v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” 338 S.C. at 101, 525 S.E.2d at 513. Thus, “[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing” to reduce murder to voluntary manslaughter. Id.



“Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation.” State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). To mitigate murder to manslaughter, the sudden heat of passion “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.” State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996).

At trial, Appellant testified he observed Moore and Salter fighting. (R. 569). Appellant then claimed Moore fled the car at which point Salter emerged stating, “[y]ou ain’t getting out this car with my weed without no money[.]” Following this exchange, Salter allegedly reached for his gun and fired at the car. (R. 569). Appellant then testified that he reached in his bag, grabbed his gun and fired two shots at Salter because “he was trying to get him to stop shooting.” (R. 569).

By contrast, Moore described the incident differently, explaining that after identifying the marijuana and passing Appellant on his return to the car, he watched as Appellant stood alongside Salter’s car. (R. 399). Moore then described Appellant leaning into Salter’s window, hearing two shots, after which, Appellant, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (R. 399-400, 402, 403, 406). According to Moore, Salter returned fire, and Appellant fired again. (R. 400). During the exchange of gunfire, Moore explained that Appellant shot Salter. (R. 402-03).

Thus the evidence presented clearly requires the jury to answer, as a threshold matter, one key question—whether Appellant was involved in the armed robbery. Upon

answering this question, the evidence presented would then lead the jury to one of two conclusions, either Appellant murdered Salter during the course of an armed robbery or Appellant had nothing to do with the armed robbery, was caught in the crossfire and was acting in self-defense when he shot Salter. Here, regardless of one's interpretation of the facts, there is simply no evidence supporting a charge on voluntary manslaughter.

A. Version One: Appellant was involved in the Armed Robbery

Believing Moore's testimony, Appellant was in the process of committing armed robbery when he shot and killed Salter. Accordingly, Salter was acting lawfully in defending himself against a crime, meaning Appellant did not act upon sufficient legal provocation and therefore, is not entitled to an instruction on voluntary manslaughter. See Shuler, 344 S.C. at 632, 545 S.E.2d at 819 (holding a victim's attempts to resist or defend himself from crime do not constitute sufficient legal provocation); State v. Tyson, 283 S.C. 375, 379, 323 S.C. 770, 772 (1984) (holding no sufficient legal provocation where the victim was defending himself against an armed robber and was killed in the attempt).

Furthermore, even if one were to assume Salter's shooting at Appellant constituted sufficient legal provocation, there is no evidence suggesting Appellant acted in the sudden heat of passion. As noted above, and explained in Pittman, the Supreme Court of South Carolina describes a sudden heat of passion as emotion which, "while it need not dethrone reason entirely, or shut out knowledge and volition, 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." 373 S.C. at 574, 647 S.E.2d at 169.

Expanding upon the emotions which may illicit a sudden heat of passion, this Court, in State v. Dickey, 380 S.C. 384, 400-01, 669 S.E.2d 917, 926 (Ct. App. 2008) concluded that fear for one's safety could lead "to an uncontrollable impulse to do violence." Likewise, appellate courts in this state have found, in addition to fear, arguments and physical threats can translate to a sudden heat of passion. Dickey, 380 S.C. at 401-02, 669 S.E.2d at 926.

In the present case, Appellant's testimony that he wanted Salter to stop shooting does not describe an emotional response tantamount to "an uncontrollable impulse to do violence." Instead, Appellant merely stated "he was just trying to get [Salter] to stop shooting." Appellant never admitted he was scared for his safety. Likewise, there was no evidence presented indicating an argument or any exchange of threats between Appellant and Salter occurred. In fact, Appellant failed to offer evidence explaining *why* he fired the gun. (R. 570). Accordingly, under this version of the facts, the trial court was correct in declining to instruct the jury voluntary manslaughter.

B. Version Two: Appellant was not involved in the Armed Robbery

Similarly, were the jury to believe Appellant's testimony, that he returned fire on Salter in an effort to defend himself, there would be no evidence supporting a charge on voluntary manslaughter. Instead, as the trial court correctly pointed out, the evidence would only suggest self-defense, an issue upon which the trial court would later instruct the jury.

As pointed out by Appellant, "it is well settled that self-defense and voluntary manslaughter are not mutually exclusive and both issues should be submitted to the jury *if supported by the evidence.*" State v. Wiggins, 330 S.C. 538, 549 n.18, 500 S.E.2d 489,

495 n.18 (1998) (emphasis added). However, in the present case, no evidence exists supporting a charge on voluntary manslaughter. As explained in State v. Gilliam, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988) the rationale for this rule is that the jury could, in some situations, fail to find all the requisite elements of self defense, but find sufficient legal provocation and heat of passion thereby allowing a jury to convict a defendant of voluntary manslaughter. Under these facts, the State submits there is no evidence by which a jury could come to the conclusion described in Gilliam as the evidence presented could lead the jury to only one of two conclusions—murder or self-defense.

In order to be entitled to an instruction on self-defense, evidence must be presented on each of the following elements: (1) the person asserting self defense must be without fault in bringing on the difficulty; (2) the person claiming self defense must be in actual imminent danger of losing his life or sustaining serious bodily injury, or he must actually believe he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if a defense is based upon the belief of imminent danger, defendant must show a reasonably prudent person of ordinary firmness and courage would entertain the belief he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the person asserting the defense must have no other probable means of avoiding the danger to his own life or well being than to act as he did in the particular situation. State v. Dickey, 380 S.C. 384, 393-94, 669 S.E.2d 917, 922 (Ct. App. 2008).

In the present case, only two inferences can be drawn from the evidence presented with regard to bringing on the difficulty. Believing Moore's testimony, Appellant, in an

effort to rob Salter, shot at Salter causing Salter to fire back, meaning there was no sufficient legal provocation as addressed in the previous section. Conversely, one could believe Appellant's testimony in which case Appellant was simply a witness to an armed robbery and was fired upon meaning he did not bring on the difficulty.

The same analysis goes in assessing the second prong of self-defense, whether Appellant was in actual imminent danger of losing his life or sustaining serious bodily injury. Specifically, the jury was presented with two scenarios. Believing Moore's testimony, that Appellant shot first during an armed robbery, Appellant, for self-defense purposes, could not be in imminent danger for his life as he was the aggressor. However, were the jury to believe Appellant's testimony, that Salter fired first, then Appellant was clearly in imminent danger of losing his life as Salter was firing at Appellant with a .40 caliber handgun at close range.<sup>8</sup>

Moving to the final prong of self-defense, whether the person asserting the defense had any other probable means of avoiding the danger to his own life or well being than to act as he did in the particular situation, the evidence would lead the jury to one of two conclusions. First, were the jury to believe Moore's testimony regarding the incident, Appellant, as the perpetrator of the crime, could have obviously avoided the danger to his own life. On the other hand, were the jury to believe Appellant's testimony, that he was stuck in the crossfire due to his being an unknowing witness to an armed robbery, then Appellant, who was in the passenger seat and had no means to extract himself from the situation, had no other alternative than to act as he did.

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<sup>8</sup> As the facts in this self-defense analysis clearly demonstrate, the third prong of self defense, the objective reasonableness of Appellant's belief regarding his fear for his life, need not be analyzed as Appellant's being fired at from close range obviously amounts to imminent danger of losing his life.

Accordingly, were the jury to believe Appellant's testimony regarding the incident, Appellant could only have acted in self-defense. There was no evidence supporting a charge on voluntary manslaughter. Appellant's testimony simply did not allege facts from which a jury could properly infer either sufficient legal provocation or a sudden heat of passion, and thus, under these facts, the trial court properly declined to charge the jury on voluntary manslaughter.

### CONCLUSION

As there was no evidence presented supporting a charge on voluntary manslaughter, the State respectfully asks this Court to affirm both the ruling of the trial court and Appellant's conviction.

Respectfully Submitted,

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August 23, 2010.

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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The State of South Carolina,

Respondent,

v.

Richard Niles,

Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

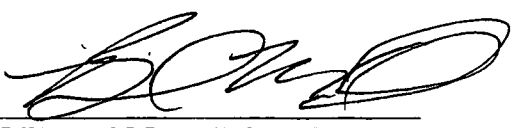
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STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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The State of South Carolina,

Respondent,

v.

Richard Niles,

Appellant.

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**PROOF OF SERVICE**

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I, Brendan J. McDonald, Counsel for Respondent, certify that I have this date served the **Final Brief of Respondent**, dated August 23, 2010, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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This 23<sup>rd</sup> day of August, 2010.



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

The State, Respondent,

v.

Richard Bill Niles, Jr., Appellant.

Appellate Case No. 2009-121246

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Appeal From Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Published Opinion No. 5034  
Heard February 14, 2012 – Filed September 12, 2012

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**REVERSED**

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Robert Michael Dudek, South Carolina Commission on  
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**WILLIAMS, J.:** On appeal, Richard Bill Niles, Jr. (Niles) argues the circuit court erred in declining to charge the jury on voluntary manslaughter because there was evidence that Niles was not the first aggressor. Niles asserts the circuit court incorrectly reasoned Niles was either acting in self-defense or shot the decedent

during the commission of an armed robbery. Because voluntary manslaughter and self-defense are not mutually exclusive, Niles contends he was entitled to a charge on voluntary manslaughter. We agree and reverse.

## **FACTS/PROCEDURAL HISTORY**

On April 9, 2007, James Salter (Salter) was shot in a Best Buy parking lot in Myrtle Beach, South Carolina. Salter later died from his injuries. Niles, his fiancée Mokeia Hammond (Hammond), and Ervin Moore (Moore) were arrested and charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State whereby Moore pled guilty to armed robbery, voluntary manslaughter, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond. Niles and Hammond were tried jointly on March 9, 2009.

At Niles' and Hammond's trial, Moore testified that on April 9, 2007, Niles and Hammond picked up Moore and headed to the beach where the trio "made a couple of drug sales at a couple of motels." Moore stated, "[W]e were smoking blunts in the car . . . [and when] we ran out of weed . . . we said we wanted to get some more weed." Moore maintained Niles "made a couple of phone calls," and they "ended up in the Best Buy parking lot." Moore testified Niles said "he was going to do a lick," which Moore understood to mean they were going to rob the drug dealer, later identified as Salter. Moore stated his job in the robbery was "to identify the weed" for Niles.

Upon arriving at the Best Buy parking lot, Moore exited his vehicle and got into Salter's vehicle. Moore stated Salter pulled a large ziploc bag of marijuana out from under his seat so Moore could see it. Moore maintained that by the time he inspected the marijuana, exited Salter's vehicle, and returned to the vehicle with Hammond, Niles had exited their vehicle. Moore testified he informed Niles that he saw the marijuana and stated, "The next thing I knew, I just heard two shots and I seen [Niles], he jumped back in the back seat behind [Hammond]." Moore further stated "after . . . [Niles] jumped in [the vehicle], after them two shots then the other guy fired a shot." Moore testified that after both Niles and Salter continued to fire shots at each other, Hammond drove out of the parking lot.

Though Moore testified on direct examination "the other guy didn't shoot until after [Niles] shot," on cross-examination, Moore admitted he did not actually see

Niles shoot first. Moore stated he originally testified Niles shot first because Niles admitted he shot first when Niles jumped back into the vehicle.

Niles testified in his own defense. He denied he told Moore he was "going to do a lick" and testified Moore asked him to purchase a pound of marijuana for him. Niles affirmed that when they pulled into the Best Buy parking lot, Moore got out of the vehicle and into Salter's vehicle. Niles testified he was talking to Hammond about their upcoming wedding when Hammond suddenly told him, "Baby, they are fighting." Niles stated he looked over to Salter's vehicle and observed Moore and Salter "tussling in the car." Niles stated he noticed Moore trying to exit Salter's vehicle and heard Salter state to Moore, "[Y]ou ain't getting out of this car with my weed without no money." Niles maintained that when Moore exited Salter's vehicle and jumped into the vehicle with Niles and Hammond, Salter pulled out a gun and began shooting at the vehicle that Niles, Hammond, and Moore occupied. Niles testified, "I grabbed my pistol and that's when I shot two times." Niles maintained he was being shot at constantly by Salter and he shot back.

The circuit court charged the jury on self-defense, but it refused Niles' request to charge the jury on voluntary manslaughter. The circuit court refused the voluntary manslaughter charge reasoning that "either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting . . . [and] killed the victim during the commission of an armed robbery."

Niles was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime.<sup>1</sup> Niles received a thirty-year sentence for murder and armed robbery and a five-year sentence for the conviction of possession of a firearm during the commission of a violent crime, all to be served concurrently. Niles appeals.

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* If any evidence supports a jury charge, the circuit court should grant the request. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). To warrant

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<sup>1</sup> While Niles was convicted of all charges, Hammond was only convicted of armed robbery and sentenced to fifteen years imprisonment.

reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Id.*

## LAW/ ANALYSIS

Niles argues the circuit court erred in failing to charge the jury on voluntary manslaughter because conflicting testimony was presented to support a jury charge on voluntary manslaughter.

To the contrary, the State asserts a jury charge of voluntary manslaughter was not appropriate in this case. The State argues only two scenarios are possible from the evidence presented at trial: (1) Salter shot first and Niles acted in self-defense by returning fire; or (2) Niles shot at Salter first, committing murder during the commission of an armed robbery. The State contends that Niles failed to present evidence showing legal provocation or sudden heat of passion, which are both prerequisites to support a charge on voluntary manslaughter. We agree with Niles.

"The evidence presented at trial determines the law to be charged to the jury." *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010). "To warrant a court's eliminating the offense of [voluntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to [voluntary] manslaughter." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the circuit court views facts in a light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

"Voluntary manslaughter is the unlawful killing of a human being in [a] sudden heat of passion upon sufficient legal provocation." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Both sufficient legal provocation and heat of passion must be present at the time of the killing to support a jury instruction on voluntary manslaughter. *Hernandez*, 386 S.C. at 660, 690 S.E.2d at 585.

Furthermore, a court is permitted to charge a jury on both voluntary manslaughter and self-defense if supported by the evidence. In *State v. Gilliam*, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988), our supreme court held a jury charge on self-defense and voluntary manslaughter are not mutually exclusive, stating:

Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if

supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

(internal citation omitted).

Here, we find Niles' testimony that Salter fired the first shot at him, and he subsequently returned fire provides sufficient evidence to support a jury charge on voluntary manslaughter. Viewing the evidence in a light most favorable to Niles, we believe a jury could find Niles acted in a heat of passion upon sufficient legal provocation, thus supporting a voluntary manslaughter jury charge.

### **I. Legal Provocation**

First, we find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles.

An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. *State v. Starnes*, 388 S.C. 590, 597-98, 698 S.E.2d 604, 608 (2010). In *Gilliam*, our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. *Gilliam*, 296 S.C. at 396-97, 373 S.E.2d at 597. Further, in *State v. Linder*, 276 S.C. 304, 306-07, 278 S.E. 2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

[W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when . . . [Salter] was shooting in the car. That's when my fiancé[e] started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter]

was shooting in the car . . . I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."); *see also State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.").

## II. Heat of Passion

Second, we find evidence was presented at trial to show Niles acted in a heat of passion when he shot Salter.

To mitigate murder to voluntary manslaughter, sudden heat of passion, while it need not dethrone reason entirely, must be such that 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." *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotation marks and citation omitted). "However, even when a person's passion is sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled, the killing would be murder and not manslaughter." *Hernandez*, 386 S.C. at 661, 690 S.E.2d at 585 (internal quotation marks and citation omitted). "Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved." *Id.*

Niles testified that after Salter began shooting at his vehicle, Niles reached for his gun and returned fire. He stated:

So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went

pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé[e] got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. *See State v. Knoten*, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the "the first thing that came to . . . [his] mind" supports that he was acting on impulse upon being shot at by Salter. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

Accordingly, viewing the evidence in the light most favorable to Niles, we find evidence sufficient to support a charge on voluntary manslaughter; therefore, the circuit court erred in failing to charge the jury on voluntary manslaughter. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that if there is any evidence to support a jury charge, the circuit court should grant the request).

### III. Prejudice

Furthermore, the error of the circuit court in failing to charge the jury with voluntary manslaughter prejudiced Niles. "The [circuit] court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Harrison*, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000). However, even if the circuit court "refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (internal citation omitted). The party complaining of the circuit court's refusal to give the requested instruction bears the burden of demonstrating prejudice to warrant a reversal. *Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 299, 450 S.E.2d 41, 45 (1994).

We find Niles met his burden of showing he was prejudiced by the circuit court's refusal to give the requested jury instruction. Here, the circuit court failed to give any instruction on voluntary manslaughter. The jury charges the circuit court gave regarding self-defense, murder, armed robbery, and possession of a firearm during the commission of a violent crime do not cover the substance of voluntary manslaughter, nor do they explain the elements of voluntary manslaughter. Based on the evidence presented at trial, viewed in a light most favorable to the defendant, a jury could have found Niles guilty of voluntary manslaughter. Therefore, Niles was prejudiced by the circuit court's failure to instruct the jury on voluntary manslaughter. *See Harrison*, 343 S.C. at 175, 539 S.E.2d at 76 (holding defendant was prejudiced when based on the evidence at trial, a different verdict might have been reached if the jury had been charged with the instruction requested by the defendant).

Because the circuit court erred in refusing to charge the jury on voluntary manslaughter and that error prejudiced Niles, we reverse the circuit court. *See Harrison*, 343 S.C. at 173, 539 S.E.2d at 75 ("To warrant reversal, a [circuit court's] refusal to give a requested jury charge must be both erroneous and prejudicial.")

## **CONCLUSION**

Accordingly, the circuit court's decision is

**REVERSED.**

**THOMAS and LOCKEMY, JJ., concur.**



STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2009-121246

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THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

APPELLANT

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**PETITION FOR REHEARING**

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Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing.

**INTRODUCTION**

On April 9, 2007, James Salter was shot in a Best Buy parking lot in Myrtle Beach. (R. 153, 172). He later died from his injuries. (R. 534-35). Richard Niles ("Appellant"), his fiancé, Mokeia Hammond and a third party, Ervin Moore, were each charged with murder, armed robbery and possession of a firearm during the commission of a violent crime. (R. 118, 392). Appellant and Hammond invoked their respective rights to trial by jury, while Moore pled guilty to charges of voluntary manslaughter, robbery and possession of a firearm during the

commission of a violent crime.<sup>1</sup> (R. 16, 391-93). Appellant was convicted on all charges while Hammond was convicted of armed robbery.<sup>2</sup> (R. 741).

### STATEMENT OF THE CASE

Appellant was indicted during the August 2007 and October 2008 terms of court pursuant to indictment numbers: #2007-GS-26-3362 (murder), #2008-GS-26-4118 (possession of a firearm during the commission of a violent crime) and #2008-GS-26-4119 (armed robbery). (R. 773-77). On March 9, 2009, Appellant and Hammond's cases were called to trial before the Honorable Benjamin H. Culbertson. (R. 16). Appellant was represented by Verdell Barr. Four days later, Appellant was convicted of murder, armed robbery and possession of a firearm during the commission of a violent crime. (R. 744). Appellant received a thirty (30) year sentence for both the murder and armed robbery charges, in addition to a five (5) year sentence for the weapons charge, all to be served concurrently. (R. 764). Thereafter, Appellant filed a timely notice of appeal and on August 23, 2010, filed a final brief appealing only his murder conviction arguing the trial court erred in refusing to charge voluntary manslaughter. Br. of App. at 11; Br. of App. at 3. In the conclusion of his brief, Appellant requested his murder conviction be reversed and remanded for a new trial on the murder indictment, while the State asked that his murder conviction be affirmed. Br. of App. at 11; Br. of Resp. at 15. On September 12, 2012 this Court reversed and remanded finding Niles' testimony that Victim fired first after which Niles subsequently returned fire constituted evidence of voluntary manslaughter and therefore entitled Niles to a jury charge on voluntary manslaughter. See State v. Niles, No. 5034 (Ct. App.

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<sup>1</sup> The terms of Moore's plea agreement allowed him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Appellant and Hammond. (R. 391).

<sup>2</sup> Hammond was acquitted on the charges of both murder and possession of a firearm during the commission of a violent crime. (R. 741). On appeal, Hammond's armed robbery charge was affirmed via an unpublished opinion. See State v. Hammond, No. 2011-UP-476 (Ct. App. filed October 26, 2011).

filed on September 12, 2012). The State now seeks rehearing to: (1) clarify that only Niles' *murder conviction* was reversed and remanded in the Court's opinion; (2) highlight that Niles' testimony, "I was just trying to get him to stop shooting" did not amount to evidence of sudden heat of passion and therefore, Niles was not entitled to an instruction on voluntary manslaughter; and (3) show that even if Niles was entitled to an instruction on voluntary manslaughter, any error was necessarily harmless in light of the fact the jury clearly believed Moore's testimony, that Niles shot the victim in the course of an armed robbery, since it convicted Niles of armed robbery.

### STANDARD OF REVIEW

"[A] petition for rehearing must 'state with particularity the points supposed to have been overlooked or misapprehended by the court.' " Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). Similarly, "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)).

### ARGUMENTS

#### I. The Only Conviction Appealed by Niles was his Murder Conviction and therefore Niles' Armed Robbery and Firearms Convictions Still Stand

The State seeks clarification from this Court as to whether its opinion merely reversed Niles' murder conviction, which was the only conviction that was appealed, or reversed and remanded Niles' additional unappealed convictions, the armed robbery and firearms conviction. Initially, the State notes the opinion only vaguely addresses this stating in its conclusion that the trial court's "decision" was reversed. While the State presumes the Court uses such language

simply because the only conviction which was before the Court was the murder conviction<sup>3</sup>, the State respectfully asks that the Court clarify this. Specifically, because Appellant only appealed from the murder conviction, the unappealed convictions are law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case). Further, because the trial court's purported failure to charge the jury on voluntary manslaughter would have no effect on the jury's decision to convict Niles on the armed robbery or the firearms charge, the State submits Niles' remaining convictions should remain in tact.

II. Niles Testimony Regarding the Shooting did not Establish that Niles was Acting in the Sudden Heat of Passion

In its opinion, this Court found Niles established sudden heat of passion based upon the following testimony:

So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. *I didn't know if my fiancé got shot or nothing. That's the first thing that came into my head, you know.*

(R. 569) (emphasis added). In response, the State notes Niles' testimony, even when viewed in the light most favorable to Niles, fails to amount to "an uncontrollable impulse to do violence" which as this Court is well aware, is the definition of sudden heat of passion. See State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (explaining the sudden heat of passion "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.").

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<sup>3</sup> See State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) ("Appellate courts like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

In the present case, Niles' testimony merely established that after seeing the victim shoot at the car, Niles' *initially fearing that his fiancé got shot*, returned fire simply to get the victim to *stop shooting*. (R. 569). In other words, even Niles' own testimony only establishes that upon seeing the victim fire at the car, Niles returned fire not because he had an uncontrollable impulse to violence to the victim, but because he feared for the safety of his fiancé and wanted the victim to stop shooting. (R. 569). Understanding, this Niles testimony simply does not establish the proper *mens rea* for voluntary manslaughter—a lesser included offense of murder which reduces a defendant's culpability in light of the facts and circumstances of the case—and instead only demonstrates Appellant's *mens rea* was that of self-defense or defense of others, both of which are justification defenses.<sup>4</sup> Thus, the State maintains that in reviewing Niles' testimony and subsequently concluding that such testimony amounted to evidence of sudden heat of passion, the Court overlooked or misapprehended the substance of Niles' testimony since it merely referenced the *mens rea* for a justification defense and not that of an excuse defense such as voluntary manslaughter.<sup>5</sup> Specifically, Niles' testimony does not establish an uncontrollable impulse to do violence to the victim because, in the words of Niles he was not aiming at the victim, did not intend to shoot him, but only wanted the shooting to stop because he feared for his fiancé's safety and his safety when he fired at the victim. (R. 569). In light of this testimony, Niles simply did not possess the proper *mens rea* required for a finding of sudden heat of passion

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<sup>4</sup> See State v. Dickey, 394 S.C. 491, 515-16, 716 S.E.2d 97, 109-10 (2011) (Beatty dissenting) (quoting State v. Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 ("Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the distinction between voluntary manslaughter and self-defense.")).

<sup>5</sup> This was a clear concern of the Starnes Court who explained that testimony regarding one's fear alone could not, by itself, give rise to a finding of sudden heat of passion. Starnes, 590 S.C. at 599-600, 698 S.E.2d at 609. Continuing, the Starnes Court elaborated on its concern stating, that if it held that fear alone could amount to sudden heat of passion, it "would impermissibly blend the elements of voluntary manslaughter and self-defense" and "would render voluntary manslaughter a lesser-included offense of self-defense, for where there is an intentional killing based on fear alone, a defendant would be entitled to a voluntary manslaughter charge." Id.

and therefore, the State asks this Court to allow for rehearing on this ground, or in the alternative, to substitute an opinion consistent with the aforementioned analysis.

III. Even if Niles' Testimony Established that he was Entitled to an Instruction on Voluntary Manslaughter, the Trial Court's Failure to Charge the Jury was Harmless Error in light of the fact the Jury Convicted Niles of Armed Robbery Meaning it did not find Niles' Testimony Credible

In its opinion, this Court, citing to State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000) found the trial court's failure to charge voluntary manslaughter was prejudicial error because a different verdict might have been reached had the jury been charged on voluntary manslaughter. However, this is at odds with what the jury actually found—that Niles was committing an armed robbery when he shot and killed the victim, James Salter. Specifically, as the basis of Niles' voluntary manslaughter charge would be solely based upon his own testimony as to how the events occurred, the fact that both Niles and Hammond were convicted of armed robbery necessarily meant the jury simply did not believe Niles' testimony regarding his version of events.

At trial, Niles testified he observed Moore and Salter fighting. (R. 569). Niles then claimed Moore fled the car at which point Salter emerged stating, “[y]ou ain’t getting out this car with my weed without no money[.]” Following this exchange, Salter allegedly reached for his gun and fired at the car. (R. 569). Niles then testified that he reached in his bag, grabbed his gun and fired two shots at Salter because “he was trying to get him to stop shooting.” (R. 569).

By contrast, Moore described the incident differently, explaining that after identifying the marijuana and passing Niles on his return to the car, he watched as Niles stood alongside Salter's car. (R. 399). Moore then described Niles leaning into Salter's window, hearing two shots, after which, Niles, with the marijuana and a .357 in hand, dove into the backseat behind Hammond.

(R. 399-400, 402, 403, 406). According to Moore, Salter returned fire, and Niles fired again. (R. 400). During the exchange of gunfire, Moore explained that Niles shot Salter.<sup>6</sup> (R. 402-03).

Thus, the evidence presented clearly required the jury to answer, as a threshold matter, one key question—whether Niles was involved in the armed robbery. Upon answering this question, the evidence presented would then lead the jury to one of two conclusions, either Niles murdered Salter during the course of an armed robbery or Niles had nothing to do with the armed robbery and was caught in the crossfire.

Here, because the jury answered the question by finding Niles and Hammond guilty of armed robbery, the jury necessarily determined Niles' version of events was not credible. Understanding this, Niles testimony that Salter fired first prompting him to return fire, the testimony which provided the basis for the Court's decision that Niles was entitled to a charge on voluntary manslaughter, was not credible testimony in the eyes of the jury. Accordingly, there is simply nothing in the record to suggest the jury would have convicted Niles of voluntary manslaughter when the jury clearly believed Moore's testimony that Niles shot the victim during the course of a robbery. As such, the State submits this Court overlooked or misapprehended the fact that the jury convicted both Niles and Hammond of armed robbery.

### CONCLUSION

In light of the aforementioned arguments, the State respectfully asks this Court to affirm both the ruling of the trial court and Appellant's murder conviction.

