

North Carolina Trial School
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North Carolina Office of Indigent Defense Services
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PLENARY SESSION FACT PROBLEM

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The Indictment and Related Law

Your client, Mal Davis, was indicted for one count of felony murder.

Felony murder is defined in North Carolina law as a killing “committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon.” Case law establishes that sale or attempted sale of cocaine with the use or possession of a deadly weapon is a proper foundational offense for felony murder. A person cannot be convicted of felony murder unless the jury finds beyond a reasonable doubt that he has committed the underlying felony. It is sufficient for the defendant to have aided and abetted the underlying felony.

The case is not being prosecuted as a capital case.

Information from P.O. Ron White’s police incident report dated 3/13/2023

Officer White is 23 years old, and has been a patrol officer with the county police department for two years. On March 12, 2023, at 7:30 P.M. he was off duty and having dinner at Chili’s with his friend, Officer Pete Mills. Officer Mills was 34 years old and had been on the Special Undercover Narcotics Squad for eight years and was also off duty. Officer Mills brought his girlfriend, 27 year-old Helen Cruz, with them to dinner.

By 11:00 P.M., they were still at their table in Chili’s. They had finished dinner and had “a drink, maybe two at most,” when Mills was approached by a man who Mills later told the others was a known and reliable drug informant. They had a private conversation in the bar, and Mills then went back to his table, where P.O. White, and Ms. Cruz were waiting for him. He told them that they had to leave immediately, because he was going to make a big undercover buy and arrest a notorious dealer named “Jelly.” Mills told the others not to call for backup or tell anyone else in the police department about this “until we make the score.”

The three drove in Mills’s unmarked SUV to the corner of Huron Avenue and Elm Street, where the informant was supposed to meet them with the seller. The informant was waiting on the corner for them. They waited together for about an hour and a half, but no one else showed up. P.O. White testified that during the wait, everyone was calm and friendly. The informant then left.

After the informant departed, Mills told P.O. White to drive to the parking lot of Magnolia Terrace, a well-known spot for drug dealing, stating, “I know somewhere else we can make a buy.”

At Magnolia Terrace, Mills got out of the car and approached a group of men who were standing under a lamp post. After a few seconds, he got in a shouting match with one of the men, and P.O. White had to get out of the car to pull Mills away from the others to avoid a fight. It was now about 2:00 A.M.

P.O. White wrote that just as he got Mills back to their car, the defendant, Mal Davis, appeared “out of nowhere,” and asked them if they wanted to buy crack. This was the first time P.O. White had ever seen Mal Davis.

Mills answered that he wanted to buy crack. The defendant then got in Mills’s car, and directed them to a house on the 600 block of Walker Street. When they arrived at the house, Mal Davis borrowed Mills’s cell phone and made a call, saying only, “Some guy wants to buy. Be up in a minute.”

Mills and Mr. Davis got out of the car and walked to the bottom of a small flight of steps leading to the porch of the house. P.O. White and Ms. Cruz waited in the SUV. A man came out of the house (later arrested and identified as Ed Akins). P.O. White said that he could tell Mills and the man were speaking, but he couldn’t hear the words. Mal Davis stood a few feet away and didn’t talk. P.O. White heard Mills say, “Now you go to jail, sucker.” He then heard two gunshots and saw the muzzle flash from the porch.

According to P.O. White, just before the shots, Mal Davis said, “Are you fucking crazy?” Davis then ran off down Walker Street and around the nearest corner. The shooter ran into the house.

P.O. White told Helen Cruz to call 911 and ran toward the house to help Mills. Police and paramedics arrived in two minutes, but Mills died on the way to the hospital. Ed Akins was arrested fifteen minutes later, hiding in the basement of the house on Walker Street. He denied knowing Mal Davis and denied shooting anyone. The gun that fired the fatal bullets was found in his pocket when he was searched.

Your first interview with Mal Davis

Mr. Davis is a 28-year-old black man who lives in a city of about 100,000 people in. He was born in rural Tennessee and moved to North Carolina with his parents when he was 5 years old. He dropped out of high school when he was 16 and in 9th grade.

Mr. Davis is addicted to heroin and crack. He began using both drugs when he was about 13. He has never had a real job and supports himself by selling small amounts of narcotics and occasionally steering buyers to other, larger-scale dealers. He has never worked as part of a larger drug operation because even street-level dealers consider him a severe addict and too unreliable to be trusted.

He has twenty-seven prior convictions: Seven separate felonies for selling small amounts of heroin and/or crack; thirteen misdemeanor convictions for marijuana, heroin, and crack possession; one trespass misdemeanor; and six larceny/shopliftings. He has spent a total of seven of the past nine years in prison. After three of his earlier misdemeanor convictions he was sentenced to probation conditioned on completing a drug treatment program. He never

successfully completed a program. Each time his probation was violated and he finished his sentence in jail. This information is verified by his rap sheet.

Mal Davis says that he was hanging out in the parking lot at Magnolia Terrace when he heard a loud argument about twenty feet away between several black men and a white man. The argument ended after a minute or two when another white man got out of a car, walked to the group, and pulled the first white man away. The white guy who was arguing broke away from the one who was leading him away and walked over to Mr. Davis. Mr. Davis testified that he didn't know Mills by name but recognized him as a narcotics cop who "was always pushing people around." He also testified that Mills "was drunk and pissed off." Mills asked Mr. Davis if he knew where a drug dealer named "Jelly" lived. Mr. Davis said he did, and Mills ordered Mr. Davis to take him there. They got in Mills car, and Mr. Davis directed them to "Jelly's" house. Mr. Davis was surprised there was a woman and another man in the car. It was clear to him that the woman was not a cop. Even though Mills's car was unmarked, it was obvious that it was a police car because it was an SUV with "radios, and rifles, and flak jackets, and all this cop stuff all over it."