Respectfully Submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

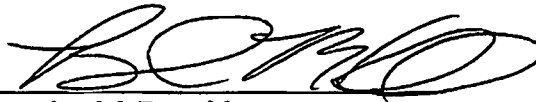
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<sup>6</sup> Hammond, the only other living eyewitness elected not to testify at trial. R. at 532.

DONALD J. ZELENKA  
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD  
Assistant Attorney General

J. GREGORY HEMBREE  
Solicitor, Fifteenth Judicial Circuit

A handwritten signature in black ink, appearing to read 'B. McDonald', written over a horizontal line.

Brendan McDonald  
ATTORNEY(S) FOR RESPONDENTS

September 26, 2012.



STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge  
Appellate Case No. 2009-121246

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THE STATE,

RESPONDENT,

v.

RICHARD BILL NILES, JR.,

APPELLANT

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**PROOF OF SERVICE**

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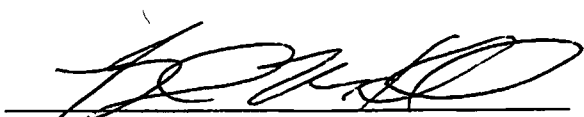
I, Brendan McDonald, counsel for the Respondent, certify that I have served the within *Petition for Rehearing*, on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Esq., SCCID/Division of Appellate Defense  
1330 Lady St., Ste. #401  
Columbia, SC 29201

Reid T. Sherard, Esq.  
Nelson, Mullins, Riley & Scarborough, LLP  
P.O. Box 10084  
Greenville, SC 29603

I further certify that all parties required by Rule to be served have been served.

This 26th day of September, 2012.

BRENDAN J. McDONALD

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Post Office Box 11549  
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ATTORNEY FOR RESPONDENT

September 26, 2012.

THE STATE OF SOUTH CAROLINA  
 IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

APPELLANT

---

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5034

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RETURN TO RESPONDENT'S PETITION FOR REHEARING

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Pursuant to the letter dated September 27, 2012 from the Clerk of Court, Appellant Richard Bill Niles, Jr., by and through his undersigned counsel, files his Return to the State's Petition for Rehearing (the "Petition").

The Court heard oral argument on the appeal on February 14, 2012 and issued Published Opinion No. 5034 on September 12, 2012. The Court's ruling is correct as to the matters presented by the Petition and should not be revisited.

**I. The Court of Appeals Did Not Overlook or Misapprehend Any Points When Correctly Reversing Appellant's Convictions.**

As the Court of Appeals correctly recognized in its opinion of reversal, Appellant was entitled to a jury instruction of voluntary manslaughter. When reversing, the Court was

explicitly aware Appellant “was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime.” (Opinion p. 2). With such knowledge, the Court ended the “Facts/Procedural History” section of the Opinion by simply noting “Niles appeals.” (*Id.* at p. 3). After analyzing the application of law to facts, the Court stated “we reverse the circuit court . . . [a]ccordingly, the circuit court’s decision is **REVERSED.**” (*Id.* at p. 8) (emphasis in original).

The State argues that Appellant’s armed robbery and firearm convictions should stand. This argument fails to acknowledge the Court’s reversal, and further fails to acknowledge that the failure to charge voluntary manslaughter infected the entire jury instruction. It is undisputed that the facts which supported the charges on armed robbery and the firearm charge were part of the same transaction which led to the murder charge. All the charges are inextricably entwined, and because it was error not to charge voluntary manslaughter, Appellant is entitled to a new trial on all three convictions.

## **II. The Court of Appeals Did Not Overlook or Misapprehend Any Points When Correctly Determining the Record Contained Some Evidence of Sudden Heat of Passion.**

“Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given. *State v. Starnes*, 388 S.C. 590, 597-598, 698 S.E.2d 604, 608 (2010). Stated another way, “[t]o warrant a court’s eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). This is such an important tenet of law it applies even if the defendant does not want a jury instruction for manslaughter due to fear of a compromise verdict. *State v. Nichols*, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997).

“Trial courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter, especially where a defendant claims he acted in self-defense,” and this case is no exception. *Starnes*, 388 S.C. at 597-598, 698 S.E.2d at 608. In *Starnes*, the Supreme Court took the opportunity to “reaffirm the principle that a person’s fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion.” *Id.* at 598, 609.

In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Here, the Court of Appeals found evidence in the record supporting a manslaughter charge. (Opinion at pp. 5-7). That the evidence was conflicting makes no difference. *See Knoten*, 347 S.C. at 305-306, 555 S.E.2d at 396. As the assistant solicitor put it so aptly at trial, “[the jury] can believe part of this, part of that, part of nothing.” (R. p. 634, ll. 20-22).

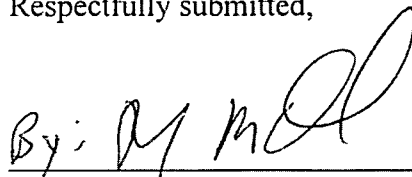
### **III. The Court of Appeals Did Not Overlook or Misapprehend Any Points When Correctly Determining the Trial Court’s Error Was Not Harmless.**

Since no voluntary manslaughter charge was given when there was evidence of same in the record, the charges actually given in this case did not “sufficiently cover[] the substance of the request.” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). “It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.” *Id.* at 549-550, 603. The Petition’s attempt to require the jury’s decision to be broken down into a progression analysis is misguided and without authority.

CONCLUSION

Rehearing is only proper where the Court overlooks or misapprehends specific points. For the reasons stated above, and based on the arguments, points, and authorities in Appellant's brief and oral argument, the Court did not overlook or misapprehend any point, and therefore should deny the Petition.

Respectfully submitted,

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October 8, 2012

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

APPELLANT

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Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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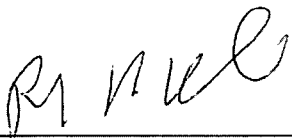
Opinion No. 5034

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CERTIFICATE OF SERVICE

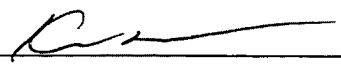
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The undersigned attorney hereby certifies that a true copy of the Return to the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of October, 2012.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day  
of October, 2012.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013.

# The South Carolina Court of Appeals

The State, Respondent,  
v.  
Richard Bill Niles, Jr., Appellant.

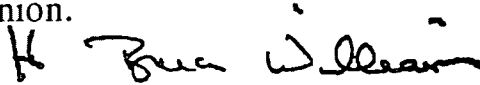
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Appellate Case No. 2009-121246

SC OFFICE OF  
APPELLATE DEFENSE

## ORDER

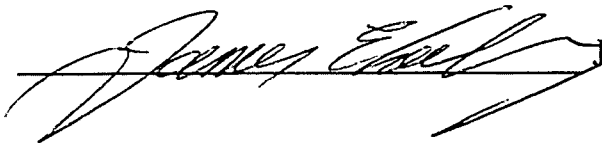
After careful consideration of the Petition for Panel Rehearing, the Court has decided to issue a substituted opinion. It is, therefore, ordered that the Petition for Panel Rehearing be denied and the earlier opinion, Op. No. 5034, be withdrawn and substituted with the attached opinion.



J. Williams



J. Thomas



J. Lockemy

Columbia, South Carolina

cc:

Robert Michael Dudek

FILED

14 November 2012

Brendan Jackson McDonald  
Reid T. Sherard

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

The State, Respondent,

v.

Richard Bill Niles, Jr., Appellant.

Appellate Case No. 2009-121246

---

Appeal From Horry County  
Benjamin H. Culbertson, Circuit Court Judge

---

Published Opinion No. 5034  
Heard February 14, 2012 – Filed September 12, 2012  
Withdrawn, Substituted and Refiled November 14, 2012

---

**REVERSED AND REMANDED**

---

Robert Michael Dudek, South Carolina Commission on  
Indigent Defense, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Salley W. Elliott, and Assistant  
Attorney General Brendan J. McDonald, all of Columbia,  
for Respondent.

---

**WILLIAMS, J.:** On appeal, Richard Bill Niles, Jr. (Niles) argues the circuit court erred in declining to charge the jury on voluntary manslaughter because there was evidence that Niles was not the first aggressor. Niles asserts the circuit court incorrectly reasoned Niles was either acting in self-defense or shot the decedent during the commission of an armed robbery. Because voluntary manslaughter and



self-defense are not mutually exclusive, Niles contends he was entitled to a charge of voluntary manslaughter.<sup>1</sup> We reverse and remand.

## **FACTS/PROCEDURAL HISTORY**

On April 9, 2007, James Salter (Salter) was shot in a Best Buy parking lot in Myrtle Beach, South Carolina. Salter later died from his injuries. Niles, his fiancé Mokeia Hammond (Hammond), and Ervin Moore (Moore) were arrested and charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State whereby Moore pled guilty to armed robbery, voluntary manslaughter, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond. Niles and Hammond were tried jointly on March 9, 2009.

At Niles' and Hammond's trial, Moore testified that on April 9, 2007, Niles and Hammond picked up Moore and headed to the beach where the trio "made a couple of drug sales at a couple of motels." Moore stated, "[W]e were smoking blunts in the car . . . [and when] we ran out of weed . . . we said we wanted to get some more weed." Moore maintained Niles "made a couple of phone calls," and they "ended up in the Best Buy parking lot." Moore testified Niles said "he was going to do a lick," which Moore understood to mean they were going to rob the drug dealer, later identified as Salter. Moore stated his job in the robbery was "to identify the weed" for Niles.

Upon arriving at the Best Buy parking lot, Moore exited his vehicle and got into Salter's vehicle. Moore stated Salter pulled a large ziploc bag of marijuana out from under his seat so Moore could see it. Moore maintained that by the time he inspected the marijuana, exited Salter's vehicle, and returned to the vehicle with Hammond, Niles had exited their vehicle. Moore testified he informed Niles that he saw the marijuana and stated, "The next thing I knew, I just heard two shots and I seen [Niles], he jumped back in the back seat behind [Hammond]." Moore further stated "after . . . [Niles] jumped in [the vehicle], after them two shots then the other guy fired a shot." Moore testified that after both Niles and Salter continued to fire shots at each other, Hammond drove out of the parking lot.

---

<sup>1</sup> Niles did not appeal his convictions for armed robbery and possession of a firearm during the commission of a violent crime.

Though Moore testified on direct examination "the other guy didn't shoot until after [Niles] shot," on cross-examination, Moore admitted he did not actually see Niles shoot first. Moore stated he originally testified Niles shot first because Niles admitted he shot first when Niles jumped back into the vehicle.

Niles testified in his own defense. He denied he told Moore he was "going to do a lick" and testified Moore asked him to purchase a pound of marijuana for him. Niles affirmed that when they pulled into the Best Buy parking lot, Moore got out of the vehicle and into Salter's vehicle. Niles testified he was talking to Hammond about their upcoming wedding when Hammond suddenly told him, "Baby, they are fighting." Niles stated he looked over to Salter's vehicle and observed Moore and Salter "tussling in the car." Niles stated he noticed Moore trying to exit Salter's vehicle and heard Salter state to Moore, "[Y]ou ain't getting out of this car with my weed without no money." Niles maintained that when Moore exited Salter's vehicle and jumped into the vehicle with Niles and Hammond, Salter pulled out a gun and began shooting at the vehicle that Niles, Hammond, and Moore occupied. Niles testified, "I grabbed my pistol and that's when I shot two times." Niles maintained he was being shot at constantly by Salter and he shot back.

The circuit court charged the jury on self-defense, but it refused Niles' request to charge the jury on voluntary manslaughter. The circuit court refused the voluntary manslaughter charge reasoning that "either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting . . . [and] killed the victim during the commission of an armed robbery."

Niles was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime.<sup>2</sup> Niles received a thirty-year sentence for murder and armed robbery and a five-year sentence for the conviction of possession of a firearm during the commission of a violent crime, all to be served concurrently. Niles appeals.

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* If any evidence supports a jury charge, the circuit court should grant the request.

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<sup>2</sup> While Niles was convicted of all charges, Hammond was only convicted of armed robbery and sentenced to fifteen years' imprisonment.

*State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). To warrant reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Id.*

## LAW/ANALYSIS

Niles argues the circuit court erred in failing to charge the jury on voluntary manslaughter because conflicting testimony was presented to support a jury charge on voluntary manslaughter.

To the contrary, the State asserts a jury charge of voluntary manslaughter was not appropriate in this case. The State argues only two scenarios are possible from the evidence presented at trial: (1) Salter shot first, and Niles acted in self-defense by returning fire; or (2) Niles shot at Salter first, committing murder during the commission of an armed robbery. The State contends that Niles failed to present evidence showing legal provocation or sudden heat of passion, which are both prerequisites to support a charge on voluntary manslaughter. We agree with Niles.

"The evidence presented at trial determines the law to be charged to the jury." *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010). "To warrant a court's eliminating the offense of [voluntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to [voluntary] manslaughter." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the circuit court views facts in a light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

"Voluntary manslaughter is the unlawful killing of a human being in [a] sudden heat of passion upon sufficient legal provocation." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Both sufficient legal provocation and heat of passion must be present at the time of the killing to support a jury instruction on voluntary manslaughter. *Hernandez*, 386 S.C. at 660, 690 S.E.2d at 585.

Furthermore, a court is permitted to charge a jury on both voluntary manslaughter and self-defense if supported by the evidence. In *State v. Gilliam*, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988), our supreme court held a jury charge on self-defense and voluntary manslaughter are not mutually exclusive, stating:

Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

(internal citation omitted).

Here, we find Niles' testimony that Salter fired the first shot at him, and he subsequently returned fire provides sufficient evidence to support a jury charge on voluntary manslaughter. Viewing the evidence in a light most favorable to Niles, we believe a jury could find Niles acted in a heat of passion upon sufficient legal provocation, thus supporting a voluntary manslaughter jury charge.

### **I. Legal Provocation**

First, we find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles.

An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. *State v. Starnes*, 388 S.C. 590, 597-98, 698 S.E.2d 604, 608 (2010). In *Gilliam*, our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. *Gilliam*, 296 S.C. at 396-97, 373 S.E.2d at 597. Further, in *State v. Linder*, 276 S.C. 304, 306-07, 278 S.E. 2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

[W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when . . . [Salter] was shooting in the car. That's

when my fiancé started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter] was shooting in the car . . . I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."); *see also State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.").

## II. Heat of passion

Second, we find evidence was presented at trial to show Niles acted in a heat of passion when he shot Salter.

To mitigate murder to voluntary manslaughter, sudden heat of passion, while it need not dethrone reason entirely, must be such that 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." *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotation marks and citation omitted). "However, even when a person's passion is sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled, the killing would be murder and not manslaughter." *Hernandez*, 386 S.C. at 661, 690 S.E.2d at 585 (internal quotation marks and citation omitted). "Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved." *Id.*

Niles testified that after Salter began shooting at his vehicle, Niles reached for his gun and returned fire. He stated:

So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. *See State v. Knoten*, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when in viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the "the first thing that came to . . . [his] mind" supports that he was acting on impulse upon being shot at by Salter. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

Accordingly, viewing the evidence in the light most favorable to Niles, we find evidence sufficient to support a charge on voluntary manslaughter; therefore, the circuit court erred in failing to charge the jury on voluntary manslaughter. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that if there is any evidence to support a jury charge, the circuit court should grant the request).

### III. Prejudice

Furthermore, the error of the circuit court in failing to charge the jury with voluntary manslaughter prejudiced Niles. "The [circuit] court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Harrison*, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000). However, even if the circuit court "refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (internal citation omitted). The party complaining of the circuit court's refusal to give the requested instruction

bears the burden of demonstrating prejudice to warrant a reversal. *Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 299, 450 S.E.2d 41, 45 (1994).

We find Niles met his burden of showing he was prejudiced by the circuit court's refusal to give the requested jury instruction. Here, the circuit court failed to give any instruction on voluntary manslaughter. The jury charges the circuit court gave regarding self-defense, murder, armed robbery, and possession of a firearm during the commission of a violent crime do not cover the substance of voluntary manslaughter, nor do they explain the elements of voluntary manslaughter. Based on the evidence presented at trial, viewed in a light most favorable to the defendant, a jury could have found Niles guilty of voluntary manslaughter. *See Harrison*, 343 S.C. at 175, 539 S.E.2d at 76 (holding defendant was prejudiced when based on the evidence at trial, a different verdict might have been reached if the jury had been charged with the instruction requested by the defendant). Therefore, Niles was prejudiced by the circuit court's failure to instruct the jury on voluntary manslaughter. *See id.*, 343 S.C. at 173, 539 S.E.2d at 75 ("To warrant reversal, a [circuit court's] refusal to give a requested jury charge must be both erroneous and prejudicial.").

## CONCLUSION

Based on the foregoing, we find the circuit court erred in refusing to charge the jury on voluntary manslaughter, and thus, we **REVERSE** Niles' conviction for murder and remand for a new trial.

Accordingly, the circuit court's decision is

**REVERSED AND REMANDED.**

**THOMAS and LOCKEMY, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**RECEIVED**

DEC 14 2012

APPEAL FROM HORRY COUNTY  
Court of General Sessions

**S.C. Supreme Court**

Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

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THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

---

**PETITION FOR A WRIT OF CERTIORARI**

---

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**CERTIFICATE OF COUNSEL**

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals, in the form of a withdrawn, substituted and refiled opinion, on November 14, 2012.

## TABLE OF AUTHORITIES

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**QUESTION PRESENTED**

- I. Whether the Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in the sudden heat of passion.

## INTRODUCTION

On April 9, 2007, James Salter was shot in a Best Buy parking lot in Myrtle Beach. (R. 138, 157). He later died from his injuries. (R. 519-20). Richard Niles, his fiancé, Mokeia Hammond and a third party, Ervin Moore, were charged with murder, armed robbery and possession of a firearm during the commission of a violent crime. (R. 103, 377). Niles and Hammond invoked their respective rights to trial by jury, while Moore pled guilty to charges of voluntary manslaughter, robbery and possession of a firearm during the commission of a violent crime.<sup>1</sup> (R. 1, 376-78). Niles was convicted on all charges while Hammond was convicted of armed robbery.<sup>2</sup> (R. 726).

## WHY THIS COURT SHOULD GRANT CERTIORARI

Stated simply, this is not a case where the trial court should have charged voluntary manslaughter. In fact, there was no evidence Niles was acting in the sudden heat of passion when he fired the weapon that killed Salter. Niles' testimony, if believed, could never support an inference that he possessed criminal intent when he fired the weapon that killed Salter since Niles testified that:

- Salter fired at he and his fiancé first;
- "[T]he first thing that came into [his] head" after Salter shot at his car was whether his "fiancé got shot[.]"
- He then grabbed his gun and, with his eyes closed and without looking, fired his gun twice in an effort to "get [the victim] to stop shooting[;]"
- He confirmed he "wasn't trying to hit nobody[.]"

This is not sudden heat of passion. Accordingly, the State asks this Court to grant certiorari.

---

<sup>1</sup> The terms of Moore's plea agreement allowed him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Niles and Hammond (R. 376-77).

<sup>2</sup> Hammond was acquitted on the charges of both murder and possession of a firearm during the commission of a violent crime. (R. 726).

## STATEMENT OF THE CASE

Niles was indicted during the August 2007 and October 2008 terms of court pursuant to indictment numbers: 2007-GS-26-3362 (murder), 2008-GS-26-4118 (possession of a firearm during the commission of a violent crime) and 2008-GS-26-4119 (armed robbery). (R. 760-65). On March 9, 2009, Niles and Hammond's cases were called to trial before the Honorable Benjamin H. Culbertson. (R. 1). Niles was represented by Verdell Barr. (R. 1). Four days later, Niles was convicted of murder, armed robbery and possession of a firearm during the commission of a violent crime. (R. 726). He received a thirty (30) year sentence for both the murder and armed robbery charges, in addition to a five (5) year sentence for the weapons charge, all to be served concurrently. (R. 749).

On appeal, Niles, represented by Robert M. Dudek of the South Carolina Commission on Indigent Defense and Reid T. Sherard, of Nelson, Mullins, Riley and Scarborough, L.L.P. sought appellate review of his murder conviction arguing the trial court erred in failing to instruct the jury on voluntary manslaughter. Following oral argument, the Court of Appeals, on September 12, 2012, issued a published opinion reversing and remanding Niles' murder conviction. The State then timely filed a petition for rehearing and Niles filed a response in opposition. Thereafter, the Court of Appeals withdrew, substituted and refiled its previous opinion on November 14, 2012. See State v. Niles, Op. No. 5034 (Ct. App. withdrawn, substituted and refiled on November 14, 2012). The State now seeks a writ of certiorari.

## STATEMENT OF THE FACTS

### The Killing of James Salter

On April 9, 2007, Ervin Moore was sitting outside the Trio Mini-mart in Trio, South Carolina, when he ran into drug dealer Richard Niles and his fiancé Mokeia Hammond. (R. 379-

80). Following a brief conversation, Moore learned that Hammond and Niles were headed to Myrtle Beach. (R. 379-80). When Niles asked Moore if he wanted "to ride" Moore jumped at the chance. (R. 379). Shortly thereafter, Hammond drove the trio to Myrtle Beach in Niles' car, a black Ford Fusion.<sup>3</sup> (R. 379).

On the drive to the beach, Niles made several phone calls and the threesome began "smoking blunts." (R. 379). Upon their arrival, the group continued to smoke with Hammond occasionally dropping Niles off at various hotels to conduct drug sales. (R. 379). Eventually the group ran out of marijuana. (R. 379-80). Looking to get more marijuana, Niles called James Salter, a fellow drug dealer, and arranged a meeting in a nearby Best Buy parking lot. (R. 380). While the testimony differs as to how events unfolded in the time immediately leading up to the shooting, the evidence clearly shows Salter was shot and killed by Niles. (R. 387, 554-55, 519-20).

Immediately following the incident Salter attempted to flee the scene, but after exiting the parking lot, crashed his car on a nearby side street. (R. 156). Officers Ryan Wood and Keith Deverell, who were responding to the shooting, came across Salter's recently crashed car and attempted to give aid. (R. 141-42). While Officers Wood and Deverell were assisting Salter, he explained that he was shot by "two black dudes." (R. 142). Salter died as a result of the gunshot wound. (R. 519-20).

At the scene of the crime, police collected a spent bullet. (R. 244-45). Police also searched Salter's car and collected the following: (1) swabs of blood; (2) clothing; (3) a .40 caliber Smith and Wesson handgun; (4) bullet casings; (5) two cell phones; and (6) a backpack full of money. (R. 248, 247-57).

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<sup>3</sup> While the car was actually a rental car rented to Niles' mother, Martha, the State, for purposes of convenience, will refer to the car as Niles' car. Furthermore, while there is a discrepancy in the record as to whether the car is gray, dark gray or black, there is no question that the car involved in the incident was the car rented to Martha Niles.

The next day, police discovered Niles' car at a nearby trailer park. (R. 220-23, 339). After identifying the car, authorities towed the car to the police annex to be searched and inventoried. (R. 237-38). The results of the search yielded the following items: (1) shell casings and bullets (R. 348-50); (2) a red plastic cup (R. 346); (3) cigarette filters (R. 347-48); (4) glass fragments (R. 341); and (5) blood samples (R. 343-44).

On April 13, 2007, Investigator Willie Brown of the Williamsburg County Sheriff's office along with investigators from the Myrtle Beach Police Department executed a search warrant at the home of Martha Niles, Richard Niles' mother. (R. 459-60). The results of the search yielded additional shell casings, a room key, a digital scale, baggies with marijuana seeds, a rental car receipt for a black Ford Fusion, and seven-hundred (\$700) dollars in cash. (R. 464).

### **The Charges**

Following the conclusion of the investigation Niles, Hammond and Moore were charged with armed robbery, murder and possession of a firearm during the commission of a violent crime. (R. 751-59). The day before his trial was scheduled to begin, Moore entered into a plea agreement whereby the State would allow him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Niles and Hammond. (R. 376).

### **The Trial**

At trial, the State painted the picture that Niles and Hammond, who were tried jointly, acted as a modern-day Bonnie and Clyde, with Hammond as the getaway driver and Niles as the robber. (R. 108). In support of this theory, the State called Ervin Moore. (R. 376). In particular, Moore explained that Niles, shortly before the robbery, announced to the trio, "we're



going to do a lick”<sup>4</sup> which Moore understood to mean, “we’re going to commit a robbery.” (R. 381). Getting into the specifics of the plan, Moore testified he was supposed to make sure the marijuana was in the car, at which point Niles would get out of the car and demand the money from Salter. (R. 381-83). Hammond would serve as the getaway driver. (R. 381-83).

In his testimony, Moore described the incident in detail, stating that upon Salter’s entering the parking lot and pulling beside Niles’ vehicle, he got out of the car to identify the marijuana. (R. 382). Moore explained that after identifying the marijuana and passing Niles on his return to the car, he watched as Niles stood alongside Salter’s car. (R. 383, 384). Continuing, Moore said he observed Niles leaning into Salter’s window when he heard two shots, after which, Niles, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (R. 384-85, 387, 388, 391). Moore testified Salter returned fire, and Niles fired back. (R. 385). During the exchange of gunfire, Moore explained that Niles shot Salter. (R. 387-88). Moore then stated that the trio fled the Best Buy parking lot in Niles’ car, retreating to a nearby trailer park.<sup>5</sup> (R. 386). There, Niles reportedly called his mother and asked her to report the car stolen. (R. 386). According to Moore, Niles hid the stolen marijuana and gun before getting a cab to an area hotel. (R. 386, 390). Hammond accompanied Niles, leaving Moore behind. (R. 390).

Corroborating Moore’s testimony regarding the aftermath of the incident, the State presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Niles’ description run from a white car and jump into the rear driver’s side door of a dark car. (R. 212,

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<sup>4</sup> According to Urban Dictionary, a lick is defined as: “any instance when you come upon easy money, whether you jack it, hustle it, or barter for it.” See [www.urbandictionary.com](http://www.urbandictionary.com) entry entitled “lick.” Alternate definitions include “stealing from someone.” See [www.urbandictionary.com](http://www.urbandictionary.com) entry entitled “lick” definition number three.

<sup>5</sup> Moore testified that on the way to the trailer park, Niles admitted he fired the initial shots. (R. 387-88).

213). The dark car then sped out of the parking lot. (R. 212, 213). Watts further noted the driver of the getaway car was a female. (R. 214). Angie Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (R. 182-83, 191). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Niles. Specifically, Niles' fingerprints were found on top of Salter's car. (R. 313). Additionally, DNA evidence taken from the driver's seat of Niles' car was consistent with that of Hammond to a probability of one in one quadrillion. (R. 511-12).

Meanwhile, Niles, testifying in his own defense, disputed Moore's version of the incident explaining there was no agreement between anyone to do "a lick." (R. 546). Instead, Niles explained, he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (R. 543-44).

Describing the incident, Niles stated that upon Salter's arrival at the scene, Moore emerged from the car and got into Salter's white Mustang, presumably in an effort to purchase the marijuana. (R. 553, 572). At that time, Hammond, who was seated next to Niles, allegedly informed him that Moore and Salter were fighting. (R. 553). Niles then testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which Salter allegedly reached for his gun and fired at the car. (R. 554). Continuing, Niles explained that he reached in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because "he was trying to get him to stop shooting." (R. 554, 555). After the incident, Niles admitted to leaving the car in a nearby trailer park.<sup>6</sup> (R. 556-57).

### **The Request to Charge**

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<sup>6</sup> On cross-examination, Niles admitted, that to his knowledge, Moore did not have a gun. (R. 594).

Following the close of evidence, Niles asked the trial court to charge, in addition to self-defense, the lesser-included offense of voluntary manslaughter arguing, the gunshots could serve as sufficient legal provocation and “the jury could infer that . . . the situation got out of hand and [the crime] was committed in the heat of passion. (R. 622). The trial court denied Niles’ request, finding the evidence showed that either Salter began firing and Niles was acting in self-defense, or Niles started shooting during the course of an armed robbery, which the trial judge implied, would result in his being guilty of murder. (R. 623).

### STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The evidence presented at trial determines the law from which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). The trial court’s decision regarding jury charges will not be reversed where the charges as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). However, the trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

### ARGUMENT

- I. The Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in the sudden heat of passion

On appeal, Niles maintained the trial court erred in failing to charge the jury on voluntary manslaughter arguing his testimony that Salter shot first, at which point he returned fire was evidence of sufficient legal provocation and sudden heat of passion since self-defense and

voluntary manslaughter are not mutually exclusive. In response, the State, while agreeing that self-defense and voluntary manslaughter are not mutually exclusive, disagreed with the proposition that the trial court should have charged voluntary manslaughter on the facts of this case arguing *inter alia* that Niles' testimony failed to establish he was acting in the sudden heat of passion when he shot and killed Salter.

In its opinion, the Court of Appeals, after explaining Niles established sufficient legal provocation based upon his testimony that Salter fired first, further found Niles established sudden heat of passion based upon the following testimony:

So, while [Salter] was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. *I didn't know if my fiancé got shot or nothing. That's the first thing that came into my head, you know.*

State v. Niles, Op. No. 5034 (Ct. App. withdrawn, substituted and refiled on November 14, 2012) (emphasis added). Continuing, the panel stated "Niles' testimony that grabbing the gun and returning fire was the 'first thing that came to . . . [his] mind' supports that he was acting on impulse upon being shot at by Salter." State v. Niles, Op. No. 5034 (Ct. App. withdrawn, substituted and refiled on November 14, 2012).

Quite simply, the State disagrees with the Court of Appeals' conclusion that Niles' testimony provided evidence he was acting in the sudden heat of passion when he shot and killed Salter. Furthermore, while voluntary manslaughter and self-defense are not mutually exclusive, the opposite is also true as voluntary manslaughter is not a lesser-included offense of self-defense. E.g. State v. Starnes, 388 S.C. 590, 599-600, 698 S.E.2d 604, 609 (2011) (explaining fear alone did not entitle an accused to a charge on voluntary manslaughter since it would render voluntary manslaughter a lesser-included offense of self-defense). Perhaps most notably, the

legal analysis for an instruction on each doctrine requires proof of different elements with remarkably different *mens rea* which, if proved, results in completely different consequences for the accused.<sup>7</sup> Keeping this in mind, the State submits that if the Court of Appeals ruling on this issue is not revisited it “would impermissibly blend the elements of voluntary manslaughter and self-defense” which in turn, “would render voluntary manslaughter a lesser-included offense of self-defense[.]” Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609.

In State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) this Court explained, “[v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” 338 S.C. at 101, 525 S.E.2d at 513. Thus, “[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing” to reduce murder to voluntary manslaughter. Id. Additionally, “[p]rovocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation.” State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). Further, to mitigate murder to manslaughter, the sudden heat of passion “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.” State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996).

“[I]t is well settled that self-defense and voluntary manslaughter are not mutually exclusive and both issues should be submitted to the jury *if supported by the evidence*.” State v. Wiggins, 330 S.C. 538, 549 n.18, 500 S.E.2d 489, 495 n.18 (1998) (emphasis added).

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<sup>7</sup> Furthermore, while other jurisdictions have essentially combined self-defense and voluntary manslaughter to allow a jury to find, under a theory of “imperfect self-defense” that a failure to prove each of the elements of self-defense could still yield a verdict of voluntary manslaughter, this is not the law in South Carolina. See State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) (declining to adopt the theory of imperfect self-defense).

Accordingly, in cases where both self-defense and voluntary manslaughter jury instructions may be involved, courts must review the facts to see if a charge on both is warranted. State v. Gilliam, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988). In doing so, the circuit court should view the facts in the light most favorable to the defendant. Byrd, 323 S.C. at 321, 474 S.E.2d at 431.

Initially, the State notes the Court of Appeals incorrectly characterized Niles' testimony when it found that grabbing the gun and returning fire was "the first thing that came to . . . [his] mind" after Salter fired at the car. State v. Niles, Op. No. 5034 (Ct. App. withdrawn, substituted and refiled on November 14, 2012). Specifically, Niles, when asked whether he or Salter fired first, said that Salter fired first. (R. 554). He then testified as follows:

That's when my fiancé she started screaming. She ducked in my lap. She was screaming. So, while he was shooting in the car, yes, I did had a gun. So, I grabbed my, I grabbed my pistol and that's when I shot two times. I went pow, pow. I wasn't trying to hit nobody.

(R. 554). Defense counsel again asked Niles *what* happened immediately after the gunshots, to which Niles responded:

I was leaning back in the car and I shot two times . . . I was just trying to get him to stop shooting. That's all I was trying to do. *I didn't know [if] my fiancé got shot or nothing. That's the first thing that came into my head, you know.*

(R. 555) (emphasis added). While it is true that the first *action* Niles carried out after the shooting was to return fire, his testimony very clearly established "the first *thing* that came into [his] head" was whether his "fiancé got shot[.]" (R. 555). In other words, while Niles' *actions* show he retaliated, an action which is ambiguous as to criminal intent, his first *thought* after he and his fiancé were shot at clearly reflected concern for his fiancé's welfare. (R. 555). Thus, the State submits the Court of Appeals' determination that Niles' actions of grabbing the gun and

returning fire were an impulsive response to being fired upon by Salter is not supported by the evidence.

Understanding Niles' testimony established "the first thing" that came into his mind after Salter allegedly shot at his car was fear for his fiancé, Hammond's safety, *after which* he closed his eyes and without looking, fired two shots in an effort to get Salter to "stop shooting" the testimony fails to show Niles was acting with an uncontrollable impulse to do violence to Salter. Specifically, the State first notes Niles' testimony that he feared for Hammond's safety cannot establish the appropriate *mens rea* for sudden heat of passion since fear, by itself, does not establish sudden heat of passion. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 ("[T]he mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge.") (emphasis in original). Furthermore, when combining sufficient legal provocation in this case—Niles' testimony that Salter shot first—with his testimony that after Salter allegedly fired the gun at the car he feared for Hammond's safety, the testimony still fails to reveal whether Niles' was acting with criminal intent at the time he allegedly returned fire on Salter. Indeed, as noted by the Starnes Court, "[a] person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear." 388 S.C. at 599, 698 S.E.2d at 609.

In fact, even adding Niles' testimony that he "grabbed his pistol . . . [and] shot two times" with his testimony that Salter shot first which made him fear for Hammond's safety, Niles still fails to show he was acting with an uncontrollable impulse to do violence to Salter at the time he fired the gun. Specifically, Niles' testimony that he grabbed his pistol and shot twice, physical actions which fail to reveal any sort of intent, are coupled with Niles' testimony which

reveal that at the time he fired the gun: (1) his eyes were closed; (2) he “wasn’t even looking[;]” and (3) he, “wasn’t trying to hit nobody” but was instead, “just trying to get [Salter] to stop shooting.” (R. 569). Keeping this in mind, Niles’ testimony simply does not establish the proper *mens rea* for voluntary manslaughter, which as a lesser included offense of murder, “by definition requires *criminal intent* to do harm to another.” State v. Childers, 373 S.C. 367, 375-76, 645 S.E.2d 233, 237-38 (2007) (Toal concurring) (emphasis added). Rather, Niles’ testimony, consistent with Chief Justice Toal’s description of the defendant’s testimony in Childers, simply fails to establish any sort of criminal intent, instead establishing circumstances, which if believed, would justify the homicide as opposed to mitigating it.<sup>8</sup> In other words, even when viewing the evidence in the light most favorable to the accused, Niles’ testimony does not establish a *mens rea* consistent with an uncontrollable impulse to do violence to the victim because, as noted above, he was not aiming at Salter and did not intend to shoot him, but instead said he merely wanted the shooting to stop because he feared for Hammond’s safety when he fired the gun. (R. 569). In light of this testimony, Niles cannot establish the criminal intent required for a finding of sudden heat of passion and therefore, the State asks this Court for a writ of certiorari in order to review the Court of Appeals’ opinion on this matter.<sup>9</sup>

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<sup>8</sup> Indeed, this distinction is the clear difference between voluntary manslaughter and self-defense. See Starnes, 388 S.C. at 598-99, 698 S.E.2d at 609 (“Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter-it will not justify it. This is the distinction between voluntary manslaughter and self-defense.”).

<sup>9</sup> The State further questions the Court of Appeals finding that the trial court’s purported failure to charge voluntary manslaughter was reversible error. See Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002) (explaining that in order to warrant reversal, the trial court’s refusal to give a requested instruction must be both erroneous and prejudicial). While the Court of Appeals determined the jury may have reached a different verdict had it been charged on voluntary manslaughter, this is at odds with what the jury actually found. Specifically, because the only evidence in the record, and the judge’s charge itself, required the jury to answer whether it believed Moore’s testimony; that the trio of himself Niles and Hammond agreed to rob Salter; or Niles’ testimony, that there was no agreement to rob Salter, the jury, by finding Hammond guilty of armed robbery, clearly determined there was an agreement amongst the group to commit an armed robbery (R. 702) (“The only limitations on your verdict regarding [Hammond] is that you cannot find [her] guilty of any crime unless you likewise find [Niles] guilty of that same crime.”). Understanding that the jury determined there was an agreement to commit an armed robbery, there is simply no likelihood that had the jury received a charge on voluntary manslaughter, it would



**CONCLUSION**

In light of the aforementioned arguments, the State respectfully asks this Court to grant certiorari and reverse the Court of Appeals' finding that Niles was entitled to an instruction on voluntary manslaughter.

Respectfully Submitted,

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have even considered such a verdict for Niles. Indeed, the law as charged to the jury, allowed the jury to infer malice from the fact that Salter was killed during the commission of an armed robbery meaning the jury was not even required to consider whether Niles acted with malice, but instead could have inferred as much. (R. 694) ("If one intentionally kills another during the commission of a felony the inference of malice may arise."). Thus, because the jury could have, and likely did, find Niles guilty of murder on the basis that he killed Salter during the course of a felony, in this case armed robbery, it is unlikely the jury would have even considered a voluntary manslaughter verdict since malice was inferred from Niles' intent to commit the armed robbery.

STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

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DEC 14 2012

S.C. Supreme Court

Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT

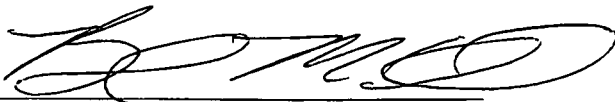
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of  
Certiorari in the above referenced case has been served upon:

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On this 14<sup>th</sup> day of December, 2012.



Brendan McDonald  
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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry CountyBenjamin H. Culbertson, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

APPELLANT

Appellate Case No. 2012-213592

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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### INTRODUCTION

In Opinion No. 5034 filed<sup>1</sup> November 14, 2012, a unanimous Panel of the South Carolina Court of Appeals reversed Respondent Richard Bill Niles, Jr.'s ("Niles") conviction for murder and remanded the matter for a new trial due to the trial judge's failure to instruct the jury on the elements of voluntary manslaughter and submit it as a potential verdict. The State of South Carolina now petitions this Court for certiorari. As shown herein, the State has failed to offer any grounds that warrant certiorari as provided by Rule 242 of the South Carolina Appellate Court Rules. Instead, the State seeks for this Court to simply revisit the same issue accurately decided by the Court of Appeals without identifying any significant issues or inconsistency with prior decisions of this Court. The State's petition for certiorari should be denied.

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<sup>1</sup> Opinion No. 5034 was originally filed on September 12, 2012, before being withdrawn, substituted and refiled on November 14, 2012.

## ARGUMENT

**I. The Court of Appeals properly reversed the trial court for failing to grant Niles' request for a jury instruction on voluntary manslaughter when evidence presented at trial showed Niles acted in the sudden heat of passion.**

The State argues “there was no evidence Niles was acting in the sudden heat of passion when he fired the weapon that killed [the decedent].” (Petition p. 1). More bluntly, “[q]uite simply, the State disagrees with the Court of Appeals’ conclusion that Niles’ testimony provided evidence he was acting in the sudden heat of passion when he shot and killed [the decedent].” (*Id.* at 8). The Court of Appeals properly rejected this argument, made both in the State’s brief, at oral argument, and in the petition for rehearing, because evidence exists in the record that Niles was acting in the sudden heat of passion.<sup>2</sup>

**A. The State is offering a new theory that was not presented in the Final Brief of Respondents to the Court of Appeals and is thus not preserved.**

For the extraordinary<sup>3</sup> relief of certiorari to even be considered, the State must overcome two prerequisites of issue preservation: (1) the issue must have been raised to the Court of Appeals, and (2) the issue must have been raised in the petition for rehearing. Rule 242(d)(2), SCACR; *see Sloan v. Department of Transp.*, 365 S.C. 299, 307-308, 618 S.E.2d 876, 880 (2005). Both requirements are mandatory. *See Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (citing conjunctive nature of Rule 226(d)(2), SCACR, the precursor to Rule 242(d)(2), SCACR).

In the Final Brief of Respondents, the State spent significant effort arguing the jury could only draw one of two conclusions, “either [Niles] murdered [the decedent] during the course of

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<sup>2</sup> The State does not raise the issue of sufficient legal provocation element of voluntary manslaughter in the Petition.

<sup>3</sup> A writ of certiorari is an extraordinary form of relief . . .” *Rowe v. City of West Columbia*, 334 S.C. 400, 408, 513 S.E.2d 379, 383 (Ct. App. 1999).

an armed robbery or [Niles] had nothing to do with the armed robbery, was caught in the crossfire and was acting in self-defense when he shot [the decedent].” (Brief p. 11; generally pp. 10-15).

At no point in the brief did the State make any argument regarding Niles’ *mens rea* or lack thereof. Conversely, the thrust of the Petition is the argument that “Niles cannot establish the criminal intent required for a finding of sudden heat of passion,” (Petition p. 12), and *mens rea* is referenced a half-dozen times in the Petition. This argument was not presented in the State’s brief to the Court of Appeals, and certiorari in favor of the State should be denied because the argument was not preserved.

**B. Even if the State’s argument is preserved, there is evidence in the record that Niles acted in the sudden heat of passion, and the Court of Appeals properly remanded the murder conviction to the trial court for failure to instruct the jury on the elements of voluntary manslaughter.**

Even if the State preserved its single<sup>4</sup> argument in the Petition, the Petition should be denied. The Court of Appeals properly found Niles was acting in the sudden heat of passion upon a sufficient legal provocation.

“Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given. *State v. Starnes*, 388 S.C. 590, 597-

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<sup>4</sup> The State, in a footnote to the last sentence before the conclusion in the Petition, appears to argue there was no prejudice to Niles in the failure of the trial court to charge voluntary manslaughter. (Petition p. 12, n. 9). As an initial matter, this issue is not part of the Petition proper and should not be considered. Further, the State’s speculation as to what the “likelihood” of what a jury would have done is irrelevant. The charges actually given in this case did not “sufficiently cover[] the substance of the request.” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). “It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.” *Id.* at 549-550, 603. To warrant the court in eliminating the offense of manslaughter, it should clearly appear there is no evidence whatsoever tending to reduce crime from murder to manslaughter. e.g. *State v. Smith*, 391 S.C. 408, 706 SE2d 12 (2011) (emphasis added).

598, 698 S.E.2d 604, 608 (2010). Stated another way, “[t]o warrant a court’s eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). This is such an important tenet of law it applies even if the defendant does not want a jury instruction for manslaughter due to fear of a compromise verdict. *State v. Nichols*, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997).

“Trial courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter, especially where a defendant claims he acted in self-defense,” and this case is no exception. *Starnes*, 388 S.C. at 597-598, 698 S.E.2d at 608. In *Starnes*, this Court took the opportunity to “reaffirm the principle that a person’s fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion.” *Id.* at 598, 609.<sup>5</sup>

The State spends great efforts parsing the words of Niles and chastising the Court of Appeals because it “incorrectly characterized Niles’ testimony when it found grabbing the gun and returning fire ‘was the first thing that came to . . . [his] mind’ after [the decedent] first at the car.” (Petition p. 10). According to the State, there is a legal difference as to sudden heat of passion in the split second between Niles’ concern for his fiancé’s safety during a gunfight and his simultaneous reaction by pulling his own pistol and returning fire. This is a distinction not found in case law, even if the State could show its interpretation of the words and sequence of words used in Niles’ testimony was “more correct” than the Court of Appeals’ interpretation.

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<sup>5</sup> In the Brief of Respondents to the Court of Appeals, the State acknowledged fear could lead to evidence supporting a voluntary manslaughter charge. (Brief p. 12, citing *State v. Dickey*, 380 S.C. 384, 400-01, 669 S.E.2d 917, 926 (Ct. App. 2008)). By the time of the Petition, the State was arguing “fear, by itself, does not establish sudden heat of passion,” (Petition p. 11), without acknowledging *Starnes* does not treat the issue so succinctly.



Further, the State leaves out of its Petition that in the immediate aftermath of Niles' firing his weapon he was "seriously upset", "really pissed off" and "fussing at" Ervin Moore ("Moore") (the man who started the incident by stealing the marijuana from the decedent). (R. p. 575-576). The State also neglects to mention its position taken in the brief before the Court of Appeals, where it acknowledged "[Niles'] being fired at from close range obviously amounts to imminent danger of losing his life." (Brief p. 14, n. 8).

In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Here, the Court of Appeals found evidence in the record supporting a manslaughter charge. (Opinion at pp. 5-7). The State admits "the testimony differs as to how events unfolded in the time immediately leading up to the shooting. . ." (Petition p. 3). That the evidence was conflicting makes no difference. *See Knoten*, 347 S.C. at 305-306, 555 S.E.2d at 396. As the assistant solicitor put it so aptly at trial, "[the jury] can believe part of this, part of that, part of nothing." (R. p. 634, ll. 20-22).

Niles testified that Moore asked him to attempt to purchase "a pound" of marijuana for him. (R. p. 558, ll. 6-21). Niles spoke to the decedent and planned to meet him at the Best Buy. (R. p. 564, l. 25 – 567, l. 17).

Niles recalled that Moore got out of his car and got into the car with the decedent. Niles recalled that as he was talking with his girlfriend, Hammond, about their upcoming wedding Hammond suddenly told him, "Baby, they are fighting." Niles looked over and saw "they were tussling in the car." Niles said he noticed Moore trying to get out of the car and he heard the decedent say, "You ain't getting out of this car with my weed without no money." (R. p. 568, l. 11 – 569, l. 24).

Niles remembered Moore then jumped back into his car, and “I seen him pull out a gun. [T]hat’s when he [the decedent] started firing off as Ervin was jumping in the back seat and when he pulled the door that’s when he was shooting in, he was shooting in the car.” Hammond was screaming while these shots were fired at them, “So, while he was shooting in the car, yes, I did have a gun. So, I grabbed my, I grabbed my pistol and that’s when I shot two times. My eyes was closed. I wasn’t even looking. I shot two times. I went pow, pow. I wasn’t trying to hit nobody.” (R. p. 568, l. 11 – 569, l. 24). Niles was being shot at “constantly,” and he shot back. (R. p. 569, l. 25 – 570, l. 9).

“It is well settled that self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence.” *State v. Wiggins*, 330 S.C. 538, 549 n. 18, 500 S.E.2d (1998); *State v. Nichols*, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); *State v. Gilliam*, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988).

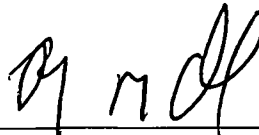
The rationale for this rule is that the jury may fail to find all of the elements for self-defense but still find a sufficient legal provocation and heat of passion to conclude the defendant was only guilty of voluntary manslaughter. *See, Gilliam*, 296 S.C. at 396-397, 373 S.E.2d at 597. It is elementary that a person is going to be in fear when they are being shot at and fear can constitute a basis for heat of passion to support a voluntary manslaughter instruction. *Wiggins*, 330 S.C. at 549, 500 S.E.2d at 495.

Because there is evidence in the record that Niles was acting in the sudden heat of passion upon a sufficient legal provocation certiorari for the State is not warranted.

CONCLUSION

Based on the foregoing, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

Reid T. Sherard, SC Bar No. 72536  
Nelson Mullins Riley & Scarborough LLP

ATTORNEYS FOR RESPONDENT.

This 13th day of February, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RICHARD BILL NILES, JR.,

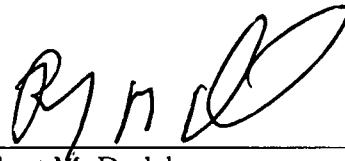
APPELLANT

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CERTIFICATE OF SERVICE

---

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of February, 2013.




---

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 13th day  
of February, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

---

Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

---

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

Appellate Case No. 2012-213592

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**REPLY TO RESPONDENT'S RETURN TO  
THE PETITION FOR WRIT OF CERTIORARI**

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S.C. Supreme Court

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## PETITIONER'S REPLY

- I. The Question Presented is Properly before this Court as it was briefed in the State's Final Brief of Respondent before the Court of Appeals and was the main focus of the State's Petition for Rehearing

In Respondent, Richard Niles' ("Niles") return to the petition for writ of certiorari, Niles contends Petitioner, the State of South Carolina ("The State"), failed to preserve the question which is now before this Court, "whether Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to established Niles was acting in the sudden heat of passion." Pet. for Writ of Cert. at i, iv, 7-13. Specifically, Niles contends the State never presented this argument to the Court of Appeals. Ret. to Pet. for Writ of Cert. at 3-4. In reply, the State submits this argument was not only raised in the State's final brief before the Court of Appeals, but was the subject of the majority of oral arguments and, after the Court rendered its' opinion, was the main focus of the State's petition for rehearing. See Rule 242(d)(2), SCACR (West 2013), ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. *A question presented will be deemed to include every subsidiary question fairly comprised therein.*") (emphasis added). As such, the State submits this question is properly before this Court.

Rule 242(d)(2), SCACR, discusses which questions may be included in a petition for writ of certiorari to the Court of Appeals stating, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein."). Indeed, Niles correctly highlights that Sloan v. Department of Transp., 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005) and Kleckley v.



Northwestern Nat. Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000), both cases which applied Rule 226(d)(2), SCACR, the precursor to Rule 242(d)(2), stand for the same proposition. Understanding this, the State submits it complied with this Court's issue preservation requirements since it raised both the question and even the subsidiary question, whether Niles' testimony established he was acting in the sudden heat of passion, to the Court of Appeals.

#### **A. Presentation of the Argument in Briefing before the Court of Appeals**

The State has always argued there was no evidence Niles' was acting in the sudden heat of passion when he shot and killed Salter. Specifically, the State's brief, responding to Niles' question presented—that the trial court erred in failing to instruct on voluntary manslaughter—wrote, “[t]he trial court did not err in failing to instruct the jury regarding voluntary manslaughter as there was no evidence presented showing either sufficient legal provocation or sudden heat of passion[.]” (App. 813, 820). Furthermore, the record reflects the Court of Appeals interpreted the State's brief as contesting the same, writing, “[t]he State contends that Niles failed to present evidence showing legal provocation or sudden heat of passion, which are both prerequisites to support a charge on voluntary manslaughter.” (App. 793).

Moreover, while Rule 242(d)(2) does not require that a subsidiary argument consumed within the question presented be specifically preserved, the State did this as well since it contended that Niles' testimony failed to establish the appropriate *mens rea* for sudden heat of passion. (App. 824) (“In the present case, Appellant's testimony that he wanted Salter to stop shooting does not describe an emotional response tantamount to ‘an uncontrollable impulse to do violence.’ ”); (App. 825) (“Under these facts, the State submits there is no evidence by which a jury could come to the conclusion described in Gilliam as the evidence presented could lead the

jury to only one of two conclusions—murder or self-defense.”). Thus, the record clearly reflects the State presented the question now at issue to the Court of Appeals via its’ final brief.

### **B. Presentation in the Petition for Rehearing**

Likewise, while the State admittedly conceded the issue of sufficient legal provocation in its petition for rehearing, it continued to maintain Niles was not acting in the sudden heat of passion when he shot and killed Salter. Specifically, in its’ petition for rehearing, the State, in argument heading II, wrote, “Niles [t]estimony [r]egarding the [s]hooting did not [e]stablish that Niles was [a]cting in the [s]udden [h]eat of [p]assion. (App. 778). Explaining the basis for its argument, the State reasoned “Niles’ own testimony only establishes that upon seeing the victim fire at the car, Niles returned fire not because he had an uncontrollable impulse to violence to the victim, but because he feared for the safety of his fiancé and wanted the victim to stop shooting.” (App. 779). Continuing, in the very next sentence, the State said, “Niles testimony simply does not establish the proper *mens rea* for voluntary manslaughter—a lesser included offense of murder which reduces a defendant’s culpability in light of the facts and circumstances of the case—and instead only demonstrates Appellant’s *mens rea* was that of self-defense or defense of others[.]” (App. 779). Thus, the record demonstrates the State has preserved the question and subsidiary arguments which are now before this Court—that Niles was not acting in the sudden heat of passion when he shot and killed Salter, since, by his own words, he was scared; had his eyes closed; “wasn’t even looking[;]” and “wasn’t trying to hit nobody” when he shot at Salter, killing him.

**CONCLUSION**

Accordingly, the State submits the question presented is properly before this Court and therefore asks the Court to grant certiorari and reverse the Court of Appeals' finding that Niles was entitled to an instruction on voluntary manslaughter.

Respectfully Submitted,

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J. GREGORY HEMBREE  
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---

Brendan McDonald  
ATTORNEY(S) FOR PETITIONER(S)

February 15, 2013.

STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

---

Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

---

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT

Appellate Case No. 2012-213592

---

**CERTIFICATE OF SERVICE**

---

The undersigned attorney hereby certifies that a true copy of the Reply to the Petition for Writ of Certiorari in the above referenced case has been served upon:

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Reid T. Sherard  
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On this 15<sup>th</sup> day of February, 2013.

A handwritten signature in black ink, appearing to read 'B. McDonald', written over a horizontal line.

Brendan McDonald  
Bar No. 77784

ATTORNEY FOR PETITIONER(S)

# The Supreme Court of South Carolina

The State, Respondent,

v.

Richard Bill Niles, Jr., Petitioner.

Appellate Case No. 2012-213592

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APPELLATE DEFENSE

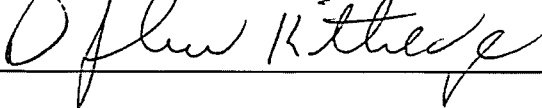
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## ORDER

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We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Niles*, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

  
C.J.

  
J.

Columbia, South Carolina

February 6, 2014

cc:

The Honorable Jenny Abbott Kitchings

Robert Michael Dudek, Esquire

Donald J. Zelenka, Esquire

John Gregory Hembree, Esquire

Brendan Jackson McDonald, Esquire

Reid T. Sherard, Esquire

Melanie Huggins-Ward

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Horry County  
Benjamin H. Culbertson, Circuit Court Judge

---

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT

APPELLATE CASE NO. 2012-213592

---

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in a sudden heat of passion.

COUNTER QUESTION PRESENTED

Whether the Court of Appeals correctly held respondent was entitled to a jury instruction on voluntary manslaughter where there was evidence respondent was shot at and returned fire and since the trial court incorrectly reasoned that respondent was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive?