As they approached Walker Street, Mills gave Mr. Davis a cell phone, told him what number to call, and ordered him to call Jelly and say they were coming to buy crack. Mr. Davis made the call, and they got out of the car and walked to the steps. When Jelly came out, P.O. Mills offered Jelly \$200 for twenty vials of crack. Jelly agreed. Mills then started yelling that Jelly was going to prison, so Jelly shot him.

When the shooting started, Mr. Davis ran away. He was arrested at home the next day. He gave a statement explaining all this, saying that he wasn't possessing or selling any drugs that night. He knew Mills was a cop, and the only reason he was there at all was "this crazy drunk cop grabbed me and made me go."

Additional information obtained through discovery and investigation

Helen Cruz's statement

Helen Cruz's statement was identical to that of P.O. White except for the following details:

She is 27 years old, and dated P.O. Mills for about three years. She was employed as receptionist in a dental clinic and was never a police employee, although Mills let her help him out "informally" as a decoy in a few undercover drug buys during the past year.

She believes that each of them had two drinks at Chilli's and is sure no one was drunk. She acknowledged that Mills had "a hot temper when it came to work and was really angry that the drug dealer did not show up."

When they were waiting for the drug dealer at Huron Avenue and Elm Street, Mills got very angry at the delay and loudly said "some very hateful things" to the informant who had met

them there. P.O. White also got into a big argument with the informant and urinated on the hood of informant's car.

She did not see Mal Davis appear on the street and had never seen him before he got in the car with them.

Autopsy report

Death was caused by internal bleeding from two gunshots to the torso, either of which could have been fatal. The decedent's blood alcohol was .11.

The response to your *Brady/Kyles* motions

The State informed you that in 2020, Mills had been the subject of an Internal Affairs investigation about accusations that he robbed and beat up a drug dealer, stealing both money and drugs from the dealer. The investigation found that Mills had beaten the dealer, causing a broken jaw. Mills was reprimanded for using excessive force in an arrest, and no other action was taken. No findings were made about the theft allegations.

In response to your specific request, the State informs you that Mills' cell phone was collected with all of his other belongings at the hospital, but it is now lost. Its contents were never examined.

Your interview with Bob Hale, the manager at Chili's

Mr. Hale is 31 years old and has been the night manager at Chili's for three years. He tells your investigator that on March 14, 2023, he saw the front page article in the local newspaper about the shooting. There was a picture of P.O. Mills on the front page. Mr. Hale recognized the picture because two nights before, Mills had been at Chili's for several hours with two friends, a man and a woman. Hale knew that the other man was a police officer also but thought the woman was not an officer. He recognized both officers and said that Mills had a reputation as a "pretty nasty guy. You wanted to stay out of his way." The other officer, who he did not know by name, "seemed OK but was kind of young and seemed to look up to Mills.

According to Mr. Hale, all three arrived at Chili's at about 7:15 or so. The men drank a lot, at least 3 or 4 scotches and a couple of beers apiece. The woman only had two or three glasses of wine. By about 10:30 or 11, the men were very drunk and loud. Other customers began to complain. Hale considered cutting them off, but was afraid of making trouble with Mills. He was relieved when they left at about 11:00.

The co-defendant's trial

Akins's case was severed from your client's and tried first. He testified that he did not know who Mal Davis was and that he did not shoot anyone. He was convicted of felony murder and sentenced to life without parole.

Chili's 3/12/2023
Server 1020 Mgr Hale

5 JW Black	60.00
4 Corona	24.50
3 KJ Chardonnay	30.00
Tax	6.85
Total	120.35

Theory of Defense Ethics Supplement

Two weeks before trial Mal tells you that things did not happen as he had previously said. He says it is true the police approached him about making a deal, but he knew them as dangerous and said no. They were very angry, but he saw them walk up to another man, who Mal knows as Reggie, and who looks like Mal, and saw Reggie get in the car with them. Mal says it was Reggie that was at the scene of the killing, not him, and that White and Cruz are trying to blame him because he knew Jelly better, and they think Mills wouldn't have been shot if Mal had taken them there. He wants his defense to be that he was not present at all, and that White and Cruz are framing him. What do you do?

Jury Selection Ethics Supplement

During jury selection, the prosecution succeeds in removing several potential black jurors. Mal is unhappy about it and tells you he wants you to keep a black, former police officer on the jury. You suggest a former officer is likely to be unsympathetic in a case involving the death of a detective and you'd recommend he be struck. Mal says, "Well, I don't know; looks like we may end up with an all-white jury." What do you do?

Cross-Examination Ethics Supplement

Mal tells you a week before trial that he has seen White mistreat black men on the streets, has heard that he consistently harasses them, and that White has had complaints filed against him for doing so. He thinks that is another reason White is saying Mal was at the scene of the shooting when he actually wasn't. He wants White cross-examined on this issue.

Direct Examination Ethics Supplement

Consistent with the pretrial conversation Mal had with you about arguing he was not present during the shooting, Mal tells you when, two weeks before trial, you are preparing him to testify, that he wants to testify to that effect. You are fairly certain this is false, and you remind Mal that the government will be able to present evidence that he was there, and that when he was arrested, he blurted out, "It's not my fault Mills got himself shot," which at least suggests that he was there. You recommend that he testify consistent with the original story about Mills and White coercing him to participate as that is a stronger and more credible defense. Mal says, "Well, we'll decide during trial." What do you do before putting Mal on the stand?

If Mal agrees to testify to the original story, what do you do if, during his direct, he starts straying into the new story?