STATEMENT OF THE CASE

Respondent was indicted at the August 23, 2007 term of the Horry County Grand Jury for the offenses of murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 766 -777. His case came on for trial on March 9, 2009, before the Honorable Benjamin H. Culbertson and a jury. R. 1.

Respondent was tried together with co-defendant Mokeia Hammond. Verdell Barr represented respondent. Ron Hazzard represented co-defendant Hammond. Donna Elder and Brad Richardson were the assistant solicitors. R. 1.

On March 13, 2009, the jury found respondent guilty on all three counts. The jury found co-defendant Hammond not guilty on the charge of murder, guilty of armed robbery and not guilty on the charge of possession of a weapon during a violent crime. R. 741, ll. 1-19.

Judge Culbertson sentenced respondent to thirty years imprisonment for murder, thirty years imprisonment for armed robbery and five years imprisonment for possession of a weapon during the commission of a violent crime. The judge sentenced co-defendant Hammond to fifteen years imprisonment for armed robbery. R. 763, l. 24 – 764, l. 14.

The Court of Appeals reversed respondent's conviction and sentencing in Opinion 5034 September 12, 2012. The state filed a petition for rehearing on September 26, 2012, and on November 14, 2012 the Court of Appeals denied the petition for rehearing but substituted and refiled the opinion. See State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (2012). On December 14, 2012, the state filed its petition for writ of certiorari with this Court, and respondent filed his return on February 13, 2013. This Court granted the state's petition for writ of certiorari on February 6, 2014, and the brief of petitioner was filed on March 10, 2014.

This brief of respondent follows.

### ARGUMENT

The Court of Appeals correctly held respondent was entitled to a jury instruction on voluntary manslaughter where there was evidence respondent was shot at and returned fire -- he acted in a sudden heat of passion upon a sufficient legal provocation -- and particularly where the trial court incorrectly reasoned that respondent was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive.

#### **Relevant Facts**

Myrtle Beach Police Officer Ryan Wood responded to a “shots fired call” on April 9, 2007, in the “Coastal Grand Mall area.” R. 152, l. 1 – 153, l. 10. The shooting occurred in the parking lot near the Best Buy. R. 153, l. 11 – 154, l. 5.

Wood found the decedent “slumped over the driver’s seat.” R. 156, l. 22 – 157, l. 4. The decedent was able to tell Wood his name, and “he was kind of going in and out of consciousness.” The decedent told Wood he had been shot by “a couple of black dudes.” R. 157, ll. 8-19.

On cross-examination, Wood acknowledged that the decedent never said “Rich Boy,” respondent’s nick name, shot him. Neither did he say: “Mokeia Hammond shot me.” R. 168, ll. 10-13.

The obvious import of this, as defense counsel later argued, was that this case involved a drug deal where respondent knew the decedent, and that respondent would not have planned an armed robbery in broad daylight near the Best Buy. Further, the decedent would have named respondent as the shooter to Officer Wood if he thought respondent had shot him. The defense evidence, as will be seen infra was that alleged accomplice Ervin Moore decided to turn a “normal drug deal” into a robbery attempt without the knowledge of respondent. R. 652, l. 2 – 653, l. 21.

Ervin Moore pled guilty the week of respondent's trial to voluntary manslaughter "and robbery and gun possession" as an accomplice in this case, and he testified for the state. R. 391, l. 13 – 392, l. 1. Moore was originally charged with murder, armed robbery and possession of a weapon during a violent crime. R. 392, ll. 2-21. This Court can take judicial notice that Moore is serving a fifteen year sentence for voluntary manslaughter as a result of the incident in this case, and his testimony for the state.<sup>1</sup>

### **Moore's testimony**

Moore said on April 9, 2007, he was at a store in Trio, South Carolina "a little boring little town from where my family is from. So, I got in the car with them [respondent and Hammond] and came to the beach." Hammond apparently was driving. R. 394, ll. 13-20.

Moore said on the way to the beach respondent "made a couple of drug sales at a couple of motels." Moore claimed: "We were smoking blunts in the car and while we [were] riding on the beach we were smoking blunts. We ran out of weed and we said [decided] we wanted to get some more weed. R. 394, l. 21 – 395, l. 2. Moore maintained respondent "made a couple of phone calls" and we "ended up in the Best Buy parking lot." R. 395, l. 4-7.

Moore claimed he did not know who respondent was talking to on the phone. R. 395, ll. 3-21. Moore also maintained respondent said "he was going to do a lick." R. 395, ll. 23-24. Moore said he understood this meant a robbery. R. 396, ll. 1-18.

Moore said when they got to the Best Buy he "got out of the car and got in the other car, the white mustang [the decedent's car]" R. 397, ll. 3-6. Moore testified his job was "to identify the weed" for respondent. R. 397, ll. 3-16.

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<sup>1</sup> South Carolina Department of Corrections inmate locator, <http://public.doc.state.sc.us/scdc-public/>

Moore said that the decedent pulled the marijuana out from under his seat so Moore could see it. R. 397, ll. 20-22. Moore stated the pound of marijuana was in a “big Ziploc bag.” R. 398, ll. 2-7.

Moore maintained that after he inspected the marijuana he got out of the decedent’s car and got back into the car with Hammond. Respondent was outside the car at this time. R. 398, ll. 8-23. Moore said he informed respondent he had seen the marijuana, and “the next thing I knew I just heard two shots and I seen Richard [respondent], he jumped back in the back seat behind Mokeia [Hammond]. He didn’t go in the front seat. He jumped in the back seat where I was at.” R. 399, l. 1 – 400, l. 2.

Moore maintained: “[A]fter he [respondent] jumped in, after them two shots then the other guy fired a shot and he fired a shot between, I mean, through the driver’s door on Mokeia’s car.” R. 400, ll. 3-6. Moore said “everybody was shook up . . . stunned. Then after that Richard shot some more and then he shot some more, I mean, by the, by the victim shooting he shot the back window out where I was sitting at and glass went, a piece of glass flew in my eye.” Moore stated that at this point Hammond drove out of the parking lot with much of the glass shot out of the car’s windows. R. 400, ll. 3-25.

Moore claimed on direct-examination that “the other guy didn’t shoot until after Richard shot.” R. 403, ll. 3-4. On cross-examination by defense counsel Barr Moore admitted that he lied to the police about the shooting. R. 423, ll.12-14. Moore acknowledged he told the police: “I didn’t see Richard shoot first.” Moore said he was testifying respondent shot first “because Richard told me he shot first when he jumped back in the car.” R. 429, l. 6 – 430, l. 5.

Moore also said respondent had a couple hundred dollars with him from drug sales that day. At the same time, Moore alleged respondent set up the drug robbery. R. 431, ll. 1-13.

### Respondent's testimony

Respondent testified in his own defense. He said he had "no reason" to attempt to rob the decedent for marijuana. He denied he told either Hammond or Moore that "we're going to do a lick." R. 561, ll. 18-20.

Respondent testified that Moore asked him to attempt to purchase "a pound" of marijuana for him. R. 558, ll. 6-21. Respondent said he spoke to the decedent and planned to meet him at the Best Buy. R. 564, l. 25 – 567, l. 17.

Respondent recalled that Moore got out of his car and got into the car with the decedent. Respondent said as he was talking with Hammond about their upcoming wedding Hammond suddenly told him, "Baby, they are fighting." Respondent said he looked over and saw "they were tussling in the car." Respondent noticed Moore trying to get out of the car and he heard the decedent say, "You ain't getting out of this car with my weed without no money." R. 568, l. 11 – 569, l. 24.

Respondent remembered Moore then jumped back into his car, and "I seen him pull out a gun." *[T]hat's when he [the decedent] started firing off as Ervin was jumping in the back seat and when he pulled the door that's when he was shooting in, he was shooting in the car.* Hammond was screaming while these shot were fired at them, "So, while he was shooting in the car, yes, I did have a gun. So, I grabbed my, I grabbed my pistol and that's when I shot two times. My eyes was closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody." R. 568, l. 11 – 569, l. 24. Respondent testified the gunfire was "**constantly**" coming into his car when he shot back. R. 569, l. 25 – 570, l. 9.

Defense counsel Barr argued in closing that respondent and "Mr. Salter [the decedent] know each other. They're engaged in a business where they're making money. There's no logical reason

Niles would screw that up . . .” Counsel also argued, “[I] don’t think that Niles went to the Best Buy Parking lot with any intention to harm Salter [the decedent] or anyone else in any way and I don’t think the evidence has pointed to it.” R. 652, l. 2 – 653, l. 21.

Counsel for co-defendant Hammond complained about the jury verdict finding her guilty of armed robbery where the jury acquitted her of murder thereby finding the homicide was not the natural consequence of a planned robbery under the principle of the “hand of one is the hand of all.” He moved for a new trial on that basis. The judge refused to grant a new trial noting that **inconsistent verdicts** did not entitle Hammond to a new trial. R. 746, l. 15 – 748, l. 18.

### **Request to charge**

The judge agreed to charge self-defense. Defense counsel Barr also requested that the judge charge the jury on voluntary manslaughter based on evidence the decedent shot at him and he shot back. R. 637, l. 10 – 638, l. 5. The judge ruled he was not going to charge voluntary manslaughter, and he reasoned that “either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting or killed the victim during the commission of an armed robbery.” R. 638, ll. 6-13.

### **Opinion of the Court of Appeals**

The Court of Appeals held:

[W]e find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles. An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. State v. Starnes, 388 S.C. 590, 597–98, 698 S.E.2d 604, 608 (2010). In Gilliam,<sup>2</sup> our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. Gilliam, 296 S.C. at 396–97, 373 S.E.2d at 597. Further, in State v. Linder, 276 S.C. 304, 306–07, 278 S.E.2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began

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<sup>2</sup> State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1998).



shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

[W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when ... [Salter] was shooting in the car. That's when my fiancé started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter] was shooting in the car ... I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. See State v. Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."); see also State v. Gadsden, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.").

State v. Niles, 400 S.C. 527, 534-36, 735 S.E.2d 240, 244 (2012)

The Court of Appeals also found there was evidence respondent Niles was acting in a heat of passion at the time he returned fire. The Court noted that after the decedent began shooting at his vehicle, Niles reached for his gun and returned fire:

So, while he was shooting in the car ... I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody ... I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. See State v. Knoten, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when in viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the "the first thing that came to ... [his] mind" supports that he was acting on impulse upon being shot at by Salter. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

State v. Niles, 400 S.C. 527, 536, 735 S.E.2d 240, 245 (2012).

The Court of Appeals wrote the trial judge's instructions on self-defense, murder, armed robbery and possession of a weapon during a violent crime **"do not cover the substance of voluntary manslaughter nor do they explain the elements of voluntary manslaughter."**

State v. Niles, 400 S.C. 527, 537, 735 S.E.2d 240, 245-46 (2012). (emphasis added).

### **Discussion**

The Court of Appeals correctly held that respondent's testimony provided evidence that the shooting was voluntary manslaughter rather than murder. First, "it is well settled that self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence." State v. Wiggins, 330 S.C. 538, 549 500 S.E.2d 489, n. 18 (1998); State v. Nichols, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); State v. Gilliam, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988). The rationale for this rule is that the jury may fail to find all of the elements for self-defense but still find a sufficient legal provocation and heat of passion to conclude the defendant was only guilty of voluntary manslaughter. See, Gilliam, 296 S.C. at 396-397, 373 S.E.2d at 597.

The trial judge here consequently erred by reasoning and only instructing the jury based upon his reasoning that the jury had to find respondent acted in self-defense or that he murdered the decedent.

As the Court of Appeals correctly noted there was evidence respondent was being shot at when he returned fire and that he acted on impulse. Respondent said they were under "constant fire," and that he wanted to somehow make the decedent "stop shooting." Returning fire in this situation was simply a natural human reaction. Wiggins, 330 S.C. at 549, 500 S.E.2d at 495.

Here, defense counsel correctly argued that respondent being shot at provided the heat of passion and sufficient legal provocation necessary for voluntary manslaughter. The judge erred by reasoning respondent either shot back at the decedent in self-defense, and that the jury could acquit him by reason of self-defense based on that evidence, or the jury could only find him guilty of murder based on the planned armed robbery. See State v Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). The Court of Appeals properly found that respondent was entitled to a voluntary manslaughter instruction, and reversed respondent's murder conviction since the jury was not given that verdict option.

The state in its brief in the Court of Appeals simply argued that there was no evidence of voluntary manslaughter, and that the trial judge correctly reasoned that while the jury could have found respondent not guilty by reason of self-defense that voluntary manslaughter was not a proper verdict option because there was no evidence to support that lesser-included offense. Respondent has shown above why that reasoning is incorrect and why the Court of Appeals correctly decided this issue.

In its brief of Petitioner the state now argues that the failure to instruct the jury on voluntary manslaughter was "harmless error." Interestingly though the state repeats that "[t]he evidence yielded one of two conclusions – either Niles shot Salter during the course of a robbery or Niles shot Salter after Salter shot at Niles' vehicle." Brief of Petitioner at 18. The state then maintains that the judge's charge "required the jury to answer whether it believed Moore's testimony" that "the trio" had agreed to rob the decedent. It then goes on to offer its opinion on the logic of the jury's verdict. Id.

There are several problems with this: First, South Carolina abolished the doctrine of "inconsistent verdicts" given the undoubtedly correct reasoning that juries compromise at times in a

lenient fashion, at times harshly -- in ways that logic cannot explain. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Further, juries are instructed that they can believe the entire testimony of a witness, part of it, or none of it. Consequently, the trial judge “requiring the jury to answer whether it believed Moore’s testimony” would be an impossible task even if that was the trial judge’s intent.

Moreover, the jury’s task is to judge whether the state has proved the defendant guilty beyond a reasonable doubt on each and every charge. Its function is not to “seek the truth” or find the truth. *“We again take this opportunity to strongly urge the trial courts to avoid using any “seek” language, or any of the other offending terms described above, when charging jurors on either reasonable doubt or circumstantial evidence. Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant.”* State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998). (emphasis added).

Although respondent agrees that the failure to charge a lesser-included offense where it is supported by the evidence is an error of law requiring reversal, respondent would be remiss in not noting the very real differences between this case and State v. Middleton, Op. No. 27358, Shearouse’s Adv. Sh. #8, at pp. 45-52 (filed February 26, 2014) (Pleicones, J. dissenting) if a harmless error analysis is unfortunately conducted here. In Middleton, the evidence established that the defendant deliberately drove up to the passenger window of an automobile and shot into the vehicle at least five times.

Respectfully, the regrettable holding of that case found harmless error in the refusal to charge assault and battery in the first degree rather than a holding there was no evidence of that lesser included offense given the obvious Mouzon<sup>3</sup> malice in firing five shots into an automobile.

Here, respondent's testimony plainly provides evidence of voluntary manslaughter. Respondent was being shot at and he shot back out of fear and to make "the shooter stop." See State v. Knoten, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001); State v. Linder, 276 S.C. 304, 306-07, 278 S.E.2d 335, 337 (1981). Respondent's actions were impulsive when his life was in danger because he was being shot at by the decedent.

Finally, and again, the rationale for requiring charging both voluntary manslaughter and self-defense in this situation is that the jury may fail to find all of the elements for self-defense but still find a sufficient legal provocation and heat of passion to conclude the defendant was only guilty of voluntary manslaughter. See, Gilliam, 296 S.C. at 396-397, 373 S.E.2d at 597. There was evidence of voluntary manslaughter in this case, and the jury would have been fully justified in rejecting self-defense yet finding appellant guilty of voluntary manslaughter rather than murder.

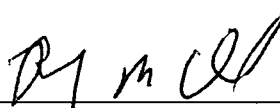
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<sup>3</sup> State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957).

CONCLUSION

The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT.

This 9th day of April, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT

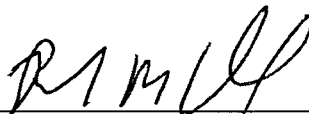
APPELLATE CASE NO. 2012-213592

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CERTIFICATE OF SERVICE

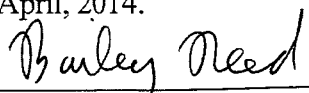
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I certify that a true copy of the brief of respondent, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of April, 2014.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day  
of April, 2014.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: October 24, 2021

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012).

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THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

Appellate Case No. 2012-213592

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**BRIEF OF PETITIONER**

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**CERTIFICATE OF COUNSEL**

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals, in the form of a withdrawn, substituted and refiled opinion, on November 14, 2012.

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**QUESTION PRESENTED**

- I. Whether the Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in the sudden heat of passion.

## INTRODUCTION

On April 9, 2007, James Salter was shot in a Best Buy parking lot in Myrtle Beach. (App. 138, 157). He later died from his injuries. (App. 519-20). Richard Niles, his fiancé, Mokeia Hammond and a third party, Ervin Moore, were charged with murder, armed robbery and possession of a firearm during the commission of a violent crime. (App. 103, 377). Niles and Hammond, who were tried jointly, invoked their respective rights to trial by jury, while Moore pled guilty to charges of voluntary manslaughter, robbery and possession of a firearm during the commission of a violent crime.<sup>1</sup> (App. 1, 376-78). Niles was convicted on all charges while Hammond was convicted of armed robbery.<sup>2</sup> (App. 726).

## SUMMARY OF ARGUMENT

Contrary to the finding of the Court of Appeals, this is not a case where the trial court should have charged voluntary manslaughter. In fact, there was no evidence Niles was acting in the sudden heat of passion when he fired the weapon that killed Salter. Niles' testimony, if believed, cannot support an inference that he possessed criminal intent when he fired the weapon that killed Salter since Niles testified that:

- Salter fired at he and his fiancé first;
- “[T]he first thing that came into [his] head” after Salter shot at his car was whether his “fiancé got shot[.]”
- He then grabbed his gun and, with his eyes closed and without looking, fired his gun twice in an effort to “get [the victim] to stop shooting[.]”
- He confirmed he “wasn’t trying to hit nobody[.]”

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<sup>1</sup> The terms of Moore’s plea agreement allowed him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Niles and Hammond. (App. 376-77).

<sup>2</sup> Hammond, the so-called getaway driver, was acquitted on the charges of both murder and possession of a firearm during the commission of a violent crime. (App. 726).

This is not sudden heat of passion. Accordingly, the State asks this Court to reverse the judgment of the Court of Appeals and affirm the murder conviction and sentence of Richard Niles.

### **STATEMENT OF THE CASE**

Niles was indicted during the August 2007 and October 2008 terms of court pursuant to indictment numbers: 2007-GS-26-3362 (murder), 2008-GS-26-4118 (possession of a firearm during the commission of a violent crime) and 2008-GS-26-4119 (armed robbery). (App. 760-65). On March 9, 2009, both Niles and Hammond's cases were called to trial before the Honorable Benjamin H. Culbertson. (App. 1). Niles was represented by Verdell Barr. (App. 1). Four days later, Niles was convicted of murder, armed robbery and possession of a firearm during the commission of a violent crime. (App. 726). He received a thirty (30) year sentence for both the murder and armed robbery charges, in addition to a five (5) year sentence for the weapons charge, all to be served concurrently. (App. 749).

On appeal, Niles, represented by Robert M. Dudek of the South Carolina Commission on Indigent Defense and Reid T. Sherard, of Nelson, Mullins, Riley and Scarborough, L.L.P. sought appellate review of his murder conviction arguing the trial court erred in failing to instruct the jury on voluntary manslaughter. Following oral argument, the Court of Appeals, on September 12, 2012, issued a published opinion reversing and remanding Niles' murder conviction. The State then timely filed a petition for rehearing and Niles filed a response in opposition. Thereafter, the Court of Appeals withdrew, substituted and refiled its previous opinion on November 14, 2012. (App. 790-97). This Court granted the State's petition for writ of certiorari on February 6, 2014.

## STATEMENT OF THE FACTS

### The Killing of James Salter

On April 9, 2007, Ervin Moore was sitting outside the Trio Mini-mart in Trio, South Carolina, when he ran into drug dealer Richard Niles and his fiancé Mokeia Hammond. (App. 379-80). Following a brief conversation, Moore learned that Hammond and Niles were headed to Myrtle Beach. (App. 379-80). When Niles asked Moore if he wanted “to ride” Moore jumped at the chance. (App. 379). Shortly thereafter, Hammond drove the trio to Myrtle Beach in Niles’ car, a black Ford Fusion.<sup>3</sup> (App. 379).

On the drive to the beach, Niles made several phone calls and the threesome began “smoking blunts.” (App. 379). Upon their arrival, the group continued to smoke with Hammond occasionally dropping Niles off at various hotels to conduct drug sales. (App. 379). Eventually the group ran out of marijuana. (App. 379-80). Looking to get more marijuana, Niles called James Salter, a fellow drug dealer, and arranged a meeting in a nearby Best Buy parking lot. (App. 380). While the testimony differs as to how events unfolded in the time immediately leading up to the shooting, the evidence clearly shows Salter was shot and killed by Niles. (App. 387, 554-55, 519-20).

Immediately following the incident Salter attempted to flee the scene, but after exiting the parking lot, crashed his car on a nearby side street. (App. 156). Officers Ryan Wood and Keith Deverell, who were responding to the shooting, came across Salter’s recently crashed car and attempted to give aid. (App. 141-42). While Officers Wood and Deverell were assisting Salter, he explained that he was shot by “two black dudes.” (App. 142). Salter died as a result of the gunshot wound he received in the shooting. (App. 519-20).

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<sup>3</sup> While the car was actually a rental car rented to Niles’ mother, Martha, the State, for purposes of convenience, will refer to the car as Niles’ car. Furthermore, while there is a discrepancy in the record as to whether the car is gray, dark gray or black, there is no question that the car involved in the incident was the car rented to Martha Niles.



At the scene of the crime, police collected a spent bullet. (App. 244-45). Police also searched Salter's car and collected the following: (1) swabs of blood; (2) clothing; (3) a .40 caliber Smith and Wesson handgun; (4) bullet casings; (5) two cell phones; and (6) a backpack full of money. (App. 248, 247-57).

The next day, police discovered Niles' car at a nearby trailer park. (App. 220-23, 339). After identifying the car, authorities towed the car to the police annex to be searched and inventoried. (App. 237-38). The results of the search yielded the following items: (1) shell casings and bullets (App. 348-50); (2) a red plastic cup (App. 346); (3) cigarette filters (App. 347-48); (4) glass fragments (App. 341); and (5) blood samples (App. 343-44).

On April 13, 2007, Investigator Willie Brown of the Williamsburg County Sherriff's office along with investigators from the Myrtle Beach Police Department executed a search warrant at the home of Martha Niles, Richard Niles' mother. (App. 459-60). The results of the search yielded additional shell casings, a room key, a digital scale, baggies with marijuana seeds, a rental car receipt for a black Ford Fusion, and seven-hundred (\$700) dollars in cash. (App. 464).

### **The Charges**

Following the conclusion of the investigation Niles, Hammond and Moore were charged with armed robbery, murder and possession of a firearm during the commission of a violent crime. (App. 751-59). The day before his trial was scheduled to begin, Moore entered into a plea agreement whereby the State would allow him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Niles and Hammond. (App. 376).

### **The Trial**

At trial, the State painted the picture that Niles and Hammond, who were tried jointly, acted as a modern-day Bonnie and Clyde, with Hammond as the getaway driver and Niles as the robber. (App. 108). In support of this theory, the State called their confederate, Ervin Moore. (App. 376). In particular, Moore explained that Niles, shortly before the robbery, announced to the trio, “we’re going to do a lick”<sup>4</sup> which Moore understood to mean, “we’re going to commit a robbery.” (App. 381). Getting into the specifics of the plan, Moore testified he was supposed to make sure the marijuana was in the car, at which point Niles would get out of the car and demand the money from Salter. (App. 381-83). Hammond would serve as the getaway driver. (App. 381-83).

In his testimony, Moore described the incident in detail, stating that upon Salter’s entering the parking lot and pulling beside Niles’ vehicle, he got out of the car to identify the marijuana. (App. 382). Moore explained that after identifying the marijuana and passing Niles on his return to the car, he watched as Niles stood alongside Salter’s car. (App. 383, 384). Continuing, Moore said he observed Niles leaning into Salter’s window when he heard two shots, after which, Niles, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (App. 384-85, 387, 388, 391). Moore testified Salter returned fire, and Niles fired back. (App. 385). During the exchange of gunfire, Moore explained that Niles shot Salter. (App. 387-88). Moore then stated that the trio fled the Best Buy parking lot in Niles’ car, retreating to a nearby trailer park.<sup>5</sup> (App. 386). There, Niles reportedly called his mother and asked her to report the car stolen. (App. 386). According to Moore, Niles hid the stolen

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<sup>4</sup> According to Urban Dictionary, a lick is defined as: “any instance when you come upon easy money, whether you jack it, hustle it, or barter for it.” See [www.urbandictionary.com](http://www.urbandictionary.com) entry entitled “lick.” Alternate definitions include “stealing from someone.” See [www.urbandictionary.com](http://www.urbandictionary.com) entry entitled “lick” definition number three.

<sup>5</sup> Moore testified that on the way to the trailer park, Niles admitted he fired the initial shots. (App. 387-88).

marijuana and gun before getting a cab to an area hotel. (App. 386, 390). Hammond accompanied Niles, leaving Moore behind. (App. 390).

Corroborating Moore's testimony regarding the aftermath of the incident, the State presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Niles' description run from a white car and jump into the rear driver's side door of a dark car. (App. 212, 213). The dark car then sped out of the parking lot. (App. 212, 213). Watts further noted the driver of the getaway car was a female. (App. 214). Angie Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (App. 182-83, 191). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Niles. Specifically, Niles' fingerprints were found on top of Salter's car. (App. 313). Additionally, DNA evidence taken from the driver's seat of Niles' car was consistent with that of Hammond to a probability of one in one quadrillion. (App. 511-12).

Meanwhile, Niles, testifying in his own defense, disputed Moore's version of the incident explaining there was no agreement between anyone to do "a lick." (App. 546). Instead, Niles explained, he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (App. 543-44).

Describing the incident, Niles stated that upon Salter's arrival at the scene, Moore emerged from the car and got into Salter's white Mustang, presumably in an effort to purchase the marijuana. (App. 553, 572). At that time, Hammond, who was seated next to Niles, allegedly informed him that Moore and Salter were fighting. (App. 553). Niles then testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which

Salter allegedly reached for his gun and fired at the car. (App. 554). Continuing, Niles explained that he reached in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because “he was trying to get him to stop shooting.” (App. 554, 555). After the incident, Niles admitted to leaving the car in a nearby trailer park.<sup>6</sup> (App. 556-57).

### **The Request to Charge**

Following the close of evidence, Niles asked the trial court to charge, in addition to self-defense, the lesser-included offense of voluntary manslaughter arguing, the gunshots could serve as sufficient legal provocation and “the jury could infer that . . . the situation got out of hand and [the crime] was committed in the heat of passion. (App. 622). Outside of this general argument, defense counsel never specifically identified the evidence supporting a theory that Niles was acting in the sudden heat of passion. The trial court denied Niles’ request, finding the evidence showed that either Salter began firing and Niles was acting in self-defense, or Niles started shooting during the course of an armed robbery, which the trial judge implied, would result in his being guilty of murder. (App. 623).

### **STANDARD OF REVIEW**

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The evidence presented at trial determines the law from which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). The trial court’s decision regarding jury charges will not be reversed where the charges as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). However, the trial court commits reversible error

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<sup>6</sup> On cross-examination, Niles admitted, that to his knowledge, Moore did not have a gun. (App. 594).

if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

### ARGUMENT

- I. The Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in the sudden heat of passion

On appeal, Niles maintained the trial court erred in failing to charge the jury on voluntary manslaughter arguing his testimony that Salter shot first, at which point he returned fire, was evidence of sufficient legal provocation and sudden heat of passion since self-defense and voluntary manslaughter are not mutually exclusive. In response, the State, while agreeing that self-defense and voluntary manslaughter are not mutually exclusive, disagreed with the proposition that the trial court should have charged voluntary manslaughter on the facts of this case arguing *inter alia* that Niles' testimony failed to establish he was acting in the sudden heat of passion when he shot and killed Salter.

In its opinion, the Court of Appeals, after explaining Niles established sufficient legal provocation based upon his testimony that Salter fired first, further found Niles established sudden heat of passion based upon the following testimony:

So, while [Salter] was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. *I didn't know if my fiancé got shot or nothing. That's the first thing that came into my head, you know.*

(App. 796) (emphasis added). Continuing, the panel stated "Niles' testimony that grabbing the gun and returning fire was the 'first thing that came to . . . [his] mind' supports that he was acting on impulse upon being shot at by Salter." (App. 796).

Quite simply, the State disagrees with the Court of Appeals' conclusion that Niles' testimony provided evidence he was acting in the sudden heat of passion when he shot and killed Salter. Furthermore, while voluntary manslaughter and self-defense are not mutually exclusive, the opposite is also true as voluntary manslaughter is not a lesser-included offense of self-defense. E.g. State v. Starnes, 388 S.C. 590, 599-600, 698 S.E.2d 604, 609 (2011) (explaining fear alone did not entitle an accused to a charge on voluntary manslaughter since it would render voluntary manslaughter a lesser-included offense of self-defense). Perhaps most notably, the legal analysis for an instruction on each doctrine requires proof of different elements with remarkably different *mens rea* which, if proved, results in completely different consequences for the accused.<sup>7</sup> Keeping this in mind, the State submits that if the Court of Appeals ruling on this issue is not revisited it "would impermissibly blend the elements of voluntary manslaughter and self-defense" which in turn, "would render voluntary manslaughter a lesser-included offense of self-defense[.]" Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609.

#### A. Voluntary Manslaughter

In State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) this Court explained, "[v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." 338 S.C. at 101, 525 S.E.2d at 513. Thus, "[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing" to reduce murder to voluntary manslaughter. Id. Additionally, "[p]rovocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819

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<sup>7</sup> Furthermore, while other jurisdictions have essentially combined self-defense and voluntary manslaughter to allow a jury to find, under a theory of "imperfect self-defense" that a failure to prove each of the elements of self-defense could still yield a verdict of voluntary manslaughter, this is not the law in South Carolina. See State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) (declining to adopt the theory of imperfect self-defense).

(2001). Further, to mitigate murder to manslaughter, the sudden heat of passion “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.” State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996).

### **B. The Relationship Between Self-Defense and Voluntary Manslaughter**

In cases where both self-defense and voluntary manslaughter jury instructions may be involved, courts must review the facts to see if a charge on both is warranted. State v. Gilliam, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988). This was noted in State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), where Wiggins, the appellant, was convicted of voluntary manslaughter and on appeal argued the trial court erred in charging voluntary manslaughter because of his claim of self-defense. Rejecting Wiggins’ argument and affirming the trial court’s decision to charge both voluntary manslaughter and self-defense, this Court said, “it is well settled that self-defense and voluntary manslaughter are not mutually exclusive and both issues should be submitted to the jury *if supported by the evidence*.” 330 S.C. at 549 n.18, 500 S.E.2d at 495 n.18 (emphasis added).

As mentioned above, the State completely agrees with this legal proposition but submits the evidence in this case—Niles’ testimony regarding his intent in firing the weapon—cannot simultaneously serve as evidence of both self-defense and sudden heat of passion. For example, the evidence of sudden heat of passion in Wiggins came from the victim’s sister who testified that she and the victim were in a heated argument with Wiggins when Wiggins threatened to “kick both [the victim and his sister’s] asses.” Wiggins, 330 S.C. 538 at 542, 500 S.E.2d at 491. The victim’s sister recounted that immediately after stating this Wiggins shot the victim, who

although armed, did not reach for his gun until he was shot. Id. In contrast, the evidence supporting self-defense in Wiggins came in the form of Wiggins' testimony that the victim had cocked and pointed a gun at him as he was attempting to escort the victim off of the premises of his business following an argument, which Wiggins claimed, caused him to shoot the victim. 330 S.C. at 543-44, 500 S.E.2d at 492.

In other words, the rule from Wiggins is not that an individual's testimony regarding his intent can simultaneously serve as evidence of both sudden heat of passion and self-defense. Rather, Wiggins, like Gilliam, merely reiterated what the law already was—that in order to charge the jury on a lesser-included offense, or an affirmative defense, there must be evidence in the record supporting the charge. Nevertheless, the appellate panel here erroneously used Niles' testimony as evidence of both sudden heat of passion and as evidence he was acting in self-defense.

### **C. Niles' Testimony that he Shot the Gun is not Evidence of Intent**

Initially, the State notes the Court of Appeals incorrectly characterized Niles' testimony when it found that grabbing the gun and returning fire was "the first thing that came to . . . [his] mind" after Salter fired at the car. (App. 796). Specifically, Niles, when asked whether he or Salter fired first, said that Salter fired first. (App. 554). He then testified as follows:

That's when my fiancé she started screaming. She ducked in my lap. She was screaming. So, while he was shooting in the car, yes, I did had a gun. So, I grabbed my, I grabbed my pistol and that's when I shot two times. I went pow, pow. I wasn't trying to hit nobody.

(App. 554). Defense counsel again asked Niles *what* happened immediately after the gunshots, to which Niles responded:

I was leaning back in the car and I shot two times . . . I was just trying to get him to stop shooting. That's all I was trying to do. *I didn't know [if] my fiancé got shot or nothing. That's the first thing that came into my head, you know.*



(App. 555) (emphasis added). While it is true that the first *action* Niles carried out after the shooting was to return fire, his testimony very clearly established “the first *thing* that came into [his] head” was whether his “fiancé got shot[.]” (App. 555). In other words, while Niles’ *actions* show he retaliated, an action which is ambiguous as to criminal intent, his first *thought* after he and his fiancé were shot at clearly reflected concern for his fiancé’s welfare. (App. 555). Thus, the State submits Niles’ actions of grabbing the gun and returning fire is not evidence of sudden heat of passion, nor is it evidence of self-defense. Instead, the only evidence in the record regarding Niles’ intent is his testimony that he shot at Salter because he was scared for his fiancé’s welfare. The State submits this testimony does not establish that Niles was acting in the sudden heat of passion.

**D. Niles’ Testimony Regarding his Intent in Firing the Weapon Cannot Serve as Evidence of Sudden Heat of Passion where the Testimony Fails to show that he was acting with Criminal Intent**

Understanding Niles’ testimony established “the first thing” that came into his mind after Salter allegedly shot at his car was fear for his fiancé, Hammond’s safety, *after which* he closed his eyes and without looking, fired two shots in an effort to get Salter to “stop shooting,” the testimony fails to show Niles was acting with an uncontrollable impulse to do violence to Salter. Specifically, the State first notes Niles’ testimony that he feared for Hammond’s safety cannot establish the appropriate *mens rea* for sudden heat of passion since fear, by itself, does not establish sudden heat of passion. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 (“[T]he mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge.”) (emphasis in original). Furthermore, when combining sufficient legal provocation in this case—Niles’ testimony that Salter shot first—with his testimony that after Salter allegedly fired the gun at the car he feared for Hammond’s safety, the testimony still fails

to reveal whether Niles' was acting with criminal intent at the time he allegedly returned fire on Salter.

"Intent" is defined as "[d]esign, resolve, or determination with which the person acts" and a "state of mind in which a person seeks to accomplish a given result through a course of action." Black's Law Dictionary 810 (6th ed. 1990). "Criminal intent" is defined as "[t]he intent to commit a crime." *Id.* at 373; see also *State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) (internal citations omitted) ("Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand.'"). Here, the fact that Niles was scared for his fiance's well-being does not reveal any sort of criminal intent. In fact, as noted by the *Starnes* Court, testimony regarding fear is often irrelevant to a determination of sudden heat of passion. In *Starnes*, this Court explained that "[a] person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear." 388 S.C. at 599, 698 S.E.2d at 609.

Furthermore, even adding Niles' testimony that he "grabbed his pistol . . . [and] shot two times" with his testimony that Salter shot first which made him fear for Hammond's safety, Niles still fails to show he was acting with an uncontrollable impulse to do violence to Salter at the time he fired the gun. Specifically, Niles' testimony that he grabbed his pistol and shot twice, physical actions which, as mentioned above, fail to reveal any sort of intent, are coupled with Niles' testimony which show that at the time he fired the gun: (1) his eyes were closed; (2) he "wasn't even looking[;]" and (3) he, "wasn't trying to hit nobody" but was instead, "just trying to get [Salter] to stop shooting." (App. 569). Keeping this in mind, Niles' testimony simply does not establish the proper *mens rea* for voluntary manslaughter, which as a lesser

included offense of murder, “by definition requires *criminal intent* to do harm to another.” State v. Childers, 373 S.C. 367, 375-76, 645 S.E.2d 233, 237-38 (2007) (Toal concurring) (emphasis added). Rather, Niles’ testimony, consistent with Chief Justice Toal’s description of the defendant’s testimony in Childers, simply fails to establish any sort of criminal intent, instead establishing circumstances, which if believed, would justify the homicide as opposed to mitigating it.<sup>8</sup> In other words, even when viewing the evidence in the light most favorable to the accused, Niles’ testimony does not establish a *mens rea* consistent with an uncontrollable impulse to do violence to the victim because, as noted above, he was not aiming at Salter and did not intend to shoot him, but instead said he merely wanted the shooting to stop because he feared for Hammond’s safety when he fired the gun. (App. 569). In light of this testimony, Niles cannot establish the criminal intent required for a finding of sudden heat of passion and therefore, the State asks this Court to reverse the opinion from the Court of Appeals and affirm Niles’ murder conviction and sentence.

**E. Regardless of Whether Niles was Entitled to an Instruction on Voluntary Manslaughter the Failure to Charge the Jury on Voluntary Manslaughter was not Prejudicial Error**

The State further questions the Court of Appeals finding that the trial court’s purported failure to charge voluntary manslaughter was reversible error. See Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002) (explaining that in order to warrant reversal, the trial court’s refusal to give a requested instruction must be both erroneous and prejudicial). While the Court of Appeals determined the jury may have reached a different verdict had it been

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<sup>8</sup> Indeed, this distinction is the clear difference between voluntary manslaughter and self-defense. See Starnes, 388 S.C. at 598-99, 698 S.E.2d at 609 (“Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter-it will not justify it. This is the distinction between voluntary manslaughter and self-defense.”).

charged on voluntary manslaughter, this is clearly at odds with what the jury actually found in this case.

In Arizona v. Fulminante, 499 U.S. 279, 307 (1991) the Supreme Court of United States, citing to Hopper v. Evans, 456 U.S. 605 (1982) found that the failure to give a jury instruction on a lesser included offense squarely fit into the category of Constitutional violations termed by the Court as “trial error.” 499 U.S. at 307. Trial error “occur[s] during the presentation of the case to the jury,” and is subject to harmless-error analysis because it “may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].” Fulminante, 499 U.S. at 307-308. Accordingly, on direct review, a trial court’s failure to charge a lesser included offense is subject to the harmless error standard first laid out in Champan v. California, 386 U.S. 18 (1967) that the error in question must be “harmless beyond a reasonable doubt.” Brecht, 507 U.S. at 630.

Moreover, this Court has agreed with the Supreme Court’s conclusion that a failure to charge a jury on a lesser included offense is subject to a harmless error analysis. See State v. Middleton, 2014 WL 766294 (Feb. 26, 2014) (“When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’”); State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (“Errors, including erroneous jury instructions, are subject to harmless error analysis.”).

Here, the State submits that regardless of whether the trial court erred in failing to charge the jury on voluntary manslaughter, any error was clearly harmless and as such, cannot be prejudicial based on the facts before the Court. Specifically, because the jury was presented with two different versions of how the shooting transpired, only one of which incriminated Niles, it is

clear beyond a reasonable doubt that the jury, by convicting both Hammond and Niles of armed robbery, would have convicted Niles of murder regardless of whether Niles had receive a jury instruction on voluntary manslaughter.

1. The State's Version of the Shooting

In particular, Moore, Hammond and Niles' confederate, explained that Niles, shortly before the robbery, announced to the trio, "we're going to do a lick" which Moore understood to mean, "we're going to commit a robbery." (App. 381). Getting into the specifics of the plan, Moore testified he was supposed to make sure the marijuana was in the car, at which point Niles would get out of the car and demand the money from Salter. (App. 381-83). Hammond would serve as the getaway driver. (App. 381-83).

In his testimony, Moore described the incident in detail, stating that upon Salter's entering the parking lot and pulling beside Niles' vehicle, he got out of the car to identify the marijuana. (App. 382). Moore explained that after identifying the marijuana and passing Niles on his return to the car, he watched as Niles stood alongside Salter's car. (App. 383, 384). Continuing, Moore said he observed Niles leaning into Salter's window when he heard two shots, after which, Niles, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (App. 384-85, 387, 388, 391). Moore testified Salter returned fire, and Niles fired back. (App. 385). During the exchange of gunfire, Moore explained that Niles shot Salter. (App. 387-88). Moore then stated that the trio fled the Best Buy parking lot in Niles' car, retreating to a nearby trailer park. (App. 386). There, Niles reportedly called his mother and asked her to report the car stolen. (App. 386). According to Moore, Niles hid the stolen marijuana and gun before getting a cab to an area hotel. (App. 386, 390). Hammond accompanied Niles, leaving Moore behind. (App. 390).

Corroborating Moore's testimony regarding the incident, the State presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Niles' description run from a white car and jump into the rear driver's side door of a dark car. (App. 212, 213). The dark car then sped out of the parking lot. (App. 212, 213). Watts further noted the driver of the getaway car was a female. (App. 214). Angie Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (App. 182-83, 191). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Niles. Specifically, Niles' fingerprints were found on top of Salter's car. (App. 313). Additionally, DNA evidence taken from the driver's seat of Niles' car was consistent with that of Hammond to a probability of one in one quadrillion. (App. 511-12).

## 2. Niles' Version of the Shooting

In contrast, Niles, testifying in his own defense, disputed Moore's version of the incident explaining there was no agreement between anyone to do "a lick." (App. 546). Instead, Niles explained, he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (App. 543-44).

Describing the incident, Niles stated that upon Salter's arrival at the scene, Moore emerged from the car and got into Salter's white Mustang, presumably in an effort to purchase the marijuana. (App. 553, 572). At that time, Hammond, who was seated next to Niles, allegedly informed him that Moore and Salter were fighting. (App. 553). Niles then testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which Salter allegedly reached for his gun and fired at the car. (App. 554). Continuing, Niles

explained that he reached in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because "he was trying to get him to stop shooting." (App. 554, 555). After the incident, Niles admitted to leaving the car in a nearby trailer park. (App. 556-57). On cross-examination Niles said Moore did not have a gun. (App. 594).

3. Regardless of Whether there was Error, any Error was Harmless and Therefore, Cannot be Prejudicial

At its' core, this case as it relates to murder, is simply a question of intent. There is no question that Richard Niles shot and killed James Salter. The only question is, if one were to assume that the jury was instructed on voluntary manslaughter, can this Court find, beyond a reasonable doubt, that the jury would have still convicted Niles of murder. The State believes that it can.

In this case, the jury's task, as it relates to the murder charge, was to review the evidence and determine whether Niles was acting with criminal intent when he shot and killed Salter. As summarized above in Sections I(E)(1) and I(E)(2), the evidence yielded one of two conclusions—either Niles shot Salter during the course of a robbery or Niles shot Salter after Salter shot at Niles' vehicle. Indeed, it is clear the only evidence in the record, and the judge's charge itself, required the jury to answer whether it believed Moore's testimony; that the trio of himself Niles and Hammond agreed to rob Salter; or Niles' testimony, that there was no agreement to rob Salter. Here, the jury, by finding Hammond guilty of armed robbery, clearly determined there was an agreement amongst the group to commit an armed robbery. (App. 702) ("The only limitations on your verdict regarding [Hammond] is that you cannot find [her] guilty of any crime unless you likewise find [Niles] guilty of that same crime."). This is obviously the reason Niles was also convicted of armed robbery. Moreover, because the only evidence at trial indicated Hammond was the getaway driver, Hammond's conviction was clearly based on the

concept that the hand of one is the hand of all, meaning the jury believed Moore's "hit a lick" testimony which of course at least evidenced an implicit agreement.

Understanding that the jury determined there was an agreement to commit an armed robbery, there is simply no likelihood that had the jury received a charge on voluntary manslaughter it would have even entertained such a verdict for Niles. Indeed, the law as charged to the jury, allowed the jury to infer malice from the mere fact that Salter was killed during the commission of an armed robbery meaning the jury was not even required to consider whether Niles acted with malice, but instead could have inferred as much. (App. 694) ("If one intentionally kills another during the commission of a felony the inference of malice may arise."). Moreover, the only arguable evidence of sudden heat of passion—Niles' testimony that Salter fired first and fired back—could not be believed by the jury in light of their implicit finding that there was an agreement to commit an armed robbery. Thus, because, as mentioned in the instructions, the jury had to base its' verdict on the evidence, and the evidence showed, beyond a reasonable doubt, that Hammond and Niles committed an armed robbery, the jury's decision to convict Niles means it did not believe Niles' self-serving testimony as to his intent in firing the weapon. Accordingly, the State submits that even if the jury had received a charge on voluntary manslaughter, the evidence shows, beyond a reasonable doubt, that Niles was guilty of murder.

### CONCLUSION

In light of the aforementioned arguments, the State respectfully asks this Court to reverse the judgment of the Court of Appeals' and affirm Niles' murder conviction and sentence.

Respectfully Submitted,

ALAN WILSON  
Attorney General

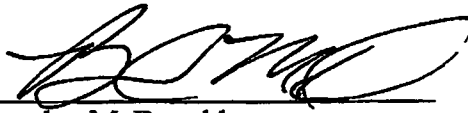


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A handwritten signature in black ink, appearing to read 'B. McDonald', written over a horizontal line.

Brendan McDonald  
S.C. Bar No. 77784

ATTORNEY(S) FOR PETITIONER(S)

March 10, 2014.

STATE OF SOUTH CAROLINA  
In the Supreme Court

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Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

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THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

Appellate Case No. 2012-213592

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**CERTIFICATE OF SERVICE**

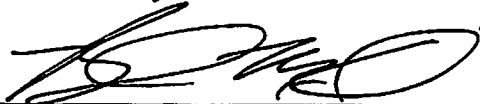
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The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon:

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On this 10<sup>th</sup> day of March 2014.



Brendan McDonald  
S.C. Bar No. 77784  
ATTORNEY FOR PETITIONER(S)

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 27510  
Heard June 25, 2014 – Filed March 25, 2015

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**REVERSED**

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Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, and  
Assistant Attorney General Brendan Jackson McDonald,  
all of Columbia, and Solicitor Jimmy A. Richardson II,  
of Conway, for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of  
Columbia, and Reid T. Sherard, of Nelson Mullins Riley  
& Scarborough, LLP, of Greenville, for Respondent.

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**CHIEF JUSTICE TOAL:** Richard Bill Niles, Jr. was convicted of murder,

armed robbery, and possession of a weapon during the commission of a violent crime. The court of appeals reversed Respondent's murder conviction and remanded for a new trial, finding the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. *State v. Niles*, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012).<sup>1</sup> We reverse.

### FACTS/PROCEDURAL BACKGROUND

This case arises from the shooting death of James Salter (the victim) in a Best Buy parking lot in Myrtle Beach. It is undisputed that Niles, his fiancé, Mokeia Hammond, and Ervin Moore met the victim at the parking lot to purchase marijuana from him.<sup>2</sup> Niles and Moore testified at trial,<sup>3</sup> and Niles's version of events matched Moore's version, except as to whose idea it was to rob the victim and whether Niles or the victim fired the first shots.<sup>4</sup> Thus, the evidence at trial focused on whether Niles was the aggressor in the deadly encounter.

On the afternoon of April 9, 2007, Niles and Hammond encountered Moore at a convenience store in Trio, South Carolina, and invited Moore to accompany them to Myrtle Beach. Niles and Moore were acquaintances, having known each other through various family members. On the way to Myrtle Beach, the trio smoked all of the marijuana that they had brought with them.

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<sup>1</sup> Niles did not appeal his convictions for the remaining offenses. *Niles*, 400 S.C. at 531 n.1, 735 S.E.2d at 242 n.1.

<sup>2</sup> Hammond and Moore were also charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State, whereby he pleaded guilty to voluntary manslaughter, armed robbery, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond at their joint trial.

<sup>3</sup> Hammond chose not to testify in her defense.

<sup>4</sup> Niles admitted he shot the victim and that Moore and Hammond were unarmed.

Therefore, Niles contacted the victim<sup>5</sup> via telephone and arranged to meet him at the Best Buy parking lot to purchase marijuana. Niles testified that his conversation with the victim had a dual purpose. Not only was he meeting with the victim so that Moore could purchase a pound of marijuana from him, but he claimed that the victim owed him \$5,000 as payment for other drug transactions. According to Moore, however, Niles subsequently decided to rob the victim instead.<sup>6</sup>

Once in Myrtle Beach, the trio made several stops at various motels so that Niles could sell crack cocaine before meeting the victim at the designated meeting spot at approximately 7:00 p.m. Hammond was driving Niles's rental vehicle, with Niles riding in the front passenger's seat and Moore riding in the back seat. Hammond parked the rental vehicle next to the victim's vehicle. Moore testified that his role in the robbery was "to identify the weed" for Niles. Therefore, Moore approached the victim's vehicle first. Moore joined the victim in the victim's vehicle, and the victim produced the bag of marijuana for Moore to inspect.

Moore testified that as he returned to Niles's vehicle, Niles had already exited his vehicle, and Moore told Niles that the victim had the drugs. Moore testified that as he returned to his place in Niles's vehicle, Niles was leaning inside the passenger-side door of the victim's vehicle and was speaking to the victim.<sup>7</sup>

Moore testified he heard two shots and saw Niles leap into the back seat of his vehicle behind Hammond.<sup>8</sup> Moore then heard the victim fire a weapon in

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<sup>5</sup> While Niles testified that he and the victim did not know each other personally, they had engaged in drug transactions for the past six to nine months. Niles testified he knew the victim by his nickname, "Spice," and that the victim knew him by his nickname, "Rich Boy." Niles testified that he and the victim were "in the business of selling drugs."

<sup>6</sup> Niles, on the other hand, testified that it was Moore's decision to rob the victim, and he did so without warning Niles beforehand.

<sup>7</sup> Niles's fingerprints were found on the victim's vehicle near where Niles was allegedly standing, corroborating Moore's testimony.

<sup>8</sup> Other witnesses to the shooting testified that they saw a "heavyset" black male running from the victim's car back to a dark sedan, which the State argued closely

response. Niles and the victim shot back and forth multiple times. Niles had the drugs with him that Niles had stolen from the victim.

In contrast, Niles testified that Moore acted alone. Niles stated he merely set up the meeting, but Moore went over to the victim's vehicle to purchase the drugs while Niles and Hammond sat in the car and discussed their upcoming wedding. Niles said he then saw Moore and the victim fighting in the victim's vehicle, and realized that Moore was robbing the victim. Niles testified that Moore exited the victim's vehicle with the stolen drugs, and as Moore dove back into Niles's vehicle, Niles saw the victim draw his gun and shoot at them, knocking out the rear windows of Niles's vehicle. Therefore, Niles grabbed his gun, and returned fire. According to Niles, he was concerned with stopping the shooter and for Hammond's safety:

So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

After the shooting, Niles instructed Hammond to drive away from the scene, and the trio abandoned the vehicle at a nearby trailer park. Niles then called a taxicab to transport him and Hammond to a local motel. At that point, he and Hammond parted ways with Moore, and Moore kept the marijuana. The victim died at the scene from a gunshot wound.

On these facts, the trial court instructed the jury on the law of murder and self-defense, but refused Niles's request to instruct the jury on voluntary manslaughter, reasoning that the evidence showed Niles was either guilty of murder or he was not guilty of any crime based on his claim of self-defense.

The court of appeals reversed Niles's murder conviction and remanded the case for a new trial, finding the evidence compelled a jury instruction on the lesser-included offense of voluntary manslaughter. *Niles*, 400 S.C. at 534, 735 S.E.2d at 244. Specifically, the court of appeals found there was evidence of sufficient legal provocation based on Niles's testimony that he shot at the victim only after the victim began shooting first. *Id.* at 535, 735 S.E.2d at 244. Further, the court of

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matched Niles's description, as Moore had a much smaller build than Niles.

appeals found that there was evidence that Niles acted in a sudden heat of passion based on Nile's testimony that he took Moore to meet the victim to buy marijuana; that Moore, without warning, decided to rob the victim; and that Niles did not fire his gun until after Moore perpetrated the robbery and the victim shot first. *Id.* at 536, 735 S.E.2d at 245. Therefore, the court of appeals concluded that there was evidence that Niles did not have an opportunity for cool reflection, and as such, there was evidence Niles acted in a sudden heat of passion. *Id.*

We granted the State's petition for a writ of certiorari to consider the State's argument that the court of appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter because there was no evidence at trial that Niles acted in the sudden heat of passion.<sup>9</sup>

### STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

### ANALYSIS

The State maintains the trial court did not err in refusing Niles's request for an instruction on voluntary manslaughter because Niles failed to present evidence that he acted in the sudden heat of passion. We agree with the State that there was no evidence that Niles acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than

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<sup>9</sup> We note that the State has not challenged the court of appeals' finding that there was evidence of sufficient legal provocation.

the greater, offense. *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005). When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant. *Pittman*, 373 S.C. at 572–73, 647 S.E.2d at 168.

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Smith*, 391 S.C. 408, 412–13, 706 S.E.2d 12, 14 (2011). To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, 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.

*State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court. *State v. Hernandez*, 386 S.C. 655, 662, 690 S.E.2d 582, 586 (Ct. App. 2010) (citation omitted).

Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*. Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim. See *Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not



heat of passion."). As in *Cole*, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense. In *State v. Childers*, we explained:

Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.

If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court . . . . Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.

373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007). Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.<sup>10</sup>

We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking to rob the victim during the drug transaction.<sup>11</sup> Niles further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly

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<sup>10</sup> Undeniably, murder, self-defense, and voluntary manslaughter may coexist under the right factual circumstances; here, however, Niles's testimony went to the elements of self-defense, not voluntary manslaughter.

<sup>11</sup> There was conflicting testimony regarding whose idea it was to rob the victim and who in fact robbed the victim. However, it is undisputed that an armed robbery occurred, of which *all* were found guilty. See S.C. Code Ann. § 16-11-330(A) (Supp. 2013) (providing that any person who commits robbery while armed with a pistol or other deadly weapon is guilty of armed robbery). Importantly, Niles has not appealed his conviction. Thus, even viewing the facts in a light most favorable to Niles, we may presume that Niles actively participated in perpetrating the armed robbery.

planned for the possibility that he might have to discharge his weapon to accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored. *See Pittman*, 373 S.C. at 575, 647 S.E.2d at 169 ("In determining whether an 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." (citation omitted)). In other words, there was nothing *sudden* about Niles's decision to shoot the victim.<sup>12</sup>

Thus, we hold that the evidence did not warrant a voluntary manslaughter charge. *See State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 412–13 (1994) ("The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.").

### CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

**REVERSED.**

**BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.**

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<sup>12</sup> Along the same lines, while the State has not challenged the court of appeals' findings with respect to sufficient legal provocation, we note that sufficient legal provocation cannot be found to exist where the victim is defending himself from a crime. *See State v. Knoten*, 347 S.C. 296, 314, 555 S.E.2d 391, 400 (2001) (Burnett, J., dissenting) ("A victim's attempts to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001))).

**JUSTICE PLEICONES:** I respectfully dissent. In my opinion, the court of appeals was correct in its holding that there is evidence in the record entitling Niles to a charge on voluntary manslaughter.

If there is any evidence to support a jury charge, the trial judge should grant the request. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14 (2011). The sudden heat of passion needed to justify a voluntary manslaughter charge 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 may be called an uncontrollable impulse to do violence. *State v. Cole*, 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000).

In this case, a voluntary manslaughter charge should have been given if there were *any* evidence in the record from which a jury could infer that this killing was the result of sufficient legal provocation which caused Niles to experience an uncontrollable impulse to do violence. In my opinion, there is.

First, as the court of appeals noted, the unprovoked shooting by Salter amounted to evidence sufficient for a jury to infer that there was legal provocation. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). Second, I agree with the court of appeals that Niles's testimony that he immediately returned fire out of fear for himself and his fiancée provided evidence from which a jury could find that Niles was acting pursuant to an uncontrollable impulse to do violence. *State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (holding that the lower court properly charged the jury on voluntary manslaughter where defendant testified he was in fear of the threat of physical assault). Accordingly, I would affirm the court of appeals because I cannot say there is no evidence whatsoever tending to reduce this crime from murder to manslaughter.

Unlike the majority, I am unable to discern Niles' intent and state of mind on April 9, 2007, and to resolve numerous factual issues much as a jury might have done. For example, the majority states with certitude that Niles determined "to arrive at the scene armed with a deadly weapon," thus demonstrating he "clearly planned for the possibility that he might have to discharge his weapon to accomplish the

robbery . . . ." In light of this premeditated decision, the majority states "there was nothing *sudden* about Niles' decision to shoot the victim." In my opinion, the majority exceeds our scope of review in this law case by resolving disputed issues of fact in order to deny Niles a new trial. *E.g.*, *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014).

I would affirm the court of appeals.

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**

APR 9 2015

**S.C. Supreme Court**

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

APPELLATE CASE NO. 2012-213592

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Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 27510

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, respondent respectfully requests rehearing because this Court may have misapprehended the fact that, as former Justice Waller of this Court once stated during an oral argument: "If someone is aiming a gun at me I am scared." In this case, there was evidence that respondent Niles went to what he expected to be an uneventful, non-violent marijuana deal. This was with a dealer (decendent) who he had done business with on prior occasions. Co-defendant Moore unexpectedly decided to rob the victim, and shots were fired towards respondent and his girlfriend as they sat in the car. Any person, Respondent Niles included, would have been scared for his life, and the life of his girlfriend, in this situation.

A sufficient legal provocation (being shot at) that is likely to produce a sudden urge to respond with violence (heat of passion), and being in great fear because you are being shot are **not** mutually exclusive concepts. In fact, the complete opposite is the intuitive experience of man, and the well settled case law of this case.

In State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), this Court, in an opinion by Chief Justice Gregory, that was joined in by now Chief Justice Toal, held that the defendant was entitled to a voluntary manslaughter, as well as self-defense instruction where he went to a club even though violence could result because of his difficulties with the decedent. Gilliam was told that the angry decedent was looking for him. Gilliam testified, as did respondent Niles, that he had no intention of shooting the decedent. Gilliam should have expected trouble, and Niles conversely had no reason to expect anything out of the ordinary.

Gilliam found the decedent at a bar and motioned for him to come outside. The two men argued and the decedent shot at Gilliam. Gilliam shot back at the decedent, killing him. This Court held that Gilliam was entitled to a voluntary manslaughter instruction given the evidence that he was shot at by the decedent. This Court noted that to warrant refusal of a charge on voluntary manslaughter, there must be no evidence tending to reduce the crime from murder to manslaughter. "To warrant the court in eliminating the offense of manslaughter it should very clearly appear there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter." State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). (emphasis added). As the Court held: "Appellant's testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation AND heat of passion." (emphasis added). This is a common sense inference.

In this case, the majority found that respondent shooting back in self-defense (to stop the decedent from shooting any more) or shooting back in anger (an uncontrollable impulse to do violence) are implicitly mutually exclusive concepts, as is respondent shooting back while in fear of the incoming bullets. The majority focused on respondent's testimony "that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot the gun, he was thinking of Hammond rather than perpetrating violence upon the victim." State v. Richard Niles, Jr., Op.No. 27510, Shearouse's Adv. Sh. #12, at 15-16. Respondent respectfully submits that even this carefully chosen testimony of the respondent does not justify the denial of a verdict option for voluntary manslaughter, and it certainly should not be used to justify the overturning of the Court of Appeals' unanimous well-reasoned holding that respondent was entitled to a voluntary manslaughter instruction.

The fact that respondent testified that he was only attempting to get the decedent to stop shooting at them (self-defense) did not mean that he also was not also in grave fear, that he had the natural instinct to shoot back in self-preservation, and out of sudden heat of passion at being shot at by the decedent (sufficient legal provocation). State v. Gilliam holds that respondent was entitled to a voluntary manslaughter instruction given the fact that he was being shot at before he returned fire. See Brief of Respondent citing Gilliam at 9, 11, and 14.

Also instructive in Gilliam, Appellant Gilliam did not appeal an ABHAN conviction for which he was tried along with his murder case. This involved an assault on Daisy Mae Reed (his prior seven year live in lover and the victim's new lover) by hitting her on the head with a walking stick and slashing her severely with a switchblade. The fatal encounter with the victim took place only "a few hours" later, and could have interpreted as Gilliam being on a mission to destroy the decedent and Reed (malice aforethought). This Court did not try and use the "unappealed"

conviction as a conclusive factor negating the duty to charge. Appellant Gilliam testified he had no intent to shoot the victim. “[T]here must be no evidence tending to lessen the crime from murder to manslaughter.”

Further, this Court incorrectly states in Footnote 11 that respondent did not appeal his armed robbery conviction. Respondent did appeal his armed robbery and his murder conviction when his trial attorney filed and served a notice of intent to appeal.

Present appellate counsel simply could not find a meritorious issue upon which to challenge that armed robbery conviction. This was not a directed verdict appellate issue on armed robbery given the disputed evidence. Appellate counsel here also did not find a meritorious evidentiary issue he thought could warrant reversal on the armed robbery conviction. None of this logically leads to the conclusion that respondent conceded his guilt to armed robbery. To the contrary, respondent has been advised that the challenge to that conviction must await another day in post-conviction relief. Moreover, there is not any “hybrid” representation in this state where appellate counsel could have filed a merit brief on the murder conviction, and an Anders brief on the armed robbery conviction.

Importantly, this footnote is respectfully going to be read to mean that appellate counsel must challenge each jointly tried conviction on appeal no matter how weak or frivolous the argument challenging such conviction may be in any given case, or the propriety of that conviction and others is somehow **conceded**. That does violence to the law for several reasons.

First, in Appellate Practice in South Carolina, Chief Justice Toal wrote that: “One of the first steps in effective brief-writing is identifying the few issues that are most likely to lead to a successful result on appeal . . . . The attorney who discusses numerous issues is like an amateur enthusiast firing a machine gun, hoping randomly to hit some object. However, the advocate who



homes in on a few issues is akin to the skilled marksman carefully aiming a rifle at select strategic targets. The latter approach is much more likely to produce the desired result . . . Limiting the number of arguments not only implicitly conveys the message that the issues presented are all very significant, but it also gives the attorney the opportunity to develop those arguments in greater depth.” Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina at 224-225 (1989 ed.).

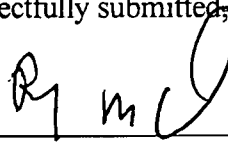
Respectfully, while this footnote should be removed from the opinion after rehearing is granted, that is not enough. It is elementary that the jury must separately consider each charge before it.

Finally, respondent would ask the majority to reconsider its statement that “There was nothing *sudden* about Niles’ decision to shoot the victim.” Many people carry weapons in this state, and this country. Many are legally concealed handguns by permit, and some of them are not legally carried weapons.

Regardless, the fact that a person had a weapon on his person does not lead to the rational conclusion that there was “nothing sudden” about the person’s shooting back when provoked by someone who unexpectedly shot at them. Respectfully, this Court does not have jurisdiction to weigh testimony in a law case. Niles’ testimony was that *while the decedent was shooting into his car*, Niles grabbed his pistol and shot two times. It is difficult to envision a more “sudden” reaction. In any event, “sudden” refers to the onset of heat of passion. Once established, as it was here, this issue then analytically becomes one of “cooling time.” And this is a matter for the jury. See State v. Jones, 90 S.C. 290, 73 S.E. 177 (1912). Respondent’s testimony that he fired while being shot at inside his car precludes any finding as a matter of law that any cooling time excluded manslaughter. There was none, in fact.

Respondent strongly submits for the reasons above that this Court should grant rehearing and reconsider its opinion in this case. It most respectfully is unfair in several respects, including the realities of appellate advocacy contained in Footnote 11 in the opinion as discussed above. This is a rehearing petition about fundamental fairness.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

This 9th day of April, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**  
APR 9 2015  
S.C. Supreme Court

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT

APPELLATE CASE NO. 2012-213592

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Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge  
Opinion No. 27510

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CERTIFICATE OF SERVICE

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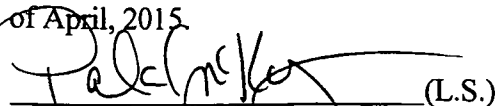
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, Assistant Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of April, 2015.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 9th day  
of April, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.

# The Supreme Court of South Carolina

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

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## ORDER

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The petition for rehearing is granted with respect to the request that footnote 11 be deleted. All other grounds for rehearing raised in the petition for rehearing are denied. The attached opinion is substituted for the previous opinion, which is withdrawn.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

I would grant the petition for rehearing in its entirety.

s/ Costa M. Pleicones J.

Columbia, South Carolina  
June 10, 2015

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 27510  
Heard June 25, 2014 – Refiled June 10, 2015

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**REVERSED**

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Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, and  
Assistant Attorney General Brendan Jackson McDonald,  
all of Columbia, and Solicitor Jimmy A. Richardson II,  
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### FACTS/PROCEDURAL BACKGROUND

This case arises from the shooting death of James Salter (the victim) in a Best Buy parking lot in Myrtle Beach. It is undisputed that Niles, his fiancé, Mokeia Hammond, and Ervin Moore met the victim at the parking lot to purchase marijuana from him.<sup>2</sup> Niles and Moore testified at trial,<sup>3</sup> and Niles's version of events matched Moore's version, except as to whose idea it was to rob the victim and whether Niles or the victim fired the first shots.<sup>4</sup> Thus, the evidence at trial focused on whether Niles was the aggressor in the deadly encounter.

On the afternoon of April 9, 2007, Niles and Hammond encountered Moore at a convenience store in Trio, South Carolina, and invited Moore to accompany them to Myrtle Beach. Niles and Moore were acquaintances, having known each other through various family members. On the way to Myrtle Beach, the trio smoked all of the marijuana that they had brought with them.

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<sup>1</sup> Niles did not appeal his convictions for the remaining offenses. *Niles*, 400 S.C. at 531 n.1, 735 S.E.2d at 242 n.1.

<sup>2</sup> Hammond and Moore were also charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State, whereby he pleaded guilty to voluntary manslaughter, armed robbery, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond at their joint trial.

<sup>3</sup> Hammond chose not to testify in her defense.

<sup>4</sup> Niles admitted he shot the victim and that Moore and Hammond were unarmed.

Therefore, Niles contacted the victim<sup>5</sup> via telephone and arranged to meet him at the Best Buy parking lot to purchase marijuana. Niles testified that his conversation with the victim had a dual purpose. Not only was he meeting with the victim so that Moore could purchase a pound of marijuana from him, but he claimed that the victim owed him \$5,000 as payment for other drug transactions. According to Moore, however, Niles subsequently decided to rob the victim instead.<sup>6</sup>

Once in Myrtle Beach, the trio made several stops at various motels so that Niles could sell crack cocaine before meeting the victim at the designated meeting spot at approximately 7:00 p.m. Hammond was driving Niles's rental vehicle, with Niles riding in the front passenger's seat and Moore riding in the back seat. Hammond parked the rental vehicle next to the victim's vehicle. Moore testified that his role in the robbery was "to identify the weed" for Niles. Therefore, Moore approached the victim's vehicle first. Moore joined the victim in the victim's vehicle, and the victim produced the bag of marijuana for Moore to inspect.

Moore testified that as he returned to Niles's vehicle, Niles had already exited his vehicle, and Moore told Niles that the victim had the drugs. Moore testified that as he returned to his place in Niles's vehicle, Niles was leaning inside the passenger-side door of the victim's vehicle and was speaking to the victim.<sup>7</sup>

Moore testified he heard two shots and saw Niles leap into the back seat of his vehicle behind Hammond.<sup>8</sup> Moore then heard the victim fire a weapon in

---

<sup>5</sup> While Niles testified that he and the victim did not know each other personally, they had engaged in drug transactions for the past six to nine months. Niles testified he knew the victim by his nickname, "Spice," and that the victim knew him by his nickname, "Rich Boy." Niles testified that he and the victim were "in the business of selling drugs."

<sup>6</sup> Niles, on the other hand, testified that it was Moore's decision to rob the victim, and he did so without warning Niles beforehand.

<sup>7</sup> Niles's fingerprints were found on the victim's vehicle near where Niles was allegedly standing, corroborating Moore's testimony.

<sup>8</sup> Other witnesses to the shooting testified that they saw a "heavysset" black male running from the victim's car back to a dark sedan, which the State argued closely matched Niles's description, as Moore had a much smaller build than Niles.

response. Niles and the victim shot back and forth multiple times. Niles had the drugs with him that Niles had stolen from the victim.

In contrast, Niles testified that Moore acted alone. Niles stated he merely set up the meeting, but Moore went over to the victim's vehicle to purchase the drugs while Niles and Hammond sat in the car and discussed their upcoming wedding. Niles said he then saw Moore and the victim fighting in the victim's vehicle, and realized that Moore was robbing the victim. Niles testified that Moore exited the victim's vehicle with the stolen drugs, and as Moore dove back into Niles's vehicle, Niles saw the victim draw his gun and shoot at them, knocking out the rear windows of Niles's vehicle. Therefore, Niles grabbed his gun, and returned fire. According to Niles, he was concerned with stopping the shooter and for Hammond's safety:

So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

After the shooting, Niles instructed Hammond to drive away from the scene, and the trio abandoned the vehicle at a nearby trailer park. Niles then called a taxicab to transport him and Hammond to a local motel. At that point, he and Hammond parted ways with Moore, and Moore kept the marijuana. The victim died at the scene from a gunshot wound.

On these facts, the trial court instructed the jury on the law of murder and self-defense, but refused Niles's request to instruct the jury on voluntary manslaughter, reasoning that the evidence showed Niles was either guilty of murder or he was not guilty of any crime based on his claim of self-defense.

The court of appeals reversed Niles's murder conviction and remanded the case for a new trial, finding the evidence compelled a jury instruction on the lesser-included offense of voluntary manslaughter. *Niles*, 400 S.C. at 534, 735 S.E.2d at 244. Specifically, the court of appeals found there was evidence of sufficient legal provocation based on Niles's testimony that he shot at the victim only after the victim began shooting first. *Id.* at 535, 735 S.E.2d at 244. Further, the court of appeals found that there was evidence that Niles acted in a sudden heat of passion



based on Niles's testimony that he took Moore to meet the victim to buy marijuana; that Moore, without warning, decided to rob the victim; and that Niles did not fire his gun until after Moore perpetrated the robbery and the victim shot first. *Id.* at 536, 735 S.E.2d at 245. Therefore, the court of appeals concluded that there was evidence that Niles did not have an opportunity for cool reflection, and as such, there was evidence Niles acted in a sudden heat of passion. *Id.*

We granted the State's petition for a writ of certiorari to consider the State's argument that the court of appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter because there was no evidence at trial that Niles acted in the sudden heat of passion.<sup>9</sup>

### STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

### ANALYSIS

The State maintains the trial court did not err in refusing Niles's request for an instruction on voluntary manslaughter because Niles failed to present evidence that he acted in the sudden heat of passion. We agree with the State that there was no evidence that Niles acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than

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<sup>9</sup> We note that the State has not challenged the court of appeals' finding that there was evidence of sufficient legal provocation.

the greater, offense. *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005). When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant. *Pittman*, 373 S.C. at 572–73, 647 S.E.2d at 168.

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Smith*, 391 S.C. 408, 412–13, 706 S.E.2d 12, 14 (2011). To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, 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.

*State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court. *State v. Hernandez*, 386 S.C. 655, 662, 690 S.E.2d 582, 586 (Ct. App. 2010) (citation omitted).

Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*. Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim. See *Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in *Cole*, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense. In *State v. Childers*, we explained:

Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.

If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court . . . . Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.

373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007). Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.<sup>10</sup>

We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking lot to rob the victim during the drug transaction. Niles further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored. *See Pittman*, 373 S.C. at 575, 647 S.E.2d at 169 ("In determining whether an 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." (citation omitted)). In other words, there was nothing *sudden* about Niles's decision to shoot the victim.<sup>11</sup>

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<sup>10</sup> Undeniably, murder, self-defense, and voluntary manslaughter may coexist under the right factual circumstances; here, however, Niles's testimony went to the elements of self-defense, not voluntary manslaughter.

<sup>11</sup> Along the same lines, while the State has not challenged the court of appeals' findings with respect to sufficient legal provocation, we note that sufficient legal provocation cannot be found to exist where the victim is defending himself from a crime. *See State v. Knoten*, 347 S.C. 296, 314, 555 S.E.2d 391, 400 (2001)

Thus, we hold that the evidence did not warrant a voluntary manslaughter charge. *See State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 412–13 (1994) ("The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.").

### CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

**REVERSED.**

**BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.**

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(Burnett, J., dissenting) ("A victim's attempts to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001))).

**JUSTICE PLEICONES:** I respectfully dissent. In my opinion, the court of appeals was correct in its holding that there is evidence in the record entitling Niles to a charge on voluntary manslaughter.

If there is any evidence to support a jury charge, the trial judge should grant the request. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14 (2011). The sudden heat of passion needed to justify a voluntary manslaughter charge 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 may be called an uncontrollable impulse to do violence. *State v. Cole*, 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000).

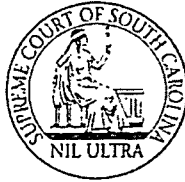
In this case, a voluntary manslaughter charge should have been given if there were any evidence in the record from which a jury could infer that this killing was the result of sufficient legal provocation which caused Niles to experience an uncontrollable impulse to do violence. In my opinion, there is.

First, as the court of appeals noted, the unprovoked shooting by Salter amounted to evidence sufficient for a jury to infer that there was legal provocation. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). Second, I agree with the court of appeals that Niles's testimony that he immediately returned fire out of fear for himself and his fiancée provided evidence from which a jury could find that Niles was acting pursuant to an uncontrollable impulse to do violence. *State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (holding that the lower court properly charged the jury on voluntary manslaughter where defendant testified he was in fear of the threat of physical assault). Accordingly, I would affirm the court of appeals because I cannot say there is no evidence whatsoever tending to reduce this crime from murder to manslaughter.

Unlike the majority, I am unable to discern Niles' intent and state of mind on April 9, 2007, and to resolve numerous factual issues much as a jury might have done. For example, the majority states with certitude that Niles determined "to arrive at the scene armed with a deadly weapon," thus demonstrating he "clearly planned for

the possibility that he might have to discharge his weapon to accomplish the robbery . . . ." In light of this premeditated decision, the majority states "there was nothing *sudden* about Niles' decision to shoot the victim." In my opinion, the majority exceeds our scope of review in this law case by resolving disputed issues of fact in order to deny Niles a new trial. *E.g.*, *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014).

I would affirm the court of appeals.



## The Supreme Court of South Carolina

DANIEL E. SHEAROUSE/  
CLERK OF COURT

BRENDA F. SHEALY  
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June 10, 2015

The Honorable Melanie Huggins-Ward  
PO Box 677  
Conway SC 29528-0677

### REMITTITUR

Re: The State v. Richard Bill Niles, Jr.  
Lower Court Case No. 2007GS2603363, 2008GS2604116, 2008GS2604117  
Appellate Case No. 2012-213592

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Donald J. Zelenka, Esquire  
Brendan Jackson McDonald, Esquire  
Reid T. Sherard, Esquire  
Jimmy A. Richardson, II, Esquire  
Robert Michael Dudek, Esquire

## FORM 5

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )Richard Bill Niles, Jr. )  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

20 16 CP26 1258APPLICATION FOR  
POST-CONVICTION RELIEFINSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Corr. Inst. / S.C.D.C.
2. Name and location of Court which imposed sentence Horry County / Conway
3. Name(s) of co-defendant(s) (if any) <sup>(1)</sup> Ervin Moore Jr. <sup>(2)</sup> Makeia Hammond
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 07-GS-26-3362 / Murder
  - (b) 08-GS-26-4118 / Armed Robbery
  - (c) 07-GS-26-4119 / possession of a weapon during the conv.
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) 30 years
  - (b) 30 years

Revised 3/2003



- (c) 5 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
\_\_\_\_\_
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. S.C. Supreme Court / Writ of Cert.
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Reversed / Applicants Conviction & Sentence in Opinion 5034 Sept. 12, 2012
- ii. Reversed / Court of Appeals Conviction
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. Sept. 12, 2012
- ii. 1<sup>st</sup> March 25, 2015 / 2<sup>nd</sup> June 10, 2015
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion # 5034 / State v. Niles, 735 S.E. 2d 24 (2012)
- ii. Opinion # 27510
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
- (b) N/A
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel/Trial  
 (b) \_\_\_\_\_  
 (c) See : Attached Memorandum / Brief

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

- (a) Ineffective Assistance of Trial Counsel  
 (b) \_\_\_\_\_  
 (c) See : Attached Memorandum / Brief

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

- (a) any petition in a State Court under South Carolina Law? No  
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No  
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No  
 (d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

- i. N/A  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_

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

- i. \_\_\_\_\_  
 ii. N/A  
 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. \_\_\_\_\_

ii. N/A

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) N/A

(b) \_\_\_\_\_

(c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? 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. (a); (B); (C) Verdell Barr, Esq.
- ii. (d) Robert M. Dudek, Esq. S.C. Common Indigent Defense
- iii. \_\_\_\_\_

(b) the proceedings at which each such attorney represented you:

- i. (a); (B); (C)
- ii. (d)
- iii. \_\_\_\_\_

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

Reversed Conviction & Sentence

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

N/A

STATE OF SOUTH CAROLINA )

County of )

VERIFICATION

20 16 CP26 1258

I, RBN, 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.

Richard B. Moss

SWORN to and subscribed before me this 22nd  
day of February, 2016

Michael Carnare  
(L.S.)

Notary Public

My Commission Expires: July 09, 2026

2016 FEB 24 PM 2:22

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

20 16 CP26 1258

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

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

15/ Richard B. Thibault  
Applicant

SWORN or affirmed to and subscribed before me this  
22<sup>nd</sup> day of February, 2016.

Michael Casane  
Notary Public

My Commission Expires: July 09, 2026

2016 FEB 24 PM 2:21  
CLERK OF COURT

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Docket No: 20 16 CP26 1258

Richard Bill Niles, Jr.

Applicant

vs.

State of South Carolina

Respondent

MEMORANDUM OF LAW IN SUPPORT OF  
POST-CONVICTION RELIEF APPLICATION

FILED  
FEB 24 PM 2:22  
CLERK OF COURT

COMES NOW, Richard Bill Niles, Jr. above captioned Applicant, Pro Se respectfully seeking relief in this Honorable Court pursuant to S.C. Code Ann. §17-27-20 through §17-27-160, asserting that his Sixth Amendment right to the effective assistance of trial Counsel was violated during trial, including but not limited to his fourteenth Amendment right to a fair trial that is protected under the Federal Constitution.

Applicant believes through the issues presented, statement of facts and legal authorities relied on, he will show unto this Court his entitlement to the requested relief sought herein.

I. TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING.

FACTS:

Applicant asserts that he was denied the effective assistance of trial Counsel when Counsel failed to object to the Prosecution's improper closing that undeniably used "YOU" and forms of the word "YOU" before the Jury in closing argument that would lead a reasonable jurist to imagine themselves in the shoes of the victim. This is known as the Golden Rule argument, which requires reversal of the conviction. In the instant case the following argument was recorded:

" and folks, I submit to you when you get shot, uh it takes a second to recover even with adrenaline. you pull your weapon and you

See the Defendant Niles jumping in the back seat. Where are you going to shoot first? Back towards your attacker, the man who's killed you, given you the mortal wound. (Tr. p. 678 line 21-25, Tr. p. 679, line 1)

"He sees a heavyset black male in the back. It's happening fast. All you can tell is it's a heavyset black male. Once again not a tiny guy like Ervin Moore but a big old fellow with a Black female driver. (Tr. p. 675 lines 10-13) Emphasis added.

### ARGUMENT :

"A Solicitor's closing argument must not appeal to the personal biases of the Jurors nor be calculated to arouse the Juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord Simmons v. State 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A Solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the Jurors.") State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding because the Solicitor's duty is not to convict the defendant but to see justice done, the Solicitor's closing argument must be "carefully tailored" to not appeal to the personal bias of jurors nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (ct. App. 2003)

Specifically, the Solicitor asking the Jurors to put themselves in the place of the victim is improper and constitutes reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (ct. app. 1995). This is known as the "Golden Rule Argument". The "Golden Rule Argument" asks the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgment. Black's Law Dictionary, 700 (7th ed. 1999); See also John W. Reis, Improper Jury Argument: Gilding the Luster of the Golden Rule, 69 Jan Fla. B.J. 60, 60 (1995) ("The Traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdicts from that perspective.")



Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions. 75 A. Am. Jur. 2d Trial § 650 (1991); see Lucas v. State, 335 So. 2d 566, 568 (Fla. Dist. Ct. App. 1976) (holding that "the technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil cases").

The Golden Rule Argument suggesting to Jurors as it does that they put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." 75 A. Am. Jur. 2d Trial § 650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors to place themselves in the victim's shoes is disallowed, Golden Rule Argument. Johnson v. State 263 G.A. App. 443, 587 S.E.2d 775, 781 (2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003); See also State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 476 (N.C. 2002) (Arguments that ask jurors to place themselves in the victim's shoes are improper.) Velocity Express Mid-Atlantic, Inc. v. Hugen, 266 VA. 188, 585 S.E.2d 557, 565 (2003) (ruling plaintiffs repeated request to the Jury that it apply the Golden Rule were prejudicial and constituted reversible error).

In the instant case the Solicitor calculated his closing argument in a prejudicial manner by the terms used of "You" and the form of the word "You" would lead a reasonable jurist to place themselves in the role of the victim. Regardless of what interpretation the jury used to consider the verdict against Applicant the importation of the language used was improper and could have easily mislead the jurors from neutrality and to render a verdict on the basis of personal feelings and bias rather than on the evidence. Applicant asserts that he was denied his Sixth Amendment right to the effective assistance of counsel and as a result of Counsel's failure to object Applicant was also denied his Fourteenth Amendment right to a fair trial. For the aforementioned reasons, Applicant prays this Honorable Court will grant a new trial.

## II. TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTIONS IMPROPER BOLSTERING THAT RESULTED IN IMPERMISSIBLE VOUCHING FOR A STATE'S WITNESS.

### FACTS:

Applicant asserts that he was denied the effective assistance of trial Counsel, when counsel failed to object to the State's bolstering of a State's witness, that later resulted in impermissible vouching that denied Applicants right to a fair trial.

Applicant asserts that the State impermissibly "bolstered" Ervin Moores testimony during trial, and later relied on Moores testimony and vouched for the credibility of his testimony before the Jury.

The following colloquy was recorded during Ervin Moores testimony:

Q. Part of that written agreement it deals with what happens if you get on the stand and lie; doesn't it?

A. Yes, ma'am

Q. And if you get up on the stand and you lie what happens to that agreement?

A. It aint no good.

Q. It goes out of the window?

A. Yes, ma'am (Tr.p. 450 line 23-25, Tr.p. 451 lines 1-5) Emphasis Added

Coming after the prosecution successfully bolstered the witness's credibility, the prosecution argued the following to the Jury without objection from trial Counsel, as was recorded:

"He told you, and he told you he knew that if he lied on the stand all deals were off. He's facing a longer sentence. So what did he tell you?" (Tr.p. 669 lines 24-25, Tr.p. 670 line 1) emphasis added.

"Ervin Moore's story is the one thats adding up. Ervin Moore's story is the one thats corroborated" (Tr.p. 675 lines 13-15) emphasis added.

"Mr. Niles story doesn't make sense. Ervin Moore's testimony does"  
(Tr.p. 678 lines 13-14) emphasis added.

"Folks, whose story is corroborated by the testimony? whose story is corroborated by the evidence? Its Ervin Moores He took the Stand. Yeah, he entered a Proffer yeah. He's going to do ten to 15 years. Yes, he's got a record, but he told you, if I lie I know the deals off." (Tr.p. 680 lines 5-9) emphasis added

### ARGUMENT:

In State v. Kelly, 343 S.C. 350 (2001), the Court found an assistant Solicitor "improperly bolstered" a witness credibility through improper questioning. While the assistant solicitor in Kelly did not assert he had personal knowledge his witness was testifying truthfully, he "improperly phrased his question." 343 S.C. at 69 n.12, 540 S.E.2d at 861 n.12.

The Court found the Jury could have interpreted or perceived the assistant Solicitor held the opinion the witness was in fact telling the truth. Id. at 369, 540 S.E.2d at 860 The witness' testimony therefore, carried with it the imprimatur of the government, and "this bolstering" may have induced the jury to trust the state's judgement about the witness.

In United States v. Walker, 155 F.3d 180 (3rd Cir. 1998), the Court of Appeals for the third Circuit discussed generally the concept of vouching: "Vouching constitutes an assurance by the prosecuting attorney of the Credibility of the Government witness through personal knowledge or by other information outside of the testimony before the jury... A prosecutors vouching for the credibility of a government witness raises two concerns: (1) Such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried Solely on the basis of the evidence presented to the jury; and (2) the Prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgement rather than its own view of the evidence. Id. at 184 Emphasis added.

Simply put, "vouching occurs when the prosecution comments on a witness's credibility in its opening or closing argument. See Id 155 F.3d 185-87 (good discussion law on vouching). Interestingly in the instant case, the prosecution "bolstered" its case by "vouching" for the credibility of Ervin Moore's testimony, but the prosecution also targeted improper questioning of Ervin Moore as well. At least one Court has held that this type of questioning is improper. See Mitchell v. State, 549 P.2d 96 (Oklahoma App. 1976) (where prosecutor asked the witness whether they had "talked about this case" and witness responded "Yes. Sir. You instructed me to tell the truth," the Court found improper bolstering). The questioning used by the prosecution in the instant case mirrors that of Mitchell Supra. Yet in the instant case the prosecution goes one step further. After the improper bolstering the prosecution successfully "vouches" for Ervin Moore's testimony credibility as well. The result is a multi-faceted tangle that denied Applicant and Ms Hammond their right to a fair trial.

Bolstering occurs when one item of evidence is "improperly used" by a party to add credence or weight to some earlier unimpeached piece of evidence offered by some party. Sledge v. St. of Texas Cr. App., 686 S.W. 127, 128. In the instant case, it cannot be denied that the Prosecution's improper bolstering questions to Ervin Moore, that later opened the door and set the stage for the prosecution to successfully "vouch" for Moore's credibility during closing argument. Surely Counsel should have objected.

For the aforementioned reasons and violations of Applicant's Sixth and Fourteenth Amendment rights, Petitioner respectfully prays that this Honorable Court will grant the requested relief of a new trial.

### III. APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO ARGUE THAT "TRIAL COURT ERRED IN CHARGING THE JURY THAT IT MAY INFER MALICE FROM THE USE OF A DEADLY WEAPON"

#### FACTS:

Applicant asserts that he was denied the effective assistance of Appellate Counsel when counsel failed to argue on appeal that the "Trial Court erred in charging the Jury that it may infer malice from the use of a deadly weapon."

where evidence was presented which would have reduce, mitigate, excuse or justify the homicide.

On April 9, 2007, James Salter was shot in a Best Buy parking lot in Myrtle Beach, South Carolina. Salter later died from his injuries.

The testimony presented a trial revealed conflicting versions of the event. The State's view tended to show that the Applicant Niles was in the process of committing armed robbery when he shot and killed Salter. Conversely Niles presented evidence that he returned fire on Salter in an effort to defend himself.

The Jury was instructed that "malice may be inferred by the use of a deadly weapon" and convicted Niles of Murder, Armed Robbery and the related firearm charge. The Jury charge was as follows:

"Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. (Tr.p. 694 lines 7-10) emphasis added.

### ARGUMENT:

In State v. Hopkins, 15 S.C. 153 (1881) Hopkins was convicted of murder. He pled accident, and objected to the following "use of a deadly weapon" implied malice instruction:

"In every case of intentional homicide the presumption of malice arises, and the fact of killing intentionally by the use of a deadly weapon, being shown in any case, the burden of proof is thereby imposed upon the defendant to rebut such presumption unless the facts and circumstances shown in the testimony in behalf of the State incidentally rebut it." Id. at 156. (emphasis)

Under the circumstances, the charge was error, and Hopkins was granted a new trial.

Hopkins cited to the rule that "there is no doubt whatever of the isolated proposition that the law presumes malice from the mere fact of homicide, but there are cases as made by the proof to which the rule is inapplicable." The Court explained that "when all the circumstances of the case are fully proved there is no room for presumption. The question becomes one of fact for the Jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears". Id. at 156-57 (citing State v. Coleman 6 S.C. 185 (1875)).

In a case just recently decided by our Supreme Court, the Court stated:

"We are firmly convinced that instructing a jury that "malice may be inferred by the use of a deadly weapon" is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity. "see State v. Belcher 385 S.C. 597 685 S.E.2d 802 (S.C. 2009)(emphasis added)"

Errors including erroneous jury instructions, are subject to harmless error analysis. See Lourey v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008). In many murder prosecutions, there will be overwhelming evidence of malice apart from the use of a deadly weapon. Here, however, the error in charging that malice may be inferred by the use of a deadly weapon cannot be considered harmless. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is clearly conceivable that the only evidence of malice that the jury relied on was the use of Applicant's gun, this can be supported by their question to the Court:

"Can the Defendant be found guilty of Murder and not guilty of armed Robbery?"

Apparently the Jury was not convinced of the ~~guilt~~ guilt of the armed robbery but was convinced that the "malice" existed to convict on murder simply by the use of a gun. Thus the jury's question to the Court add credence to the conclusion that the only evidence of malice that they relied on was the use of the gun. Thus the error in the Jury instruction was not harmless.

Although Trial Counsel did not object to this erroneous jury instruction at trial. Appellate Counsel could still have challenged this issue on appeal. In State v. Belcher 385 S.C. 597, 685 S.E.2d 802 (S.C. 2009) Our Supreme Court stated: "Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved," citing Griffith v. Kentucky 479 U.S. 314, 328, 107 S.Ct. 708 (1987) ("holding that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases... pending on direct review or not yet final") See also Harris v. State 273 Ga. 608, 543 S.E.2d 716, 717-18 (2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule to all cases in the pipeline - i.e. cases which are pending on direct review or not yet final.) Emphasis added

At the time the Court ruled on the Belcher case (October 12, 2009), Appellate Counsel had not yet filed his Final Brief to the South Carolina Court of Appeals, nor had a ruling been made, thus Applicant's case was still pending on direct review and the Belcher decision was a effective decision in this case.

Appellate Counsel did not render effective assistance on appeal when he failed to raise an issue that not only would guarantee his client's conviction being reversed, but would effectively have barred the State from filing a frivolous appeal to prolong the entitled relief. For the aforementioned reasons, Applicant prays that this Court grant a new trial.

#### IV. APPELATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE THAT "TRIAL COURT ERRED IN NOT PROPERLY ANSWERING THE JURYS QUESTIONS.

##### FACTS:

Applicant asserts that he was denied the effective assistance of ~~the~~ Counsel when Counsel failed to raise the issue on appeal, "that Trial Court erred in not properly answering the Jury's questions." In the instant case the following are recorded:

THE COURT: Alright, the first one, "Can the defendant be guilty of Armed Robbery if doubt exists as to his actual knowledge of it prior to the act of robbery?" Please refer to the Courts instructions for reasonable doubt and armed Robbery. (Tr p. 721 lines 7-11)

THE COURT: The next question, "can the defendant be found guilty of murder and not guilty of armed Robbery?" Please refer to the Courts instructions for Murder and Jury Verdict. (Tr p. 721 lines 14-17)

##### ARGUMENT:

Neither one of the Courts answers to the Jury's two questions properly clarified the matter. In the first question the Court referred the Jury to the instructions previously given for reasonable doubt, see (Tr.p. 687 lines 1-25, Tr.p. 688 lines 1-10 for Reasonable doubt instructions). Now while this referral may have cleared up any questions as to the type or degree of 'doubt' is necessary, it sheds no light whatsoever on whether "actual knowledge of a crime prior to its commission" is necessary for a

Finding of guilt? The Court also referred the Jury to the Armed Robbery Instructions (see Tr.p. 694 lines 22-25. Tr.p. 695 lines 1-20 for Armed Robbery instructions) This instruction mentions nothing at all about whether or not actual knowledge of a crime prior to its commission is necessary for a finding of guilt. In other words the Court did not answer the Jury questions properly and referring the Jurors to Instructions that were irrelevant to their question could very well have confused the Jury even more than they already were. The Jurors had all of the Courts instructions back in the Juror room with them, obviously if those instructions was sufficient enough to answer their questions, it would have been no need to send a note asking the Court for clarification.

The same is the case with the Jury's second question. The Jury asked the Court can the defendant be found guilty of Murder and not guilty of armed Robbery? Again the Courts response added no clarification to the Jury's Question and trial Counsel did object to this response. Tr.p. 721 lines 2-5 The way the question is formulated would lead any reviewing Court to understand it in two or more ways One, the Jury could be asking if the Defendant didn't go to the location with the intention of robbing the victim then could he be found guilty of Murder separate and apart from that? Two, the Jury could have been asking do they have to convict the defendant of Armed Robbery if they find him guilty of Murder?

The Major problem here is if in fact the Second formulation of the question is more accurate of what the Jury was attempting to inquire about. That would mean by the Courts improper response to that question the Jury may have convicted Applicant of Armed Robbery not because they found all the necessary elements had been proven, but simply because they found him guilty of Murder. This type of conclusive presumption is forbidden in a criminal trial. see Sandstrom v. Montana 442 U.S. 510, 524, 99 S.Ct. 2450 (1979) ("holding that burden-shifting presumptions or "conclusive" presumptions deprive a defendant of the due process of law and are therefore unconstitutional") See also Mullaney v. Wilbur 421, U.S. 684, 703-04, 95 S.Ct. 1881 (1975).

Since this issue was objected to and preserved for direct review Appellate Counsel was ineffective for not raising it on appeal, as shown above it had merits. See McKee v. U.S. 167 F.3d 103 (2nd Cir. 1999) Brown v. U.S. 167 F.3d 109 (2nd Cir. 1999).



## V Trial Counsel Ineffective For Failing To Object To The Prosecutors Introducing Void Indictments To The Trial Court...

On August 23, 2007 a Grand Jury was [allegedly] convened for the purpose of indicting me for Murder. However, according to §14-9-210, S.C. Code Annotated, A PROSECUTOR CAN ONLY SEEK INDICTMENTS AGAINST A DEFENDENT DURING A [GENERAL SESSION TERM OF COURT].

Each county in the state of South Carolina has its own original jurisdiction terms of court for General Sessions' matters, pursuant to Article V, §4 of the South Carolina Constitution. Pursuant to the same Article and Section the Chief Justice of South Carolina can set additional terms of court for [any] court in South Carolina. However, this order must specify when such additional term is to start, end, and, specify where such term is to be held and specify the Judge appointed to preside over such special term.

Due to the fact that Horry County [does not] have a General Sessions term of court that covered August 23, 2007, the alleged convening was without authority of law and all judgments, rulings, orders, creeds, etc, that were made during or as a result of this alleged convening are Null, Void, Invalid and Unenforceable. (See Ex Parte DeHay 3 S.C. 564 (1872),) and (State ex rel. Riley v. Martin, 262 S.E.2d 404 (1980)).

In DeHay, supra and Riley, supra, the courts of subject had convened at a time unauthorized by law. The DeHay Court had vacated his conviction completely and restored him back to the custody of the sheriff of the county that arrested him. The Riley Court had voided all or most of the judgments, rulings, and orders, etc, that had took place at a time unauthorized by law.

In the present case the same has occurred. I was indicted, "alleged", at a time unauthorized by law. This makes my indictments void immediately. Further, this makes my trial, conviction, and sentence void immediately. Without valid indictments or a waiver of presentment to Grand Jury the trial court did not have jurisdiction to convene a jury for the purpose of determining my innocence or guilt.

In order to prove that the State did not have authority of convene a Grand Jury on August 23, 2007, the State must produce an Order from the Chief Justice that [Specify] the following:

- 1) A special term of court covering August 23, 2007, for Horry County;
- 2) The exact place this special term was to be convened;
- 3) The Date this special term was to start;
- 4) The Date this special term was end;
- 5) The exact name of each Judge appointed to preside over such special term.

If the state of South Carolina can not produce an order, specifying the above five (5) items listed above, from the Chief Justice who presided over the Supreme Court on or before August 23, 2007, it is this court's duty to vacate my conviction and sentence immediately.

VI. TRIAL COUNSEL INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURTS INADEQUATE RESPONSE TO THE JURYS QUESTION

"SEE FACTS AND ARGUMENT IV"

Trial Counsel objected to trial Courts response to Jury Question #2 but DID NOT object to trial Courts response to Jury Question #1 See United States v. Bosch 584 F.2d 1113 (1st Cir. 1978) ("Trial Counsel held ineffective for failure to object to the trial Courts erroneous reply to the jury note.")

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VII. CONCLUSION.

Applicant Apply for a New Trial on all Charges based on all of the aforementioned alleged Constitutional Violations, that occurred during the course of his Trial

Respectfully Submitted,

Richard B. Niles Jr.

Richard Bill Niles Jr. #333708  
McCormick Correctional Inst.  
386 Redemption Way  
McCormick, S.C. 29899

APPLICANT PRO SE

|                          |   |                                   |
|--------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS      |
| COUNTY OF HORRY          | ) | OF THE FIFTEENTH JUDICIAL CIRCUIT |
|                          | ) |                                   |
|                          | ) |                                   |
| Richard B. Niles, Jr.,   | ) | Case No.: 2016-CP-26-1258         |
| S.C.D.C. No. 333708,     | ) |                                   |
|                          | ) |                                   |
| Applicant,               | ) |                                   |
|                          | ) | <b>RETURN</b>                     |
| v.                       | ) |                                   |
|                          | ) |                                   |
| State of South Carolina, | ) |                                   |
|                          | ) |                                   |
| Respondent.              | ) |                                   |
| _____                    | ) |                                   |

In response to Applicant's post-conviction relief application filed February 24, 2016, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Horry County Grand Jury indicted the Applicant at the August 2007 term for murder (2007-GS-26-3363). He was also indicted at the October 2008 term for armed robbery and possession of a weapon during the commission of a violent crime (2008-GS-26-4117, -4116). Verdell Barr, Esquire, represented the Applicant.

The case proceeded to a jury trial on March 9, 2009, whereby Applicant was found guilty of all three charges. On March 13, 2009, the Honorable Benjamin H. Culbertson sentenced Applicant to thirty (30) years confinement for murder, with credit for time served, to be served consecutively with thirty (30) years imprisonment for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal as to his murder conviction and a direct appeal was perfected by Robert M. Dudek, Esquire, and Reid T. Sherard, Esquire (Appellate Case No.: 2009-121246). By opinion filed September 9, 2012, the South Carolina Court of Appeals reversed the circuit court, ruling that the circuit court erred in refusing to charge the jury on voluntary manslaughter, and that error prejudiced Applicant. See State v. Niles, Op. No. 5034 (Ct. App. Filed September 12, 2012).

The State filed a petition for rehearing in the Court of Appeals on September 28, 2012. By opinion filed November 14, 2012, the Court of Appeals withdrew, substituted, and refiled Opinion No. 5034, issuing a second opinion which also reversed the circuit court's murder conviction and denying the State's petition for rehearing. See State v. Niles, Op. No. 5034 (Ct. App. Refiled November 14, 2012); State v. Niles, 400 S.C. 527, 735 S.E.2d. 240 (Ct. App. 2012).

Thereafter, the State filed a petition for writ of certiorari to the South Carolina Supreme Court (Appellate Case No. 2012-213592), which was heard on June 25, 2014. By opinion filed March 25, 2015, the Supreme Court reversed the Court of Appeals, holding that the evidence at Applicant's trial did not warrant a voluntary manslaughter charge. See State v. Niles, Op. No. 27510 (Sup. Ct. Filed March 25, 2015). The State filed a petition for rehearing, which the Supreme Court granted only to edit its previously published opinion, upholding its prior reversal of the Court of Appeals. See State v. Niles, Op. No. 27510 (Sup. Ct. Refiled June 10, 2015).

## II.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel.
  - a. "Trial counsel ineffective for failing to object to the solicitor's improper closing."
  - b. "Trial counsel ineffective for failing to object to the prosecution's improper bolstering that resulted in impermissible vouching for a State's witness."
  - c. "Trial counsel ineffective for failing to object to the prosecution introducing void indictments to the trial court."
  - d. "Trial counsel ineffective for not objecting to the trial court's inadequate response to the jury's question."
2. Ineffective Assistance of Appellate Counsel.
  - a. "Appellate counsel ineffective for failing to argue that 'trial court erred in charging the jury that it may infer malice from the use of a deadly weapon.'"
  - b. "Appellate counsel was ineffective failing to raise the issue that 'trial court erred in not properly answering the jury's questions.'"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the appellate records, and the records of this action. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

### III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. Respondent asserts Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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 on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced 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 of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Respondent submits Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

V.

The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). “For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy...” Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The 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 the record does not



conclusively refute. Accordingly, 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).

## VI

Respondent denies each allegation not expressly admitted, qualified or explained.

## VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held and counsel appointed to represent Applicant.

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT BOLCHOZ  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

VALERIE GARCIA GIOVANOLI  
Assistant Attorney General

By:



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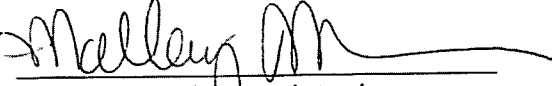
February 16, 2017

|                                |   |                              |
|--------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA        | ) |                              |
|                                | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY                | ) |                              |
|                                | ) |                              |
|                                | ) | 2016-CP-26-1258              |
| RICHARD B. NILES, JR., 333708, | ) |                              |
|                                | ) |                              |
| Applicant,                     | ) |                              |
|                                | ) |                              |
| vs                             | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                                | ) |                              |
| STATE OF SOUTH CAROLINA,       | ) |                              |
|                                | ) |                              |
| Respondent.                    | ) |                              |
| _____                          | ) |                              |

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

**Mr. James K. Falk, Esquire**  
**Falk Law Firm, LLC**  
**PO Box 1058**  
**Charleston, SC 29402**

DATED this 16<sup>th</sup> day of February, 2017.

  
 \_\_\_\_\_  
 Mallory Morris, Legal Assistant  
 For Respondent

1

2 State of South Carolina ) Court of Common Pleas  
3 County of Horry ) 2016-CP-26-01258

4

5

6 Richard Bill Niles, Jr. )  
7 vs. ) Transcript of Record  
8 State of South Carolina )

9

10 November 27, 2017  
11 Conway, South Carolina

12

13 BEFORE:

14 Honorable William H. Seals, Jr., Judge.

15

16 APPEARANCES:

17

18 James K. Falk, Esq.  
19 Attorney for the Applicant

20

21 Johnny E. James, Jr., Esq.  
22 Attorney for the State

23

24

25

26 Teresa J. F. Bautz, RPR  
27 Official Court Reporter

28

29

30

## 1 I N D E X

2 WITNESS DIR CROSS RED REC

3 Robert M. Dudek (via phone)

4 Mr. Falk 9 -- -- --

5 Mr. James -- 18 -- --

6 Richard Bill Niles, Jr.

7 Mr. Falk 30 -- -- --

8

9

## 10 E X H I B I T S

11

12 NO. DESCRIPTION ID EV

13 No exhibits submitted.

14

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21

22 Exhibits retained by Clerk of Court.

23

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25

1 (The hearing commenced at approximately  
2 10:26 a.m.)

3 THE COURT: Good morning. Go ahead and call your  
4 case.

5 MR. JAMES: Thank you, Your Honor. If it may  
6 please the Court, my name is Johnny Ellis James, Jr.,  
7 and I have the honor and privilege to represent the  
8 State of South Carolina as respondent in the action  
9 before the Court today. Also with me at the table is  
10 Mallory Morris, my legal assistant, who will be  
11 assisting me in today's matters.

12 The first matter before the Court this morning is  
13 Richard Bill Niles versus the State of South Carolina.  
14 That is Docket No. 2016-CP-26-1258. Mr. Niles is here  
15 and present in the courtroom today and is represented  
16 by Mr. James K. Falk.

17 Mr. Niles was indicted in August of 2007 for  
18 murder and in October of 2008 for armed robbery and  
19 possession of a weapon during the commission of a  
20 violent crime. Your Honor, he was a co-defendant of  
21 Boiquin Hammond, which Your Honor is also already  
22 familiar with, as she had her PCR at the prior term.

23 This case proceeded to a jury trial March 9th,  
24 2009, before the Honorable Benjamin H. Culbertson, and  
25 Mr. Niles was convicted on March 13, 2009, and

1 sentenced to 30 years in prison.

2 Mr. Niles appealed and was represented on appeal  
3 by Mr. Robert M. Dudek and Mr. Reid T. Sherard,  
4 Esquires. By opinion filed September 9, 2012, the  
5 Court of Appeals actually reversed the conviction  
6 ruling that the circuit court erred in refusing to  
7 charge the jury on voluntary manslaughter.

8 The State filed a petition for writ of certiorari  
9 to the South Carolina Supreme Court which was heard on  
10 June 25, 2014, and by opinion on March 25th, 2015, the  
11 Supreme Court reversed the Court of Appeals and  
12 reinstated the conviction finding that the evidence at  
13 Applicant's trial did not warrant a voluntary  
14 manslaughter charge.

15 Your Honor, with that said, I will concede the  
16 floor to Mr. Falk.

17 THE COURT: All right, Mr. Falk.

18 MR. FALK: Thank you, Your Honor. My client is  
19 alleging ineffective assistance of both trial counsel  
20 and appellate counsel. If I could, I'm going to just  
21 read through his more specific grounds for ineffective  
22 assistance of counsel.

23 His first count would be that trial counsel was  
24 ineffective for failing to object to the solicitor's  
25 improper closing argument. And by this is we believe

1 that the solicitor used sort of crossed the line as far  
2 as the golden rule in closing argument.

3 THE COURT: Um-hum.

4 MR. FALK: And then our second ground is trial  
5 counsel was ineffective for failing to object to the  
6 prosecution's improper bolstering of its witnesses,  
7 both in its closing argument and through some of the --  
8 some of his actual direct examination of one of his  
9 witnesses.

10 And here's what I think is --

11 THE COURT: Go ahead.

12 MR. FALK: -- really one of the more interest --  
13 well, they are all interesting and they are all solid  
14 arguments, but one I want the Court to maybe pay  
15 particular attention to is because of the timing of  
16 this case, this is a case where the trial Court was  
17 instructed on applied malice by use of a deadly weapon.

18 This case went to trial in early 2009, and of  
19 course the Belcher decision comes out in the end part  
20 of 2009. And I believe that the Belcher decision says  
21 that, you know, it's going to apply to cases that were  
22 still pending, still in the pipeline. The appellate  
23 brief in this case was filed in 2010, and we think,  
24 although appellate counsel certainly did a good job at  
25 the -- in the Court of Appeals and that the decision

1 was reversed, we think it should have also raised the  
2 Belcher argument also especially under the facts in  
3 this case.

4 THE COURT: All right. Ready when you are.

5 MR. FALK: I'm sorry, Your Honor. If I could  
6 just --

7 THE COURT: There is more?

8 MR. FALK: Yeah. Just trying to take it in order  
9 of the...

10 THE COURT: That's okay.

11 MR. FALK: We are also raising that trial counsel  
12 failed to properly handle some of the Court's responses  
13 to questions that were asked by the jury during their  
14 deliberation. And trial counsel failed to do -- to  
15 object to or move to quash the indictments in this case  
16 because of the fact that they were not -- the  
17 indictments were not handed down in a procedurally  
18 correct method. We don't think that there was a term  
19 of court when it says that the grand jury indicted my  
20 client, so...

21 THE COURT: All right.

22 MR. JAMES: One clerical matter, Your Honor, that  
23 I forgot to mention in my call of the case, Mr. Niles  
24 was originally represented by Mr. Verdell Barr,  
25 Esquire. Mr. Barr is now deceased. On the roster it



1 indicates that Mr. Charles Barr will be testifying. He  
2 was only included on there as the custodian, as  
3 Mr. Verdell Barr's files. In consultation with  
4 Mr. Falk, I don't believe any of the materials out of  
5 that defense file will be necessary to the adjudication  
6 of the allegations that he has now summarized to you.  
7 And therefore, Mr. Charles Barr will not be called here  
8 today. So I just wanted to make that clear.

9 MR. FALK: And in my discussion with Mr. James, it  
10 was provided that we weren't going to try to argue that  
11 some of the decisions were trial strategy.

12 THE COURT: All right. Sounds good.

13 MR. FALK: One moment, Your Honor.

14 (Discussion off the record.)

15 MR. FALK: Your Honor, could I have two minutes  
16 with my client?

17 THE COURT: You may.

18 (Discussion off the record.)

19 MR. FALK: Your Honor, I guess normally this would  
20 be kind of a -- I'd ask trial counsel why he didn't  
21 object to these certain elements. And maybe we're  
22 going to have to do this in a different manner.

23 So if I could -- I'm just taking pages out of the  
24 trial. I made copies out of the trial transcript of  
25 some pages that I'm going to address.

1 THE COURT: Thank you.

2 MR. FALK: I know that 450 is at the top of that,  
3 but could you look at page 675.

4 THE COURT: I got 670 and 678.

5 (Discussion off the record.)

6 MR. FALK: Okay. And, Your Honor, I'm coming to,  
7 this is part of Mr. Richardson's closing argument. And  
8 there is some sections in here where we believe that  
9 trial counsel crossed the line as far as trying to make  
10 the jurors feel like they were the victims in this  
11 case.

12 MR. JAMES: If I may interject in here, as a  
13 procedural suggestion, it may, since we don't have  
14 Verdell to call to the witness stand, we may wish to  
15 simply call the witnesses that we do have available and  
16 address all of this as part of our closing argument.  
17 Otherwise, we're going to get back and forth over  
18 matters that may necessitate the testimony of appellate  
19 counsel. But I know it's an unusual...

20 THE COURT: That would kind of make the most  
21 sense. Let me go ahead and hear from all the  
22 witnesses, and then you can have whatever time you need  
23 to address --

24 MR. FALK: Okay.

25 MR. JAMES: Because the matters are already on the

1 record to the application, there's a substantive  
2 pleading.

3 MR. FALK: Do we want to get Dudek on the phone?

4 MR. JAMES: All right. Are you calling him as a  
5 witness or?

6 MR. FALK: I'll call him as my witness.

7 MR. JAMES: Okay.

8 THE COURT: Who is your first witness?

9 MR. FALK: Robert Dudek, he's testify by telephone  
10 from appellate defense. I waived his personal  
11 appearance.

12 THE COURT: Okay.

13 (WHEREUPON, Mr. Dudek was contacted by telephone.)

14 MR. JAMES: Hello? Hello. Yes, hello, this is  
15 Johnny James.

16 THE COURT: Do you want to have the clerk go ahead  
17 and swear him.

18 MR. FALK: Mr. Dudek can you hear us?

19 MR. DUDEK: Yes, sir, I can.

20 MR. JAMES: All right.

21 ROBERT M. DUDEK, after being duly sworn, testified  
22 as follows via telephone:

23 THE COURT: All right.

24 DIRECT EXAMINATION

25 BY MR. FALK:

1 Q Hello, Bob. This is Jim Falk, can you hear me?

2 A Yes, sir. Hey, Mr. Falk.

3 Q How are you?

4 A Doing well, thank you.

5 Q Do you recall this case? This is an appeal you  
6 filed on Richard Niles.

7 A Well, I do recall -- I do recall the case because  
8 it went through the Court of Appeals and the Supreme  
9 Court. So I think I remember it reasonably well.

10 Q This is a case where my client has alleged  
11 ineffective assistance of appellate counsel. And I'm  
12 not sure how much of the file that you've gotten. But  
13 basically the sum and substance of our argument here is  
14 this case was actually pending after the Belcher  
15 decision came down in October of 2012. No, excuse me,  
16 October 12th, 2009.

17 And I believe that it's my understanding  
18 Belcher -- and again, I certainly would -- you probably  
19 know this better than I do -- but as far as the  
20 retroactive effect of the Belcher decision, I think in  
21 footnote 10, it addresses that they were going to apply  
22 the case law in Belcher as all cases that were pending  
23 at the time that the decision came down. Is that  
24 somewhat your understanding?

25 A Well, I got Belcher, I got the opinion in front of

1 me. And it was decided October 12th, 2009. And I'm  
2 looking at footnote --

3 Q Well, actually look at headnote 7.

4 A Okay. Bear with me, Mr. Falk, just a second.

5 Okay. Headnote says: Court's ruling would be  
6 effective for all cases which are pending on direct  
7 review or not final where the issue was preserved.

8 However, the Court's ruling would not apply to  
9 convictions challenged on post conviction relief.

10 Okay, I think I'm with you.

11 Q All right. So the date that you filed the  
12 appellate brief is October 23rd, 2010, that's the date  
13 on the certificate of service. So you would agree that  
14 this case was pending on direct review at the time?

15 A Are you talking about the Supreme Court or the  
16 Court of Appeals?

17 Q I'm looking at the Court of Appeals brief.

18 A Okay. I don't -- I don't remember, Mr. Falk,  
19 Belcher being an issue in this case.

20 Q Well, this is a case where the Court was  
21 instructed -- part of the charges to the -- part of the  
22 charges were that you could imply malice from the use  
23 of a deadly weapon. That's how the jury was charged in  
24 this case.

25 A Okay, I have this transcript in front of me also.

1 So, I mean, I don't obviously doubt what you're saying.  
2 That was a, you know, as you know, Mr. Falk, very  
3 normal jury instruction.

4 Q Yes. I'm just -- if you look at page 694 of the  
5 trial transcript.

6 A Okay. Give me just a second, I'm flipping to that  
7 page. Inferred malice may also arise when the deed is  
8 done with a deadly weapon. Okay, I see that, in 694,  
9 lines 7 and 8. And it says that, you know, a gun --  
10 the gun is a deadly weapon. Right, I'm with you. I  
11 mean, this is, you know, pretty normal jury  
12 instruction --

13 Q Yes.

14 A -- at the time.

15 Q And so, I mean, you would acknowledge under the  
16 facts in this case, certainly you were arguing that  
17 they should have instructed on involuntary  
18 manslaughter?

19 A Well, my argument was they should have charged on  
20 voluntary manslaughter, as I recall.

21 Q Right.

22 A That's what I won on in the Court of Appeals, and  
23 the Supreme Court, four to one, took it back and found  
24 no err in not charging voluntary manslaughter. But I  
25 take it your point would be, does -- you're entitled to

1 a instruction on voluntary manslaughter, does that  
2 lessen or mitigate the homicide? And I think the  
3 answer for Belcher purposes would be yes, it does.

4 Q Okay. Do you think that by raising the Belcher  
5 argument in addition to the argument you raised in your  
6 Court of Appeals brief, that that would have somehow  
7 detracted from either argument?

8 A I'm just trying to -- I mean, was Belcher brought  
9 -- I just don't remember it being an issue. I mean,  
10 was there an exception to it that you could point me  
11 to?

12 Q Well, I'm just looking at, if you look at footnote  
13 10, yeah, I guess, footnote 10 on page 810, this is of  
14 the -- you know, the West version. It says: The  
15 decision today overrules in parts considerable  
16 precedent of the Court -- of this Court and of the  
17 Court of Appeals. We overrule all cases involving a  
18 homicide or a charge of assault and battery with intent  
19 to kill where two factors exist; one, approval of the  
20 jury instruction that malice may be inferred from a use  
21 of a deadly weapon, and two, evidence was presented  
22 that, if believed, would have reduced, mitigated,  
23 excused or justified the homicide or the charge or the  
24 ABWIK charge.

25 And so it would seem that there certainly was

1 evidence, in my reading of the transcript it seems that  
2 there was evidence that certainly would have mitigated  
3 the murder charge.

4 A Well, being my argument was, you know, voluntary  
5 manslaughter which would obviously be a lesser offense,  
6 I guess, Mr. Falk, my question was I just don't recall  
7 there being -- that issue being an issue at the trial  
8 level. I mean, am I wrong, or is there an exception to  
9 the inferred malice jury instruction?

10 Q Mr. Hazzard, co-counsel, objected to it, tried to  
11 preserve the issue.

12 A Okay. I'm looking at page 705, and Ron Hazzard  
13 says, just renew the objection regarding the failure to  
14 charge, and then he cites Gore v. Leeke. Can you  
15 tell --

16 Q Look on page 624, look on page 624.

17 A 624.

18 Q Line 7.

19 A Okay, 624, line 7.

20 Q Right.

21 A Case talking about malice, inferred malice when a  
22 deed is one -- it cites Sandstrom v. Montana. Well,  
23 not to be difficult, Mr. Falk, but Ron Hazzard was  
24 representing the codefendant. I mean, did they --  
25 refresh my memory, I mean, did we join in that



1 exception?

2 Q No. But let me just -- let me just make this  
3 point. If it had been -- if you thought it had been  
4 adequately preserved, is that an issue that you would  
5 have raised?

6 A I mean, if -- I think, you know -- I mean, I  
7 remember when Belcher was going on because Ron Wise,  
8 the attorney, was on the Skakel, you know, criminal  
9 defense lawyers Listserv talking about it a good deal.  
10 So I was well aware of Belcher. So certainly, you  
11 know, not raising it, I certainly would like to think  
12 there's a good reason for it like it -- you know, like  
13 it wasn't preserved.

14 Q Okay.

15 A Unless I'm missing something. Trying to be very  
16 straightforward.

17 Q No, I understand.

18 A I just don't remember it being an issue.

19 Q But if the -- certainly the point of issue  
20 preservation is more to make sure that the trial Court  
21 is aware of the law. And certainly --

22 A Yeah. I mean, issue preservation, as I've always  
23 understood, is all about fairness to the trial judge  
24 that, you know, if you think you're entitled to  
25 something or something goes wrong, that you bring it to

1 the attention of the trial judge at the first  
2 opportunity.

3 But my also -- you know, Mr. Falk, my also -- my  
4 understanding is you cannot, quote, "ride," unquote, a  
5 codefendant's objection or exception.

6 Q Okay. I'm just trying to get a better  
7 understanding of what the testimony is for not raising  
8 the Belcher. You're saying you think it's a question  
9 of issue preservation?

10 A From what you pointed out to me, that would look  
11 to be true. If, you know, the attorney for Mr. Niles  
12 had taken exception to it, you know, again, I'm --  
13 let's see, this -- at the time, then, I think, you  
14 know, yeah, then we would have an issue.

15 Q Can you not argue that if the judge -- can you not  
16 argue as far as issue preservation the fact that it  
17 wouldn't have made a difference because the judge had  
18 already decided the issue?

19 I mean, in this case the judge decided to go ahead  
20 after hearing the objection from co-counsel as citing  
21 the Sandstrom case, and the judge ruled that he was  
22 going to go ahead and charge on inferred malice from a  
23 deadly weapon.

24 A I mean, as I see your point, I mean, that you're  
25 saying it was brought to the judge's attention by

1 co-counsel. And, you know, right or wrong, it's always  
2 been my understanding you cannot ride a codefendant's  
3 objection or exception.

4 Q Okay.

5 A I mean, that's just straight rules. I think I'm  
6 right about that.

7 Q Okay.

8 A Well, I teach it all the time. I hope I'm right  
9 about that.

10 Q All right, thank you.

11 A Yes, sir.

12 Q But just make sure I'm understanding, but it is  
13 your testimony that had it been preserved, that would  
14 have been an issue to raise on appeal?

15 A Yes. I mean, I get -- as I understand it, I mean,  
16 I was certainly aware of Belcher, when Belcher came  
17 out. I just did not remember it being an issue at the  
18 time. And from what you've just pointed me to after  
19 all these years with the transcript right in front of  
20 me here, it looks like there was no exception to it  
21 from us, from our Defendant, Mr. Niles.

22 Q Okay.

23 A Okay?

24 Q Yeah.

25 MR. FALK: I believe I have no further questions.

1 Thank you.

2 THE WITNESS: Thank you.

3 CROSS-EXAMINATION

4 BY MR. JAMES:

5 Q Good morning, Mr. Dudek.

6 A Good morning.

7 Q I will be very brief with you, because you and  
8 Mr. Falk got into most of the details that were  
9 necessary and appropriate. You're the one who drafted  
10 the appellate brief; correct?

11 A Right, that's my understanding. I wrote the brief  
12 and brought in Reid Sherard from our pro bono project  
13 with Nelson Mullins. My memory is Reid actually argued  
14 it in the Court of Appeals. But yes, I wrote the  
15 initial brief is my memory.

16 Q Would Reid have had any opportunity to add to or  
17 take away from issues that you argued in the briefing?

18 A Well, I mean, Reid and I, I'm sure, talked about  
19 the issues. And Reid's an excellent lawyer, but with  
20 deference, I think Reid would, Mr. Sherard would tell  
21 you he probably would defer to me as to substantive  
22 criminal law.

23 But yeah, I think on the cases I've worked on with  
24 Reid, you know, we've kicked around the issues. I just  
25 don't know -- I just don't have a memory if Reid was

1 involved at the initial brief stage.

2 Q I suppose my question is a little bit higher  
3 level. After you have submitted the initial brief, can  
4 you or can you not add to or take away from the issues  
5 that you have briefed?

6 A Well, you can't -- you cannot add an issue without  
7 there being leave of -- leave of Court. I don't think  
8 in my 28 years of doing this that I've ever made a  
9 motion to add an issue. So the answer would be, you  
10 know, the issue needs to be in your initial brief.

11 MR. JAMES: Thank you, I have no further  
12 questions.

13 THE COURT: Mr. Falk?

14 THE WITNESS: Yes, sir.

15 MR. FALK: I have no redirect. No redirect.

16 THE COURT: All right. Thank you very much. You  
17 have a good day.

18 THE WITNESS: Thank you very much.

19 (Witness excused.)

20 THE COURT: All right. Call your next witness.

21 MR. FALK: One moment, Your Honor.

22 (Discussion off the record.)

23 MR. FALK: Your Honor, at this time, we don't have  
24 any other witnesses to call.

25 THE COURT: All right. Mr. James?

1 MR. JAMES: The State has no witness to call, Your  
2 Honor.

3 THE COURT: All right. Anything you would like to  
4 put on the record, Mr. Falk?

5 MR. FALK: Yes, Your Honor. If this is now the  
6 appropriate time to call the Court's attention to the  
7 testimony, some of the arguments of -- again, I'm going  
8 to go back to calling the Court's attention to page  
9 675, lines 11 through 13. And I believe more to the  
10 point would be on page 678, lines 21 through -- 679,  
11 line 3.

12 And I believe under the issue of preservation laws  
13 in South Carolina that if you are going to make an  
14 objection to a closing argument, the objection has to  
15 be made contemporaneously basically so that there could  
16 be some type of remedy of the situation on the spot.  
17 We believe that the testimony that's set forth in those  
18 passages I've called your attention to, I think, go  
19 beyond what is permissible as far as putting the  
20 jury -- trying to put the jury into the shoes of the  
21 victim in this case.

22 For example, I submit to you when you get shot, it  
23 takes a second to recover with the adrenaline, pull  
24 your weapon, you see the Defendant Niles jumping in the  
25 back seat. That's testimony that came on page 678.

1           So again, that's a -- we believe that's a golden  
2 rule violation. There was no contemporaneous  
3 objection. Because of the unique situation in this  
4 case that trial counsel is not available to talk about  
5 whether or not there was a trial strategy basis for not  
6 objecting, you have to assume that -- I think it's  
7 unfair to assume that he did not have a trial strategy  
8 basis for that objection.

9           I think there is also a problem, if the Court  
10 could look at page 450 on the redirect examination of  
11 Ms. Elder. And it's starting on lines 20 and  
12 continuing on to page 451, through -- 451, line 9. And  
13 we believe that there's precedent in South Carolina  
14 that you cannot, in effect, bolster your own witness  
15 through indirect testimony.

16           And we would call the Court's attention to State  
17 versus Kelly, which is a 2000 case, by the South  
18 Carolina Supreme Court at 540 S.E. 2d 851, where that  
19 is a --

20           MR. JAMES: I beg your pardon, can I get that cite  
21 again?

22           MR. FALK: Yeah, yeah. And I'm going to talk  
23 about that. And the Court in the Kelly case did state  
24 that you can have a questioning of your own witness  
25 that, in effect, can be bolstering their honesty. And

1 that's what we're talking about in this case where he's  
2 saying, now, if you were lying today you would lose the  
3 deal.

4 And that's exactly the type of bolstering through  
5 direct testimony that we believe the Court was  
6 addressing in Kelly. And as a footnote, I want to  
7 bring the Court's attention that Kelly was actually  
8 reversed and remanded by the United States Supreme  
9 Court at 122 Supreme Court 2d 726.

10 I do not -- I think those -- if you look at the  
11 decision, the remand does not address this bolstering,  
12 does not address the bolstering issue. The Supreme  
13 Court in Kelly, the South Carolina Supreme Court in  
14 Kelly, stated that what had transpired in that case was  
15 certainly was an example of impermissible bolstering  
16 through direct examination. But under these facts it  
17 was harmless error.

18 The United States Supreme Court reversed and  
19 remanded Kelly in total and sent the case back. So I  
20 mean, I don't think the reversal by the Supreme Court  
21 affects the law that the South Carolina Supreme Court  
22 stated in the case on that issue.

23 THE COURT: Do you think that the little bit of  
24 testimony or idea that you call bolstering, would that  
25 have made any difference in this trial at all, the



1 overall decision in the trial by the jury, considering  
2 all the facts and everything that's in the record?

3 MR. FALK: Well, if you read the transcript in  
4 this case, this certainly was a close case. The jury  
5 came back a couple of times having a problem with  
6 the -- I mean, I think they all agreed that possibly an  
7 armed robbery took place. But whether or not there was  
8 a murder, if you look at the jury -- the questions that  
9 the jury asked, and if you look at the issues that are  
10 argued on appeal, this certainly, whether or not this  
11 was a murder as defined under South Carolina law.

12 So I do think this could have a -- I do think it  
13 was not harmless under this case, because we believe  
14 that the jury decision was very close to start with,  
15 based on questions that the jury had asked.

16 And I just call the Court's attention to a recent  
17 South Carolina Supreme Court case in Tappeiner,  
18 T-A-P-P-E-I-N-E-R, versus State, which is at 785 S.E.  
19 2d 471. That's a 2016 case where they certainly are  
20 going into the issues of -- I guess that's a  
21 reaffirmation of the prior South Carolina case law as  
22 far as the golden rule argument and that a solicitor's  
23 closing argument must be carefully tailored not to, you  
24 know, cross that golden rule line as far as trying to  
25 appeal to the passions and emotions of the jury by

1 having them feel like, what would it be like for you to  
2 be the victim in this case.

3 If I could move forward, then, on page -- just if  
4 I could call the Court's attention to page 721 of the  
5 trial transcript, lines 7 through 11. Then to lines 14  
6 through 17.

7 THE COURT: What page again?

8 MR. FALK: 721 of the transcript. And I think  
9 that that clearly shows that the jury was sort of  
10 wrestling with reasonable doubt, burden of proof that  
11 the State had to make in that case. And trial counsel  
12 should have sought clearer -- should have sought a  
13 different answer by the Court to the jury's question.

14 And then on the -- if I could address the issues  
15 regarding the indictments that should have been  
16 considered void because on August 23rd, 2007 there was  
17 no grand jury convened for the purpose of indicting.  
18 But if you -- calling the Court's attention 14-9-2010,  
19 South Carolina Statute 14-9-2010, a prosecutor can only  
20 seek indictments against a defendant during a general  
21 sessions term of court. And I believe the record would  
22 reflect that there was no general session term of court  
23 when the indictments were handed down.

24 And, I guess, Your Honor, on the Belcher issue,  
25 whether or not -- I think appellate counsel should have

1 raised it, and I think they could have at least made a  
2 callable argument that the issue was preserved, as far  
3 as the purpose. The issue of preservation, the Court  
4 was aware of it, the Court had made a decision.

5 But if this Court thinks that that is the -- that  
6 is the biggest issue with that argument, then I would  
7 assert that trial counsel was ineffective for not  
8 joining in Mr. Hazzard's objection to the instruction.

9 THE COURT: All right.

10 MR. FALK: Because we had Mr. -- you did hear  
11 Mr. Dudek say that had the issue been raised -- I mean,  
12 had the issue been reserved, he would have raised the  
13 issue.

14 THE COURT: All right. Mr. James, in reply to all  
15 of that?

16 MR. JAMES: I'll just go in order of the  
17 allegations as they are set forth in the application,  
18 Your Honor. As to the allegation that trial counsel  
19 was ineffective for failing to object to the golden  
20 rule argument, Your Honor, the solicitor's closing  
21 argument does unfortunately drift into that dangerous  
22 sort of combination of second-person speech and  
23 rhetorical questions.

24 But read in the context of the entire argument,  
25 the State is clearly not seeking to put the jury in the

1 victim's place. The solicitor was, at worst,  
2 inarticulate in explaining the obvious and foreseeable  
3 reactions of a man in a heated moment who was at that  
4 time deceased, he was the victim. The incidental use  
5 of, by my count, five you's that were questionable does  
6 not make for a golden rule argument.

7 If it does, it doesn't rise to the level of  
8 prejudice that our jurisprudence has considered  
9 necessary in order to vacate a conviction. And I have  
10 a heap of case law that I can cite to you, but  
11 unfortunately I do not have copies of those cases to  
12 hand up to you this morning, Your Honor.

13 As examples what is necessary to vacate a  
14 conviction for a golden rule argument, I will refer to  
15 State versus Reese, and that is 370 South Carolina 31.  
16 That is a 2006 case out of our Supreme Court. The  
17 violation in that case was who speaks for the victim  
18 repeatedly in closing argument.

19 Another example would be, and this is the classic  
20 one, State versus White, 246 South Carolina 502, that's  
21 1965, out of our Supreme Court. That example is, let  
22 him come into your wife's bedroom or your mother or  
23 your daughter's, and asking the jury to imagine their  
24 own family in the place of the victim's.

25 Another example is Von Dohlen versus State, that

1 would be 360 SC 598, that's 2004. That was quite  
2 literally, put yourself in Margaret's shoes, size 6.

3 And what is probably most applicable to this case  
4 would be State versus McDaniel. That is 320 SC 33.  
5 That's out of our Court of Appeals in 1995. In that  
6 case the Court found that the use of second-person  
7 you's 45 times in closing argument rises to the level  
8 of prejudice necessary to vacate the conviction.

9 By comparison, Your Honor, five incidental you's  
10 in the middle of a long closing argument in a case that  
11 lasted four days, and there were three closing  
12 arguments, one by each of the defense counsel and one  
13 by the State, hardly rises to the level of prejudice  
14 necessary to so infect a trial with unfairness to make  
15 its conviction a denial of due process.

16 The remaining issues I'll be much more brief. As  
17 to the ineffective assistance of counsel for failure to  
18 object to bolstering, as to that testimony about the  
19 plea deal and lying, that isn't improper, nor is any  
20 subsequent argument based thereupon. And dispositive  
21 of that issue is State versus Schuler. That is 344  
22 South Carolina 604 545 S.E. 2d, 805, and that is a 2001  
23 Supreme Court case.

24 As to the Belcher issue, we went over this  
25 extensively with Mr. Dudek. Belcher is not

1 retroactive. Defense counsel was not obligated to  
2 object, he is not held to a standard of clairvoyance to  
3 see Belcher coming. Belcher overturned centuries or  
4 decades of precedent, and the issue was not preserved  
5 for appellate review. So trial counsel had no  
6 obligation to object, and appellate counsel had no  
7 obligation to brief an issue that was not preserved.

8 As to the allegation about an ineffective  
9 assistance of counsel for failing to brief the  
10 objection to the jury question, the Court's response to  
11 the jury questions, appellate counsel -- on its face  
12 that is a weaker issue than that which appellate  
13 counsel raised to the Court of Appeals if only by  
14 virtue of the fact that the Court of Appeals reversed  
15 this case on the issue that appellate counsel raised to  
16 it.

17 As to ineffective assistance of counsel over  
18 failing to object to the indictment, towards the end of  
19 Applicant's argument in the application he indicates  
20 that this is because it deprived the Court of subject  
21 matter jurisdiction. The indictment and subject matter  
22 jurisdiction are two completely distinct concepts. The  
23 indictment is merely a notice document. And Mr. Niles  
24 was very plainly on notice.

25 And for that I would refer to State verse Gentry,

1 and I will not give the full cite to that case, as I  
2 probably do that in almost every case.

3 Finally, as to ineffective assistance of counsel  
4 for failing to object to the Court's response to the  
5 jury question, upon the full context of the transcript  
6 it appears to me that Mr. Verdell Barr objected to both  
7 parts of the Court's response to the jury question.  
8 And that issue, though incredibly weak, was preserved  
9 for use on appeal.

10 And so for all those reasons, Your Honor,  
11 respectfully Applicant has failed to meet his burden  
12 pursuant to Strickland versus Washington, and I would  
13 respectfully request that the application for relief be  
14 denied.

15 THE COURT: All right. I'll take the matter under  
16 advisement and have you a ruling by Thursday.

17 MR. JAMES: Thank you, Your Honor.

18 MR. FALK: Thank you, Your Honor.

19 (Discussion off the record.)

20 MR. FALK: Your Honor, if I could briefly call my  
21 client to the stand.

22 MR. JAMES: Your Honor, I must respectfully  
23 object. We've already heard testimony, we've already  
24 closed the record, we've already had arguments. It's  
25 too late to call witnesses at this time.

RICHARD B. NILES, JR.-DIRECT BY MR. FALK

30

1 THE COURT: I'm going to let you call him.

2 MR. FALK: Oh, no, you're going to have to go  
3 there and be sworn.

4 RICHARD NILES, after being duly sworn, testified  
5 as follows:

6 THE CLERK: Just state your name for the Court.

7 THE APPLICANT: Richard Niles. Richard Bill  
8 Niles, Jr.

9 DIRECT EXAMINATION

10 BY MR. FALK:

11 Q Mr. Niles, you have prepared a PCR application,  
12 and you briefed the issues in pretty good detail. I  
13 wanted you to make sure that you knew that your  
14 application is part of the record of these proceedings.  
15 And the Court's decision will include matters that you  
16 addressed in your application.

17 Is there something else that you wanted to talk to  
18 the Court, something else you wanted to say?

19 A I just wanted to state to the victim's family, but  
20 I see they are not present, I wanted to give my  
21 apologies of my wrongdoing, my actions during this time  
22 when I did committed this crime.

23 And I'm just asking the Court for my forgiveness  
24 and have mercy. Just allow me to go home to my family,  
25 man, just one more time, you know. I was young when I



1 did what I did in the streets. But, you know, I don't  
2 regret doing this time that I've done in the time in  
3 prison because I've learned a lot. I'm becoming a man  
4 and seeing life in a different view.

5 I know when I was in the streets out there, you  
6 know, I did things that was not justice. In God I  
7 cite. But, you know, I'm here today and I'm asking for  
8 forgiveness. That's all I wanted to say.

9 THE COURT: All right. Thank you very much.

10 MR. FALK: Thank you.

11 THE COURT: I don't think there is any need for  
12 cross; do you, Mr. James?

13 MR. JAMES: No, Your Honor.

14 THE COURT: All right. Thank you, Mr. Niles.

15 (Witness excused.)

16 (The hearing concluded at approximately

17 11:05 a.m.)

18 (End of Transcript of Record.)

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25

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA )  
4 COUNTY OF HORRY )

5

6 I, TERESA J.F. BAUTZ, Official Court  
7 Reporter for the Fifteenth Judicial Circuit of the  
8 State of South Carolina, do hereby certify that the  
9 foregoing is a true, accurate and complete Transcript  
10 of Record of the proceedings had and evidence  
11 introduced in the trial of the captioned case, relative  
12 to appeal, in the Court of Common Pleas for Horry  
13 County, South Carolina, on the 24th day of May, 2018.

14

15 I FURTHER CERTIFY that I am neither of  
16 kin, counsel nor interest to any party hereto.

17

18

19

*S/Teresa J. F. Bautz*

20

TERESA J.F. BAUTZ, RPR  
Official Court Reporter

21

22

23

24

25

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF HORRY ) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
)

Richard B. Niles, Jr., ) Case No : 2016-CP-26-01258  
S.C.D.C. No. 333708, )  
)

Applicant, )

v. )

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

**ORDER OF DISMISSAL**

2018 FEB 13 PM 12:47  
RENEE H. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Richard B. Niles, Jr. ("Applicant") on February 24, 2016. Respondent made its return on or about February 16, 2017. The Court convened an evidentiary hearing into the matter on Monday, November 27, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's appellate counsel, Robert M. Dudek, Esquire ("Counsel") also testified by telephone with the consent of the parties and this Court.<sup>1</sup> The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2007

<sup>1</sup> Applicant's trial counsel, Verdell Barr, Esquire, was deceased at the time of the evidentiary hearing